**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**SOUTHERN DIVISION**

**EARL DURHAM,**
**Plaintiff,**
**vs.**

**AETNA LIFE INSURANCE COMPANY; and DOES 1 through 10, inclusive,**
**Defendant.**

**Case No.: 8:19-cv-01494-DOC-DFM**

**ORDER GRANTING IN PART MOTION FOR ATTORNEYS' FEES, INTEREST, AND COSTS**

Before the Court is Plaintiff Earl Durham's ("Durham" or "Plaintiff") Motion for Attorney's Fees and Costs ("Motion") (Dkt. 26). The Court finds this matter appropriate for resolution without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. Having reviewed the moving papers and considered the parties' arguments, the Court **GRANTS IN PART** Plaintiff's Motion.

## I. BACKGROUND

This case arises out of events related to Durham's action "to recover benefits and to enforce and clarify his rights under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B)." Complaint ("Compl.") (Dkt. 1) ¶ 1. On October 25, 2019, Plaintiff filed a Notice of Settlement (Dkt. 24), and, on November 25, 2019, this Court dismissed the case (Dkt. 25). Plaintiff now seeks to recover attorneys' fees and costs under 29 § U.S.C. 1132(g)(1). *See generally* Mot.

### A. FACTS

Durham was formerly employed by HomeBridge Financial Services, Inc. ("HomeBridge"). Compl. ¶ 3. HomeBridge had established an ERISA-governed employee welfare benefit plan (the "Plan") that provided long-term-disability ("LTD") benefits to participants, including Durham. *Id.* ¶ 3–4. Defendant Aetna Life Insurance Company ("Aetna" or "Defendant") administered the LTD benefits for Plan participants, and it "acted as a claims administrator and as an ERISA claims fiduciary of the Plan." *Id.* ¶ 4. On April 7, 2015, Durham "stopped working due to complications with his liver" and "became disabled as defined by the Plan." Opposition to Motion for Attorneys' Fees and Costs ("Opp'n") (Dkt. 30) at 4:1–4:3. The Plan had an Alcohol Abuse Limitation (the "Limitation") that limited the availability of LTD benefits to 24 months. *Id.* at 4:9–4:12. Aetna decided that the Limitation applied to Durham, and then cut his benefits. *Id.* In turn, Durham brought this ERISA action (the "Action") to seek further payment. *See generally* Compl. Ultimately, the parties settled the claim when Aetna decided to fully

"reinstate Plaintiff's LTD claim under the Plan, issue payment for past due benefits to bring the LTD claim under the Plan, issue payment for past due benefits to bring the LTD claim current and continue to pay benefits . . . . " Opp'n at 5:26–6:3.

McKennon Law Group PC ("MLG") represented Durham in the Action. *See generally* Mot. Managing shareholder Robert McKennon ("McKennon"), and two associates, Andrea Soliz ("Soliz") and Nicholas West ("West"), worked on the matter. *Id.* at 16:23–16:25. On August 2, 2019, MLG filed the Complaint (Dkt. 1). Defendant Aetna filed an Answer on September 16, 2019 (Dkt. 16). After a "telephonic Rule 26(f) conference of counsel[,] Aetna's counsel drafted the Rule 26(f) joint report and sent it to Plaintiff's counsel for their input." Opp'n at 5:18–5:21. On September 19, 2019, MLG returned the joint report with some proposed edits, which Aetna's counsel accepted. *Id.* at 5:21–5:23. MLG then "filed the joint report with no further changes on September 20, 2019." *Id.* at 5:23–5:25. And, on October 11, 2019, Aetna's counsel notified MLG that it would "reinstate Plaintiff's LTD claim under the Plan, issue payment for past due benefits to bring the LTD claim under the Plan, issue payment for past due benefits to bring the LTD claim current and continue to pay benefits . . . . " *Id.* at 5:26–6:3. The parties then filed a Notice of Settlement, and this Court dismissed the Action on October 25, 2019. *Id.* at 6:4–6:6. That same day, Plaintiff "communicated a demand to settle his claim for attorneys' fees and costs." *Id.* at 6:7–6:10. Aetna offered $35,000 to settle the claim, but the fees claim was not resolved, and this Motion followed. *Id.*

Plaintiff requests attorneys' fees in the amount of $125,485.25 ($112,090.25 for fees and costs at the time of the Motion, $13,080 to prepare the Reply, and $315.00 "for other miscellaneous post-Motion work"). Response in Support of Notice of Motion and Motion ("Reply") (Dkt. 33) at 20. MLG had originally billed Aetna for 197.90 hours, for a total of $111,510. Detail Fee Transaction File List ("Fee Report") (Dkt. 26) Ex. 6 at 5; Opp'n at 12:12–12:14. MLG's hourly rates were "$750 for Mr. McKennon, $525 for Ms. Soliz and $375 for Mr. West[.]" Mot. at 2:18–2:19; *see generally* Fee Report Ex. 6.

Aetna's general position is that: (1) certain categories of fees in the Fee Report are outside the scope of ERISA and, thus, they cannot be recovered; (2) Aetna made a reasonable offer to pay MLG's attorney's fees, $35,000, and, thus, any work done after the rejection of that reasonable offer is not recoverable; and (3) MLG's billings are inflated because the litigation lasted for only two months, and the expended hours are unreasonably excessive in light of tasks involved and the level of expertise implied by MLG's "premium" hourly rates. *See generally* Opp'n. Plaintiff generally maintains that: (1) he is entitled to reasonable attorney's fees; (2) the fees he incurred are within ERISA's scope; (3) MLG's reasonable hourly rates are in-line with the rates of similar practitioners; (4) MLG spent a reasonable amount of time on necessary tasks; and (5) he is entitled to recover certain costs and prejudgment interest. *See generally* Mot; Reply.

### B. PROCEDURAL HISTORY

On November 25, 2019, Plaintiff filed his Motion, seeking recovery of $125,290.25, plus interest, in attorneys' fees and costs under 29 U.S.C. § 1132(g)(1) of ERISA. Mot. at 25:19–25:21. On December 16, 2019, Defendant filed an Opposition. On December 23, 2019, Plaintiff filed his Reply, requesting a revised sum of $125,485.25.

## II. LEGAL STANDARD

### A. REASONABLE ATTORNEY'S FEES ARE AVAILABLE TO ELIGIBLE FEE CLAIMANTS UNDER 29 U.S.C. § 1132(G)(1)

ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). But, before a court can exercise this discretion, the fee claimant must establish that she is eligible to recover fees under this section. A fee claimant is eligible for attorney's fees if she achieved "some degree of success on the merits" of her claim. *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242, 245 (2010) (citing *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)). Next, "before exercising their discretion to award fees under § 1132(g)(1)," the Ninth Circuit requires district courts to look to five factors, as discussed below, to

determine that an award in that particular circumstance is appropriate. *Simonia v. Glendale Nissan/Infiniti Disability Plan*, 608 F.3d 1118, 1121 (9th Cir. 2010).

