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FILED

JUL 16 2018

Clerk of the Court
Superior Court of CA County of Santa Clara
BY J. Lara DEPUTY
J. Lara

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

DIANA P. BLUM, M.D.,

Plaintiff,

vs.

SUTTER HEALTH, a California corporation; PALO ALTO FOUNDATION MEDICAL GROUP, INC., a California Corporation; PALO ALTO MEDICAL FOUNDATION, a California corporation; and DOES 1 through 20,

Defendants.

Case No. 115-CV-277582

ORDER RE DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS AND PLAINTIFF'S MOTION TO STRIKE OR TAX COSTS

This matter came for hearing in Department 16 on May 18, 2018. Plaintiff, Diana P. Blum, M.D., is represented by attorneys, Theresa J. Barta, Barta Law, and Charles M. Louderback and Stacey L. Pratt, Louderback Law Group. Defendants, Sutter Health and Palo Alto Medical Foundation, are represented by attorneys, Lindbergh Porter and Maiko Nakarani, Little Mendelson, P.C. Defendant, Palo Alto Foundation Medical Group, Inc. ("PAFMG"), is represented by attorneys, Marcie Isom Fitzsimmons and Hieu T. Williams, Gordon Rees Scully Mansuhani, L.L.P.

1 Hearing is for Defendant PAFMG's motion for attorneys' fees and costs incurred
2 postoffer pursuant to Code of Civil Procedure section 998, and Plaintiff's motion to strike or tax
3 Defendant PAFMG's costs. Defendant PAFMG's motion was initially heard on March 15, 2018
4 on issues of service of Defendant's offer of compromise and compliance with Code of Civil
5 Procedure section 998. Pursuant to Findings and Order filed May 14, 2018, Defendant's offer
6 was determined received by Plaintiff's counsel, made in good faith, and in compliance with
7 Code of Civil Procedure section 998.

8 During the present hearing, Plaintiff made oral motion for reconsideration of the
9 Findings and Order.

10 After consideration of the pleadings submitted in support and in opposition, argument
11 of counsel and application of law, THE COURT ISSUES THE FOLLOWING ORDER:

12 Plaintiff's motion for reconsideration of the Findings and Order filed May 14, 2018 is
13 DENIED.

14 Plaintiff did not obtain a more favorable judgment than the offer to compromise¹,
15 shifting to Plaintiff the obligation to pay Defendant's costs from the time of the offer. Code of
16 Civil Procedure Section 998 subdivision (c) (1).

17 Because the action involved enforcement of a contract that included a provision for
18 recovery of the prevailing party's attorney's fees, Defendant's postoffer costs include its
19 attorney's fees. Civil Code section 1717; *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103; *Biren v.*
20 *Equality Emergency Med. Group, Inc.* (2002) 102 Cal.App.4th 125.

21 Determination of attorney fees is pursuant to the Lodestar methodology which requires
22 determination of the number of hours reasonably expended and the reasonable hourly rate
23 that is prevailing in the community for similar services. *Keep Our Mountains Quiet v. County of*
24 *Santa Clara* (2015) 236 Cal.App.4th 714; *Rey v. Madera Unified Sch. Dist.* (2012) 203 Cal.App.4th
25 1223; *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852.

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¹ Defendant's offer to compromise was \$201,000, plus statutory costs, including Plaintiff's reasonable attorney fees incurred to the date of offer. The verdict of the jury awarded Plaintiff \$28,415 in damages.

1 The Court has considered declarations of Defendant's attorneys describing the
2 experience of counsel, hourly rates and itemization of services and time, and Plaintiff's
3 opposition to the reasonableness of services and hours. Neither party requests a positive or
4 negative Lodestar enhancement.

5 The standard for reasonable hourly rate is the reasonable market value of the services.
6 The Court may consider the actual hourly billing rate and other factors in its discretion to
7 determine a hourly rate that is prevailing in Santa Clara County for similar services.

8 The services rendered by Defendant's counsel at trial were professional and effective.
9 Services evidence superior preparation and organization. Oral and written argument was
10 reasoned and supported by on point authority. The Court considered the actual rates billed by
11 Defendant's counsel², whose offices are located in San Francisco, and the Court's experience
12 with reasonable rates in Santa Clara County for similar experience and skill. The Court finds
13 that the rates of Defendant's attorneys are appreciably lower than reasonable hourly rates for
14 similar experience, skill and services in Santa Clara County.

