UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA KELLY, et al., Plaintiffs-Appellees, vs. TIMOTHY WENGLER; CORRECTIONS CORPORATION OF AMERICA, Defendants-Appellants.	No. 14-35199 District Court No. 1:11-cv-00185-EJL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final order awarding attorneys' fees. Therefore, this Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Federal courts have long had discretion under 42 U.S.C. § 1988 to add a multiplier to a lodestar attorney fee calculation in exceptional cases. Congress has expressly barred these multipliers in certain cases, but not in prisoner cases under the Prison Litigation Reform Act, which governs this case. Should this Court write into the PLRA a bar on multipliers that Congress did not put there?

2. Did the district court abuse its discretion in concluding that Plaintiffs were entitled to an attorney fee multiplier after Plaintiffs clearly and convincingly proved, over strenuous resistance, that appellants (CCA) repeatedly violated a federal court order, had done almost nothing to ensure it complied with that order, had lied to state officials in an effort to cover up their violations, and where the district court expressly found that proving these transgressions required exceptional lawyering skills, performed under extreme time pressure and with very limited resources?

3. Did the district court abuse its discretion in awarding fees for certain deposition and trial work that Plaintiffs' counsel and support staff performed,

where CCA offered no evidence that the time spent on that work was unreasonable?

STATEMENT OF THE CASE[1]

Plaintiffs brought this lawsuit to remedy CCA's deliberate indifference to prisoner safety at the Idaho Correctional Center (ICC), Idaho's largest prison. (*See* ER 663.) Plaintiffs' class action complaint stated that "[i]t's impossible for ICC to provide prisoners with adequate protection from assault—or to timely intervene when an assault has commenced—with as few guards as ICC has on its staff." (ER 787 at ¶ 25.)[2] The parties reached a settlement agreement in September 2011 in which CCA promised to fully staff ICC according to the mandatory staffing pattern in CCA's contract with the State of Idaho, plus add an additional three guards on top of that. (ER 642 ¶ 4.) The District Court ordered the case dismissed, expressly incorporating the parties' Stipulation for Dismissal, with the Settlement Agreement attached to it, into its order of dismissal. (ER 639–45.)

[1] Plaintiffs incorporate by reference the Statement of the Case contained in the answering brief filed in the related appeal, No. 13-35972, which this Court has consolidated with this appeal. This Statement of the Case highlights facts and procedural history particularly relevant to this appeal regarding attorney fees.

[2] As in CCA's briefs, "ER" refers to the Excerpts of Record filed in the related appeal, No. 13-35972, "SER" refers to the Supplemental Excerpts of Record filed in that related appeal, and "AER" to the Additional Excerpts of Record filed in this appeal.

A year and a half later, in April 2013, the Idaho Department of Correction (IDOC) revealed to the public that CCA had actually been grossly understaffing ICC for many months, with nearly 4,800 hours of mandatory security posts going vacant during just seven months of 2012. (ER 342–343.) All that CCA would itself acknowledge, however, was that there were "some inaccuracies" in ICC staffing records over an isolated seven-month period. (ER 342.) It had been Plaintiffs' lawyers, in fact, who had originally brought possible understaffing at ICC to the State's attention, by passing on to IDOC officials an anonymous whistleblower's detailed tip, months before the public knew about any of CCA's transgressions. (ER 372 at 464:1–465:21.) After IDOC revealed that about 4,800 mandatory staffing hours went vacant at ICC during seven months in 2012, Plaintiffs' counsel conducted their own initial investigation and found that CCA was likely concealing thousands more vacant, mandatory staffing hours at ICC that had occurred since the court-ordered settlement. (*See, e.g.*, ER 595–611.) Based on this information, Plaintiffs filed a motion for the court to hold CCA in contempt for violating the September 2011 order. (ER 616–633.)

On July 12, 2013, the district court ordered CCA to show cause why it should not be held in contempt, setting a two-day hearing for August 7 and 8, 2013—less than a month away. (ER 36.) Plaintiffs had only 26 days to get documents from CCA and the State of Idaho, review and analyze them, depose key

State and CCA officials in three different states, interview witnesses and prepare for trial, research numerous legal issues that arose in connection with the proceeding, and write several briefs. (*See* ER 36, 612–615; *see also* ER 585–589; 538–539; 91–126; AER 198 ¶ 14; 222–24 ¶¶ 14–16.) The work took everything the Plaintiffs' two attorneys could muster. (AER 198 ¶ 14; 222– 24 ¶¶ 14–16.) CCA was still producing important documents to Plaintiffs' counsel on the eve of trial—and still more after the trial began. (AER 222–23 ¶ 14.) Most of CCA's document production did not arrive until just five days before trial, and that was in addition to 1.65 GB of ESI from IDOC that Plaintiffs' counsel had to comb through. (*Id.*) Compounding all of it, the State and CCA stymied counsels' inquiries in discovery and at trial due to a criminal investigation that the State said was pending. (*See, e.g.*, ER 448–449 at 26:18–29:25; 371–372 at 461:14–463:15.)

What Plaintiffs' counsel were able to expose through their hard work during those 26 days proved astounding. Counsel's work confirmed that there had been hundreds and likely thousands more vacant mandatory staffing hours at ICC after the settlement order in 2011 than what CCA had reported to IDOC (*see, e.g.*, ER 377–378 at 485:4–488:18; ER 483–484 at 166:22–172:17; SER 1–124; *cf.* ER 211), and that mandatory security posts were still going vacant in the weeks just before trial, up through and including the latest information counsel could obtain (ER 391–393; *cf* ER 129–176). Plaintiffs even discovered that some of the three

new guard posts the court had ordered—which the Warden himself controlled—had gone vacant many days in 2012. (ER 16–17; *cf.* ER 375 at 474:18–477:8, 181–203.) Plaintiffs proved all of this at trial by clear and convincing evidence. (AER 9–10.) As the district court found, "it is clear that the non-compliance was far worse than the report of about 4,800 hours would lead one to believe." (ER 9.)

Plaintiffs also proved at trial not only that CCA had covered up these vacancies by falsifying its records (*see* ER 478 at 146:19–147:11), but also, as the court found, that "Warden Wengler and CCA itself [were] responsible for the staffing shortages." (AER 11). Warden Wengler admitted at trial that he had known before the Settlement Agreement that ICC was having trouble filling all its mandatory posts (ER 466 at 99:25–100:3), and that his Chief of Security had repeatedly notified him about difficulties filling mandatory posts (ER 339; 467 at 102:18–103:4; 468 at 106:13–17; 508 at 267:12–23; 508–509 at 268:17–269:4; 509 at 269:10–20). Plaintiffs' counsel found during discovery and showed at trial that IDOC had issued CCA a "notice of breach" for "non-compliance with contractually required staffing," and sent another memo to a CCA Vice President just three months before the Settlement Agreement documenting five recent incidents where CCA had failed to fill a mandatory security post at ICC. (ER 334.)

Plaintiffs thus proved that CCA "had ample reason over the past two years to proactively check that they were in compliance with staffing requirements for

mandatory positions," and yet flagrantly failed to undertake easy, reasonable measures to perform that duty. (ER 8–9.) For instance, Plaintiffs proved that neither Warden Wengler nor anyone from CCA headquarters *ever* checked to ensure that the prison was fully staffed. (ER 406 at 599:18–24; 452 at 41:24–42:7.) CCA's Managing Director for ICC admitted during the hearing that he made no attempt to confirm that mandatory posts were being filled and never asked anyone else to verify it. (ER 415 at 634:6–15; 496 at 218:20–219:10.) Warden Wengler, despite continued complaints from his Chief of Security and notices of noncompliance from IDOC, failed to hire as many guards as he could have (ER 16 (citing SER 173–180); ER 470 at 113:7–116:8.), and admitted that not once did he instruct his staff to inform him when mandatory posts went vacant (ER 426 at 679:3–11) or ask any guards or shift supervisors if they knew of any vacancies. (ER 457 at 63:19–22; 453 at 45:9–46:4.) The district court found that the Warden "did not check at any point in 2012 for vacancies 'specifically,' nor did he ever walk around the prison and compare the staff roster to the officers on required posts." (ER 17 (quoting ER 452 at 41:24–42:7).) The district court expressly rejected Wengler's attempt to blame the daily and persistent violations of the court order on his subordinates, finding that the "responsibility to check on mandatory staffing posts falls higher than Wengler's subordinates; it falls on him, and it falls on CCA." (ER 17.)

The district court also found that the information CCA must have given to IDOC indicating 4,800 hours of missing guards "constituted a significant under-estimate," "that posts had been empty even in the weeks before the contempt hearings," and "that CCA's remedial efforts did not cure the violations." (AER 10.) As the court stated in its fees decision: "Plaintiffs uncovered substantial evidence of noncompliance with the Settlement Agreement and long-term knowledge of that noncompliance by high-ranking individuals at CCA." (AER 22.) The court specifically remarked about how difficult Plaintiffs' burden had been, because CCA "kept records that obscured who was working at what posts and at what times." (ER 22.)

