UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-13-03865-MWF (JEMx) **Date: July 10, 2017**
Title: Marine Bargas -*v.*- Rite Aid Corporation, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE MOTION FOR ATTORNEYS' FEES [153]

Before the Court is Plaintiff Marine Bargas' Motion for Attorneys' Fees and Related Nontaxable Expenses (the "Motion"), filed April 10, 2017. (Docket No. 153). On May 22, 2017, Defendant Rite Aid Corporation ("Rite Aid") filed its Opposition. (Docket No. 156). On May 29, 2017, Plaintiff filed her Reply. (Docket No. 157). The Court reviewed and considered the papers filed on the Motion and held a hearing on **June 12, 2017.**

The Motion is **GRANTED *in part*.** The Court reviewed Plaintiff's proposed lodestar and found it to be well-supported. However, the Court concludes that the lodestar amount is excessive in light of Plaintiff's limited success at trial. Therefore, the Court reduces the requested fee award by 23% to account for what would otherwise be a windfall to counsel.

The parties agreed in their briefing that the requested nontaxable costs should be reduced. Accordingly, Plaintiff is awarded **$309,586.20** in attorneys' fees, and **$12,408.64** in nontaxable costs.

I. BACKGROUND

On March 22, 2013, Plaintiff filed an action in the Los Angeles County Superior Court alleging violations of the California Labor Code and Business & Professions Code. (Notice of Removal, Ex. A at 1 (Docket No. 1)). Plaintiff was a former Store

Manager for Rite Aid, who had been classified as an exempt employee and paid on a salary basis. (Amended Findings of Fact and Conclusions of Law ("FFCL") at 1 (Docket No. 148)). Plaintiff claimed that she had been misclassified, and was owed overtime wages and wages for missed meal and rest breaks. (*Id.*).

On May 30, 2013, Rite Aid removed the action to this Court. (Notice of Removal at 1). After two stays and extensive litigation, the action was tried before the Court sitting without a jury November 1 through November 10, 2016. (FFCL at 1).

On March 28, 2017, almost four years to the day after Plaintiff first filed her Complaint, the Court reached its verdict. (FFCL at 1). The Court concluded that, for the most part, Plaintiff had been properly classified as a salaried employee under the executive exemption. (*Id.* at 31). However, the Court awarded Plaintiff $8,349.56 in unpaid overtime wages for a handful of weeks in which she did not qualify for the executive exemption, plus $3,875.03 in prejudgment interest. (Judgment at 2 (Docket No. 147)). The Court additionally awarded Plaintiff $1,297.24 in restitution for unpaid meal and rest break premium wages during those same weeks. (*Id.*). The Court found for Rite Aid on Plaintiff's claim for failure to pay timely wages. (*Id.*). In sum, the Court awarded Plaintiff $13,521.83. (*Id.*).

Plaintiff now seeks to recover her attorneys' fees and reimbursement for nontaxable costs.

II. DISCUSSION

In light of Plaintiff's verdict on two of her three claims, Plaintiff requests the Court award (1) attorneys' fees in the amount of **$603,090** and (2) litigation costs in the amount of **$21,938.80.**

A. Compliance with the Local Rules

As an initial matter, Rite Aid contends that the Motion should be denied outright because Plaintiff's counsel failed to meet and confer prior to filing the Motion, in

violation of Local Rule 7-3. Rite Aid contends that although the parties discussed "the ***fact*** that [P]laintiff would be seeking fees several times following the Court's issuance of its March 16, 2017, ruling, there was no discussion of the substance of any such motion until April 6, 2017," less than seven days before the Motion was filed. (Opp. at 6). Rite Aid further complains that Plaintiff's counsel never provided Rite Aid with billing records or other evidence to support their fee request prior to filing the Motion. (*Id.* at 7). Plaintiff's counsel responds that the parties discussed the fee request on several occasions prior to the filing of the Motion, during which conversations counsel discussed the lodestar and the requested 1.5 positive multiplier that Plaintiff now seeks. (Supplemental Declaration of Michael Righetti ¶ 2 (Docket No. 157-1)).

