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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COURTHOUSE NEWS SERVICE,

Plaintiff,

v.

MICHAEL PLANET, in his official capacity as court executive officer/clerk of the Ventura County Superior Court,

Defendant.

Case No. 2:11-cv-08083-DMG (FFMx)

Assigned for all purposes to Hon. Dolly M. Gee

VENTURA SUPERIOR COURT'S OPPOSITION TO COURTHOUSE NEWS SERVICE'S MOTION FOR $6,641,613.64 IN ATTORNEYS' FEES AND $57,389.00 IN NON-TAXABLE COSTS

Date: April 2, 2021
Time: 9:30 a.m.
Courtroom: 8C

[Concurrently filed with the Declaration of Erica L. Reilley and the Declaration of Grant Stiefel]

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INTRODUCTION

The Superior Court of California, County of Ventura (VSC) acknowledges that the Ninth Circuit and this Court have held that Courthouse News Service (CNS) is the prevailing party in this action for purposes of 42 U.S.C. § 1988. In addition, VSC does not challenge the reasonableness of the rates charged by CNS's attorneys in this action. Hence, the question before this court is whether CNS's current fee request, reflecting 14,707 hours and totaling $6.64 million,[1] constitutes a *reasonable* fee.

In determining a *reasonable* fee here, VSC submits that a few overarching points should be front-of-mind.

First, this is not the first time CNS has presented its fee request to the district court for decision. After citing to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), *Hoye v. City of Oakland*, No. C 07-06411 CRB, 2012 WL 4644307 (N.D. Cal. Oct. 1, 2012), and *Willis v. City of Fresno*, 2014 WL 3563310 (E.D. Cal. July 17, 2014), Judge Otero reduced CNS's then-$5 million fee demand by nearly 60%, finding both that CNS had only partially succeeded on the merits and that the case had been over-litigated:

> The Court finds these cases, and in particular *Hoye*, to be instructive here, and finds a downward adjustment of forty percent (40%) to be warranted. Although CNS obtained significant relief – including a declaration that Planet's policies violated the First Amendment and an injunction against two different intake policies – CNS did not succeed in obtaining its ultimate goal: a declaration that the First Amendment to the United States Constitution requires same-day access to newly filed civil complaints. Correspondence between CNS and VSC staff confirms that CNS, as early as 2011, insisted the First Amendment requires same-day access and pressed Planet and his staff for such relief. CNS framed the central question in this litigation the same way during both trips to the Ninth Circuit, arguing "[t]his action advances a simple idea: that new civil complaints filed throughout

[1] This figure is the sum of the amounts CNS claims in its moving papers [Doc. # 271-2 at 11] plus the additional amount claimed in its supplemental declaration [Doc. #273]—that is, $6,497,289.34 plus $144,324.10.

> the day should be available for public view by the end of the same day so journalists can report on them, thus informing interested persons of the fact that the court's powers have been invoked with respect to a new civil controversy." Moreover, this Court, in its summary judgment order expressly denied the CNS Motion insofar as it asked the Court to find a First Amendment right of same-day access to newly filed complaints, finding "it would defy logic to read an unyielding same-day access requirements into the First Amendment.
>
> Moreover, "[i]n setting a reasonable fee award . . . [a] district court should consider whether, and to what extent, [the plaintiff's] suit benefited the public." Throughout this litigation, Planet and VSC have worked to improve their processes for taking in and making public newly filed civil complaints, highlighted by VSC's implementation of the Scanning Policy more than two years ago. Indeed, it appears as though access to newly filed complaints improved under the voluntary implemented Scanning Policy)(although the degree of improvement is disputed by the parties). Thus, there appears to be a non-zero possibility that, had CNS not demanded same-day access to newly filed complaints, this litigation could have been more amicably – and cheaply – resolved.

[Doc. # 212 at 8-9 (citations omitted).][2]

Second, the Ninth Circuit's decision in *Planet III* establishes that the judgment to which CNS is entitled is *more limited* than that ordered by Judge Otero. In affirming in part and reversing in part Judge Otero's summary judgment ruling, the Ninth Circuit reversed Judge Otero's finding that VSC's current scanning policy violated the First Amendment, finding instead that VSC's "scanning policy, which requires court staff to scan new civil complaints and make the electronic scans available on public computer terminals, survives *Press-Enterprise II* scrutiny." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 598 (9th Cir. 2020) (*Planet III*). In so holding, the Ninth Circuit recognized, among other things, that "greater solicitude for the courtroom setting," requires courts to

[2] VSC adopts the Court's same citation style to docket entries in this case. For docket entries in *Planet III*, VSC cites to those as "ECF ___." VSC also adopts the defined terms identified in this Court January 26, 2021 Order. [Doc. # 269.]