The Court may exercise its discretion to award reasonable attorney's fees under 29 U.S.C. § 1132(g)(1) if (1) claimant reached some degree of success on the merits, and (2) the factors weigh in favor of an award. *Id.* As analyzed below, Durham reached some degree success on the merits when Aetna gave Durham the benefits that he requested. A fee award is appropriate because Aetna has the ability to satisfy the award, Aetna concedes that Durham is entitled to reasonable fees, and Durham successfully litigated his claim. Therefore, because both conditions have been satisfied, the Court will exercise its discretion to award reasonable fees under § 1132(g)(1).

**1. Some Degree of Success on the Merits**

A claimant reaches "some degree of success on the merits" if the court "can fairly call the outcome of the litigation some success . . . without conducting a lengthy inquir[y] into the question whether a particular [claimant's] success was substantial or occurred on a central issue." *Harlow v. Metro. Life Ins. Co.*, 379 F. Supp. 3d 1046, 1052 (C.D. Cal. 2019) (quoting *Hardt*, 560 U.S. at 255). This showing requires more than just a "'trivial success on the merits' or a 'purely procedural victor[y].'" *Id.*; *see also Barnes v. AT&T Pension Benefit Plan*, 963 F. Supp. 2d 950, 960 (N.D. Cal. 2013) ("Procedural victories are those a party obtains in the course of the litigation but that do not result in any success on the litigated claim itself." (quoting *Olds v. Ret. Plan of Int'l Paper Co.*, 2011 WL 2160264, at *3 (S.D. Ala. June 1, 2011))).

Aetna concedes that Durham is entitled to reasonable attorneys' fees. Opp'n at 2:14–15. Durham had some degree of success on the merits of the Action. Aetna ultimately "reinstate[d] Plaintiff's LTD claim under the Plan, issue[d] payment for past due benefits to bring the LTD claim under the Plan, issue[d] payment for past due benefits to bring the LTD claim current and continue[d] to pay benefits . . . . " Opp'n at 5:26–6:3; *Cf. Taaffe v. Life Ins. Co. of N. Am.*, 769 F. Supp. 2d 530, 540–41 (S.D.N.Y.

2011) (finding that claimant, through a settlement agreement, achieved "more than some success on the merits" because insurer "provided her with everything she demanded in her complaint"). Durham litigated his claim and caused Aetna to reconsider its position and grant him his benefits, thereby obtaining full relief through a settlement.

The Court finds that Durham achieved "some degree of success on the merits." *Hardt*, 560 U.S. at 245.

**2. The *Hummell* Factors**

Next, and "before exercising their discretion to award fees under § 1132(g)(1)," a district court must look to five factors in determining whether an award is appropriate. *Simonia*, 608 F.3d at 1121. These factors, the *Hummell* factors, are:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

*Id; Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980). No single factor is determinative. *Simonia*, 608 F.3d at 1122.

**Culpability or bad faith**

There is no evidence that Aetna acted in bad faith when denying Durham's LTD benefits. MLG argues, in part, that Aetna's bad faith in denying these benefits is "evidenced by the fact that it has now reinstated them." Mot. at 8:3. However, the mere fact that Aetna denied benefits and later reinstated them is not sufficient evidence of bad faith, and bad faith cannot be presumed on this basis alone. *Rangel v. Aetna Life Ins. Co.*, 2016 WL 1449539, at *2 (C.D. Cal. Apr. 12, 2016); *see also Sun Life Assurance Co. of Can. v. Jackson*, 2018 WL 4489289, at *3 (S.D. Ohio Sept. 19, 2018) (defining bath faith as "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty"); *Gurasich v. IBM Ret. Plan*, 2016 WL 3683044, at *4 (N.D.

Cal. July 12, 2016) (defining culpability as a failure to satisfy a legal duty to another and finding that it is "sufficient to support award of fees") (first citing *Smith v. Cmta-Iam Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984) ("Although bad faith is a factor that would always justify an award, it is not required."); then citing *Caplan v. CNA Fin. Corp.*, 573 F. Supp. 2d 1244, 1248 (N.D. Cal. 2008); and then citing *King v. Cigna Corp.*, 2007 WL 4365504, at *2 (N.D. Cal. Dec. 13, 2007) ("[F]rom a legal perspective, Defendants are 'culpable' in that they were found to owe Plaintiff a legal duty that they were not fulfilling")).

**Ability to satisfy an award**

The second factor, Aetna's ability to satisfy a fees award, is relevant. "[A]t least as to a suit involving an ERISA beneficiary as a plaintiff, a defendant[ ]'s ability to pay should weigh strongly in favor of an award of fees." *Micha v. Sun Life Assurance of Canada, Inc.*, 874 F.3d 1052, 1058 (9th Cir. 2017) (citing *Smith v. Cmta-Iam Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984)); *see Mardirossian*, 457 F. Supp. 2d 1038, 1045 (C.D. Cal. 2006) ("Based on this factor alone, absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily receive attorney's fees from the defendant." (quoting *Smith*, 746 F.2d at 590)). This factor weighs in favor of Durham because Aetna concedes that he is entitled to reasonable fees and, further, "does not dispute its ability to satisfy a fee award," *Micha*, 874 F.3d at 1058. Further, there are no special circumstances indicating that a fee should not be awarded. Thus, the Court finds that the second factor weighs heavily in favor of an award.

**Deterrence of similar behavior**

The third factor asks whether the awarding of fees in this case would deter future violations of ERISA. *Gurasich*, 2016 WL 3683044, at *3 (first citing *Caplan*, 573 F. Supp. 2d at 1247 ("[A]n award of attorneys' fees could serve to deter other plan administrators from denying meritorious disability claims. This could indirectly benefit other individuals."); and then citing *Carpenters S. Cal. Admin. Corp. v. Russell*, 726

F.2d 1410, 1416 (9th Cir. 1984) ("If defendant employers face the prospect of paying attorney's fees for successful plaintiffs, they will have added incentive to comply with ERISA.")). This factor weighs slightly in favor of awarding fees. Though the case was settled, the settlement indicates that the Plaintiff had at least a colorable argument for benefits. Therefore, payment of attorneys' fees in this instance would add an "incentive [for the Defendant] to comply with ERISA" moving forward. *Russell*, 726 F.2d at 1416.

**Significance of legal issue or benefit to plan participants**

The fourth factor weighs in favor of an award when a claimant benefits other plan participants or the plan as a whole. *Mardirossian*, 457 F. Supp. 2d at 1045. A claimant provides such benefit(s) when her action "assist[s] plan fiduciaries to some degree in their future administration of plan benefits," or clarifies the terms of the plan "by settling a disputed provision or an ambiguity." *Id.* (quoting *Smith* 746 F.2d at 590). This factor is inapplicable to the instant case.

**Relative merits of the parties' positions**

The fifth factor is met when an ERISA plaintiff "receives what [s]he . . . sued for by way of voluntary settlement." *Smith*, 746 F.2d at 590. "[T]he relative merits of the parties' positions, is, in the final analysis, the result obtained by the plaintiff." *Id.* Durham obtained full relief by way of settlement. The Court finds that the fifth factor weighs in favor of an award.