15 The case was complex in legal and factual issues, and involved many percipient and
16 expert witnesses, and extensive documentary evidence. The litigation was active for three
17 years, and included motion for summary judgment, discovery matters and mediation before
18 trial. Trial was demanding and at times, contentious, requiring 17 days for completion.

19 The number of hours incurred and corresponding fees are extraordinary,
20 notwithstanding hourly rates well below those charged in Santa Clara County for comparable
21 experience and skill. The case was complex and vigorously pursued and defended. The amount
22 claimed as damages in the complaint was substantial, and the services, hours, and fees are not
23 disproportionate to potential liability. The favorable outcome to Defendant of the litigation
24 suggests the effectiveness of services of Defendant's counsel.

25 Plaintiff objects to Defendant's redacted description of services as obscuring accurate
26 assessment of reasonableness of services, that fees are disproportionate to the value of the
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² \$275 per hour for partners/senior counsel (Ms. Fitzsimmons), \$235-275 per hour for associate trial counsel (Ms. Williams), \$235 per hour for other associates (Ms. Lawler and Ms. Eklof) and \$115 per hour for paralegals.

1 case, that depositions were inefficient, and that hours are inflated. Plaintiff also asserts that
2 fees for hours waiting for the jury's verdict are not reasonable and necessary. Plaintiff further
3 contends that fees billed for travel is excessive because counsels' reduced travel rate of \$100
4 per hour is not reflected in all travel entries, and entries indicated as "no charge" to Defendant
5 are included in the fee request.

6 The Court finds that attorney fees of Defendant in the net amount of \$984,744 are
7 reasonable and necessary to the litigation, and are awarded to Defendant. The Court further
8 finds that it was reasonable and necessary under the circumstances of this case to have *one*
9 attorney from each side available to timely respond to issues that arose during jury
10 deliberations. The hours of Ms. Fitzsimmons in that regard are approved, and the hours of Ms.
11 Williams will be taxed.³ An additional reduction to fees for entries of "no charge" to Defendant
12 is appropriate and those fees are taxed.⁴ The Court declines to adjust fees to reflect that all
13 travel is charged at \$100 per hour to be reasonable. There can be many reasons for varying
14 billing rates for travel, and the instances where travel is billed at regular hourly rates is
15 reasonable.

16 Plaintiff's contention that redaction of billing entries obscures assessment of the
17 services is unconvincing.⁵ For example, where Plaintiff is a recipient of the communications,
18 Plaintiff should be able to assess whether or not those entries are valid. Entries involving
19 defense internal communications or communications with defense witnesses or client
20 representatives do not require disclosure of substance or topics to assess reasonableness.
21 Similarly, reviewing or analyzing documents or preparing summaries of records do not require
22 disclosure of the particular documents in light of the large number of documents in the case.
23 Drafting of legal arguments for motions does not require disclosure of the legal arguments.

25 ³ The portion taxed is hours of Ms. Williams waiting for the verdict on 02.15.18 through 02.13.18 – 31.7 hours at
26 \$275 per hour = \$8,718.

27 ⁴ \$3,498 per Ex. N of declaration of Ms. Barta in support of opposition to Defendant's motion for attorney fees and
28 costs.

⁵ Ex. O of declaration of Ms. Barta.

1 Larger time entries on September 21, 2016 for "(A)ttend ..." when viewed in context with other
2 entries at that time infer that the entries were for attending mediation or deposition. There are
3 various entries on the same date(s) of Ms. Williams for reviewing documents, depositions, and
4 drafting summaries. Considering the detail in billing practice evident from overall entries, it is
5 apparent that Ms. Williams is referring to different documents, depositions, or subjects, and
6 separated entries rather than consolidating all entries into one large time entry. Disclosure of
7 the specific documents, depositions or subjects is not necessary.

