2014 WL 12564091
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United States District Court, D. Arizona.

ROY and Josie Fisher, et al., Plaintiffs,
United States of America, Plaintiff-Intervenor,
v.
Anita LOHR, et al., Defendants,
and
Sidney L. Sutton, et all, Defendants-Intervenors.
Maria Mendoza, et al., Plaintiffs.
United States of America, Plaintiff-Intervenor,
v.
Tucson Unified School District, Defendant.

CV 74-90 TUC DCB, CV 74-204 TUC DCB
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Signed 08/08/2014

Attorneys and Law Firms

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ORDER

David C. Bury, United States District Judge

***1** On August 10, 2011, the Ninth Circuit Court of Appeals entered its Mandate and reversed this Court's decision to end 31 years of judicial oversight of TUSD under a 1978 Settlement Agreement.[1] The appellate court reversed this Court's finding that Defendant Tucson Unified School District (TUSD) had attained unitary status and remanded the case for continued oversight until TUSD attains unitary status. *Fisher v. TUSD*, 652 F.3d 1131 (9th Cir. 2011). Subsequently, the parties negotiated the Unitary Status Plan (USP), which was approved by the TUSD School Board on January 8, 2013, with some exceptions. This Court resolved all disputed provisions of the USP, and as so revised, the USP was adopted by this Court and filed into the record on February 20, 2013. Implementing the plans, programs and provisions in the USP over the next several years will lead TUSD to unitary status.

Pursuant to the USP, Plaintiffs Fisher and Mendoza have submitted their requests for attorneys' fees and expenses to TUSD. (USP (Doc. 1450), § XIII.) Plaintiffs Fisher seeks $1,536,321.60 in fees for substantive legal work performed from April 12, 1983 through the adoption of the USP, February 20, 2013, and for work performed to recover these fees. (Fisher Memo (Doc. 1503) at 19.) Plaintiffs Mendoza seek $676,927.50 in fees[2] and $6,223.62 in costs, exclusive of the cost for their expert witnesses,[3] totaling $683,151.12, for work performed post-remand, August 10, 2011, to February 20, 2013. (Mendoza Memo (Doc. 1525) at 1.) Plaintiffs' fee and expense requests were rejected by TUSD, and the parties were unable to agree to an amount, even after settlement negotiations were held before Magistrate Judge Macdonald on June 26, 2013. Subsequently, Plaintiffs filed their requests for fees and expenses with the Court. The motions are fully briefed and ready for disposition.

As to both Plaintiffs, TUSD objects to their proposed hourly rates, which are as follows: $550 per hour for Mendoza attorney Lois Thompson, $425 per hour for Mendoza attorney Nancy Ramirez. Fisher attorney, Rubin Slater, seeks fees dating back to 1983 and correspondingly adjusts his hourly fee request of $400 to $550 depending on the number of years of experience he had been in practice at the time he rendered the specific services during the past 30 years. TUSD objects that these hourly rates do not reflect the prevailing market rate for civil rights practitioners in Tucson, Arizona, which is between $300 and $350. The Court finds $350 per hour to be the reasonable rate for work performed by counsel up through the adoption of the USP. The Court awards

$475,072.50 in fees and $6,223.62 in costs for a total of $481,296.12 for Plaintiffs Mendoza. The Court reserves the attorney fee award for Plaintiffs Fisher, pending supplemental briefing, and refers the parties to further settlement discussions with Magistrate Judge Bruce MacDonald regarding future attorney fees.

Reasonable Attorney Fees

***2** The "American Rule" is that each party in a lawsuit bears its own attorney's fees unless there is express statutory authorization to the contrary. *AlyeskaPipeline Service Co., v. Wilderness Society*, 421 U.S. 240, 247 (1975). Congress expressly authorized reasonable attorney's fees to prevailing parties in civil rights litigation for the purpose of ensuring effective access to the judicial process for persons with civil rights grievances. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). "Accordingly, a 'prevailing plaintiff should ordinarily recover on attorney's fee unless special circumstances would render such an award unjust.' " *Id.* (quoting S.Rep. No. 94-1011, p. 4 (1976), U.S.Code Cong. & Admin. News 1976, p. 5912 (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)). But the burden is on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984).