Plaintiff appears to have made an effort to meet and confer prior to filing the Motion. Moreover, although Plaintiff filed her Motion on April 10, 2017, the Motion was not noticed for hearing until June 12, 2017. Rite Aid had more than the usual 28 day notice of the Motion and its contents. There is no requirement that a party must disclose all supporting documents during the meet and confer on a request for attorney's fees. The Court emphasizes the importance of complying with Local Rule 7-3, which has several important functions; here, however, the Court concludes that Plaintiff's counsel substantially complied with the rule. The Court will consider the Motion. *See Jeff Tracy, Inc. v. Scottsdale Ins. Co.*, No. SACV 14-1532-DOC (ANx), 2015 WL 12778349, at *3 (C.D. Cal. Aug. 28, 2015) (declining to deny motion under Local Rule 7-3 where Plaintiff's counsel substantially complied with its requirements); *Reed v. Sandstone Properties, L.P.*, No. CV 12-5021 MMM (VBKx), 2013 WL 1344912, at *6 (C.D. Cal. Apr. 2, 2013) ("Because Reed suffered no real prejudice as a result of the late conference, however, the court elects to consider the motion on the merits.").

B. Attorneys' Fees

California Labor Code section 1194 provides for the award of attorneys' fees and costs to a prevailing plaintiff on an action for unpaid overtime compensation. *Id.*; *see also Earley v. Superior Court*, 79 Cal. App. 4th 1420, 1429, 95 Cal. Rptr. 2d 57 (2000), *as modified* (Apr. 26, 2000). "[T]he one-way fee-shifting rule in section 1194

was meant to 'encourage injured parties to seek redress — and thus simultaneously enforce [the minimum wage and overtime laws] — in situations where they otherwise would not find it economical to sue.'" *Id.* at 1430–31 (quoting *Covenant Mutual Ins. Co. v. Young*, 179 Cal. App. 3d 318, 325, 225 Cal. Rptr. 861 (1986)).

California requires that the Court begin its fee calculation with the lodestar method. *See Ketchum v. Moses*, 24 Cal. 4th 1122, 1134, 104 Cal. Rptr. 2d 377 (2001). To determine the lodestar, the Court must first determine all the hours reasonably billed. The Court must then multiply that total by "the hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type." *Horsford v. Bd. of Trustees of Cal. State Univ.*, 132 Cal. App. 4th 359, 394, 33 Cal. Rptr. 3d 644 (2005) (describing the policy behind requiring use of the lodestar method). The moving party bears the burden to produce evidence that the rates and hours worked are reasonable. *See Intel Corp. v. Terabyte Int'l*, 6 F.3d 614, 623 (9th Cir. 1983) ("If the applicant satisfies its burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee.") (internal quotation marks and citations omitted). The Court may exclude hours it deems "excessive, redundant, or otherwise unnecessary." *Jankey v. Poop Deck*, 537 F.3d 1122, 1122 (9th Cir. 2008).

Plaintiff requests the following attorneys' fees:

Attorney	Title	Hours Billed	Rate	Lodestar Total
Matthew Righetti	Partner	162.3	$800	$129,840
Michael Righetti	Associate	540	$450	$243,000
Kelly Karpenske	Paralegal	194.8	$150	$29,220
Total		**897.1**		**$402,060**

(Mot. at 5–6).

1. Reasonable Hourly Rate

"To determine a 'reasonable hourly rate,' the district court should consider: 'experience, reputation, and ability of the attorney; the outcome of the results of the proceedings; the customary fees; and the novelty or the difficulty of the question presented.'" *Hiken v. Dep't of Def.*, 836 F.3d 1037, 1044 (9th Cir. 2016) (quoting *Chalmers v. City of L.A.*, 796 F.2d 1205, 1211 (9th Cir. 1986)). "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1224 (9th Cir. 2016) (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)). "Once a fee applicant presents such evidence, the opposing party 'has a burden of rebuttal that requires submission of evidence . . . challenging the accuracy and reasonableness of the . . . facts asserted by the prevailing party in its submitted affidavits.'" *Chaudhry v. City of L.A.*, 751 F.3d 1096, 1110–11 (9th Cir. 2014) (quoting *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir.2008)).

Plaintiff's counsel have submitted several affidavits regarding their experience, qualifications, prior fee awards in similar cases, and the prevailing fees in the community. (*See* Declaration of Michael Righetti ("Michael Righetti Decl.") ¶¶ 10–15) (Docket No. 153-2); Declaration of Matthew Righetti ("Matthew Righetti Decl.") ¶¶ 2–14 (Docket No. 153-3); Declaration of Kelly Karpenske ("Karpenske Decl.") ¶ 3(Docket No. 153-5)). Specifically, Matthew Righetti has been practicing law for 32 years, during which time he has developed a robust class action practice. (Matthew Righetti Decl. ¶ 3). Michael Righetti had been practicing law since 2008, and litigated multiple class actions to trial. (Michael Righetti Decl. ¶¶ 10–14). Both of the Righettis and Karpenske present evidence that they previously have been approved at their requested rates. (*See id.* ¶ 15; Matthew Righetti Decl. ¶ 8). Finally, Rite Aid does not contest the reasonableness of the requested rates.