Based on what Plaintiffs' counsel uncovered during the 26-day expedited discovery period and proved at trial, the district court held CCA in contempt. (ER 25.) It granted all of the types of sanctions that Plaintiffs suggested except those that the State said it was already addressing. Although the district court did not immediately order certain specific sanctions Plaintiffs suggested, it expressly reserved the ability to modify the order to do just that. (ER 5.) The court said that it would wait and see, for instance, whether to increase prospective fines for future violations up to the levels Plaintiffs recommended. (ER 24.) The Court believed at the time that a criminal investigation of the understaffing fabrications was ongoing, and that the State was auditing CCA's staffing records to determine how

much CCA owed taxpayers for the missing guards that CCA had billed for. (ER 5 n.3, 22, 25.) Similarly, the court said it would not order CCA to discipline all personnel who falsified staffing records "when a state criminal investigation is ongoing" into those activities. (ER 25.) Thus, the court only deferred Plaintiffs' other suggestions for the time being; it never totally rejected them. (ER 26.)

As part of its contempt order, the district court directed Plaintiffs to submit documentation of their fees and costs, (ER 25), which Plaintiffs did. In a February 2014 decision, the court awarded Plaintiffs their fees, first computing the lodestar based on hourly rates set by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(d)(1), and then awarding a separate enhancement above the lodestar. (AER 18–27.) The court based the enhancement on alternate grounds. First, the court found that Plaintiffs' counsel had brought "extraordinary performance yielding extraordinary results" to the contempt proceedings. (AER 22.) With hardly any time to discover and prove all they did, the court found that "Plaintiffs' counsel achieved excellent results for their clients under extreme time pressure and with very limited resources." (AER 22.) As a second, alternate ground for fee enhancement, the court found, based on Plaintiffs' largely undisputed evidence, that private attorneys in Idaho were unwilling to undertake expensive, class action prison litigation seeking declaratory and injunctive relief. (AER 25.) Indeed, the

court found that current counsel were the only attorneys in Idaho likely to ever accept this class of cases. (AER 26.)

After being found in contempt and ordered to fully staff ICC in the future, CCA announced that it would not seek to continue its contract to run the prison, and in June 2014, CCA returned the administration of ICC back to the State of Idaho. Reply Brief in No. 13-35972, at 1 & n.1. CCA has appealed both the contempt decision (in No. 13-35972) and the fee award, and this Court has consolidated the two cases.

SUMMARY OF THE ARGUMENT

Nothing in the text of the PLRA bars an attorney fee enhancement. Nothing in the PLRA's legislative history or purpose suggests that Congress intended to bar fee enhancements in prisoner cases, either. Federal courts had allowed those enhancements for years before Congress passed the PLRA. Notably, a decade before the PLRA, Congress passed another fee-shifting statute that specified how to compute a prevailing attorney's hourly rates, and *this one* barred fee enhancements. Congress did only the former in the PLRA. The Supreme Court has since specifically held that enhancements can be appropriate in cases where federal fee-shifting statutes artificially constrain lodestar amounts. Because Congress in the PLRA chose not to modify the long-established law allowing enhancements, the district court had discretion to grant one here.

The district court appropriately awarded an enhancement in this instance, closely following the Supreme Court's recent instructions. Its findings, that Plaintiffs' counsel had obtained exceptional results through exceptional lawyering and that the lodestar was inadequate to attract competent counsel for this entire class of cases, were linked to specific evidence in the record and thus not clearly erroneous. The district court did not abuse its discretion on either alternate ground. Neither did the district court abuse its discretion in rejecting CCA's nitpicking of certain hours spent by Plaintiffs in preparing for depositions and for trial, as CCA submitted no evidence that those efforts were unreasonable.

ARGUMENT

I. STANDARDS OF REVIEW.

Three different standards of review apply here. The statutory meaning of § 1988 and the PLRA are reviewed *de novo*, guided by traditional principles of statutory interpretation. *See* Opening Brief 16–17; *United States v. Ventre*, 338 F.3d 1047, 1052 (9th Cir. 2003).

The district court's decisions to award fees for the billing entries that CCA protests, and to grant a fee multiplier, are reviewed for abuse of discretion. *See* Opening Brief at 16. Under the highly deferential abuse of discretion standard of review, reversal is only appropriate "when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the

circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000); *see also Armstrong v. Davis*, 318 F.3d 965, 975 (9th Cir. 2003) (upholding fee award where "the record revealed many other instances in which reasonable people could disagree about whether the fees awarded were too high but none in which the district court acted outside the broad range of its discretion in determining appropriate fees," and deferring to district court's method of calculating fees even where another reasonable approach existed). The already deferential abuse of discretion review is heightened "where the court has been overseeing complex institutional reform litigation for a long period of time," and where a party has repeatedly failed to comply with the court's own orders. *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1073 (9th Cir. 2010) (internal quotation marks omitted); *see Sharp v. Weston*, 233 F.3d 1166, 1174 (9th Cir. 2000).

The district court's factual findings undergirding its decisions are reviewed for clear error. *See Native Village of Quinhagak v. United States*, 307 F.3d 1075, 1079 (9th Cir. 2002). Because of the district court's particular expertise, reversal of its factual findings requires a "definite and firm conviction that a mistake has been committed." *Brown v. Plata*, 131 S. Ct. 1910, 1929–30 (2011) (internal quotation marks omitted). Where there are two permissible views of the evidence, the district court's "choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

II. THE DISTRICT COURT APPROPRIATELY AWARDED A FEE MULTIPLIER ABOVE THE LODESTAR.

The parties are in complete agreement on the following two facts: (1) Plaintiffs are entitled to an award of attorneys' fees for time spent securing the contempt ruling below if that ruling is affirmed on appeal, and (2) in calculating Plaintiffs' fee award, the district court was required to base its lodestar calculation on an hourly rate capped by the PLRA.[3]

The district court did, in fact, base its lodestar calculation on the PLRA-capped hourly rate. Nothing in the PLRA, however, prohibited the district court from then enhancing the lodestar amount with a fee multiplier, using its long-established authority under 42 U.S.C. § 1988, which Congress did not modify in the PLRA. The district court properly granted that enhancement, faithfully applying the standards recently set out by the Supreme Court.

[3] As Plaintiffs discuss in the brief filed in the related appeal, CCA's argument with respect to the PLRA is self-contradictory. *See* Answering Brief in No. 13-35972 at 27–29. CCA compounds that contradiction here. CCA contends in the related appeal that even though the Settlement Agreement expressly cites to the PLRA, this fails to prove that the Agreement is federally enforceable. *See* Opening Brief in No. 13-35972 at 45–46; Reply Brief in No. 13-35972 at 10–11. That, however, is impossible because unless the Agreement is federally enforceable in the first place, the PLRA has no application to it. Here, by agreeing that the PLRA's fee provision (*nowhere* cited in the Settlement Agreement) applies to it, CCA only further proves that the Settlement Agreement is federally enforceable. In any event, CCA concedes here that the PLRA fee provision applies to the issues presented in this appeal, although CCA seeks to avoid the obvious consequences of that concession in the related appeal.

II.A. The PLRA Does Not Prohibit Multipliers.

Nowhere does the PLRA in its text prohibit a court from awarding an enhancement or multiplier when making an attorney's fees award. What is more, Plaintiffs are not aware of anything in the legislative history of the PLRA that even hints that Congress sought to eliminate multipliers in prison litigation. Rather, under the principles of statutory construction that the Supreme Court laid out in its unanimous decision in *Jones v. Bock*, 549 U.S. 199 (2007) (Roberts, C.J.), both the PLRA's express language and its legislative history demonstrate that in injunctive relief cases like this one, Congress only capped hourly rates. It left intact the federal courts' authority to award a multiplier in the few "rare" and "exceptional" cases that qualify for an enhancement under Section 1988. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010).

Hourly rates and multipliers are different, and a cap on rates does not bar a multiplier. By expressly capping hourly rates while remaining silent about multipliers, Congress preserved the authority of federal courts to award multipliers in the rare prison cases that warrant them.

II.A.1. The PLRA's Express Language Does Not Prohibit Multipliers.

Whether the PLRA bars a bonus or multiplier to the base lodestar

calculation[4] of attorney's fees is a question of statutory construction. In "determining the meaning of a statutory provision, [courts] look first to its language, giving the words used their ordinary meaning." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (citation and internal quotation marks omitted). Only if the statute's terms are ambiguous would this Court "use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006); *see also United States v. Harrell*, 637 F.3d 1008, 1010 (9th Cir. 2011). Here, then, Plaintiffs first examine the PLRA's express language and then discuss the legislative history of the PLRA and its overall purpose. Fortunately, the guideposts are well marked because the Supreme Court engaged in a similar effort when it construed the PLRA in *Jones*.

Jones involved the PLRA's exhaustion provision, which bars certain prisoner litigation unless the prisoner first exhausts all available administrative remedies. The question in *Jones* was whether prisoners must affirmatively plead exhaustion in their complaints, or whether prison officials must instead raise the absence of exhaustion as an affirmative defense. The Court noted at the outset that

[4] The "lodestar" method calculates fees based on "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *See Gisbrecht v. Barnhart*, 535 U.S. 789, 801-02 (2002); *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1110 (9th Cir. 2014). The lodestar is the presumptively appropriate fee award, on top of which a multiplier may be added in "rare" and "exceptional" cases. *See Perdue*, 559 U.S. at 554.

the prevailing norm under other statutes with exhaustion provisions was that the defendant must raise failure to exhaust as an affirmative defense, and that it need not be pleaded by the plaintiff. *Jones*, 549 U.S. at 212. The Court also noted at the outset that the PLRA expressly addresses the subject of exhaustion in some detail, but is silent on the subject of pleading requirements. *Id.* at 214.

