

139 F.Supp.3d 1170  
United States District Court,  
S.D. California.

[Fernando MEDINA](#), et al., Plaintiffs,  
v.  
METROPOLITAN INTERPRETERS  
AND TRANSLATORS, INC., Defendant.

Case Nos. 12cv0460 JM(MDD), 13cv1891  
JM(MDD), 13cv1892 JM(MDD).

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Signed Oct. 13, 2015.

### Synopsis

**Background:** Employees of translation services provider brought action against employer, alleging violations of the Employee Polygraph Protection Act (EPPA), as well as claims for civil conspiracy and negligent misrepresentation. Following jury trial, judgment was entered in favor of employees in the amount of \$2,632,000. Employer moved for judgment notwithstanding the verdict, for a new trial, and to stay execution of the judgment, and employees moved for an award of attorney fees.

**Holdings:** The District Court, [Jeffrey T. Miller](#), J., held that:

- [1] evidence was sufficient to support determination that employer violated the EPPA;
- [2] damages in the range of \$200,000 to \$500,000 for employees' emotional distress were not excessive;
- [3] employees' reference to employer's financial condition did not so prejudice employer that new trial was warranted;
- [4] employer was not entitled new trial on ground that trial court failed to provide jury instructions on affirmative defenses;
- [5] hourly rates for legal services in the amounts of \$850, \$625, and \$295 per hour were reasonable; and
- [6] 25% reduction in attorney fees award requested was warranted.

Employer's motions denied, and employees' motion granted.

West Headnotes (23)

[1] [Federal Civil Procedure](#) 🔑 Evidence

[Federal Civil Procedure](#) 🔑 Construction of evidence

Judgment notwithstanding the verdict is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. [Fed.Rules Civ.Proc.Rule 50\(b\)](#), 28 U.S.C.A.

[2] [Federal Civil Procedure](#) 🔑 Evidence

On a motion for judgment notwithstanding the verdict, the district court must uphold the jury's verdict if there was any legally sufficient basis to support it. [Fed.Rules Civ.Proc.Rule 50\(b\)](#), 28 U.S.C.A.

[3] [Federal Civil Procedure](#) 🔑 Construction of evidence

In ruling on a motion for judgment notwithstanding the verdict, the court may not make any credibility determinations or reweigh the evidence. [Fed.Rules Civ.Proc.Rule 50\(b\)](#), 28 U.S.C.A.

[4] [Labor and Employment](#) 🔑 Polygraph testing

[Labor and Employment](#) 🔑 Particular cases in general

Evidence was sufficient to prove that employer, a translation services provider, violated its employees' rights under the EPPA; testimony and documentary evidence was presented showing that employer notified employees of the required polygraph examinations in writing, scheduled polygraph examinations for employees, and advised employees that they would be terminated if they refused to take the exams, and evidence

showed that when an employee refused to take the polygraph examination or failed the test, the employee was terminated. Employee Polygraph Protection Act of 1988, § 3(1, 2), 29 U.S.C.A. § 2002(1, 2).

[5] **New Trial** 🔑 Failure of justice in general

Ultimately, the district court can grant a new trial under on any ground necessary to prevent a miscarriage of justice. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[6] **New Trial** 🔑 Clear, great or overwhelming, or manifest weight or preponderance

A motion for a new trial will only be granted if the verdict is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[7] **New Trial** 🔑 Verdict Contrary to Evidence

Doubts about the correctness of the verdict are not sufficient grounds for a new trial: the trial court must have a firm conviction that the jury has made a mistake. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[8] **New Trial** 🔑 Verdict Contrary to Evidence

A jury verdict should be set aside on a motion for a new trial only when the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[9] **Damages** 🔑 Particular cases

Damages in the range of \$200,000 to \$500,000 for employees' emotional distress based on employer's violation of the Employee Polygraph Protection Act (EPPA) were not excessive; employer engaged in egregious conduct in violation of federal law, in that employees were wrongfully required to subject themselves to

illegal polygraph examinations, threatened, and then discharged if they failed the exam or refused to comply, and employees obtained psychiatric treatment or were hospitalized due to stress from the loss of income, ability to provide for their families, and the ability to engage in meaningful work. Employee Polygraph Protection Act of 1988, § 3(1, 2), 29 U.S.C.A. § 2002(1, 2).

