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Attorneys for Plaintiff
COURTHOUSE NEWS SERVICE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Courthouse News Service,

Plaintiff,

vs.

Michael Planet, in his official capacity as Court Executive Officer/Clerk of the Ventura County Superior Court,

Defendant.

Case No. CV11-08083 DMG (FFMx)

REPLY OF PLAINTIFF COURTHOUSE NEWS SERVICE IN SUPPORT OF MOTION TO SET AMOUNT OF ATTORNEYS' FEES AWARD

Date: April 2, 2021
Time: 9:30 a.m.
Courtroom: 8C
Judge: Hon. Dolly M. Gee

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INTRODUCTION

After "'fight[ing] the case to its last breath'" and losing, Defendant Michael Planet, the Court Executive Officer/Clerk of Ventura Superior Court ("VSC"), "'***cannot*** … ***complain*** that the attorneys' ***fees***'" resulting from VSC's tactics "'are ***disproportionate***.'" *CNS v. Schaefer*, 484 F. Supp. 3d 273, 280 (E.D. Va. 2020) (finding CNS time reasonable through trial and awarding $1.9 million for two years).[1] VSC therefore focuses on a slightly different argument. "[A]ware that awarding attorneys' fees to prevailing parties in civil rights cases is a tedious business," *Moreno v. City of Sacramento*, 534 F.3d 1106, 1116 (9th Cir. 2008), especially in a case lasting 10 years and with a "'voluminous paper record,'" *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1150 (9th Cir. 2001), VSC offers the Court an out: Just do what the now-vacated Fee Ruling did, both for time incurred through the Fee Ruling and for time the 4½ years after it was issued.

But that would just trade one problem for a host of others. Because there "is 'a strong presumption that the lodestar represents the reasonable fee,'" it can only be reduced "'in rare instances,'" *U.S. v. $28,000.00 in U.S. Currency*, 802 F.3d 1100, 1108 (9th Cir. 2015), and if justified by "specific" reasoning. *Moreno*, 534 F.3d at 1111. The Fee Ruling failed this test for several reasons, not least because it "failed to give any 'explanation of its reasons for choosing [any of its] given percentage reduction[s].'" *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203 (9th Cir. 2013) (vacating percentage cuts similar to the Fee Ruling, resulting in an overall percentage cut of 66%, virtually identical to the Fee Ruling's 63% cut).

There is a better option. Having fought through 10 years and three appeals to establish a constitutional right protecting the public and press throughout this circuit, CNS is entitled to a full fee award, but the Court may deduct up to 10% in its "'discretion and without a more specific explanation.'" *Id.* Given what VSC made it cost to get here, CNS believes no reduction is warranted or no more than 5%.

[1] Emphases are added and citations to internal quotations omitted, unless noted.

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I.

THE COURT SHOULD NOT DEFER TO THE VACATED FEE RULING, WHICH VSC KNOWS REPEATEDLY MISSTATED THE RECORD

The Court should decline VSC's invitation to defer to the prior Fee Ruling. Despite VSC's erroneous attempt to label it "CNS's failed fee appeal," Fee Opp. 18, the Fee Ruling was vacated by the Ninth Circuit. That vacatur means that, "on remand, the [Fee Ruling]'s original finding[s] no longer exist[.]" *Masachi v. Astrue*, 486 F.3d 1149, 1154 & n.21 (9th Cir. 2007) ("defining 'vacate' as 'to nullify or cancel; to make void'") (quoting Black's Law Dictionary 1584 (8th ed. 2004).

In addition, to quote VSC's own authority, "[t]his is not the usual situation" because Judge Otero had this case for less than 18 months of its 10 years, and thus his Fee Ruling "need not be accorded the deference that would be given to decisions which involved matters within the 'first-hand' knowledge of the District Court" that issued the ruling. *Perkins v. Standard Oil Co.*, 474 F.2d 549, 552 (9th Cir. 1973). Perhaps for that reason, the Fee Ruling contains the sort of fundamental flaws that would require reversal on appeal, not least because – to quote another of VSC's authorities – "its findings were illogical, implausible or without support in the record.'" *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013).

A. The Ninth Circuit Declined To Defer To Fee Rulings In Similar Contexts

VSC fails to note Judge Otero was not initially assigned to this case, did not preside over its first four years, and "necessarily lacked the [first] judge's intimate knowledge of the proceedings, the issues in the original suit, and the intricacies in the presentation of these issues on the appeal." *Perkins*, 474 F.2d at 552.

"In combination, th[ose] two factors" would have "dictate[d] that [appellate] review" would have been "broader that it might be" otherwise, *id.* – i.e., accorded little or no deference on appeal. *Id.* Because it neglects to mention this point, let alone address it, VSC offer no reason why this Court to defer to the Fee Ruling, either, especially its unexplained and inexplicable decision to "include[] in its [63]-percent reduction" the $2.13 million in fees CNS was forced to incur the first four

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years defending against VSC's two misguided motions to dismiss and "pursuing two appeals in which [CNS] was completley successful," and which saved its case. *Bee v. Greaves*, 910 F.2d 686, 689 (10th Cir. 1990). *Bee* reversed a district court's application of the same "fifty-percent reduction" it applied to fees for work in its court to the "fees awarded for two critical appeals in which Bee obtained excellent results." *Id.* That is hardly a ringing endorsement of deferring to the Fee Ruling.

That is no less true of the proceedings in the 4½ years following the Fee Ruling – i.e., the consolidated merits and fee appeals in *Planet III*, CNS's successful fee motion in the Ninth Circuit, and the proceedings in this Court on remand, including CNS's successful defense of its proposed Amended Judgment, which VSC fought vigorously, but in vain, to gut. It is VSC's "burden" to justify applying the Fee Ruling's reductions to post-Fee Ruling work before other judges, and it failed to do so. *McGrath v. County of Nevada*, 67 F.3d 248, 255 (9th Cir. 1995).

B. <u>This Court Should Not Repeat The Same Errors As The Fee Ruling</u>

CNS appealed the Fee Ruling precisely because it adopted virtually verbatim VSC's multiple misstatements of the record and the law. While CNS' reply had pointed out these errors, the Fee Ruling apparently overlooked that reply.

The Fee Ruling begins its analysis by asserting that "there does not appear to be a dispute that the total unadjusted lodestar in this case is $4,868,853.97." Doc. 212 at 6.[2] That was inaccurate. The cited figure was the amount through July 2016, which CNS presented with its fee motion. But it expressly did not include time for the fee motion and the fee reply, which were presented with the reply and brought the total unadjusted lodestar to $5,160,023.27. Doc. 210 at 16; Doc 210-1, ¶ 54.

The Fee Ruling went on to adopt several misstatements of the record by VSC, even though each mistake was corrected in CNS' reply, including the following:

[2] District Court records are cited as "Doc.," Ninth Circuit as "ECF." Both cite CM/ECF page numbering. Shortened citations are the same as in CNS's Fee MPA.

