IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01065-KLM

RODNEY DOUGLAS EAVES,

Plaintiff,

v.

EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS,
ZACHARY MARGURITE,
CANYON PARCELL,
MICHAEL KIMBERLAIN,
JOHN DOES 1-6, and
JANE DOE,

Defendants.

ORDER

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on Plaintiff's **Motion for Renewal of Motion for the Appointment of Counsel** [#85][1] (the "Motion"). For the reasons set forth below, the Motion [#85] is **granted**.

This is Plaintiff's second motion for appointment of counsel. Plaintiff's first motion was filed in July 2016, shortly after the filing of the Amended Complaint [#6], and was denied on the basis that the factors relevant to the appointment of volunteer counsel were not then met. *See Order* [#28]. Those factors are: (1) the nature and complexity of the action; (2) the potential merit of the pro se party's claims; (3) the demonstrated inability of

[1] "[#85]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). The Court uses this convention throughout this Order.

the pro se party to retain counsel by other means; and (4) the degree to which the interests of justice will be served by appointment of counsel, including the benefit the Court may derive from the assistance of the appointed counsel. *See* D.C.COLO.LAttyR 15(f)(1)(B); *see also Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (citing *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991)).

In denying the initial motion for appointment of counsel, the Court found, for example, that the legal issues presented were not overly complex, novel, or particularly difficult to state, and that Plaintiff had demonstrated in the Amended Complaint [#6] that he had the ability to frame facts and state claims for relief. [#28] at 3. The Court finds, however, that the circumstances of the case have since changed.

Plaintiff's federal constitutional claims survived a motion to dismiss [#19]. *See Order* [#33]. Further, the Court recently denied Defendants' Motion for Summary Judgment [#106] as to a portion of Plaintiff's due process claims and as to Plaintiff's excessive force claim. *See* [#129.] Thus, the remaining claims have been found to have merit and the case will be set for trial. Moreover, the briefing on the summary judgment demonstrated to the Court that the claims involve a level of complexity that may be difficult for a pro se, incarcerated prisoner to present at trial. For example, during the period at issue, Plaintiff was a pretrial detainee whose rights are different from those a convicted prisoner. This status implicates both the due process and the excessive force claims and the standards applicable to them.

The Court also finds that while Plaintiff has appeared capable in many respects of representing himself up to this point, it is likely that Plaintiff's ability to present his claims will diminish now that the summary judgment motion has been denied and the case will

proceed through the completion of discovery and depositions, the designation of witnesses and experts, and the trial. *See McCoy v. Meyers*, 12-3160-CM-GLR, 2016 WL 305365, at *2 (D. Kan. Jan. 26, 2016). In fact, Plaintiff asserts in the Motion [#85] that he cannot communicate with two witnesses because of prison rules and regulations, and that he has no access to the internet, yellow pages, or other research materials to locate expert witnesses or investigators. *Id*. at 2-3. Additionally, Plaintiff asserts that he has made many attempts to find counsel and has been unsuccessful, which weighs slightly in Plaintiff's favor. *Id*. The Court finds that given the difficulties that Plaintiff has noted and the Court has identified, the interests of justice will be served by appointment of counsel.

Accordingly, as the Court now finds that the pertinent factors now weigh in favor of the appointment of counsel for Plaintiff,

IT IS HEREBY **ORDERED** that the Motion [#85] is **GRANTED**.

IT IS FURTHER **ORDERED** that the Clerk shall select, notify, and appoint counsel to represent Plaintiff, the pro se litigant, in this civil matter. Plaintiff is advised that there is no guarantee that Panel members will undertake representation in every case selected for pro bono representation. Plaintiff is further cautioned that, **unless and until appointed counsel enters an appearance, he is responsible for all scheduled matters, including hearings, depositions, motions, and trial.** It remains Plaintiff's legal obligation to comply with the Federal Rules of Civil Procedure, the Local Rules in this District, and all orders of this Court. *See Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992).

Dated: March 10, 2020

BY THE COURT:

Kristen L. Mix
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01065-KLM

RODNEY DOUGLAS EAVES,

Plaintiff,

v.

EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS,
ZACHARY MARGURITE,
CANYON PARCELL,
MICHAEL KIMBERLAIN,
JOHN DOES 1-6, and
JANE DOE,

Defendants.

NOTICE OF APPOINTMENT

As directed by the Order of Appointment of Counsel for Plaintiff Timothy Philip Rodgers, entered by U.S. Magistrate Judge Kristen L. Mix on March 10, 2020, and in accordance with D.C.COLO.LAttyR 15(f) of the U.S. District Court's Local Rules of Practice, the undersigned designated clerk has selected counsel from the list of members of the Civil Pro Bono Panel.

THE CLERK hereby notifies the court and the parties that attorney Kevin Homiak of the law firm of Homiak Law LLC has been selected. Selected counsel has preliminarily reviewed this case to determine if a conflict exists or other impediment to accepting this case; as it appears there is no such conflict at this time, he has informed the court of his availability. Under D.C.COLO.LAttyR 15(g), appointed counsel has thirty days to either enter an appearance(s) in the case, or file a Notice Declining Appointment. **The Clerk cautions the plaintiff that in the interim, he is responsible for all other scheduled matters by court order or operation of the federal courts' rules of procedure, including appearances at hearings or depositions, and submitting responses to motions, discovery requests, etc.**

ACCORDINGLY, the Clerk hereby enters this Notice of Appointment in this case, and will also send a copy of this Notice, the Appointment Order, and a copy of local rule D.C.COLO.LAttyR 15, Civil Pro Bono Representation to the pro se litigant. A copy of this Notice will also be sent to appointed counsel by the undersigned designated clerk.

Dated at Denver, Colorado this 4th day June, 2020.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

By: s/ Edward Butler
Edward Butler, Deputy Clerk/Legal Officer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
OFFICE OF THE CLERK

Alfred A. Arraj
United States Courthouse
901 19th Street
Denver, Colorado 80294
www.cod.uscourts.gov

Jeffrey P. Colwell
Clerk of the Court

Phone: (303) 844-3433

March 2nd, 2020

Re: Case No. _____

Dear Plainitff:

Pursuant to U.S. Magistrate Judge _____'s Order of Appointment of counsel, the clerk's office of the U.S. District Court placed your case on the list of civil actions from which counsel will be appointed from the court's Civil Pro Bono Panel of attorneys.

I am pleased to report that attorney Kevin D. Homiak of the law firm Homiak Law LLC has been selected as counsel in this matter. **Please be aware that because the court does not have your phone number or email address, Mr. Homiak has not been able to contact you. Please contact him by phone or email at: 505-385-2614 or kevin@homiaklaw.com**

Mr. Homiak has reviewed the documents in your case and has **preliminarily** agreed to represent you. As directed by the Civil Pro Bono Panel local rule, his discussion with you is to explore if any actual or potential conflicts of interest exist, whether the dispute could be resolved more appropriately by other means, and in general whether representation of you in this matter should proceed. Please understand that at this point he has **not** formally accepted your case. (An attorney is considered to have formally accepted a case when he/she files an "Entry of Appearance" in the case.)

Mr. Homiak has a substantial legal background with a variety of experiences in various areas of law. They are members of this court's federal trial bar as well as the court's Civil Pro Bono Panel.

This letter is a means of officially introducing you to Mr. Homiak and to inform you that he has responded to the Court's request for pro bono representation through the Civil Pro Bono Panel – a partnership program sponsored by the U.S. District Court and the local federal trial bar association, the Faculty of Federal Advocates. Members of the Faculty have a reputation for accomplishment and commitment to assisting the court with pro bono representation and are familiar with the unique aspects of such cases.

Please contact Mr. Homiak as soon as possible. Also, please be aware that he is acting purely on a voluntary basis and will litigate this matter in consultation with you, using his experience and talent in all aspects of the case, including strategic decision making. He can withdraw from the case if he determines that he can no longer represent you under the Rules of Professional Conduct for attorneys.

I hope your discussions go well. I am enclosing a copy of the judge's original Order of Appointment, the Clerk's Notice of Appointment, and a copy of the court's Civil Pro Bono Local Rule.

Sincerely,

Kelsey Montalban, Deputy Clerk/Paralegal

cc: Mr. Kevin Homiak, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01341-CMA-STV

WALDO MACKEY,

Plaintiff,

v.

BRIDGETTE WATSON, and
SUSAN PRIETO,

Defendants.

PLAINTIFF'S OPPOSED MOTION FOR EXTENSION OF DISCOVERY DEADLINE

Plaintiff Waldo Mackey, by and through his counsel, Kevin D. Homiak, Esq. and V. William Scarpato III, Esq. of Wheeler Trigg O'Donnell LLP, respectfully asks the Court to extend the fact discovery deadline to June 28, 2019, for the limited purpose of allowing Plaintiff's recently appointed counsel to depose the two Defendants and six fact witnesses identified in the Final Pretrial Order.

1. **Certificate of Conferral:** Pursuant to D.C.COLO.LCivR 7.1(A), Plaintiff's counsel conferred with counsel for the Defendants on May 17, 2019 and May 20, 2019 regarding the requested extension. Plaintiff's counsel explained that Plaintiff could not have taken any depositions within the November 30, 2018 discovery deadline because he was incarcerated and counsel was not appointed until well after the deadline had passed. They further noted that the extension is not for purposes of expanding the

issues in the case, but rather to ensure that Plaintiff is prepared for trial. Defendants' counsel oppose the requested extension.

2. *Pro se* Plaintiff Waldo Mackey filed this lawsuit on June 2, 2017. (ECF 1.) That same day, he filed his first Motion for Appointment of Counsel. (ECF 2.) In that Motion, Plaintiff argued that, although the legal issues in this case "are complex" and would "require significant research and investigation," he was "unable to afford counsel," he had "limited access to the law library and limited knowledge of the law," and his imprisonment would "greatly limit his ability to litigate." (*Id.*) He further explained that "[a] trial in this case will likely involve conflicting testimony, and counsel would better enable Plaintiff to present evidence and cross examine witnesses." (*Id.*)

3. Plaintiff filed his second Motion for Appointment of Counsel two months later, on August 25, 2017, and his third Motion for Appointment of Counsel on November 3, 2017—both of which raised substantially the same arguments as his first motion. (ECF 34 & 44.) He reiterated the central importance of witness testimony to this case, and his inability to effectively prepare that testimony for trial while incarcerated and unrepresented. (*See* ECF 34 ¶¶ 3, 5.)