[10] **New Trial** 🔑 Conduct of counsel

Employees' reference to employer's financial condition during the liability phase of the trial for violation of the Employee Polygraph Protection Act (EPPA) did not so prejudice employer that a new trial was warranted; although during cross-examination of employer's representative, employees' counsel asked about employer's business deal involving contract worth hundreds of millions of dollars, trial court immediately stopped the questioning and instructed the jury to disregard any reference to the dollar amounts. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.; Employee Polygraph Protection Act of 1988, § 3(1, 2), 29 U.S.C.A. § 2002(1, 2).

[11] **Federal Civil Procedure** 🔑 Jury's Custody, Conduct and Deliberations

The law presumes that the jury carefully follows the instructions given to it.

[12] **New Trial** 🔑 Particular actions or issues

Employer was not entitled to grant of its motion for new trial on ground that trial court failed to provide jury instructions concerning the affirmative defenses of contractual assumption of the risk, consent, superseding cause, unclean hands, and waiver, in employees' action for violation of the Employee Polygraph Protection Act (EPPA); employer failed to cite any evidence supporting the applicability of any of these affirmative defenses. Employee Polygraph Protection Act of 1988, § 3(1, 2), 29 U.S.C.A. § 2002(1, 2).

**[13] Labor and Employment** 🔑 Costs and attorney fees

The amount of reasonable attorney fees for a prevailing party under the Employee Polygraph Protection Act (EPPA) is determined by using the lodestar method. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[14] Labor and Employment** 🔑 Costs and attorney fees

The lodestar, as used to determine an award of attorney fees under the Employee Polygraph Protection Act (EPPA) is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

[1 Cases that cite this headnote](#)

**[15] Labor and Employment** 🔑 Costs and attorney fees

Although in most Employee Polygraph Protection Act (EPPA) cases, the lodestar figure is presumptively a reasonable attorney fees award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[16] Labor and Employment** 🔑 Costs and attorney fees

Factors used to determine whether the lodestar figure should be adjusted in calculating an attorney fees award for a prevailing party under the Employee Polygraph Protection Act (EPPA) include (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other 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. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[17] Labor and Employment** 🔑 Costs and attorney fees

The prevailing party seeking an award of attorney fees under the Employee Polygraph Protection Act (EPPA) bears the burden of producing evidence that the requested hourly rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[18] Labor and Employment** 🔑 Costs and attorney fees

The relevant community in determining a reasonable hourly rate for legal services, for purpose of calculating an award of attorney fees under the Employee Polygraph Protection Act (EPPA), is the forum in which the district court sits. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[19] Labor and Employment** 🔑 Costs and attorney fees

Hourly rates for legal services in the amounts of \$850, \$625, and \$295 per hour were reasonable for purpose of calculating attorney fees award for employees who prevailed in their claim against employer for violation of the Employee Polygraph Protection Act (EPPA); attorneys submitted their own declarations substantiating their education and experience, as well as four

declarations from attorneys in the community with similar skills, experiences, and reputations, which established that the requested rates are in line with the fees of similarly situated attorneys, and attorneys did not oppose the hourly rates of counsel. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[20] Labor and Employment** ➡ Costs and attorney fees

The party seeking attorney fees under the Employee Polygraph Protection Act (EPPA) bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[21] Labor and Employment** ➡ Costs and attorney fees

The party opposing a motion for attorney fees by a prevailing party in an Employee Polygraph Protection Act (EPPA) action has the burden of submitting evidence that challenges the accuracy or reasonableness of the hours charged or the facts asserted by the prevailing party in its affidavits. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[22] Labor and Employment** ➡ Costs and attorney fees

In determining an award of attorney fees in favor of a prevailing party in an Employee Polygraph Protection Act (EPPA) action, 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; however, courts may reduce the allowable hours if they are inadequately documented, duplicative, excessive, or otherwise unnecessary. Employee Polygraph Protection

Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**[23] Labor and Employment** ➡ Costs and attorney fees

Twenty-five percent reduction in attorney fees award requested was warranted for employees who prevailed in Employee Polygraph Protection Act (EPPA) action against employer; the arguments and issues raised were not complex, the original complain alleged 10 claims, and sought both compensatory and punitive damages, but employees only prevailed on EPPA claim, and recovered only compensatory damages. Employee Polygraph Protection Act of 1988, §§ 3(1, 2), 6(c)(3), 29 U.S.C.A. §§ 2002(1, 2), 2005(c)(3).