"countenance greater restrictions on access than those allowed in public forums," and to recognize "that courtrooms have limited capacity [and] that 'there may be occasions when not every person . . . can be accommodated.'" *Id.* at 595 (citation omitted). "The First Amendment does not require us to second guess the careful deliberations the state court undertook in deciding how to manage scarce resources." *Id.* at 599-600.

Third, in finding that CNS was a prevailing party with respect to its motion for an award of appellate attorneys' fees, the Ninth Circuit confirmed that its disposition "altered little in the 'real-world relationship' between the parties" and that CNS only "succeeded in gaining '*some*' of the benefit [it] sought":

> Because we held that Ventura County's current "scanning policy" passes constitutional scrutiny, *Courthouse News Serv. v. Planet*, 947 F.3d 581, 598 (9th Cir. 2020), *our disposition altered little in the real-world relationship between the parties in this case*. Significantly, however, through this litigation, Courthouse News Service (CNS) established that a First Amendment right of access to civil complaints at the time of filing exists, and that this right is reviewed under the Press Enterprise II standard. Because CNS succeeded in gaining "*some* of the benefit [it] sought in bringing suit," it is the prevailing party. *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (emphasis added).

[Doc. # 255 at 1 (first emphasis added).]

Against this backdrop, there are strong grounds to argue that CNS's fee request is subject to an even greater reduction than that imposed by Judge Otero—after all, CNS prevailed on even less of its claims as a result of *Planet III*. However, VSC does not seek to further prolong these proceedings, or to further burden this Court, by asking that Judge Otero's original fee award be fully relitigated in light of *Planet III*. Instead, VSC suggests that Judge Otero's fee award serve as a reference and a ceiling, and asks this Court to:

a. Adopt Judge Otero's original fee award (if not further reduce it), thereby resolving CNS's request for fees incurred in litigating this matter on the

merits through judgment in the trial court, including the fees incurred in the first two appeals;

b. Use the same methodology used by Judge Otero to reduce the amount of fees CNS is awarded in connection with the *Planet III* appeal and the further proceedings before this Court; and

c. Re-enter Judge Otero's slightly reduced nontaxable costs award of $52,893.98 because, despite CNS now seeking the full amount, "[n]either party suggests that the [non]taxable costs amount should be any different from that already calculated" [Doc. # 269 (incorporating Judge Otero's prior award of $20,730.81 of taxable costs based on such reasoning)].

By our calculations, then, a reasonable fee award in this case would be no more than:

	$2,065,752.80	(Judge Otero's prior fee award)
	$562,559.54	(same methodology applied to fees since then)
+	$52,893.98	(Judge Otero's prior cost award)
	$2,681,206.32	**Total Fees and Costs**

This fee award gives deference to Judge Otero's first-hand knowledge over the bulk of fees at issue and incurred during its most intense phase; it accounts for CNS's partial success in the litigation, albeit without adjusting down further for CNS's even more limited success after *Planet III* (which this Court certainly has discretion to do); and it reinstates Judge Otero's prior cost award, as CNS does not challenge the limited reductions it incorporated.

This should be the outer bounds of a reasonable fee award here, not the $6.6 million CNS has demanded.

LEGAL FRAMEWORK

District courts within the Ninth Circuit use the lodestar method for calculating reasonable attorney's fees, "multiplying the number of hours reasonably

expended on the litigation by a reasonable hourly rate." *Welch v. Metro Lie Ins. Co.*, 480 F.3d 942, 945 (9th Cir. 2007) (citing *Hensley*, 461 U.S. at 437).

The lodestar does not end the inquiry, though. Courts are directed to consider other factors to determine whether the lodestar should be adjusted. One such factor arises "where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." *Hensley*, 461 U.S. at 434. Where "a plaintiff has achieved only partial or limited success," as is the case here, "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 436. Thus, "[t]hat the plaintiff is a 'prevailing party' therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Id*.