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- VSC contended CNS should not be compensated for any fees for preparing 26 reporters declarations attesting to a history of access to complaints upon receipt on the theory that they were "duplicative" and "unnecessary" because they were "***only*** relevant … to CNS's defeated claim for same-day access." Doc. 209 at 25. The Fee Ruling adopted this argument. Doc. 212 at 9 (refusing to compensate CNS for any fees for the declarations because they did not convince the Court to find a mandatory right of "same-day access," impliedly accepting VSC's view that the declarations were otherwise not relevant) (quoting MSJ Order 17).

But as CNS noted in its reply, this assertion is not supported by the record. The declarations were the very basis on which the Merits Ruling found a history of access justifying a "First Amendment right of timely access … that attaches when new complaints are received by the court." MSJ Order 18 ("CNS has submitted a number of declarations demonstrating that there is a long history of courts making complaints available to the media and the public soon after they are received, regardless whether such courts use paper filing or e-filing systems. (*See, e.g.*, Decl. Robert Drechsel in Supp. CNS Mot. ('Drechsel Decl.') ¶ 39 …; Decl. Adam Angione in Supp. CNS Mot. ('Angione Decl.') ¶¶ 51, 61, 66-68 …; Decl. Nick Cahill in Supp. CNS Mot. ('Cahill Decl.') ¶ 8, ….)") (Doc. 195).

As CNS also noted in reply, and as this passage illustrated, the 26 declarations were not duplicative because they attested to access in different courts in many states, which CNS had to present in response to VSC's argument against a history of access "'in the absence of nationwide experience.'" Doc. 163-1 at 26. Any doubt that VSC and the Fee Ruling erred on this point was removed when *Planet III* cited CNS's declarations in rejecting VSC's argument that access should not attach at filing. 947 F.3d at 592 ("CNS has submitted specific evidence that numerous jurisdictions around the country make newly filed complaints publicly available. The declarations of CNS reporters demonstrate a widespread practice of making complaints available before they are subjected to judicial review.").

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- VSC's 2016 opposition asserted that CNS should not receive any fees for time spent on its expert, Robert Drechsel, on theory that his declaration was "unnecessary" because it "was not cited once in the Court's [MSJ] Order." Doc. 209 at 26. The Fee Ruling adopted this argument. Doc. 212 at 9 ("The Court found no occasion to cite the Dreschel declaration or report in its MSJ Order[.]"). This assertion was also not supported by the record. The MSJ Order expressly cited the "Decl. [of] Robert Drechsel." MSJ Order 18. It also quoted Plaintiff's Statement of Undisputed Material Fact based on the Drechsel Declaration in holding VSC's process-first policy violated the First Amendment. *Id.* at 27 ("Planet does not genuinely dispute CNS's proffered statement that '[t]here is no adequate or reliable way for reporters to view new complaints on the same day they are filed other than to obtain them from the courts at which they are filed.' (PSUMF ¶ 113.)").
- VSC's 2016 opposition also asserted that CNS incurred $485,257 in fees on the declarations, including $20,964.90 on just one (the Williams Declaration). Doc. 209 at 25 & n.10. Again, the Fee Ruling accepted this argument at face value. Doc. 212 at 9. But more than half the time VSC included in its $20,964 calculation was not spent on the Williams Declaration at all. Doc. 210-1, ¶ 42. This misstatement of the record by VSC – and thus the Fee Rulings itself – was not limited to the Williams Declaration. The time entries for which CNS was denied any compensation on the theory that they were all spent on the purportedly "unnecessary" declarations also included time on, *inter alia*, depositions, written discovery, a settlement conference and the research and drafting of the motion for summary judgment. *Id.*; Doc. 209-1, ¶ 7 & Exh. E. VSC had sought to deny CNS any compensation for any of a timekeeper's time on any day in which any time was spent on a reporter or expert declaration, and the Fee Ruling unwittingly obliged.
- VSC also argued CNS used 33 timekeepers, and should not be paid for those who billed less than 100 hours. Doc. 209 at 26-27. The Fee Ruling adopted this argument, Doc. 212 at 9-10, even though CNS noted the numbers (of billers and

those under 100 hours) were inaccurate. Doc. 210 at 15 n.13; Doc. 210-1, ¶ 43.[3]

- Even the amount of the fee award VSC says this Court should adopt is wrong. To address the Fee Ruling's problems, CNS moved for reconsideration, Doc. 213, and filed two notices of clerical error. Doc. 214 & 221. The Order Granting Reconsideration in Part agreed that the Fee Ruling had erred in certain respects (but not others), and ordered the award increased to include CNS's fees on fees less a 40% reduction, Doc. 219 at 3 ("find[ing] a 40% reduction from the requested $291,169.30 to be reasonable"), and fees that had been improperly subjected to double reductions, again less 40%. *Id.* at 4 ("the Court will award CNS 40% of the $103,086.90 it submits should have not have been reduced").

But the Order Granting Reconsideration then miscalculated, and mistakenly ordered that CNS's fee award only be increased by an amount that was 40% of the two figures, rather than an amount 40% less than those figures. *Id.* at 3-4 (ordering $166,467.72, which is 40% of $291,169.30, not the 60% CNS was awarded, and $41,234.76, which is 40% of $103,086.90, not 60%). Consequently, the $2,065,073 the reconsideration order awarded was short by $78,851. VSC urges this Court to repeat the same mistake and award only $2,065.073. Doc. 277 at 9.

The Ninth Circuit would have little choice but to find a fee order abused its discretion in accepting a party's arguments for reducing an award based on the sort of misstatements of the record outlined above. *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016) ("'A district court abuses its discretion if its decision is based on an erroneous conclusion of law or if the record contains no evidence on which it rationally could have based its decision.'"). As the Fee Ruling was vacated – and thus is not "law of the case," despite what VSC's expert's thinks, Stiefel Dec., ¶ 68 (Doc. 277-2) – it need not and should not be followed.

[3] It borders on bad faith for VSC to continue to claim that "33 timekeepers" were transient billers whose time was deducted because under 100 hours. Fee Opp. 16. Not only did the order granting reconsideration acknowledge the error, Doc. 219 at 3-4, VSC's expert now lists only 24, one of whom billed 100. Stiefel Dec., Exh. J.

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II.

THE COURT SHOULD NOT DEFER TO THE FEE RULING'S CUTS FOR LIMITED SUCCESS BECAUSE CNS WON ALL POINTS ON WHICH IT SOUGHT SUMMARY JUDGMENT AND *PLANET III* AFFIRMED

From before this action was filed, ***the*** over-arching issue – and the obstacle to a resolution – was VSC's insistence that the First Amendment did not require public access to complaints before processing. *See* Comp., ¶ 27 (action filed because VSC insisted it "'cannot make any new filings available until the requisite processing is completed") (Doc. 1); MSJ Order 22 (noting VSC view that "neither CNS nor any other member of the press or public are entitled to see a new complaint 'until it is processed'") (Doc. 195); Order re Amend. Judgment 4-5 & n.4 (Doc. 269).