**Attorneys and Law Firms**

\***1173 Eugene G. Iredale, Grace S. Jun, Julia Yoo**, Iredale & Yoo, APC, San Diego, CA, for Plaintiffs.

**Barry William Lee**, Manatt Phelps & Phillips, San Francisco, CA, **Erin Cranman Witkow, Rebecca L. Torrey, Yoanna S. Binder, Maura F. Kingseed**, Manatt, Phelps and Phillips, LLP, Los Angeles, CA, for Defendant.

ORDER DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW; DENYING MOTION FOR NEW TRIAL; AWARDING ATTORNEYS' FEES AND COSTS; and DENYING EX PARTE APPLICATION TO STAY EXECUTION OF JUDGMENT

**JEFFREY T. MILLER**, District Judge.

Defendant Metropolitan Interpreters and Translators, Inc. ("Metropolitan") moves for judgment as a matter of law pursuant to [Fed.R.Civ.P. 50](#), for a new trial pursuant to [Fed.R.Civ.P. 59](#), and to stay execution of the judgment. Plaintiffs Fernando Medina, Eduardo Ruvalcaba, Richard Gonzalez, Francisco Bates, Maria Nielsen, Melany Duran, Lilia Palomino, Elizabeth Sanchez, and Maribel Taylor (collectively "Plaintiffs") oppose both motions and separately move for an award of attorneys' fees and costs. Metropolitan

opposes Plaintiffs' motion. Pursuant to Local Rule 7.1(d) (1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court denies the [Rule 50](#) motion for judgment as a matter of law, denies the [Rule 59](#) motion for new trial, awards Plaintiffs attorneys' fees and \*1174 costs in the amount of \$916,998.37 and \$21,824.15, respectively, and denies the *ex parte* application to stay execution of the judgment as moot.

## BACKGROUND

Following trial by jury, on June 30, 2015, judgment was entered against Metropolitan and in favor of the Plaintiffs in the total amount of \$2,632,000.<sup>1</sup> (Ct. Dkt. 315). The court incorporates by reference the court docket, including this court's October 24, 2014 Order Grant in Part and Denying in Part Motions for Summary Judgment ("Order," Ct. Dkt. 161), and the trial record.

## DISCUSSION

### The Rule 50 Motion

[1] [2] [3] Pursuant to [Fed.R.Civ.P. 50\(b\)](#), Metropolitan renews its motion for judgment as a matter of law. Judgment notwithstanding the verdict is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. See [Gilbrook v. City of Westminster](#), 177 F.3d 839, 864 (9th Cir.1999). The district court must uphold the jury's award if there was any "legally sufficient basis" to support it. [Costa v. Desert Palace, Inc.](#), 299 F.3d 838, 859 (9th Cir.2002). In making that determination, the district court considers all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party. [Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.](#), 762 F.3d 829, 842 (9th Cir.2014). In ruling on the motion, the court may not make any credibility determinations or reweigh the evidence. *Id.*

[4] Metropolitan contends that no reasonable juror could find that (1) Metropolitan caused Plaintiffs any damage and (2) Metropolitan's conduct permitted the consideration of punitive damages. In light of the extensive evidentiary record supporting the jury's findings, these arguments are easily discounted. The jury's determination that Metropolitan facilitated and was a substantial factor in jointly causing Plaintiffs harm is supported by substantial evidence and

provides an adequate legal basis for the imposition of liability. As noted in this court's Order:

Metropolitan, through its employees, facilitated the implementation of the DEA's polygraph examination plan. Metropolitan, who employed about 100 linguists in 2011, notified Plaintiffs of the required polygraph examinations in writing, scheduled the polygraph examinations, and advised the employees of the adverse consequences of not taking the polygraph examinations. Plaintiffs received letters and memos from Metropolitan purporting to explain that the polygraph examinations were legal and that monitors/linguists were required to submit for examination. Once an employee refused to take the polygraph examination or failed the test, the employee was not permitted to continue to work on DEA projects and was terminated. Metropolitan also disclosed the DEA polygraph examination results of its linguists to ICE officials. ICE then terminated access to ICE projects for those employees who failed or refused to take the polygraph examination.

