

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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CLIFFORD W. MILLER,

Plaintiff,

v.

ROMEO ARANAS, *et al.*,

Defendants.

Case No. 3:17-cv-00068-MMD-CSD

ORDER

**I. SUMMARY**

This action stems from the denial of cataract surgery to an inmate with monocular blindness. (ECF No. 71.) The inmate, Plaintiff Clifford Miller, brought claims against Defendants the Nevada Department of Corrections (“NDOC”) for violations of Title II of the Americans with Disabilities Act (“ADA”) and against Dr. Romeo Aranas under 42 U.S.C. § 1983 for violation of Plaintiff’s Eighth Amendment rights. (*Id.*) In March 2022, the parties entered into a settlement agreement, and the Court subsequently dismissed the action. (ECF Nos. 137, 138.) Before the Court is Plaintiff’s motion for attorneys’ fees and costs. (ECF No. 139, errata 140-1 (“Motion”).)<sup>1</sup> Because the limit on attorneys’ fees under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d)(2) (“PLRA’s fee limit”), does not apply—and as further explained below—the Court will grant the Motion in part and deny in part. The Court will award Plaintiff a total of \$562,535.62 in attorneys’ fees and costs.

**II. BACKGROUND**

The following facts are undisputed. Plaintiff is an inmate in the custody of the NDOC and originally filed a complaint under 42 U.S.C. § 1983 as a *pro se* litigant, alleging

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<sup>1</sup>The Court notes that Plaintiff attached several exhibits and declarations in support of his Motion. (See ECF Nos. 139-1–139-32.) Defendants filed a response and Plaintiff filed a reply to the Motion. (ECF Nos. 146, 147.)

1 that he was being denied cataract surgery because he was an inmate. (ECF No. 4.) The  
2 Court screened his complaint and dismissed his claim of deliberate indifference to a  
3 serious medical need in violation of the Eighth Amendment and his claims of equal  
4 protection and due process in violation of the Fourteenth Amendment. (ECF No. 3.)  
5 Plaintiff subsequently filed a first amended complaint ("FAC") and again alleged violations  
6 of the Eighth and Fourteenth Amendments. (ECF No. 5.) The Court screened the FAC  
7 and only allowed Plaintiff's Eighth Amendment claim to proceed. (ECF No. 6.)

8 In August 2019, Plaintiff secured attorney Terri Keyser-Cooper as counsel, and on  
9 August 27, 2019, counsel entered a notice of appearance. (ECF No. 26.) Plaintiff, having  
10 secured counsel, proceeded to file a second amended complaint ("SAC") that included a  
11 claim that the NDOC had violated the ADA. (ECF No. 35 at 11-15.) Plaintiff additionally  
12 moved for a preliminary injunction seeking (1) modification of the NDOC's alleged policy  
13 rejecting corrective surgery for monocular blindness, and (2) expungement of Plaintiff's  
14 disciplinary conviction for filing an ADA grievance. (ECF No. 38 (sealed).) After Plaintiff  
15 moved for a preliminary injunction, he eventually received the corrective surgery he had  
16 alleged the NDOC previously denied him. (ECF No. 135-1.) In July 2020, Plaintiff filed a  
17 third and final amended complaint that included his Eighth Amendment claim against Dr.  
18 Aranas and his Title II ADA claims against the NDOC. (ECF No. 71.)

19 On September 20, 2021, the Court scheduled a bench trial regarding the ADA  
20 claims for March 2022, and a jury trial regarding the Eighth Amendment claim for April  
21 2022. (ECF Nos. 125, 126.) In addition to Terri Keyser-Cooper, Plaintiff secured attorneys  
22 Diane Vaillancourt and Peter Wetherall as counsel. (ECF Nos. 128, 132.) Days prior to  
23 the commencement of the bench trial, the parties entered into a settlement agreement  
24 and stipulated to dismiss the case with prejudice. (ECF No. 137.) The settlement  
25 agreement provided, in relevant part, the following:

- 26 1. . . . NDOC will pay to Plaintiff a total of SEVEN THOUSAND FIVE  
27 HUNDRED DOLLARS (\$7,500) by check made out to the Law  
28 Office of Terri Keyser-Cooper.