**3. If Claimant Achieved Some Degree Of Success On The Merits And The *Hummell* Factors Weigh In Favor Of An Award, Then The Court May Exercise Its Discretion Under § 1132(g)(1).**

Therefore, because Plaintiff obtained some degree of success on the merits, and because plan participants "should ordinarily recover attorney's fees," a balancing of the *Hummell* factors leads to the conclusion that an award is appropriate. The Court finds that Durham is entitled to attorney's fees.

## B. CLAIMANT'S RECOVERY MUST BE LIMITED TO FEES INCURRED IN CONNECTION WITH AN "ACTION"

Recovery under ERISA is limited to work done in connection with a formal action. *Cann v. Carpenter's Pension Trust Fund for Northern California*, 989 F.2d. 313, 316 (9th Cir. 1993) ("The word 'action' generally designates only proceedings in court, not administrative proceedings even though necessary and valuable."); *Oster v. Standard Ins. Co.*, 768 F. Supp. 2d. 1026, 1037 (N.D. Cal. 2011). Fees "in connection with the exhaustion of administrative procedures" cannot be recovered, but a claimant may request reasonable fees for "reasonable efforts directed toward the filing of the litigation." *Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 987–88 (9th Cir. 2001) (including conferences with clients and drafting of complaint).

On October 2, 2018, "Aetna issued its final claim determination, denying Plaintiff's administrative appeal of the claim determination." Opp'n at 5:7–8. Aetna claims that "counsel did not perform any work in connection with an 'action'" from October 2018 to August 2019 because "[t]here was no litigation pending during that time." *Id.* at 20:20–20:23. However, Aetna agrees that any administrative remedy would already have been exhausted during this time period.

Nevertheless, Aetna takes issue with the fact that MLG is billing for activities—namely preparing the Complaint—five months prior to the actual filing, and it claims that five months was more than enough time to prepare a complaint governed by ERISA. *Id.* at 20:24–21:2. Yet, Aetna agrees that "Plaintiff's counsel will reasonably need to bill time before commencing litigation to draft a complaint." *Id.* Finally, Aetna argues that "[n]one of counsel's time before March 13, 2019 is recoverable." *Id.* at 21:2.

In determining whether a pre-filing billing entry falls within the scope of recovery under ERISA, the question is whether the challenged entry can be characterized as a reasonable effort directed towards the filing of a formal action. *See Cann*, 989 F.2d at 315. For example, "[t]ime spent researching and drafting the complaint . . . is 'properly

considered as part of the litigation in the District Court, even though it occurred prior to filing." *Colby v. Assurant Employee* Benefits, 635 F. Supp. 2d 88, 100 (D. Mass. 2009) (first quoting *Hahnemann Univ. Hosp. v. All Shore, Inc.*, 514 F.3d 300, 314 n.10 (3d Cir. 2008); and then citing *Peterson v. Continental Cas. Co.*, 282 F.3d 112, 121 n.5 (2d Cir. 2002) (holding that plaintiff may "collect a reasonable amount for fees and costs incurred in initiating a suit in the District Court")). Reviewing the administrative record after Durham's administrative remedies had been exhausted, drafting the complaint, and conducting due diligence by researching the Limitation and claims handling guidelines, which form the basis of the Complaint, are categories of work that Durham is entitled to recover for.

It does not necessarily follow that the drafting of the Complaint is unreasonable, or otherwise outside the permissible scope of recovery, merely because the first entry (for drafting of complaint) predates the actual filing by five months. Further, there is no precedent supporting the argument that fees are not recoverable for work done prior to the first entry for the drafting of the Complaint. And, to argue that MLG spent too much time drafting the Complaint presumes, rightly so, that MLG is entitled to recover for that category of work in the first place.

*Cann* sets forth the analysis for the *type* of work that is recoverable under ERISA once it has been determined that a claimant can generally recover under ERISA in the first place. For example, to exclude hours from October 2018 to August 2019 on the basis that "[t]here was no litigation pending during that time," Aetna must successfully argue that a specific undertaking was not in connection to the Action. To do this, Aetna could argue, for example, that the work was done at the administrative phase or that the work in question was not "in direct pursuance of the instant litigation." *See Colby*, 635 F. Supp. 2d at 100 (limiting recovery of pre-litigation fees to "only those fees and costs accrued in *direct pursuance* of the instant litigation") (emphasis added). Instead, it argues that a wide range of fees must be excluded because MLG spent an unreasonable

amount of time drafting the complaint and billed for work that was done far in advance of the initial filing, claiming, without support, that no litigation was pending.

On October 2, 2018, "Aetna issued its final claim determination, denying Plaintiff's administrative appeal of the claim determination." Opp'n at 5:7–8. Therefore, because any work done after that final claim denial is necessarily not in connection to the exhaustion of Durham's administrative remedies, and because MLG's pre-filing efforts were in direct pursuance of the Action, the Court finds that Aetna's arguments fail and MLG may recover *reasonable* fees for these efforts.

### C. WHETHER FEES ARE BARRED AFTER A "REASONABLE OFFER" IS MADE

Defendant Aetna asserts that "[t]he Court should not award fees charged by counsel after October 30, 2019 when Aetna made a reasonable offer to settle the fees claim." Opp'n at 21. Aetna believes that $35,000 was a reasonable settlement offer. *Id.*

Aetna proposes an unsupported rule, that a reasonable offer precludes recovery of fees for any subsequent work. *See, e.g.*, *Harlow*, 379 F. Supp. 3d at 1058 ("The Court will not hamstring plaintiffs and their attorneys into accepting compromise offers by using such offers to preclude recovery of fees incurred to vindicate a plaintiff's entitlement to reasonable fees."); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("It remains for the district court to determine what fee is 'reasonable.'"). Further, $35,000 is not a reasonable offer in this case. *Cf. Harlow*, 379 F. Supp. 3d at 1058 (rejecting argument that an offer to pay 93% of fees renders fees motion unreasonable).

Therefore, because Aetna's argument is unsupported by precedent, and because $35,000 is not an otherwise reasonable offer, the Court finds that Durham may recover those fees that were incurred after the October 30, 2019 offer was made.

