BARRETT S. LITT, SBN 45527
blitt@kmbllaw.com
DAVID S. McLANE, SBN 124952
dmclane@kmbllaw.com
LINDSAY BATTLES, SBN 262282
lbattles@kmbllaw.com
KAYE, MCLANE, BEDNARSKI & LITT
975 East Green Street
Pasadena, California 91106
Telephone: (626) 844-7600
Facsimile: (626) 844-7670

MELISSA GOODMAN, SBN 289464
MGoodman@aclusocal.org
BRENDAN M. HAMME, SBN 285293
BHamme@aclusocal.org
PETER J. ELIASBERG, SBN 189110
PEliasberg@aclusocal.org
AMANDA C. GOAD, SBN 297131
AGoad@aclusocal.org
ADITI FRUITWALA, SBN 300362
AFruitwala@aclusocal.org
ACLU Foundation of Southern CA
1313 West 8th Street
Los Angeles, California 90017
Telephone: (213) 977-9500
Facsimile: (213) 977-5299

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAN MCKIBBEN, et al.,

Plaintiffs,

vs.

JOHN MCMAHON, et al.,

Defendants.

Case No.14-2171-JGB-SP

[Hon. Jesus G. Bernal]

NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS; DECLARATIONS AND EXHIBITS

Date: February 11, 2019
Time: 9:00 A.M.
Place: Courtroom 1

TO DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on February 11, 2019, at 9:00 a.m., or as soon thereafter as this matter may be heard in Courtroom 1 of the above-entitled Court, located at 3470 Twelfth Street, Riverside, CA 92501-3801, Plaintiffs will, and hereby do, move the Court to award, as part of the final settlement in this case, attorneys' fees and costs to Plaintiffs.

This motion is based on the accompanying Memorandum of Law, the Declarations and exhibits thereto, the Settlement Agreement previously submitted in connection with the preliminary approval hearing, the files and records in this case, and on such further evidence as may be presented at a hearing on the motion.

DATED: November 5, 2018

Respectfully submitted,

Kaye, McLane, Bednarski & Litt, LLP
ACLU Foundation Of Southern California

By: /s/ Barrett S. Litt
Barrett S. Litt
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiffs are former or current inmates of jails operated by the San Bernardino County Sheriff's Department (hereafter "SBCSD") who were housed at SBCSD's "Alternative Lifestyle Tank" (hereafter "ALT") at the West Valley Detention Center (hereafter "WVDC"), where inmates who self-identify as gay, bisexual, and/or transgender (hereinafter "GBT inmates") were housed. Plaintiffs claimed Defendants have engaged in systematic discrimination and denial of equal treatment against GBT inmates at the WVDC. Plaintiffs contend, inter alia, that GBT inmates 1) were automatically placed in the ALT if they self-identified as GBT; 2) would have been at risk for their safety if admitted to the general population as openly GBT inmates because SBCSD did not have any means or programs to ensure their safety; 3) had no or inadequate PREA programs in place to protect GBT inmates or address particular vulnerabilities of GBT inmates placed in the general population; 4) were limited in their time-out-of-cell generally to an hour and a half per day, and often less, in contrast to similarly situated by classification or sentencing status as general population inmates; 5) were denied the same work opportunities that were provided to similarly situated by classification or sentencing status as general population inmates; 6) were denied the same programming opportunities[1] that were provided to similarly situated by classification or sentencing status as general population inmates; and 7) a comparable range of religious services to those available to the general population. Plaintiffs also contend that certain aspects of this disparate treatment continue to this day.

[1] Programming opportunities include classes in anger management, thinking for change, living skills, parenting skills, substance abuse, GED high school diploma, literacy, automobile mechanics, bakery occupations, culinary, reading enrichment classes, computer skills, HVAC training, fire camp vocational training, employment readiness, and re-entry services.

This Court previously preliminarily approved the settlement in this case. In summary, the settlement's basic terms provide comprehensive injunctive relief, a class damages fund of $950,000 (from which certain litigation costs, incentive awards to Named Plaintiffs, class administration costs and class damages will be paid) and attorneys' fees and costs of $1,100,000 inclusive of costs not covered by the Class Fund, based on a lodestar analysis as opposed to a percentage of the fund analysis.

The $1,100,000 is compensation for statutory fees and certain costs pursuant to 42 U.S.C. §1988 and Civil Code §52.1(h), and is subject to Court approval after class members have received notice and had the opportunity to object. The costs included in this motion includes all litigation costs incurred except for mediation costs, consultant/expert costs and Class Administration costs (all of which are to come from the class fund). This motion explains the basis for that $1,100,000 figure, including that it is substantially less than Plaintiffs' counsel's lodestar, and was so discounted because Plaintiffs' counsel agreed to reduced fees in light of the broad injunctive relief reached.