Accordingly, the Court will calculate the lodestar according to counsel's requested rates.

2. Reasonable Number of Hours

Plaintiff's attorneys also provide detailed time sheets indicating that they have spent a total of 897.1 hours prosecuting this action. (Matthew Righetti Decl. ¶ 15, Ex. 1 ("Billing Records") (Docket No. 153-4)). Rite Aid contests a number of entries it believes to be block-billed, excessively vague, and inflated. (Opp. at 14–18). Rite Aid further contends that Plaintiff's counsel have billed for hours they spent litigating other, related actions. (*Id.* at 17–18).

The Court has reviewed the billing records and finds them reasonably specific. Rite Aid's objections to Plaintiff's counsel's practice of block billing are well-taken. For example, Plaintiff occasionally billed for "teleconferences" and "correspondence" without further elaboration, and numerous hours before and during trial were billed to "trial prep" without further elaboration. On the other hand, taken as a whole the billing records indicate that Plaintiff's counsel ran a surprisingly lean operation, given the large amount of discovery Rite Aid produced (*see, e.g.*, Michael Righetti Decl. ¶ 8), the extended period of time in which this action was pending in the Court, and the sheer amount of time it takes to prepare an action for trial, especially one where the Plaintiff had the burden of producing evidence of her schedule week by week for more than three years. Despite Rite Aid's objections, raised in the briefing and renewed at the hearing, the Court takes Plaintiff's counsel at their word that they "did not 'double bill' for work performed across the various Rite Aid cases" and that in "situations where the work covered multiple cases, Plaintiff's counsel either did not include all of the time spent or drastically discounted such time to account for the fact that the same work needed to be performed across dozens of cases." (Matthew Righetti Decl. ¶ 16) (emphasis omitted). The truth of this statement is reflected in the overall modest lodestar request.

At the hearing, Rite Aid renewed its challenge, set out in the briefing, that the time Plaintiff's counsel billed during trial was inflated. Specifically, Rite Aid contends

that Michael Righetti could not possibly have "attended trial" for 32 hours each week (that is, 8 hours each day for the 4 day trial week) given that trial itself lasted only five and a half hours per day, plus some time to argue motions before and after trial each day, and trial ended early on the third day of the second week. (*See* Opp. at 16–17). Assuming that, as he explains, Michael Righetti arrived at 7:30 a.m. each day and stayed until the late afternoon meeting with Plaintiff and working on trial-related issues, these hours are, if anything, reduced from the amount of time Michael Righetti spent physically in the courthouse "attending trial." (*See* Reply at 10–11). Nor does the Court find it unlikely that Matthew Righetti would have participated in trial preparation and strategy from San Francisco. Plaintiff's counsel affirmed that this was so at the hearing. Accordingly, the Court finds that the time billed by Plaintiff's counsel in connection with the trial was not impermissibly inflated.

Whether to penalize for block billing is within the discretion of the Court. Where block billing does not prevent the Court from meaningfully "discerning which tasks are compensable and which are not" the Court may decline to take a red pen to each block-billed entry. *Heritage Pac. Fin., LLC v. Monroy*, 215 Cal. App. 4th 972, 1010, 156 Cal. Rptr. 3d 26 (2013). Here, despite the occasional vague time entry, there simply is not much in the way of fat to cut. Accordingly, the Court applies a small, 3% "haircut" to the hours charged, to account for any inefficiencies. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (permitting the district court to "impose a small reduction, no greater than 10 percent — a 'haircut' — based on its exercise of discretion and without a more specific explanation"); *see also*, *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1111 (9th Cir. 2014) (affirming the rule that "[a] district court can reduce a lawyer's request for duplicative or unnecessary work, and it can impose up to a 10 percent reduction without explanation."); *Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 969 (N.D. Cal. 2014) (applying a 5% across-the-board reduction to the hours billed to account for excessive billing and inefficiency); *Rosenfeld v. U.S. Dep't of Justice*, 904 F. Supp. 2d 988, 1008 (N.D. Cal. 2012) (reducing fee award by 10% to account for counsel's billing inefficiencies and failure to demonstrate appropriate billing judgment); *Jadwin v. Cty. of Kern*, 767 F. Supp. 2d

1069, 1112–13 (E.D. Cal. 2011) (applying "[a] modest downward adjustment of 10% . . . with respect to the alleged non-litigation work").