In addition, courts "may exclude from the fee request any hours that are 'excessive, redundant, or otherwise unnecessary.'" *Welch*, 480 F.3d at 946 (quoting *Hensley*, 461 U.S. at 434). "Cases may be overstaffed, and the skill and experience of lawyers vary widely." *Hensley*, 461 U.S. at 434. If a court determines that some hours billed are not reasonable, it may exclude them either through an "hour-by-hour analysis" or an "across the board percentage cut[]." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203 (9th Cir. 2013).

The burden is on the party seeking fees to establish the reasonableness of its request. *Welch*, 480 F.3d at 945-46.

ARGUMENT

I. JUDGE OTERO'S PRIOR FEE AWARD, WHICH COVERS THE BULK OF CNS'S CURRENT FEE REQUEST, SHOULD BE ADOPTED BY THIS COURT (IF NOT FURTHER REDUCED).

CNS's fee request asks this Court to revisit the details of the long history of this case by largely ignoring all the time and attention Judge Otero paid to CNS's *prior* fee request, which captured $5.2 million of the $6.64 million now requested.

There is no need for that. As the Ninth Circuit has repeatedly noted, "the district court is more familiar with the course of the litigation before it," *Ingram v.*

Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011), and "is in the best position to determine in the first instance the number of hours reasonably expended in furtherance of the successful aspects of a litigation and the amount which would reasonably compensate the attorney," *Chalmers v. City of L.A.*, 796 F.2d 1205, 1211 (9th Cir. 1986), *amended on other grounds*, 808 F.2d 1373 (9th Cir. 1987). *See also Perkins v. Standard Oil Co. of Cal.*, 474 F.2d 549, 552 (9th Cir. 1973) (noting "the deference that would be given to decisions which involved matters within the 'first-hand' knowledge of the District Court"). Although those statements are in the context of appellate review of fee awards, the sentiment applies equally here.

As the judge that presided over the summary judgment phase of this case, during which CNS incurred the largest portion of fees (more than $3.2 million), Judge Otero's thoughtful consideration of CNS's billing records, the parties' litigation propensities, and CNS's level of success in the case, should be given to appropriate deference.

A. Judge Otero Substantially Reduced CNS's Fee Award Because He Rejected CNS's "Ultimate Goal" Of Same-Day Access, Even Though He Granted Summary Judgment In CNS's Favor As To The Processing Policy And Scanning Policy.

The district court found the "central question" framed by CNS's complaint was whether there was a First Amendment right to same-day access:

> CNS framed the central question in this litigation the same way during both trips to the Ninth Circuit, arguing "[t]his action advances a simple idea: that new civil complaints filed throughout the day should be available for public view **by the end of the same day** so journalists can report on them . . . ."

[Doc. # 212 at 8 (original emphasis).]

Following a detailed, three-page analysis of the issue, Judge Otero concluded that recognizing such a right "logically culminates with a requirement that courts make complaints available the exact moment they are received," and "it would defy

logic to read an unyielding same-day access requirement into the First Amendment." [Doc. # 195 at 18.] As a result, Judge Otero "DENIE[D] the CNS Motion insofar as it ask[ed] the Court to find a First Amendment right of same-day access to newly filed complaints." [Doc. # 195 at 18.][3]

Judge Otero continued on, however, to conclude that there was a right to "timely" access. [Doc. # 195 at 19.] Through that analysis, Judge Otero concluded that neither VSC's processing policy nor its current scanning policy satisfied the First Amendment, and he granted summary judgment in favor of CNS and entered a declaratory and injunctive judgment against VSC on both policies accordingly. [Doc. # 195.]

Thereafter, CNS sought nearly $5.2 million in attorneys' fees (and nearly $58,000 in costs) as the prevailing party. [Doc. # 206.] The matter was painstakingly briefed by both sides. [*See* Docs. # 206 through # 217.] In opposing CNS's fee motion, VSC did not dispute CNS's status as a prevailing party or the reasonableness of CNS's hourly rates; but VSC did argue that "a reduction [was] necessary because CNS 'overlitigated the case' and did not prevail on its primary demand for same-day access to newly filed complaints." [Doc. # 209; *see also* Doc. # 209-1, Doc. # 209-2, Doc. # 209-3.]