4. On November 28, 2017, Magistrate Judge Varholak granted Plaintiff's request for counsel, but counsel was not appointed until nearly a year and a half later—on April 23, 2019. (ECF 50 & 235.)

5. Magistrate Judge Varholak set the initial discovery deadline as September 19, 2018. (ECF 74.) He later granted two extensions, to October 19, 2018, and later to

November 30, 2018. (ECF 124 & 142.) Thus, the current discovery deadline is November 30, 2018.

6. Counsel first met Plaintiff on May 15, 2019 at the Fremont Correctional Facility. They entered their appearances the following day. (ECF 247 & 248.)

7. Plaintiff has been incarcerated at the Fremont Correctional Facility and proceeding *pro se* from the initiation of this lawsuit on June 2, 2017 until May 16, 2019—well after the current discovery deadline passed on November 30, 2018. Thus, despite filing several motions for appointment of counsel, he was unable to depose the Defendants or any witness listed on his Initial Witness List within the deadline.

8. As a result, Plaintiff's counsel respectfully requests an extension of the discovery deadline until June 30, 2019 for the limited purpose of deposing the two Defendants and the six fact witnesses listed on Plaintiff's Initial Witness List and in the Final Pretrial Order: (i) Lieutenant Jeffrey Hawkins; (ii) Captain Brian Kirk; (iii) CO Linda Witte; (iv) CO Casey Warner; (v) CO Christopher Wood; and (vi) CO Tiffany Hernandez. (ECF 225.) As explained in the Final Pretrial Order (and upon information and belief), these six witnesses are all employees of the Fremont Correctional Facility and have first-hand knowledge of either the facility's grievance procedure or the other facts lying at the heart of this case. (*Id.* at 5-6.) Defendants have, likewise, identified both Lt. Hawkins and Capt. Kirk as "may-call" witnesses at trial. (*See id*. at 6-7.)

9. Plaintiff's counsel expects that the depositions of the two Defendants will take no more than four hours each and can be conducted on the same day, and that the depositions of the six fact witnesses will take no more than two hours each and can be

conducted over two days. Thus, Plaintiff estimates that the additional depositions will take no more than three days total.

10. For the convenience of Defendants, Defendants' counsel, and the fact witnesses, Plaintiff's counsel is willing to take all eight depositions on mutually agreeable dates and times at the Fremont Correctional Facility or whatever more convenient location may be established through further conferral.

11. Denying Plaintiff's Motion to extend the discovery deadline will greatly prejudice Plaintiff, as these depositions are essential to his ability prepare for trial, devise trial strategy, and examine the Defendants and the fact witnesses at trial. By contrast, Defendants would suffer no identifiable prejudice from extending the discovery deadline. Plaintiff's counsel does not intend to file any additional dispositive motions or add any additional claims to the Complaint. Nor does Plaintiff's counsel intend to serve any written discovery requests.

12. Because the Parties' current trial date is September 16-19, 2019, and the additional depositions will be completed well before the Parties' pending pre-trial deadlines, extending the deadline until June 28, 2019 will not lead to undue delay or affect the trial date.

13. Pursuant to D.C.Colo.LCiv.R. 6.1(c), undersigned counsel certifies that they will serve a copy of this Motion on Plaintiff as reflected in the attached Certificate of Service.

For the foregoing reasons, Plaintiff Waldo Mackey respectfully requests the discovery deadline be extended until June 28, 2019 for Plaintiff's counsel to take the

depositions of Defendant Bridgette Watson, Defendant Susan Prieto, Jeffrey Hawkins, Brian Kirk, Linda Witte, Casey Warner, Christopher Wood, and Tiffany Hernandez, as well as any other and further relief the Court deems appropriate.

Dated this 21st day of May, 2019.

Respectfully submitted,

s/ *Kevin D. Homiak*

Kevin D. Homiak, Esq.
V. William Scarpato III, Esq.
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Denver, Colorado 80202-5647
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Attorneys for Plaintiff Waldo Mackey

Faculty of Federal Advocates

Civil Pro Bono Panel Reimbursement Fund Reimbursement Request

General Information

The Faculty of Federal Advocates (the "FFA") manages the Civil Pro Bono Panel Reimbursement Fund, which fund provides limited reimbursement of out-of-pocket expenses in cases handled by panel attorneys for the Civil Pro Bono Panel of the U.S. District Court for the District of Colorado.

Reimbursement in any single case will be limited to $3,000 for non-expert costs. An additional reimbursement of up to $7,500 for expert fees may be requested in advance in cases where expert witnesses are reasonably required.

Panel attorneys may petition the FFA Pro Bono Committee for reimbursement of higher amounts upon a showing of exceptional circumstances. Panel attorneys are expected to advise the FFA, in advance of retaining expert(s), that such expert(s) will be retained and reimbursement will be requested. Failure to do so may result in the denial of reimbursement. Additionally, if a panel attorney believes a given case may exceed the reimbursement limits set forth above and wishes to petition for additional funds, such request should be made before the funds are expended.

The FFA will reimburse costs only to the extent that funds are available and reserves all rights to approve or deny any request.

Attorneys should allow at least ninety (90) days for receipt of their reimbursements.

Substantiating documentation, *i.e.*, court reporter invoices and in-house and/or vendor copying charges, **must** be submitted in support of costs. Invoices and documentation for those invoices **must be submitted electronically** to dana@facultyfederaladvocates.org.

Panel attorneys must complete the section of this form reporting their total hours and costs involved with the case in the Civil Pro Bono Program.

If you receive a favorable settlement or judgment in your Pro Bono case, it is expected that you reimburse the FFA's Pro Bono Panel Reimbursement Fund for all costs paid by the Fund. In addition, should you obtain an award of attorney's fees, it is highly recommended that all or some of those fees be donated to the Fund so that the FFA may continue to fund Pro Bono cases.

Updated July 24, 2019

Costs that *are* reimbursable:

1. Photocopies: The FFA will reimburse copy costs at $.16 per page.
2. Long Distance Calls: The FFA will reimburse for long distance calls.
3. Investigation: The FFA will reimburse investigation costs at $100/hr.
4. Depositions: The FFA will cover the costs of depositions, if panel attorneys first attempt to schedule depositions through the Colorado Court Reporters Association ("CCRA") Pro Bono Program. The CCRA Pro Bono guidelines are attached.

   Contact Carmen Murphy at 303-522-1604 or Carmen.Murphy@outlook.com to schedule a deposition through the CCRA Pro Bono Program.
5. Transcripts: The FFA will cover the cost of necessary transcripts.
6. Travel: The FFA will cover out-of-state travel costs only upon pre-approval and encourages all participants to conduct depositions and attend hearings by telephone whenever possible.

Costs that *are not* reimbursable:

1. Faxes: The cost of sending local faxes is not reimbursable. The cost of long distance faxes is recoverable to the extent the charges are for actual long distance phone time.
2. Staff Costs: Secretarial, paralegal, and overtime costs for staff are not reimbursable.
3. Legal Research: The FFA will not reimburse for computerized legal research.
4. Other Expenses: Overhead expenses, after-hours expenses, building expenses, in- town travel, in-town meals, attorney billing expenses, and office supplies are not recoverable.

Civil Pro Bono Panel Reimbursement Fund

Substantiating documentation, *i.e.*, court reporter invoices and in-house and/or vendor copying charges, must be submitted in support of costs. Invoices and documentation for those invoices must be submitted electronically to dana@facultyfederaladvocates.org.

Date:	Panel Member:
Case No.	Payee for Reimbursement and Address:
Case Caption: _____ v. _____	

Civil Pro Bono Panel Case Report

Total Attorney Hours on Case	_____
Total Costs (including non-reimbursable expenses):	$_____
Please briefly describe the disposition of this case, *e.g.*, settled, tried to verdict, dismissed, etc.: _____ _____	

Reimbursement Request

Photocopies:_____copies @ $.16	
Long distance calls	
Investigation	
Experts (itemized and preapproved)	
Depositions	
Transcripts	
Out-of-state travel	
TOTAL	

DECLARATION AND AFFIRMATION

I declare that the foregoing costs are correct and were necessarily incurred and have been or will be paid in this action, that the services for which reimbursement is sought were actually and necessarily performed, and that the invoices provided are true and accurate.

I affirm that I have notified all service providers that I am providing pro bono representation in this action through appointment of the United States District Court for the District of Colorado's Civil Pro Bono Panel. I have requested discounted services and fees from such service providers. Should this action result in a favorable settlement, I agree to provide notice to the FFA of such a settlement and promptly refund the reimbursed fees and costs to the FFA's Civil Pro Bono Reimbursement Fund to enable the Fund to continue to provide support for pro bono representation.

A copy hereof was this day mailed with postage fully prepaid thereon or submitted by electronic mail to:

_____

_____

_____

_____

OPTIONAL INFORMATION REQUEST

To assist the Faculty of Federal Advocates in gathering information relevant to the reimbursement request process, please consider answering the questions below. Information may be provided directly on this form (using additional pages), emailed separately to dana@facultyfederaladvocates.org, or provided anonymously by mail to Faculty of Federal Advocates, Civil Pro Bono Panel Committee, 3700 Quebec Street #100-389, Denver, CO 80207-1639.

1. Have the requirements or process for submitting reimbursement requests or obtaining reimbursement impacted your representation as a Pro Bono Panel attorney? If so, please provide information you consider relevant to the FFA's consideration.

2. Would you change the requirements or process for reimbursement requests? If so, please provide information you consider relevant to the FFA's consideration.

3. Is there any aspect of the Civil Pro Bono Panel program that you would suggest be changed? Please include any relevant information about the appointment process, any preparation for the case by the program that you feel is lacking, situations that occurred as the case progressed, the conclusion and the end of your involvement in the case, and anything else about your pro bono service that could be addressed by the court and/or the FFA that could improve the overall experience.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01341-CMA-STV

WALDO MACKEY,

Plaintiff,

v.

BRIDGETTE WATSON and
SUSAN PRIETO,

Defendants.

PLAINTIFF WALDO MACKEY'S PARTIALLY OPPOSED MOTION FOR ATTORNEY FEES

Plaintiff Waldo Mackey respectfully moves under 42 U.S.C. § 1988(b), Federal Rule of Civil Procedure 54(d)(2), and D.C.COLO.LCivR 54.3 for an award of reasonable attorneys' fees in the amount of $122,661.80.