3. Multiplier

Finally, Plaintiff requests a 1.5 upward multiplier to account for the quality of representation, contingent nature of the litigation, novelty and complexity of the issues, special skill and experience of counsel, and what she believes to be counsel's superior performance. (Mot. at 15–17). In response, Rite Aid contends that the fee award should be reduced to reflect the fact that Plaintiff's award was a fraction of what she sought in the litigation. (Opp. at 8–14, 18–21).

"Because there is a strong presumption that the lodestar amount represents a reasonable fee, adjustments to the lodestar 'are the exception rather than the rule.'" *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016) (per curiam) (quoting *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1007 (9th Cir. 2002)). Nevertheless, the Court in its discretion may adjust the lodestar figure upward or downward based on the factors first enunciated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), including:

> (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.

Antoninetti v. Chipotle Mexican Grill, Inc., 49 F. Supp. 3d 710, 715–16 (S.D. Cal. 2014), *aff'd sub nom. Goldkorn v. Chipotle Mexican Grill, Inc.*, 669 F. App'x 920 (9th

Cir. 2016). Many of these factors are necessarily folded into the lodestar calculation, and need not be considered again as to a multiplier.

The most important factor, both in the view of the State of California and in the view of this Court under the current circumstances, is the plaintiff's success. *See Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.*, 190 Cal. App. 4th 217, 238, 118 Cal. Rptr. 3d 352 (2010), *as modified on denial of reh'g* (Dec. 15, 2010) ("*EPIC*") ("California law, like federal law, considers the extent of a plaintiff's success a crucial factor in determining the amount of a prevailing party's attorney fees."). "[U]nder state law as well as federal law, a reduced fee award is appropriate when a claimant achieves only limited success." *Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 989, 104 Cal. Rptr. 3d 710 (2010) (citations omitted). Where a plaintiff fails to obtain "important goals of" the action, even if she has technically prevailed on all of her claims, "the trial court should take into consideration the limited success achieved . . . ." *Sokolow v. Cty. of San Mateo*, 213 Cal. App. 3d 231, 250, 261 Cal. Rptr. 520 (Ct. App. 1989).

The Court recognizes that wage and hour claims like this one are an important vehicle for holding California employers accountable under the state's particularly strict labor scheme. On the other hand, where the plaintiff has achieved only a very limited form of success, the full lodestar amount may be a windfall. The Court concludes that is the case here. After balancing the important objectives underlying the California Labor Code and the interest in encouraging future such lawsuits to be brought with the limited success Plaintiff achieved, the fees will be reduced by an additional 20%.

In *Hensley v. Eckhart*, 461 U.S. 424 (1983), the Supreme Court set out a two-step test for determining whether a fee award should be reduced in light of the plaintiff's limited success. California applies the *Hensley* approach to fee requests under state statute. *See Chavez*, 47 Cal. 4th at 989.

"The first step asks whether 'the plaintiff failed to prevail on claims that were unrelated to the claims on which [s]he succeeded.'" *EPIC*, 190 Cal. App. 4th at 239

(quoting *Hensley*, 461 U.S. at 434). Here, both parties agreed that all of Plaintiff's claims were related. Accordingly, "the [C]ourt proceeds to the second step of Hensley inquiry, which asks whether 'the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award.'" *Id.* (quoting *Hensley*, 461 U.S. at 434). "The court may appropriately reduce the lodestar calculation if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* (quoting *Harman v. City and Cty. of S.F.*, 136 Cal. App. 4th 1279, 1312, 39 Cal. Rptr. 3d 589 (2006)).

Plaintiff asserted at trial that Rite Aid misclassified her as an exempt employee, and thus owed her overtime compensation, for the approximately three and a half years (about 182 weeks) she worked as a Store Manager. (FFCL at 10–11). The Court found for Plaintiff on only 16 of those weeks, *i.e.* the weeks that Plaintiff participated in remodels and inventories. (*Id.* at 20). That is, Rite Aid was found to have no liability for about 90% of the weeks in which Plaintiff sought recovery. Well aware of the minimal nature of the award, the Court explicitly characterized it as "a modest verdict" in light of the fact that "in general, Plaintiff did not spend most of her time on nonexempt work. In other words, Rite Aid largely proved its affirmative defense of the executive exemption" with just a few exceptions. (*Id.* at 2). Given Plaintiff's minimal success in her misclassification claim, awarding counsel the lodestar amount would be a windfall.