Here, the Court considers the Plaintiffs' requests for attorney fees in the context of the remand, which issued by Mandate on August 10, 2011. The Plaintiffs have clearly prevailed in establishing that TUSD has not attained unitary status and that further judicial oversight is required. Likewise, Plaintiffs prevailed in securing a new agreement under which TUSD must operate, and the USP has been adopted by this Court as the desegregation plan for implementation in TUSD for it to attain unitary status.

In addition to judgments on the merits, settlement agreements enforced through a consent decree may serve as a basis for an award of attorney fees, even when the consent decree has not included an admission of liability by the defendant. *Buckhannon Board and Care Home v. W. Virginia Dept of Health and Human Services*, 532 U.S. 598, 604 (2001) (citing *Maher v. Gagne*, 448 U.S. 122, 126 n. 8 (1980)). The requisite factor is a court-ordered change in the legal relationship between the plaintiff and defendant, and Congress has clearly intended to permit interlocutory awards to a party who has established entitlement to some relief on the merits of his claims, either in the trial or on appeal. *Id.* The Court finds the Plaintiffs have so prevailed, here, and are entitled to an award of their attorney fees. The Court turns to the question of the reasonable amount of the fees to be awarded Plaintiffs.

The Supreme Court explains that the starting point for determining an attorney fee award is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley*, 461 U.S. at 432. Generally, courts consider twelve factors first set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974): (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley*, 461 U.S. at 430 n. 3 (*citing Johnson*, 488 F.2d at 717-719)). The amount of attorney fees is determined on the facts of each case. *Id.* at 429-430.

The Court does not award fees for the Fisher Plaintiffs for work during the time period between April 1983 and April 2004. The 1978 Stipulation of Settlement provided $500,000 "to counsel for all Plaintiffs and for their attorneys' fees and costs, both past and future, except to the extent of any attorneys' fees and costs incurred by Plaintiffs in the future as a result of Defendants' failure to comply with the terms and conditions agreed to" in the Stipulation of Settlement." (TUSD F Resp. (Doc. 1506) at 3 (citing Stipulation ¶ 26)). In 2004, the Court, *sua sponte*, directed TUSD to show cause why TUSD had not attained unitary status. (Oder to Show Cause (OSC) (doc. 1028), filed 4/22/2004.) TUSD responded on January 14, 2005, with a Petition for Unitary Status and Termination (Doc. 1056). Until now, the Fisher Plaintiffs have never filed a fee application, with the exception of work performed in 1993 related to TUSD's plan to close Catalina High School. Plaintiffs Fisher admit to being compensated for work related to Catalina High School.

***3** Until the 2004 OSC followed by TUSD's Petition for Unitary Status and Termination, Plaintiffs had not challenged nor had they sought at any time to compel TUSD's compliance with the 1978 Stipulation of Settlement. For this approximately 25 year time period, the Court excludes the time spent by Fisher Plaintiffs for what the Court finds to have been general oversight work compensated pursuant to Paragraph 26 of the 1978 Stipulation of Settlement.

Beginning in 2004 through December 18, 2009, when this Court closed the case, the Fisher Plaintiffs are entitled to fees and costs incurred fighting TUSD's assertion of unitary status. Since remand, the parties briefed the status of the case in respect to the *Green* factors, proposed and briefed appointment of the Special Master, and in consultation with the Special Master participated in large part by stipulation in preparing the USP and worked to secure its adoption by this Court. The Court delineates the facts of this case relevant to the attorney fee award to be the remand and the February 20, 2013, adoption of the USP. The amount of attorney fees, including the customary fee set here, is based on the set of facts surrounding these circumstances and is not determinative of any future award of fees which may be entered in this case at a later date for legal work related to implementation of the USP and the final analysis regarding unitary status.

Customary Fee

The Court recognizes that the Ninth Circuit Court of Appeals awarded counsel for Fisher, Ruben Salter, attorney fees at $550/hour as the prevailing market rate in Tucson for his appellate work. Plaintiffs Mendoza seek comparable hourly rates. The Court notes the work, here, since remand has been decidedly different than appellate work. *See eg., Lee v. Randolph County Board of Education*, 882 F. Supp.2d 1292, 1295 (Ala. 2012) (counsel should not recover same hourly rate for monitoring as awarded for litigation). The Court is persuaded that the more customary fee is $300 to $350/hour as supported by the examples given by the Defendant. The Court notes that there are attorneys practicing in Tucson, who demand high-end rates of $510, such as Jeffrey Willis, or $450 to $600 per hour for former Arizona Supreme Court Chief Justice Zlaket. (Mendoza Memo (Doc. 1525), Ex. 7: *Fisher/Mendozav. TUSD*, Nos. 10-15124; 10-15375; 10-15407, (App Commissioner, March 13, 2013) at 4-13.) And, these high-end attorneys command these rates for complex cases because of years of experience comparable to those of Plaintiffs' attorneys. *Id.* at 11. Nevertheless, the Court finds that $500 to $600 per hour is not the customary rate in Tucson for such competent and experienced attorneys.