(Ct. Dkt. 160 at p. 5). The trial record is replete with evidence that Metropolitan was Plaintiffs' employer, required Plaintiffs to submit to the polygraphs, rejected \*1175 claims by its employees that the polygraphs violated the Employee Polygraph Protection Act ("EPPA"), [29 U.S.C. §§ 2002\(1\), \(2\), and \(3\)](#) EPPA, misinformed its employees about the polygraphs, scheduled the polygraphs, used the polygraph results to discharge its employees who failed or refused to take the exam, acted jointly and in concert with the DEA in effectuating the polygraphs, and shared the polygraph results with ICE, leading to additional employee firings.<sup>2</sup> Moreover, the Plaintiffs provided substantial evidence of the emotional distress caused by Metropolitan's wrongful discharge of Plaintiffs. In light of the substantial evidence submitted in support of Plaintiffs' claims, the [Rule 50](#) motion fails.

Metropolitan's arguments concerning punitive damages are moot. While the jury determined that Metropolitan did in fact act in reckless disregard of Plaintiffs' rights, the jury ultimately determined not to assess punitive damages. Simply stated, the jury apparently concluded that the degree of reprehensibility associated with Metropolitan's conduct did not justify damages to punish that conduct. As such, Plaintiffs failed to carry their burden to establish punitive damages. Metropolitan simply fails to cite any authority that the denial of a punitive damages award by the jury presents a live controversy. Furthermore, even if not moot, as set forth by Plaintiffs, the evidentiary record demonstrated that "Metropolitan's conduct reflected [a] complete [and reckless] indifference to Plaintiffs' [EPPA] rights." (Oppo. at pp. 9–10).

In sum, the court denies the motion for new trial.

### The Rule 59 Motion

[5] [6] [7] [8] Pursuant to [Rule 59](#), the court may "grant a new trial on all or some of the issues ... after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court..." [Fed.R.Civ.P. 59\(a\) \(1\)](#). "Ultimately, the district court can grant a new trial under [Rule 59](#) on any ground necessary to prevent a miscarriage of justice." [Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.](#), 762 F.3d 829, 842 (9th Cir.2014). A [rule 59](#) motion will only be granted if the verdict "[i]s against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result." [EEOC v. Pape Lift, Inc.](#), 115 F.3d 676, 680 (9th Cir.1997). "Doubts about the correctness of the verdict are not sufficient grounds for a new trial: the trial court must have a firm conviction that the jury has made a mistake." [Landes Const. Co., Inc. v. Royal Bank of Canada](#), 833 F.2d 1365, 1372 (9th Cir.1987). "A jury verdict should be set aside only when the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." [DSPT Int'l, Inc. v. Nahum](#), 624 F.3d 1213, 1218 (9th Cir.2010) (internal quotations and citations omitted).

Metropolitan moves for a new trial on six separate grounds: (1) the emotional distress damages were excessive; (2) Plaintiff's counsel engaged in prejudicial misconduct by referring to Metropolitan's financial condition; (3) the court refused to instruct on Metropolitan's affirmative defenses; (4) this court's summary judgment Order/instruction was erroneous; (5) the jury's damages findings were against the

weight of evidence; and (6) Metropolitan was prejudiced by irrelevant evidence. Each is discussed in turn.

### Excessive Emotional Distress Damages

[9] Metropolitan contends that Plaintiffs, based upon their own representations, \*1176 were limited to "garden variety" emotional distress damages. Metropolitan represents that garden variety emotional distress damages are in the range of about \$5,000–\$30,000, and not the \$200,000–\$500,000 awarded by the jury. This argument is not persuasive for several reasons. First, contrary to Metropolitan's contentions, the term "garden variety" is not a term of art with a specialized legal meaning. "Garden variety" simply means "not unusual: ordinary or common." [Merriam Webster](#) <http://www.merriam-webster.com/dictionary/garden-variety> (last visited October 1, 2015). Jury Instruction No. 20, Measure of Types of Damages, sets forth the scope of emotional distress damages:

"In determining the measure of damages, you should consider past and future: (2) emotional distress such as any inconvenience, grief, anxiety, humiliation, worry, or shame, and which with reasonable probability will be experienced in the future."