CERTIFICATE OF CONFERRAL

Pursuant to D.C.COLO.LCivR 7.1(A), Plaintiff's counsel conferred with counsel for the Defendants on September 30, October 6, and October 9, 2019. Defendants do not oppose this motion with respect to the hourly billing rates for Mr. Homiak ($222), Mr. Scarpato ($222), Mr. Mason ($100), and Ms. Apodaca ($100). Defendants otherwise oppose.

RELEVANT PROCEDURAL HISTORY

Plaintiff Waldo Mackey filed this lawsuit *pro se* under 42 U.S.C. § 1983 on June 2, 2017, alleging, among other things, First Amendment retaliation against defendant

Sgt. Bridgette Watson and a procedural Due Process violation under the Fourteenth Amendment against defendant Lt. Susan Prieto. (ECF 1.) He filed several motions for the appointment of counsel. (*e.g.*, ECF 2, 34, 44.) On November 28, 2017, Magistrate Judge Varholak granted Plaintiff's request for counsel, and counsel was appointed on April 23, 2019. (ECF 50 & 235.) After preliminary case analysis and an initial meeting with Mr. Mackey, his current counsel entered their appearances on May 16, 2019. (ECF 247 & 248.) At the time Mr. Mackey's counsel entered their appearances, only the First Amendment claim against Sgt. Watson and the Fourteenth Amendment claim against Lt. Prieto survived. (*See* ECF 6.)

On May 21, 2019, Mr. Mackey filed an opposed motion requesting a limited extension of the discovery cutoff to conduct depositions of the defendants and certain key witnesses. (ECF 254.) After a hearing, Magistrate Judge Varholak granted that request. (ECF 259.) In the ensuing weeks, Mr. Mackey's counsel conducted six depositions in various locations in southern Colorado. (Ex. F, Decl. of V. William Scarpato III (Oct. 10, 2019) (hereinafter Scarpato Decl.) ¶ 9.)

On August 22, 2019, Mr. Mackey made a settlement demand to counsel for Defendants. (*Id.* ¶ 12.) Counsel for Defendants responded that they forwarded the settlement demand to their clients and other relevant decision makers, but they made no substantive response to the demand. (*Id.* ¶ 12.)

On August 14, 2019, Mr. Mackey filed an opposed motion in limine to exclude evidence of his prior convictions and parole proceedings. (ECF 263.) He also filed an unopposed motion for writ of habeas corpus ad testificandum to secure his presence at

trial on that date. (ECF 262.) Both of those motions were granted in substantial part. (*See* ECF 265 & 273.)

On September 16 to 18, 2019, Mr. Mackey's case was tried to a jury. (ECF 274, 275, 276.) The jury returned a verdict in Mr. Mackey's favor on both of his claims. (ECF 279.) It awarded $1 in compensatory damages and $60,000 in punitive damages against Sgt. Watson on his First Amendment claim, and $1 compensatory damages and $120,000 in punitive damages against Lt. Prieto on his Fourteenth Amendment claim. (*Id.*)

The Court entered a final judgment in accordance with the verdict on September 19, 2019. (ECF 281.) The Court also awarded Mr. Mackey costs pursuant to Federal Rule of Civil Procedure 54(d)(1) and D.C.COLO.LCivR 54.1. (*Id.*)

DISCUSSION

Under 42 U.S.C. § 1988(b), Mr. Mackey is entitled to reasonable attorneys' fees as the prevailing party. Section 1988(b) provides in relevant part: "In any action or proceeding to enforce a provision of section[]. . . 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Under § 1988, the fee claimant must establish that: (i) it is the prevailing party; and (ii) its fee request is reasonable. *Arend v. Paez*, C.A. No. 12-cv-01270-DDD-SKC, 2019 WL 2726231, at *1, (D. Colo. July 1, 2019) (quoting *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998)). "The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours

expended and hourly rates." *Id.* (quoting *Case v. Unified Sch. Dist. No. 233, Johnson Cnty., Kan.*, 157 F.3d 1243, 1249 (10th Cir. 1998)).

I. MR. MACKEY IS THE PREVAILING PARTY BECAUSE THE JURY AWARDED HIM PUNITIVE DAMAGES AND HE SECURED A JUDGMENT IN HIS FAVOR

Mr. Mackey is the prevailing party in this litigation because he was successful on his claims at trial. "To qualify as a prevailing party, a plaintiff must obtain at least some relief on the merits of her claim." *Stockmar v. Colo. Sch. of Traditional Chinese Med.*, C.A. No. 13-cv-02906-CMA-MJW, 2015 WL 4710840, at *1 (D. Colo. Aug. 7, 2015) (citing *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)). In *Stockmar*, the Court concluded that Title VII plaintiffs were the prevailing party even though they received only nominal damages because they were awarded significant punitive damages and obtained a judgment against the defendant.[1] *Id.*; *see also Farrar*, 506 U.S. at 112 ("We therefore hold that a plaintiff who wins nominal damages is a prevailing party under § 1988.").

Here, Mr. Mackey received nominal damages, and the jury also awarded him significant punitive damages—$180,000 in total. (ECF 281.) He also obtained a judgment against both defendants. (*Id.*) He is therefore a prevailing party for purposes of a fee award.

II. MR. MACKEY'S FEE REQUEST IS REASONABLE BECAUSE THE PARTIES HAVE STIPULATED TO THE HOURLY RATES AND THE HOURS SPENT WERE APPROPRIATE

Under § 1988, a fee request based on "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" is presumptively

[1] "[T]he standard for the award of attorney fees under § 1988(b) is the same as that under [Title VII]." *Id.* at *5.

reasonable. *Stockmar*, 2015 WL 4710840, at *2 (quoting *Jane L. v. Bangerter*, 61 F.3d 1505, 1509 (10th Cir. 1995)). The first step in this "lodestar" calculation is the determination of the number of hours reasonably spent. *Id.* The prevailing party must establish this number "by submitting meticulous, contemporaneous time records," and the party must also "make a 'good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.'" *Id.* (quoting *Jane L.*, 61 F.3d at 1509; *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). After establishing a reasonable number of hours, the Court must determine "the reasonable rate per hour," i.e., "what lawyers of comparable skill and experience practicing in the area in which the litigation occurs would charge for their time." *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983), *overruled on other grounds by Pa. v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987).

Here, Mr. Mackey seeks a total of $122,661.80 in reasonable attorneys' fees, as summarized in the following chart:

Name	Title	Hours	Rate	TOTAL
Kevin D. Homiak	Associate	167.4	$222	$37,162.80
V. William Scarpato III	Associate	294.5	$222	$65,379.00
Brianna S. Apodaca	Paralegal	160.9	$100	$16,090.00
Robert G. Mason	Trial Support Manager	40.3	$100	$4,030.00
			TOTAL:	$122,661.80

A set of contemporaneous, detailed time records (redacted for privilege) substantiating the hours spent litigating this matter is set out in Exhibits A-E.[2]

A. The parties have stipulated that the hourly rates requested are reasonable.

For purposes of a fee award, a "reasonable rate" is "the prevailing market rate in the relevant community for an attorney of similar experience." *Zinna v. Congrove*, C.A. No. 05-cv-01016-PAB, 2019 WL 1236725, at *3 (D. Colo. Mar. 18, 2019) Moreover, under 42 U.S.C. § 1997e(d)(3), attorney's fee awards in actions brought by a prisoner under § 1983 are statutorily capped. The parties have agreed that the statutorily appropriate hourly rate for Messrs. Homiak and Scarpato is $222, and that an hourly rate of $100 per hour is appropriate for Ms. Apodaca and Mr. Mason, Mr. Mackey's paralegal and trial technician, respectively.

[2] An excel spreadsheet summarizing the supporting documentation is set forth in Exhibit F.

B. The number of hours expended was reasonable.

In determining the reasonable number of hours expended, the Court may consider a number of factors, including:

1. whether the tasks being billed would normally be billed to a paying client;
2. the number of hours spent on each task;
3. the complexity of the case;
4. the number of reasonable strategies pursued;
5. the responses necessitated by the maneuvering of the other side; and
6. potential duplication of services by multiple lawyers.

Robinson, 160 F.3d at 1281 (internal quotation marks omitted).

Here, the hours expended were reasonable. The vast majority of the hours expended went either directly to trial preparation and trial, or to critical discovery—mainly depositions—that Mr. Mackey had been unable to pursue before he obtained counsel. Without those depositions, Mr. Mackey would have been unable to establish his trial theme that Sgt. Watson and Lt. Prieto acted contrary to their knowledge and training as experienced corrections officers. (*See* Ex. G, Scarpato Decl. ¶ 7.) Moreover, Mr. Mackey's counsel dedicated substantial hours to researching, drafting, and submitting motions for relief that Defendants' counsel opposed. (*See* Exs. A-F.) All of these tasks would normally be billed to a paying client. (Ex. G, Scarpato Decl. ¶ 14.) And while Messrs. Homiak and Scarpato jointly attended the depositions of Officer Christopher Wood and Sgt. Watson and certain strategy and trial preparation sessions

with Mr. Mackey for which the presence and attention of two attorneys was important, there was no duplication of attorney efforts. (*Id.* ¶ 11.)

CONCLUSION

For the reasons set forth above, Mr. Mackey respectfully requests that the Court enter a fee award in the amount of $122,661.80.

Dated: October 10, 2019

Respectfully submitted,

s/ Kevin D. Homiak

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01341-CMA-STV

WALDO MACKEY,

Plaintiff,

v.

BRIDGETTE WATSON and
SUSAN PRIETO,

Defendants.

MR. MACKEY'S REPLY IN SUPPORT OF PLAINTIFF'S PARTIALLY OPPOSED MOTION FOR ATTORNEY FEES

Plaintiff Waldo Mackey, by and through his counsel, Kevin D. Homiak, Esq. and V. William Scarpato III, Esq. of Wheeler Trigg O'Donnell LLP, submits the following reply in support of Plaintiff's Partially Opposed Motion for Attorney Fees.