### D. A REASONABLE FEE CONSISTS OF REASONABLE (1) HOURLY RATES AND (2) REASONABLE TIME EXPENDITURES

After determining that Durham is entitled to recover reasonable fees, the Court must determine whether the requested fee is reasonable. *Hensley*, 461 U.S. at 433. To calculate the appropriate award for reasonable attorney's fees in ERISA cases, the Ninth Circuit uses a two-step lodestar/multiplier method. *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (citing *Hensley* 461 U.S. at 424). First, a district court "determines the 'lodestar' amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Id.* Then, a multiplier may be used to make upwards or downwards adjustments of the lodestar amount. *Id.*

The burden is on the claimant to "submit evidence supporting the hours worked and the rates claimed." *Id.* After the claimant submits sufficient evidence, "the party opposing the fees has a 'burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.'" *Gurasich v. IBM Ret. Plan*, 2016 WL 3683044, at *6 (N.D. Cal. July 12, 2016) (quoting *Gates v. Duekmejian*, 987 F.2d 1392, 1397–98 (9th Cir. 1992)). The opposing party meets this burden only if it makes *specific* objections to the requested fee. *Cancio v. Fin. Credit Network, Inc.*, 2005 WL 1629809, at *5 (N.D. Cal. July 6, 2005) (citing *Gates*, 987 F.2d at 1404). "Conclusory and unsubstantiated objections are not sufficient to warrant a reduction in fees." *Id.* at *3 (quoting *Lucas v. White*, 63 F. Supp. 2d 1046, 1057–58 (N.D. Cal. 1999)). The following explanation from the Third Circuit is illustrative:

> Turning to the required level of detail, we emphasize that the adverse party's submissions cannot merely allege in general terms that the time spent was excessive. In order to be sufficient, the briefs or answers challenging the fee request must be clear in two respects. First, they must generally identify the type of work being challenged, and second, they must specifically state the adverse party's grounds for contending that the hours claimed in that area are unreasonable. The briefs must be specific and clear enough that the fee applicants have a fair chance to respond and defend their request.

*Bell v. United Princeton Properties, Inc.*, 884 F.2d 713, 720 (3d Cir. 1989). However, while a district court must explain with specificity its reasons for making a fee reduction, it may "impose a small reduction, no greater than 10 percent—a 'haircut'—based on its exercise of discretion and without a more specific explanation." *Gurasich*, 2016 WL 3683044, at *5 (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)) (internal quotation marks omitted).

**1. Reasonableness of Hourly Rate**

An hourly rate is reasonable if it is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Mardirossian v. Guardian Life Ins. Co. of Am.*, 457 F. Supp. 2d 1038 (C.D. Cal. 2006) (citing *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)); *Gates*, 987 F.2d at 1405 (noting that the relevant community is typically that of the forum district). The reasonableness of a rate "may be established by attorney declarations or prior court orders." *Harlow*, 379 F. Supp. 3d at 1053. Once the claimant meets their burden, and absent evidence to the contrary, "the court must presume that those requested rates are reasonable." *Welch v. Metro Life Ins. Co.*, 480 F.3d 942, 947 (9th Cir. 2007) (citing *United Steelworkers of Am. V. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)).

**Robert McKennon**

Robert McKennon ("McKennon") is the Managing Shareholder of McKennon Law Group PC, and he is "one of the attorneys at this firm with primary responsibility for handling this case on behalf of Plaintiff." Declaration of Robert J. McKennon ("McKennon Decl.") (Dkt. 26) ¶ 1. His regularly hourly rate is $750. *Id.* ¶ 11. McKennon has practiced law since 1986 and has spent most of that time "litigating insurance bad-faith cases involving life, health and disability insurance, and ERISA-regulated group disability, life and health insurance claims." *Id.* ¶ 2. McKennon has "over 30 years of ERISA experience." Mot. at 22:22. Not only does McKennon have significant experience

litigating ERISA matters on behalf of claimants, but, for the first twenty-four years of his practice, he also represented insurers, ERISA plan and claim administrators and fiduciaries. McKennon Decl. ¶ 3. Further, McKennon is recognized as a prominent insurance/ERISA attorney, has received numerous recognitions, and served as a guest speaker at various functions concerning ERISA issues. *See generally id*.

**Andrea Soliz**

Andrea Soliz ("Soliz") is an associate attorney at MLG. Declaration of Andrea Soliz Declaration ("Soliz Decl.") (Dkt. 26) ¶ 1. She regularly bills at a rate of $525 per hour. *Id.* ¶ 9. Soliz is "the attorney with daily responsibility for the *Durham* case," and she has "been involved as one of the lead attorneys for Mr. Durham in this action since March 2019." *Id.* ¶ 7. Soliz "was admitted to the California State Bar in June 2006 and ha[s] practiced law since that time," and she has "spent approximately 12 years handling person injury civil litigation matters, immigration law matters and criminal cases." *Id.* ¶ 2. In 2018, she joined MLG and has mainly handled ERISA disputes ever since. *Id.* ¶ 3. As part of her responsibilities, she also regularly writes about ERISA issues on the firm's blog. *Id.* ¶ 4.

**Nicholas West**

Nicholas West ("West") is an associate attorney at MLG, and he has "over one year's experience involving ERISA matters and an additional three years' legal experience that includes two years as a federal judicial law clerk." Mot. at 16:28–17:2 (citing McKennon Decl. ¶ 30 and Soliz Decl. ¶¶ 2–3). His hourly rate is $375. Mot. at 21:9. West "graduated with 'high honors' from The George Washington University Law School in 2015," and he was admitted to the California State Bar in 2016. *Id.* at 20:20–20:24. After his clerkship, "he spent one year addressing insurance matters, employment disputes and business litigation before joining the McKennon Law Group in May 2018." *Id.* at 20:24–20:26. At MLG, "he has worked on numerous ERISA matters." *Id.* at 30:1.

Here, Plaintiff submits prior court orders and declarations in support of the requested hourly rate. *See, e.g.*, Mot. at 19:15 (citing *Reddick v. Metro. Life Ins. Co.*, 2018 WL 637938, at *4–5 (S.D. Cal. Jan. 31, 2018) (awarding McKennon $700 hourly rate)); McKennon Decl. Ex. 2, *Cinader v. Life Ins. Co. of N. Am. Order* ("Cinader Order") at 4 (awarding McKennon full rate of $650 per hour in 2013, noting that claimant's unrebutted affidavits were enough to establish hourly rates for given market); *Leetzow v. Metro. Life Ins. Co.*, 2017 WL 1231719, at *3 (C.D. Cal. Mar. 3, 2017) (approving $600 hourly rate for attorney with 11 years of experience who focused primarily on disability insurance litigation); Declaration of Glenn R. Kantor ("Kantor Decl.") (Dkt. 26) Ex. A ¶ 8 (declaring that hourly rate for ERISA partner was $700 in 2017); Declaration of Scott E. Calvert ("Calvert Decl.") (Dkt. 26) Ex. B ¶ 8 (declaring that his current hourly rate as a senior attorney is $700). *But see Evans v. Sun Life & Health Ins. Co.*, 2013 WL 12077817, at *5 (C.D. Cal. Mar. 22, 2013), *aff'd*, 601 F. App'x 497 (9th Cir. 2015) (reducing McKennon's hourly rate in 2013 from $650 to $600 because previous courts, based on MLG's submitted orders, had only awarded him up to $600).

Defendant Aetna raises no specific objection to the hourly rates of MLG, nor does it assert that MLG's rates are not "in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." Moreover, Aetna submits no evidence regarding the hourly rates of similar attorneys, nor does it challenge the accuracy of MLG's submissions. As such, Plaintiff's unrebutted evidence, if sufficient, will set forth a presumptively reasonable rate. *Welch*, 480 F.3d at 947.