However, the Court also considers Rite Aid's suggested reduction — an almost 95% cut, from about $400,000 to just over $30,000 — to be overly harsh. A reduction of that magnitude is unwarranted in light of Plaintiff's counsel's excellent trial advocacy, the great number of attorney hours required to deal with the volume and extent of Rite Aid's discovery responses, Rite Aid's insistence on litigating the action to trial, and the important role wage and hour claims play in enforcing the California Labor Code.

Indeed, this Court's discretion to reduce a fee award is not unfettered. The Ninth Circuit emphasizes balancing the limited success with the public benefit in fee shifting actions. Although the existing case law might support as much as a 30% cut,

the Court believes that anything more would be much more closely scrutinized in light of the fact that the California Labor Code explicitly provides for fee shifting to encourage litigation in this particular area. *See Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 957 (9th Cir. 2002) (approving district court's fee reduction of 30% where the district court balanced the public benefits of the suit with the individual plaintiff's limited success); *Corder v. Gates*, 947 F.2d 374, 378–81 (9th Cir. 1991) (discussing instances in which the Ninth Circuit approved fee reductions of up to 25% for the plaintiffs' limited success); *Pierce v. Cty. of Orange*, 905 F. Supp. 2d 1017, 1041 (C.D. Cal. 2012) (reducing fee award by 30% after balancing the plaintiffs' limited success with the importance of encouraging similar claims).

At the hearing, Rite Aid discussed three cases in which the plaintiff's requested fees were cut by more than 30%: *Perez v. Safety-Kleen Systems, Inc.*, 448 F. App'x 707 (9th Cir. 2011); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); and *Heyen v. Safeway Inc.*, No. B243610, 2014 WL 2154676 (May 23, 2014). None of these cases are binding, and all are distinguishable. As the Court noted at the hearing, Plaintiff's fee motion does not present a heavy pencil issue. Rather, the question is whether, and to what extent, Plaintiff's fees should be cut to account for her limited success. Most notably, unlike the plaintiffs in all three of the foregoing cases, Plaintiff's action was tried in the context of a plethora of similar actions brought by similar plaintiffs and represented by the same attorneys. Therefore, the purpose of the trial was not just to determine Rite Aid's liability as to Plaintiff, but also to gauge the strength of the entire cluster of claims, and hopefully thereby to facilitate settlement discussions. As Plaintiff's counsel explained at the hearing, the trial provided valuable data for both sides, which has since led to a wave of settlements. In this sense, then, Plaintiff achieved a greater success than Rite Aid gives her credit for.

Nor did the Court discount Plaintiff's larger theory — that Rite Aid was using its store managers to soak up overtime hours it did not want to pay. That theory was expressly preserved in the Court's Findings of Fact and Conclusions of Law. Although the Court found Plaintiff to be less than credible as to her own hours, Plaintiff's theory

continues to be viable. A different, more credible, plaintiff from the cluster could easily meet with greater success.

In light of the foregoing, the Court concludes that even a 30% cut would be inequitable. The Court has already accounted to some extent for Plaintiff's limited success by reducing the fee award based on counsel's billing inefficiencies. *See Corder*, 947 F.2d at 378 (noting that typically limited success is "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate"). Accordingly, the Court concludes that a more modest reduction of 20%, in addition to the 3% "haircut," is sufficient to transform the requested fee award from a windfall to a fair award in light of all the relevant factors.

4. Final Award

In sum, a 23% cut will be applied to the lodestar amount to account for billing inefficiencies and Plaintiff's limited success at trial. The Court thus awards Plaintiff **$309,586.20** in attorneys' fees.

C. Nontaxable Costs

The Motion included a request for $21,938.80 in nontaxable "costs of suit" as provided for in California Labor Code section 1194(a). (Mot. at 17). Rite Aid challenged some of Plaintiff's calculations and the propriety of certain enumerated costs, and asked the Court to reduce the award of costs to $12,408.64. (Opp. at 21). In her Reply, Plaintiff did not contest Rite Aid's requested reduction. (Reply at 11–12). The Court has reviewed the records submitted in support of Plaintiff's request and finds that the remaining costs are reasonable.

Accordingly, Plaintiff is awarded **$12,408.64.**

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III. CONCLUSION

For the foregoing reasons, the Motion is **GRANTED *in part.*** Plaintiff is awarded **$309,586.20** in attorneys' fees, and **$12,408.64** in nontaxable costs.

IT IS SO ORDERED.