Judge Otero reviewed the detailed record and agreed. Relying upon *Hensley*, *Hoyt*, and *Willis*, Judge Otero first found "a downward adjustment of forty percent (40%) to be warranted" because "CNS did not succeed in obtaining its ultimate goal" of "same-day access." [Doc. # 212 at 8.] Judge Otero further concluded that "[i]n addition to an overall downward adjustment of 40 percent, the Court finds that

---

[3] CNS now claims it "had not actually sought" a "right of same-day access," but instead "envision[ed]" that such access would "flow" from other findings. [Doc. # 271-1 at 5.] Surely Judge Otero would not have engaged in that lengthy analysis if CNS "had not actually sought" such relief. And the Ninth Circuit saw it the same way: "CNS filed its original lawsuit seeking same-day access to newly filed civil complaints on September 29, 2011." *Planet III*, 947 F.3d at 587; *see also id*. at 591 ("In CNS's view, anything short of immediate access violates its First Amendment rights.").

certain reductions must be made in this case." [Doc. # 212 at 9.] Specifically, Judge Otero concluded that "CNS engaged in unnecessary and duplicative work in preparing its summary judgment briefs and associated materials," thereby warranting itemized reductions of nearly $800,000. [Doc. # 212 at 9-10.] Judge Otero also concluded that CNS's block-billed entries warranted a 20% reduction, and CNS's redacted entries warranted a 25% reduction. [Doc. # 212 at 10.] These adjustments collectively reduced CNS's fee award to $2,065,753.[4]

Without rehashing all the arguments already reflected in the record, these reductions were well within the district court's discretion.

B. Courts Regularly Reduce Fee Awards By Large Percentages Based On A Party's Partial Success.

As the Ninth Circuit explained, "[w]hen a party . . . is only partially successful, *Hensley* requires the court to determine first if the plaintiff's losing claims were related to the plaintiff's successful claims; if they were not, no fees should be awarded for work done on the losing claims. If the claims were related, the court must then evaluate the significance of the result achieved and calibrate the compensation accordingly." *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 619 (9th Cir. 1993).

Sometimes there is no "'mathematical ratio of winning claims to losing claims . . . .' Instead, we compare the overall relief eventually obtained by the plaintiff to the relief originally requested, and gauge the award accordingly.". *Toussaint v. McCarthy*, 826 F.2d 901, 905 (9th Cir. 1987) (internal citation omitted). Indeed, in *Toussaint*, relied upon by CNS [Doc. # 271-1 at 7], the Ninth Circuit "conclude[d] that plaintiffs achieved far less than what they originally sought to achieve," and thus "[t]heir proposal to reduce their fee award by one-third [was] inadequate in light of their limited success." 826 F.2d at 905. Rather, the

[4] This was the amount of CNS's fee award after some additional minor adjustments following CNS's motion for reconsideration. [Doc. # 219.]

court "h[e]ld that plaintiffs' limited success entitle[d] them to 37.5% of the total lodestar amount," thereby reducing the fee award by more than 60%. *Id.*

Here, Judge Otero found *Hoye* particularly "instructive." [Doc. # 212 at 7.] In *Hoye*, the court applied a 50% reduction where plaintiff "prevailed on his as-applied challenge to the [city o]rdinance, [but he] failed to prevail on his facial challenge." 2012 WL 4644307, at *5, *7. As Judge Otero explained, "[t]he court reached this conclusion notwithstanding the fact that plaintiff 'achieved success on a "significant issue of litigation which achieves some of the benefit [he] sought in bringing suit."'" [Doc. # 212 at 7, quoting *Hoye*, 2012 WL 4644307, at *9.] From this, Judge Otero concluded a 40% reduction of CNS's fee award was "warranted." [Doc. #212 at 8.]