1 2. . . . NDOC will cause the discipline imposed upon Plaintiff which  
2 is the subjection of his retaliation claim to be retracted, rescinded,  
3 stricken from Plaintiff's prison record, and sealed or otherwise  
4 deleted so that said discipline can never be disclosed or argued  
5 to the Pardon's Board.

6 3. NDOC acknowledges and agrees that its internal policies and  
7 procedures for dealing with inmates with monocular blindness  
8 shall conform to the requirements of *Colwell v. Bannister*, 763  
9 F.3d 1060 (9th Cir. 2014). Specifically, NDOC acknowledges and  
10 agrees that neither it nor any employee acting on its behalf will  
11 exclude inmates with monocular blindness from *consideration* for  
12 corrective surgery based solely on a policy requiring an inmate to  
13 endure reversible blindness in one eye if he can still see out the  
14 other. . . .

15 (*Id.* at 4-5 (underline removed, emphasis added and in original).) Moreover, under the  
16 "Fees and Costs" section, the settlement agreement further provided:

17 The NDOC and Plaintiff agree that the payment of \$7,500 to  
18 Plaintiff provided herein is exclusive of reasonable and verifiable  
19 costs and attorneys' fees, with said costs and fees to be  
20 determined by the Court upon motion by Plaintiff, to be filed no  
21 later than 30 days from the date this Agreement is executed.

22 (*Id.* at 6.)

23 On March 29, 2022, Plaintiff filed the instant Motion. (ECF No. 140-1.) Plaintiff's  
24 counsel requests \$559,397.50 in attorneys' fees. (*Id.* at 29.) This amount was calculated  
25 based on 807.75 hours performed by Keyser-Cooper at a rate of \$550.00 an hour, 179.2  
26 hours performed by Vaillancourt at \$550.00 an hour, and 22.1 hours by Wetherall at  
27 \$750.00 an hour. (*Id.*) In the reply brief, Plaintiff's counsel requests an additional  
28 \$5,610.00 an hour for 10.2 hours spent on the case since the Motion was filed. (ECF No.  
147 at 7.) Additionally, Plaintiff's counsel also requests a total of \$1,948.12 in costs with  
\$1,518.22 being paid to Keyser-Cooper and \$429.90 paid to Plaintiff. (ECF No. 140-1 at  
29.)

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### 1 III. DISCUSSION

2 As an initial matter, the parties do not dispute that Plaintiff is the prevailing party.  
 3 (ECF Nos. 140-1 at 18-19, 146 at 3.) Defendants' response additionally does not appear  
 4 to oppose the requested amount of \$1,948.12 in costs.<sup>2</sup> (See ECF No. 146.) Moreover,  
 5 Defendants notably state that Dr. Aranas "agrees [Plaintiff] is entitled to a reasonable  
 6 attorney fee [sic]." (*Id.* at 3.) Therefore, the dispute is essentially over whether the PLRA's  
 7 fee limit caps the amount of attorneys' fees to be awarded to Plaintiff.

8 As the party seeking attorneys' fees, Plaintiff argues the PLRA's fee limit does not  
 9 apply in the following instances: (1) the parties settle privately and include an attorneys'  
 10 fee provision in their settlement agreement, (2) the case involves ADA claims in the prison  
 11 context, and (3) an inmate brings a § 1983 claim for equitable relief.<sup>3</sup> (ECF No. 140-1 at  
 12 19-20.) Because the PLRA's fee limit does not cap attorneys' fees in cases involving ADA  
 13 claims and thus Plaintiff's second argument proves to be dispositive, the Court will first  
 14 discuss the PRLA and state the relevant language. The Court will then address the  
 15 parties' arguments regarding attorneys' fees under the relevant ADA provision and will  
 16 conclude by determining whether the amount requested by Plaintiff is reasonable.

