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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

AMBER WINTERS, et al., Plaintiffs, vs. BANNER HEALTH, INC., et al., Defendants.	NO. CV2012-007665 **DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES** (Assigned to the Hon. J. Richard Gama)

Plaintiffs' Application for Attorneys' Fees (the "Application") seeks an award of more than $2.8 million in a case that involved no fact issues, almost no discovery, and was resolved on summary judgment. To get that high, the Application breaks numerous rules and exhibits abuse that is almost endless and breathtaking. Plaintiffs seek *$192,000 for a single telephone call* and nearly *$100,000* to prepare three disclosure statements that totaled 38 pages. Plaintiffs demand payment for time expended on claims asserted by *different plaintiffs* (the Closed Lien Plaintiffs) *even though they lost*. Plaintiffs request time expended for the Closed Lien Plaintiffs' *ongoing appeal* and on *unrelated litigation.* Plaintiffs also include time expended for *different plaintiffs* on claims against a *different defendant*, Kingman Regional Medical Center—*even though Kingman won*.

The Application makes a mockery of the admonition that counsel must exercise billing judgment. Instead, the Application takes a kitchen-sink approach and leaves it to Defendants to police the excess and overreach.

This Objection has three parts. First, Defendants assert three facial challenges to the entire Application. Second, Defendants scrutinize the time entries that comprise the lodestar and demonstrate that significant blocks of time entries must be stricken. Finally, Defendants show why the remaining lodestar must be reduced significantly to account for vagueness, block billing, and other issues.

If the Court does not sustain one of the facial challenges, Defendants have provided a Decision Matrix to guide the Court in navigating the remaining objections. The Decision Matrix is attached as Exhibit 1. The Decision Matrix does not provide a sum certain for the Court to award, even if the Court sustains all of Defendants' objections. This is because Defendants have objected to some time entries on multiple grounds—the amounts in the Decision Matrix thus represent the full value of each objection, without considering the possibility of double-counting. Once the Court rules on the objections, Defendants will work with Plaintiffs to eliminate any double-counting and arrive at an exact fee award quickly and in good faith, should the Court so direct.

I. FACIAL OBJECTIONS

a. Objection 1: Plaintiffs cannot rely on the "private attorney general" doctrine because their pleadings never once mentioned this theory, as required by Rule 54(g).

The entire Application rests on a "switcheroo" that violates Rule 54(g)(1). To give early warning of what claims are on the table, that Rule requires a party's pleading to state any "claim" for attorneys' fees. This requires a party to specify the statute, contract provision, or substantive theory that the party is relying upon. *King v. Titsworth*, 221 Ariz. 597, 600, ¶ 15, 212 P.3d 935, 938 (App. 2009); *Robert E. Mann Const. Co. v.*

Liebert Corp., 204 Ariz. 129, 133, ¶ 12, 60 P.3d 708, 712 (App. 2003). The State Bar Committee notes emphasize the need to specify the "grounds" for fee claims "under A.R.S. § 12-341.01 or other similar grounds**."** Rule 54(g), State Bar Committee Notes.

Plaintiffs did make a specific claim for attorney's fees in their complaint—under A.R.S. § 12-341.01. *Second Amended Class Action Complaint*, at 39 § VII(G) (requesting that the Court "[a]ward costs and attorneys fees pursuant to A.R.S. §§ 12-341 and -341.01"). The fatal defect is that the present Application rests on an entirely different ground, the private attorney general doctrine. Neither the original complaint nor any of their amended complaints said one word about this doctrine.[1] The existence of *this* fee claim was never revealed until after the merits were decided.

Rule 54(g) prohibits an award of fees based upon a theory that is kept secret until the end of the litigation. The only way plaintiffs could defend their violation of the Rule is to argue that the mention of *any* substantive theory is good enough to preserve all possible fee claims, even if that theory is later abandoned (or was meritless to begin with). In other words, the only way to defend the Application is to submit that the Rule permits a litigant to conceal the "true" basis on which it will seek an award of attorneys' fees until after the merits are decided.

Of course, that would undermine Rule 54(g)'s purpose, which is to facilitate settlement by allowing the parties to "accurately assess the risks and benefits of litigating versus settling." *Robert E. Mann*, 204 Ariz. at 133, 60 P.3d at 712; *accord King*, 221

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[1] *Class Action Complaint* at 31, § VII(G) (May 8, 2012); *First Amended Class Action Complaint* at 31, § VII(G) (May 11, 2012). Recently, Plaintiffs' counsel filed a new complaint against two of the Defendants. Perhaps recognizing Rule 54(g)'s standard, this complaint specifically pleads each claim for attorneys' fees: A.R.S. § 12-341.01, the private attorney general doctrine, and the common fund doctrine. *See* Exhibit 17, a true and correct copy of excerpts from the complaint in *Aycock, et al. v. Scottsdale Healthcare, et al.*, CV2014-006862.

Ariz. at 600, ¶ 15, 212 P.3d at 938. A litigant can only evaluate its potential fee exposure when it knows what claims its opponent is making. When the complaint specifies one claim for fees and not others, Rule 54(g) and the logic of *expressio unius* allow the defendant to assess the risks of the fee claims stated in the complaint and to forget about claims not stated.

The text of Rule 54(g) forecloses the Trojan horse strategy of concealing the substantive basis for its fee claim until after the court decides the merits. Rule 54(g) does not require a mere "request" for attorney's fees. Instead, the Rule uses the word "claim" which of course requires a "statement . . . that the pleader is entitled to relief." Ariz. R. Civ. P. 8(a). In other words, the word "claim" requires "the allegations that give rise to an enforceable right to relief." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 (9th Cir. 2006) (quoting *Moore's Federal Practice* § 10.03[2][a] at 10–23 (3d ed. 2006)). A party cannot state a *claim* for attorneys' fees without specifying the legal rule in question, any more than a party can pray for damages without specifying the legal theory on which it relies. When Plaintiffs' complaint expressly pleaded a claim for attorneys' fees under A.R.S. § 12-341.01, that implicitly excluded a fee claim under the private attorney general doctrine, for the same reasons that pleading a claim for negligence is distinct from pleading a claim for breach of contract.

The entire fee Application must be denied under Rule 54(g). The Rule required Plaintiffs to lay *all* of their cards on the table with respect to attorneys' fees, not just one.

b. <u>Objection 2</u>: Plaintiffs are not entitled to recover fees under the private attorney general doctrine.

Even if Plaintiffs could rely on the previously-undisclosed private attorney general doctrine, this case does not fit into that category. The private attorney general doctrine permits courts to award attorneys' fees to a party that "vindicat[es] . . . important public rights." *Arnold v Ariz. Dept. of Health Servs.*, 160 Ariz. 593, 609, 775 P.2d 521, 538

(1989). The doctrine permits litigants to recover their fees when they press claims that "direct[] substantial benefits to the general public." *Kadish v. Ariz. State Land Dep't* (*Kadish I*), 155 Ariz. 484, 497-98, 747 P.2d 1183, 1196-97 (1987). A party asserting a claim under this doctrine "do[es] not act for [its] own benefit, nor even for the benefit of a particular class or group, but only for the purpose of vindicating the interests of the entire citizenry of the state of Arizona." *Id.*

In *Arnold*, the Supreme Court set a high bar for litigants who seek fees under the private attorney general doctrine. A party must show that it "vindicated a right" that (1) "benefits a large number of people," (2) "requires private enforcement," and (3) "is of societal importance." *Arnold*, 160 Ariz. at 609. Plaintiffs cannot clear this high bar.

i. This decision did not vindicate a public right.

The case law makes clear that a private concern does not become a "public right" just because a class has been certified. In *Arnold*, the Maricopa County Public Fiduciary vindicated the statutory rights of indigent Arizonans to receive mental health care. In *Kadish v. Ariz. State Land Dep't* (*Kadish II*), the plaintiff established "the right of the state, on behalf of the public school trust, to receive royalties for mineral ore based on the true value rather than on a flat rate." 177 Ariz. 322, 329-30, 868 P.2d 335, 342-43 (App. 1993). And in *Friedman v. Cave Creek Unified Sch. Dist. No. 93*, the plaintiff upheld the electorate's decision to appropriate bond funds to the purpose stated in the bond election's publicity pamphlet. 231 Ariz. 567, 570, 299 P.3d 182, 185 (App. 2013).

In each of these cases, the party conferred a substantial benefit upon the general public by prevailing. In contrast, Plaintiffs have always admitted that the focus of this case was the carving up of private tort settlements:

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> If Defendants' Cross-Motion [for Summary Judgment] is granted, more than 90% of the lead Plaintiffs herein would recover nothing from their accidents– Defendants' lien would wipe out their entire recovery.[2]

Everyone agrees that those funds are *personally* important to Plaintiffs. But there are no *public rights* in personal-injury recoveries, tort claims, or health care provider liens. By prevailing, Plaintiffs conferred a substantial benefit upon themselves, but not upon the general public. Their claim for fees under the private attorney general doctrine fails at the outset.

ii. This case did not require private enforcement.

In a classic private attorney general case, a private party sues a public body to compel that body to act in accordance with the law. The name of the doctrine makes the point: a "private" attorney general becomes necessary because "a state agency that is charged with carrying out state law [was not] in a position to challenge the validity of a duly enacted statute." *Kadish II*, 177 Ariz. at 330, 868 P.2d at 343.

Plaintiffs chose to ignore the convenient, low-cost means of redress that were created for this very purpose. By law and regulation, the AHCCCS Administration has established and operates a grievance and appeal system to address every sort of legal dispute and issue that arises in connection with the administration of the AHCCCS program. *See generally* A.R.S. § 36-2903.01(B)(4) and A.A.C. R9-34-101, *et seq.* Indeed, standard principles of administrative law would suggest that Plaintiffs were required to exhaust their administrative remedies before going to court.

Indeed, Plaintiffs argued repeatedly that the AHCCCS Administration considered the "balance billing" to be fraudulent, citing the Administration's website.[3] If that was so, Plaintiffs could have filed a grievance with the AHCCCS Administration, arguing that Defendants were barred from asserting their liens. The AHCCCS Administration could

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[2] Pl.'s Reply in Supp. of Pl.'s Mot. for Summ. J. at 16 (Sept. 6, 2013).
[3] *E.g.*, Pl.'s Reply in Supp. of Pl.'s Mot. for Summ. J. at 4-6 (Sept. 6, 2013).

have sustained that grievance and directed *all hospitals* to cease enforcing liens on AHCCCS accounts. But Plaintiffs did not file a grievance with AHCCCS.

In addition to pursuing a simple administrative grievance, Plaintiffs could have made demand upon the Arizona Attorney General's office to review the matter (another standard step in such cases). Barring that, the federal government has its own system of grievances and appeals. If the hospitals were indeed violating federal law, Plaintiffs could have brought the matter to the attention of the Centers for Medicaid Services or the Office of the Inspector General within HHS. But Plaintiffs did none of these things. Simply put, Plaintiffs have created no record that this lawsuit was "necessary" within the meaning of *Arnold*.

iii. Any right vindicated by this case is not of societal importance.

The case law shows that the "societal importance" standard is limited to the types of cases traditionally handled by public-interest law firms. *Arnold* concerned the right of Arizona's indigent population to receive mental health care. *Kadish* concerned the valuation of state trust lands used to finance the education of Arizona's children. *Friedman* addressed the rights of voters in school bond elections.

In none of these cases were the individual plaintiffs concerned about their own personal finances. Instead, society at large was the primary beneficiary. By prevailing, the plaintiffs conferred substantial benefits on the general public, not themselves.

In stark contrast, this case is about how to divide tort recoveries. Everybody can agree that money is a good thing, but that's true in almost every civil case. From a societal point of view, there is nothing particularly important about how to divide personal-injury recoveries. Arizona's society-at-large receives no substantial benefits if hospitals are barred from asserting liens on the tort recoveries of AHCCCS beneficiaries.

The private attorney general doctrine simply does not apply when a party sues to benefit primarily itself. *E.g.*, *State v. Boykin*, 112 Ariz. 109, 114, 538 P.2d 383, 388

(1975) ("[A]ppellees were not pressing their claim in hopes of directing 'substantial benefits to the general public.'"); *Reisch v. M & D Terminals, Inc.*, 180 Ariz. 356, 365, 884 P.2d 242, 251 (App. 1994) ("[Plaintiff's] defense to the claim benefitted just herself."); *Chavarria v. State Farm Mut. Auto. Ins. Co.*, 165 Ariz. 334, 337-38, 798 P.2d 1343, 1346-47 (App. 1990) (Plaintiff "pressed her claim throughout this case in the hope of recovering…damages for herself, not in the hope of directing substantial benefits, financial or otherwise, to the general public.").

Plaintiffs vindicated their personal economic interests by prevailing in this case, not the interests of the public at large. They are ineligible for an award of fees under the private attorney general doctrine.

iv. No Arizona appellate court has upheld a fee award under the private attorney general doctrine in litigation involving only private parties.

All the litigants in this case are private entities; there are no public bodies. Arizona courts have never awarded fees under the private attorney general doctrine in cases that involved only private parties.[4] *E.g.*, *Chavarria*, 165 Ariz. at 337-38, 798 P.2d at 1346-47 (denying fees in a lawsuit against a private insurance company); *Reisch*, 180 Ariz. at 365, 884 P.2d at 251 (against a private employer and insurer); *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 150 P.3d 773 (App. 2007) (against a private manufacturer).

Plaintiffs would expand the private attorney general doctrine so that it encompassed basically any class action litigation. Many class actions turn upon federal safety regulations that have an automatic "public importance" just because they involve a statute. But the private attorney general doctrine has never encompassed private class

[4] Fees have been awarded against a private party that intervenes in litigation against public body when the private party is coming to the government's assistance. In *Hassell v. Ariz. Ctr. for Law*, for example, the private parties were "intervenor-appellees [that] came to the state's aid." 172 Ariz. at 371, 837 P.2d at 173.

action litigation just because a statute or regulation was relevant to the case. There is no principled distinction between this case and a class action against a pharmaceutical company that violated federal safety regulations. If the Court awards fees here, any plaintiff who prevails in a products liability action involving federal law could attempt to shift fees under the private attorney general doctrine.

The Legislature has not created a fee-shifting statute that would cover the claims asserted by Plaintiffs. As such, the American Rule—that each party bears its own attorneys' fees—should apply to this case. The Court should decline Plaintiffs' invitation to erode the American Rule even further.

c. <u>Objection 3</u>: The Application is tainted by misconduct and should be denied in its entirety.

Arizona law prohibits an unadorned objection that "the fee is too high." *State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 594, 845 P.2d 513, 520 (App. 1992). The Court of Appeals, however, trusts that lawyers will act in good faith and exercise billing judgment before submitting a fee application.[5] When a lawyer breaks that trust and submits an application that is "so outrageously excessive" as to "shock the conscience," a court retains discretion to deny the application altogether. *Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92, 96-98 (4th Cir. 1993); *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554, 557 (5th Cir. 1998); *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980).[6] This strong medicine ensures that attorneys "act responsibly when submitting petitions for attorneys' fees." *Fair Hous. Council*, 999 F.2d at 96-98.

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[5] *Accord Cobell v. Norton*, 407 F. Supp. 2d 140, 158-63 (D.D.C. 2005) ("Courts assume that attorneys routinely exercise billing judgment on behalf of their client and expect that same treatment with respect to the legal bills presented to one's adversary.").

[6] Because Arizona has limited case law relating to attorneys' fees applications, Arizona courts often draw upon federal case law in adjudicating fee applications. *E.g., Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983)). Plaintiffs did the same in

Plaintiffs' counsel seek over ***$2.8 million*** in attorneys' fees and claim that they expended ***3,361 hours*** in litigating this case. That is the equivalent of over ***eighty-four consecutive weeks*** of billing eight hours per day, every day, five days a week.

This case was decided on motion, not after a lengthy trial. The parties took no depositions and did not conduct extensive written discovery. The parties briefed no more than ten substantive motions. The Court held three oral arguments. One can only wonder how Plaintiffs' counsel could have legitimately spent *3,361 hours* in litigating this case.

The Application's request is not even remotely reasonable. A request for $2.8 million in fees *in a motion case* is outrageous on its face and shocks the conscience. The Court should deny the Application, not winnow it down to the reasonable fee that should have been requested to begin with.