This case lasted a decade because VSC did everything to avoid a ruling on this issue. Doc. 271-1 at 2-6. VSC knew a ruling that the right of timely access attaches on receipt, and that delays from that point are unconstitutional unless they survive *Press-Enterprise II* scrutiny, would mandate that in most cases the press and public be able to access complaints from the time of filing. Ultimately, the MSJ Order ruled for CNS on those two critical points (and *Planet III* affirmed on both).

Despite this, the vacated Fee Ruling accepted VSC's argument to reduce CNS's award by 40 percent on the theory that "CNS did not succeed in obtaining its ultimate goal" of an "'unyielding same-day access requirement.'" Doc. 212 at 8. It compounded this mistake by failing to consider the public interest served by CNS's success, and instead erroneously concluded CNS had harmed the public interest on the theory that the only reason the case was not resolved earlier was CNS' purported "demand[]" of same-day access, *id*, for which it cited no evidence in the record.

This Court should not accept VSC's invitation to make the same mistakes, or to cut CNS's fees because the scanning ruling was reversed. That minor setback on a subsidiary issue did not detract from CNS's excellent result, which settled "novel and important First Amendment questions," *Planet I*, 750 F.3d at 793, in a manner that, as VSC said, "amounts to same-day access." AOB 2 (*Planet III*, ECF 24).

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A. CNS Obtained The Relief It Sought In Its Summary Judgment Motion

The fundamental flaw in VSC's position is that this part of the Fee Ruling – and the portion of the MSJ Order on which it was based – confused the result CNS sought for the rules CNS advocated. To wit, CNS sought a ruling that:

- "The First Amendment right of access applies to civil complaints upon receipt by a court for filing,'" MSJ MPA 22 (Heading II) (Doc. 119-1); MSJ Prop. Order, ¶ 2(b)(ii) ("the First Amendment right of access attaches to complaints at the time they are submitted to the court for filing") (Doc. 119-3);
- "Delaying access for 'even a day or two' cannot survive the compelling interest [test]," or even the time, place and manner test, MPA 29 (Heading III); Prop. Order, ¶¶ 2(d)(i) (VSC failed "overriding interest" test) & (d)(ii);
- Scanning did not moot CNS' case, MPA 33 n.16; Prop. Order, ¶ 2(e); and
- Consequently, "CNS is entitled to declaratory relief and a permanent injunction to prevent defendant from denying access until complaints are processed," MPA 32 (Heading IV); Prop. Order, ¶¶ 3-5.

CNS believed a ruling in its favor on these core points would yield the result of "restor[ing] the simple premise that new civil complaints filed throughout the day can and should be available for media review by the end of the day." MPA 10.

VSC understood this premise, identifying "exactly ***what CNS is asking for***" as "'***Timely access***' to new civil complaints '***prior to processing***.'" VSC MSJ Opp. 28 (Doc. 182). The Ninth Circuit did, too. In *Planet I*, it cited the "'overriding [governmental] interest'" test and the "'time, place, or manner'" test as potential "limitations" on "same-day viewing" of complaints. 750 F.3d at 792-93 & n.9.

For whatever reason, the MSJ Order did not. Instead, it treated the anticipated result as a separate proposed rule, and held CNS had not established a mandatory right of same-day access in all circumstances. Ultimately, it did not matter, and CNS did not notice a cross appeal, because the MSJ Order went on to find for CNS on each of the core holdings above, leading to the predicted result.

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But that did not stop VSC from arguing, and the Fee Ruling from agreeing, that there was such a huge difference between a per se right of same day access and the right of timely access on receipt that it warranted a huge reduction in the award.

On appeal, VSC again changed its tune. It acknowledged the relief CNS obtained "'amounts to same-day access,'" Fetterly Dec., ¶ 78 (Doc. 271-3) (quoting AOB 2 (*Planet III*, ECF 24)), and argued the MSJ Order's core holdings – that the right of timely access attaches upon receipt, and that "'any "delay" past that moment must be justified as serving an overriding or compelling state interest'" – were "'more demanding'" than the "'right of "same-day" access'" the MSJ Order rejected (and that CNS did not seek). *Id.*, ¶ 77 (quoting AOB 3 (Issue Presented 1)).

Now that the Ninth Circuit has affirmed those rulings in *Planet III*, VSC is back to contending that there is such a meaningful difference – in VSC's favor – between CNS "'winning claims [and] losing claims'" that this Court should adopt the Fee Ruling's 40% reduction for partial or limited success. Fee Opp. 13 (quoting *Touissant v. McCarthy*, 826 F.3d 901, 907 (9th Cir. 1987)).

But there were no "claims" (plural) here, only a single claim on which CNS prevailed. It got everything requested in its summary judgment motion – on each of the issues presented by CNS, the MSJ Order ruled in its favor, "result[ing] in CNS reporting 'near perfect' same-day access." *Planet III*, 947 F.3d at 599.

None of the inapposite cases cited by VSC involve or support any reduction, let alone 40%, for partial success where, as here, the plaintiff won its only claim against the only defendant it sued, and obtained the very relief it sought.[4] Certainly

[4] The declaratory relief CNS obtained was more comprehensive than what it sought. *Compare* Doc. 119-3, ¶ 3 (Prop. Order) *with* Doc. 199, ¶ 1 (Judgment). The only difference in injunctive relief was that rather than being "directed to provide CNS with access to new unlimited civil complaints, exhibits and attachments included, no later than the end of the court day on which they are filed," Prop. Order, ¶ 5, VSC was "directed to make such complaints and exhibits accessible to the public and press in a timely manner from the moment they are received by the court," Judgment, ¶ 2, which, as VSC later admitted, was "more demanding." AOB 3.

the case VSC and the Fee Ruling cited as "particularly 'instructive,'" Fee Opp. 14 (quoting Fee Ruling 7) did not support it, as that case involved ***two "unrelated" claims*** – a facial attack that sought an injunction against enforcement of an entire ordinance, and an as-applied claim seeking even-handed enforcement – but the plaintiff prevailed only on the more limited as-applied claim, and thus "the relief Plaintiff obtained was significantly narrower than he sought." *Hoye v. City of Oakland*, 2012 WL 4644307, *6 (N.D. Cal. Oct. 1, 2012).[5]

What VSC and the Fee Ruling missed is that courts must "compare the overall relief eventually obtained by the plaintiff to the relief originally requested." *Toussaint*, 826 F.2d at 905. The Fee Ruling did not do so. It never considered the relief CNS actually sought, which was the same as what it obtained.