ARGUMENT

Defendants ask the Court for a 40% reduction in Mr. Mackey's fees in this matter, arguing that (i) Mr. Mackey's counsel spent too much time on discovery and trial preparation, (ii) Mr. Mackey's attorneys duplicated each other's efforts, (iii) Mr. Mackey's billing entries are so vague that they can't reasonably be interpreted, and (iv) Mr. Mackey cannot seek fees for administrative work performed by his paralegal. Although Mr. Mackey will agree to a $4,050.00 reduction in fees associated with work performed by his paralegal, Defendants are not entitled to any further reduction in Mr. Mackey's fees for the reasons set forth below.

I. MR. MACKEY'S VICTORY AT TRIAL JUSTIFIES A FULL FEE AWARD.

First, Defendants claim that Mr. Mackey's counsel spent an unreasonable and inappropriate amount of time on discovery and trial preparation tasks. But nowhere in their response do Defendants acknowledge that the time and effort Mr. Mackey's counsel spent led to a verdict in his favor and a substantial punitive damages award. This is fatal to their argument.

The U.S. Supreme Court has observed that a party's degree of success is "the most critical factor in determining the reasonableness of a fee award." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). This Court has thus previously taken into consideration a party's success at trial in issuing a full fee award. *See, e.g.*, *Santacruz v. Standley & Assocs., LLC*, No. 10-CV-00623-CMA-CBS, 2011 WL 3366428, at *3 (D. Colo. Aug. 4, 2011) (Arguello, J.) ("The Court also takes into consideration plaintiff's high degree of success in this case, which underscores the reasonableness of plaintiff's counsel's time expended on jury instructions."). Ultimately, "[t]he result is what matters" in determining the reasonableness of a fee award. *Hensley*, 461 U.S. at 435.

Here, Mr. Mackey achieved an outstanding result at trial. Mr. Mackey prevailed on both claims submitted to the jury and was awarded over $180,000. This is more than three times the amount of Mr. Mackey's pre-trial settlement demand—to which Defendants never responded. *Cf. Santacruz*, 2011 WL 3366428, at *3 (taking into account in determining the reasonableness of plaintiff's fee request the fact that "plaintiff was awarded $29,300.00 in actual damages by a jury, more than five times Defendants' offer of judgment"). This result justifies a full fee award.

Nor did Mr. Mackey's counsel have any reason to bill an unreasonably high number of hours to this case. Lawyers "are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees," because "[t]he payoff is too uncertain, as to both the result and the amount of the fee." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). "It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning." *Id.* This is especially true where, as here, Mr. Mackey proceeded against only individual defendants, and the risk of not collecting the judgment, much less any attorney's fees, was (and apparently remains) high. (*See* Defs. Mot. for Remittitur or Motion for New Trial (ECF No. 286) at 13 ("The punitive damage awards, here, . . . have the potential to bankrupt Ms. Watson and Ms. Prieto.").)

That Defendants' counsel may have spent less time on discovery or trial preparation tasks than Mr. Mackey's counsel did is, likewise, unavailing. Defendants offer no authority or evidence (other than their attorneys' *ipse dixit*) to suggest that any amounts billed by Mr. Mackey's counsel on certain tasks were unreasonably high.[1] *Cf.*

[1] Because Mr. Homiak was not heavily involved in discovery and pre-trial matters, the 30.3 hours billed to drafting his opening statement was also spent on developing trial strategy, determining which witnesses to call at trial, crafting trial themes and theories, developing voir dire themes, drafting and revising the slides for his PowerPoint presentation, and delivering in-house "mock openings" to staff members (as well as Mr. Scarpato and Ms. Apodaca) for their comments and input. (K. Homiak Decl. ¶ 10.) Mr. Homiak and Mr. Scarpato, likewise, spent a significant amount of time on deposition designations both to understand what the witnesses would likely testify to at trial, and to prepare for the possibility that certain witnesses would be unavailable (as, in fact, occurred with Mr. Wood's medical emergency). This is Mr. Scarpato's and Mr. Homiak's standard practice in preparing for any trial for a paying client, and they treated this case no differently (*See id.* ¶ 11.). Defendants cite no authority indicating that attorneys should not receive any fees for crafting deposition designations that, though they ultimately prove to be unnecessary, are designed to aid in the attorneys'

Fox v. Pittsburg State Univ., 258 F. Supp. 3d 1243, 1258 (D. Kan. 2017) ("While Defendant contends it would not have billed for Ms. Casement and Ms. Willoughby, this is a mere conjecture and not permissible argument.").

Defendants also overlook the fact that their attorneys each have been practicing law for over two decades and have tried dozens of cases, whereas Mr. Mackey's attorneys each have practiced for fewer than six years, and this was Mr. Homiak's second jury trial, and Mr. Scarpato's first. Thus, it should come as no surprise that tasks Defendants' counsel may see as routine (such as drafting an opening statement or preparing their clients to testify at trial), took Mr. Mackey's counsel more time to complete. Had Mr. Mackey's counsel spent less time on these tasks, they would have done their client a disservice. Ultimately, Mr. Mackey's counsel spent the amount of time they believed was necessary to give their client the best possible representation at trial, and the outstanding results at trial speak for themselves. *See Moreno*, 534 F.3d at 1112 ("By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.").

II. MR. MACKEY'S COUNSEL DID NOT DUPLICATE THEIR EFFORTS.

Second, Defendants erroneously claim that "[s]everal different instances of duplication of effort are reflected in the bills submitted by Mr. Mackey." (Resp. at 10.) Defendants are incorrect.

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understanding of the record before trial and to avoid inconvenience to the Court and to the jury should a witness be unavailable to testify in person.

Mr. Mackey's attorneys billed a total of only 461.9 hours to this matter—167.4 by Mr. Homiak and 294.5 by Mr. Scarpato. With this time, Mr. Mackey litigated a motion to extend the discovery deadline (which Defendants opposed and on which Mr. Mackey prevailed), conducted six depositions (all of whom testified at trial live or by designation), litigated a pre-trial motion *in limine* (which Defendants opposed and on which Mr. Mackey prevailed), and litigated a two-and-a-half-day trial (which Mr. Mackey won). Little, if any, of the time billed to these matters was duplicative.

To the contrary, Plaintiff's counsel sought to maximize efficiency and avoid duplicative efforts by having Mr. Scarpato perform the overwhelming majority of discovery and trial preparation tasks. In the five months between when counsel was retained and the first day of trial, Mr. Homiak only billed 123.2 hours to this matter, whereas Mr. Scarpato billed more than twice as much—248.6 hours—during this time.

Each time both attorneys attended certain matters, there was a specific reason for doing so. Both attorneys attended the hearing on Mr. Mackey's motion to extend the discovery deadlines, because it was their first hearing before Judge Varholak, and Mr. Mackey's ability to depose Defendants and key fact witnesses was crucial to his ability to prepare for trial. (K. Homiak Decl. ¶ 7.) Both attorneys attended Sgt. Watson's and Christopher Wood's depositions because they were both conducted on the same day at the same location, and counsel used the round-trip drive to discuss trial preparation, trial strategy, and discovery strategy. (*See id.* ¶ 8.) And both attorneys attended Mr. Mackey's trial preparation sessions because of the importance of his direct examination testimony and to run through mock cross-examinations. (*See id.* ¶ 9.) Courts have found this approach appropriate. *See, e.g., Review Publ'ns, Inc. v. Navarro*, No. 89-

1187-Civ, 1991 WL 252962, at *7 (S.D. Fla. June 26, 1991) ("Equally unavailing is defendant's contention that the presence of two attorneys at deposition or at trial was unreasonable and plaintiffs should, therefore, not be fully compensated.").

Periodic brief conferences between Mr. Scarpato, Mr. Homiak, and Ms. Apodaca were also necessary to discuss discovery strategy, trial strategy, and division of labor. (K. Homiak Decl. ¶ 12.) Courts have also awarded fees for such conferences. *See, e.g.*, *Prison Legal News v. Inch*, No. 4:12CV239-MW/CAS, 2019 WL 5394614, at *8 (N.D. Fla. Oct. 22, 2019) ("[I]t would be naive to believe that attorneys should not brainstorm over strategic decisions. In fact, it could be detrimental to a client's overall litigation position if lawyers operated in intellectual silos and never shared analytic approaches with their colleagues."). Aside from these limited instances, nearly all of the remaining tasks set forth in Mr. Mackey's billing entries were performed by one attorney. Thus, it's simply not the case that Mr. Mackey's counsel duplicated their efforts on this case, and no reduction is necessary on this basis.

III. MR. MACKEY'S BILLING ENTRIES ARE NEITHER VAGUE NOR BLOCK BILLED.

Third, Defendants request a 20% reduction in Mr. Mackey's fee award because, they claim, Mr. Mackey's billing records are "replete" with "vague" and "block bill[ed]" time entries "making meaningful review by Defendants and this Court of the time spent on specific tasks extremely difficult if not impossible." (Resp. at 9.) Defendants are wrong.

To begin, Defendants do not identify a single entry which is so vague that they cannot "meaningful[ly] review" it. Defendants' proposed reduction should be rejected on this basis alone. *See Hodges v. School Bd. of Orange Cty., Fla.*, No. 6:11-cv-135, 2014

WL 6455436, at *9 (M.D. Fla. Nov. 13, 2014) ("[A] party opposing a fee application should submit objections and proof that are specific and reasonably precise, and . . . a failure to do so is generally fatal."). On the merits, Defendants' contention is, likewise, incorrect. Mr. Mackey submitted a chart with over 300 billing entries that span 17 pages, which contain detailed descriptions of the tasks performed, the dates on which they were performed, the purpose of the tasks, and the time billed to each task. None of those entries are vague, and Defendants can easily ascertain the work performed by Mr. Mackey's counsel, and whether the amount of time spent on each task was reasonable, as evidenced by Defendants' itemized response to Mr. Mackey's fee request.

Nor is a 10% reduction justified for "block billing." This Court has previously stated that "[t]he use of block-billing often warrants a reduction in the award of attorneys' fees because the records are inadequate insofar as they are not meticulous, contemporaneous time records that reveal, . . . all hours for which compensation is requested and how those hours were allotted to specific tasks." *Santacruz*, 2011 WL 3366428, at *2. But that's not the case here. In the rare instances in which entries were "block billed," there is sufficient information for both Defendants and the Court to ascertain the work performed and determine whether the amount expended on the tasks was reasonable. *See Home Design Servs., Inc. v. Turner Heritage Homes, Inc.*, No. 4:08-cv-355, 2018 WL 4381294, at *6 (N.D. Fla. May 29, 2018) (declining to eliminate requested fees for block-billed time entries occurring in the days immediately before trial because the court was able to ascertain from the billing descriptions in the block entries the services rendered). As a result, such a reduction is unnecessary.