Employing the statutory analysis used in "silence" cases, the Court held that Congress's silence supports the conclusion that the PLRA did not change the prevailing norm. *See id.* at 212. "The PLRA . . . is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed," the Court held. *Id.* Accordingly, because of the PLRA's silence, district courts should not "deviat[e] from the usual procedural practice beyond the departures specified by the PLRA itself." *Id.* at 214; *see also id.* at 221 ("If Congress meant to depart from this norm, we would expect some indication of that, and we find none.") (quoting *Robinson v. Page*, 170 F.3d 747, 748–49 (7th Cir. 1999)).

Likewise, this Court also has refused to read limitations into the PLRA beyond those set by Congress. In *Perez v. Cate*, this Court held that because the PLRA does not impose a specified cap on hourly rates for paralegals, federal courts must apply to paralegals the same cap that the PLRA applies to attorneys, even though this can result in paralegals recovering a much higher percentage of

their market rates than attorneys. 632 F.3d 553, 556–58 (9th Cir. 2011); *see also Graves v. Arpaio*, 633 F. Supp. 2d 834, 844–45 (D. Ariz. 2009) (holding that the PLRA's silence regarding whether prisoners could recover attorney's fees for time spent monitoring a consent decree means that the PLRA incorporated the prevailing law allowing the award of such fees), *aff'd*, 623 F.3d 1043 (9th Cir. 2010); *accord*, *Robinson*, 170 F.3d at 748–49 (interpreting a different section of the PLRA and concluding that because the PLRA did not explicitly modify prevailing law, the court would interpret that silence as acceptance of prevailing law); *Hernandez v. Kalinowski*, 146 F.3d 196, 199–200 (3d. Cir. 1998) (holding that the PLRA's silence regarding whether federal courts may continue to award fees-on-fees in prison litigation means that the PLRA incorporated, rather than legislatively overruled, the prevailing law).

As discussed next, the prevailing law at the time Congress passed the PLRA allowed district courts to award multipliers to prevailing plaintiffs in "rare" and "exceptional" cases. *See Perdue*, 559 U.S. at 546. Congress's silence in the PLRA on multipliers can only mean that Congress intended to preserve that discretion. *See Jones*, 549 U.S. at 212–14.

II.A.1.a. *The Statutory and Judicial Backdrop to the PLRA.*

Twenty years prior to the PLRA, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, to help ensure that the victims of civil rights violations will be able to attract competent counsel to vindicate their rights in court. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *see also Perdue*, 559 U.S. at 559 ("Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights."); *Seattle Sch. Dist. No. 1 v. State of Wash.*, 633 F.2d 1338, 1348 (9th Cir. 1980) ("The congressional purpose in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law."). Section 1988 seeks to accomplish that goal by making certain that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Hensley*, 461 U.S. at 429 (quoting S.Rep. No. 94-1011, at 4 (1976)).

Furthermore, the Supreme Court has recognized since at least 1983—over a decade before the passage of the PLRA—that district courts awarding attorney's fees pursuant to fee-shifting legislation such as § 1988 could grant a bonus or multiplier, above the lodestar, when determining the final award. *See Hensley*, 461 U.S at 435 (recognizing that a prevailing plaintiff seeking fees under § 1988 should

recover "a fully compensatory fee . . . and indeed in some cases of exceptional success an enhanced award may be justified"). Similarly, this Court upheld fee awards granting bonuses and multipliers under applicable fee-shifting legislation, including § 1988, before the PLRA was enacted. *See Bernardi v. Yeutter*, 951 F.2d 971, 975 (9th Cir. 1991) (reversing a district court's denial of multiplier in a case where, as here, plaintiffs proved that the defendant had committed a contempt of court, and directing on remand a 2.0 multiplier); *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 650 (9th Cir. 1988) (awarding a 2.0 multiplier based on a finding that victims of Title VII discrimination in San Francisco would face "severe difficulties" as a class attracting counsel without "the possibility of substantial enhancement over the ordinary hourly rate"); *Clark v. City of Los Angeles*, 803 F.2d 987, 991–92 (9th Cir. 1986) (awarding a 1.5 enhancement based in part on the contingent nature of the case, the difficulty of the case, and the results obtained). Thus, courts' discretion to award fee multipliers was well-established long before Congress passed the PLRA.

II.A.1.b. *Lodestar Calculations Based on Hourly Rates Are Different from Multipliers.*

Additionally, both Congress and the Supreme Court distinguish lodestar calculations, which are based on an hourly rate usually set by the market or by statute, from bonuses and multipliers above the lodestar. The Supreme Court has made clear that the base hourly rate calculation under the lodestar method "was

never intended to be conclusive in all circumstances." *Perdue*, 559 U.S at 552, 553; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Hensley*, 461 U.S. at 435).

Since it first recognized the propriety of awarding multipliers in exceptional cases in 1983 in *Hensley*, the Supreme Court has consistently treated the setting of a reasonable hourly rate separately from the awarding of a multiplier, and applied distinctly different legal principles to the two. *See Blum*, 465 U.S. at 892–97 (hourly rates), 898–902 (multipliers); *Hensley*, 461 U.S. at 433–34 (hourly rates), 434–37 (multipliers). In *Perdue* itself, the Court noted at the outset that half of the amount sought was the lodestar, based on hourly rates, and the other half was an enhancement "for superior work and results." 559 U.S. at 547–48.

Congress treats the two distinctly, as well. In 1986, ten years before the PLRA was passed, Congress added an attorney fee provision to the Individuals with Disabilities in Education Act of 1975 ("IDEA"). *See* Pub.L. No. 99–372, 100 Stat. 796 (1986), originally codified as 20 U.S.C. § 1415(e)(4)(c) and now codified as 20 U.S.C. § 1415(i)(3)(C). The first part of the IDEA fee provision prescribes what hourly rate a lodestar calculation can be based on: "Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. §

1415(i)(3)(C). A separate sentence addresses multipliers, expressly prohibiting them in IDEA cases: "No bonus or multiplier may be used in calculating the fees awarded under this subsection."[5]

By contrast, when passing the PLRA a decade later, Congress expressly capped the hourly rates for lodestar calculations in prisoner litigation, but did not prohibit multipliers:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded except to the extent that–
>
> * * * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.

42 U.S.C. § 1997e(d)(3).[6]

[5] The fee provision in the IDEA was added in response to *Smith v. Robinson*, 468 U.S. 992 (1984), in which the Court held that because attorneys' fees were not explicitly authorized by the IDEA, they could not be awarded. Congress filled that void two years later, but opted to prohibit multipliers when it did so.

[6] 18 U.S.C. § 3006A of the Criminal Justice Act ("CJA") sets forth the method for determining the hourly rate paid to appointed criminal defense counsel. The Judicial Conference sets and periodically alters this rate.

It is clear, then, that Congress was well aware long before it passed the PLRA that district courts were awarding multipliers under fee-shifting legislation pursuant to Supreme Court precedent, and that Congress knew it could eliminate that authority by expressly stating its intent to do so, as it did in the IDEA. Congress decided that in IDEA cases, a prevailing plaintiff's attorney fee will be computed using market rates, but that no multiplier can be awarded. Ten years later when Congress enacted the PLRA, Congress decided to do just the opposite: Prevailing plaintiffs in prison litigation will receive attorney's fees based on capped, below-market hourly rates, but in extraordinary cases may receive a multiplier.[7]

II.A.1.c. *Congress Chose When Enacting the PLRA Not to Modify Well-Established Supreme Court Law Permitting Multipliers.*

Congress's silence on fee multipliers in the PLRA is particularly stark because of the three specific and careful limitations on attorney's fees that the Act does contain. Reading a multiplier prohibition into the PLRA that is *not* in the statute violates Congress's clear intent to set forth all of its limitations on fee

[7] As explained below, capping hourly rates but permitting a multiplier advances the purpose of the PLRA, which is designed to curtail frivolous or insignificant cases without deterring meritorious and compelling cases. *See Graves*, 633 F. Supp. 2d at 844. A rate cap will discourage attorneys from taking frivolous or insignificant cases, but by allowing a multiplier, attorneys may be encouraged to take the most egregious, meritorious cases and prosecute them exceptionally well, which is exactly what Congress sought to accomplish through passage of the PLRA.

awards in a single, omnibus provision. *See Jones*, 559 U.S. at 212 (holding that an additional limitation should not be read into the PLRA's omnibus exhaustion provision).

First, the PLRA authorizes a fee award only in two circumstances: (1) "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's [civil] rights" and "the amount of the fee is proportionately related to the court ordered relief for the violation," or (2) "the fee was directly and reasonably incurred in enforcing the relief ordered for the violation." 42 U.S.C. § 1997e(d)(1). Second, the PLRA requires prisoners to use a portion of any money judgment they obtain to satisfy attorney's fees, which are, in any event, capped at 150 percent of the amount awarded in damages. *Id.* § 1997e(d)(2). Third, in declaratory and injunctive relief cases, the hourly rate awarded to counsel may not exceed "150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel." *Id.* § 1997e(d)(3).

Therefore, the PLRA's plain text—expressly capping the hourly rates on which a lodestar can be based, but not regulating multipliers at all—"is strong evidence that the usual practice should be followed" in permitting multipliers in prison litigation. *See Jones*, 549 U.S. at 212. The Supreme Court "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997).