This motion seeks fees for the whole case but, in order to efficiently prepare the motion, fees and costs have been cut off for this motion as of September 21, 2018. In the motion for final approval of the settlement, Plaintiffs will supplement the lodestar figure through the date of the motion.

Because the proposed Final Order of Approval will address the award of fees and costs, a separate proposed fee order is not being submitted.

II. THE LODESTAR METHOD FOR AN AWARD OF STATUTORY ATTORNEYS' FEES IS THE APPROPRIATE METHODOLOGY IN THIS CLASS ACTION.

In the Ninth Circuit, the court has discretion to use either a percentage of the fund or a lodestar approach in compensating class counsel. *See, e.g., Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291,

1295 (9th Cir. 1994). In a class action where there is no available statutory attorney's fee available, the lodestar or percentage method comes from a common fund, but either method can be used to determine the fee. On the other hand, where a statutory fee is available, such as here under §§1988 and 52.1(h), a statutory fee award is appropriate independent of the class damages fund. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 972 (9th Cir. 2003) ("in a class action involving both a statutory fee-shifting provision and an actual or putative common fund, the parties may negotiate and settle the amount of statutory fees along with the merits of the case, …[and] the amount of such attorneys' fees can be approved if they meet the reasonableness standard when measured against statutory fee principles"); *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 489, 376 P.3d 672, 676 (2016) ("Class action litigation can result in an attorney fee award pursuant to a statutory fee shifting provision or through the common fund doctrine when, as in this case, a class settlement agreement establishes a relief fund from which the attorney fee is to be drawn"); *Sobel v. Hertz Corp.*, 53 F. Supp. 3d 1319, 1326 (D. Nev. 2014) ("the differing purposes behind statutory fee shifting and the common fund doctrine confirm that the lodestar method is the appropriate manner for calculating reasonable attorney's fees" in a class action where a statutory fee is available, but the court may add a risk multiplier in a common fund case); *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1126 (C.D. Cal. 2008) (citing $27 Million total settlement in *Williams v. Block* with both "a statutory fee of $5.5 Million negotiated in connection with a related state court taxpayer's suit for injunctive relief" and "an additional 20% of the remaining class fund ($21.5 Million) in attorney's fees").

In this case, Plaintiffs' counsel are fully aware that the attorneys' fees here exceed the class damages fund. In a case without an available statutory fee, this disparity would be inappropriate. However, in a case with a statutory fee, it is common that statutory fees exceed recovered damages, particularly where

nonpecuniary injunctive relief is involved. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 575–76, 106 S. Ct. 2686, 2695, 91 L. Ed. 2d 466 (1986) (fee award of $245,456 upheld where plaintiffs received only $33,350 in damages, with no injunctive relief; Congress intended that fee awards "be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and *not be reduced because the rights involved may be nonpecuniary in nature,*" citing cases with "substantial attorney's fees despite the fact the plaintiffs sought no monetary damages") (original emphasis); *Morales v. City of San Rafael*, 96 F.3d 359, 365 (9th Cir. 1996), *opinion amended on denial of reh'g,* 108 F.3d 981 (9th Cir. 1997) ("we have repeatedly made it clear that the level of success achieved by a civil rights plaintiff should be measured by more than the amount of damages awarded"; damages verdict was itself "significant…[and] established a deterrent to the City, its law enforcement officials and others who establish and implement official policies"); *Quesada v. Thomason,* 850 F.2d 537, 539 (9th Cir.1988) (holding that "court should not reduce lodestars based on relief obtained simply because the amount of damages recovered on a claim was less than the amount requested").

III. ANALYSIS OF THE FACTORS IN DETERMINING AN APPROPRIATE ATTORNEYS' FEE AWARD IN CLASS ACTIONS.

Although not mandated by the Ninth Circuit, courts often consider the following factors when determining the benchmark percentage to be applied: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's lodestar. *See, e.g., In re Heritage Bond Litigation,* 2005 WL 1594403 at 18*; In re Quintus Sec. Litig.,* 148 F.Supp.2d 967, 973-74 (N.D.Cal.2001). Although a percentage of the fund is not the request here, these

factors are also relevant in determining the reasonableness of Plaintiffs' fee request on a lodestar basis, and so Plaintiffs address them here.