Plaintiff asserts that the requested rates, which "reflect the 2018-2019 rates charged by [his] counsel, are consistent with the rising costs associated with the practice of law, the risk assumed by [his] counsel in taking this matter on a pure contingency basis and the experience of [his] counsel." Mot. at 17:4–17:8 (citing McKennon Decl. ¶¶ 11, 29). As a preliminary matter, MLG cannot inflate its hourly rate or enhance its fee on

the basis that it accepted the case on a contingency basis. *Welch*, 480 F.3d at 947. Nor can this Court properly take that contingency-fee arrangement into account. *Id.* However, Plaintiff does assert that his "counsel has worked without any compensation since September 2017." Mot. at 17:9–17:10. And, "[d]istrict courts have the discretion to compensate plaintiff's attorneys for a delay in payment by either applying the attorneys' current rates all hours billed during the course of the litigation or using the attorneys' historical rates and adding a prime rate enhancement." *Welch*, 480 F.3d at 947. Thus, to the extent that it seeks a higher rate on the basis that Durham's matter was taken on a contingency basis, MLG's request must be denied.

The highest rate that has been approved for McKennon is $700. *Reddick*, 2018 WL 637938, at *4–5. Plaintiff also cites to a case from this district in which an hourly rate of $860 was approved "for a partner with 27 years' ERISA experience, five years' less ERISA experience than Mr. McKennon has, calling that rate 'typical in this district' for an attorney with that experience." Mot. at 20:2–20:6 (citing *Plan Board of Sunkist v. Harding & Leggett, Inc.*, 2011 WL 13205768, at *3 (C.D. Cal. Aug. 30, 2011)).

Based on prior court orders and Plaintiff's submissions, the Court finds that $750 is a reasonable hourly rate for McKennon.

In *Reddick*, a rate of $550 was approved for an MLG attorney with 21 years of legal experience and over 14 years of experience in insurance litigation, including ERISA. 2018 WL 637938, at *4. Moreover, in *Leetzow*, an hourly rate of $600 was approved for an attorney with 11 years of experience that focused primarily on insurance disability litigation. 2017 WL 1231719, at *3. As compared to the attorneys in *Leetzow* and *Reddick*, Soliz's hourly rate properly reflects her skill, experience, and reputation. Moreover, Kantor's declaration provides a range of $500-$600 for hourly rates of senior associates. Kantor Decl. ¶¶ 6, 11.

The Court finds that a $525 hourly rate is reasonable for Soliz.

Calvert's declaration provides that an hourly rate of $375 is "in accord with prevailing market rates." Calvert Decl. ¶ 19. Calvert is an experienced ERISA attorney and his determination was based on his own hourly rate and the rates of other attorneys with whom he is familiar. *Id.* Further, he has observed West's skills while working alongside him at MLG, noting that West is on the path "to quickly becoming a skilled ERISA attorney." *Id.* ¶¶ 16–18. And, Plaintiff asserts that insurance companies previously paid West's, and a similarly situated associate's, hourly rate of $375. McKennon Decl. ¶¶ 23–28.

Based on the declarations and prior court orders, the Court finds that an hourly rate of $375 is reasonable and properly reflects West's experience, skill, and reputation.

**2. Reasonableness of Expended Hours**

A fee request can only include those hours that were *reasonably* expended on the litigation. *Van Gerwen*, 214 F.3d at 1045. Hours are not reasonably expended if they are "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434; *see also Harlow*, 379 F. Supp. 3d at 1056 ("A court may reduce the number of hours awarded where counsel performs unnecessarily duplicative work, but 'determining whether work is unnecessarily duplicative is no easy task.'" (quoting *Moreno*, 534 F.3d at 1112)); *Doe v. Prudential Ins. Co. of Am.*, 258 F. Supp. 3d 1089, 1096 (C.D. Cal. 2017) (noting that it is "often necessary" and "not uncommon" for several attorneys to collaborate by reviewing the same order or editing the same document). And, "because of the district court's superior understanding of the litigation," the district court's conclusion that the time spent on a certain task was excessive, redundant, or otherwise unnecessary "is entitled to considerable deference." *Welch*, 480 F.3d at 949 (citing *Van Gerwen*, 214 F.3d at 1047 (quoting *Hensley*, 461 U.S. at 437)).

A court "should be skeptical when several lawyers were needed for a single task," but not when the effort of multiple attorneys "clearly reflects a division of labor." *Harlow*, 379 F. Supp. 3d. at 1057 (finding a clear division of labor where one attorney

drafted trial documents while two others provided review, and noting that "it is necessary that more than one attorney review the records and pleadings"); *Doe v. Prudential Ins. Co. of Am.*, 258 F. Supp. 3d 1089, 1096 (C.D. Cal. 2017) (noting that it is "often necessary" and "not uncommon" for several attorneys to collaborate by reviewing the same order or editing the same document).

As a preliminary matter, Aetna's request to reduce the total fees award by 80%, Opp'n at 24:17, is not based on any specific objection to the time expended on a specific entry or general type of work. The Court may only "impose a small reduction, no greater than 10 percent—a 'haircut'—based on its exercise of discretion and without a more specific explanation." *Gurasich*, 2016 WL 3683044, at *5 (quoting *Moreno*, 534 F.3d at 1112) (internal quotation marks omitted). Aetna fails to explain how 80% of MLG's billings is unreasonable, and, thus, it fails to satisfy its burden in proposing this across-the-board reduction of the requested fee. Thus, the Court rejects Aetna's proposal of an 80% across-the-board cut.

**Review of Administrative Record**

Aetna, however, makes several specific objections. First, Aetna objects to the 40.4 hours MLG billed to review the administrative record. Opp'n at 13:8. Aetna's counsel asserts that she spent only 11.40 hours to review the entire administrative record relating to Plaintiff's claim. Declaration of Jenny H. Wang ("Wang Decl.") (Dkt. 30) ¶ 2. Further, in another declaration, an attorney from Defendant-counsel's firm describes this time expenditure as unreasonable and suggests that MLG could have more efficiently reviewed the record by using tools such as summaries, chronologies, and bookmarks. Declaration of Russell S. Buhite ("Buhite Decl.") (Dkt. 30) ¶ 19. Plaintiff, on the other hand, asserts that its counsel found it necessary and reasonable for two attorneys to review and re-review the record at various points during the litigation. Reply at 12:3–12:5.

Defendant-counsel's assertion that it spent substantially less time than MLG does not render unreasonable the number of hours spent by the latter, and, further, that assertion alone does not "meaningfully guide [the] [c]ourt's reasonable number of hours inquiry." *Harlow*, 379 F. Supp. 3d at 1057 n.2 ("MetLife [ . . . ] provides no authority to support the proposition that the time it spent should meaningfully guide this Court's reasonable number of hours inquiry. MetLife further fails to provide any information concerning its billing breakdown. The Court rejects such an argument as unpersuasive and unsupported."). Much like the assertions made in *Harlow*, Aetna's assertions and supporting declarations provide no basis upon which the court can justify a reduction in hours for reviewing the administrative record, nor does it follow that the time spent by Aetna's counsel is the appropriate benchmark to use in determining the reasonableness of MLG's time expenditures. Thus, the time spent by MLG in reviewing the administrative record is not unreasonable on this basis.