The Fee Ruling therefore could not have correctly applied *Hensley v.*

[5] Similarly, in *Red v. Kraft Foods Inc.*, 680 F. App'x 597 (9th Cir. 2017), "appellants' success was ***very limited*** because they ***did not prevail on their primary claims***, they failed three times to certify a class, most of their claims failed as a matter of law, and there was no liability finding," *id.* at 599; in *Ambat v. City & County of San Francisco*, 757 F.3d 1017 (9th Cir. 2014), "[t]he district court ***granted summary judgment to the County as to all but three plaintiffs***, and the County settled the remaining claims," *id.* at 1032; in *Mahach-Watkins v. Depee*, 593 F.3d 1054 (9th Cir. 2010), plaintiff sued "several … defendants," asserting at least seven causes of action, "***only three claims survived***" against a "sole defendant," the jury found for plaintiff on two but awarded ***only nominal damages***, *id.* at 1057, 1063; in *Thomas v. Baca*, 2014 WL 7333266 (C.D. Cal. Dec. 19, 2014), the ***damages class was decertified***, the named defendant was granted qualified immunity, and the jury awarded two individual plaintiffs $10,000 each, *id.* at *1, *aff'd sub nom. Thomas v. County of Los Angeles*, 703 F. App'x 508, 511 (9th Cir. 2017); in *Jadwin v. County of Kern*, 767 F. Supp. 2d 1069 (E.D. Cal. 2011), plaintiff brought 11 claims, the jury found for plaintiff on five, the court found for plaintiff on one against plaintiff on another, he was awarded 12% of the damages sought, the fee award was cut because plaintiff's ***counsel repeatedly refused to comply with the Court's request*** for details and information, *id.* at 1103 ("None of the billing information requested in open court or via Minute Order was included."); and in *Hunter v. County of Sacramento*, 2013 WL 5597134 (E.D. Cal. Oct. 22, 2013), two inmates alleged "five claims against six named defendants," ***only one claim. survived***, and each plaintiff was ***awarded $1 nominal damages***, *id.* at *1.

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Eckerhart, 461 U.S. 424, 435 (1983) – and should not be followed – because it missed the main point of *Hensley*. As Justice Kagan explained, "[a] civil rights plaintiff who ***obtains meaningful relief*** has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes. ***That 'result is what matters***,' as we explained in *Hensley* …: A court should compensate the plaintiff for the time his attorney reasonably spent in achieving the favorable outcome, ***even if*** 'the ***plaintiff failed to prevail on every contention***.'" *Fox v. Vice*, 563 U.S. 826, 834 (2011) (quoting *Hensley*, 461 U.S. at 435) (middle emphasis in original).[6]

B. <u>The Fee Ruling Failed To Consider The Public Benefit From CNS's Win</u>

The Ninth Circuit has authorized downward adjustments to the lodestar for partial success "where the plaintiff has obtained limited success on his pleaded claims, ***and*** the result does not confer a meaningful public benefit." *McCown v. City of Fontana*, 565 F.3d 1097, 1103 (9th Cir. 2009). Consequently, even where – unlike here – the relief obtained "was limited" compared to what was sought, a fee request can still "be granted in full" where it "conferred a benefit on the public." *Id.* at 1105; *Bravo v. City of Santa Maria*, 810 F.3d 659, 666 (9th Cir. 2016) (affirming refusal to reduce reward where "litigation benefited the public by identifying a serious flaw" in defendant's policy and obtaining a Ninth Circuit decision that "provides guidance to law enforcement officers and to magistrate judges"); *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1209-10 (9th Cir. 2013) (reversing "across-the-board cuts to the lodestar" without considering "non-monetary benefits" to plaintiffs and "'others throughout society' by, for example, ending institutional civil rights abuses or clarifying standards of constitutional conduct").

In the passage VSC urges the Court to follow, the Fee Ruling said it "'should consider whether, and to what extent, [the plaintiff's] suit benefitted the public.'"

[6] *Planet III*'s observation that the First Amendment does not demand "'immediate'" access, Fee Opp. 17 n.6 (quoting 947 F.3d at 596), does not support the Fee Ruling's deduction because CNS obtained meaningful relief by winning on all the core issues on which it sought summary judgment, all of which were affirmed by *Planet III*.

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Fee Opp. 7 (quoting Fee Ruling 8). But reciting the right rule is not enough. The Fee Ruling erred by "significantly reduc[ing] its lodestar determination" without evaluating "'the public benefit of deterring unconstitutional conduct,'" *Orr v. Brame*, 727 F. App'x 265, 269 (9th Cir. 2018) (quoting *McCown*, 565 F.3d at 1105), or the "'policy changes … achieved,'" *Barrios v. California Interscholastic Fed'n*, 277 F.3d 1128, 1135 (9th Cir. 2002), let alone in a manner supported by the record, *id.* (finding case did not produce policy change clearly erroneous), and consistent with precedent. *Orr*, 727 F. App'x at 269; *Gonzalez*, 729 F.3d at 1210.

In fact, the Fee Ruling never even considered the extent to which CNS's lawsuit benefitted the public, instead extolling VSC's purported "voluntary" efforts and policy change. This was legal error and a clearly erroneous view of the record.

Even before *Planet III*, CNS obtained an appellate ruling instructing courts throughout this Circuit that the First Amendment right of "timely access" extends to civil cases. *Planet I*, 750 F.3d at 786, 788 ("we have not expressly held that the First Amendment right of access encompasses civil cases"). The MSJ Order and Judgment established that this right applies to complaints on receipt, requiring delay from that point to satisfy *Press-Enterprise II*, and permanently enjoined VSC.

The Fee Ruling was not free to ignore the resulting benefits to "the public's First Amendment interests" from preventing courts from denying access until after processing. *Planet I*, 750 F.3d at 788-89 ("if the Ventura County Superior Court's policy of withholding filings violates CNS's First Amendment rights, it also violates the rights of anyone else who has tried to access a complaint – or was deterred from trying because he did not think it was possible"); *id.* at 787-88 ("The purpose of CNS's effort to timely access … complaints is to report on whatever newsworthy content they contain, and CNS cannot report on complaints the Ventura County Superior Court withholds."); *see Bravo*, 810 F.3d at 666.

The Fee Ruling also erred in failing to recognize that the "permanent injunction" CNS obtained "would advance the public interest by serving as a

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deterrent to Defendant[] and third parties" from delaying access to civil pleadings, *NuScience Corp. v. Henkel*, 2009 WL 10700220, *11 (C.D. Cal. Apr. 14, 2009), and the "fee award" itself would have a "deterrence effect." *Orr*, 727 F. App'x at 270.

The Fee Ruling's assertion that VSC worked to improve access, and "voluntar[ily] implemented" the scanning policy, overlooked that any access improvements were in response to CNS and "the 'suspicious' timing of VSC's adoption of the Scanning Policy … after receiving an adverse ruling from the Ninth Circuit in *Planet I*." MSJ Order 22. Not only did CNS's success in *Planet I* prompt that policy change, "the legally enforceable policy change memorialized" in the judgment "significantly alter[ed] the legal relationship between [CNS] and [VSC]" by barring VSC from reinstating its process-first policy. *Barrios*, 277 F.3d at 1135.