Courts routinely apply percentage reductions based on partial success that are even greater than that applied by *Hoye* or Judge Otero. *See, e.g., Red v. Kraft Foods Inc.*, 680 F. App'x 597, 599 (9th Cir. 2017) (affirming 90% reduction of fee award, from $3.3 million to $101,702, finding the fee request was "grossly excessive in light of the very limited success appellants actually achieved in their lawsuit"); *Ambat v. City & Cnty. of S.F.*, 757 F.3d 1017, 1032 (9th Cir. 2014) (affirming 90%-plus reduction, from $127,447 to $8,925, where "plaintiffs' success was minor relative to the scope of the sex discrimination action"); *Mahach-Watkins v. Depee*, 593 F.3d 1054, 1056 (9th Cir. 2010) (affirming 80% reduction, from $700,000 to $136,687); *Thomas v. Baca*, No. CV 04-08448 DDP (SHx), 2014 WL 7333266, at *1, *3, *6 (C.D. Cal. Dec. 19, 2014) (applying 90%-plus reduction, from $7.09 million to $384,275, due to plaintiffs' partial success where court found Los Angeles County jail facilities violated Eight and Fourteenth Amendments on summary judgment and jury awarded damages after a three-day trial); *Jadwin v. Cnty. of Kern*, 767 F. Supp. 2d 1069, 1097, 1097 (E.D. Cal. 2011) (rejecting multiplier and applying 70%-plus reduction to lodestar, from $1,972,409 to $535,700); *Hunter v. Cnty. of Sacramento*, No. 2:06-cv-00457-GEB-EFB, 2013

WL 5597134, at *1, *10 (E.D. Cal. Oct. 11, 2013) (applying "a 50% downward adjustment to the lodestar," from more than $400,000 to $197,000).

Thus, Judge Otero's 40% reduction based on CNS's partial success at summary judgment, which he subsequently reaffirmed [Doc. # 219 at 1], was well within reason. Indeed, given CNS's even more limited success after *Planet III*, an even greater reduction for partial success would be warranted now.

C. Courts Also Regularly Reduce Fee Awards Based On Excessive Billing And Other Deficiencies.

Courts are directed to "guard against awarding fees and costs which are excessive and must determine which fees and costs were self-imposed and avoidable." *Jadwin*, 767 F. Supp. 2d at 1105; *see also Spalding Lab'ys, Inc. v. Ariz. Biological Control, Inc.*, No. CV 06 – 1157 ODW (SHx), 2008 WL 2227501, at *4 (C.D. Cal. May 29, 2008) (excessive billing during trial "shows commendable industry but is nonetheless unreasonable").

Courts therefore routinely reduce fee awards to where the prevailing party over-litigates the case. *See Padurjan v. Aventura Limousine & Transp. Serv., Inc.*, No. 08-20128-CIV, 2009 WL 4633526, at *7, *16, *20 (S.D. Fla. Dec. 2, 2009) (reducing fee award by 70% because "the number of filings in this case substantially exceeds that which would have been necessary to bring the action to its proper resolution, even if it had gone to trial"), *aff'd*, 441 F. App'x 684, 686 (11th Cir. 2011) (noting district court's "reasoning that [counsel] engaged in an 'inefficient, over-litigatory approach' that warranted reducing the reasonable [hourly] rate").

Here, Judge Otero found that "CNS engaged in unnecessary and duplicative work in preparing its summary judgment briefs and associated materials." [Doc. # 212 at 9-10.] For example, Judge Otero noted the "staggering twenty-six (26) separate declarations in support of the CNS MSJ" and the "staggering $485,257.55 [charged] by Bryan Cave" for "drafting and revising a number of unnecessary and

duplicative declarations." [Doc. # 212 at 9.] Having concluded on summary judgment that those "voluminous declarations" could not "convince" the court "that the First Amendment requires same-day access to newly filed complaints," Judge Otero found that "th[o]se significant expenditures cannot be reimbursed." [Doc. # 212 at 9.] Judge Otero also concluded that "remarkably little" of Robert Dreschel's expert report "b[ore] on the access issues faced by CNS at VSC," and thus excluded the 200 hours and $88.718 in fees incurred for it. [Doc. # 212 at 9.]

Judge Otero also concluded that CNS's 33 timekeepers' "transient involvement" "necessarily resulted in inefficiencies" and disallowed most of their time. [Doc. # 212 at 9, citing *Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 130 F. Supp. 3d 1331, 1338-39 (C.D. Cal. 2015) ("Of the 16,731.7 hours Defendant's lawyers billed to this case, 549.55 were billed by attorneys who spent less than 100 hours on the matter. Because such transient involvement is inefficient, the Court excludes those hours[.]").] *See also Jadwin*, 767 F. Supp. 2d at 1112 ("To account for such unjustified duplication of efforts, among other reductions, the total number of deposition hours are reduced by 30%.").

These additional itemized reductions, totaling approximately 33% of the lodestar, also were well within reason.