More troubling is that Plaintiffs' counsel failed to exclude time expended for unrelated claims and claims they lost. The Application included time expended for the Closed Lien Plaintiffs—even though they are different plaintiffs and even though they lost. Plaintiffs' counsel demands recovery for time expended on an ongoing appeal from a judgment *against* the Closed Lien Plaintiffs. Even more audaciously, Plaintiffs' counsel seeks their fees for time expended by different plaintiffs against a different defendant (Kingman Regional)—even though Kingman Regional won. *See* Objection 8 *infra*.

Plaintiffs' counsel was obligated to exclude time entries that are not recoverable. State Bar of Arizona, *Ariz. Attorneys' Fees Manual* ("*Attorneys' Fees Manual*") § 1.6.13, 1-12 (4th ed. 2003); *China Doll*, 138 Ariz. at 189, 673 P.2d at 933. Their failure to do so constitutes "bad faith" and warrants denial of the Application. *In re Schiff*, 684 A.2d 1126, 1135 (R.I. 1996); *accord Fair Hous. Council*, 999 F.2d at 96-98; *Lewis v.*

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the Application. Pl.'s App. for Attorneys' Fees ("App") at 3, 5 (Jan 30, 2014). This response follows suit—and Plaintiffs cannot marginalize the federal cases cited herein

Kendrick, 944 F.2d 949, 957-58 (1st Cir. 1991) (denying fee application when counsel failed to make a "good faith effort" to exclude "unnecessary" hours).

This cannot be excused as an honest mistake. Plaintiffs' counsel billed 32.6 hours to prepare the Application and its supporting documents, more than enough time to have reviewed the billing records and excluded unrecoverable time. *See* Exhibit 18. Moreover, Plaintiffs' counsel certified that (1) they read the Application and (2) the Application was "well grounded in fact" to the best of their knowledge "formed after reasonable inquiry." Rule 11(a), Ariz. R. Civ. P. Their certification was simply not true—even a cursory review would have revealed that the billing records included, for example, time spent on the Closed Lien Plaintiffs' appeal and the KRMC litigation. Whether intentionally or carelessly, Plaintiffs' counsel egregiously misrepresented their entitlement to fees.

The Court cannot brush aside this misconduct. Rather, a strong, punitive response is warranted. The Application should be denied in its entirety.

d. <u>Objection 4</u>: Plaintiffs are not entitled to a multiplier of the lodestar.

Showing extraordinary chutzpah, Plaintiffs ask the Court to apply a 2.0 multiplier to their already eye-popping lodestar. Plaintiffs claim that a multiplier is "appropriate in this case due to the risk of nonpayment." App. at 9. In other words, Plaintiffs' counsel wants an additional <u>$1,381,534.00</u> from Defendants because Plaintiff's counsel *chose* to assume some risk of nonpayment.

Defendants are some of the largest employers and interests in Arizona's economy. To posit some special "risk of nonpayment" with respect to these defendants is absurd.

In any event, there is a strong presumption that the lodestar is a reasonable attorneys' fee. *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 2641 (1992); *see also Newburg on Class Actions* § 14:5. Courts do not enhance the lodestar—using a multiplier or otherwise—to compensate counsel for the risk of nonpayment:

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simply because they are not controlling authority.

> [J]ust as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss. An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. ***To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail.***

Dague, 505 U.S. at 565, 112 S. Ct. at 2643 (citations omitted). Arizona courts follow *Dague*. *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 352, 141 P.3d 824, 832 (App. 2006) (multipliers inappropriate in the context of fee-shifting); *Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, 273, 77 P.3d 444, 448 (App. 2003) (same).[7]

A multiplier is appropriate only under the common fund doctrine. This doctrine is essentially an equitably-imposed contingency fee on the ***plaintiff***. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (common fund doctrine gives attorneys "the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client"). In a common fund case, attorneys' fees "*are not assessed against the unsuccessful litigant* (fee shifting), but rather, are taken from the fund or damage recovery (fee spreading)" created by the attorneys' efforts. *Burke*, 206 Ariz. at 273, 77 P.3d at 448 (emphasis added); *accord In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("[A]ttorneys' fees in common fund cases are not paid by the losing defendant . . . .").

Plaintiffs concede, as they must, that "no common fund [was] created" in this case. App. at 1. Instead, Plaintiffs seek to shift their fees to Defendants under the private

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[7] In *Charles I. Friedman, P.C.*, the Court of Appeals upheld the use of a multiplier in a fee award against defendant Microsoft. 213 Ariz. at 352, 141 P.3d at 832. Microsoft, however, had entered into a settlement agreement in which it agreed that attorneys' fees would be calculated under the common fund doctrine. *Id.*

attorney general doctrine.[8] The Court of Appeals has specifically refused to allow a multiplier in a private-attorney-general case.[9] *Kadish II*, 177 Ariz. at 333, 868 P.2d at 346. Under *Kadish*, *Friedman*, and *Burke*, no multiplier is permitted here.

Indeed, applying a multiplier here would be illogical and inequitable. The Court should not impose a *contingency fee* upon *Defendants* to compensate Plaintiffs' counsel for *any* risk of nonpayment they chose to assume. Moreover, multipliers duplicate many of the factors already subsumed in the lodestar, such as the case's complexity or novelty, the results obtained and the quality of counsel's performance. *Dague*, 505 U.S. at 562, 112 S. Ct. at 2641. Enhancing the lodestar amount would result in a double (or more) recovery for Plaintiffs' counsel. That might be an appropriate result when the Court is dividing a common fund, but not when shifting fees to the non-prevailing party.

Plaintiffs' counsel is clearly not entitled to any multiplier. Any fee award is limited to the unenhanced lodestar that is allowed by the Court.

II. OBJECTIONS TO CATEGORIES OF TIME ENTRIES

a. Objection 5: Plaintiffs may not recover for time expended in the prior federal litigation.

Before Plaintiffs brought this action, they filed a similar suit in U.S. District Court (the "Federal Case"). The Federal Case pleaded claims under the federal Declaratory Judgment Act, 42 U.S.C. § 1983, and for breach of contract and unjust enrichment.

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[8] Plaintiffs try to manufacture a conceptual link between the private attorney general doctrine and the common fund doctrine (and also try to tie each doctrine to Rule 23(b)(2) and (b)(3), respectively), but no such link exists. *Charles I. Friedman* explains that the private attorney general doctrine is a fee-shifting concept and the common fund doctrine is a fee-spreading concept. Further, neither concept is linked to Rule 23 in any way.

[9] In *Kadish II*, the Court of Appeals left open the possibility of enhancing the lodestar in "rare and exceptional circumstances" that are supported by "specific evidence on the record." Plaintiffs made no effort to show that this case is "rare and exceptional"—and they may not do so in reply. *See Zeagler v. Buckley*, 223 Ariz. 37, 39 n.4, 219 P.3d 247, 249 n.4 (App. 2009) (courts do not consider "issues raised for the first time in a reply").

Defendants moved to dismiss the Federal Case for lack of federal jurisdiction and it became clear that Judge Bolton would grant that motion.[10] Plaintiffs thus voluntarily dismissed the Federal Case.[11]

Now, Plaintiffs seek recovery of $485,442.50 for 1167.7 hours of work performed in the Federal Case.[12] *See* Exhibit 2.[13] But ***Defendants*** prevailed in the Federal Case. When a plaintiff voluntarily dismisses an action, the ***defendant*** is the prevailing party. *Vicari v. Lake Havasu City*, 222 Ariz. 218, 223, 213 P.3d 367, 372 (App. 2009) (upholding award of fees against a plaintiff who dismissed his case before the defendant had filed an answer or motion for summary judgment).[14] A Rule 41 dismissal returns the plaintiff "to the same legal position as if the action had never been filed," but the rule does not "reward a plaintiff for ending his case early by shielding him from the liability of attorneys' fees." *Id.*

Similarly, Rule 41 does not reward Plaintiffs for ending the Federal Case early by preserving their right to recover fees in future litigation. No case anywhere awards fees to a prevailing plaintiff for time expended in another proceeding in which the *defendant* prevailed. Had Plaintiffs waited for Judge Bolton to dismiss the Federal Case, they certainly would not be entitled to recover fees. That should be the case here too: when

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[10] *See* Exhibit 19, a true and correct copy of a transcript from Oral Argument in the Federal Case held on January 9, 2012, at 8:7-9:11, 10:12-23, 13:8-10.