IV. MR. MACKEY DOES NOT OPPOSE A REDUCTION IN FEES FOR HIS PARALEGAL.

Finally, Mr. Mackey does not oppose reducing Ms. Apodaca's compensable time by 40.5 hours for administrative tasks, which constitutes a total reduction of $4,050.00.

Specifically, Mr. Mackey does not oppose the following reductions proposed by Defendants:

Billing Entry	Date	Purpose	Time Billed	Proposed Reduction
Supplement master witness list and conduct additional fact witness research, as well as organize file.	5/28/19	Discovery	3.3	0.5
Calculate deadlines for trial and distribute to team; draft notices of deposition.	5/31/19	Discovery	1.4	0.6
Download production from opposing counsel and distribute to the team.	6/10/19	Discovery	0.9	0.9
Coordinate additional dates for depositions and transcribe audio.	7/1/19	Discovery	1.1	1.1
Communicate with process server regarding invoices and payment.	7/5/19	Discovery	0.2	0.2
Download, save, and upload deposition transcript for Ms. S. Prieto.	7/10/19	Discovery	0.7	0.7
Communicate with court reporter and facility regarding the deposition of Mr. B. Kirk on 7/22/19.	7/21/19	Discovery	0.5	0.5
Communicate with opposing counsel and court reporter regarding cancellation of the deposition of Mr. B. Kirk, as well as coordinate regarding new dates.	7/22/19	Discovery	0.6	0.6

Billing Entry	Date	Purpose	Time Billed	Proposed Reduction
Amend Mr. Mackey's exhibit lists; set up conference room for pre-trial conference; draft a writ of habeas corpus; cite check Mr. Mackey's motion for writ of habeas corpus to permit appearance at trial.	8/13/19	Trial Preparation	4.1	1.0
Attend trial and prepare for day 2 of trial	9/16/19	Trial	12.8	12.8
Attend trial and prepare for day 3 of trial	9/17/19	Trial	13.5	13.5
Attend trial and clean-up war room.	9/18/19	Trial	7.9	7.9
Communicate with court reporter regarding final transcripts.	9/23/19	Post-Trial	0.2	0.2
Total Reductions				**40.5**

Aside from these reductions, however, Mr. Mackey is entitled to recover fees for the itemized work of Ms. Apodaca, because it was "equal to that traditionally done by an attorney, including such tasks as document review and updating electronic files."*QFA Royalties LLC v. Q of O, LLC*, No. 15-CV-00461-CMA-MJW, 2016 WL 915753, at *3 (D. Colo. Mar. 10, 2016) (Arguello, J.). These entries constitute time entries "that would typically be billed to clients," and therefore provide the appropriate basis for recoverable fees. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, No. 09-CV-00717-CMA-BNB, 2011 WL 3568165, at *8 (D. Colo. Aug. 15, 2011) (Arguello, J.).

V. MR. MACKEY'S COUNSEL EXERCISED BILLING JUDGMENT.

Moreover, Mr. Mackey's counsel has exercised billing judgment by not billing for any other paralegals who assisted Ms. Apodaca in this matter. Those paralegals spent

a combined 111.6 hours on this matter: E. Maher (85.8), J. Alberghini (12.2), J. Loadman (4.2), A. Henrickson (1.0), E. Conn (7.0), and A. Ricco (1.4). (*See* Exhibit A, at A-7 (entries for paralegals Jennifer L. Alberghini and Erin E. Maher); Exhibit B, at B-6 (same); Exhibit C, at C-4 (same); Exhibit D, at D-11 (entries of paralegals Jennifer A. Loadman, Ava R. Hendrickson, Jennifer L. Alberghini, and Erin E. Maher); Exhibit E, at E-11 (paralegals Erin M. Conn, Annalise C. Ricco, and Erin E. Maher).) Their time constitutes a total of $11,160.00 for which Mr. Mackey has exercised billing judgment in not seeking compensation from Defendants. As a result, Mr. Mackey's counsel has already exercised billing judgment, and no further reduction is necessary.

CONCLUSION

For the reasons set forth above, Mr. Mackey respectfully requests that the Court enter a fee award in the amount of $118,611.80, which constitutes a $4,050.00 reduction from his initial fee request of $122,661.80.

Dated: November 25, 2019.

Respectfully submitted,

/s/ Kevin D. Homiak

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 17-cv-01341-CMA-STV

WALDO MACKEY,

Plaintiff,

v.

BRIDGETTE WATSON, and
SUSAN PRIETO,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR REMITTUR, OR IN THE ALTERNATIVE, A NEW TRIAL ON PUNITIVE DAMAGES; DENYING DEFENDANTS' MOTION FOR EXTENSION OF STAY OF EXECUTION OF JUDGMENT; AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S PARTIALLY OPPOSED MOTION FOR ATTORNEY FEES

This matter is before the Court on three motions: Defendants' Motion for Remittitur or, in the Alternative, for New Trial on Punitive Damages ("Motion for Remittitur") (Doc. # 286), Defendants' Motion for Extension of Stay of Execution of Judgment Pending Resolution of their Motion for Remittitur and Any Appeal ("Motion for Stay") (Doc. # 287), and Plaintiff Waldo Mackey's Partially Opposed Motion for Attorney Fees ("Motion for Attorney Fees") (Doc. # 285). For the reasons that follow, the Court denies Defendants' Motions for Remittitur and Stay and grants in part and denies in part Plaintiff's Motion for Attorney Fees.

I. BACKGROUND

The Court's previous Order Affirming and Adopting the February 27, 2019 Recommendation of United States Magistrate Judge and Denying Defendants' Motion for Summary Judgment (Doc. # 267) recites the factual and procedural background of this dispute and is incorporated herein by reference. Accordingly, this Order will reiterate only what is necessary to address the instant Motions.

Plaintiff Waldo Mackey filed this lawsuit *pro se* while he was incarcerated at the Fremont Correctional Facility in Cañon City, Colorado. He claimed, in relevant part, that Defendant Bridgette Watson, a sergeant at Fremont Correctional Facility, retaliated against him for exercising "his right to grieve/complain" in violation of the First Amendment by performing harassing searches of his cell, confiscating his prescription eyeglasses and clothing, directing other staff to terminate him from his job as an Offender Care Aid, and filing a false disciplinary report. (Doc. # 1 at 16–21); (Doc. # 6 at 3–4). He further claimed that Defendant Susan Prieto, a hearing officer at the correctional facility, denied him his due process rights in violation of the Fourteenth Amendment at a Code of Penal Discipline ("COPD") disciplinary hearing on March 9, 2017, by excluding his witnesses and by informing him that videotape of the incident with Defendant Watson had been taped over and that he should have asked for it within three days of the incident. (Doc. # 1 at 21–22); (Doc. # 6 at 4).

Plaintiff tried his First and Fourteenth Amendment claims to a jury from September 16 through 18, 2019. At trial, Mr. Mackey submitted evidence that Defendant Watson had violated his First Amendment rights by confiscating his prescription

eyeglasses and/or issuing a false incident report against him after he complained about her search of his cell, and that Defendant Prieto violated his Fourteenth Amendment procedural due process rights by convicting him of a COPD violation despite the corrections officers' failure to preserve potentially exculpatory videotape evidence and by excluding Mr. Mackey's witness testimony that would have shown Defendant Watson had a motive to lie about the search. The jury returned a verdict in favor of Mr. Mackey on both claims. (Doc. # 279.) The jury awarded $1 in nominal damages and $60,000 in punitive damages against Defendant Watson and $1 in nominal damages and $120,000 in punitive damages against Defendant Prieto. Final judgment entered in favor of Plaintiff and against Defendants Watson and Prieto on September 19, 2019. (Doc. # 281.) The instant Motions followed.

II. DISCUSSION

A. DEFENDANTS' MOTION FOR REMITTITUR

Defendants argue that the jury's punitive damage award was so grossly excessive as to violate the due process clause of the Fourteenth Amendment. They move the Court to order remittitur of Plaintiff's $180,000 punitive damages award to $18, representing a 1:9 ratio of compensatory to punitive damages per Defendant or, in the alternative, to order a new trial on damages. The Court declines to set aside the punitive damages awarded by the jury, finding that the award was not motivated by passion, prejudice, or bias, and is not so excessive as to shock the judicial conscience. *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1560 (10th Cir. 1991).

1. Applicable Law

"Punitive damages are only available in a Section 1983 action when 'the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Hampton v. Evans*, No. 11-cv-01415-RM-CBS, 2015 WL 1326147, at *4 (D. Colo. Mar. 20, 2015) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). The Supreme Court established the guideposts for evaluating the constitutionality of a punitive damages award in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). They are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 409 (2003). "Additionally, in analyzing a punitive damages award for excessiveness, [courts] must consider the goal of deterrence." *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1272 (10th Cir. 2000) (citations omitted).

2. Analysis

a. Reprehensibility of Defendants' conduct

The degree of reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore,* 517 U.S. at 575–76. The Supreme Court has observed that "some wrongs are more blameworthy than others," noting that "trickery and deceit" are more reprehensible than negligence. *Id.* (citations

omitted). The Tenth Circuit has considered the following factors in evaluating reprehensibility: whether a defendant's behavior causes economic rather than physical harm, would be considered unlawful in all states, involves repeated acts rather than a single one, is intentional, involves deliberate false statements rather than omissions, and is aimed at a vulnerable target. *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 638 (10th Cir. 1996). Purely economic harm may warrant less punishment than harm to the health or safety of individuals. *Id.*

Applying the Tenth Circuit's indicia of reprehensibility to the instant case, the Court finds that Defendants' misconduct was reprehensible.

First, Defendants caused Mr. Mackey harm. Defendant Watson's confiscation of Mr. Mackey's prescription eyeglasses caused him pain in the form of debilitating migraines.[1] Although Defendant Watson's actions did not permanently injure Mr. Mackey, depriving him of proper eyesight did jeopardize his health and safety, particularly in a prison setting. *See Cont'l Trend Res., Inc.*, 101 F.3d at 638. Further, Defendant Watson's First Amendment retaliation constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). With respect to Defendant Prieto, the Court agrees with Plaintiff that "the harm was to Mr. Mackey's rights themselves, and to any future interest he may have that depends on his disciplinary record." (Doc. # 298 at 7.) Moreover, the Court regards the injury to Mr.

[1] Mr. Mackey testified at trial that one migraine lasted 24 hours and was the worst migraine he has ever experienced.

Mackey that "was ostensibly emotional or physiological . . . as more reprehensible than strictly economic harm, if not equivalent to physical harm." *Tate v. Dragovich*, No. CIV.A. 96-4495, 2003 WL 21978141, at *8 (E.D. Pa. Aug. 14, 2003). Additionally, Mr. Mackey lost his paid position as an Offender Care Aide, which Mr. Mackey enjoyed and excelled at, following Defendants' actions.

Second, the misconduct of both Defendants Watson and Prieto would be considered unlawful in all states because it violated the U.S. Constitution.

Third, Defendants' misconduct was intentional. In holding Defendant Watson liable for First Amendment retaliation, the jury found that she "intentionally confiscated Mr. Mackey's personal property or filed an incident report against him." (Doc. ## 277, 279.) Defendant Watson confiscated Mr. Mackey's glasses in violation of Department of Corrections regulations that require a corrections officer to obtain approval from medical personnel before confiscating a prisoner's prescription healthcare items. Although the jury instructions did not specifically address the intentionality of Defendant Prieto's conduct, Defendant Prieto's testimony as to her familiarity with due process requirements and the importance of witness testimony indicates that her actions were intentional.

Lastly, as a prisoner, Mr. Mackey presented a 'vulnerable target' to Defendants Prieto and Watson, who were both senior prison staff members. *See Tate*, 2003 WL 21978141, at *8. Notably, Defendant Watson's actions rendered Mr. Mackey even more vulnerable, as she deprived him, for six weeks, of his prescription eyeglasses in a

prison setting. In sum, the Court finds that the evidence showed that Defendants' misconduct was reprehensible.

b. Relationship between harm and punitive damages award

Defendants put great emphasis on the large ratio of punitive to nominal damages in this case and cite to *State Farm*, 538 U.S. 408, for the proposition that Mr. Mackey should receive no more than $18 in punitive damages (applying a single-digit multiplier to his nominal damages). Although the Supreme Court has indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," a higher ratio "may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *State Farm*, 538 U.S. at 425 (quoting *Gore,* 517 U.S. at 582). Such is the case here.

Defendants' focus on the proportionality of the nominal to punitive damages awarded in this case is misplaced because the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e), prohibited Mr. Mackey from receiving compensatory damages without a finding of physical injury. *Jordanoff v. Coffey*, CIV-15-939-R, slip op. at 3 (W.D. Okla. July 13, 2018). The PLRA does not, however, bar Plaintiff's recovery of nominal or punitive damages, even in the absence of a showing of physical injury. *See Searles*, 251 F.3d at 879, 880–81 ("[A]s a general rule, punitive damages may be recovered for constitutional violations without a showing of compensable injury."); *McDaniels v. McKinna*, 96 F. App'x 575, 581 (10th Cir. 2004) (noting that "*Searles* did not foreclose prisoners' claims for First Amendment violations that only

sought nominal damages or punitive damages."). Accordingly, "[i]n cases like this where there are little to no compensatory damages to compare, courts have consistently declined to apply the Supreme Court's 'ratio to the actual harm' factor for assessing the excessiveness of punitive damages awards." *Jordanoff*, CIV-15-939-R, slip op. at 3 (first citing *State Farm*, 538 U.S. at 425; then citing *Gore*, 517 U.S. at 580–81). Indeed, courts have upheld large punitive damages awards in Section 1983 cases where the PLRA applies, even where plaintiffs were awarded nominal damages against individual defendants.[2] Constitutional violations such as the ones that took place in this case fall within the category of exceptional cases that may constitutionally exceed the single-digit multiplier of punitive damages. The Court rejects Defendants' argument to the contrary.

c. Comparison to civil penalties owed in similar cases

The Court is unable to locate any statutory penalties for due process violations or retaliation analogous to Mr. Mackey's claims in this case. Therefore, this guidepost "has no application here, as neither party could direct the lower court to civil or criminal penalties" that Defendants could face for their conduct. *Haynes v. Stephenson*, 588 F.3d 1152, 1159 (8th Cir. 2009) (citing *Asa–Brandt, Inc. v. ADM Investor Servs.,*

[2] *See, e.g.*, *Haynes v. Stephenson*, 588 F.3d 1152, 1158 (8th Cir. 2009) (citing *JCB, Inc. v. Union Planters Bank, NA,* 539 F.3d 862, 877 (8th Cir. 2008) (awarding more than $100,000 in punitive damages on a trespass claim where the compensatory damages award was $1)) (upholding $2,500 to $1 punitive to nominal damages award as constitutional and noting the "the district court did not err in concluding that the high ratio of punitive to compensatory damages awarded did not offend due process" because the defendant's actions resulted in only nominal compensatory damages); *Tate*, 2003 WL 21978141, at *9 (upholding $10,000 punitive damages award where PLRA barred compensatory damages for Plaintiff on First Amendment retaliation claim); *Jordanoff*, CIV-15-939-R, slip op. at 3–5 (upholding punitive damages award of $35,000 against individual defendant where PLRA limited Plaintiff to nominal damages); *cf. Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 817–20 (E.D. Mich. 2006) (upholding punitive damages award of $200,000 against individual defendant for retaliatory transfer).

Inc., 344 F.3d 738, 747 n. 16 (8th Cir. 2003)). However, when examining this third factor, the Court may look to the amount of punitive damages necessary to deter similar misconduct in the future. *Tate*, 2003 WL 21978141, at *10 (citing *Gore,* 517 U.S. at 584–85).

It is manifest from the record and the Motion that the punitive damages awarded in this case are a reasonably necessary deterrent against future constitutional violations. Although Defendants each had more than 10 years of experience as corrections officers (12 years for Defendant Watson and 19 years for Defendant Prieto), they violated Mr. Mackey's constitutional rights. Both Defendants are still employed by the Colorado Department of Corrections ("CDOC"). Defendants were not reprimanded or disciplined in any way by CDOC for the misconduct underlying this case. Importantly, the same lack of remorse Defendants demonstrated on the witness stand is echoed in the instant Motion; Defendants proceed to minimize the harms they inflicted on Mr. Mackey and have yet to acknowledge the severity of their misconduct. *See, e.g.*, (Doc. # 286 at 11–12) (characterizing this case as "involv[ing] Plaintiff's lack of access to his eyeglasses for a six-week period," likening Defendant Watson's intentional deprivation of Plaintiff's prescription eyewear to theft of property between $300 and $750, and commenting that Defendants' theft analogy is not perfect because Plaintiff's glasses were returned to him).

The Court finds, in light of the evidence presented at trial and the factors discussed above, that the punitive damages awarded in this case were not motivated by passion, prejudice, or bias, and are not so excessive as to shock the judicial

conscience. *Mason*, 948 F.2d at 1560. To remit the punitive damages award to $18, as Defendants urge, "would encourage bad behavior by prisoner officials and would discourage settlement in litigation because it would tell prison officials that they could violate prisoners' rights on the cheap." *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 819 (E.D. Mich. 2006). Because the Court firmly believes that the jury decision in this case is supported by the evidence, it declines to interfere with that verdict and, in effect, send such a message to prison officials.

B. DEFENDANTS' MOTION TO STAY

Defendants move the Court to stay the execution of judgment during the pendency of this Court's consideration of the instant Motions and any subsequent appeals either by extending Fed. R. Civ. P. 62(a)'s automatic stay or by entering a Fed. R. Civ. P. 62(b) stay. In support of their request, Defendants assert that they have made a "substantially founded challenge to the award of punitive damages against them" and that "the near certainty such an award of punitive damages will not withstand appellate review" justifies the imposition of a stay. (Doc. # 287 at 2.) Defendants posit that they "should not be required to pay the judgment, or make any arrangements for any security related to the judgment, until issues surrounding (without limitation) the permissibility of a more than 10:1 ratio of actual damages are fully resolved." (*Id.* at 6.)

The Court addressed herein the "permissibility of a more than 10:1 ratio of actual damages" in general and found that a higher ratio is reasonable in the instant case because of the PLRA's limitation on Mr. Mackey's ability to receive compensatory damages. Therefore, the Court rejects Defendants' premise that a stay is justified in the

instant case because it is nearly certain the punitive damages award will not withstand appellate review. To the extent Defendants move the Court to stay this action pending any appeals, the Motion is denied for lack of good cause shown. *See Landis v. North American Co.,* 299 U.S. 248, 254 (1936) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."). To the extent Defendants move the Court for a stay pending the Court's resolution of the instant Motions, the Motion is denied as moot.

C. PLAINTIFF'S MOTION FOR ATTORNEY FEES

Mr. Mackey moves the Court to award his counsel $122,661.80 in attorneys' fees. Defendants have stipulated to counsel's hourly rate but vehemently object to the hours billed, arguing that counsel failed to exercise billing judgment; overbilled for travel time, administrative tasks, and paralegal time; and that the fee award should be reduced by 20% for vague entries and block billing. The Court agrees with Defendants in part and reduces the fee award to $100,820.03.

1. Applicable Law

Under 42 U.S.C. § 1988(b), "[i]n any action or proceeding to enforce a provision of section. . . 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Under § 1988, a fee claimant "must prove two elements: (1) that the claimant was the prevailing party in the proceeding; and (2) that the claimant's fee request is reasonable." *Arend v. Paez*, C.A. No. 12-cv- 01270-DDD-SKC, 2019 WL 2726231, at *1, (D. Colo. July 1, 2019) (quoting *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998)).

When evaluating a motion for attorneys' fees, the Court follows the three-step process set forth in *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), *overruled on other grounds by Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). The first step in determining a fee award is to determine the number of hours reasonably spent by counsel for the prevailing party. *Malloy v. Monahan*, 73 F.3d 1012, 1017 (10th Cir. 1996); *Ramos*, 713 F.2d at 553. The factors considered in a reasonableness determination include: (1) whether the amount of time spent on a particular task appears reasonable in light of the complexity of the case, the strategies pursued, and the responses necessitated by an opponent's maneuvering; (2) whether the amount of time spent is reasonable in relation to counsel's experience; and (3) whether the billing entries are sufficiently detailed, showing how much time was allotted to a specific task. *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs of Boulder Cty.*, No. 06-cv-00554, 2010 WL 3703224, at *2–3 (D. Colo. Sept. 13, 2010). Time spent by counsel that is "excessive, redundant, or otherwise unnecessary" is not compensable. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). "The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Id.* at 433.