A. The Complexity Of The Issues

This was a complex case. First, class actions are generally considered one of the most complex types of litigation. "It is common knowledge that class action suits have a well-deserved reputation as being most complex. The requirement that counsel for the class be experienced attests to the complexity of the class action." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Second, civil rights cases, even if not class actions, are generally considered complex litigation. Indeed, Congress recognized the complexity of civil rights cases when the civil rights attorneys' fee statute (42 U.S.C. §1988) was passed in 1976. The legislative history states, "It is intended that the amount of fees awarded under S. 2278 (42 U.S.C. §1988) be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S.Rep.No. 94-1011, 1976 U.S.Code Cong. & Admin.News at 5913. See also Declaration of Barrett S. Litt (hereafter "Litt Dec."), Sections III and IV.

1. The Legal Issues Here Were Complex.

The issues in this case involve complex issues of constitutional law, involving application of equal protection of the law standards to gay, bisexual and transgender individuals in a jail context. As a threshold matter, Plaintiffs faced the challenge of establishing a *Monell* violation, itself a challenge in any case. *See, e.g., Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) (Justice Breyer, dissenting and calling for reexamination of *Monell* because it "*has generated a body of interpretive law that is so complex that the law has become difficult to apply*" and noting, *inter alia*, the difficulty of the concept that that official action be "so likely to result in violations of constitutional rights that he [the policymaker] could reasonably [be] said to have

been deliberately indifferent to the constitutional needs of the Plaintiff" and the difficulty of "decid[ing whether a failure to make policy was deliberately indifferent," or, "for example, whether it matters that some such failure occurred in the officer-training, rather than the officer-hiring, process") (emphasis supplied, internal quotation marks removed).

Additionally, in jail and prison cases, Plaintiffs must overcome the broad deference provided jail administrators in reaching judgments about the handling of prison conditions, rules and regulations. *See, e.g.*, *Bell v. Wolfish*, 441U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974) (explaining that although the protections of the Constitution extend to prisoners, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform"; questions of institutional competence and the separation of powers counsel "a policy of judicial restraint" when it comes to prisoners' rights), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 411, 413 (1989); *see also Thornburgh*, 490 U.S. at 414 (overruling *Procunier* because it could be read as extending *too little* deference to prison administrators); *Turner v. Safley*, 482 U.S. 78, 84–85 (1987) (adopting a four factor test to determine if prison action is "reasonably related to legitimate penological interests"). As one commentator has explained, "[T]he *Turner* Court's elaboration of each of [the factors underlying the reasonableness standard] leaves no doubt that the test is intended to be extremely deferential, and provides language for lower courts to draw on to frame this deference as a legal mandate." Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 246 n.2 (2012). *See also* Litt Dec. ¶ 38.

These challenges intersect with the challenge from a trial perspective of representing inmates, who are generally viewed with greater suspicion than other plaintiffs. *See Battle v. Anderson*, 564 F.2d 388, 398 (10th Cir. 1977) (in prisoner civil rights class action, "plaintiffs' class are generally a feared and despised class"); *Morales* Feliciano *v. Hernandez Colon*, 697 F.Supp. 51, 60 (D.P.R. 1988) ("The general population's attitude toward those who commit or are accused of committing crimes is understandably one bordering in despise. Many [] believe that since plaintiffs are criminals, they deserve the conditions under which they live in the prisons."). Although things have changed significantly in the past twenty years, community attitudes towards gay, bisexual and transgender individuals are mixed; it was, after all, only ten years ago that Proposition 8, banning gay marriage, was adopted by a majority of California voters. *See also* Litt Dec. ¶ 40.

Finally, while it has been established that equal protection extends under the United States Constitution to sexual orientation, the reach of that protection and the level of scrutiny remains amorphous, confused and largely undeveloped. *See, e.g., United States v. Windsor*, 570 U.S. 744, 793, 133 S. Ct. 2675, 2706, 186 L. Ed. 2d 808 (2013) (striking down Defense of Marriage Act) (Scalia, J. dissenting) ("if this is meant to be an equal-protection opinion, it is a confusing one"); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 342 (7th Cir. 2017) ("Especially since the Supreme Court's recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, *Obergefell v. Hodges*, — U.S. —–, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), bizarre results ensue from the current regime"); Mary Ziegler, *Perceiving Orientation: Defining Sexuality After Obergefell*, 23 Duke J. Gender L. & Pol'y 223, 248–49 (2016) ("*Obergefell* leaves many questions unanswered. Kennedy does little to resolve the standard of scrutiny applied to sexual-orientation classifications. While *Obergefell* explicitly concludes that same-sex

marriage bans in some way violate both the Due Process and Equal Protection Clauses, the decision provides no real map for lower courts dealing with sexual-orientation classifications"). While Plaintiffs believed that their case was strong, they also recognized the challenges given the still developing state of the law. *See also* Litt Dec. ¶ 41.