Metropolitan does not dispute that the jury was properly instructed on the measure of emotional distress damages nor does it show that the emotional distress damages actually awarded fall outside the scope of Jury Instruction No. 20.

Second, Metropolitan's argument that the amount of emotional distress damages is excessive ignores the evidence of significant, extensive emotional suffering by Plaintiffs, as reflected in evidentiary record, and fails to recognize that Metropolitan engaged in egregious conduct which violated federal law. Moreover, Metropolitan fails to cite any evidence suggesting that any Plaintiff suffered such severe emotional distress to require intensive psychiatric treatment or hospitalization such that an expert on mental health issues would be required for the jury to understand the nature of the emotional distress suffered by Plaintiffs. [See FRE 702](#). The emotional distress damages, as discussed below, are ordinary, commonplace, and thoughtfully and reasonably determined by the jury.

The emotional distress suffered by Plaintiffs fully supports the jury's verdict. Plaintiffs' were wrongfully required to subject themselves to an illegal polygraph, certain Plaintiffs (correctly) informed Metropolitan that the polygraphs violated EPPA, Metropolitan provided erroneous information concerning the polygraphs, and Metropolitan required its employees to take the polygraphs. Metropolitan then discharged the employees who refused to take the exam or failed the exam or imposed other significant adverse employment consequences. From this conduct, Plaintiffs lost their unique and purposeful employment, in which they performed important services for the United States government, and suffered serious diminished quality of life. Plaintiffs provided testimony about the severe emotional distress including, the stress arising from the loss of income, the ability to provide for their families, and loss of meaningful and satisfying work. Furthermore, the evidentiary record demonstrates that Plaintiffs were humiliated because, as discharged employees who failed a polygraph exam, they could be seen by members of the community as having engaged in criminal conduct and shunned by society and prospective employers because of those perceptions. The emotional distress suffered by Plaintiffs is significant and the jury's verdict is amply supported by the evidentiary record.

The court rejects Metropolitan's argument that the emotional distress damages are excessive.

#### *Reference to Metropolitan's Financial Condition*

[10] Metropolitan contends that Plaintiffs' reference to Metropolitan's financial condition during the liability phase of the trial so prejudiced Metropolitan that a new \*1177 trial is warranted. This argument is not persuasive. During the cross examination of Mr. Citrano, Plaintiffs' counsel asked about Metropolitan's business dealings with the DEA and asked about a multi-year contract for hundreds of millions dollars. At this point, the court *sua sponte* stopped the questioning and instructed the jury to disregard any references to specific dollar amounts. Plaintiffs' counsel also made reference to the contract between Metropolitan and DEA as “very large” and “huge.” Metropolitan concludes its argument by noting that the non-economic damages were so large that only improper prejudice can explain the amount of the non-economic damages award.

[11] The court rejects Metropolitan's arguments. The court struck the monetary references in the question and answer and promptly provided two firmly worded limiting instructions, instructing the jury not to consider the financial

evidence in determining liability. “The law presumes that the jury carefully follows the instructions given to it.” *Jadwin v. County of Kern*, 767 F.Supp.2d 1069, 1084 (E.D.Cal.2011). Accordingly, any potential prejudice suffered by Metropolitan was cured by the court's timely action, including its limiting instructions.

In sum, the court rejects Metropolitan's argument that the brief reference to its financial condition caused severe prejudice.

#### *The Affirmative Defense Instructions*

[12] Metropolitan contends that the court erred in not providing jury instructions concerning the affirmative defenses of contractual assumption of the risk, consent, superseding cause, unclean hands, and waiver. As a threshold matter, the court denies this ground for a new trial because Metropolitan, who has the burden to show that the evidentiary record supports the elements of the affirmative defenses, does not cite any evidence supporting the applicability of any of these affirmative defenses. *See United States v. Sparks*, 791 F.3d 1188 (10th Cir.2014) (“To qualify for an affirmative defense jury instruction, a defendant must point to evidence supporting each element of the affirmative defense.”); *United States v. Figueroa-Lugo*, 793 F.3d 179 (1st Cir.2015) Here, without reference to the evidentiary record, the court is unable to assess whether the evidence would support any element of an affirmative defense. Moreover, the court incorporates its reasoning and rulings during jury instruction conferences when those matters were addressed.