#### 17 A. PLRA

18 In enacting the PLRA, "Congress meant to discourage the filing of § 1983 claims  
 19 by prisoners because there were so many unmeritorious cases[.]" *Woods v. Carey*, 722

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21 <sup>2</sup>In their response, Defendants do not appear to oppose this amount. (See ECF  
 22 No. 146.) The Court will therefore grant Plaintiff the requested \$1,948.12 in costs.

23 <sup>3</sup>Because Plaintiff's ADA argument proves to be dispositive, the Court need not  
 24 address the merits of his remaining arguments. However, the Court notes that even if the  
 25 ADA argument did not prove to be dispositive, in the alternative, Plaintiff's third argument  
 26 would nevertheless persuade the Court to grant Plaintiff's requested attorneys' fees in  
 27 light of *Dannenberg v. Valdez*, 338 F.3d 1070, 73-75 (9th Cir. 2003) (holding the PLRA's  
 28 fee limit does not apply in a § 1983 case when injunctive relief is awarded to an inmate in  
 addition to monetary damages). Here, in addition to \$7,500.00 in monetary damages to  
 Plaintiff, the settlement agreement required the NDOC to change its policies and practices  
 to conform to the requirements set forth in *Colwell v. Bannister*, 763 F.3d 1060 (9th Cir.  
 2014). (ECF No. 137 at 4-5.) Additionally, the settlement agreement required the NDOC  
 to expunge the discipline imposed on Plaintiff for filing an ADA grievance. (*Id.*) The Court  
 is therefore further persuaded that the PLRA's fee limit does not apply in this instance  
 and therefore Plaintiff is entitled to attorneys' fees consistent with *Dannenberg*.

1 F.3d 1177, 1183 (9th Cir. 2013). “Congress, therefore, sought to have frivolous prisoner  
 2 actions dismissed at an earlier part of the process and enacted disincentives to limiting  
 3 frivolous claims, such as filing fees and caps on attorney’s fees, that would affect a  
 4 prisoner’s decision to file the action in the first place.” (*Id.* at 1182 (quotes and citation  
 5 omitted).) However, Congress did not “intend to discourage the collection of awards in  
 6 those comparatively few meritorious cases in which the district court had found that the  
 7 prisoner’s constitutional rights had been violated and that the prisoner was entitled to  
 8 collect damages for that violation.” (*Id.*)

9 To that end, the PLRA provides in relevant part the following:

10 (1) In an action brought by a prisoner . . . in which attorney’s fees  
 11 are authorized by section 1988 of this title, such fees shall not  
 be awarded, except to the extent that—

12 (A) the fee was directly and reasonably incurred in proving  
 13 an actual violation of the plaintiff’s rights protected by a  
 14 statute pursuant to which a fee may be awarded under  
 section 1988 of this title[.]

15 42 U.S.C. § 1997e(d)(1)(A). Immediately following, the PLRA further provides limitations  
 16 on fees:

17 (2) Where a monetary judgment is awarded in an action  
 18 described in paragraph (1), a portion of the judgment (not to  
 19 exceed 25 percent) shall be applied to satisfy the amount of  
 20 attorney’s fees awarded against the defendant. If the award  
 of attorney’s fees is not greater than 150 percent of the  
 judgment, the excess shall be paid by the defendant.

21 (3) No award of attorney’s fees in an action described in  
 22 paragraph (1) shall be based on an hourly rate greater than  
 23 150 percent of the hourly rate established under section  
 3006A of Title 18 for payment of court-appointed counsel.