Finally, the Fee Ruling speculated – without citing any support in the record – that "there appears to be a non-zero possibility that, had CNS not demanded same-day access..., this litigation could have been more amicably – and cheaply – resolved" after the scanning policy was implemented. Doc. 212 at 9. But it was VSC that declined to mediate, Doc. 271-2, ¶¶ 64-66, and VSC that refused to consider "any settlement that involved a stipulated injunction or judgment." Doc. 207, ¶ 66. "Because Planet maintain[ed] that the public has no right of access until judicial action upon a complaint" or processing, that meant the ***only*** way CNS could ensure VSC would not restore its prior no-access-before-processing policy was to obtain declaratory and permanent injunctive relief. *Planet III*, 947 F.3d at 599 n.10 ("nothing other than the injunction in this litigation prevents Ventura County from returning to its pre-2014 policy"); Order re Amend. Judgment 4-5 & n.4.

C. <u>As The Amended Judgment Shows, *Planet III* Affirmed The Core Right</u>

As the foregoing illustrates, the MSJ Order's ruling on the merits of the scanning policy was not part of the relief CNS sought and was not part of the MSJ's core holdings. It is therefore not surprising that VSC cannot articulate any way in which its reversal reduced the benefits to CNS and the public from CNS's success.

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Instead, VSC resorts to misstating *Planet III* and its impact on the Judgment. VSC contends that "half of [CNS's] judgment [was] reversed by *Planet III*," Fee Opp. 18, and that the post-remand Amended Judgment is materially "***more limited***" than the original, *id.* at 7 (emphasis in original), but both are demonstrably untrue.

Planet III ***affirmed*** that the First Amendment right of timely access "extends to civil complaints," 947 F.3d at 591; that this right "arises when [complaints] are filed with the court," *id.* at 594; that at this point, "a presumption of access arises under *Press-Enterprise II* that may be restricted only if 'closure is essential to preserve higher values and is narrowly tailored to serve those interests,'" *id.* at 595 (quoting 478 U.S. at 13-14);[7] that VSC's "no-access-before-process policy … fails both prongs of *Press-Enterprise II*," *id.* at 596; and that "CNS's challenge to Ventura County's no-access-before-process policy [was] not moot[ed]" by VSC's adoption of the scanning policy, *id.* at 599 n.10. Five out of six is hardly "half."

As for *Planet III*'s impact on the Judgment, VSC's argument cannot be squared with this Court's rejection of "all of VSC's objections" to CNS's proposed Amended Judgment. Doc. 269 at 1. All the declaratory relief remains intact save only on the last point (on scanning), and the permanent injunction "is nearly identical to the injunctive relief granted in the Original Judgment," except one clause was removed because it referenced scanned complaints. *Id.* at 4-6; Doc. 270.

That is because the only point on which CNS did not prevail in *Planet III* was one on which it had not sought summary judgment, and that simply found that an access policy adopted in a "severe" budget "crisis," which allowed access the day of receipt except for "an overnight delay in access to complaints filed during the last ninety minutes," met the *Press-Enterprise II* test. 947 F.3d at 599.

This disposition did not undermine CNS's success – and "'altered little in the

[7] VSC makes it sound like *Planet III* "'countenance[d] greater restrictions on access than those allowed in public forums,'" which are subject to the time, place or manner scrutiny. Fee Opp. 8 (quoting 947 F.3d at 595). In fact, *Planet III* rejected the time, place and manner test VSC advocated. 947 F.3d at 596 n.9.

real-world relationship between the parties," Fee Opp. 8 (quoting Doc. 255 at 1) – because the core holdings were affirmed, the permanent injunction remains intact, and VSC is "'continu[ing] its current practice,'" adopted after the Judgment, "'of providing electronic copies of all new unlimited complaints and exhibits, prior to processing.'" Obj. to Prop. Amend. Judgment 10 (Doc. 264) (quoting VSC policy)).

Indeed, by its "affirmance of CNS's constitutional right of access before processing and its denial of [VSC's] mootness claim," *Planet III* "greatly ***enhanced*** CNS's level of success." Pearl Reply Dec., ¶ 54 (emphasis in original). "As a result of [CNS's] victory in the Ninth Circuit, this constitutional right is now the law for the ***entire Ninth Circuit***, not just Ventura Superior Court. This is a highly significant achievement, far beyond what [CNS] had obtained initially in the district court." *Id.* (emphasis again in original). At the least, losing on the scanning policy did not detract from the value of an appellate decision affirming on all other grounds, especially since the portion addressing scanning only applies during "severe budget constraints" – and where a court allows access on the day of filing accept to pleadings filed near the end of the day – while the rest provides the public and other members of the process a powerful right of access throughout the circuit.

The value and deterrent effect of *Planet III* is illustrated by the recent resolution of a similar action in Orange County Superior Court ("OCSC"), where the delays involved e-filed complaints. Before *Planet III*, the district court granted partial summary judgment to OCSC, *CNS v. Yamasaki*, 312 F. Supp. 3d 844 (C.D. Cal. 2018), then entered judgment for OCSC after a bench trial. 2018 WL 3862905 (C.D. Cal. Aug. 13, 2018). After *Planet III*, the Ninth Circuit vacated both – as well as the prior denial of a preliminary injunction – and remanded for "further proceedings consistent with" *Planet III*. *CNS v. Yamasaki*, 950 F.3d 640 (9th Cir. 2020). OCSC then agreed to "a settlement under which dismissal … is conditioned upon [OCSC's] implementation of an Electronic Media Inbox into which new electronically submitted non-confidential civil unlimited complaints will be

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automatically deposited upon receipt by [OCSC] for review by members of the media." Notice of Settlement and Request to Vacate Case Deadlines and Trial Date, *CNS v. Yamasaki*, No. 8:17-cv-126-JVS-KES (C.D. Cal. Jan. 20, 2021) (ECF 210).

Planet III's impact on OCSC was not impaired in any way by *Planet III*'s ruling on the scanning policy. Nor will that ruling detract from the benefit, to CNS and the public, from the Ninth Circuit affirming a First Amendment right of timely access on receipt that cannot be overcome except by meeting the "'rigorous'" *Press-Enterprise II* test. 947 F.3d at 596. VSC provided no rationale, as it must, why the scanning ruling – on an issue VSC raised in a vain attempt to forestall a ruling on the core issues on which CNS prevailed – warrants a reduction, let alone the "wholly arbitrary" 40-55% cut VSC seeks. Pearl Reply Dec., ¶ 58; *Cunningham v. County of Los Angeles*, 879 F.2d 481, 488 (9th Cir. 1988) ("Adjustments to the lodestar based on 'results obtained' must be supported by evidence in the record demonstrating why such a deviation from the lodestar is appropriate."); *Vargas v. Howell*, 949 F.3d 1188, 1197 (9th Cir. 2020) (reversing because "significant reduction" for limited success "requires a more thorough explanation"); *Barnard v. Theobald*, 721 F.3d 1069, 1077 (9th Cir. 2013) (vacating because ruling "failed to explain why … a 40 percent reduction would be an appropriate remedy").