In sum, the court rejects Metropolitan's argument that the jury should have been instructed on the affirmative defenses of contractual assumption of the risk, consent, superseding cause, unclean hands, and waiver.

#### *The Summary Judgment Order*

Metropolitan contends that the Order was erroneous because “the evidence showed that Metropolitan's conduct did not constitute any of the statutory violations set forth in EPPA.... [and Metropolitan did] not take adverse employment actions against Plaintiff.” (Motion at p. 17:9–13). Metropolitan also repeatedly argues that the “DEA revoked Plaintiffs' security access, which meant that they could not work in the DEA facility.” (Motion at p. 17 13–14). This argument misconstrues the evidentiary record and minimizes Metropolitan's wrongful conduct. As noted in the Order,

The court grants summary judgment in favor of Plaintiffs and against Metropolitan on whether Metropolitan violated 29 U.S.C. §§ 2002(1), (2) and (3). Plaintiffs come forward with overwhelming evidence to show (1) Metropolitan is the Plaintiffs' employer and (2) Metropolitan required Plaintiffs to submit to or take a polygraph examination, it inquired into \*1178 the results of the polygraph examinations, and Metropolitan discharged employees who failed or refused to take the polygraph examination. *See i.e.* Exh. 24, Metro 2101–02. Such conduct violates 29 U.S.C. §§ 2002(1), (2) and (3). Moreover, Metropolitan does not submit any evidence to rebut or challenge the evidence submitted by Plaintiffs that it, in fact, was Plaintiffs' employer or that it required, inquired into, or discharged Plaintiffs who failed or refused to submit to polygraph examination.

(Order at p. 9:9–19). Metropolitan's wrongful conduct in subjecting its employees to polygraph examination in violation of EPPA provides a private right of action by creating a cause of action for an employee against “an employer who violates [the EPPA] ... for such legal or equitable relief as may be appropriate.” 29 U.S.C. § 2005(c)(1). Contrary to Metropolitan's contentions, the evidentiary trial record overwhelmingly supports, rather than undermines, the grant of summary adjudication on the issue of whether Metropolitan violated EPPA.

In sum, the court rejects Metropolitan's argument that the Order was improvidently granted.

#### *Excessive Damages Award*

Metropolitan contends that the damages awarded to Plaintiffs are excessive because “the evidence demonstrated that the damages were caused by the conduct of the DEA, not Metropolitan.” (Motion at p. 18:5–6). As set forth above,

this skewed view of the evidentiary record minimizes Metropolitan's significant wrongful conduct in subjecting its employees to polygraph examination and ignores its role in the examinations. While Metropolitan views its conduct as mere “technical EPPA violation[s],” the evidentiary record refutes these contentions. These arguments do not directly challenge the amount of damages awarded. Rather, Metropolitan argues that it is an innocent party and continues to lay blame at the foot of the DEA for the discharge of Plaintiffs. The court rejects these contentions.

Here, Metropolitan was under a duty imposed by EPPA to *not* polygraph its employees. *See* 29 U.S.C. §§ 2002(1), (2) and (3). Causation and the amount of emotional distress injuries and damages is a question of fact determined by the jury based upon the admissible evidence presented at trial. Here, based upon applicable legal authorities and the evidentiary record, the damages awarded are not excessive and merely compensate Plaintiffs for the harm caused by Metropolitan.

In sum, the court rejects Metropolitan's argument that the damages awarded are excessive.

#### *Irrelevant Evidence*

Metropolitan contends that it was prejudiced by irrelevant evidence related to Plaintiffs' fraud cause of action which was later dismissed by Plaintiffs. Metropolitan's failure to cite any prejudicial and irrelevant evidence is fatal to this argument. Metropolitan fails to show that the unidentified evidenced (1) did not have some relevance to the EPPA or state law claims or (2) caused Metropolitan any unfair prejudice. Under these circumstances, the court rejects Metropolitan's argument that it suffered undue prejudice by irrelevant evidence.

In conclusion, the court denies the motion for new trial.