24 § 1997e(d)(2)-(3).<sup>4</sup>

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 26 <sup>4</sup>The Court notes that Defendants argue the PLRA’s cap on hourly rates should  
 27 limit the attorneys’ fees granted. (ECF No. 146 at 4-5.) The Court declines to address this  
 28 argument further because, as stated below, the Court can award Plaintiff attorneys’ fees  
 under the ADA. Moreover, the Ninth Circuit in *Armstrong v. Davis*, 318 F.3d 965, 973-74  
 (9th Cir. 2003) addressed this same argument regarding an hourly rate limit under the

1           **B.     ADA**

2           Plaintiff cites to *Armstrong v. Davis*, 318 F.3d 965 (9th Cir. 2003), to argue the  
 3   PLRA's fee limit does not apply to inmates with ADA claims. (ECF No. 140-1 at 19-20.)  
 4   Given his success on the claims, which includes Title II ADA claims, Plaintiff appears to  
 5   additionally argue that counsel should be awarded full attorneys' fees because his ADA  
 6   and § 1983 claims substantially overlap. (*Id.*) Defendants appears to counter that Plaintiff  
 7   is bound by the PLRA's fee limit and thus merely entitled to \$11,250.00 in attorneys' fees.  
 8   (ECF No. 146 at 4.) Defendants appear to further counter that because Plaintiff's ADA  
 9   claim is similar to his § 1983 claim, and the Court did not decide the ADA claim on the  
 10   merits, a discretionary increase in awarding attorneys' fees beyond the PLRA's fee limit  
 11   is unwarranted. (*Id.* at 5-8.) The Court agrees with Plaintiff.

12           In *Armstrong*, the Ninth Circuit affirmed the district court's decision to award  
 13   attorney's fees to a class of inmates and parolees with disabilities, who prevailed in their  
 14   action under the ADA and the Rehabilitation Act of 1973 ("RA"). 318 F.3d 965 (9th Cir.  
 15   2003). In doing so, the Ninth Circuit held the PLRA's fee limit did not apply where fees  
 16   were sought under the ADA and RA.<sup>5</sup> *Id.* at 974. Moreover, the court found that arguments  
 17   supporting plaintiff's ADA and § 1983 claims "so overlapped" that the district court was  
 18   within its discretion to conclude that it was not appropriate to apply the PLRA's fee limit.  
 19   *Id.* at 975. Despite Defendants' response being strikingly silent as to *Armstrong*, the case  
 20   is particularly analogous here.

21           In addition to his § 1983 claim, Plaintiff's complaint included a similar ADA claim.  
 22   (ECF No. 71 at 11-16.) Not only is it undisputed that Plaintiff is the prevailing party, but

23  
 24   PLRA and articulating that "[t]he PLRA does not limit the award of attorney's fees to a  
 prevailing plaintiff whose award is authorized under a statute separate from § 1988.").

25           <sup>5</sup>The relevant ADA attorney's fee provision, 42 U.S.C. § 12205, provides that "the  
 26   court . . . in its discretion, may allowing the prevailing party . . . a reasonable attorney's  
 27   fee, including litigation expenses, and costs[.]" While Plaintiff does not directly cite to this  
 28   provision in his Motion, the Court construes his reliance on *Armstrong* as arguing that §  
 12205 is the "independent justification" for seeking full attorneys' fees unencumbered by  
 the PLRA. (ECF No. 140-1 at 19-20.) This reading is further supported by Plaintiff's  
 reference to § 12205 in his reply. (See ECF No. 147 at 2.)

the terms of the settlement agreement are decisively favorable to Plaintiff. (See ECF No. 137 at 4-6.) Whether the ADA claim was decided on the merits has lesser relevance than determining the “prevailing party” in an action. See *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1134 (9th Cir. 2002) (holding that a prevailing party in an ADA action, that had entered into a settlement agreement with terms it could enforce against the opposing party, is entitled to fees and costs under § 12205). Additionally, because Plaintiff’s ADA claim is “similar” to his § 1983 claim—as Defendants state to their detriment (see ECF No. 146 at 5)—the Court finds the claims “so overlapped” that it would present significant challenges to divide verifiable hours spent on each claim. See *Armstrong*, 318 F.3d at 974-75 (citation and quotes omitted) (noting the rule that if fee and non-fee claims are intertwined that time spent on claims cannot be divided, fees could be granted for the entire case).