* * *

In calculating the total fee award, Judge Otero first subtracted these additional reductions from the lodestar and then applied the 40% downward adjustment based on partial success. [Doc. # 212 at 10.] Judge Otero's calculations, as subsequently modified, reflected an overall reduction of 60%, and yielded a fee award of **$2,065,75.80** through the original judgment in the district court [Doc. # 223].[5] That award should be adopted here, if not further reduced.

[5] CNS's final fee request before Judge Otero was $5,217,412.77. [Doc. # 210-1 at 28.] This amount does not directly equate to CNS's fee total through "District Court Round Three [Doc. # 271-2 at 11], which is $5,359,693.91, but the percentage principles apply equally.

Indeed, Judge Otero applied those reductions having found both VSC's old processing policy and its current scanning policy to be unconstitutional. [Doc. # 195.] But the Ninth Circuit has now *reversed* his decision as to the scanning policy, holding that it passes *Press-Enterprise II* scrutiny. *Planet III*, 947 F.3d at 598. Under the unique circumstances of this case, VSC would be remiss if it did not submit that there are grounds for reducing CNS's award even further—perhaps by as much as 10-15%—in light of *Planet III* and the Ninth Circuit's frank acknowledgment that its disposition "altered little in the 'real-world relationship' between the parties." [Doc. # 255 at 1.]

II. THIS COURT SHOULD, AT A MINIMUM, APPLY JUDGE OTERO'S SAME METHODOLOGY TO CNS'S FEES INCURRED DURING *PLANET III* AND SINCE THEN, WHERE CNS SUCCEEDED ON EVEN LESS.

Following *Planet III*, CNS *had* to concede that its success was only "partial." (ECF 100-1 at 7.) Indeed, *Planet III* confirmed there is no constitutional right to same-day access[6] and further concluded that VSC's scanning policy is constitutional, thereby partially reversing the summary judgment order that had been in CNS's favor. *Planet III*, 947 F.3d at 594, 600.

Nevertheless, CNS now argues it should be awarded *all* $6.64 million in fees it has incurred over the last ten years. But the only thing that has changed since Judge Otero's fee award is that CNS has succeeded *on even less*. Inasmuch as CNS's more limited success countenances in favor of reducing Judge Otero's fee award even further, it surely does not countenance in favor of no reduction at all.

Rather, at a minimum, this Court should apply Judge Otero's same methodology to the $1,424,201.37 in fees that CNS is claiming since the prior fee award, thereby reducing that amount by at least 60%.

[6] Because CNS did not appeal that portion of Judge Otero's ruling, it was not at issue in *Planet III*, but his conclusion was endorsed by the Ninth Circuit: "The First Amendment does not require courts, public entities with limited resources, to set aside their judicial operational needs to satisfy the immediate demands of the press." *Planet III*, 947 F.3d at 596.

A. CNS Continued To Engage In Unnecessary And Duplicative Work After Judge Otero's Fee Award.

Judge Otero previously identified multiple instances of "unnecessary and duplicative work performed by CNS, largely during the summary judgment process." [Doc. # 219 at 1.] The record since then shows that Judge Otero's findings were simply a reflection of CNS's broader approach to litigating this case. For example, as reflected in CNS own summaries [Doc. # 271-2 at 11]:

- In *Planet III*, CNS billed nearly 1,200 hours and more than $630,000 in fees to reargue the same issues counsel had litigated the last many years, and through what amounted to one substantive brief and one argument. CNS claims those figures *already* reflect a reduction for time spent on CNS's failed fee appeal. (ECF 100-3 at 7-8.) Those hours are partially comprised of nearly *400 hours* on drafting, almost *175 hours* preparing for argument, and more than *150 hours* to obtain and review records (which stands unexplained and in stark contrast to the 40 to 50 hours incurred in *Planet I* and *Planet II*). (ECF 100-7.) *See Chalmers*, 796 F.2d 1205 at 1214 (reducing appellate fees by more than 40% where "amount of time is excessive in light of counsel's familiarity with the issues in this case, his experience in this profession, as well as the nature of the issues on appeal").
- After having half of its judgment reversed by *Planet III*, CNS filed an application seeking nearly $2 million in appellate fees for *all* fees incurred in all three appeals, and sought an additional $200,000 for its 340 hours spent briefing that application. [Doc. # 271-2 at 11.] Counsel claimed that fee motion was "more challenging and time-intensive than other fee motions" (ECF 104-1 at 3), yet counsel requested even more ($260,000) for its fee motion before the district court [Doc. # 210-1 at 25]. *See Loranger v. Stierheim*, 10 F.3d 776, 782-83 (11th Cir. 1994) ("The fee request evidences patently excessive expenditures of time throughout the litigation. Ray seeks, for example, compensation for over 100 hours for preparing his initial fee request.").