#### **Attorneys' Fees**

[13] [14] Plaintiffs request an award of attorneys' fees in the amount of \$1,222,664.50 and litigation expenses of \$21,824.15. The parties do not dispute that the court may award the prevailing party “reasonable costs, including attorney's fees.” 29 U.S.C. § 2005(c)(3). The amount of the prevailing party's reasonable \*1179 attorney fees is determined by using the lodestar method. *See Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir.2008). The lodestar is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. *See*



*Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir.2008).

[15] [16] “Although in most cases, the lodestar figure is presumptively a reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it.” *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n. 4 (9th Cir.2001). These factors include (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other 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. See *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975).

In this case, Plaintiffs seek to be compensated for attorneys' fees consisting of fees for Eugene Iredale (846.3 hours at \$850 per hour), Julia Yoo (523.7 hours at \$625 per hour), and Grace Jun (596.6 hours at \$295 per hour) for a total of \$1,222,664.50, in addition to expenses of \$21,824.15.

#### *The Hourly Rates*

[17] [18] The fee applicant bears the burden of producing 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, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The relevant community is the forum in which the district court sits. See *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir.1997). Comparable cases are those of “similar complexity.” *Davis v. City & Cnty. of San Francisco*, 976 F.2d 1536, 1545 (9th Cir.1992), *vacated in part on other grounds on denial of reh'g*, 984 F.2d 345 (9th Cir.1993).

[19] Here, Iredale, Yoo, and Jun seek to be compensated at the hourly rates of \$850, \$625, and \$295 per hour, respectively. The court finds these hourly rates reasonable under the circumstances. Plaintiffs' attorneys include their own declarations substantiating their education and experience, as well as four declarations from attorneys in the community with similar skills, experiences, and reputations. These declarations, as well as the declaration of Carol Sobel, and the authorities cited by Plaintiffs, establish

that the requested rates are in line with the fees of similarly situated attorneys. Moreover, Metropolitan does not oppose the hourly rates of counsel.

In sum, the court finds the proposed hourly rates reasonable under the circumstances.

#### *Hours Reasonably Expended*

[20] [21] “The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir.1992). The opposing party then has the burden of submitting evidence that challenges the accuracy or reasonableness of the hours charged or the facts asserted by the prevailing party in its affidavits. *Id.* at 1397–98.

\*1180 [22] “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.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir.2008). However, courts may reduce the allowable hours if they are inadequately documented, duplicative, excessive, or otherwise unnecessary. See *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir.1986), *amended on other grounds*, 808 F.2d 1373 (9th Cir.1987).

In large part, Metropolitan does not challenge the total amount of time spent by Plaintiffs' counsel in prosecuting this action. Metropolitan does assert that Plaintiffs engaged in “block-billed time entries.” Block billing is described as a time-keeping method in which an attorney enters the time working on a case rather than specifically itemizing the time spent on specific tasks. See *Welch v. Met. Life Ins. Co.*, 480 F.3d 942, 945 n. 2 (9th Cir.2007). The court notes that Plaintiffs' counsel have submitted approximately 51 pages of detailed billing records identifying the activity performed by counsel and the time spent on that activity. The only challenged so-called “block entry” identified by Metropolitan is an entry on February 28, 2015 for 5.5 hours. The description states: “Trial preparation meeting with Richard, Maria and Francisco.” (Ct. Dkt. P. 28). The court concludes that this is not a “block entry” because it identifies that counsel met with three of the Plaintiffs to discuss trial related matters. This entry, in combination with counsel's other detailed entries, is sufficient to substantiate counsel's time and the work performed on this activity.

In sum, the court finds that the requested hours were reasonably expended.

#### *Adjustments*

[23] Metropolitan seeks a downward adjustment of 90% to the lodestar amount based upon its perception of the limited success obtained by Plaintiffs' counsel. Metropolitan contends that Plaintiffs prevailed on only one of ten claims (the EPPA claim) against only one of eight defendants thereby warranting a 90% reduction in the requested fees. This argument is not persuasive.

There is a strong presumption that the lodestar figure represents a reasonable fee. *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir.1990). In determining the reasonableness of any fee award, the court considers all relevant circumstances, including the 12 factors identified in *Kerr*. Applying the *Kerr* factors, the court concludes that a 25% reduction in the fee request is appropriate in light of the degree of success of the overall litigation.