2. The Management of the Case was Challenging.

Management of the case was complicated by the large number of class representatives and by keeping up to date on day-to-day developments. Due to the challenges posed by the PLRA, there was a need to have damages class representatives who were no longer in jail, but injunctive relief representatives who were still in jail. There were both federal and state claims, and timely § 910 class claims had to be presented. Clients regularly contacted counsel regarding problems or new developments, and counsel spent hundreds of hours visiting and communicating with the class representatives and class members. *See* Litt Dec. ¶42.

Data collection and analysis was also complicated. Because conditions changed over time, Plaintiffs ultimately had to analyze data broken into important time periods. Significant hours were required of both Plaintiffs' counsel and their expert, Brian Kriegler as reflected in the tens of thousands in expert fees advanced to Dr. Kriegler's firm, Econ One. *See* Litt Dec. ¶43.

A. The Risks Of Non-Payment

The risk of non-payment flowed from the challenges described above. This case was taken on a fully contingent basis. If Plaintiffs did not prevail, counsel would receive no compensation. While Plaintiffs were not concerned about their ability to collect if they were successful, the risk lay in establishing that the underlying conduct was illegal and, if so, what the appropriate remedy was. This was discussed in the previous section, and will not be repeated here. Additionally, seeking seven figure amounts of money from government entities carries inherent

risks because factors other than economic risk-benefit analysis (i.e., politics) are involved. See Litt Dec. ¶¶44-48.

Further, class actions are inherently risky for a variety of reasons. Most cases filed as a class action are not certified and many that are can still result in a loss, or in only a partial success. Thus, there is an added level of risk in any class action. See Litt Dec. ¶¶ 49 to 52.

B. The Effort Expended By Counsel

Including the investigation time and pre-litigation settlement efforts, counsel litigated this case for approximately four years. A partial list of the work performed, or to be performed, includes: 1) extensive investigation of the underlying circumstances, including communicating directly with class members; 2) preparation of the complaint and amended complaint and extensive legal research related to framing the issues; 3) the Rule 26 conference and report; 4) propounding discovery and analyzing Defendants' documents, which consumed a substantial amount of Plaintiffs' counsel's time; 5) defeating the motion to dismiss, including resulting in a significant decision regarding Civil Code §52.1 regarding an issue (coercive choice) that had not previously been addressed; 6) conducting a formal inspection of the jail; 7) obtaining the class databases and retaining experts to analyze the data in a way that would allow identification of class members and their damages, always a complex endeavor; 8) retaining a jail expert (a former head of the CDCR) to advise and assist in developing the needed policy changes; 9) preparation of an extensive mediation brief, 2 ½ days of mediation sessions with Judge Woehrle plus numerous other meetings between Plaintiffs' and Defense counsel; 10) negotiation and preparation of lengthy settlement documents, including settlement agreement, preliminary approval motion, class certification motion, class notice, claim form and injunctive relief agreement; 11) obtaining bids from qualified settlement administrators and ongoing work with the selected Class Administrator, JND; 12) yet to be done

responses if objections are filed, Motion For Final Approval and proposed Final Approval Order; 13) Final Approval Hearing; and 14) continuing contact with class members offering information and assistance as requested.. See Litt Dec.. Section II.

C. The Result Obtained For The Class

The class members are by definition low income individuals of little means. All work was performed on a contingent fee basis. The settlement was the result of arm's length negotiations and required extensive settlement efforts. See Litt Dec.. ¶¶ 30-31.

The financial terms of the settlement are very favorable to class members. Many class members will receive five figure recoveries. The mean class member recovery exceeds $1200 if every class member made a claim. Experience shows that the likelihood is that the claim rate will be well under 50%, and the mean recovery is likely to be meaningfully above $2400. Plaintiffs' counsel have extensive experience in jail class actions, and this is an excellent recovery. Many strip search class actions, where Plaintiffs' counsel have extensive experience, have resulted in mean recoveries for claiming class members of under $500 each.

This is a very favorable result for the class members and was the result of counsel's extensive and uncompensated effort over several years.

D. Counsel's Experience

Class Counsel are highly experienced litigators in the fields of civil rights and class actions. The first set of counsel is Kaye, McLane, Bednarski & Litt, specifically Barry Litt, David McLane and Lindsay Battles. Mr. Litt is a well-known civil rights lawyer in the Los Angeles area, who has decades of class action and civil rights experience, as his Declaration and CV attached to it attest. Mr. McLane has been handling civil rights cases as well as criminal defense cases over the past nearly fifteen years and is currently counsel on another pending civil rights class action. Ms. Battles, a ten year attorney, had handled only civil rights cases

and she likely has more civil rights class action experience than any attorney practicing in the Central District. The other attorneys from Kaye, McLane, Bednarski & Litt who worked on the case (Mr. Litt and Mr. McLane are listed in Super Lawyers, and Ms. Battles is listed in Super Lawyers Rising Stars). Both have worked with Mr. Litt in other pending class actions listed in his CV, specifically the *Amador*, *Roy* and *Scott* class actions.