TUSD's lead attorney during the time period relevant to the award of attorney fees, Lisa Anne Smith, had 18 years of experience, and she charged $310 per hour. (TUSD F Resp. (Doc. 1506), Ex. B: Smith Affid. ¶ 3.) Richard M. Yetwin, also with DeConcini McDonald Yetwin & Lacey, had 39 to 40 years experience, and his regular billing rate was $330. *Id.* at 9. The Court finds TUSD's attorneys comparably qualified to Plaintiffs' attorneys.

John Gabroy, with Gabroy, Rollman & Bosse P.C., has over thirty-four years of experience and emphasis in commercial and civil rights litigation. Peter Akmajian, with the Udall Law Firm, LLP., is a litigator with twenty-seven years of experience. Mr. Gabroy, and Mr. Akmajian, both well respected civil attorneys practicing in Tucson for many years, opine that experienced commercial litigators, including civil rights practitioners, typically bill between $300 and $450 per hour. They both charge $300 per hour. (TUSD M Resp. (Doc. 1505), Ex. A: Gabroy Affid. and Akmajian Affid.)

***4** These rates are consistent with various court decisions relied on by Defendant. In *Arizona Department of Law, Civil Rights Division v. ASARCO, L.L.C.*, 2011 WL 6951842, *5 (D. Ariz. 2011), Tucson-based counsel Jenne Sandy Forbes sought fees, pursuant to § 1988, at the rate of $300 per hour. She submitted the affidavit of Armand Salese, a noted "AV" rated lawyer with nearly forty years of experience litigating employment and civil rights cases, who averred that lawyers in Tucson charge in the range of $300 to $450 per hour and that Ms. Forbes' hourly rate of $300 was "fair and reasonable." (TUSD M Resp. (Doc. 1505) at 7.)

In *Cruz Young v. Columbia Sussex Corp, dba Phoenix Airport Marriot Hotel*, an Arizona District Court judge ordered an award of fees to Stephen Montoya, a renowned Arizona civil rights attorney, at the rate of $350 per hour. Mr. Montoya, with twenty-two years experience as a civil rights litigator, avowed that rates charged by similarly situated lawyers in Phoenix ranged from $400 to $450 per hour. *Id.*, Ex. B

In *Smith v. Barrow Neurological Institute*, 2013 WL 2897778, *1 (D. Ariz. 2013), in support of a fee request,

pursuant to 42 U.S.C. § 1988, the law firm of Snell and Wilmer attested hourly rates for attorneys in Phoenix ranged from $160 to $285 per hour. "The court concluded a rate of $222.50 for attorneys was reasonable based on the court's familiarity with the Phoenix legal market." *Id.* at 7-8, *see also Vesecky v. Wilshire Aspirations*, LLC, 2012 WL 715564, *11 (D. Ariz. 2012) (finding rate of $375 reasonable for experienced civil rights attorney); *Wilson v. Yavapai County Sheriff's Office*, 2012 WL 3108843, *4 (D. Ariz. 2012) (§ 1988 request by attorney with 22 years of experience for hourly rate of $205-reduced from customary rate of $300-was "reasonable for this type of work within the Phoenix area"); *Rhett v. Sausalito Foods, LLC*, 2009 WL 2055217, *1 (D. Ariz. 2009) (observing requested $535 per hour rate was "well above the reasonable prevailing rate in the Phoenix community").

In arguing for higher rates, the Plaintiffs offer affidavits attesting to rates that are clearly at the high end of rates being charged in Tucson. They assert the Defendant's examples are for years prior to the relevant time period, but the Court notes that along with the American economy, the legal profession has been in a slump since 2008. Attorney fees have not necessarily been on the rise. The Defendant's examples are not so far afield as to be not relevant. Defendant secured capable counsel during this time period for a discounted rate of between $215 and $220 per hour from an existing pool of competent attorneys in Tucson charging a customary rate of between $300 to $350 per hour. (TUSD F Resp. (Doc. 1506), Ex. B: Smith Affid ¶ 3.) While the customary rate is a discounted rate for the Mendoza Plaintiffs' Los Angeles, attorneys and less than the Fisher Plaintiffs' attorney recovered for appellate work, the Court finds $300 to $350 per hour would enable Plaintiffs to attract competent counsel in Tucson.