This Court must presume that Congress expected the PLRA to be read in conformity with the prevailing law on multipliers, given that nothing in the PLRA modifies that law. "Congress is understood to legislate against a background of common-law adjudicatory principles. . . .Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. and Loan Ass'n v. Solimino,* 501 U.S. 104, 108 (1991) (internal quotation marks omitted); *see also Albernaz v. U. S.*, 450 U.S. 333, 340-42 (1981) (holding that "if anything is to be assumed from . . . congressional silence . . . it is that Congress" was aware of applicable law and "legislated with it in mind."); *Marchese v. Shearson Hayden Stone, Inc.*, 822 F.2d 876, 878 (9th Cir. 1987) (holding that "it is proper for this court to presume that Congress was aware of the existing" norm, and therefore Congress's silence connotes acceptance of that norm). As *Jones* declared in the PLRA context, "courts should generally not depart from the usual practice" in the face of congressional silence. *See* 549 U.S. at 212.

Interpreting the PLRA fee provision as preserving multipliers is consistent with interpretations of the PLRA fees provision in analogous contexts, where courts have refused to read into the PLRA fee provision limits that Congress did not explicitly impose. Just three years ago, this Court held that because the PLRA

did not explicitly cap paralegal rates under the Criminal Justice Act, that limitation would not be read into the statute. *See Perez*, 632 F.3d at 556–57. This Court expressly noted that its "conclusion in this regard is buttressed by the fact that the PLRA post-dates" Supreme Court precedent allowing for the recovery of paralegal fees under § 1988. *Id.* at 557; *see also Woods v. Carey*, 722 F.3d 1177 (9th Cir. 2013) (narrowly construing a portion of the PRLA attorney's fee provision); *Dannenberg v. Valadez*, 338 F.3d 1070, 1073 (9th Cir. 2003) (narrowly construing a different portion of the PLRA attorney's fee provision).

The Third Circuit similarly held that the PLRA allows for recovery of fees for time spent seeking fees, because Congress expressed no clear intent to modify existing Section 1988 precedent that allows this. *Hernandez*, 146 F.3d at 199–200. The court concluded that Congress's failure to "clearly express its intent to change the established construction" meant that Congress intended to incorporate that precedent. *Id.* The Fifth Circuit has adopted the same holding reached by this Court in *Perez* and by the Third Circuit in *Hernandez*, using similar reasoning. *See Volk v. Gonzales*, 262 F.3d 528, 535-36 (5th Cir. 2001); *see also United States v. Vallee*, 677 F.3d 1263 (9th Cir. 2012) ("We assume that Congress is aware of existing law when it passes legislation," and the absence of any explicit rejection of that law connotes incorporation of it (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).).

Plus, in the Supreme Court's most recent multiplier decision, *Perdue*, the Court specifically identified situations like the one in this case as eligible for fee multipliers. 559 U.S. at 554– 55. The Court held that enhancements may be awarded "where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value," including in situations where an artificial cap on rates applies. *Id.* "In such a case," the Court held expressly, "an enhancement may be appropriate so that an attorney is compensated *at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes*." *Id.* at 555 (emphasis added).

The Supreme Court had clearly established prior to the PLRA's passage, and has subsequently reaffirmed, that bonuses and multipliers are permitted under § 1988, even when they enhance fees on top of statutorily-imposed limits. *See id.*; *see also Delaware Valley*, 478 U.S. at 565; *Blum*, 465 U.S. at 897; *Hensley*, 461 U.S. at 435; *see also Perdue*, 559 U.S. at 552 (reaffirming that multipliers are appropriate in rare and exceptional cases under § 1988). Congress did not modify that long-established norm in the PLRA.

II.A.1.d. *None of CCA's Authority is Persuasive.*

CCA provides a string citation of sixteen cases that stand for the point that under the PLRA, "*the hourly rate* for fees authorized under § 1988 cannot exceed the fee cap in § 1997e(d)(3)." Opening Brief at 22 (emphasis added). But the

presence of a cap on the attorney's hourly rate is not the issue: Plaintiffs do not dispute that the PLRA caps the hourly rate on which the lodestar is calculated. (Indeed, the PLRA's express hourly rate cap is proof that when Congress wants to place a limit on a court's authority to fashion a fee award, it knows how to accomplish that result and does so explicitly.)

Even a cursory review of CCA's sixteen cases demonstrates that, to the extent they are even relevant, they support Plaintiffs' position that the PLRA does not prohibit a multiplier far more than CCA's claim to the contrary. Eleven of the sixteen cases do not discuss multiplier awards at all, and stand merely for the undisputed fact that the PLRA prescribes a maximum hourly rate for calculating the lodestar. Not one of these cases holds that the PLRA prohibits a multiplier to the lodestar. *See Perez v. Westchester Cnty. Dep't of Corr.*, 587 F.3d 143 (2d Cir. 2009), *Sallier v. Scott*, 151 F. Supp. 2d 836 (E.D. Mich. 2001); *Waterman v. Farmer*, 84 F. Supp. 2d 579 (D.N.J. 2000); *Smith v. Beauclair*, CV03-222-C-EJL, 2010 WL 4641333 (D. Idaho Nov. 4, 2010); *Curry v. Montgomery*, 07-22899-CIV, 2010 WL 883798 (S.D. Fla. Mar. 9, 2010); *Farella v. Hockaday*, 304 F. Supp. 2d 1076 (C.D. Ill. 2004); *Morrison v. Davis*, 88 F. Supp. 2d 799 (S.D. Ohio 2000), *amended in part*, 195 F. Supp. 2d 1019 (S.D. Ohio 2001); *D.M. v. Terhune*, 67 F. Supp. 2d 401 (D.N.J. 1999); *Beckford v. Irvin*, 60 F. Supp. 2d 85 (W.D.N.Y. 1999); *Ackerman v. Nevada Dep't of Corr.*, 2:11-CV-00883-GMN, 2013 WL

6669066 (D. Nev. Dec. 17, 2013); *Minikin v. Walter*, CS-96-407-JLQ, 1999 WL 778753 (E.D. Wash. Oct. 15, 1997).

Of the five remaining cases on CCA's list, three of them denied a multiplier on the merits, thus presumptively holding that a multiplier was available, but inappropriate in that instance. *See Barnard v. Piedmont Reg'l Jail Auth.*, CIV.A. 3:07CV566, 2009 WL 3416228 at *2 n. 4 (E.D. Va. Oct. 21, 2009) (finding "that this relatively simple case [did] not warrant" a multiplier); *Hall v. Terrell*, 648 F. Supp. 2d 1229, 1236 (D. Colo. 2009) (denying a multiplier because the facts of the case presented "no reason" to award one); *Lake v. Schoharie Cnty. Com'r of Soc. Servs.*, CIV-A901-CV1284-NAM-DEP, 2006 WL 1891141, at *10-11 (N.D.N.Y. May 16, 2006) (denying a multiplier to plaintiffs and granting defendant's request for a downward adjustment to reflect plaintiff's partial success in the litigation). A fourth case, *Lira v. Cate*, C00-0905 SI, 2010 WL 727979 at *10 (N.D. Cal. Feb. 26, 2010), is equally as unsupportive of CCA's position. In *Lira*, the court found it "unnecessary to resolve the question of whether a multiplier is permitted under the PLRA" because the facts did not support an award anyway. Only one of the sixteen cases cited by CCA supports their position that multipliers are barred by the PLRA, *Kahle v. Leonard*, CIV. 04-5024-KES, 2008 WL 2776494 (D.S.D. July 14, 2008), *remanded in part on other grounds*, 563 F.3d 736 (8th Cir. 2009), but

that court's two-sentence ruling on this issue cites no case law or legislative analysis.

In sum, CCA's litany of cases boils down to one lonely, cursory, and unpersuasive out-of-circuit district court case. In contrast, six district courts have addressed the question of multipliers in the PLRA context on the merits. Three of them (cited above) denied multipliers, after presuming they were allowed. The other three expressly held that nothing in the PLRA prohibits the award of a multiplier—and awarded a multiplier. *See Kelly v. Wengler*, __F. Supp. 2d__, 2014 WL 1246064 at **9-13 (D. Idaho 2014); *Ginest v. Bd. of Cnty. Comm'rs of Carbon Cnty., WY*, 423 F. Supp. 2d 1237, 1241 (D. Wyo. 2006); *Skinner v. Uphoff*, 324 F. Supp. 2d 1278, 1288 (D. Wyo. 2004). And although CCA criticizes the decisions in *Ginest* and *Skinner* because those courts "relied on pre-PLRA cases" in awarding a multiplier, *see* Opening Brief at 28, that is precisely what all courts *should* do, given that nothing in the PLRA changed the pre-PLRA norm.

Thus, based on well-settled Supreme Court and Ninth Circuit precedent, the PLRA's silence regarding multipliers shows that Congress meant to preserve existing law in prison litigation that allows a district court to add a bonus or multiplier to a lodestar amount in the rare, extraordinary cases that warrant one. *See Perdue*, 559 U.S. at 552; *Jones*, 549 U.S. at 214–16; *Perez*, 632 F.3d at 556–57. That is just what the district court did in this case: the court capped the hourly

rate consistent with the PLRA, and only then determined that Plaintiffs were entitled to a multiplier, using precisely the standards required in *Perdue*. (AER 19–26.) As the district court correctly explained in rejecting CCA's contention that the PLRA prohibits a multiplier, adopting CCA's position would "eliminate[] the well-established enforcement framework in § 1988 litigation, a drastic step" for which there is "no basis in the PLRA." *Id*. at 23-24. Indeed, in order to accept the proposition that Congress banned multipliers in the PLRA by not saying so, the Supreme Court's unanimous decision in *Jones* would have to have been decided the other way.