Aetna further argues that "MLG does not tell the Court how many hours it spent reviewing the Administrative Record during the administrative process[,]" and that "MLG fails to note, and the record fails to reveal, any efficiencies at all created by MLG's handling of the administrative appeal." Opp'n at 13:16–13:21. Assuming that MLG fully reviewed the administrative record during the administrative process, the billings here are for a review of the record in anticipation of litigation, after Aetna denied Durham's claim—a substantially different undertaking that justifies a review and re-review of the record under a different lens. *See Moreno*, 534 F.3d at 1113 ("After all, duplication always happens . . . . But necessary duplication—based on the vicissitudes of the litigation process—cannot be a legitimate basis for a fee reduction. It is only where the lawyer does *unnecessarily* duplicative work that the court may legitimately cut the hours.").

MLG reviewed the record at about 1.35 minutes per page (3,291 pages ÷ (40.4 hours × 60 minutes)). This time "included two different lawyers reviewing the record, as

necessary, several times at different stages of the case." Mot. at 12:1–12:3. A rate of one minute per page is more appropriate; this accounts for inefficiencies inherent in duplicative, although necessary, review efforts, and it considers MLG's familiarity with the facts given its efforts at the administrative stage.

The Court finds that 32.91 hours is more appropriate and, thus, makes a 7.29 hour reduction in Soliz's time.

**Drafting Complaint**

Next, Aetna specifically objects to the reasonableness of spending 40.2 hours to draft the Complaint. Opp'n at 14:3. Aetna argues that "MLG [ ] billed 40.2 hours drafting an unnecessarily lengthy, 25-page Complaint in violation of notice pleading rules." *Id.* at 14:3–14:4.In support of its position, Aetna offers comparisons to other ERISA litigators, claiming that these litigators filed complaints that were substantially shorter than the one filed by plaintiff. *See, e.g.*, Opp'n at 14 n.5 (explaining that one ERISA litigator, Glen Kantor, "routinely files ERISA LTD benefit complaints that are fewer than 11 pages, and often only 5 to 6 pages").

Fees incurred for drafting Complaint total 39.6 hours. Ng Decl. Ex. B (green entries); *Cf.* Opp'n at 14:3 (reporting 40.2 hours). While a shorter complaint might have satisfied federal pleading requirements and survived a motion to dismiss, it does not follow that a complaint must necessarily be so carefully crafted for that purpose alone, nor does it necessarily follow that MLG spent an unreasonable amount of time when it pled Durham's case in a manner beyond what is required by the Federal Rules of Civil Procedure. *See Reddick*, 2018 WL 637938, at *3 (finding it reasonable to spend 40.5 hours to draft 85 paragraphs in complaint "[b]ecause a detailed complaint can effectively signal the strength of a case and the diligence of a plaintiff's counsel"). *But see* Declaration of Stephanie Ng ("Ng Declaration") (Dkt. 30) Ex. D at 44 (*Cinader* Order, reducing to 12 hours requested 33.2 hours spent drafting a 17-page complaint consisting of 48 paragraphs).

Aetna further asserts that the Complaint contains "canned" allegations, and it claims that "over half of Plaintiff's Complaint was copied from prior complaints filed by MLG and counsel's May 2018 appeal letter to Aetna authored during the administrative phase of Plaintiff's complaint." Opp'n at 14:15–14:17. The court in *Harlow* expressly refused to "reduce the number of hours on the basis that [a] [fees] Motion [ ] contained boilerplate language *for which counsel does not attempt to inflate its time*." 379 F. Supp. 3d at 1057 (emphasis added). *But see Welch*, 480 F.3d at 950 (reducing hours from 13 hours to 9 hours because motion contained "boilerplate" language that was recycled from submissions to other courts, and counsel failed to rebut the court's determination that 13 hours was excessive).

The use of recycled or boilerplate language in the Complaint does not warrant a fee reduction in the instant case. MLG asserts, "[w]hile Durham's lawyers did use templates from prior cases . . . , they did not bill any time that was not actually incurred in preparing the Complaint and revising the templates as necessary to fit the facts and law unique to this case." Reply at 10:21–11:1 (citing Soliz Decl. ¶ 3). MLG further claims that "the underlying analysis needed to be performed again, as there were now additional bases for denial." *Id.* at 11:1–11:3. Moreover, because "the attorney who conducted most of the work on the appeal letter left McKennon Law Group PC . . . the firm assigned another attorney to handle the file, Ms. Soliz." *Id.* at 11:4–11:6 (citing Soliz Decl. ¶ 4). The Court finds this unpersuasive. Similar to *Welch*, the Complaint contains boilerplate language and the total amount of time expended on drafting it is grossly excessive. Further, MLG has not provided sufficient evidence to rebut the argument that the reported hours were unnecessarily duplicative.

The Court finds that a 20-hour reduction of Soliz's time is warranted.

**Research and Strategy**

Next, Aetna specifically objects to the reasonableness of spending 19.1 hours to research and strategize. Opp'n at 15:2. The entries that Aetna labels as "research and

strategy" consist of discrete tasks that logically follow the progression of Durham's Action; Durham's counsel collect facts, conduct legal research, and confer with one another to plan their next step. Far from "excessive, redundant, or otherwise unnecessary, *Hensley*, 461 U.S. at 434, the "research and strategy" entries reflect efficiency and billing judgment.

The Court finds that these entries, Ng Decl. Ex. B (yellow entries), reflect reasonable time expenditures.

**Review and Revisions of Joint Report**

Next, Aetna claims that 4.70 hours (1.5 hours for McKennon and 3.2 hours for Soliz) to assess and revise a Rule 26(f) report was excessive because Aetna's counsel had drafted it and MLG only made minor revisions. Opp'n at 23:3–23:5 (citing Wang Decl. ¶ 4; and then citing McKennon Decl. Ex. 6 (entries dated 9/19/2020 through 9/20/20)). Considering that Aetna's counsel did most of the work on this report, and considering the revisions made and work involved here, the Court reduces to 1 hour, using McKennon's rate, the compensable time for these tasks.

Thus, the Court reduces 0.5 hours from McKennon's time and 3.2 hours from Soliz's time.

**Settlement Demand**

Aetna asserts that "counsel spent 3.80 [hours] to send Aetna's counsel a demand for attorney's fees and costs and respond to Aetna's counsel's request for a billing statement to back-up the demand." Opp'n at 24:5–24:8 (citing McKennon Decl. Ex. 6 (entries dated 10/25/19, and 10/29/19 through 10/31/19). First Plaintiff- and Defendant-counsels' exchange, between October 29, 2019, and October 30, 2019, Wang Decl. Ex. 4, reveals that MLG was "not inclined to send the fee statement," and that the parties anticipated a fees motion. *Id.* The fee report reveals that 5.3 hours were spent in total on tasks related to the fee demand. McKennon Decl. Ex. 6 (RJM entries on 10/25/2019, 10/29/2019 through 10/31/2019; last AS entry on 10/25/2019, and AS entries on

10/31/2019). Counsel knew that the settlement demand was going to be fruitless and result in fees litigation, yet, somehow, they spent 5.3 hours to tally up its costs and engage in needless back-and-forth discussions. The Court finds that 1.3 hours of McKennon's time during the above period, given his significant experience, was excessive.