[11] *See* Exhibit 20, a true and correct copy of Plaintiffs' Notice of Voluntary Dismissal.

[12] Exhibit 2 is a list of time entries for the Federal Case. Time spent in the Federal Case includes all of Plaintiffs' time entries up to the date of the voluntary dismissal, February 7, 2012, except for a telephone call for $86,000, addressed in Objection 17.

[13] All exhibits consisting of time entries are based upon true and correct reproductions of Plaintiffs' counsel's time records, as attached to the Application.

[14] Arizona law governs the question of whether a voluntary dismissal in federal court confers prevailing party status upon the Defendant. *See Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 887 (9th Cir. 2000).

Plaintiffs voluntarily dismissed the Federal Case, they gave up any right to recover fees for work performed in that action, even if that work contributed to their success here.[15]

Plaintiffs chose to take an ill-fated detour into federal court, reversing course only when it became clear that Judge Bolton would dismiss the case. That decision had consequences—it made Defendants the prevailing party in the Federal Case. The Court must exclude all time expended in the Federal Case from the lodestar.

b. <u>Objection 6</u>: The Open Lien Plaintiffs may not recover for time expended on the Closed Lien Plaintiffs' claims in this Court.

Plaintiffs' counsel brought claims for two groups of plaintiffs: the Open Lien Plaintiffs and the Closed Lien Plaintiffs. The Court dismissed the Closed Lien Plaintiffs' claims. *See* Minute Entry (Sept. 28, 2012). Although an appeal is pending, Defendants are clearly the prevailing parties as to the Closed Lien Plaintiffs' claims.

Unrelated claims must "be treated as if they had been raised in separate lawsuits." *Hensley*, 461 U.S. at 434-35, 103 S. Ct. at 1940. "[F]ees should not be awarded for those unsuccessful separate and distinct claims which are unrelated to the claim upon which the plaintiff prevailed."[16] *China Doll*, 138 Ariz. at 189, 673 P.2d at 933 (emphasis added). Similarly, "time spent on dismissed plaintiffs should be excluded from a fee award if the result is discrete and unsuccessful." *Newburg on Class Actions* § 14:3 (citing *Webster Greenthumb Co. v. Fulton County*, 112 F.Supp.2d 1339, 1352 (N.D. Ga. 2000)).

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[15] Plaintiffs correctly state that pre-filing work is recoverable. But they do not seek fees for pre-filing investigation—they seek fees incurred from *another lawsuit* in which *Defendants* prevailed. Plaintiffs cite *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115 (9th Cir. 2002), but that case is inapposite—the Ninth Circuit did not consider a request to award fees incurred in another proceeding in which the party lost. Indeed, no case anywhere permits a party to recover, as pre-filing work, fees from a prior action it lost.

[16] Plaintiffs' suggestion that legal fees are "not to be segregated by legal theory" is simply false. *See generally Attorneys' Fees Manual* at § 1.7, 1-12 (discussing apportionment of fees between successful and unsuccessful claims and theories).

The Closed Lien Plaintiffs' claims involved ***separate parties*** and were decided in ***Defendants'*** favor on ***separate grounds***: whether the doctrine of accord and satisfaction barred the Closed Lien Plaintiffs from litigating the merits of the claims they settled. In dismissing the Closed Lien Plaintiffs' claims, the Court stated that "the lien settlements are final and binding regardless of the validity of the underlying claims." Minute Entry, 2 (Sept. 28, 2012). And in granting Rule 54(b) judgment, the Court reasoned that the issues raised by the Closed Lien Plaintiffs "are distinct from the issues raised by the Open Lien Plaintiffs." Minute Entry, 1 (Feb. 26, 2013).

The Closed Lien Plaintiffs' claims are clearly separate from the claims asserted by the Open Lien Plaintiffs. Any time expended on those claims did not contribute to the result attained by the Open Lien Plaintiffs. Of course, a prevailing party may recover only those attorneys' fees that were necessary to achieving the result in the litigation. *Hensley*, 461 U.S. at 434, 103 S. Ct. 1933.

The Application, however, seeks $60,442.50 for 154.5 hours expended on the Closed Lien Plaintiffs' claims. *See* Exhibit 3a.[17] These are time entries whose descriptions clearly relate to only the Closed Lien Plaintiffs' claims and do not involve the Open Lien Plaintiffs' claims in any conceivable way. Specifically, these time entries refer to Defendants' accord and satisfaction defense, discovery undertaken to obtain lists of Closed Lien Plaintiffs, Defendants' motion to dismiss the Closed Lien Plaintiffs, Defendants' motion for entry of Rule 54(b) judgment against the Closed Lien Plaintiffs, and communications with the Closed Lien Plaintiffs.[18]

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[17] Exhibit 3a does not include time expended for the Closed Lien Plaintiffs in the Federal Case. If the Court overrules Objection 5, the Court should refer to Exhibit 3b instead of Exhibit 3a. Including the Federal Case, the Application seeks $193,785.00 for 474.6 hours expended on the Closed Lien Plaintiffs' claims. *See* Exhibit 3b.

[18] This objection (and many of Defendants' other objections) includes time entries that group objectionable content with non-objectionable content, *i.e.* entries that are block billed. The Court should exclude the entirety of any such block-billed entries. Neither

For example, Mr. Entrekin requested $11,432.50 for time expended in unsuccessfully opposing Defendants' motion to dismiss the Closed Lien Plaintiffs.[19] A few representative examples from Mr. Trachtenberg's time entries are set forth below:

4/16/2012	GMT	Telephone call with Redmond Brown.	0.60	$255.00
7/17/2012	GMT	Research re: motion to dismiss.	8.90	$3,782.50
2/4/2013	GMT	Research and review Rule 54 b motion; case management; correspondence with opposing Counsel.	4.20	$1,785.00
2/27/2013	GMT	Attention to Rule 54b issue. Call with Lance E. Call with David Abney. Pull file documents for Abney. Correspondence with Abney. Correspondence with Dana.	3.80	$1,615.00

None of this time contributed to the Open Lien Plaintiffs' success. *China Doll* obligated Plaintiffs' counsel to exclude this time from the Application, but they failed to do so. The Court should exclude all time entries listed in Exhibit 3a.

c. Objection 7: The Open Lien Plaintiffs may not recover for time expended on the Closed Lien Plaintiffs' appeal.

The Open Lien Plaintiffs seek an additional $52,345.00 for 127.1 hours expended on the Closed Lien Plaintiffs' appeal. *See* Exhibit 4. This appeal is ***ongoing*** from a judgment in ***the Defendants' favor***. Moreover, the Closed Lien Plaintiffs have already asked the Court of Appeals for an award of attorneys' fees under ARCAP 21—yet the Open Lien Plaintiffs seek recovery of those exact same fees here.[20]

Time expended for the Closed Lien Plaintiffs' appeal is clearly not recoverable. The Court should exclude all time entries listed in Exhibit 4.

Defendants nor the Court has an obligation to split block billed entries and arbitrarily apportion time to the tasks in those entries. *Cobell*, 407 F. Supp. 2d at 158-63. Plaintiffs' counsel cannot inflate their fee award by grouping unrecoverable time with recoverable time. Moreover, Plaintiffs bear the burden to establish that the time expended was reasonable and necessary. *Attorneys' Fees Manual* at § 1.6.4, 1.5. Plaintiffs cannot meet that burden by grouping objectionable and unobjectionable content into one time entry.

[19] Each time entry specifically referred to the response to Defendants' motion to dismiss.

d. Objection 8: Plaintiffs may not recover for time expended on behalf of other plaintiffs in their unsuccessful claims against Kingman Regional Medical Center ("KRMC").

Plaintiffs' counsel represented four individuals who brought claims against KRMC in this litigation.[21] The Court granted KRMC's motion to dismiss those claims.[22] None of the prevailing Plaintiffs brought claims against KRMC. None of the KRMC plaintiffs stated any claims against Defendants.

Yet Plaintiffs seek $44,472.50 from ***Defendants*** for 111.1 hours expended on other parties' claims against KRMC. *See* Exhibit 5. It should be obvious that Plaintiffs cannot recover for time expended by their lawyers on claims ***unsuccessfully*** asserted by ***different plaintiffs*** against a ***different defendant***. Plaintiffs' counsel had no good faith basis whatsoever to request any fees from the KRMC litigation.

The Court should exclude all time entries in Exhibit 5 from the lodestar.

e. Objection 9: Plaintiffs may not recover for time expended in the conservatorship proceedings for Brianna Phair.

Plaintiffs seek $2,462.50 for 8.9 hours expended in representing Brianna Phair (one of the Open Lien Plaintiffs) in her conservatorship proceedings. *See* Exhibit 6. But Defendants were not parties to the conservatorship proceeding. It is not clear that the time claimed is even related to the hospital's lien on Phair's personal injury recovery. And even if they were related, these fees were incurred in the course of Plaintiffs' counsel's separate representation of Ms. Phair—which is governed by a separate fee arrangement and could be subject to a separate fee-shifting rule.

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[20] *See* Exhibit 21, a true and correct copy of excerpts from the Opening Brief.

[21] The KRMC plaintiffs were Penny Summerlin, Lora Newton, Renee Burmudez, and Matthew Mendez. *Second Amended Complaint*, ¶¶ 67-69.

[22] Minute Entry, 2 (Apr. 10, 2013).

By definition, any hours expended in Brianna Phair's conservatorship did not contribute to the result obtained here. All time entries in Exhibit 6 should be excluded.

f. Objection 10: Plaintiffs may not recover for time expended in *Puch v. Key Health Medical Solutions*.

Plaintiffs' counsel represented the plaintiffs in *Puch v. Key Health Medical Solutions*.[23] In that case, the Court of Appeals *affirmed* an award of attorneys' fees to Plaintiffs' counsel and *granted* fees on appeal. None of the Plaintiffs and Defendants in this case was a party in *Puch*.

Plaintiffs, however, seek $10,200.00 for 24 hours that relate to *Puch*. *See* Exhibit 7. Those hours obviously did not contribute to the results obtained in *this case*. Indeed, most of the hours relate to the *Puch* plaintiffs' motion for publication of the Court's memorandum opinion. Those hours might be necessary to the *Puch* litigation, but they did not contribute in any way to Plaintiffs' success here.

Again, Plaintiffs' counsel cannot recover for time expended in an entirely separate case. The time entries in Exhibit 7 should be excluded.

g. Objection 11: Plaintiffs may not recover for time expended in litigating the offer of judgment made to Mark Shea.

A party cannot recover for time expended on "unnecessary motions" and "unproductive litigation." *In re Guardianship of Sleeth*, 226 Ariz. 171, 176, ¶ 22, 244 P.3d 1169, 1174 (App. 2010). This rule disincentivizes attorneys from "churn[ing] cases to generate fees beyond those reasonably necessary" to litigate the case. *ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 52-53, 952 P.2d 286, 290-91 (App. 1996).

Mark Shea, an Open Lien Plaintiff, accepted Defendants' offer of judgment. Under Rule 68, the standard practice was for Plaintiffs' counsel to submit a form of judgment that tracked the offer exactly. Instead, Plaintiffs' counsel submitted a judgment

[23] *See* Exhibit 22, a true and correct copy of the Memorandum Decision from *Puch*.

that included extensive findings of fact, conclusions of law, and statements that were prejudicial to Defendants, none of which appeared in the offer. After briefing the issue, the Court agreed that Plaintiffs' counsel's form of judgment was inappropriate and signed the Defendants' proposed form of judgment.[24]

Now, Plaintiffs' counsel demands $18,445.00 for 43.4 hours related to the proceedings on Shea's offer of judgment. *See* Exhibit 8. These proceedings were wholly unnecessary and unproductive. The Court should not force Defendants to pay for Plaintiffs' counsel's failure to follow basic procedure. Instead, the Court should disallow recovery of all time expended on litigating the Shea offer of judgment, listed in Exhibit 8.

h. Objection 12: Plaintiffs may not recover for time expended in litigating their "emergency" standing motion.

On February 1, 2013, Plaintiffs filed a "Motion Regarding Standing as to Lead Plaintiffs Whose Liens Exist As of December 7, 2012," asking the Court to decree that any Open Lien Plaintiff whose lien was outstanding on December 7, 2012 had standing to represent the class. This motion was clearly a request for an advisory opinion—and Defendants objected as such. The Court agreed and denied the motion.[25]

Yet Plaintiffs now demand $10,795.00 for 25.4 hours expended on proceedings related to the standing motion. *See* Exhibit 9. This motion was unnecessary and achieved absolutely nothing. Again, the Court should not reward Plaintiffs' counsel for failing to observe elementary legal precepts. The Court should disallow recovery for all hours expended on the standing motion, which are listed in Exhibit 9.

[24] Minute Entry, 2 (Jan. 4, 2013).
[25] Minute Entry, 1 (Apr. 10, 2013).

i. Objection 13: Plaintiffs may not recover for time expended exclusively for their claim for breach of contract.

Plaintiffs brought two substantive claims: a declaratory claim that federal law preempted Arizona's lien statutes (the "Preemption Claim") and a claim for breach of the AHCCCS Program Participation Agreements (the "Contract Claim"). Plaintiffs prevailed on the Preemption Claim, but not the Contract Claim. *See* Minute Entry (May 16, 2014). Plaintiffs themselves argued that the Preemption Claim is separate from the Contract Claim. Pl.'s Reply in Support of Mot. for Entry of Rule 54(b) J. at 4 (Feb. 24, 2014) ("The Breach of Contract and Preemption Claims Are Not the Same Claim.").

Plaintiffs lost on the Contract Claim, yet they seek recovery of $6,857.50 for 15.5 hours on that claim. *See* Exhibit 10. These time entries are all from December 2013, after the Court held oral argument on the Preemption Claim. As such, those hours can only be attributable to the Contract Claim. And by Plaintiffs' own admission, time spent on the Contract Claim did not contribute to Plaintiffs' success on the Preemption Claim. Accordingly, the Court should exclude these time entries, listed in Exhibit 10.

III. OBJECTIONS TO PARTICULAR TIME ENTRIES

a. Objection 14: Plaintiffs may not recover for egregiously vague and unintelligible time entries.

Attorneys must record their time "in sufficient detail so that the work performed or task accomplished is clearly described and identified." *Attorneys' Fees Manual*, at § 1.6.3, 1-5. Courts frequently exclude time entries that are nonsensical, unintelligible, or so vague as to lack a specific topic or fail to identify the general subject matter of the service performed. *Kearney v. Auto-Owners Ins.*, 713 F. Supp. 2d 1369, 1379 (M.D. Fla. 2010); *Robinson v. Instructional Sys.*, 105 F. Supp. 2d 283, 284-86 (S.D.N.Y. 2000).

Terse time entries, such as "library research," "analyzing documents" or "phone interviews," entered with no further explanation, are insufficient and stricken as inadequately documented. *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 99 F.3d 761,

773 (5th Cir. 1996); *e.g.*, *Spiller v. Comm'r of Soc. Sec.*, 940 F. Supp. 2d 647, 651-52 (S.D. Ohio 2013) (excluding "review of file; dictation of file"); *Handschu v. Special Servs. Div.*, 727 F. Supp. 2d 239, 249-51 (S.D.N.Y. 2010) (excluding "Engaged on Jones case—8 hours"); *Tsombanidis v. City of W. Haven, Conn.*, 208 F. Supp. 2d 263, 277-82 (D. Conn. 2002) (excluding "legal research; analyze cases" as insufficient).

The time entries attached as Exhibit 11a are all unacceptably vague.[26] Many of Mr. Entrekin's time entries, such as "worked out strategy for new filing," "worked with GT on motions," "negotiated and filed stipulation," "worked on strategy on motion with GT," and "research and write response to same," lack a specific topic or fail to identify the task performed. They are egregiously vague, if not outright unintelligible.

Mr. Trachtenberg's time sheets are similarly replete with egregiously vague time entries, such as "Attention to filing issues," "Attention to state court action and related research," "Attention to expert issues," and "Attention to class notices." And incredibly, no fewer than 47 of Mr. Trachtenberg's time entries are tersely described as "case management," "attention to case management," or some variant thereof. These entries provide no explanation whatsoever as to what, exactly, Mr. Trachtenberg did.

Litigants who submit excessively vague time entries "take their chances" that those entries will be disallowed. *League of United Latin American Citizens No. 4552 v. Roscoe ISD*, 119 F.3d 1228, 1233 (5th Cir. 1997). The entries set forth in Exhibit 11a are unintelligible and unacceptably vague. The Court should exclude these entries.

b. Objection 15: Plaintiffs cannot recover for time expended on clerical work and administrative tasks.

Courts disallow recovery for hours expended on purely clerical or secretarial tasks. *Attorneys' Fees Manual*, at § 1.6.4 at 1-6; *accord Spegon v. Catholic Bishop of Chicago*,

[26] Exhibit 11a does not include egregiously vague time entries from the Federal Case. If the Court overrules Objection 5, the Court should refer to Exhibit 11b, which includes all such time entries from the Federal Case, instead of Exhibit 11a.

175 F.3d 544, 553 (7th Cir. 1999). Clerical work is part of a law firm's overhead and reflected in the attorney's hourly rate—permitting recovery for hours expended on secretarial tasks would thus result in a double recovery. *Seven Signatures Gen. P'ship v. Irongate Azrep BW LLC*, 871 F. Supp. 2d 1040, 1057-58 (D. Haw. 2012).

Non-compensable secretarial tasks include copying and mailing documents, filing pleadings, and maintaining case files. *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 973 (D.C. Cir. 2004); *Okla. Nat. Gas Co. v. Apache Corp.*, 355 F. Supp. 2d 1246, 1257 (N.D. Okla. 2004). Similarly, tasks pertaining to the attorney-client relationship, such as drafting an engagement letter or retainer agreement, are non-compensable "administrative matters." *Brownlee*, 353 F.3d at 973; *accord Am. Civil Liberties Union of Ga. v. Barnes*, 168 F.3d 423 (11th Cir. 1999); *Wzorek v. City of Chicago*, 739 F. Supp. 400, 402 (N.D. Ill. 1990) (no recovery for discussion of retainer agreement with client).

Plaintiffs seek $44,317.50 for 128.1 hours expended on tasks that are clearly secretarial, clerical, or administrative. *See* Exhibit 12a.[27] Some examples include:

3/22/2012	GMT	Attention to retainer agreements.	2.10	$892.50
4/4/2012	GMT	Attention to retainer agreement status.	3.40	$1,445.00
5/4/2012	EDG	Begin to prepare updated Lead Plaintiff Retainer Index.	2.20	$605.00
5/8/2012	EDG	Revise File Directory	0.50	$137.50
5/25/2012	EDG	Update Pleading backer.	0.50	$137.50
11/15/2012	EDG	Review of file re receipt of pending outstanding Retainer Agreements from new Plaintiffs.	1.00	$275.00
4/10/2013	EDG	Update New Clients index.	0.40	$110.00

These services did not require professional legal skills.[28] Nobody disputes that this clerical or administrative time assisted Plaintiffs' counsel in litigating this case. But

[27] Exhibit 12a does not include clerical time from the Federal Case. If the Court overrules Objection 5, the Court should refer to Exhibit 12b in lieu of Exhibit 12a. Including the Federal Case, the Application seeks $61,012.50 for 176.7 hours expended on clerical work. *See* Exhibit 12b.

secretarial time is overhead that is accounted for in counsel's hourly rate. The Court should exclude time expended on clerical, secretarial, or administrative tasks.

c. Objection 16: Plaintiffs may not recover for communications and conferences that are not properly documented.

Time entries for meetings, conferences, correspondence, and telephone calls "must identify the participants, describe the substance of the communications, explain its outcome and justify its necessity." *In re Baker*, 374 B.R. 489, 496-97 (Bankr. E.D.N.Y. 2007); *In re Fibermark, Inc.*, 349 B.R. 385, 402 (Bankr. D. Vt. 2006) (time spent on communications, "without any reference to the subject, the recipient or the sender of those emails is not compensable"); *Pressman v. Estate of Steinvorth*, 886 F. Supp. 365, 367 (S.D.N.Y.1995) (time entries for "telephone conference," "prepare correspondence," and "review file" excluded). A court will exclude time entries without this information because it cannot assess whether the time spent on the communication or meeting was reasonable. *In re Wheeler*, 439 B.R. 107, 110 (Bankr. E.D. Mich. 2010).

Plaintiffs seek $32,000.00 for 76 hours expended on conferences and communications whose time entries are missing key information. *See* Exhibit 13a.[29] Representative examples include:

4/16/2012	GMT	Telephone call with Redmond Brown.	0.60	$ 255.00

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[28] Plaintiffs argue that they can recover time expended by paralegals, but that is a *non sequitur*. Time for clerical work is not recoverable *at all*, regardless of who performs the work. *Attorneys' Fees Manual*, at § 1.6.4 at 1-6; *Missouri v. Jenkins*, 491 U.S. 274, 288, 109 S. Ct. 2463, 2472 (1989). Clerical work does not require the type of special "legal training and knowledge" that warrants an award of fees for paralegal time. *Ahwatukee Custom Estates Mgmt. Ass'n v. Bach*, 193 Ariz. 401, 403, ¶ 9, 973 P.2d 106, 108 (1999); *accord Trotwood*, 493 F. Supp. 2d at 987 (paralegal time is recoverable only if the services "involve professional legal skills").

[29] Exhibit 13a does not include improperly documented communications in the Federal Case. If the Court overrules Objection 5, the Court should refer to Exhibit 13b. Including the Federal Case, the Application seeks $40,590.00 for 96.6 hours of improperly documented communications. *See* Exhibit 13b.

6/13/2012	BLE	e-mails with Barker; call with GT; review expert affidavit	2.8	
6/26/2012	BLE	preparation and phone conference with Barker and Margulies	2.2	
7/13/2012	GMT	Telephone calls with various CRs.	0.60	$ 255.00
1/10/2014	GMT	Correspondence re: Pye bankruptcy.	1.00	$ 425.00

These entries do not properly describe the participants and/or the substance of communications and conferences. Neither the Court nor the Defendants can evaluate whether this time was reasonable and necessary (or even relevant) to the result attained. Consequently, the Court must exclude the entries attached as Exhibit 13a.

d. Objection 17: The Court should disallow or sharply reduce certain excessive hours claimed by Plaintiffs.

Lawyers must exercise billing judgment when submitting bills to clients and when seeking fees from their adversaries. *Attorneys' Fees Manual* at § 1.6.4, 1-5; *accord Hensley*, 461 U.S. at 434, 103 S. Ct. at 1940. Courts scrutinize fee requests for "excessive, redundant or otherwise unnecessary hours which firms would have excluded from bills to their own clients." *Cobell*, 407 F. Supp. 2d at 158-63; *accord China Doll*, 138 Ariz. at 188, 673 P.2d at 932 (the court must determine "that the hours claimed are justified"). In *Cobell*, the Court addressed "egregious examples" of excessive billing in a fee application, such as a request for 852.47 hours spent drafting a 66-page brief, which amounted to $1,615 per page.[30] *Id.* The Court noted its discretion to deny the request, but instead sharply reduced the excessive time, up to 95% in certain cases. *Id.* at 162.

The same egregious excessiveness is present here:

- Mr. Trachtenberg seeks ***$86,275.00*** for "Telephone calls with Jackie Abbott, Amber Winters and Redmond Brown re: Class Action" on July 7, 2011. The Court should deny this abusive entry in its entirety. *See* Exhibit 14.

[30] In *Cobell*, the Equal Access to Justice Act capped counsel's hourly rate at $125.

- Both firms request a combined $24,265.00 for preparing expert disclosures, which totaled 14 pages including exhibits. *See* Exhibit 14. This amounts to ***$1,733.24 per page***.[31]
- Both firms request a combined $19,632.50 for preparing a 22-page disclosure statement, much of which consists of repetitive statements regarding Plaintiffs' testimony. *See* Exhibit 14. This amounts to ***$892.39 per page***.[32]
- Mr. Entrekin requests $4,037.50 for preparing a second supplemental disclosure statement with *six lines of text* and no attachments. *See* Exhibit 14. That amounts to ***$807.50 per line of text*** or ***$61.17 per word***.[33]

This sort of excess is unconscionable and offensive. The Court should, in its discretion, deny these requests in their entirety. At minimum, the Court should reduce the time claimed for preparation of Plaintiffs' disclosures by 90%.[34]

IV. THE COURT SHOULD APPLY CERTAIN DISCOUNTS TO THE REMAINING LODESTAR.

When an attorney fails to keep adequate records, "the court should not award the full amount requested." *Mr. & Mrs. B. v. Weston Bd. of Ed.*, 34 F. Supp. 2d 777, 781 (D. Conn. 1999). Plaintiffs' counsel's failure to maintain proper records requires multiple reductions to the remaining lodestar.

a. Objection 18: The Court should reduce the lodestar by 30% to account for vague time entries.

Attorneys must record their time "in sufficient detail so that the work performed or task accomplished is clearly described and identified." *Attorneys' Fees Manual*, § 1.6.3, 1-5. Time records should allow the Court to determine the nature of the tasks performed

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[31] A true and correct copy of the expert disclosures is attached as Exhibit 23.
[32] A true and correct copy of this disclosure statement is attached as Exhibit 24.
[33] A true and correct copy of this disclosure statement is attached as Exhibit 25.
[34] The Decision Matrix excludes these time entries entirely.

and ascertain whether the time claimed is reasonable. *Id.; accord Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986).

Entries such as "research for brief," "research and draft brief," and "draft and edit brief" are not sufficiently detailed. *Ragin v. Harry Macklowe Real Estate Co.*, 870 F. Supp. 510, 520, (S.D.N.Y.1994); *Weston*, 34 F. Supp. 2d at 781 ("preparation of brief" and "review of correspondence" insufficient); *Attorneys' Fees Manual* at § 1.6.3, 1-5 ("Time entries that simply reflect 'research' or 'consult with opposing counsel' provide little guidance as to what was actually accomplished."). Courts reduce the lodestar to account for vague time entries. The reduction ranges from between 10-50%, depending upon the pervasiveness of the vague entries. *Brownlee*, 353 F.3d at 971 (50%); *Casper v. Lew Lieberbaum*, 182 F.Supp.2d 342, 349 (S.D.N.Y.2002) (10-30%, collecting cases).

This Application is rife with vague time entries. A few examples are below:

7/17/2012	GMT	Research re: motion to dismiss.	8.90	$3,782.50
11/19/2012	GMT	Attention to drafting various pleadings.	4.00	$1,700.00
8/21/2013	GMT	Review of rep. to MSJ and sources; calls with LE. ; begin research re case law.	8.40	$3,570.00
9/4/2013	GMT	Review and revise MSJ.	11.50	$4,887.50
9/5/2013	GMT	Review and revise MSJ/reply.	12.70	$5,397.50

Mr. Entrekin recorded five identical time entries in June 2013: "work on motion for summary judgment and statement of facts." Those entries ranged from 6.7 to 9.1 hours each. In November 2013, he recorded six identical time entries: "prepare for oral argument on liability."

A 30% reduction is appropriate for several reasons. First, unlike the time entries at issue in Objection 14, one can ascertain the general subject matter at hand in the examples above. But the descriptions are not detailed enough to permit the Court to assess whether the time claimed is reasonable. Second, many of Plaintiffs' counsel's time entries are vague. Plaintiffs' counsel's general practice was to record time in accordance with the examples set forth above. Third, many of counsel's vague entries

involve large blocks of time, at least 6.0 hours. That, combined with Plaintiffs' counsel's penchant for claiming excessive time, warrants a significant reduction.

The Court should reduce the remaining lodestar by 30%.

b. Objection 19: All block-billed time entries must be reduced by 30%.

Courts disapprove of block billing, a practice in which lawyers combine multiple discrete activities into a single time entry. *In re Guardianship of Sleeth*, 226 Ariz. 171, 178, ¶ 34, 244 P.3d 1169, 1176 (App. 2010).[35] Block billing "obfuscates the amount of time expended on distinct tasks." *Miroglio S.P.A. v. Conway Stores, Inc.*, 629 F. Supp. 2d 307, 312-14 (S.D.N.Y. 2009). It also inflates the amount of time claimed by up to 30%. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007).

A court will not separate block-billed entries "into their constituent tasks and apportion[] a random amount of time to each." *Cobell*, 407 F.Supp.2d at 158-63. Rather, the court applies a percentage discount to all block-billed hours. The Ninth Circuit reduces block-billed entries by 20-30%. *E.g., Lahiri v. Univ. Music & Video Distribution Corp.*, 606 F.3d 1216, 1223 (9th Cir. 2010) (30%); *Welch*, 480 F.3d at 948 (20%).

The time entries attached as Exhibit 15a are block-billed.[36] These entries lump multiple activities into a single time entry. Representative examples include:

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[35] Plaintiffs might point to *Orfaly v. Tucson Symphony Soc'y*, in which the Court of Appeals declined to *exclude* block billed time entries altogether as a *per se* violation of *China Doll*. 209 Ariz. 260, 266, ¶ 22, 99 P.3d 1030, 1036 (App. 2004). *Orfaly* is not apposite—Defendants do not argue that the block-billed time entries must be *excluded*. Rather, the Court should simply discount those entries, an issue *Orfaly* did not address.

[36] Exhibit 15a does not include block-billed entries from the Federal Case. If the Court overrules Objection 5, the Court should refer to Exhibit 15b, which includes all block-billed entries from this litigation and the Federal Case.

10/26/2012	GMT	Calls to new plaintiffs. Correspondence with various attys to obtain new plaintiffs. Correspondence with Lance re; new plaintiffs. Revise Complaint. Research re; KRMC. Call with Mark Shea. Call with Summerlin. Call with Newton. Call with Hester. Call with Jully. Attention to James Issues; Telephone calls with Lance.	9.50	$4,037.50
10/29/2012	GMT	Telephone call with Lance. Calls with various plaintiffs for potential plaintiffs; revise complaint. Calls to various attys re; new plaintiffs	10.10	$4,292.50
10/30/2012	GMT	Calls with various new and potential plaintiffs. Call with Lance re; strategy; draft form of Judgment for Mark Shea. Amend complaint. Follow up with other clients to get ratiner agreements signed and returned.	12.50	$5,312.50
11/7/2012	BLE	worked on motion to certify; worked on response to motion	9.5	
8/23/2013	BLE	read motion for procedural order; continued research on cross motion	9.4	
9/4/2013	BLE	integrated four draft motions and statements of facts, gathered exhibits	11	

A 30% reduction is warranted for three reasons. First, Plaintiffs' counsel has more than shown their proclivity to inflate their hours, requiring a reduction at the top end of the typical range. Second, Mr. Entrekin and Mr. Trachtenberg never itemized their time. Instead, they entered one large block of time per day, combining any and all tasks purportedly performed, exacerbating any inflation of time.[37] Third, Plaintiffs' counsel failed to keep separate records for the discrete claims at issue. Many block-billed entries explicitly conflated the Open Lien Plaintiffs' claims with those of the Closed Lien Plaintiffs or the KRMC Plaintiffs. Other block-billed entries included time that is not recoverable, such as clerical work or improperly documented communications. A 30% reduction accounts for unrecoverable time that is embedded in the block-billed entries.

Defendants have objected to many of the block-billed entries on other grounds. Simply subtracting 30% of the value of all block-billed time from the lodestar could

result in a double-reduction—it would automatically subtract an additional 30% of the value of any block-billed entries that the Court already excluded on other grounds. The Court, however, should not have to ascertain which specific block-billed entries should be excluded, remove those entries from Exhibit 15a, and then apply the 30% block-billing discount to the remainder.

Instead, the Court should reduce the remaining lodestar to account for the block-billing. The Decision Matrix calculates an appropriate discount. Block-billed entries account for 22.9% of Mr. Entrekin's time and 43.5% of Mr. Trachtenberg's time.[38] In other words, 22.9% of Mr. Entrekin's time is subject to a 30% reduction. Multiplying those percentages yields the correct discount to the remaining lodestar—the Court should reduce the lodestar by 6.88% for Mr. Entrekin and 13.05% for Mr. Trachtenberg.[39]

c. Objection 20: All time entries dated before the Closed Lien Plaintiffs' dismissal must be reduced by 50%.

Once again, "[t]ime spent on dismissed plaintiffs should be excluded from a fee award if the result is discrete and unsuccessful." *Newburg on Class Actions* § 14:3. The Court dismissed the Closed Lien Plaintiffs' claims as barred by accord and satisfaction, a discrete and unsuccessful result. Obviously, Plaintiffs cannot recover for time expended on behalf of different parties that did not win. *See* Objections 6-8, *supra*.

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[37] Mr. Trachtenberg's paralegals often, but not always, itemized their time.

[38] If the Court overrules Objection 5, these numbers change. Including the Federal Case, 26.6% of Mr. Entrekin's time entries and 40.56% of Mr. Trachtenberg's time entries are block billed. Utilizing the math above, the Court should reduce the lodestar by 7.98% for Mr. Entrekin and 12.17% for Mr. Trachtenberg.

[39] Defendants have set forth the most feasible method available to implement this reduction. Plaintiffs' counsel may not be heard to complain—they waived any right to an exact calculation by keeping sloppy time records that necessitated layer-upon-layer of objection. The *Attorneys' Fees Manual* admonishes lawyers to keep detailed time records because "[a]pportionment decisions are far easier to make when the underlying documentation clearly identifies the work and services performed." § 1.6.3, 1-5.

Defendants have endeavored to segregate those time entries that pertain to just the Closed Lien Plaintiffs' claims. Objection 6, *supra*. But excluding those entries does not fully cleanse the Application of time expended on behalf of the Closed Lien Plaintiffs. Many of Plaintiffs' counsel's time entries inevitably include time expended on behalf of both sets of plaintiffs. Some examples include:

4/27/2012	BLE	drafted Complaint and certificate	8.5	
5/7/2012	GMT	Call with Lance re; complaint. Revise complaint. Attention to retainer agreement. Attention to filling complaint.	3.30	$1,402.50
5/8/2012	GMT	Revised complaint filed and call with Lance E.	2.10	$892.50
7/2/2012	GMT	Attention to scheduling conference.	1.90	$807.50
8/13/2012	EDG	Begin to draft Initial Disclosure Statement.	1.60	$440.00
8/19/2012	EDG	Continue to draft Initial Disclosure Statement.	3.30	$907.50

Both the complaint and initial disclosure statement clearly include material that is unique to the Closed Lien Plaintiffs' case. But because Plaintiffs' counsel did not keep proper time records, one cannot ascertain how much time was attributable to the Closed Lien Plaintiffs. In that situation, courts reduce the lodestar to account for time spent on unsuccessful claims. *E.g., Scanlon v. Kessler*, 23 F. Supp. 2d 413, 418 (S.D.N.Y. 1998) (reducing the lodestar to account for limited success).

The Court should apply a 50% reduction to all time entries for this action that pre-date the Closed Lien Plaintiffs' dismissal. The time entries subject to this reduction are attached as Exhibit 16a.[40]

A 50% reduction is more than fair. Fifteen of the 18 plaintiffs during this time period were Closed Lien Plaintiffs.[41] Defendants, however, have always conceptualized this case as two equal prongs—open liens and closed liens. This tracks Plaintiffs' complaint, which requested certification of two subclasses—of Open Lien and Closed

[40] Exhibit 16a does not include time entries from the Federal Case that are subject to reduction. If the Court overrules Objection 5, the Court should refer to Exhibit 16b, which lists all time entries subject to reduction from this action and the Federal Case.

[41] All but three of the Open Lien Plaintiffs became parties in December 2012.

Lien Plaintiffs—and asserts claims on behalf of one or both subclasses. Each subclass should be treated as an equal portion of this case.

Plaintiffs' counsel may complain that they devoted more than 50% of their time to the Open Lien Plaintiffs' claims. But they failed to keep specific time records that could be accurately apportioned between the Open Lien and Closed Lien Plaintiffs. They cannot prove how much time, exactly, was devoted to each set of plaintiffs. Without any reliable evidence, the Court should presume that Plaintiffs' counsel's devoted half of its time to the claims of the Closed Lien Plaintiffs.

Defendants objected to many of the time entries at issue in this objection on other grounds. Any reduction should therefore be applied to the lodestar to avoid an improper double reduction. The Decision Matrix computes the appropriate discount, largely relying upon the methodology described in Objection 19.[42] The lodestar should be reduced by 10.77% for Mr. Entrekin and 6.15% for Mr. Trachtenberg.[43]

d. Objection 21 (Alternative to Objection 5): The Federal Case's time entries must be reduced by 30% to account for unsuccessful federal claims and federal issues that were unnecessary to the success in this case.

Courts use percentage cuts "as a practical means of trimming fat from a fee application" when a more precise calculation is impossible. *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983); *In re Wash. Pub. Power Supply Sys.*, 19 F.3d at 1298-99 (reducing time entries to account for excessive travel time); *Scanlon*, 23 F. Supp. 2d at 418 (reducing the lodestar to account for limited success).

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[42] Defendants have subtracted the time entries that are clearly attributable to the Closed Lien Plaintiffs and should be excluded under Objection 6.

[43] As in Objection 19, these calculations include only time expended in this case, not the Federal Case. Again, the math changes if time entries from the Federal Case are included. If the Court overrules Objection 5, the Court should reduce the lodestar by 18.98% for Mr. Entrekin and 16.69% for Mr. Trachtenberg. *See* Exhibit 1.

The Court should reduce the Federal Case's time entries by 30%. Plaintiffs asserted four total claims in the Federal Case, including a claim under 42 U.S.C. § 1983. *See* Objection 5. Case law would support apportioning 25% of the time expended to the § 1983 case. *Cf. Coe v. Town of Blooming Grove*, 714 F. Supp. 2d 439, 449 (S.D.N.Y. 2010) (reducing lodestar by 50% when plaintiff prevailed on only two of ten claims); *Vialpando v. Johanns*, 619 F. Supp. 2d 1107, 1128-29 (D. Colo. 2008) (reducing lodestar by 70% when plaintiff prevailed on only one of 12 claims). Further, the parties spent substantial time on purely federal issues—such as federal jurisdiction and the state action doctrine—that were irrelevant to this litigation. As such, that time did not contribute at all to the success Plaintiffs attained in this case.

Once again, Defendants objected to many of the Federal Case's time entries on other grounds. The discount should therefore be applied to the entire lodestar, as computed in the Decision Matrix. Utilizing Objection 19's methodology, the lodestar should be reduced by 10.66% for Mr. Entrekin and 10.43% for Mr. Trachtenberg.

V. REMAINING MATTERS

A few issues remain. First, Plaintiffs may not submit any new evidence with their reply, whether in the form of affidavits or otherwise. In quashing both parties' subpoenas duces tecum, the Court clearly limited the record to the materials presented in the original Application. Minute Entry, 2 (Apr. 22, 2014) ("[T]he Application for Attorneys' Fees will stand on its own merits."). The reply must draw from only the evidence submitted with the original Application.

Second, Plaintiffs argue that it is "equitable" to require Defendants to pay fees, citing Defendants' "brazen[]" decision to "ignore" *Lizer v. Eagle Air Med. Corp.* App. at 8. This is a red herring—there is no broad "equitable" entitlement to attorneys' fees. To recover fees, Plaintiffs must (1) show that a legal rule permits the Court to shift fees and

(2) produce sufficient evidence relating to the time expended in the litigation. What Defendants supposedly did in response to *Lizer* is irrelevant to either issue.

Similarly, Plaintiffs state that Defendants have collected $50 million pursuant to A.R.S. § 36-2903(G)(4). Plaintiffs simply fabricated that number—nothing in the record sets forth how much Defendants collected. And in any event, Defendants' collections are irrelevant to whether the Court can shift fees.

Finally, Plaintiffs accuse Defendants' counsel of drawing out this litigation, "refus[ing] to make basic admissions or stipulations," and "ma[king] numerous collateral and procedural attacks."[44] App. at 8. These attacks are simply mendacious and find no support whatsoever in the record.

VI. CONCLUSION

The Application should be denied in its entirety. Plaintiffs never pleaded a claim for fees under the private attorney general doctrine. Rule 54(g) bars Plaintiffs from asserting that claim now. And in any event, the private attorney general doctrine is inapplicable. This case is purely an economic dispute between private parties—no public rights of great societal import are at issue here.

If the Court adjudicates individual objections, the Decision Matrix will assist the Court in navigating each objection's impact. Although the Court can certainly perform its own calculations based on the Decision Matrix, Defendants stand ready to work with Plaintiffs to arrive at a final fee award quickly if the Court so directs.

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[44] Plaintiffs also state that Defendants refused to mediate. This litigation turned on legal, not factual, issues. A mediation would not have resulted in a settlement.

RESPECTFULLY SUBMITTED this 16th day of June, 2014.

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