The other set of counsel are attorneys from the ACLU Foundation of Southern California – Melissa Goodman, Amanda Goad and Brendan Hamme. The Declaration of Amanda Goad addresses the effort involved and time spent on the ACLU's work on this case.

All of the class counsel who worked on the case are experienced, well-known and highly regarded civil rights and public interest lawyers, and all have extensive experience dealing both with civil rights and class action litigation, as do the other primary attorneys who worked on the case. See generally Litt and Goad Declarations; Litt and Goodman Declarations filed with the class certification motion.

E. Counsel's Skill

As addressed above, Plaintiffs' counsel in this case are highly skilled attorneys in the field of civil rights and civil rights class actions. Their performance in this case, and its successful outcome, attest to their skill level.

F. The Reaction Of The Class

As of the time of this writing, which is still early in the claims process, there have been 64 approved claims filed, and four claims are pending. This is approximately 10% of the 660 mailed claims (nearly 25% of which the class administrator may not be able to find addresses for, based on reports to date. To date, there have been no objections and no opt outs. See Litt Dec., ¶ 35. Assuming this trend continues, it is an indication of class approval of the settlement. *See. e.g., In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act*

(FACTA) Litig., 295 F.R.D. 438, 456 (C.D. Cal. 2014) (citing *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004) ("[t]he negligible number of opt-outs and objections indicates that the class generally approves of the settlement"; affirming the approval of a class action settlement where 90,000 members received notice and 45 objections were received).

IV. PLAINTIFFS' ATTORNEYS' FEE REQUEST IN THIS CASE IS A SUBSTANTIALLY REDUCED LODESTAR.

A. Plaintiffs' Lodestar

As we explained in the preliminary approval motion, and as is self-evident on reviewing the parties' injunctive relief agreement (attached as Exhibit D to Plaintiffs' Proposed Preliminary Approval Order), injunctive relief was a paramount consideration in the case. The settlement negotiations were primarily focused on injunctive relief, regarding which there were several meetings both with the mediator and just among counsel.. Litt Dec., ¶30. It took more time to negotiate than did the other aspects of the settlement. *Id*. After agreement in principle was reached on injunctive relief, the parties then negotiated damages and then attorney's fees, with Judge Woehrle's assistance. *Id*, ¶31. This, along with the extensive document review and analysis conducted and large expenditure of time interviewing class representatives and members, are the primary reasons the hours are as high as they are.

As we indicated in the preliminary approval motion, Plaintiffs' claim for attorneys' fees in this case is substantially discounted below the fees that would have been sought in the absence of a settlement agreement. Because Plaintiffs' counsel considered the injunctive relief agreement a model for agreements with other correctional facilities, they agreed to a substantially reduced fee. In this section, we address the standards in determining an appropriate statutory attorneys' fee in general and in the context of a class action. We then address the hours expended in this case and the rates that would have been sought in a normal fee

motion to justify the award sought here. Since attorneys' fees in this case are available under both federal and California law, we cite to both.

Because the requested fee is not based on the lodestar but rather on the agreement of the parties, "a less exhaustive cataloging and review of counsel's hours" is involved than where the fee is based on a lodestar directly. *See, e.g., Victoria Secret Stores, LLC*, 2008 WL 8150856, at *9 (C.D. Cal. July 21, 2008) and cases cited therein. Nonetheless, we provide detailed timesheets in the event the Court wishes to review them. All the time records submitted were contemporaneously maintained. The KMBL and ACLU detailed time records are attached as Exhibits C and E to Mr. Litt's and Ms. Goad's Declarations respectively; the detailed cost records are attached as Exhibits D and F. The Litt and Goad declarations provide the summaries of fees and costs, which are reproduced below for fees, and in Section V *infra* (for costs).

The tables below show each person for whom time has been billed, that person's position and years of practice, the hours worked (through September 21, 2018) and the hourly rate used to bill for that person's time (using current rates) for KMBL and he ACLU. Each of the billers for KMBL, and an explanation of the role they played, is discussed in Mr. Litt's Declaration. Each of the billers for the ACLU, and an explanation of the role they played, is discussed in Ms. Goad's Declaration. All KMBL firm time was contemporaneously recorded. See Litt Dec., ¶¶28, 31.

ACLU LODESTAR				
NAME	**GRAD YR**	**HOURS**	**RATE**	**TOTAL**
Barrett S. Litt	1969 (49)	475.8	$1,150.00	$547,170.00
David McLane	1986 (32)	907	$875.00	$793,625.00
Lindsay Battles	2008 (10)	558.4	$600.00	$335,040.00
Ron Kaye	1988 (30)	20.4	$875.00	$17,850.00
Julia White	Sr. Paralegal	877	$335.00	$293,795.00
Esteban Gil	Jr. Paralegal	104.4	$175.00	$18,270.00
Rene Arriaza	Jr. Paralegal	26	$175.00	$4,550.00

Sujata Awasthi	Law Clerk	60.5	$225.00	$13,612.50
Evan Ettinghoff	Law Clerk	51.9	$225.00	$11,677.50
TOTAL				**$2,035,590.00**

ACLU LODESTAR				
NAME	**GRAD YR**	**HOURS**	**RATE**	**TOTAL**
Melissa Goodman	2003 (15)	246.66	$715	$176,361.90
Amanda Goad	2005 (13)	43.62	$640	$27,916.80
Brendan Hamme	2012 (6)	606.09	$480	$290,923.20
Tasha Hill	2014 (4)	133.83	$390	$52,193.70
Aditi Fruitwala	2014 (4)	23.83	$390	$9,293.70
Diana Gonzalez	Sr. Paralegal	281.99	$195	$54,988.05
TOTAL		**1,343.68**		**$611,677.35**

Based on these hours and rates (which are the rates these attorneys would seek in an awarded statutory fee motion), the lodestar through September 21, 2018 is $2,647,267.35. This does not account for the remaining work, which includes work done after September 21on this motion and accompanying declarations, the yet to be drafted motion for Final Approval and Order, responses to objections to the extent necessary, ongoing work with the Class Administrator and class members as needed and appearance at the final approval hearing (which time will be provided for the Final Approval Hearing). Plaintiffs estimate an additional 100-150 hours, possibly more, to complete this work.

B. Counsel's Hourly Rates Are Reasonable

Counsel's requested hourly rates are reasonable for attorneys of their skill, experience and reputation. Under California law, plaintiff's attorneys are entitled to their requested rates if those rates are "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." *Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 783 (Cal. Ct. App. 2002). Federal law is the same. *See, e.g., Jordan v. Multnomah Cty.*, 815 F.2d

1258, 1263 (9th Cir. 1987) ("requested rates [should be] in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation") (citing *Blum v. Stenson*, 465 U.S. 886, 895 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

In calculating the lodestar, Plaintiffs used current rates to adjust for delay in payment. *See, e.g., Missouri v. Jenkins,* 491 U.S. 274, 282, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) ("an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of the statute [42 U.S.C. §1988]"); *Barjon v. Dalton*, 132 F.3d 496, 502–03 (9th Cir. 1997) ("the district court may choose to apply either the attorney's current rates to all hours billed or the attorney's historic rates plus interest"). Generally, for a "fee award to be reasonable, it must be based on current, rather than historic, hourly rates." *Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1119 (C.D. Cal. 2012) (lodestar award in settled class action, citing *Missouri v. Jenkins*). The *Charlebois* Court noted that the increase to current rates

> "is justified by comparable increases in the market. *See Coles v. City of Oakland,* No. C03–2961 THE, 2007 WL 39304, *7 (N.D.Cal. Jan. 4, 2007) (rejecting defendants' argument that rate increases should not surpass the rate of inflation and stating 'the focus of the rate analysis is to ensure that fees are awarded at 'prevailing market rates in the relevant community,' and such rates may be affected by factors other than inflation, such as attorneys' additional years of experience or changes in the legal market') (quoting *Blum v. Stenson,* 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *Parker v. Vulcan Materials Co. Long Term Disability Plan,* No. EDCV 07–1512 ABC (OPx), 2012 WL 843623, *7 (C.D.Cal. Feb. 16, 2012) (approving as reasonable an approximate 10 percent increase between 2011 rates and 2012 rates and because '[i]t is common practice for attorneys to

> periodically increase their rates for various reasons, such as to account for expertise gained over time, or to keep up with the increasing cost of maintaining a practice'); *LaPeter v. Canada Life Ins. Co. of Am.*, No. CV06–121–S–BLW, 2009 WL 1313336 *3 (D.Idaho May 11, 2009) ('It is typical for rates to increase on a yearly basis and, also, for associates' and paralegals' rates to increase as they gain more experience.')."

Plaintiffs have provided two types of declarations and evidentiary support for the requested rates. First, they have established the outstanding reputations and experience of Plaintiffs' counsel, through various declarations of Plaintiffs' counsel.

Second, the declarations from Amanda Goad and Barry Litt also address the reasonableness of the rates requested. Mr. Litt has been identified by courts as an expert on attorney fee rates in Southern California. Ample citations from a variety of sources to support the rates requested have been provided. These include reference to numerous other attorney fee awards in civil rights and consumer class actions (either direct fee awards or lodestar cross-checks in class actions). Several civil rights cases have been identified in which rates comparable to those requested have been awarded (or in which rates are comparable to those requested after accounting for the general increase in rates in intervening years).

In addition, numerous commercial rate awards or commercial fees charged to clients, for which rates are considerably higher than those listed as Counsel's rates have been identified. Congress expressly recognized that fees in federal civil rights cases should be comparable to those in complex federal civil litigation. *See City of Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986) ("Congress made clear that it 'intended that the amount of fees awarded under [§1988] be governed by the same standards which prevail in other types of equally complex Federal litigation.'" (citing S. Rep. No. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913)). Given that standard, it would be reasonable to use

rates comparable to those for complex commercial litigation, but, as the Litt Declaration demonstrates, the rates used are generally below those often paid for commercial litigation, especially for attorneys under 20 years. The reasonableness of the requested rates is reinforced by the fact that the substantial commercial fees described in the declaration are generally paid across the board; they are not generally based, for example, on peer recognition, such as Super Lawyers or some other form of acknowledgment of skill and reputation. Finally, as we explained previously, Plaintiffs' counsel have discounted their lodestar by well over 50% to resolve this case due to the model this case provides for injunctive relief, removing any conceivable issue regarding the reasonableness of the requested fee.

Skill and experience, novelty and difficulty of issues, rejection of other employment, results obtained are all factors in determining a reasonable hourly rate. *See, e.g., Harman v. City & Cnty. of San Francisco*, 158 Cal. App. 4th 407, 416 (2007); *Hensley v. Eckerhart*, 461 U.S. 424, 429–30 and n.3, 103 S. Ct. 1933, 1937, 76 L. Ed. 2d 40 (1983) (referring to twelve factor test enunciated in *Johnson v. Georgia Highway *430 Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In addition to contingent risk, which applies to this case and would support a multiplier under California law, these factors support a lodestar on the high end of the market for the reasons explained below.

Plaintiffs' lawsuit was certainly more difficult and complex than a routine case, yet Plaintiffs achieved an exceptional result. First, any case involving civil rights claims against jail officials is, by definition, more difficult than the usual matter. There are seldom independent eyewitnesses, and, if there are, they are usually jail inmates, which is combined with a significant credibility differential between the plaintiffs and the defendants. Evidence is uniquely under the control of defendants, making it difficult often to even obtain. Substantive qualified immunity and constitutional law present complex legal issues that must be litigated with skill and nuance. The law in this area is still developing, and the appropriate

standards, particularly under federal law, are subject to meaningful dispute. See Litt Dec., ¶¶36-38.

Second, as is explained in Mr. Litt's Declaration, there are substantial risks inherent in any class action, especially for damages. First, the majority of filed class actions are not certified. Second, of the cases that are certified, a significant percentage are ultimately unsuccessful. As a result, less than 2/3 of filed class actions result in successful claims on behalf of the class. The risk and complexity of civil rights class actions justifies rates at the top end of rates in the relevant legal community. *Id.* , ¶¶46-52.

C. Counsel's Hours Are Reasonable

The number of hours expended by counsel is reasonable. The accompanying Declarations establish the substantial effort Plaintiffs' counsel put into this case. Every hour reasonably spent on the case is compensable, and deference should be given to counsel's assessment of the resources necessary to prevail. *See, e.g., Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker"); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001) ("Absent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent*, including those *relating* solely to the fee") (emphasis in original); *Beaty v. BET Holdings, Inc.*, 222 F.3d 607, 612 (9th Cir. 2000) (attorneys who take FEHA cases "ordinarily . . . can anticipate receiving full compensation for every hour spent litigating a claim.") (internal quotations omitted).

Hours are reasonable if "at the time rendered, [they] would have been undertaken by a reasonable and prudent *lawyer* to advance or protect his client's interest in the pursuit of a successful recovery . . . ." *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982) (internal quotations omitted); *see also*

Ramon v. County of Santa Clara, 173 Cal. App. 4th 915, 925 (Cal. Ct. App. 2009). In making that determination, courts must look at "the entire course of the litigation, including pretrial matters, settlement negotiations, discovery, litigation tactics, and the trial itself . . . ." *Vov. Las Virgenes Municipal Utility Dist.*, 79 Cal.App.4th 440, 447 (2000); *see also Peak-Las Positas Partners v. Bollag*, 171 Cal. App. 4th 101, 114 (2009) (fees reasonable because of complexity of issues, results obtained, and defendants' aggressive litigation).

In the instant case, counsel's declarations and attached time records document the attorney, paralegal, and law clerk hours spent in the successful prosecution of this action. *See* Litt Declaration, ¶¶68-70; Goad Declaration, ¶¶7-9. Such time records are *prima facie* evidence that counsels' hours were reasonable. *See Horsford v. Bd. Of Trustees of Cal. State Univ.*, 132 Cal. App. 4th 359, 396 (2005) ("[T]he verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous.").

Because the agreed upon fee here is so far below lodestar, the only billing judgment exercised was to eliminate billers who worked less than approximately 20 hours on the case, on the theory that such billers were unnecessary. Ordinarily, Plaintiffs' attorneys would have reviewed the billings in greater detail. The fee detail was reviewed for obvious errors, but the kind of exhaustive, detailed review that would ordinarily be done was not. It is established law that a 10% discount for duplicative or unnecessary work is the most that can be done without individualized justification. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("the district court can impose a small reduction, no greater than 10 percent—a 'haircut'—based on its exercise of discretion and without a more specific explanation"). While, in an ordinary fee motion, Plaintiffs would have exercised line by line billing judgment, or provided an across the board small percentage discount of some sort to account for duplication, it was unnecessary to

exercise billing judgment in this case given the over 50% reduction in the lodestar based on the agreed upon fee. This is particularly so since the agreed upon fee was the product of mediation, was heavily discounted, and any fee reduction would not go to class members. If Defendants choose to challenge Plaintiffs' time, it is now their burden to prove that any specific time is unreasonable and "to point to the specific items challenged, with a sufficient argument and citations to the evidence." *Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guarantee Assn.*, 163 Cal. App. 4th 550, 564 (Cal. Ct. App. 2008).

V. COSTS

Plaintiffs have established their costs, which, except for copy/print, scanning and phone, are generally out of pocket and are well within the normal range of costs awarded under both California and federal fee shifting statutes, which allow reimbursement of litigation expenses that "are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of §1988." *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir. 1982), *cert. granted, judgment vacated on other grounds,* 461 U.S. 952, 103 S. Ct. 2421, 77 L. Ed. 2d 1311 (1983).

The types of costs requested here are normal costs awardable under fee shifting statutes, and are routinely allowed, including travel costs, investigators, consultants, filing fees, photocopies, printing, scans, messenger services, telephone, mailing, computerized legal research, and similar costs normally reimbursed by the client. *See, e.g., In re Immune Responses Sec. Litig.*, 497 F. Supp. 2d 1166, 1177–78 (S.D. Cal. 2007); *Ambriz v. Arrow Fin. Servs., LLC*, No. CV07-5423-JFW(SSX), 2008 WL 2095617 (C.D. Cal. May 15, 2008). Opinions of the federal courts are applicable to determining allowable costs under California law. *See, e.g., Bussey v. Affleck*, 225 Cal. App. 3d 1162, 1165 (Cal. Ct. App. 1990), abrogated on other grounds by *Robert L. Cloud & Associates, Inc. v. Mikesell*, 69

Cal. App. 4th 1141 (1999) and *Hsu v. Semiconductor Sys., Inc.*, 126 Cal. App. 4th 1330, (2005).

The charts below reflect the KMBL and ACLU costs. The combined KMBL/ACLU costs to be taken from the fee award is $18,894.92. The costs to be taken from the Class Fund amount to $36,304.49.

KMBL COSTS – FROM ATTORNEYS' FEES AND COSTS AWARDED	
Cost Item	**Amount**
E101-Copy/Print	$5,700.53
E105-Phone	$501.17
E106-Research	$2,389.54
E107-Delivery	$2,374.35
E108-Postage	$392.25
E109-LocTravel	$992.28
E110-FarTravel	$364.00
E111-Meals	$121.39
E112-FeesCrt	$700.00
E120-Pis	$766.00
E128-Records	$209.30
E134-Parking	$64.00
E146-Scans	$216.30
Sub-Total For Fee Award	**$14,791.11**

KMBL COSTS – FROM CLASS FUND	
Cost Item	**Amount**
E119-Experts	$30,059.49
E121-Arb/Medi	$6,245.00
Sub-Total From Class Fund	**$36,304.49**

VI. CONCLUSION

For the foregoing reasons, Plaintiffs ask that the Court award total fees and costs of $1,100,000, as provided in the Settlement Agreement exclusive of $36,304.49 in expert/consultant/mediation costs to be taken from the Class Fund.

DATED: November 5, 2018

Respectfully submitted,

Kaye, McLane, Bednarski & Litt, LLP
ACLU Foundation Of Southern California

By: /s/ Barrett S. Litt
Barrett S. Litt
Attorneys for Plaintiffs