As mentioned by Plaintiffs Mendoza, they have had difficulty in the past securing local counsel. But, the Court notes that in 2005 it denied the Mendoza Plaintiffs' request to appoint local counsel in place of MALDEF because of the historic complexity of the case and because MALDEF had already begun briefing the question of unitary status, which at that time required an intimate understanding of the history of the case going back to the 1978 Settlement Agreement, not because the legal issues in the case were complex, novel or difficult. (Mendoza Memo (Doc. 1525), Ex. 6: Minute Entry 1/3/2005.) And in 2004, local counsel withdrew from association with MALDEF because he could not afford to work *pro bono. Id.*, Ex. 5: Order 8/5/2004. At the time, Plaintiffs Mendoza were not a prevailing party and not entitled to an interim award of attorney fees.

***5** Additionally, since the remand, Plaintiffs' litigation responsibilities were reduced by the appointment of the Special Master to prepare the USP in consultation with the parties. (Order Appointing Special Master (Doc. 1350) at 2-3.) In the end, the parties stipulated to the vast majority of the USP provisions, further, reducing litigation necessary for preparation of the USP and leaving primarily review and comment responsibilities for the duration of the case until time for briefing unitary status and termination.

On the other hand, Plaintiffs' attorneys have worked *pro bono* for many years. Unlike TUSD's attorneys, who were guaranteed payment on a regular basis, Plaintiffs attorneys worked for free unless they prevailed so payment has been delayed at least since the remand in 2011. *See Hensley*, 461 U.S. at 448 (explaining attorneys who take contingency fees, taking upon themselves the risk that they may receive no payment, receive far more in winning than they would if they charged an hourly rate).

TUSD "agrees to the application of the District's proposed rate to all hours worked since 2005." (TUSD F Resp. (Doc. 1506) n at 19.) The basis for this agreement applies equally to any work done in 2004 related to whether TUSD had attained unitary status, and the Court applies the argument for a customary rate of $300 to $350 to all counsel representing Plaintiffs. The Court finds that $300 is the low end of the customary rate for the Tucson market for competent counsel for this type of case and that an increase to $350 per hour will account for the contingent nature of the fee and delay.

Reasonably Expended Hours

The district court should exclude from the initial fee calculation hours that were not "reasonably expended" because [c]ases may be overstaffed, and the skill and experience of lawyers vary widely. *Hensley*, 461 at 434. Counsel for the prevailing party should make a good faith effort to exclude from his or her fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his or her fee submission to a client. *Id.* In other words, hours that are not properly billed to one's client are not properly billed to one's adversary pursuant

to a fee shifting statute. *Id.*

As for TUSD's objections that the Fisher Plaintiffs improperly billed for monitoring work related to the 1978 Settlement Agreement, the Court agrees that subsequent to April 22, 2004, when the Court *sua sponte* raised the question of whether TUSD had attained unitary status, Plaintiffs Fisher included tasks compensated under the 1978 Settlement Agreement. Specifically the Court denies fees for work reviewing Plaintiffs Mendoza's efforts to obtain appointment of local counsel and review and monitoring closure of Keen Elementary School. From when the OSC issued on April 22, 2004, through January 14, 2005, when TUSD filed the Petition for Unitary Status and Dismissal, the Court allows fees for time spent reviewing and establishing a briefing schedule for the question of unitary status: 4/22/04 (1.5hr); 8/23/04 (.5hr); 8/31/04 (.5hr); 9/2/04 (.5hr), and all the time from January 14, 2005, through June 17, 2005 (9hrs) for a total of12 hours. (Fisher Memo (Doc. 1503), Table 1 at 8-9.)