- In the limited proceedings before this Court in 2020, CNS seeks more than 450 hours and $300,000 in fees, including more than 115 hours incurred in one week to respond to VSC's objections to the amended judgment. And nearly half of that (at least 200 hours and $143,000) CNS incurred in preparing the instant fee motion, which does not account for the *additional* 223 hours and $144,000 reflected in CNS's supplemental declaration [Doc. # 273], nor what CNS will incur in preparing its reply. In other words, despite having incurred a collective $460,000 in fees for its two prior fee motions, CNS now seeks to recover close to another $300,000 for *this* fee motion.[7]

Beyond these task-specific excesses since *Planet III*, and to put things in context, CNS's lawyers have spent more than 2,700 *hours* doing "research" over the course of this case and nearly 1,000 hours preparing for oral argument. (*See* Declaration of Grant Stiefel ("Stiefel Decl."), ¶¶ 55-64.) And CNS's lawyers have spent more than 3,300 hours in internal conferences. (Stiefel Decl., ¶¶ 46-54.) Those are not conferences with their client or with Jones Day or any other third party; those are conferences amongst themselves. That equates to conferencing every day, all day, for 8 hours per day for more than 410 days straight. *See, e.g., Moofly Prods., LLC v. Favila*, No. CV 13-05866 SJO (PJWx), 2015 WL 6681164, at *3 (C.D. Cal. Nov. 2, 2015) (reducing by 50% "entries involve[ing] internal conferences between multiple attorneys in the Walton Firm"); *Bernardi v. Yeutter*, 754 F. Supp. 743, 746 (N.D. Cal. 1990) (reducing hours claimed by 50% based on "*massive* duplication of effort and excessive and improper billed hours" including

[7] Albeit trivial in the scope of the $6.64 million at issue, CNS's over-lawyering can be seen in the little things as well. For example, over the course of three days, counsel spent *7 hours* drafting a stipulation to defer further proceedings before this Court until after the Ninth Circuit ruled on CNS's appellate fees application. [Doc. # 271-2 at 1493; Doc. # 246.] Those seven hours do not reflect additional time spent conferencing amongst the lawyers; that's only the drafting. *See Cho v. Joong Ang Daily News Wash., Inc.*, No. 1:18-cv-1062, 2020 WL 1056294, *5-6 (E.D. Va. Mar. 4, 2020) (reducing lodestar by 35% based in part on "record of excessive litigation": "Ryu billed 8.7 hours for producing this pro forma notice which should not have taken more than two hours to produce").

"excessive amount of time in meetings together), *aff'd in part*, 951 F.2d 971, 974 (9th Cir. 1991) (concluding "district court's decision to reduce the class' total hours billed by one half was also not an abuse of discretion").

Although Judge Otero previously made itemized deductions based on CNS's "unnecessary and duplicative work," where, as here, it may be more difficult to "come up with a precise amount," an across-the-board percentage reduction equivalent to Judge Otero's reductions is appropriate and reasonable. *See Smith v. 116 S Mkt. LLC*, 2:19-cv-05562-DMG-PLA, Doc. # 78 at 4 (applying 66% reduction based partly on "duplicative deposition preparation and attendance" and "block-billed time"); *Signature Fin., LLC v. McClung*, 2:16-cv-03621 DMG-FFM, Doc. # 125 at 6-7 (applying 40% reduction where "[i]nvoices show unreasonable duplication of effort among attorneys" and "are also rife with vague, block billed, and redacted time that make difficult, if not impossible, evaluating the reasonableness of hours expended").

B. CNS Remedied Certain Deficient Billing Practices After Judge Otero's Fee Award, But Some Still Remain.

Through this third fee motion, CNS aimed to remedy some of the billing deficiencies that Judge Otero had previously highlighted, but some still remain. For example, more than 8,800 hours of entries leading up to *Planet III* are block-billed. (Stiefel Decl., ¶¶ 32-40.) And notwithstanding CNS's claim that courts are not *required* to apply reductions for block-billing [Doc. # 271-1 at 22], courts certainly have the *discretion* to do so, which both Judge Otero and this Court have exercised. [*See* Doc. # 212 at 10; *supra* at pages 22-23.] *See also Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1128-29 (9th Cir. 2008) (concluding block-billing is "legitimate grounds for reducing or eliminating certain claimed hours"), *overruled on other grounds by Ariz. v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014).] Those block-billed entries warrant at least a 20% reduction. (Stiefel Decl., ¶ 40.)

Similarly, most of the billing entries up through *Planet I* reflect quarter-hour billing (Stiefel Decl., ¶¶ 41-45), which is an unreasonable billing practice "that will tend to inflate [the] total hours billed by adding time to each entry." *Diffenderfer v. Gomez-Colon*, 606 F. Supp. 2d 222, 229 (D.P.R. 2009) (reducing award by 20%); *Welch*, 480 F.3d at 949 (9th Cir. 2007) (affirming trial court's 20% reduction for, inter alia, quarter-hour billing because the trial court "reasonably concluded that [counsel]'s practice of billing by the quarter-hour resulted in a request for excessive hours"); *Lopez v. San Francisco Unified School District*, 385 F. Supp. 2d 981 (N.D. Cal. 2005) ("[B]illing by the quarter-hour, not by the tenth, is a deficient practice because it does not reasonably reflect the number of hours actually worked.") Those entries warrant at least a 10% reduction. (Stiefel Decl., ¶ 45.)

* * *

By applying Judge Otero's same methodology to the additional $1,424,201.37 that CNS has incurred since the prior award, those reductions would yield an additional award of **$562,559.54**. Understanding there are grounds for further reductions, that would result in a total fee award to CNS of no more than **$2,628,312.34**.[8]

III. CNS'S COST AWARD SHOULD BE THE SAME $52,893 THAT JUDGE OTERO PREVIOUSLY AWARDED.

CNS fee request makes only a passing reference to the amount it seeks in costs ($57,389), and fails to provide any explanation for why Judge Otero's prior

[8] Some courts have said "that 'if the time claimed by the prevailing party is of a substantially greater magnitude than what the other side spent, that often indicates too much time is claimed.'" *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB (SHx), 2015 WL 1746484, at *22 (C.D. Cal. Mar. 24, 2015) (quoting Democratic *Party of Wash. State v. Reed*, 388 F.3d 1281, 1287 (9th Cir. 2004)). Here, through the entire course of this litigation, VSC's counsel at Jones Day billed 4,219 hours to this matter (compared to CNS's 14,707 hours), translating into about $1.6 million in fees. (Declaration of Erica L. Reilley, ¶ 2.) Thus, notwithstanding CNS's claim that VSC "raised every obstacle possible" or litigated in a "scorched earth manner" [Doc.# 271-1 at 1, 8], it did so without incurring anywhere close to the $6.64 million CNS incurred.

reductions of $4,495.02 were not proper. [Doc. # 271-1 at 9; Doc. # 271-2, ¶ 46; *cf.* Doc. # 269 (incorporating into amended judgment Judge Otero's prior award of $20,730.81 of taxable costs where "[n]either party suggests that the taxable costs amount should be any different from that already calculated").]

To be sure, consistent with Judge Otero's finding that CNS "engaged in unnecessary and duplicative work," he concluded a 10% reduction to CNS's travel costs was "warranted" because "an excessive number of attorneys" were traveling. [Doc. # 212 at 11.] Judge Otero also concluded that costs for "'mailing, courier, binding and copying costs' cannot be reimbursed" because they are "essentially overhead costs to be absorbed in the attorneys' fee award." [Doc. # 212 at 11, quoting *Keith v. Volpe*, 501 F. Supp. 403, 415 (C.D. Cal. 1980).]

CNS offers no reason to revisit Judge Otero's analysis, much less reason to depart from it. CNS should be awarded only **$52,893.98 in nontaxable costs**.

CONCLUSION

For the foregoing reasons, CNS should be awarded reasonable attorneys' fees of no more than $2,628,312.34 and non-taxable costs of no more than $52,893.98.

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Respectfully submitted,

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