Accordingly, the Court will grant attorneys’ fees to Plaintiff in full but not in the amount requested, as the amount is not entirely reasonable for the reasons discussed below.

### **C. Reasonable Fees**

As the prevailing party, Plaintiff endorses the lodestar method and argues the factors set forth in *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67 (9th Cir. 1975), weigh in favor of granting Plaintiff the full amount requested in attorneys’ fees.<sup>6</sup> (ECF No. 140-1 at 22.) Defendants counter that the *Kerr* factors do not weigh in Plaintiff’s favor and that he unreasonably inflates the hourly rates to California rates when calculating fees for Vaillancourt and Wetherall.<sup>7</sup> (ECF No. 146 at 7-8.) The Court agrees with Defendants to

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<sup>6</sup>Plaintiff specifically argues the following *Kerr* factors weight in his favor: (1) time and labor required, (2) novelty and difficulty of the questions involved, (3) undesirability of the case, (4) amount involved and results obtained, (5) customary fee, and (6) whether fee is fixed or contingent. (ECF No. 140-1 at 22-28.)

<sup>7</sup>In regard to the *Kerr* factors, Defendants counter that (1) time and labor of counsel do not warrant an upward deviation, (2) the issues presented are neither novel or difficult questions of law, (3) representation of Plaintiff did not require three attorneys, (4) Plaintiff’s counsel were not precluded from other cases, and (5) counsel’s professional relationship is not of the length warranting the lodestar approach. (ECF No. 146 at 8.)

1 the extent that Wetherall's rates are unreasonable. However, the *Kerr* factors are not so  
2 compelling to justify deviating from the lodestar method when calculating fees.

3 When awarding attorneys' fees under 42 U.S.C. § 12205, the Court adopts the  
4 lodestar method, which calculates a base fee by "multiplying the number of hours  
5 productively expended by counsel times a reasonable hourly rate." *Hensley v. Eckerhart*,  
6 461 U.S. 424, 433 (1983). A reasonable hourly rate is the "rate prevailing in the  
7 community for similar work performed by attorneys of comparable skill, experience, and  
8 reputation." *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). A district court can  
9 properly rely on its own familiarity with the local legal market in determining a reasonable  
10 and proper rate. See *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011).

11 Here, Plaintiff's counsel provides, and has submitted declarations, that attorney  
12 Keyser-Cooper and Vaillancourt's hourly rates are \$550.00, and that attorney Wetherall's  
13 rate is \$750.00. (ECF Nos. 140-1 at 29, 139-11 at 12, 139-21 at 7, 139-27 at 5.) While  
14 Keyser-Cooper and Vaillancourt's rates do not cause pause for concern, based on the  
15 Court's familiarity with the legal market in northern Nevada, Wetherall's rate causes  
16 pause as it is higher than the customary rate for the legal community in this district. See  
17 *Ingram*, 647 F.3d at 928. As such, the Court will reduce Wetherall's rate to \$550.00 in  
18 parity with Keyser-Cooper and Vaillancourt. Moreover, pursuant to LR 54-14, attorneys  
19 Keyser-Cooper, Vaillancourt, and Wetherall have submitted time records evidencing total  
20 hours each attorney respectively spent litigating this case: 817.95, 179.2, and 22.1  
21 hours.<sup>8</sup> (ECF Nos. 139-12, 139-23, 139-29, 147 at 6-7.) Defendants do not challenge  
22 these numbers, or the record provided as being inaccurate. (See ECF No. 146.) Applying  
23 the lodestar method, Keyser-Cooper is entitled to \$449,872.50, Vaillancourt to  
24 \$98,560.00, and Wetherall to \$12,155.00 in attorneys' fees.

25 As to the *Kerr* factors, the Ninth Circuit has articulated the following factors to be  
26 considered when determining the reasonableness of fees: (1) the time and labor required,

27 <sup>8</sup>Keyser-Cooper's total 817.95 hours includes the 807.75 hours provided in the  
28 Motion (ECF No. 140-1 at 29) and the 10.2 hours provided in her reply (ECF No. 147 at 7.)



1 (2) the novelty and the difficulty of the questions involved, (3) the skill requisite to perform  
2 the legal service properly, (4) the preclusion of other employment by the attorney due to  
3 acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent,  
4 (7) time limitations imposed by the client or circumstances, (8) the amount involved and  
5 the results obtained, (9) the experience, reputation, and ability of the attorneys; (10) the  
6 “undesirability” of the case, (11) the nature and length of the professional relationship with  
7 the client, (12) and awards in similar cases. *Kerr*, 526 F.2d at 70. While the parties argue  
8 the *Kerr* factors are in their favor, *see supra* at p. 7, n.6 & n.7, the Court does not find any  
9 of the factors are so compelling to deviate from the lodestar calculation. In this instance,  
10 and having reviewed the arguments, the Court finds that multiplying a fair-market rate by  
11 the number of hours expended litigating the case yields reasonable attorneys’ fees.

12 Moreover, the Court finds the total amount of attorneys’ fees to be awarded—  
13 \$560,688.50—sufficiently incentivizes attorneys to represent clients in possession of  
14 legitimate civil rights claims without excessively enriching counsel. *See Perdue v. Kenny*  
15 *A.*, 559 U.S. 542, 552 (2010) (finding that a reasonable fee is one that is “sufficient to  
16 induce a capable attorney to undertake the representation of a meritorious civil rights  
17 case.”). This is all the more important when considering how few meritorious cases result  
18 in favorable outcomes for inmates alleging violations of their rights. *See Woods*, 722 F.3d  
19 at 1182, n.5 (noting that “out of the 55,376 prisoner suits that ended in 2000, only 10.5%  
20 went to trial, and of those, a total of 77 resulted in victories for prisoners.”). Accordingly,  
21 for the reasons stated herein and having considered the *Kerr* factors, the Court declines  
22 to modify the lodestar amount.

23 In sum, Plaintiff’s Motion is granted in part and denied in part. The Court awards  
24 Plaintiff a total of \$562,535.62 in attorneys’ fees and costs: \$449,872.50 and \$1,518.22  
25 for Keyser-Cooper; \$98,560.00 for Vaillancourt; \$12,155.00 for Wetherall; and \$429.90  
26 for Plaintiff.

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1 **IV. CONCLUSION**

2 The Court notes that the parties made several arguments and cited to several  
3 cases not discussed above. The Court has reviewed these arguments and cases and  
4 determines that they do not warrant discussion as they do not affect the outcome of the  
5 Motion before the Court.

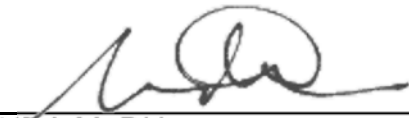
6 It is therefore ordered that Plaintiff Clifford Miller's motion for attorneys' fees and  
7 costs (ECF No. 139, errata 140-1) is granted in part and denied in part.

8 It is further ordered that Plaintiff is entitled to attorneys' fees in the amount of  
9 \$560,587.50. The amount is divided as follows: \$449,872.50 for Terri Keyser-Cooper,  
10 \$98,560.00 for Diane Vaillancourt, and \$12,155.00 for Peter Wetherall.

11 It is further ordered that Plaintiff is entitled to costs in the amount of \$1,948.12, with  
12 \$1,518.22 for Terri Keyser-Cooper and \$429.90 for Clifford Miller.

13 The Clerk of Court is directed to enter judgment in favor of Plaintiff to reflect the  
14 amount of attorneys' fees and costs identified above.

15 DATED THIS 15<sup>th</sup> Day of July 2022.

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20 MIRANDA M. DU  
21 CHIEF UNITED STATES DISTRICT JUDGE  
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