8 As to time incurred and fees billed for preparation of an opening statement, the Court
9 would agree in a non-extraordinary civil case that 38 hours incurred and \$10,450 in fees
10 charged to prepare an opening statement appears unreasonable. However, the case here, in
11 contrast, was complex, the law and facts were fertile for confusion, and the stakes were high.
12 Clarification of the issues and facts important to the jury and what each party believed the
13 evidence would show were critical to the case, and the importance of an effective opening
14 statement was self-evident. Defendant's opening statement was effective on those points, and
15 was delivered clearly and confidently. Under the circumstances observed by the Court, the
16 time incurred and fees charged for the opening statement were reasonable and necessary.

17 The time entries do not evidence or reflect inflation or padding of hours.

18 Plaintiff's motion to strike or tax Defendant's memorandum of costs.

19 The costs in Defendant's memorandum of costs subject to Plaintiff's motion to tax are
20 as follows:

21 Expert witness fees.

22 Dr. Mark Lipian's fees of \$289,389 and billing rate of \$725 per hour are extraordinary.
23 Dr. Lipian's report was comprehensive, but exceeded the scope of the examination set by court
24 order, and that portion is included in the cost. Plaintiff abandoned her claim for mental distress
25 damages at trial, essentially eliminating the need for testimony of Dr. Lipian. It is probable that
26 Dr. Lipian's report and anticipated testimony impacted Plaintiff's decision. Certainly, Dr.
27 Lipian's qualifications are noteworthy, and an expert need not testify for fees to be recoverable.
28 However, unlike the performance of counsel at trial, the court did not have an opportunity to

1 observe Dr. Lipian as a witness to fully assess the reasonableness of the hourly rate and hours
2 charged. \$725 per hour is higher than rates charged by forensic mental health experts with
3 impeccable credentials in Santa Clara County. Additionally, the total number of hours charged
4 appear excessive relative to the scope of examination set by court order and there are
5 instances where the number of hours billed in a day is not plausible.

6 An award of expert witness fees to a defendant under Code of Civil Procedure section
7 998 subdivision (c) is discretionary and is not a matter of right. *Rowland v. Pac. Specialty Ins.*
8 *Co.* (2013) 220 Cal.App.4th 280, 289. Fees may be awarded for trial preparation and for
9 testimony during trial. See Code of Civil Procedure section 998 subdivisions (c)(1) and (d). This
10 includes fees incurred for services of experts who do not testify and were not deposed. *Bates*
11 *v. Presbyterian Intercommunity Hosp., Inc.* (2012) 204 Cal.App. 4th 210, 222. The amount of
12 fees must be reasonable, and the Court may consider the offeree's economic resources in
13 determining what is reasonable. *Seever v. Coley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1561
14 (*Seever*). This is because the goal of Code of Civil Procedure section 998 is to encourage fair
15 settlements, not settlements where less affluent parties are pressured into accepting
16 unreasonable offers to avoid the risk of exposure to costs they cannot afford. *Seever, supra* 141
17 Cal.App.4th at p. 1561-1562.

18 Here, the primary considerations are the reasonableness of the hourly rate and hours
19 charged. For the reasons outlined above, both are excessive.

20 Economic resources of the parties is less of a consideration. Plaintiff is a neurologist in a
21 relatively affluent community. The evidence indicates that Plaintiff is doing well in her practice
22 and has an interest in a building with medical practitioner tenants. She is not a plaintiff of
23 modest means or low income, but her economic resources are appreciably less relative to the
24 resources available to Defendant medical group. However, the cost of Dr. Lipian was not
25 incurred as of the date of the offer of compromise, and hence, was not a factor in accepting or
26 rejecting the offer or negotiating another settlement at that time.

27 After consideration of all facts and circumstances, Plaintiff's motion to tax Dr. Lipian's
28 fees is GRANTED in part and DENIED in part. The portion allowed as costs is \$100,000.

1 The motion to tax the vocational rehabilitation expert fees of Carol Hyland (\$4,193) is
2 DENIED. Defendant's expert economist Dr. Charles Mahla used Ms. Hyland's analysis of
3 Plaintiff's efforts to mitigate damages in his opinion of Plaintiff's economic damages. The
4 services are not duplicative. Incurring the cost of an expert on this subject is reasonably
5 necessary in preparation for trial, and the amount incurred is reasonable.

6 The expert witness fees of Charles Bond (\$16,103) were reasonable in amount and
7 reasonably necessary in preparation for trial on issues of disciplinary actions and disruptive
8 behavior. The motion to tax Mr. Bond's fees is DENIED.