CNS's success in *Planet III* can be considered partial only because the Ninth Circuit reversed on one of six issues involving an exceptional circumstance. The rule of *Planet* III, on which CNS prevailed, will apply universally, but the exception only in rare cases. If "[f]ailure to obtain all relief requested for a claim on which plaintiff prevailed should not deprive plaintiff's attorney of a reasonable hourly fee for hours needed to obtain the relief," *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988), then failing to prevail on relief CNS did not even seek – and that did not serve the purpose for which VSC raised it – cannot justify anything close to VSC's argument that the Court should cut 50-55% from the lodestar, Fee Opp. 17 (seeking 10-15% cut on top of 40% cut), despite CNS's excellent result on all the core issues.

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III.
VSC FAILS TO JUSTIFY APPLYING THE FEE RULING'S CUTS, ESPECIALLY FOR WORK SINCE THE FEE RULING WAS ISSUED

VSC "bears the burden of providing specific evidence to challenge the accuracy and reasonableness of the hours charged." *McGrath*, 67 F.3d at 255. It failed to carry this burden because its arguments for applying the Fee Ruling's reductions to time the 4½ years since the Fee Ruling are unsupported and unreliable.

VSC's methodology differs from that of its expert, yielding inconsistent numbers.[8] The expert admits CNS's counsel stopped using "block billing" after the Fee Ruling, and stopped billing in quarter hours in August 2012, Stiefel Dec., ¶¶ 39 n.7 & 41, yet VSC asks the Court to deduct 20% for block billing "after Judge Otero's fee award" and "leading up to *Planet III*," and 10% for quarter-hour billing "through *Planet I*," which lasted until 2014. Fee Opp. 20-21. The expert also notes CNS removed the redactions for which the Fee Ruling cut $186,189.62, Stiefel Dec., ¶ 39 n3; *see* Pearl Reply Dec., ¶ 4 n.1, yet VSC urges the Court to apply all Fee Ruling deductions, apparently including for redactions that no longer exist.

VSC and its expert urge the Court to take multiple deductions from the same time, to the point where, for some entries, they ask the Court to deduct more than the fee billed for that time. Pearl Reply Dec., ¶¶ 5, 7-10. Indeed, some categories of deductions (such as research and conferencing) apply to time since the start of the case and overlap with reductions taken by the Fee Ruling (such as all time for any day that any time was spent on a declaration), which VSC asks the Court to adopt.

Finally, while arguing that the Court should defer to the Fee Ruling, VSC and its expert refuse to do so, contending that the Court should deduct 50% "or greater" for time supposedly spent only on conferencing, Fee Opp. 19; Stiefel Dec., ¶ 54, without acknowledging that Judge Otero rejected this argument. Fee Ruling 10 n.3.

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[8] For example, VSC contends the Court should adopt Judge Otero's prior reductions, which included "a reduction of $708,682.39" for block billing. Fee Ruling 10. But VSC's expert contends the Court should deduct $813,782.28. Stiefel Dec., ¶ 40.

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A. Neither VSC's Calculations Nor Its Arguments Withstand Scrutiny

"There is a strong presumption that the lodestar figure represents a reasonable fee. 'Only in rare instances should the lodestar be adjusted on the basis of other considerations,'" and only for factors "not already subsumed in the initial lodestar calculation." *Morales*, 96 F.3d at 363-64 & n.8. The Court can use across-the-board reductions, but this ""meat-axe approach"' is "controversial," employing "percentages in cases involving large fee requests [is] subject to heightened scrutiny,'" *Ferland*, 244 F.3d at 1149, and the greater the cut, the "more specific" the reasoning required. *Moreno*, 534 F.3d at 1111 (vacating 40% cut).

Consequently, "[i]f opposing counsel cannot come up with specific reasons for reducing the fee request that the district court finds persuasive, it should normally grant the award in full, or with no more than a haircut." *Id.* at 1116.

VSC's reasons are not persuasive. It seeks an unspecified cut – of at least the 20% the Fee Ruling imposed ***on top of*** a 40-55% reduction for partial success –on the theory that CNS "over-litigated," and cites figures it says were incurred over 10 years as "'[e]xcessive," "[u]nnecessary and [d]uplicative." Fee Opp. 6, 15-21.

The threshold problem with VSC's approach is that its own authority holds that where a court cuts the lodestar by a percentage to account for "limited success," consideration of whether time was "excessive," or any "duplication was not necessary," may well be "included as part of th[at] thirty-five percent" reduction for time on a theory that did not succeed. *Willis v. City of Fresno*, 2014 WL 3563310, *23-34 (E.D. Cal. July 17, 2014), *adhered to on reconsideration*, 2014 WL 4211087 (E.D. Cal. Aug. 26, 2014), *aff'd*, 680 F. App'x 589 (9th Cir. 2017).

Even beyond possible double-counting, VSC's methodology is deeply flawed.

VSC contends, for example, that CNS's hours and fees on *Planet III* were more than what was necessary "to reargue the same issues counsel had litigated the last many years, and through what amounted to one substantive brief and one argument." Fee Opp. 18. Not only is this factually wrong – CNS filed two

substantive briefs (the second a sur-reply, ECF 65, for which it had to seek leave, ECF 58 & 60) – but the Ninth Circuit has condemned this sort of reasoning:

> When a case goes on for ***many years***, a lot of ***legal work product will grow stale***; a ***competent lawyer won't rely entirely on last year's, or even last month's, research***: Cases are decided; statutes are enacted; regulations are promulgated and amended. A lawyer also needs to get up to speed with the research previously performed. All this is duplication, of course, but it's ***necessary*** duplication; it is inherent in the process of litigating over time.

Moreno, 534 F.3d at 1112 (last emphasis in original).

Moreno lasted seven years with one "previous appeal …, which would have added to the delay and rendered much of the research stale." *Id.* What *Moreno* said is doubly-true here, where there were two prior appeals, then extensive discovery and cross-motions for summary judgment, after which VSC resurrected an issue from *Planet II*, requiring CNS to update its research on both it and law of the case. *Planet III*, 947 F.3d at 591. Such "***necessary duplication*** … ***cannot be a legitimate basis for a fee reduction***." *Moreno*, 534 F.3d at 1113.

Moreno directly addresses VSC's arguments about allegedly unnecessary and duplicative research and preparation time,[9] and it is no less true of conferencing. Fee Opp. 19. "[I]nternal conferencing and communications are essential components

[9] The numbers cited by VSC are inflated by its expert's "unblocking" methodology, which allocates equal time to each task, Stiefel Dec., ¶ 50, and is "unsound." Pearl Reply Dec., ¶ 31. Under this theory, 8.3 hours for "email exchange, drafting and researching" yields 2.77 hours each. *Id.* There is nothing "conservative" about this, Stiefel Dec., ¶ 50, as it greatly inflates the time for the email and research. Pearl Reply Dec., ¶¶ 31, 34. The Court thus cannot credit VSC's assertion that CNS spent 2,700 hours on research, 1,000 on argument preparation and 3,300 on internal discussions. Even if it could, ***over 10 years***, this averages 270 hours, 100 and 330, respectively, ***less than two hours per day*** over a year ***for all attorneys combined***. *See also id.*, ¶ 36. Nor were the entries for argument preparation "'impermissibly vague,'" or preparation time for "bet the farm" appeals overbilled. *Id.*, ¶¶ 44-51.