The Court reduces by 30 percent the Fisher Plaintiffs' attorney fee award for reconstructed billing. *See Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (although the lack of contemporaneous records is not "a valid basis for denying the fee application in its entirety," such a deficiency "may ultimately provide the district court with a reason to reduce the fee."); *see also Lehr v. City of Sacramento*, 2013 WL 1326546, 9 (E.D. Cal.,2013) (making reduction because the reconstruction of time records can be difficult, and the reliability of such reconstructed billing records is inherently suspect). Here, the Court notes that reconstructed billing is estimated at .5 hours, whereas, similar review work performed beginning June 27, 2005, was actually itemized at .1 hours. (Fisher Memo (Doc. 1503), Table 2: August through December entries.) Therefore, the 12 hours allowed above, totaling $4,200, are discounted by 30% for being reconstructed to: $2,940.

***6** The Court allows the itemized fees sought by Plaintiffs Fisher, challenged by TUSD in Ex. A, June 27, 2005 through May 31, 2007, as time spent monitoring, not litigating. Under the circumstances of the OSC and the Petition for Unitary Status, work related to discovery and reviewing TUSD's Annual Report, pursuant to Paragraph 17 of the 1978 Settlement Agreement, was aimed at litigating the question of unitary status. The Court finds Plaintiffs Fisher reasonably expended the 59.2 hours of work challenged by TUSD.

As for the remainder of TUSD's objections, the Fisher Plaintiffs complain that the Defendant has "cherry-picked" various entries and challenged them as excessive. (Reply (Doc. 1530, Salter Decl. ¶ 21.) Plaintiffs Fisher reply that it is impossible in the limited space of a Reply to rebut "each of the District's spurious objections," (F Reply (Doc. 1530) at 10), and seek leave to supplement the memorandum to rebut each "misrepresentation" by Defendant, *id.*, Salter Decl. ¶ 24, if such rebuttal is required. Unfortunately such rebuttal is required. The Court cannot simply conclude that Defendant's challenges are generally, spurious, without first considering them one by one. A supplement is necessary before the Court can decide the merits of Defendant's individualized challenges.

Additionally, TUSD challenges all of the Fisher Plaintiffs' fees for legal research as insufficient, pursuant to LRCiv. 54.2(e)(2)(B), which provides such requests: "must identify the specific legal issue researched" such as: "Work on motion for summary judgment including (1) legal research re: statute of limitations applicable to Title VII cases and (2) factual investigation pertaining to claimed discrimination." The Fisher Plaintiffs suggest the local rule does not apply because the request is made pursuant to provisions of the USP. This makes sense in respect to timing of the fee request, but the Court will apply the substantive aspects of the local rule which assist it in determining whether hours were reasonably expended by a party seeking attorney fees. With the exception of the inadequate legal research bills, the Court is not concerned with the alleged "block billing" challenged by TUSD. This is not a case where billing records must distinguish between issues or claims upon which the party prevailed. As explained below, both Plaintiffs are entitled to a full recovery of fees for all work performed since the remand, and Plaintiffs Fisher are entitled to the same in respect to work performed challenging the unitary status of the District in 2004-2009. Here, what TUSD describes as block billing is more accurately described as grouping of activities that relate to a single task.

The Court is not persuaded by TUSD's criticism of Plaintiffs Fisher's review of Plaintiffs Mendoza's work, including discovery. In fact, the Court would find it a waste of time for one Plaintiff to duplicate work done by the other, instead of reviewing it to determine whether it could be relied on, with or without supplementation. The Court does not find that communications between the Plaintiff Mendoza's two attorneys is the same as duplication of efforts. The Court finds these communications to be better described as efforts to

coordinate work. And, TUSD's criticism of Plaintiffs Mendoza's decision to have both attorneys present at telephonic conferences or meetings rings hollow because TUSD was likewise represented by at least two attorneys: Lisa Ann Smith with the DeConcini law firm and Maree Sneed, an attorney from the Washington D.C. firm of Hogan Lovells, and sometimes Heather Gaines from the DeConcini law firm. As well, TUSD has in-house attorneys following the case, and Samuel Brown, former staff attorney to the District and current Director for Desegregation, also participated in respect to drafting the USP. (Mendoza Reply (Doc. 1515), Ex: Ramirez Decl. ¶¶ 4,6.)

***7** The Court will reduce the reasonable hours worked for telephone calls and emails billed in .25 increments on the Proskauer time records for Lois D. Thompson for ten entries totaling 2.5 hours. *Id.* at 7-8 (*citing Lee v. Sun Life Assurance Co. of Canada*, 2010 WL 2231943, *5(D. Or. 2010) (accepting hours of time billed but reducing quarter-hour entries to one-tenth hour for a total reduction of hours). "A comparable reduction to the Proskauer time entries would result in a total reduction of one and one-half hours [1.5hrs] (ten entries at .25 equaling 2.5 hours vs. ten entries at .10 equaling 1.0 hours)." *Id.* at 8.

The Court will not apply LRCiv. 54.2(e)(2)(A), which applies to telephone calls to billings for emails. The Court rejects TUSD's challenges to the telephone entries for failing to identify either the subject of the call or the identity of the caller, except as follows: 9/21/2011 (1.25hr): no subject; 10/19/2011 (1.25hr): same; 12/8/2011 (1hr), 1/11/2012 (1.5hr), 1/16/2012 (1.25hr) subjects are identified as Tucson issues and Mendoza issues; 7/9/2013 (3hr): no caller ID; 10/30/2012 (2.5hr): same; 11/5/2012 (2hr): same; 11/9/2012 (.75): same; 12/7/2012 (2hr): same; 12/17/2012 (1hr): same. Of 49 telephone call entries, these eleven are arguably deficient. These 17.50 hours are not redundant to the 1.5 reduction for billing telephone calls and emails in .25 increment, making a total reduction of 19 hours in reasonably expended hours for the Mendoza Plaintiffs.

The Court over rules "the objection to the time that Nancy Ramirez charged for responding to the State of Arizona's motion to intervene. The District 'reminds' this Court that the District 'took no position on the State's motion' ... and then says 'This fight was not a fight with the District. If MALDEF believes it was entitled to fees for prevailing on this particular issue, it should have sought such an award against the State.'"(Mendoza Reply (Doc. 1515) at 10 (quoting (TUSD M Resp. (Doc. 1505) at 15, n.6)). "What these statements ignore is that the 'fight,' in which the Mendoza Plaintiffs and the Department of Justice were left to engage without any support from the District, was a 'fight' to maintain the integrity of the USP process and the inclusion in the USP of the directive to offer culturally relevant courses to enhance the academic commitment and performance of the District's African American and Latino students, and thereby eliminate to the extent practicable the vestiges of TUSD's past discrimination." (Mendoza Reply (Doc. 1515) at 10.) The Court agrees.

Once the Court determines the product of reasonable hours times a reasonable rate, i.e., the loadstar amount, it must decide whether any other considerations warrant an adjustment of fees upward or downward. *Hensley*, 461 U.S. at 434. For attorney fees incurred during the relevant time period, the Court is not persuaded that any adjustment upward is necessary for either Plaintiffs for: time and labor required, novelty and difficulty of the legal questions, preclusion of other work due to this case, time limitations, the undesirability of the case, or the nature and length of the professional relationship with the client.

It is at this point, the Court must consider the important factor of the results obtained by Plaintiffs' counsel. *Id.* It is not enough that Plaintiffs are entitled to attorney fees as a prevailing party, two questions must be asked: "First did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.*

***8** Here, the Court answers the fist question: no. As explained below, in this case the important question is the second one. Plaintiffs request attorney fees, *pendente lite*, and such awards are proper where a party establishes entitlement to some relief on the merits of his claims, either in trial or on appeal. *Texas State Teachers Assoc. v. Garland Indep. School Dist.*, 489 U.S. 782, 791 (1989). The Court finds that this case is the typical civil rights case where Plaintiffs' claims arise out of a common core of facts and involve related legal theories, therefore, the most critical factor is the degree of success obtained. *Id.* (citing *Hensley*, 461 U.S. at 436)). In such a case, the district court exercises its equitable discretion to arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply adjusting the award up or down to account for the degree of overall success. *Id.*

In this type of case, the lawsuit should not be viewed as a

series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. *Hensley*, 461 U.S. at 435. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff did not prevail on every contention raised in the lawsuit.... Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Id.* (citations omitted).

On the other hand, where there is limited or partial success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. "T[h]is principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers' services." *Id.* at 436. Where these hours are expended with limited success, the expenditure of counsel's time may not be reasonable in relation to the success achieved. *Id.* The district court may simply reduce the award to account for the limited success. *Id.*

It is not enough for the Court to find that the significant extent of the reliefjustifies the award of a reasonable attorney fee. The Court must consider the relationship between the extent of success and the amount of the fee award. In other words, the court must find that the amount of the fee award is justified in relationship to the level of success. *Id.* at 440.

Here, the Court considers whether the attorney fees requested by Plaintiffs are reasonable given the excellent success achieved by them in reversing the dismissal of the case in favor of Defendants by this Court in 2009. Equally excellent, subsequent to the remand, Plaintiffs secured this Court's appointment of a Special Master and the preparation of the USP to address the requisite *Green* factors and guide TUSD to unitary status over the next few years. In other words, the Plaintiffs prevailed in securing a consent decree resolving the *Green* factors.

Even with this excellent success, however, the Court will not apply an enhancement multiplier to the lodestar figure "because 'every dollar of an excessive fee award is a dollar diverted from the education of the District's student enrollment and from the Court's ability to efficiently and effectively implement its various remedial orders ... the fiscal condition of the District is material ... to emphasize the necessity for a more scrutinizing review of legal fee submissions.' " (TUSD F Resp. (Doc. 1506) at 14-15 (quoting *Reed v. Rhodes*, 934 F. Supp. 1492, 1497 (Ohio 1996)). The same can be said for TUSD.

Conclusion

***9** With the 19 hour reduction, the Court finds without hesitation that the Mendoza Plaintiffs reasonably expended 1357.35 hours of time on work closely related to the drafting and adoption of the USP. Multiplied by $350 per hour, the Court awards the Mendoza Plaintiffs $475,072.50 in reasonable attorney fees.

The Court, likewise, approves full recovery of attorney fees for the Fisher Plaintiffs, excepting specific hours found to be unreasonably expended, because of the extremely close relationship of the time spent to this excellent success, which in addition to the USP includes fees for work performed challenging unitary status under the 1978 Settlement Agreement. The Court allows 12 reconstructed hours, reduced by 30%, for a total award of $2,940 for charges reflected on Plaintiffs Fisher's Table 1.

The Court reserves the remainder of its award for Plaintiffs Fisher until they address by supplement the individualized challenges raised by TUSD. Fisher shall reply to TUSD's Exhibit D, Excessive Fees Sought for 2005 – 2009. Plaintiffs Fisher shall do the same for TUSD's assertions in Exhibit E: Excessive Fees for 2011 – 2013, and Exhibit F: Time Sought for Fee Application. Plaintiffs Fisher shall also review their fee request to include work completed after or work done unrelated to adoption of the USP.

"Ideally, of course, litigants will settle the amount of a fee." *Hensley*, 461 U.S. at 437. The Court suggests the Plaintiffs Fisher and TUSD attempt to settle the amount of a reasonable attorney fee award, and refers the parties to Magistrate Judge MacDonald for a settlement conference. The Court does not determine reasonable attorney fees beyond February 20, 2013, or for work unrelated to the drafting and adoption of the USP. Plaintiffs Fisher's supplement shall consider the findings of the Court made, herein. The Court asks once again that

the parties consider setting limits or at least guidelines for future attorney fee awards.

Accordingly,

IT IS ORDERED that the Joint Inquiry Regarding Status of Motions for Award of Attorneys' Fees and Related Non-Taxable Expenses (Doc. 1634) is resolved by this Order.

IT IS FURTHER ORDERED that the Mendoza Plaintiffs' Motion for Award of Attorneys' Fees and Related Non-taxable Expenses (Doc. 1489) is GRANTED, as follows: Attorney Fees are awarded for $475,072.50 (702.25hrs ($245.787.50) for Lois Thompson and 655.10hrs ($229,285) for Nancy Ramirez), plus costs of $6,223.62, for a total award of $481,296.12.

IT IS FURTHER ORDERED that the Fisher Plaintiffs' Motion for Award of Attorneys' Fees (Doc. 1490) remains pending, subsequent to filing of a supplemental Reply within 30 days of the filing date of this Order. There shall be no Sur-reply from Defendants.

IT IS FURTHER ORDERED that within 10 days of the filing date of this Order the parties shall contact Magistrate Judge MacDonald to set a date for a settlement conference.

All Citations

Not Reported in Fed. Supp., 2014 WL 12564091

Footnotes

[1] The 1978 Settlement Agreement, approved by the Court on August 31, 1978, was a Consent Decree.

[2] Lois Thompson billed 721.25hrs for (Mendoza Memo (Doc. 1525), Lois Thompson Affid. Ex. 1 at 16), and Nancy Ramirez billed 655.10hrs, *id.*, Ramirez Affid. Ex. 1 at 12).

[3] The Mendoza Plaintiffs withdraw the request for costs relating to their expert witnesses. (Mendoza Reply (Doc. 1515) at 11 n.6.)