Thus, the Court excludes 1.3 hours of McKennon's time.

**Review of Standing Orders and Stipulation**

Aetna asserts that it was excessive to spend 1.20 hours, on a routine task, "to review this Court's initial standing order and scheduling conference order (Dkt. 19–20), which collectively total 11 pages." Opp'n at 23:7–23:9 (citing McKennon Decl. Ex. 6 (entry dated 10/09/2019)). Then, Aetna objects to the 1.20 hours that were spent to "review and analyze a routine stipulation to vacate the scheduling conference based upon the parties' settlement of Plaintiff's claim for ERISA plan benefits, a stipulation that Aetna's counsel prepared." *Id.* at 24:1–24:4 (citing Wang Decl. ¶ 9; and then citing McKennon Decl. Ex. 6 (entry dated 10/24/19)). These time expenditures are reasonable. Counsel will not be penalized for reviewing this Court's orders. However, counsel should not have spent 1.2 hours reviewing a stipulation to vacate the scheduling conference that Aetna's counsel drafted.

For review of the stipulation to vacate, the Court reduces 1.2 hours from Soliz's time.

**Communications with Durham**

Next, Aetna specifically objects to the reasonableness of spending 16 hours to talk to Durham. Opp'n at 15:2. MLG asserts that "[the] firm's client communications spanned twelve months, from October 2018 through October 2019." Reply 13:16–13:17. Aetna offers no justification for why it believes that it was excessive, in light of counsels' ethical duties to communicate with their clients and keep them informed, to spend a total of 16 hours communicating with Durham during this period.

The Court finds that the time spent communicating with Durham was not excessive or otherwise unnecessary.

**Drafting Fees Motion**

Finally, Aetna specifically objects to the reasonableness of spending "over 39 hours to file a canned fees motion that the firm files in every ERISA case." Opp'n at 15:2–15:3. In *Sun Life*, the court found that MLG spent excessive time on its fees motion, reducing the time from 37.3 hours to 25 hours and noting that "the law regarding attorneys' fees in ERISA cases is relatively straight forward and has been well-settled for many years." *Evans*, 2013 WL 12077817, at *5; *see also* Ng Decl. Ex. D at 44 (*Cinader* Order, reducing time for fees motion from 19.8 hours to 12 hours); *Id.* at 50 (reducing time for reply motion from 35.4 hours to 12 hours). Aetna further asserts that one-third of the 39.30 hours should be excluded because Aetna had notified MLG that it would concede Durham's entitlement to reasonable fees (the first prong of the analysis). Opp'n at 22:13–22:24. MLG asserts that this time, dedicated to pages three to ten of the Motion, was not excessive or unnecessary because it "set the stage for this Court that prevailing ERISA claimants are generally awarded all of their fees for public policy reasons and that Durham had met the lax 'some degree of success on the merits' standard required in ERISA cases to entitle him to a full fee award." Reply at 14:16–14:20.

The Court finds that the hours spent here were excessive. Similar to Defendant-counsel's fees motions, MLG's fees motions largely contain language that has been recycled from its previous motions. In light of Plaintiff-counsel's significant experience in litigating ERISA cases, the Court finds it particularly unreasonable that counsel needs to spent the amount of time that it did in reviewing the caselaw, reviewing a record (for purposes of the fees motion) that it should have been intimately familiar with at this point, and drafting arguments that have been made in its previous submissions.

For tasks relating to the fees motion, including research, review, analysis, and drafting of arguments, the Court excludes a total of 18 hours from Soliz's time.

**3. Reductions for Block-Billed Entries**

Attorneys must "keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed." *United Steelworkers of Am. v. Ret. Income Plan for Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d 555, 565 (9th Cir. 2008) (quoting *Hensley*, 461 U.S. at 441 (Burger, C.J., concurring)). Thus, a district court may impose a reduction on block-billed hours if it is unable to reasonably attribute the documented hours to the work for which a fee is sought. *Welch*, 480 F.3d at 948. Although, attorneys "are not required to record in great detail how each minute of [their] time was expended." *United Steel Workers*, 512 F.3d at 565 (quoting *Hensley*, 461 U.S. at 437 n.12) (alteration in original); *see also Fischer v. SJB-P.D. Inc.*, 2014 F.3d 1115, 1121 (9th Cir. 2000) (finding that claimant met his burden by providing a summary of the time spent and generally identifying the subject of each task). In making a reduction of block-billed entries, the court should "'explain how or why . . . the reduction . . . fairly balance[s]' those hours that were actually billed in block format." *Welch*, 480 F.3d at 948 (quoting *Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir. 2001)) (alterations in original).

Aetna objects to the 1.20 hours spent by Soliz to review an 8-page scheduling-conference order and calendar deadlines, Opp'n at 23:14 (citing McKennon Decl. Ex. 6 (entry dated 8/13/18)), and 0.60 hours block-billed by McKennon to review that same order and communicate with Durham, *Id.* at 23:16. Counsel will not be penalized for reviewing orders, nor was it unreasonable for McKennon to spend a little over half an hour reviewing an order and speaking to Durham at the same time. The Court finds that the time spent on these tasks was reasonable.

Further, Aetna asserts that "calendaring deadlines by attorney Soliz is a non-compensable clerical task." Opp'n at 23:21 (citing *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1543 (9th Cir. 1992)). "When clerical tasks are billed at hourly rates, the court should reduce the hours requested to account for billing errors." *Dragu v. Motion Picture Indus. Health Plan for Active Participants*, 159 F. Supp. 3d 1121, 1128 (N.D. Cal. 2016) (quoting *Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009)). Certain tasks, like "obtaining transcripts, tracking a package, and assembling documents," should not be billed as attorney's fees because they are "'clerical tasks' that law firms should absorb as part of overhead expenses." *Id*; *see also Cortes v. Metro. Life Ins. Co.*, 380 F. Supp. 2d 1125, 1133 (C.D. Cal. 2005) (excluding hours for sending faxes and preparing fee bill).

Soliz billed 1.20 hours in block format to review an 8-page scheduling order and calendar deadlines. Opp'n at 23:14 (citing McKennon Decl. Ex.6 (entry dated 08/13/18)). The entry lacks the specificity needed for the Court to determine the time spent on each of these tasks. Thus, the Court divides 1.20 hours equally between calendaring deadlines and reviewing the scheduling order, and 0.6 hours are excluded as being clerical. This fairly balances the block-billed hours because an equal division of the block-billed time accounts for the relative ease with which counsel can accomplish these tasks.

Thus, the Court reduces 0.6 hours from Soliz's time.

**Summary**

Hourly Reductions, Soliz: 7.29 hours for review of the administrative record, 20 hours for drafting complaint, 3.2 hours for work on the joint report, 1.2 hours for review of stipulation to vacate, 18 hours for work on the fees motion, and 0.6 hours for clerical work that was block billed. Total Reductions: 50.29 Hours.