II.A.2. Permitting Multipliers Is Consistent with the PLRA's Legislative History and Purpose.

The PLRA's legislative history and purpose only make it more clear that Congress left authority intact for district courts to award fee multipliers to prisoners who have suffered grievous violations of their federal rights, in the rare and extraordinary instances when such a bonus is appropriate. The goal of the PLRA was not to discourage all lawsuits brought by prisoners, but only frivolous ones. *See Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999) ("[T]he government's interest [in enacting the PLRA] was apparently to curtail frivolous prisoners' suits.") The PLRA's legislative history discloses a clear intent to "preserve[] the rights of prisoners with valid claims to have access to an attorney and seek legal redress for meritorious claims by including the provision for

attorney fees." *Hernandez*, 146 F.3d at 200. "Nothing in the legislative history suggests that Congress intended to deter meritorious claims." *Id.*; *see also Porter v. Nussle*, 534 U.S. 516, 524 (2002) (finding that the PLRA's purpose was to "reduce the quantity and improve the quality of prisoner suits."). "What this country needs, Congress decided, is fewer and better prisoner suits," and to achieve that result, Congress inserted into the PLRA "a variety of reforms designed to filter out the bad claims and facilitate consideration of the good." *Jones*, 549 U.S. at 204. As this Court explained in *Cano v. Taylor*, "[t]he PLRA is intended to eliminate frivolous lawsuits, but not to eliminate the ameliorative effect achieved by valid constitutionally-based challenges." 739 F.3d 1214, 1219 (9th Cir. 2014); *see also Silva v. Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011).

The PLRA's attorney fee provision, 42 U.S.C. §1997e, is consistent with the PLRA's overarching purpose. That is, the fee provision as expressly written serves Congress's goal of discouraging attorneys from filing anything other than highly meritorious cases. For one thing, § 1997e(d)(1)(a) limits the prisoners who can recover any fee at all. Under (d)(1)(a), a fee cannot be awarded unless "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights." As an accompanying House Report explained, this language was intended by Congress to narrow the definition of "prevailing party" under § 1988 as applied

to prisoners. *See Graves*, 633 F. Supp. 2d at 844 (citing H.R.Rep. No. 104-21 at 28 (Feb. 6, 1995)).

Additionally, the PLRA contains two caps: one, an overall fee cap that applies to prisoners seeking damages, and the other a cap on hourly rates that applies to prisoners seeking declaratory or injunctive relief. The former, subsection (d)(2), caps fees at 150 percent of any money awarded in damages to a prisoner. Clearly, this provision discourages attorneys from filing cases involving minimal injuries. The latter, subsection (d)(3), caps an attorney's hourly rate at 150 percent of the Criminal Justice Act rate. This provision, too, forces lawyers to be more selective in the cases they file. This result fosters the purpose of the PLRA by protecting states from having to compensate attorneys at their customary hourly rates when their lawsuits accomplished nothing more than proving "minimal violations of prisoners' rights." *Graves*, 633 F. Supp. 2d at 844.

Except for those carefully crafted measures, as the court noted in *Graves*, there is nothing in the PLRA that "indicates legislative intent to overrule judicial law on fee awards under § 1988," *id*., and certainly nothing to suggest that Congress intended to prohibit multipliers. After all, multipliers may be awarded only in the very type of "rare" and "exceptional" case that Congress did *not* intend to discourage when it enacted the PLRA. *See Porter*, 534 U.S. at 524; *Jones*, 549 U.S. at 202–04; *Cano*, 739 F.3d at 1219; *Silva*, 658 F.3d at 1100. As the Court

suggested in *Jones*, "it is hard to imagine what purpose [prohibiting a multiplier] would serve," given Congress's goal of *not* discouraging meritorious litigation. *See Jones*, 549 U.S. at 220.[8]

Fee multipliers thus further Congress's purpose in passing the PLRA by encouraging attorneys to steer well clear of prisoner cases that might be frivolous or insignificant, and instead to pour their time and resources into those that are compelling and meritorious, where bonuses and multipliers are available in especially deserving cases. Likewise, the district court's decision below furthers Congress's goal of encouraging qualified attorneys to target the most exceptional cases, as those are the only cases that could possibly qualify for an enhancement under the governing law. *See Perdue*, 559 U.S. at 552.

Even if it is conceivable that the prospect of a multiplier could encourage a lawyer to file a frivolous case (a dubious proposition), that is a policy consideration for Congress, not this Court, to resolve. Indeed, in *Perez*, this Court considered a similar policy argument and rejected it. The defendants in that case argued that allowing paralegals to recover higher rates for their services than the rate capped by the CJA was inconsistent with Congress's intent to discourage

[8] CCA claims that by awarding a multiplier, the district court rendered the PLRA "meaningless." *See* Opening Brief at 26. That statement ignores clear congressional intent. Allowing a multiplier in prison litigation will do precisely what Congress intended it to do: it will cap hourly rates in *every* case but permit courts to award multipliers in rare and exceptional cases.

frivolous litigation. *Perez*, 632 F.3d at 558. This Court held that even if allowing more fees might encourage more lawsuits, Congress obviously made reasoned decisions in weighing the alternatives, and "we are bound by the plain language of the statute, and must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Id.* (internal quotation marks omitted). Here, as in *Perez*, this Court should not read into Congress's balanced policy choices its own determination of legislative will, in light of the established rule that congressional silence must be understood as acceptance of the prevailing norm.

Thus, both the express language of the PLRA *and* its legislative history and purpose support the ruling below that the PLRA permits the award of multipliers in those rare and extraordinary cases that qualify for one. There is, in fact, nothing in either the PLRA's express language or in its history and purpose to suggest that Congress intended by silence to legislatively overrule the prevailing norm.

II.B. The District Court Did Not Abuse Its Discretion in Awarding a Multiplier.

When the district court exercised its discretion to award Plaintiffs their fees, plus a multiplier, it carefully followed the two-step process prescribed by *Perdue*. *See* 559 U.S. at 552; *Antoninetti v. Chipotle Mexican Grill*, 643 F.3d 1165, 1176 (9th Cir. 2010). The court first calculated the lodestar based on the PLRA-capped hourly rate of $213 an hour. (AER 18–19.) Only then did the court employ the *Perdue* standards to determine whether to award a multiplier above the lodestar.

(*Id.* at 19.) The court examined *Perdue*'s requirements for a multiplier closely, found this case qualified on two independent grounds, and then "adjust[ed] the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate." *Id.* at 22–23 (quoting *Perdue*, 559 U.S. at 555).

The court found a multiplier justified on two, alternate grounds. First, the district court found that Plaintiffs' contempt motion produced superior results that were the result of superior attorney performance. *See Perdue*, 559 U.S. at 554. The court held that "Plaintiffs' counsel achieved excellent results for their clients under extreme time pressure and with very limited resources." (AER 22.) It specifically found that "Plaintiffs uncovered substantial evidence of noncompliance with the Settlement Agreement and long-term knowledge of that noncompliance by high-ranking individuals at CCA," and that their attorneys used that evidence to "successfully obtain[] a contempt finding and meaningful remedies for their clients." *Id*. The district court therefore awarded a multiplier under *Perdue* because it concluded that the lodestar "do[es] not fully reflect this success because the quality of the work that produced these results is underrepresented in the hourly fee." (AER 22); *see Perdue*, 559 U.S. at 554– 55.

Second, the district court found a multiplier was independently justified because Plaintiffs presented significant and almost entirely uncontested evidence

that prisoners "seeking counsel for injunctive relief lawsuits face significant difficulty in finding such counsel, and that current counsel were likely the only attorneys willing to accept their case." (AER 26.) In light of *Perdue*'s statement that multipliers are permissible where there is "specific evidence that the lodestar fee would not have been adequate to attract competent counsel," the court found this to be a second ground for awarding enhancement. (AER 25-26); *see Perdue*, 559 U.S. at 554.

The district court judge who issued the fees decision facilitated the parties' three-day settlement negotiations that led to the Settlement Agreement (*see* ER 456 at 57:2–58:14, 646–47); he signed the Settlement Agreement under which the parties stipulated to submit all disputes regarding the Agreement directly to him and which expressly granted him "the authority to enforce the terms of this agreement in his capacity as a Federal District Court Judge" (ER 643); he oversaw CCA's implementation of the Agreement for two years, during which time he received monthly investigative files and progress reports from the Court Monitor (*see* ER 429 at 693:18–25); and he conducted all proceedings associated with Plaintiffs' motion to hold CCA in contempt, which required him to resolve numerous pre-hearing disputes, issue several decisions, and preside over a two-day evidentiary hearing. Thus, the district court judge here was uniquely situated to assess the quality of counsel's work and the value of what was accomplished, and

to exercise his wide discretion to determine whether, based on the specific proof Plaintiffs presented in support of their multiplier request, Plaintiffs were entitled to an enhancement for their remarkable efforts investigating, filing, presenting, and prevailing on their contempt motion. *See Dannenberg*, 338 F.3d at 1073 (holding that a district court "has a great deal of discretion in determining the reasonableness of the fee and, as a general rule, we defer to its determination"); *Clark*, 803 F.2d at 990 (applying this deferential standard in affirming the award of a multiplier).