9 The expert witness fees of Nate Kaufman (\$15,660) on joint venture theory of liability
10 was a reasonably necessary cost and reasonable in amount considering Plaintiff's theory of joint
11 venture liability of all defendants. The motion to tax Mr. Kaufman's fees is DENIED.

12 Travel costs.

13 Reasonable travel costs of Defendant's counsel to attend depositions is recoverable
14 under Code of Civil Procedure 1033.5 subdivision (a)(3)(C), and the motion to tax is DENIED.

15 Videotape depositions.

16 The cost of video deposition of Plaintiff did not appear reasonably necessary to the
17 conduct of the litigation because there was no risk Plaintiff would not attend trial or a need to
18 preserve her testimony. It did not appear that impeachment of Plaintiff's testimony was
19 enhanced by limited use of videotape excerpts over use of written transcripts.

20 The video deposition of Carey True is reasonable and necessary, and was presented at
21 trial.

22 The motion to tax the cost of video deposition of Plaintiff is GRANTED; the motion to tax
23 the cost of video deposition of Ms. True is DENIED.

24 Service of process costs.

25 The cost of service re motion to compel exam of Plaintiff was reasonably necessary to
26 the conduct of the litigation, and the motion to tax is DENIED.

27 The motion to tax other service of process costs is DENIED because the costs are
28 sufficiently identifiable, reasonable in amount and reasonably necessary to the litigation.

1 Demonstrative and graphics costs.

2 The motion to tax demonstrative and graphics costs is GRANTED in part and DENIED in
3 part. The Court finds that such services and presentation were reasonably helpful to the jury.
4 However, even considering a 17 day trial, \$30,629 exceeds a reasonable cost. The sum of
5 \$17,000 is allowed as a reasonable and necessary recoverable cost.

6 Mediation.

7 The motion to tax private mediation costs is DENIED. Although mediation did not
8 resolve the case, it was reasonable in amount and a necessary cost of the litigation.

9 Hotel costs.

10 The hotel costs incurred by Defendant's counsel during trial is recoverable if reasonably
11 necessary to the conduct of the litigation and reasonable in amount. The Court considered the
12 distances and time required for counsel to travel from residences to court for trial, counsel's
13 declaration for necessity to work on the case and description of work in between days of trial,
14 and the Court's observation of the proceedings. Counsel staying overnight in San Jose during
15 trial was reasonably necessary to the conduct of the litigation, and not merely convenient or
16 beneficial to preparation.

17 The hotel rate paid by Defendant's counsel is reasonable based on the declarations of
18 rates and declaration of comparable hotels within proximity of the court.

19 In conclusion, Defendant is awarded costs, including attorney fees, against Plaintiff in
20 the total sum of \$1,268,263, summarized as follows:

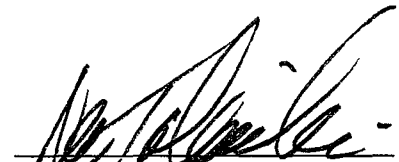
21	Attorney fees:		\$984,744
22	Costs:		
23	Per Defendant's memorandum of costs		\$491,834
24	Less: costs taxed		
25	Dr. Lipian:	\$189,390	
26	Video tape deposition costs:	\$4,675	
27	Demonstrative exhibits and graphics:	\$14,250	
28	Total costs taxed:		(\$208,315)

1 Net allowable costs under Defendant's memorandum of costs: \$283,519

2 **Total recoverable attorney fees and costs:** **\$1,268,263**

3 IT IS SO ORDERED

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5 Dated: July 13, 2018

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7 Hon. Drew C. Takaichi
8 Judge of the Superior Court
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSE, CALIFORNIA 95113
CIVIL DIVISION

FILED
JUL 16 2018

Clerk of the Court
Superior Court of CA County of Santa Clara
BY J. Lara DEPUTY
J. Lara

RE: **D. Blum vs Sutter Health, et al**
Case Number: **2015-1-CV-277582**

PROOF OF SERVICE

ORDER RE DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS AND PLAINTIFF'S MOTION TO STRIKE OR TAX COSTS was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on July 16, 2018. CLERK OF THE COURT, by Julie Lara, Deputy.

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