As noted in *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the court may adjust the lodestar amount based upon several factors, including the degree of success achieved by the prevailing party. Applying the factors identified in *Hensley* and *Kerr*, the court reduces the lodestar amount by 25%. The court notes that the distribution of labor, as reflected in the time records, does not demonstrate the most efficient use of the time of Iredale, Yoo, and Jun. For example, many of the tasks performed by Mr. Iredale at \$850 per hour could be reasonably performed at a lower partner or associate hourly rate, particularly with respect to the amount of client communication time, drafting the complaints, responses to motions to dismiss, responses to the summary judgment, and discovery related matters. (Plaintiffs Exh. 12). The court notes that the arguments and issues raised in these documents are not particularly \*1181 complex from either a factual or legal perspective such that the extensive use of a senior partner is warranted under the circumstances.

Another factor warranting an adjustment is the degree of success achieved by counsel. The original complaint alleged ten causes of action against six defendants. (Ct. Dkt. 1). The second amended complaint alleged nine cause of action against the same six defendants, and five DEA related defendants. Plaintiffs alleged three EPPA claims and six state law claims for civil conspiracy, fraud, negligent misrepresentation, intentional infliction of emotional distress, negligence, and declaratory relief. In addition, Plaintiffs

sought an award of punitive damages. The court notes that Plaintiffs spent substantial time litigating claims against parties who were ultimately dismissed from the action.

In the October 24, 2014 Order, (Ct. Dkt. 161), entered about six months prior to trial, Plaintiffs established that Metropolitan violated EPPA. Following the entry of summary judgment against Metropolitan on this portion of Plaintiffs' EPPA claims, Plaintiffs continued to conduct discovery and prepare for trial. At trial, Plaintiffs submitted evidence in support of their state law claims. While some evidentiary overlap exists, the court notes that much of the time spent in the pursuit of the state law claims never bore fruit because, after the parties expended substantial time and resources pursuing state laws claims both at trial and pre-trial, Plaintiffs dismissed all state law claims and all individual defendants prior to jury deliberation.

Finally, an adjustment to the lodestar is appropriate because Plaintiffs did not prevail on their claim for an award for punitive damages even though substantial discovery and trial time was dedicated to the pursuit of punitive damages. Further, the court notes that the reduced lodestar amount is consistent with a one third contingency attorneys' fee award.<sup>3</sup>

In sum, the court awards Plaintiffs' counsel \$916,998.37 (\$1,222,664.50 times .75) in attorneys' fees and costs of \$21,824.15.<sup>4</sup>

#### **Motion to Stay Execution of Judgment**

Metropolitan moves *ex parte* to stay execution of the judgment pending resolution of the post-trial motions and through appeal. The court denies the motion to stay as moot in light of the present order. With respect to a stay of execution pending appeal, the motion is denied until Metropolitan posts an appropriate supersedeas bond. See Fed.R.Civ.P. 62(d).

#### **CONCLUSION**

In conclusion, the court denies the Rule 50 motion for judgment notwithstanding the verdict, denies the Rule 59 motion for new trial, awards attorneys' fees and costs in the amount of \$916,998.37 and \$21,824.15, respectively, and denies the *ex parte* application to stay execution of the judgment.

**IT IS SO ORDERED.**

**All Citations**

139 F.Supp.3d 1170, 2015 IER Cases 336,643

**Footnotes**

- 1 This amount reflects the jury verdict after apportionment. The jury returned a total verdict of \$4,032,000.
- 2 In several instances, Metropolitan deprived employees of the opportunity to continue working on DEA cases due to revoked security clearances following a failed or refused exam.
- 3 In relation to the DEA settlement, Plaintiffs represented that one third of the settlement would be distributed to counsel pursuant to the client fee agreement. A one third attorneys' fee award on the present record would amount to \$877,333 (\$2,632,000 times one third).
- 4 The court finds that the costs requested are reasonable and of the type that are typically billed to fee paying clients. While Metropolitan argues that Plaintiffs fail to show that certain Office Depot and Office Max expenses were incurred in this litigation, the court accepts counsels' declarations as officers of the court that the expenses were incurred in this litigation.

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