Once the Court has determined the number of hours reasonably spent, it must then determine a reasonable hourly rate of compensation. *Ramos*, 713 F.2d at 555. "A reasonable rate is the prevailing market rate in the relevant community." *Malloy*, 73 F.3d at 1018 (citing *Blum v. Stenson*, 465 U.S. 885, 897 (1984)). The party seeking the

award has the burden of persuading the court that the hours expended, and the hourly rate, are reasonable. *Id.* The third step consists of multiplying the reasonable hourly rate by the number of hours reasonably expended to determine the lodestar amount. *Hensley*, 461 U.S. at 433.

2. Analysis

In the instant case, it is undisputed that Mr. Mackey is a prevailing party for the purposes of 42 U.S.C. § 1988(b) because Mr. Mackey prevailed on both of his claims at trial and the jury awarded him $180,000 in punitive damages. The parties have stipulated to the hourly rates sought by Plaintiff's legal team—i.e., $222 per hour for Attorneys Homiak and Scarpato and $100 per hour for paralegal Brianna S. Apodaca and trial support manager Robert G. Mason. The Court finds that these hourly rates are reasonable, *Ramos*, 713 F.2d at 555, and comply with the limitations established by the PLRA.[3] Accordingly, the only element of Plaintiff's fee award that is at issue is the reasonableness of the hours expended.

a. Reasonableness of the hours expended

The Court has reviewed the fee application and supporting documentation and finds that the number of hours billed by Plaintiff's counsel is unreasonable. Counsel is expected to exercise billing judgment in applying for attorneys' fees.[4] Put differently,

[3] The Court notes that the agreed-upon hourly rate for Attorneys Homiak and Scarpato is the maximum rate currently allowable under the PLRA. *See* 42 U.S.C. § 1997e(d)(3) ("No award of attorney's fees . . . shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.").

[4] The Court notes that attorneys often reduce the fee award sought by 10 to 20% to close the gap between actual hours and billable hours. *See, e.g .*, *Deasy v. Optimal Home Care, Inc.*, No.

counsel should determine what subset of the actual hours spent on a case were reasonably expended in the litigation and is, therefore, billable:

> Compiling raw totals spent, however, does not complete the inquiry. It does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended. In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Copeland v. Marshall, 641 F.2d at 891 (emphasis in original). Although Plaintiff's counsel claims to have exercised billing judgment by not seeking reimbursement for additional **paralegal** time, counsel seeks to recover fees for all time spent by Attorneys Homiak and Scarpato on this case. The Court rejects counsel's position that the actual hours spent on this case were all reasonably expended in the litigation. *Ramos*, 713 F.2d at 553 (noting courts "must determine not just the actual hours expended by counsel, but which of those hours were reasonably expended in the litigation").

From review of the fee application, it is clear to the Court that Plaintiff's counsel has not carried its burden to "make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434 (emphasis added). For example, the fee application seeks reimbursement for administrative or clerical work performed by Attorney Scarpato and Ms. Apodaca. Plaintiff conceded in his reply that $4,050 should be deducted from the fee award for

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17-CV-00287-MSK-CBS, 2019 WL 2521676, at *3 (D. Colo. June 19, 2019), *appeal dismissed,* No. 19-1258, 2019 WL 7596276 (10th Cir. Aug. 22, 2019) (noting the party moving for attorneys' fees reduced their billings by 20% to account for any unnecessary overlap or excess). Such a reduction was not made by Plaintiff's counsel in this case.

clerical work performed by Ms. Apodaca, and the Court agrees.[5] Further, Plaintiff billed all transportation time at full cost.[6] The Court finds that the vast majority of Plaintiff's travel time was improperly billed at full rate and should have been billed at half rate. *See Smith v. Freeman,* 921 F.2d 1120, 1122 (10th Cir. 1990) (recognizing compensability of productive travel time and trial court discretion to apply a reduced hourly rate to travel time that is otherwise unproductive).

Lastly, to the extent Plaintiff argues that his attorneys took longer to complete tasks because they are inexperienced litigators, the Court finds that billing Defendants (and Mr. Mackey, pursuant to the PLRA)[7] for the entirety of counsel's learning curve is inappropriate. Plaintiff's counsel is billing at the maximum rate allowable under the PLRA. Therefore, attorneys with decades of trial experience would bill at the same rate for far fewer hours of work. The Court finds that the additional length of time Plaintiff's counsel required to complete tasks due to inexperience should be absorbed into their

[5] (Doc. # 306 at 9–10.) A reduction of $4,050 yields a fee request of $118,611.80.

[6] Even if the Court accepts counsel's representation that the round-trip travel of Attorneys Homiak and Scarpato to the depositions of Defendant Watson and Christopher Wood was productively spent discussing "trial preparation, trial strategy, and discovery strategy" and should be billed at full rate, this only accounts for 12 total hours of travel time billed. The same representation has not been made as to the remaining almost 50 hours of travel time billed between Attorneys Homiak and Scarpato at full billing rate. *See, e.g.*, (Doc. # 285-7 at 5–7) ("Travel to Fremont Correctional Facility and gain clearance to facility" on 5/14/2019 – 3.5 hours, "Return travel from Fremont Correctional Facility" on 5/14/2019 – 2.1 hours, "Travel to Fremont Correctional Facility for client visit" on 5/28/2019 – 2.3 hours, "Return travel from Fremont Correctional Facility" on 5/28/2019 – 2.3 hours, "Travel to Pueblo for Ms. S. Prieto's deposition" on 6/26/2019 – 2.9 hours, "Travel from Pueblo deposition location back to Denver" on 6/26/2019 – 1.6 hours).

[7] As discussed in more detail below, the PLRA requires Mr. Mackey to contribute 25% of his judgment to Plaintiff's attorneys' fees.

law firm's overhead and not billed to their adversary. *Cf. Ramos*, 713 F.2d at 554 ("time spent reading background cases, civil rights reporters, and other materials designed to familiarize the attorney with this area of the law . . . would be absorbed in a private firm's general overhead and . . . would not [be billed to] a client.").

Overall, "because there are so many billing entries that would require minute adjustments, a wholesale reduction in the fees claimed by Mr. [Mackey] is a more efficient and effective way to capture the amount of time unreasonably billed to due overlap or excess." *Deasy v. Optimal Home Care, Inc.*, No. 17-CV-00287-MSK-CBS, 2019 WL 2521676, at *3 (D. Colo. June 19, 2019), *appeal dismissed,* No. 19-1258, 2019 WL 7596276 (10th Cir. Aug. 22, 2019). The Court finds that a 15% reduction in the fee application would address the deficiencies identified and make the hours sought reasonable.[8] Accordingly, Plaintiff's fee request is reduced from $118,611.80 to $100,820.03.

Defendants argue that vague time entries and block billing each warrant 10% reduction in attorneys' fees but neglect to identify any time entries that are vague or block billed. Although courts are obligated to exclude hours not reasonably expended

[8] The Court will not address the individual hours spent on each litigation task by Attorneys Scarpato and Homiak in recognition that they obtained excellent results for their client at trial and those results flowed from counsel's preparation. *See, e.g.*, *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (citations omitted) (noting "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'"); *Santacruz v. Standley & Assocs., LLC*, No. 10-CV-00623-CMA-CBS, 2011 WL 3366428, at *1 (D. Colo. Aug. 4, 2011) ("The Court also takes into consideration plaintiff's high degree of success in this case, which underscores the reasonableness of plaintiff's counsel's time expended on jury instructions."); *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.").

from the fee award, courts need not "identify and justify every hour allowed or disallowed, as doing so would run counter to the Supreme Court's warning that a 'request for attorney's fees should not result in a second major litigation.'" *Malloy*, 73 F.3d at 1018 (quoting *Hensley*, 461 U.S. at 437); *see Fox v. Vice*, 563 U.S. 826, 838 (2011) ("The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection."). The Court concludes that a 15% reduction in the fee award is sufficient to make the hours sought reasonable.

b. Prison Litigation Reform Act

The PLRA limits the recovery of Plaintiff's counsel to 150% of the judgment and requires that 25% of the judgment obtained by Plaintiff be allocated toward the fee award. 42 U.S.C. § 1997e(d)(2);[9] *see Murphy v. Smith,* 138 S. Ct. 784, 790 (2018) ("In cases governed by § 1997e(d), we hold that district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees."); *Poore v. Glanz*, No. 11-CV-797-JED-PJC, 2019 WL 1425884, at *7 (N.D. Okla. Mar. 30, 2019), *aff'd,* 791 F. App'x 780 (10th Cir. 2020) ("Under *Murphy*, 25% of the judgment . . . must be applied pursuant to § 1997e(d) to satisfy fees, and the defendants are liable only for the remainder . . . of the total capped fees.").

As the Court has upheld Mr. Mackey's judgment of $180,002.00, the fee award of $100,820.03 falls below the cap set by the PLRA. Pursuant to the Supreme Court's

[9] 42 U.S.C. § 1997e(d)(2) provides that: "Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant."

interpretation of § 1997e(d) in *Murphy*, Plaintiff shall contribute 25% of his judgment—$45,000.50—to satisfy the fee award. Defendants shall pay the remaining $55,819.53 of the fee award.

III. CONCLUSION

For the foregoing reasons, it is ORDERED as follows:

- Defendants' Motion for Remittitur or, in the Alternative, for New Trial on Punitive Damages (Doc. # 286) is DENIED;
- Defendants' Motion for Extension of Stay of Execution of Judgment Pending Resolution of their Motion for Remittitur and Any Appeal (Doc. # 287) is DENIED; and
- Plaintiff Waldo Mackey's Partially Opposed Motion for Attorney Fees (Doc. # 285) is GRANTED IN PART and DENIED IN PART as follows:
    - the Motion is granted as to a fee award of $100,820.03;
    - 25% of Plaintiff's judgment funds ($45,000.50) shall be contributed to satisfy the fee award;
    - the remaining $55,819.53 of the fee award shall be paid by Defendants, for which Defendants are jointly and severally liable;
    - the Motion is denied to the extent it requests a greater fee award.