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of effective lawyering in long-running" cases, "'are among the least wasteful activities of attorneys'" and "'frequently save money for clients'" by helping "'coordinate'" and "'formulate strategies that prevent duplication of effort.'" Pearl Reply Dec., ¶¶ 22-27 (quoting Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* 157 (1996))). Small wonder, then, that the Fee Ruling ***rejected*** this argument and refused to deduct for internal conferences. Fee Ruling 10 n.3.

VSC's other arguments fare no better:

- It is hardly "unexplained" why preparing the record for *Planet III* was more time consuming than in *Planet I* and *II*. Fee Opp. 18. The first two appeals were from motions to dismiss and involved limited records (of two and six volumes, respectively), while the third followed discovery and cross-motions for summary judgment, and CNS had to submit 20 volumes of Supplemental Excerpts, more than half on the merits, because VSC's Excepts were thin. *See* Fetterly Reply Dec., ¶ 13.
- VSC attempts to paint CNS's original 2016 fee motion as overbilled by comparing the fees sought to those in CNS's 2020 fee motion in the Ninth Circuit. Fee Opp. 18. The comparison is inapt; the fees sought in the 2016 filing included fees for the moving and reply papers, including nine declarations, evidentiary objections and responses to VSC's objections, Doc. 206 through 206-6, 207 and 210 through 210-7, while the 2020 fees were solely for the moving papers, which needed only two declarations, *see* ECF 100 through 100-2 and 104.
- VSC's criticism of CNS's time responding to VSC's objections. VSC's filed much more than mere objections to the amended judgment; it filed a 15-page MPA, supported by new evidence and a radically different proposed amended judgment, in an effort "to relitigate issues" already decided, and to which CNS only had a week to respond. Order re Amend. Judgment 8; Fetterly Reply Dec., ¶¶ 5-6. Similarly, the seven hours to which VSC objects, Fee Opp. 19 n.7, does not just reflect time to draft a stipulation, but the time required to address VSC's objections, which required drastic revisions before filing. Fetterly Reply Dec., ¶¶ 9-12.

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This reflects one of many reasons why VSC's reliance on the hours of its counsel is of no value. Although the Court "'***must*** take into account whether the defendant mounted an aggressive defense," *Morales v. Farmland Foods, Inc.*, 2013 WL 1704722, *6 (D. Neb. Apr. 18, 2013) (citing *City of Riverside v. Rivera*, 477 U.S. 561 (1986)), to determine if "[w]hatever purported 'over-lawyering' … occurred in this case was largely the defendant's own doing," *id.* at *8; *Frank Music Corp. v. MGM, Inc.,* 886 F.2d 1545, 1556 (9th Cir.1989) ("Time spent by plaintiffs' counsel ***responding to motions or actions*** by the defendants ***should not be excluded*** from the fee award."), VSC brushes this off by claiming its "counsel at Jones Day" did not incur "anywhere close" to CNS's counsel. Fee Opp. 21 n.8.

As the Ninth Circuit has instructed, courts should not "assume[] … time spent by an opposing counsel … is a good measure of the time reasonably expended." *Ferland*, 244 F.3d at 1151 (citing *Johnson v. Univ. College*, 706 F.2d 1205, 1208 (11th Cir. 1983) ("hours … needed by one side … may differ substantially from … opposing counsel")). It takes little time to say "CNS has no possible right of access to new complaints" when "lodged" before "judicial decision," VSC Corr. MPA 15, 17 (Doc. 62-1), but weeks to prepare "a number of declarations demonstrating … a long history of courts making complaints available … as soon as they are received." MSJ Order 18-19; Fetterly Reply Dec., ¶¶ 3 (citing Brandolini's Law), 13.

VSC's comparison is also less than meets the eye because, as in the case it cites, VSC "vastly underestimates the amount of legal work [it] actually put into this case." *Perfect 10, Inc. v. Giganews, Inc.*, 2015 WL 1746484, *22 (C.D. Cal. Mar. 24, 2015) (awarding $5.6 million in fees and costs, 90% of the request), *aff'd*, 847 F.3d 657 (9th Cir. 2017). VSC had in house help, Doc. 210-1, ¶ 47, and its outside representation was not limited to "counsel at Jones Day"; another attorney, Fred Hayes (and originally the Sedwick firm), was on the case for five years (2015-20), conducted and defended depositions and other discovery, and was retained to help

defend VSC by the Judicial Council. *See* Doc. 157, ¶ 129.[10]

B. Double-Counting Negates VSC's Cuts, Which Also Fail On The Merits

In 2016, CNS's fee reply caught VSC "double-counting" deductions. Doc. 210 at 15 & n.14; Doc. 210-1, ¶¶ 6-10. The Fee Ruling "failed to consider" this double-counting – to the tune of $103,086.980 – but reconsideration was granted. Doc. 219 at 4. CNS noted this problem again in the VSC's fee opposition in the Ninth Circuit. *Planet III*, ECF 106-2, ¶¶ 6, 9, 17. That did not stop VSC from repeating this mistake, as it is still double-, triple- and even quadruple-counting deductions.[11] As a result, VSC urges the Court to deduct more from many time entries than the dollar value billed. Pearl Reply Dec., ¶¶ 7-11. This "pervasive" problem, *id.*, ¶ 12, negates VSC's proposed reductions because "such double counting is impermissible." *Moreno*, 534 F.3d at 1115.

VSC's reductions for block and quarter-hour billing also fail on the merits.

The time VSC claims was block billed, Stiefel Dec., Exh. D, has been held to "not actually constitute block billing." *Willis*, 2014 WL 3563310 at *18. This is true not only of the time noted in Pearl Reply Dec., ¶ 16 (e.g., "Researching and

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[10] VSC's comparison also fails because it overlooks that the "parties [were] not … similarly situated," *Ferland*, 244 F.3d at 1151, as CNS bore the burdens of proof and persuasion while VSC withheld key evidence, Pearl Reply Dec., ¶ 1; Fetterly Dec., ¶¶ 17, 48 (Doc. 271-3); that this case had "far greater precedential value to [CNS]," *Johnson*, 706 F.2d at 1208; Pearl Reply Dec., ¶ 2; and that the Court "must carefully control … ***for the possibility that the prevailing party's attorney – who, after all, did prevail – spent more time because she did better work***." *Ferland*, 244 F.3d at 1151; *Chabner v. United of Omaha Life Ins. Co.*, 1999 U.S. Dist. LEXIS 16552, *9 (N.D. Cal. Oct. 12, 1999) ("defendant lost this case, so defendant's approach does not recommend a model for conducting litigation.").

[11] For example, all 25 time entries on the first page of Exh D to the Stiefel Dec. for block billing were also included in Exh. E for quarter-hour billing, and 11 were included in three or more categories. Pearl Reply Dec., ¶ 6. Of the 32 entries on the first page of Exh. E to the Stiefel Dec. for quarter-hour billing, 14 were also included in block-billing (Exh. D), 19 in conferencing (Exh. G), three also involved "research," and two involved all four. *Id.*, ¶ 11.

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drafting reply brief"), but also the larger entries in Exh. D. *Perfect 10*, 2015 WL 1746484 at *25;[12] *Willis*, 2014 WL 3563310 at *18 (comparing similar entry, which was not block billing, to "46.3 hours reviewing 'additional documents,'" which was). As noted, both *Willis* and *Perfect 10* were affirmed by the Ninth Circuit.

In essence, VSC and its expert insist CNS should be punished because for the first five years of this case its counsel did not utilize "'task billing,' allocating every moment of attorney time to a plethora of specific tasks. That level of specificity improperly creates 'a pretense of mathematical precision' criticized by Justice O'Connor." *Univ. Elecs., Inc. v. Univ. Remote Control, Inc.*, 130 F. Supp. 3d 1331, 1340 (C.D. Cal. 2015) (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 189 (2d Cir. 2008)), *aff'd*, 669 F. App'x 575 (Fed. Cir. 2016). CNS should not be punished because the "billing specificity" VSC demands is "inefficient" and does not warrant "a reduction 'because counsel "is not required to record in great detail how each minute of his time was expended."'" *Id.* (quoting *Secalt S.A. v. Wuxi Shenxi Constr. Mach. Co.*, 668 F.3d 677, 690 (9th Cir. 2012) (quoting *Hensley*, 461 U.S. at 427 n.12)); *EFF v. Off. of Dir. Of Nat'l Intel.*, 2008 WL 2331959, *6 (N.D. Cal. June 4, 2008) (block billing "appropriate when the tasks listed in a block are related"); Pearl Dec., ¶¶ 36-44 (Doc. 271-4).

"As to [the] quarter-hour increments" CNS's counsel stopped using nine years ago, "this is also a common practice that … ha[s] been allowed by courts in the Ninth Circuit." *In re Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, *45 (N.D. Cal. Jan 28, 2016), *adopted in part*, 2016 WL 3648478 (N.D. Cal. July 7,

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[12] Time entry for "'Review emails from and confer with A. Bridges, J. Golinveaux, T. Kearney regarding Perfect 10's preliminary injunction motion, DMCA notices, and motion to seal; confer with J. Golinveaux concerning discovery; draft email to client concerning preliminary injunction motions; review exhibits, pleadings, and DMCA notices; review and revise draft letters to Perfect 10'" was "***not block billed***" because the "specific itemizations of counsel's tasks [were] sufficient to evaluate the reasonableness of Defendants' request." *Perfect 10*, 2015 WL 1746484 at *26.

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2016). These entries warrant no reduction, *id.*, because while VSC's expert cites cases deducting where evidence showed quarter-hour billing led to "actual over-billing," *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 949 (9th Cir. 2007), VSC points to "no evidence that plaintiff's use of quarter-hour increments posed a threat of over-billing." *EFF*, 2008 WL 2331959 at *6; *see* Pearl Reply Dec., ¶ 21.[13]

C. VSC Does Not Explain How Delegating Discreet Tasks Was Inefficient

The order granting reconsideration agreed with CNS that five timekeepers should not have been included in the 33 whose time was disallowed because the billed under 100 hours. Doc. 219 at 3-4. VSC's expert now lists 24, although one of those (Sarder) actually billed 100 hours. Stiefel Dec., Exh. J. In fact, the list should be only 18, as CNS does not seek reimbursement for fees of those who billed under 15 hours, and the fees for five who were inadvertently included in the original fee request is being cut from CNS's request. Matteo-Boehm Reply Dec., ¶¶ 2-5.

VSC offers no justification for cutting all who billed less than 100 hours – including two who billed more than 97 – other than to reassert that anyone under 100 hours was "'necessarily'" inefficient. Fee Opp. 16. But a court cannot make that assumption. *Moreno*, 534 F.3d at 1112-16. In the only case cited to justify it, the court's "review of the billing records" found duplication. *Univ. Elecs.*, 130 F. Supp. 3d at 1338-39; *but see Moreno*, 534 F.3d at 1112 ("***necessary*** duplication" cannot be cut) (emphasis in original). In this case, the billing records reveal no inefficiency – but rather a cost saving – in delegating discreet tasks to these timekeepers, Pearl Reply Dec., ¶¶ 38-39, and their time should not be deducted. *Tech Prop. v. Canon Inc.*, 2017 U.S. Dist. LEXIS 219618, *11-12 (N.D. Cal. April 12, 2017) (rejecting effort to deny fees for all who billed under 100 hours).

[13] Even if it did warrant a deduction, it should be no more than 5% of the time in 2011-12 that were billed in quarter hours. *O'Bannon v. NCAA*, 114 F. Supp. 3d 819, 832–33 (N.D. Cal. 2015), *objections sustained in part, overruled in part*, 2016 WL 1255454 (N.D. Cal. Mar. 31, 2016), *aff'd*, 739 F. App'x 890 (9th Cir. 2018).

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CONCLUSION

As the Ninth Circuit recognized, CNS's victory was "significant[]." Doc. 255 at 1. In the first appeal, CNS established that federal courts may not abstain but should hear First Amendment challenges to restrictions on access by state courts, and that a First Amendment right of access applies to civil cases. In the second, it kept its case alive so that, in the third, it could "establish[] 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." *Id.* For such "'excellent results,'" CNS is entitled to "a full fee award – that is, the entirely of those hours reasonably expended," including for related theories on which it did not prevail. *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1172 (9th Cir. 2019) (en banc).

"Reasonably expended time is generally time that 'could reasonably have been billed to a private client," *Sierra Club v. U.S. E.P.A.*, 75 F. Supp. 3d 1125, 1148 (N.D. Cal. 2014) (quoting *Moreno*, 534 F.3d at 1111), especially where the applicant "exercises 'sound billing judgment.'" *Id.* Here CNS paid the bills, and counsel "exercised good billing judgment by deducting [745] hours," plus a 10% discount, so "no [further] percentage reduction is necessary." *Id.* at 1151. CNS therefore respectfully requests the Court award the full fee amount of $6,497,289.54 plus $57,389 in costs. Matteo-Boehm Reply Dec., ¶ 7; Doc. 271-2, ¶¶ 48-51.[14]

Dated: March 19, 2021

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[14] No cost reduction is warranted. *Cf.* Fee Opp. 21-22. Contrary to the Fee Ruling, multiple attorneys did not "travel around the county" to attend the same hearing or deposition. Doc. 212 at 11. One flew to most hearings and, unlike the defense, one attended depositions. *See* Doc. 207, ¶¶ 71-72. Postage and copying costs ***were*** absorbed as overhead, *cf.* Doc. 212 at 11, but CNS is entitled to "'reimbursement for ***out-of-pocket*** expenses including ... courier and copying costs'" it actually paid. *Grove v. Wells Fargo Fin. Cal.*, 606 F.3d 577, 580 (9th Cir. 2010).