Indeed, the standard of review appropriate to the district court's order here is even more deferential than the normal abuse of discretion standard because of the district court's extensive familiarity with the intricacies of the remedial settlement agreement and CCA's breach of it. *See Armstrong*, 622 F.3d at 1073 (appellate court is especially deferential in cases where district court has overseen institutional reform litigation); *see also Brown*, 131 S. Ct. at 1929-30 (because of district court's particular expertise, reversal of its factual findings on clear error review requires a "definite and firm conviction that a mistake has been committed").

CCA's contention that Judge Carter committed plain error in making those findings lacks merit. *See* Opening Brief at 28. Rather, as discussed next, this is precisely the situation where the Supreme Court said in *Perdue* a fee enhancement

is appropriate: where exceptional lawyering led to exceptional results, and "the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value." 559 U.S. at 554–55. The Court went on to explain that "[t]his may occur if the hourly rate is determined by a formula that takes into account only a single factor"—exactly what happened here, due to the PLRA's across-the-board cap on hourly rates. The multiplier that the district court awarded was appropriately based on specific evidence and the court did not abuse its discretion in awarding it.

II.B.1. The District Court Did Not Clearly Err in Finding that Plaintiffs Achieved Exceptional Results.

The district court hewed closely to *Perdue*'s strict rules for awarding multipliers. The court began its analysis by noting that the Court in *Perdue* "treated the 'quality of an attorney's performance' and 'the results obtained' as one factor, determining that 'superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance.'" (AER 22 (citing *Perdue*, 559 U.S. at 553–54).) After examining the facts, the court concluded that Plaintiffs' counsel had engaged in "extraordinary performance yielding extraordinary results." (AER 24.)

This conclusion has abundant support in the record. In the first place, the court found that CCA undertook strenuous efforts to conceal its repeated violations of the court order, and it was only through Plaintiffs' enormous efforts that the

magnitude and the seriousness of those transgressions were brought to the court's attention. (*See* AER 9–11.) Prior to the August 2013 contempt hearing, CCA had made only one public statement about this entire matter, a press release issued on April 11, 2013, and never filed *anything* to notify the court of its persistent violations of the Settlement Agreement until after Plaintiffs filed their motion for an order to show cause. (ER 342.)

Moreover, in its press release, CCA stated only that there were "some inaccuracies" in its staffing records. The release concealed five huge facts: (1) that these "inaccuracies" reflected *thousands* of hours of missing security guards, constituting gross and persistent violations of the court order (ER 643, 204–12), (2) that these guard vacancies were occurring virtually every day (*see* ER 213–333; ER 377–378 at 485:4–488:18; ER 483–484 at 166:22–172:17; SER 1–124; *cf.* ER 211), (3) that ICC administrators deliberately fabricated those inaccurate records (ER 4, 6), (4) that the vast majority of administrators who falsified those records were still employed at ICC and CCA had no plans to discipline them (ER 22; 491–92 at 200:8–202:7), and (5) CCA was not examining additional records to determine how many thousands of hours of additional guard posts had been left vacant (ER 15; *see also* ER 490–91 at 195:3–198:9).[9]

[9] CCA notes in its Opening Brief (at 9) that on the same day that CCA issued its press release, IDOC issued a press release that contained information not found in CCA's release, including the highly relevant fact that during a seven-month period

CCA makes various attempts to undercut the district court's finding that the results here were extraordinary. Opening Brief at 9, 29–32. None of CCA's arguments comes remotely close to the clear error CCA must show to warrant reversal here.

CCA contends that the contempt proceeding "did nearly nothing" for the Plaintiffs because only one named plaintiff was still incarcerated at ICC in August 2013. Opening Brief at 29. CCA, however, ignores the fact that this case was filed as a class action and that the case was settled before the court ruled on the pending motion. Therefore, as this Court made clear in an identical situation, all of the intended beneficiaries of the Settlement Agreement have a right to enforce that order. *See Hook v. State of Arizona Dept. of Corrs.*, 972 F.2d 1012, 1014–15 (9th Cir. 1992). In *Hook*, this Court rejected an argument identical to CCA's and allowed the prisoners then affected to enforce an order obtained by previous prisoners seventeen years earlier, even though the current prisoners were not named parties to the order. *Id.* at 1015; *accord Berger v. Heckler*, 771 F.2d 1556 (2nd Cir. 1985). This principle is consistent with and codified by Rule 71 of the Federal Rules of Civil Procedure: "When an order grants relief for a nonparty or

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in 2012, CCA left vacant 4,800 hours of guard posts. CCA has never explained why its own release failed to contain that same information. In any event, none of the other information listed above was disclosed except as a result of Plaintiffs' contempt proceeding.

may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party." CCA cites no case law in support of its claim to the contrary, because none exists.

CCA also implies that Plaintiffs' contempt motion achieved little because, after a study that CCA commissioned revealed thousands of hours of missing guards and daily falsified reports, "CCA immediately implemented a corrective action plan and took certain disciplinary action." Opening Brief at 9. That statement is incomplete and misleading, as Plaintiffs proved at the contempt hearing. In actuality, CCA's "corrective action plan" was so inept and half-hearted that in the months after that "plan" went into effect, mandatory guard posts were still going unstaffed for hundreds of hours each month up through the latest information the Plaintiffs' could obtain. (ER 15–16; *see also* AER 11.) Moreover, CCA's "certain disciplinary action" consisted of nothing more than terminating two employees, while (as shown during the contempt hearing) CCA took no disciplinary action (1) against the Warden and Assistant Warden whose responsibility it was to ensure full staffing of ICC,[10] (2) against any of the captains and lieutenants who knowingly and daily lied on official forms regarding the number

[10] Warden Wengler conceded during cross-examination during the hearing that nothing prevented him from complying with the court order; he simply did not comply with it. (ER 451 at 39:14–17.) Despite this obvious incompetence and his disdain for the court order, CCA took no disciplinary action against the warden whatsoever.

of guards they had assigned to mandatory posts, or (3) against CCA's Managing Director, whose responsibilities included ensuring CCA's compliance with the court order, and who failed miserably to fulfill that duty. (ER 22; 491–92 at 200:8–202:7.)

In a similar vein, CCA informs this Court that it submitted a settlement offer to Plaintiffs shortly before the contempt hearing, and implies that offer would have given Plaintiffs everything they ultimately were awarded in the contempt order. *See* Opening Brief at 31. But CCA's offer can fairly be described as nothing more than a further effort by CCA to sweep everything under the rug, avoid public exposure, and evade judicial condemnation. As the district court noted, CCA's offer contained only three provisions: "1) an extension of the Settlement Agreement until June 30, 2014; 2) a specific individual named in the offer would act as an independent monitor to review staffing for the remainder of the Settlement Agreement; and 3) payment of Plaintiffs' reasonable fees and costs incurred in moving for contempt." (AER 3.) The offer contained no admission of wrongdoing; made no commitment to fix anything; made no promise to pay any penalty for further violations; would hire a monitor acceptable to CCA but unacceptable to Plaintiffs; and agreed only to an additional nine months of court supervision, despite two years of pernicious violations. There would be no finding of wrongdoing; no finding of contempt and thus no remedial court order; no set

penalties for future violations; and, if CCA continued to understaff ICC, Plaintiffs would have to start all over again by initiating a new grievance under the Settlement Agreement.

Plaintiffs declined CCA's patently insufficient settlement offer and proceeded with a contempt trial, where they presented extensive evidence of intentional malfeasance going to the top of CCA's ranks. As a result, the Plaintiffs proved in court that CCA:

- Understaffed ICC by thousands of hours of guards—hundreds if not thousands higher than the 4,800 initially reported by IDOC (*see* ER 377–378 at 485:4–488:18; ER 483–484 at 166:22–172:17; SER 1–124; *cf.* ER 211),[11]
- Fabricated official documents on a virtually daily basis for nearly two years (*see* ER 204–333),
- Hired a warden so incompetent he was unaware of daily vacancies in security posts (*see* 451–52 at 40:1–41:5),
- Disregarded a federal court order to such an extent that not one day in two years did anyone take their duty seriously enough to confirm compliance (*see* (ER 17 (quoting ER 452 at 41:24–42:7); 500 at 234:20–235:7; 449 at 31:14–18 and 32:16–22),

[11] As the district court remarked in its contempt ruling, "it is clear that [CCA's] non-compliance was far worse" than anything that had been reported prior to the hearing. (ER 9.)

- Blamed persistent guard vacancies exclusively on subordinates when the ultimate responsibility laid with Warden Wengler and CCA administrators (ER 17; AER 11), and
- Claimed that the problem of understaffing had already been fixed, only to admit during trial that hundreds more hours of additional vacancies occurred since CCA's claimed its "corrective action plan" had gone into effect (ER 129–76; ER 377–378 at 485:4–488:18; SER 1–124).

Moreover, Plaintiffs proved at trial that CCA never even tried to comply with the court-ordered staffing requirements in the first place. As CCA personnel admitted during the hearing:

- Warden Wengler had been placed on notice two years earlier by his own staff and by IDOC that ICC was experiencing vacancies in guard posts, but failed to correct the problem. (ER 334, 466 at 99:25–100:3.)
- Not once in two years did Wengler explicitly check to ensure that ICC was fully staffed, and never once did he walk around the prison with the staff roster to ensure that all the mandatory posts were filled. (ER 17, 406 at 599:18–24; 452 at 41:24–42:7.)
- Not once in two years did Wengler ask a supervisor or a guard whether they were aware of staff vacancies. (ER 457 at 63:19–22; 453 at 45:9–46:4.)

- Wengler failed to instruct his staff to notify him if they observed a vacant mandatory post. (ER 426 at 679:3–11.)
- CCA's Managing Director for ICC admitted that he made no attempt to confirm that mandatory posts were being filled and did not ask anyone else for verification (ER 415 at 634:6–15; 496 at 218:20–219:10).

In short, Plaintiffs demonstrated that CCA failed to take easy, clearly necessary, and commonsense steps to comply with their federal obligations. None of this evidence would have been presented to the district court had it not been for Plaintiffs' counsel's concerted efforts.

Finally, CCA claims that Plaintiffs' results were not extraordinary because the district court declined to immediately issue all of the sanctions Plaintiffs suggested. Opening Brief at 31. One remedy that Plaintiffs requested was an order requiring CCA to determine which staff at ICC deserved to be disciplined for their complicity in understaffing ICC and fabricating the staffing logs. Opening Brief at 31 n.9. But the reason the district court did not grant this remedy was because the court was told that a criminal investigation into those very activities was ongoing. (ER 25.) As the court stated in its order: "The Court DENIES at this time both requests to determine additional vacancies, or to discipline staff, deferring at this time to the ongoing state investigations that may result in criminal

prosecutions." (ER 26.) The court left open the possibility that it would, in fact, issue the requested remedy should it prove appropriate in the future. (ER 5.)

In addition, through the contempt phase work, Plaintiffs disclosed CCA's dangerous conduct to the public, revealing that CCA's lone press release—which merely reported that there had been "some inaccuracies" in record keeping—to be a misleading and totally evasive PR tactic. This is a significant result. *Morales v. City of San Rafael*, 96 F.3d 359, 365 n.12 (9th Cir. 1996) (holding that in awarding fees under § 1988, the benefit to the named plaintiffs also "must be considered along with the benefits [conferred] on others throughout society by winning a civil rights claim" (internal quotation and citations omitted)); *Wilcox v. City of Reno*, 42 F.3d 550, 556 (9th Cir. 1994) ("Exposing an unconstitutional policy of this sort . . . does a great deal more than a finding that a plaintiff's rights have been infringed upon in some unspecified way. The [State] itself, and the community at large benefit from a finding of this sort . . . .").

In short, the district court's factual finding that Plaintiffs' counsel secured extraordinary results is more than justified. None of CCA's attempts to gainsay the court's findings are persuasive, and they certainly do not establish clear error.

II.B.2. The District Court Did Not Clearly Err in Finding That the Plaintiffs Achieved Those Exceptional Results Because of Exceptional Lawyering.

As the district court found, the reason why Plaintiffs were able to prove all they did and win the contempt phase of the case so decidedly was because of the exceptional diligence, persistence, and skill of their attorneys, who did it all "under extreme time pressure and with very limited resources." (*See* AER 22.) Those findings were not clearly erroneous, but instead were well supported by the record.

The district court's order granting Plaintiffs' motion for an order to show cause was issued on July 12, 2013, and set a hearing date for August 7, 2013, just 26 days later. (ER 36.) In less than a month, Plaintiffs' two lawyers served written discovery on CCA, deposed seven witnesses in three states, received and examined seven thousand pages of CCA files and prison staffing logs, answered CCA's written discovery, interviewed potential hearing witnesses, wrote several briefs on different subjects, and prepared for and conducted a two-day hearing. (*See* ER 36, 612–615; *see also* ER 585–589, 538–539, 91–126; AER 198 ¶ 14, 222–24 ¶¶ 14–16.)

Pursuing and successfully completing the contempt action, as the district court could plainly observe, required exceptional effort. The declaration filed by Plaintiffs' lead counsel, Stephen Pevar, states: "I have never worked harder in my life than during those four weeks. . . .This case required a supreme effort by an

experienced litigator in prisoners' rights." (AER 198 ¶ 14.) Plaintiffs also filed a declaration from James Huegli, who was Mr. Pevar's co-counsel until shortly before the contempt motion was filed. Mr. Huegli, a highly-experienced litigator who has tried more than one-hundred jury trials, stated in his declaration:

> I have personal knowledge of the quality and tenacity of CCA's defense by Mr. Struck and his co-counsel. Without doubt, the success that Plaintiffs achieved in the contempt action was due to Mr. Pevar's outstanding litigating skills. It took extraordinary effort by Mr. Pevar to obtain the Settlement Agreement in September 2011 and it took extraordinary effort by him to enforce it. In my opinion, there are few attorneys who could have accomplished this. This case was truly the "small guy"--Stephen Pevar and his small team of two--against a multi-billion dollar corporation. . . .I believe that this result could only have been achieved through the extraordinary super-human efforts by Mr. Pevar, who, in my view, is the finest lawyer I have ever had the pleasure to work with.

(AER 245 ¶ 7.)

Mr. Pevar's co-counsel during the contempt phase, Richard Eppink, submitted evidence of the breakneck speed of that phase and the resulting difficulty of putting on a concise but effective trial presentation. (AER 222–24 ¶¶ 14–16.) He noted that CCA did not provide most of the documents needed for trial until five days before trial started, and that CCA was still producing documents up to and including the night before and the night after the trial began. (AER 223 ¶ 14.) Mr. Eppink was reviewing all of those documents, along with a huge production of documents from the Idaho Department of Correction, while traveling

between and preparing to take four depositions and researching legal issues at the same time. (*Id.*)

The district court did not clearly err in finding it was this level of exceptional lawyering under extreme time pressure that allowed Plaintiffs' counsel to make the proof and achieve the results they did. Nor did the district court abuse its discretion in awarding a multiplier based on these findings because it concluded that "the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation." (AER 22 (quoting *Perdue*, 559 U.S. at 554–55).) When that situation occurs and other factors favoring an enhanced fee are present, *Perdue* recognizes that a district court may "adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate." (AER 22 (quoting *Perdue*, 559 U.S. at 555).) The district court here did just that.

The district court found that due to the PLRA fee cap, "the hourly rate employed in the lodestar calculation does not adequately measure [Mr. Pevar's and Mr. Eppink's] true market value." (AER 22-23); *Perdue*, 559 U.S. at 554–55. The record before the court showed that Boise attorney J. Walter Sinclair has been practicing law for 35 years and charges $435 an hour. (AER 247–48 ¶¶ 1–3.) Plaintiffs' lead counsel, Mr. Pevar, has been practicing law seven years longer than

Mr. Sinclair but is limited by the PLRA to an hourly rate of $213, less than half of what Mr. Sinclair charges. (AER 197–98 ¶ 13; *see also* AER 253 ¶ 8 (stating that the PLRA rate is "considerably below" what Mr. Pevar could charge in the Boise community, given his expertise); AER 259 ¶ 13 (stating that the PLRA rate is below the rates that both Mr. Pevar and Mr. Eppink could charge in Boise); AER 264 ¶ 6 (similar).) The district court, just as *Perdue* instructs, "adjust[ed] the attorney[s'] hourly rate[s] in accordance with specific proof linking the attorney's ability to a prevailing market rate." (AER 22 (quoting *Perdue*, 559 U.S. at 555).) Thus, the court's multipliers, 2.0 for Mr. Pevar and 1.3 for Mr. Eppink, were tied directly to specific prevailing market rates proved by Plaintiffs' evidence. (*See* AER 22–23, 27.)

The district court did not abuse its discretion in enhancing the lodestar by an amount that adjusted the fee award to match the true market value of Mr. Pevar's and Mr. Eppink's work, as this is precisely what *Perdue* instructs. The district court was in the best position to know whether the results obtained were exceptional and were the product of superior lawyering. *See Wilcox*,42 F.3d at 555 ("The district court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the results that lawyering has achieved." (citing *Hensley*, 461 U.S. at 437)). The district court's findings that superior lawyering

led to superior results are not clearly erroneous, and its award of a multiplier based on those findings was consistent with *Perdue* and not an abuse of discretion.

II.B.3. The District Court Did Not Clearly Err in Determining the Lodestar Was Inadequate to Attract Competent Counsel.

Alternatively, this Court can also uphold the multiplier award on the second independent basis articulated by the district court, that an enhancement for superior lawyering was warranted because the lodestar would be inadequate to attract competent counsel to compelling cases like this in the future. (AER 25–26.) The Supreme Court recognized in *Perdue* that an enhanced fee can be justified in "rare" and "exceptional" cases based on "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'" *Perdue*, 559 U.S. at 554 (quoting *Blum*, 465 U.S. at 897).

Plaintiffs more than met that burden here, particularly since CCA failed to contest that evidence. (AER 26.) Plaintiffs submitted declarations from five members of the Idaho State Bar who litigate civil rights cases in Idaho. (AER 243–64.) These declarations demonstrated the lodestar here was inadequate to attract competent counsel to litigate cases where, as here, prisoners are seeking only declaratory and injunctive relief. One of CCA's principal attorneys, Kirtlan Naylor, resides in Boise and is a member of the Idaho Bar. Even Mr. Naylor did not dispute these declarations filed by Plaintiffs. The district court found this undisputed evidence persuasive, and relied on it in its findings. (AER 22–23.)

Plaintiffs' declarations also demonstrated that no Idaho attorney in at least forty years has filed a class action prisoners' rights case seeking only declaratory and injunctive relief other than attorneys associated with Legal Aid or the ACLU (AER 197–98 ¶ 13), and that Legal Aid has been barred from filing prisoners' rights cases since 1996 (AER 257 ¶ 8). The declarations proved a huge unmet need for attorneys to even examine prisoner complaints to determine which ones may be especially meritorious. (*See* AER 257–58 ¶¶ 9-10, 224–25 ¶ 18). The past president of the Idaho Trial Lawyers Association, Jason Monteleone, is "not aware of an attorney or law firm in the state of Idaho" other than Plaintiffs' counsel that would have taken this case. (AER 252 ¶ 5.) Similarly, as a general matter, the current president of the Idaho Trial Lawyers Association, Jason Wood, testified that prisoner cases seeking only injunctive relief "are extremely undesirable" and that only the ACLU is likely to take them. (AER 263 ¶ 4.)

Awarding an enhanced fee in this instance, which is one of the "rare" and "exceptional" cases anticipated by *Perdue*, furthers Congress's goal in passing the PLRA of encouraging competent members of the private bar to undertake similar, highly meritorious litigation to vindicate federal rights and help relieve the unmet need. *See supra* Section II.A.2.; (*see also* AER 249 ¶ 7 ("For the reasons explained above, these cases are not attractive to attorneys in private practice, and the only thing that might make them attractive is if attorneys knew that a multiplier

might be awarded in exceptional cases."); AER 253–54 ¶ 9 ("An enhancement is particularly appropriate in this circumstance, because I believe that it would greatly incentivize other competent attorneys in the state of Idaho to handle prisoner rights cases."); *see also* AER 263–64 ¶¶ 3, 7. Because the district court's findings were well grounded in the record and comport with *Perdue*'s teachings, the district court was within its discretion to award a multiplier based on this second rationale as well.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING PLAINTIFFS FEES FOR REASONABLE TASKS, ESPECIALLY CONSIDERING THAT CCA OFFERED NO REBUTTAL EVIDENCE.

On appeal, CCA quibbles over 3.1 hours spent on tasks necessary to arrange for and schedule depositions, issue subpoenas, prepare for trial, and draft and file papers. It also tries to argue that both of Plaintiffs' attorneys need not have attended the three most important depositions in the whole case that occurred days prior to the hearing—those of the ICC Warden and two CCA headquarters executives directly responsible for ensuring and investigating CCA's compliance with the court order. But CCA provided no rebuttal evidence in support of these objections, and the district court did not abuse its discretion in awarding fees for the few hours at issue here.

III.A. Two Attorneys at These Depositions Was Reasonable.

There was so much work to be done within a few short weeks that Plaintiffs' counsel were exceedingly careful not to engage in unnecessary duplication of effort. As Counsel Pevar stated in his declaration: "Ritchie and I were careful not to engage in any unnecessary duplication of effort. We carefully divided the assignments. We rarely worked on the same activity except for certain critical tasks. For instance, it was necessary for both of us to attend depositions because there wasn't time for us to obtain transcripts prior to the depositions that we were handling soon afterwards." (AER 196 ¶ 10.) CCA provided no rebuttal evidence in support of its objections.

CCA has the burden of "providing specific evidence that plaintiffs' hours were duplicative or inefficient." *Gates v. Gomez*, 60 F.3d 525, 535–36 (9th Cir. 1995). Having two lawyers work a case of this magnitude and complexity is typical, as revealed by the fact that CCA had more than twice as many counsel of record in this case as did Plaintiffs, and three attorneys at trial, compared to two for Plaintiffs. (*See* AER 265–66.) In any event, "division of responsibility may make it necessary for more than one attorney to attend activities such as depositions," to confer over tactics and strategy on the spot. *PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, 743 F. Supp. 2d 1136, 1157 (C.D. Cal. 2010) (internal citation omitted); *see Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1286–87 (9th Cir.

2004). In particular, depositions of key witnesses are "the building blocks of trial strategy." *Oberfelder v. City of Petaluma*, No. C-98-1470 MHP, 2002 WL 472308, at *7 (N.D. Cal. Jan. 29, 2002), *aff'd sub nom. Oberfelder v. Bertoli*, 67 Fed. App'x 408 (9th Cir. 2003). In *Oberfelder*, this Court affirmed the district court's fee award, with a 1.5 multiplier, that included time for multiple attorneys attending depositions. *Id.* The district court there pointed out that "[c]ounsel attending a deposition can better assess the quality of a witness more effectively than reading from a transcript." *Id.*

This Court recently reaffirmed that "[d]uplicative work is not inherently inappropriate." *Chaudry v. City of Los Angeles*, 751 F.3d 1096, 1112 (9th Cir. 2014). CCA failed to submit any evidence to rebut the plaintiffs' commonsense explanation for having both of their lawyers at key depositions: The expedited discovery schedule left no time for them to receive and adequately review transcripts prior to the remaining depositions they would shortly be taking, and the hearing. (AER 196 ¶ 10; *see* AER 223 ¶ 14.) It was CCA's burden to introduce specific evidence that it was unreasonable for Plaintiffs' two attorneys to help each other at these depositions, and CCA has offered none. *See McGrath v. County of Nevada*, 67 F.3d 248, 256 (9th Cir. 1995); *Center for Biological Diversity v. Marina Point Dev. Associates*, 446 Fed. App'x 843, 845 (9th Cir. 2011) ("there is no evidence that the Center's use of more than one attorney at depositions or its

use of in-house counsel rather than local counsel was unreasonable"). Given this, it was certainly not an abuse of discretion for the district court to award the hours in question.

III.B. CCA's Challenge to 3.1 Hours Lacks Merit.

Likewise, CCA's challenge to 3.1 hours spent hiring court reporters and arranging for depositions, preparing exhibits for trial, and issuing subpoenas should be rejected for the same reasons. CCA did not submit a single affidavit in support of its argument that the tasks labeled as "clerical" are performed in the Boise market by clerks rather than attorneys, not even one from its Boise attorney. This alone warrants a rejection of CCA's contentions. *See Rosenfeld v. U.S. Department of Justice*, 904 F. Supp. 2d 988, 1007 (N.D. Cal. 2012).

Moreover, the activities labeled by CCA as "clerical tasks" have been viewed by courts as tasks properly and routinely performed by attorneys. *See, e.g.*, *Blackwell*, 724 F. Supp. 2d 1068, 1079–80 (N.D. Cal. 2010) (rejecting a similar challenge to "clerical tasks," citing cases, and noting that such challenges are often "attempts to nitpick at Plaintiff's fees"). CCA also ignores the fact that Mr. Pevar and Mr. Eppink are in essence solo practitioners without the considerable support staff that CCA's attorneys apparently enjoy. (AER 85 ¶ 3, 113–115 ¶ 3–4.) As Mr. Pevar explained: "I have a one-room office. I have no secretary. There is a paralegal in my office building who works for another law firm, and I pay for 15

hours of his time a week." (AER 85 ¶ 3.) Mr. Eppink is in virtually the same situation, stating: "I file my own pleadings on ECF always, I type my own notes and letters almost all of the time, I make my own copies almost all of the time, and I draft my own pleadings and papers." (AER 114 ¶ 4.) It is unfair to deny fees to an attorney for not using support staff that does not exist. *Chaid v. Glickman*, No. c98-1004 WHO JCS, 1999 WL 33292940, at **14-15 (N.D. Cal. Nov. 17, 1999) (holding that attorneys in "small shop[s]" can be more streamlined and should not be penalized in fee awards for handling "clerical" tasks). "Courts may permit compensation at professional rates for clerical tasks where the attorney is a solo practitioner or works in a small firm" without support staff. *Parks v. District of Columbia*, 895 F. Supp.2d 124, 132 (D.D.C. 2012); *see also McDonald ex rel. Prendergast v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91, 99 (2nd Cir. 2006) ("There is simply no support for the proposition that a district court can decide what legal tasks could have been done by a hypothetical associate" not actually employed by a solo practitioner); *Weisberg v. Coastal States Gas Corp.*, No. 78 Civ. 5942, 1982 WL 1311, at *2 n.1 (S.D.N.Y. Jun. 16, 1982) (declining to reduce a fee award to a solo practitioner merely because some tasks could have been done by a hypothetical paralegal). CCA's effort to nitpick Plaintiffs' time should be rejected. The district court's award of these fees should be affirmed as clearly within its discretion.

CONCLUSION

The Court should affirm the district court's fee award.

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/s/ Stephen L. Pevar
Attorney for Appellees
Date: October 22, 2014

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on October 22, 2014.

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/s/ Richard Eppink

Date: October 22, 2014

STATEMENT OF RELATED CASES

Another case also called *Kelly v. Wengler* is pending before this Court under No. 13-35972, and this Court has consolidated it with this appeal. That case is the appeal from the District Court's order holding CCA in contempt, as well as some related orders. The Opening, Answering, and Reply briefs in that case have already been filed.