DATED: August 14, 2020

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge

*** NOTE: IT IS YOUR RESPONSIBILITY TO SET THE TIME IN THE LOWER RIGHT CORNER OF THIS FORM (CHOOSE ANY TUESDAY, WEDNESDAY, OR THURSDAY AT 8:30, 9:00 OR 9:30 A.M.) FOR APPEARANCE BEFORE THE CLERK FOR TAXATION.***

AO 133(Rev. 12/09) Bill of Costs

USDC Colo. Version – (Further Rev. (01/01/2019)

BILL OF COSTS

United States District Court | DISTRICT: **DISTRICT OF COLORADO**

Waldo Mackey
v.
Bridgette Watson and Susan Prieto

DOCKET NO. 17-cv-01341-CMA

MAGISTRATE CASE NO.

Judgment having been entered in the above entitled action on Waldo Mackev against Bridgette Watson and Susan Prieto the clerk is requested to tax the following as costs:

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
Dec. 17, 2019
JEFFREY P. COLWELL, CLERK

BILL OF COSTS

Fees of the clerk	$	
Fees for service of summons and complaint	$	$0.00
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	$	~~1,451.80~~ $180.40
Fees and disbursements for printing	$	~~1,072.33~~
Fees for witnesses (itemized on reverse side)	$	Stipulated 469.24 ✓
Fees for exemplification and copies of papers necessarily obtained for use in the case	$	
Docket fees under 28 U.S.C. § 1923	$	
Costs incident to taking of depositions	$	$4,813.21 See attached ~~7,002.07~~ e-mail re: parties' conferral.
Costs as shown on Mandate of Court of Appeals	$	
Other costs (Please itemize)	$	38.75 ✓

Please review and comply with D.C.COLO.LCivR .54.1

(See Notice section on reverse side)

TOTAL $ $5,501.60 ~~10,634.19~~

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed with postage fully prepaid thereon to:

Signature of Attorney Kevin

Print Name Kevin Homiak Phone Number

For: Waldo Mackey Date 10/9/19

Name of Claiming Party

Please take notice that I will appear before the Clerk who will tax said costs on the following day and time:
Costs are hereby taxed in the following amount and included in the judgment:

Date and Time: Hearing held Dec. 10, 2019 before the Clerk. Parties directed by Clerk to confer and submit supplement re: depositions.

Amount Taxed $ $5,501.60

(BY) DEPUTY CLERK s/ Edward Butler

DATE: Dec. 17, 2019

CLERK OF COURT
JEFFREY P. COLWELL

AO 133 (Rev. 12/09) Bill of Costs

UNITED STATES DISTRICT COURT

Witness Fees (see 28 U.S.C. § 1821 for statutory fees and www.gsa.gov for locality per diem rates)

NAME , CITY AND STATE OF RESIDENCE	ATTENDANCE Days	ATTENDANCE Total Cost	SUBSISTENCE Days	SUBSISTENCE Total Cost	MILEAGE Miles	MILEAGE Total Cost	Total Cost Each Witness
Jeffrey Hawkins 211 W 2nd St. Unit 201, Pueblo, CO 81003	2	80.00	1	257.00	228	132.24	$469.24
							$0.00
							$0.00
							$0.00
							$0.00
							$0.00
				TOTAL			$469.24

✓ Stipula -ted

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:
"Sec. 1924, Verification of billof costs."
"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:
"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:
Rule 54(d)(1): "Unless a federal statute, these rules, or a court order provides otherwise, costs - - other than attorney's fees - - should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action."

D.C.COLO.LCivR 54.1 Taxation of Costs
"Each judgment or final order shall indicate any party entitled to costs. Unless otherwise ordered, the clerk shall tax costs in favor of a prevailing party or parties. A bill of costs shall be filed on the form provided by the court within 14 days after entry of the judgment or final order. After filing a bill of costs and prior to appearing before the clerk, counsel and any unrepresented party seeking costs shall file a written statement that they have conferred as to disputes regarding costs. If all disputes are resolved, a stipulation specifying costs shall be filed with the court.

Description of Cost	Vendor	Item	Purpose	Amount	Supporting Documentation	Defendants Object/Stipulate
Costs Incident to Taking of Depositions	* See attached e-mail, dated Dec. 12, 2019, in which the parties conferred and subtracted all video depostion charges with the exception of Christopher Woods'.					
Bridgette Watson (June 27, 2019)	US Legal	Deposition transcript & video	Discovery	$1,804	**Exhibit A** at 2 & 3	Clerk's note: the costs of a deposition video may be awarded, but a reasonable use that contributes to the success of the prevailing party must be shown; playback at trial, such as with C. Woods' depo., is one example of reasonableness, and not just use for preparation for trial. Tilton v. Capital Cities/ ABC, Inc., 115 F.3d 1471, 1477 (10th Cir. 1997).
Christopher Wood (June 27, 2019)	US Legal	Deposition transcript & video	Discovery	Stipulated -- $944.30	**Exhibit A** at 2 & 3	
Susan Prieto (June 26, 2019)	US Legal	Deposition transcript & video	Discovery	$2,353.15	**Exhibit A** at 4 & 5	
Brian Kirk (August 28, 2019)	Meek & Associates	Deposition transcript & video	Discovery	$855.78	**Exhibit A** at 6	
Linda Witte (August 28, 2019)	Meek & Associates	Deposition transcript & video	Discovery	$829.08	**Exhibit A** at 6	
Jeffrey Hawkins (July 12, 2019)	US Legal	Deposition transcript & video	Discovery	$816.25	**Exhibit A** at 7 & 8	
Total Deposition Costs				~~$7,602.07~~	$4,813.21	
Witnesses Fees						
Jeffrey Hawkins	WTO	Witness fee (testimony and overnight stay)	Trial	$469.24	**Exhibit B** at 2 & 3	
Total Witness Fees				**$469.24**	✓ Stipulated	
Printing						
	In-house WTO	Color Photocopies	Trial Prep	$52.80	**Exhibit C at 2**	All awardable under 28 U.S.C. § 1920 as reasonable and necessary in anticipation and use at trial as trial exhibits.
	In-house WTO	Color Photocopies	Trial Prep	$1.60	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$25.60	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$1.60	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$0.80	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$1.60	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$10.40	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$52.00	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$1.60	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$3.20	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$1.60	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$0.80	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$0.80	**Exhibit C at 2**	
	In-house WTO	Color Photocopies	Trial Prep	$1.60	**Exhibit C at 2**	
	In-house WTO	Office Photocopies	Trial Prep	$7.20	**Exhibit C at 2**	
	In-house WTO	Office Photocopies	Trial Prep	$8.40	**Exhibit C at 2**	

Description of Cost	Vendor	Item	Purpose	Amount	Supporting Documentation	Defendants Object/Stipulate
	In-house WTO	Office Photocopies	Trial Prep	$0.40	**Exhibit C at 2**	
	In-house WTO	Office Photocopies	Trial Prep	$2.40	**Exhibit C at 2**	
	In-house WTO	Office Photocopies	Trial Prep	$0.40	**Exhibit C at 2**	
	In-house WTO	Office Photocopies	Trial Prep	$0.60	**Exhibit C at 2**	
	In-house WTO	Office Photocopies	Trial Prep	$3.00	**Exhibit C at 2**	Awardable costs, continued.
	In-house WTO	Office Photocopies	Trial Prep	$0.20	**Exhibit C at 2**	
	In-house WTO	Office Photocopies	Trial Prep	$0.40	**Exhibit C at 2**	
	In-house WTO	Office Photocopies	Trial Prep	$1.40	**Exhibit C at 2**	
	~~Repro Services, LLC / Reprochrome Enlargement with premium mount on foam core on 8/3/19~~		Trial Prep	~~$891.93~~	**Exhibit C** at 3	Not awardable under § 1920; the Reprochrome foam core was created as a demonstrative exhibit but not admitted at trial.
Total Printing Costs				~~**$1,072.33**~~ **$180.40**		
Transcripts						
	Julie Thomas	~~Trial transcripts~~	Trial	$1,451.80 ~~**$1,451.80**~~ **$0.00**	**Exhibit D** at 2	Realtime trial transcripts, use of which are a sound strategy for use at trial, are not awardable under § 1920. See Karsian v. Inter-Regional Finance Group, Inc., 13 F.Supp.2d 1085, 1091 (D. Colo. 1998).
Research						
	Fremont County Courthouse	Court Records Request		$31.75	**Exhibit E** at 2	
	U.S. District Court	Court Records Request		$7.00	**Exhibit E** at 2	
Total Research				**$38.75** ✓		Costs associated with Plaintiff's record requests and development of his case, while proceeding as a pro se party, are awardable.
TOTAL COSTS				~~**$10,634.19**~~		

TOTAL: $5,501.60

Edward Butler

From: Homiak, Kevin <Homiak@wtotrial.com>
Sent: Thursday, December 12, 2019 10:19 AM
To: Edward Butler
Cc: Kennedy, Edmund M.; Ringel, Andrew D.; Scarpato, Bill; Apodaca, Bri
Subject: RE: Activity in Case 1:17-cv-01341-CMA-STV Mackey v. Woodson et al Proposed Bill of Costs

Ed,

Thanks again for taking the time to meet with us the other day. Below is a chart of costs that Plaintiff is requesting for the witness depositions, with the costs of the videographer deducted. I conferred with Defendants' counsel (copied here), and their position is that, "[w]ithout waiving [their] ability to seek district court review, [they] have no objection to the amounts listed below for purposes of submission to the court."

Please let us know if you have any questions, or would like any additional information.

Best,

Kevin

Witness	Total Cost of Video and Deposition	Costs Deducted for Video	Total Costs Requested
Bridgette Watson	$1,804.00	$1,055.10	$748.90
Christopher Wood	$944.30	$0 (per stipulation of parties)	$944.30
Susan Prieto	$2,353.15	$840.50	$1,512.65
Brian Kirk	$855.78	$287.50	$568.28
Linda Witte	$829.08	$287.50	$541.58
Jeffrey Hawkins	$816.25	$318.75	$497.50
TOTAL			**$4,813.21**

✓ Submitted to the Clerk after the 12/10/19 hearing, at his direction.