Hourly Reductions, McKennon: 0.5 hours for work on the joint report and 1.3 hours for work on the settlement demand. Total Reductions: 1.8 Hours.

**4. Reductions in Post-Motion Fees**

Finally, the Court finds that $13,395 in post-motion fees is grossly excessive and uses its discretion to reduce post-motion fees to $5,000.

**5. Lodestar Calculation**

Total Hours Billed: MLG billed 197.90 hours at the time of the Motion and 23.50 hours for post Motion work, for a total of 221.4 hours. *See* McKennon Decl. Ex. 6; Suppl. Soliz Decl. Ex. 15. After the reductions described above, the total number of hours used for the lodestar calculation is 169.31.

- Paralegal/Assistant: 2.5 hours × $120/hr = $300.00
- West: 20.1 hours × $375/hr = $7,537.50
- McKennon: 54.7 hours × $750/hr = $41,025.00
- Soliz: 92.01 hours × $525/hr = $48,305.25
- Post-Motion Fees Reduction = -$8,395.00

Lodestar amount (sum, above): $ 88,772.75.

**6. Adjustments to Lodestar Amount**

Next, a court may use a multiplier to make upward or downward adjustments of the lodestar. *Van Gerwen*, 214 F.3d at 1045; *Blum*, 465 U.S. at 898–901 (1984). However, because the lodestar amount represents a fee that is "presumptively reasonable," *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986), a multiplier should be used only in the rare circumstance that the calculated amount is unreasonably low or high, as supported by specific evidence and detailed findings by the court. *Van Gerwen*, 214 F.3d at 1045; *Delaware Valley*, 478 U.S. at 565; *Blum*, 465 U.S. at 898–901. The following factors are relevant to this determination:

> (1) the time and labor required; (2) the novelty and difficulty of the issues; (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) time limitations imposed by the client or the circumstances; (7) the amount involved and the results obtained; (8) the

> experience, reputation and ability of the attorneys; (9) the "undesirability" of the case; (10) the nature and length of the professional relationship with the client; and (11) awards in similar cases.

*Van Gerwen*, 214 F.3d at 1045 n.2 (citing *Hensley*, 461 U.S. at 430 n.3). Adjustments cannot be made based on factors already "subsumed in the initial calculation of the lodestar." *Id.*; *Blum*, 465 U.S. at 898–901. Finally, the lodestar amount cannot be adjusted to reflect that an attorney who was retained on a contingency-fee basis assumed the risk of nonpayment. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992).

The Court finds that this is neither the "rare" nor "exceptional" circumstance that justifies a downward adjustment of the lodestar amount. *Van Gerwen*, 214 F.3d at 1045.

**E. COSTS**

Plaintiff also seeks recovery of his costs. The Court in its discretion may allow "reasonable [ . . . ] costs of action." 29 U.S.C. § 1132(g)(1). However, a claimant may recover "only the 'costs' allowed by 28 U.S.C. § 1920 and 'only in the amounts allowed by section 1920 itself, by 28 U.S.C. § 1821, or by similar such provisions." *Harlow*, 379 F. Supp. 3d at 1060 (quoting *Agredano v. Mut. Of Omaha Cos.*, 75 F.3d 541, 544 (9th Cir. 1996)). The following categories of costs are permitted under § 1920:

> 1. Fees of the clerk and marshal;
> 2. Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> 3. Fees and disbursements for printing and witnesses;
> 4. Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> 5. Docket fees under section 1923 of this title;
> 6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920. Further, a district court may award "reasonable out-of-pocket litigation expenses that would normally be charged to a fee paying client, even if the court cannot tax these expenses as 'costs' under 28 U.S.C. § 1920." *Trustees of Const. Indus. & Laborers Health & Welfare Tr. v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th

Cir. 2006); *see also Harlow*, 379 F. Supp. 3d at 1060. However, "reasonable attorney's fees" include litigation expenses "only when it is 'the prevailing practice in a given community' for lawyers to bill those costs separately from their hourly rates." *Trustees*, 460 F.3d at 1257 (citing *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286–87 (1989)). And, costs cannot be awarded as reasonable attorney's fees if, like expert fees, they "have by tradition and statute been treated as a category of expenses distinct from attorney's fees." *Id*.

Plaintiff seeks a total of $580.25 in costs and litigation expenses. McKennon Decl. Ex. 11. First, Plaintiff seeks statutorily approved costs in the amount of $400 for filing fees. Mot. at 24:4. This cost is recoverable under § 1920(1) as a filing cost paid to the clerk of the court. Plaintiff also "incurred costs for service/messenger fees and electronic legal research," and he claims that these costs are recoverable as reasonable attorney's fees because they are "customarily charged to clients in this legal community." *Id.* at 24:13–23:14 (citing McKennon Decl. ¶ 42. These fees are recoverable as reasonable attorney's fees because attorneys in this legal community customarily charge those fees separately from their hourly rates. McKennon Decl. ¶ 42; *Harlow*, 379 F. Supp. 3d at 1061 (granting attorneys' fees for travel, courier, copying, records request, and mediation fees); *see also Langston v. N. Am. Asset Dev. Corp. Group Disability Plan*, 2010 WL 330085, at *8–9 (N.D. Cal. Jan. 2020, 2010) (granting fees for postage, copying, and computerized legal research). Aetna presents no argument against an award for research and messenger fees.

Accordingly, the Court grants Durham's request for costs in the amount of $580.25.

**F. PREJUDGMENT INTEREST**

Plaintiff seeks prejudgment interest on unpaid benefits. Mot. at 24:20–25:17. Prejudgment interest "is an element of compensation, not a penalty." *Dishman*, 269 F.3d at 988 (citing *Western Pac. Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1288

(9th Cir. 1984)). And, "[t]he decision as to whether to award such interest is 'a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities.'" *Caplan v. CNA Fin. Corp.*, 573 F. Supp. 2d 1244, 1252 (N.D. Cal. 2008) (quoting *Landwehr v. DuPree*, 72 F.3d 726, 739 (9th Cir. 1995)). In determining whether to award prejudgment interest, a court considers, for example, whether such an award "could injure other beneficiaries," *Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1465 (9th Cir. 1985), and whether the opposing party exhibited any bad-faith conduct in withholding benefits, *Dishman*, 269 F.3d at 988.

The appropriate interest rate is provided under 28 U.S.C. § 1961, "unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate." *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001) (quoting *Nelson v. EG & G Energy Measurements Group, Inc.*, 37 F.3d 1384, 1391 (9th Cir. 1994)). Under 28 U.S.C. § 1961(a), interest is set "at a rate equal to the weekly 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System." Therefore, the Court awards the Plaintiff pre-judgment interest from October 5, 2017, at the rate set forth under 28 U.S.C. § 1961.

## III. DISPOSITION

The Court **ORDERS** an award of attorneys' fees to Plaintiff in the amount of $88,772.75, costs of $580.25, and pre-judgment interest.

DATED: March 3, 2020

David O. Carter

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE