IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

TABATHA MARTIN, TRACY MARTIN, T.M., a minor, by her parents and next friends, TABATHA MARTIN and TRACY MARTIN; KIONINA KANESO, K.H., a minor, by her next friend, KIONINA KANESO; TANAKO YUG, GABRIEL YUG, G.Y., a minor, by his next friends, TANAKO YUG and GABRIEL YUG; DIANA CHONIONG; JON JOSEPHSON; NORMA MANUEL; MENSI RIKAT; ARI RODEN; RIMUO RUNTE; and SNOPIA WEINEI; individually and on behalf of the class of homeless or formerly homeless individuals whose property was seized and destroyed by City and County of Honolulu officials,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU, a municipal corporation; and DOE EMPLOYEES OF CITY AND COUNTY OF HONOLULU 1-100;

Defendants.

Case No. CV 15-00363 HG-KSC
[Class Action]

MEMORANDUM IN SUPPORT OF MOTION

Judge:
Honorable Kevin S. Chang

MEMORANDUM IN SUPPORT OF MOTION

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I. INTRODUCTION

Plaintiffs are homeless or formerly homeless individuals who brought this civil rights action in September 2015, alleging that the City violated the Fourth and Fourteenth Amendments to the United States Constitution by seizing and immediately destroying Plaintiffs' property while enforcing the City's Stored Property Ordinance ("SPO"), Revised Ordinances of Honolulu ("ROH") § 29-19 *et seq.*, and Sidewalk Nuisance Ordinance ("SNO"), ROH § 29-16 *et seq*. *See* (ECF No. 1) (Complaint). Plaintiffs sought, and obtained, injunctive relief to require the City to comply with constitutional requirements in any enforcement of the SPO/SNO; Plaintiffs also sought, and obtained, damages as compensation for property unlawfully seized and destroyed in the past. It is undisputed that Plaintiffs meet the standard for a prevailing party entitled to attorneys' fees.

Plaintiffs' fee request reflects a reasonable amount of time spent at reasonable rates. For Alston Hunt Floyd & Ing ("AHFI"), Plaintiffs' request the standard rates that AHFI actually bills its paying clients and which are rates those private clients actually pay. (*See* Kacprowski Decl. ¶ 19, 26.) AHFI's rates are in the range of prevailing rates for attorneys in this community for

class action work, which is by definition complex litigation. *See* Manual for Complex Litigation, Fourth, § 21 (devoting 100 pages to the discussion of class actions). This was a particularly complicated class action, with over a dozen named plaintiffs, many of whom required interpreters, constitutional rights issues, accelerated discovery related to injunctive relief, experts, and the review of an extraordinary amount of evidence, including thousands of photographs and hundreds of videos of homeless sweeps going back years. (Kacprowski Dec. ¶ 11.) Moreover, both the ACLU and AHFI have written of substantial amounts of fees, and even after those write-offs, are voluntarily requesting only 80% of their lodestar, as a combined discount on both rates and time spent.

The final injunction in this case is extraordinarily detailed and complex, and the negotiation and drafting of it was extensive, requiring three sessions with the Chief Judge of this District Court and numerous exchanges and conferences among counsel. This is not a garden variety civil rights case involving a single public official and a single occurrence to a single individual. Indeed, because of the difficulty associated with identifying all impacted individuals, the City requested that a class be certified as

part of the settlement and the City Council has already ***resolved*** that "th[is] Class Action Lawsuit involve[d] complex issues of law and fact pertaining to civil rights and constitutional law and require[d] specialized legal knowledge and expertise in those areas[.]" Gluck Decl. Ex. 8 (City Council Resolution 15-299, Nov. 4, 2015)). Thus Plaintiffs' attorneys should be compensated at the prevailing rates for complex litigation, and not simply at the "average" rates awarded by this district in prior cases for attorneys with a comparable number of years of experience.

Among the best evidence of the reasonableness of the rates requested and time spent by Plaintiffs' counsel is the time and rates for the private law firm, McCorriston Miller Mukai MacKinnon ("M4"), that the City hired to defend it in this action in addition to the five attorneys with Corporation Counsel that have appeared in the case. M4 charged comparable rates to those Plaintiffs' counsel request, and employed similar staffing practices as Plaintiffs' counsel at depositions, hearings, and mediation sessions.

The fees Plaintiffs seek reflect the unfortunate reality that these proceedings were unnecessarily multiplied through the City's own conduct. First, the City could have resolved this case ***without***

a lawsuit at all on terms more favorable for the City than the ultimate settlement. For example, Plaintiffs' counsel attempted to resolve this dispute without litigation for more than *six months* prior to filing suit, even going so far as to allow the City's counsel to conduct six pre-litigation interviews of impacted homeless individuals. Plaintiffs offered to settle this dispute, months before filing the lawsuit, for 1) an informal commitment by the City to follow its ordinances that was ***far*** weaker than the injunction eventually obtained in settlement; 2) compensation to Plaintiffs in amounts less than those obtained in settlement; and 3) attorneys' fees of $28,370.63. (Gluck Decl. Exs. 1-4.) The City ignored these settlement overtures for months and months, necessitating the filing of this litigation. Even after filing the case, Plaintiffs offered to settle on terms similar to the final injunction and for fees that are only a fraction of those now requested. (Gluck Decl. Ex. 7.)

Defendant and its counsel also directly caused Plaintiffs to incur substantial fees in rebutting baldly inaccurate statements in material testimony the City submitted to defeat Plaintiffs' TRO motion. After the TRO was denied based on this incorrect testimony, essentially denying that the City destroyed any property

during sweeps, Plaintiffs were forced to expend significant resources gathering additional video, photographic, and testimonial evidence proving the City's testimony was false and then briefing a subsequent Motion for Preliminary Injunction submitting a massive amount of new evidence. (ECF No. 36-3 at 7-25 (Plaintiffs' Motion for Preliminary Injunction); Gluck Decl. ¶ 15.) The Court's inclination toward injunctive relief changed considerably after reviewing that new evidence conclusively disproving the City's testimony. All those efforts and fees could have been avoided had the City simply owned up to its behavior when opposing the TRO motion.

Plaintiffs hereby request an award of $382,478.90 to Alston Hunt Floyd & Ing and $219,814.05 to the ACLU of Hawai`i Foundation. The requested fees are calculated as follows:

	ACLU	**AHFI**
Lodestar Amount	$239,555.00	$372,740.00
Specific Time Write Offs In Exercise of Billing Judgment[2]	($5,732.50)	($7,472.50)

[2] These amounts do not include an estimated 15 hours, or $6,000 in time, that Plaintiffs' counsel anticipates spending on the reply to

Time Written Off Due to Hourly Rate Discount	($23,900)	N/A
Revised Lodestar	$209,922.50	$365,267.50
Voluntary Reduction of Lodestar by 20%	($41,984.50)	($72,453.50)
Further Adjusted Lodestar	$167,938.00	$292,214.00
Multiplier of 1.25	x1.25	x1.25
Fees after Multiplier	$209,922.50	$365,267.50
GET (4.712%)	$9,891.55	$17,211.40
Total Fees Requested	**$219,814.05**	**$382,478.90**

This represents a ***significant*** amount of fees written off in the exercise of billing judgment and a voluntary reduction of counsels' lodestar by 20% in the amount of $114,438.00. Counsel would only get, at most, their actual lodestar if the Court agrees that a multiplier is appropriate here. In addition, AHFI and the ACLU request an award of nontaxable costs of $11,988.35.

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this and to the finalization of the class action settlement. (*See* Kacprowski Decl. ¶ 37.)

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. Plaintiffs Investigate Claims and Attempt to Resolve the Matter Without Litigation

Plaintiffs' counsel at the ACLU began investigating Plaintiffs claims in early 2015. By March 2015, the ACLU had ten clients who had property destroyed in homeless sweeps in 2013 and 2014. (*See* Gluck Decl. Ex 1.) On March 2, 2015, Mr. Gluck of the ACLU sent Corporation Counsel a letter asking to settle the issue informally. The letter proposed a settlement that was far more favorable for the City than the settlement that resulted in litigation. The letter contained three demands: 1) an informal commitment by the City to follow the law in its homelessness sweeps and train its employees; 2) notice of future sweeps in languages other than English; and 3) damages to the ACLU's clients and the ACLU's fees and costs to that point. (*Id.*)

As to the first two points, the detailed regulations on sweeps ultimately gained through litigation were far more restrictive for the City, and were memorialized in a federal injunction, as opposed to an informal agreement. (*See* Dkt. No. 96-2). The March 5 letter did not set forth the specific damages and fees requested, but a follow up letter on April 15, 2015 did so, requesting $20,000

in damages and $28,370.63 in fees and costs. (Gluck Decl. Ex. 4.) In other words, Plaintiffs' settlement proposal in March 2015 sought damages which were less than half the amount that the City ultimately paid, and fees and costs that were only about 5% of what Plaintiffs were eventually required to expend in litigation.

Plaintiffs' counsel repeatedly reached out to the City's attorneys. Counsel even made the extraordinary accommodation of allowing the City's counsel to interview six of its clients in an attempt to avoid litigation. Despite six months of efforts to avoid litigation, the City's counsel never provided Plaintiffs' counsel with a substantive response to its settlement offer. (Gluck Decl. ¶ 8.) Plaintiffs had no choice other than pursing litigation after six months of having their settlement overtures ignored.

Plaintiffs' counsel again reached out to the City's counsel immediately upon initiating this case. Two days after filing the complaint, on September 18, 2015, Plaintiffs' counsel offered a settlement that included terms of an injunction remarkably similar to the injunction ultimately achieved, and a payment of $237,000 which would include all damages ***and*** attorneys' fees and costs. (Gluck Decl. ¶ 7.) Plaintiffs explicitly warned the City that their fees

had increased substantially since the earlier offers that the City ignored, and that "fees will continue to increase as litigation expenses are incurred." (*Id.*) The City ignored the September 18, 2015 settlement offer as well. (Gluck Decl. ¶ 15.)

B. The City Defeats the TRO Motion Based on Incorrect Testimony and Plaintiffs Must Incur Significant Fees Developing Evidence Demonstrating the Patent Inaccuracy of the City's Testimony

Rather than negotiate settlement with Plaintiffs, the City's response to the Complaint was to drastically ***escalate*** its homeless sweeps. (*See* ECF No. 12 at 5, 13; ECF No. 13 ¶¶ 3-7, 20.) Accordingly, on September 21, 2015, Plaintiffs moved for a temporary restraining order and/or preliminary injunction. (ECF No. 12.)

The City relied on blatantly inaccurate testimony to defeat the TRO. The City's response to the TRO was to simply deny that it actually destroyed any property of the homeless, and that it only disposed of things like human waste and hypodermic needles. (ECF No. 16-1 ¶¶ 3, 16; ECF No. 16-2 ¶¶ 6, 10.) Central to the Court's ruling on the TRO was a sworn declaration from Ross Sasamura, the Director of the City's Department of Facility Maintenance, attesting that the City did not destroy property

belonging to homeless persons. Specifically, he declared that "'sidewalk-nuisances' are **stored** after they are removed. They are **not 'destroyed.'"** (Dkt. 16-1 ¶ 3 (emphases in original).) The Court relied heavily on Mr. Sasamura's testimony in denying Plaintiffs' TRO Motion. (*See* Dkt. 22 at 16 ("Defendant City and County of Honolulu claims that it does not dispose of personal property when enforcing the ordinance.")).

Plaintiffs knew this testimony to be incorrect, because they had experienced the wanton destruction of their valuables. Plaintiffs' counsel therefore set about developing evidence disproving the City's testimony. Plaintiffs' counsel employed two individuals to video and photograph the homeless sweeps in Kakaako over several days in September and October 2015. (Kacprowski Decl. ¶ 41.) Plaintiffs were able to obtain the services of one of those individuals on a purely voluntary basis and the other at a very low rate. (*Id.*) That small investment paid enormous dividends, as Plaintiffs' counsel obtained videos and photographs of the City destroying over 100 items of personal property. (*See* ECF No. 36-18; 36-42).

Plaintiffs then deposed the two City witnesses who provided testimony in opposition to the TRO. Confronted with the indisputable photographic evidence, Mr. Sasamura was forced to admit that the City routinely "disposes of" tents, bedding, clothing, and other property belonging to homeless individuals. (ECF No. 36-5 (Sasamura Tran.) 58:3-20). Two other City witnesses also confirmed this practice, including the other witness whose inaccurate testimony the City used to defeat the TRO, Mr. Shimizu. (ECF No. 36-6 (Shimizu Tran.) 105:23- 106:6; 130:13-131:7; ECF No. 36-7 (Ponte Tran.) 117:12-120:9.)

When confronted with his earlier testimony that the City did not destroy any homeless property, the following testimony from Mr. Sasamura resulted:

> Q. Okay. So, is it correct then that in any enforcement action the DFM has never destroyed a tent? Is that your testimony?
>
> A. To my knowledge, we don't destroy tents. We don't destroy items. And I believe my testimony was that we dispose of certain things.
>
> Q. Oh, I see. So you're drawing a distinction between the word destroy and dispose of. Is that what's going on here?
>
> A. That's been my testimony.

(ECF No. 36-5 at 189:13-22)

> Q. Okay. Would—when a tent is processed and turned into energy, is there anything left of the tent after that happens?
>
> A. There is ash.
>
> Q. Okay. So, taking a tent and turning it into ash, would you agree that that's—that would constitute destruction of the tent?
>
> A. No I would not.

(*Id.* 191:23-192:5.)

After developing the new evidence and obtaining the critical deposition admissions following denial of the TRO motion, Plaintiffs' counsel spent significant time preparing and filing a second Motion for Preliminary Injunction on November 3, 2015. The comprehensiveness of that motion and the evidence developed speaks for itself. (*See* ECF No. 36.) The vast majority of that work would not have been necessary had the City's claims and testimony at the time of the TRO in September been more accurate.

The new evidence appeared to resonate significantly with the Court. On November 16, 2015, the Court held a status conference whereby it strongly encouraged the City to enter into a stipulation that would prohibit much of the property destruction at issue. Notably, the Court agreed with Plaintiffs that the stipulation should have the same enforceability as a TRO, ***which the Court***

had earlier denied. (Kacprowski Decl. Ex. 22, 10-14.) The Court later expressed frustration that the City had not worked out a stipulation with Plaintiffs by the time of the status conference. (*Id.* at 20:1-16) ("Okay. But I gave you a week already to do this…). Eventually the Court demanded that the parties reach an agreement on a stipulation to prevent destruction of property either that day or the next. (*Id.* 23:22-24:3 ("Well, as far as I'm concerned, you know, if it's not worked out today then it's going to be worked out tomorrow."); 30:2-3 ("So I will either see you at 10:30 tomorrow or I'll see a paper that I need to sign at that point.")) Plaintiffs were then able to obtain a stipulation limiting the City's destructive conduct, which the Court signed on November 18, 2015. (ECF No. 51.)

It was only after being forced to confront all of Plaintiffs' new evidence and being forced to sign a temporary stipulation drastically curtailing its property destruction that the City finally agreed to seriously discuss settlement.

C. The Parties Mediate with Chief Judge Seabright and Plaintiffs' Obtain a Permanent Injunction and Prevailing Party Status

Upon the Court's suggestion, the parties agreed to mediation with Chief Judge J. Michael Seabright beginning on December 18, 2015. (ECF No. 64.) The parties engaged in several additional mediation sessions. The result of the mediation was the parties entering into a stipulated injunction and a framework for settling the named Plaintiffs' damages. (ECF No. 96-2) (the "Amended Stipulation"). The injunction imposes entirely new obligations and duties on the City in its enforcement of the SPO/SNO. Among other things, the City is now required to:

- provide advance notice of SPO/SNO enforcement actions;
- allow affected individuals 30 minutes to gather and move their belongings prior to impoundment (and allow individuals to gather and move their belongings from City parks at night – during hours when the park is closed – without receiving a ticket for violating park closure rules);
- cease its practice of immediately destroying property (with very limited – and explicitly delineated – exceptions for certain hazardous materials);

- cease its practice of immediately destroying perishable food items discovered during SPO/SNO enforcement actions (and instead agreeing to leave perishable foods for at least one hour after the commencement of the sweep, allowing time for the owner to collect and move the property);
- store impounded property for 45 days (more than the 30 days required by City ordinance);
- waive all impoundment/storage fees for indigent persons;
- translate all SPO/SNO notice documents into a variety of languages.

(ECF Nos. 96-2.)

The Amended Stipulation specifically provides that Plaintiffs satisfy the legal standard entitling them to prevailing party status:

> 6. Notwithstanding any other provision herein, all parties agree that this Amended Stipulation has resulted in a material alteration of the legal relationship of the parties, and that this alteration is judicially sanctioned. That is, this Amended Stipulation includes the following: (1) judicial enforcement; (2) a material (and not technical or *de minimis*) alteration of the legal relationship between the parties; and (3) actual relief on the merits of Plaintiffs' claims.

(ECF No. 96-2, ¶ 6). In addition, this court retains jurisdiction to enforce the Amended Stipulation. (ECF No. 96-2 ¶ 7.)

The Amended Stipulation also provides that the parties would ultimately agree to a certified class settlement for injunctive relief. (*Id.* ¶ 11.) This is important to this fee motion, because Plaintiffs' preferred to simply dismiss the case upon reaching a final settlement agreement. (Kacprowski Decl. ¶ 13.) A class settlement adds substantial procedural complexity, delays the final judgment, and requires Plaintiffs' attorneys to spend additional time as class counsel. (*Id.*) Plaintiffs eventually acquiesced to the City's request for a certified class settlement. (*Id.*) It would be in particular bad form for the City to dispute any of the fees Plaintiffs request for time spent on the class settlement procedures.

D. Defendant's Counsel Generally Failed to Communicate with Plaintiffs' Counsel

Plaintiffs' fees are substantially higher than they needed to be in large part due to the City's consistent failure to communicate with Plaintiffs' counsel, and in some case to meet deadlines imposed by the FRCP. Defendant objected to nearly all of Plaintiffs' discovery requests, failed to timely produce initial disclosures, and requested an overly broad protective order before it

would release much of the discovery sought, requiring several rounds of letter briefing and status conferences. (*See* Gluck Decl. ¶ 22; ECF No. 56 (Minutes of Status Conference re Letter Briefs)).

Indeed, the City's counsel further prolonged litigation by failing to communicate with Plaintiffs' counsel about the litigation in a timely manner – or, frankly, at all. Plaintiffs' counsel had to request several status conferences with the Court (requiring several letter briefs and significant expenditures of time) simply to try to complete the most basic of litigation tasks. (*See* Gluck Decl. ¶ 31). As just one example, on May 3, 2016, Plaintiffs' counsel requested a status conference with the Court to discuss the Settlement Agreement because Defendant's counsel simply refused to respond to Plaintiffs' counsel's inquiries as to whether we had a final agreement. After Defendant's counsel e-mailed Plaintiffs' counsel on April 15, 2016, Plaintiffs' counsel followed up by e-mail on April 18, April 25, April 27, and May 3 – and had an in-person conversation with one of Defendant's attorneys – without receiving a substantive response. As such, Plaintiffs' counsel spent several hours preparing a letter brief, and additional time in another mediation session with Judge Seabright, that could have been

avoided had Defendant's counsel simply responded to Plaintiffs' counsel. (Gluck Decl. ¶ 31 (also containing several other examples, but by no means an exhaustive list)).

E. The City's Use of Outside (Private) Counsel

During the course of this litigation, the City itself agreed that "th[is] Class Action Lawsuit involves complex issues of law and fact pertaining to civil rights and constitutional law and requires specialized legal knowledge and expertise in those areas[.]" (Gluck Decl. Ex. 8). The City hired M4 to assist in representing it in the instant case. (*See* ECF No. 54, 59-62). The City had multiple lawyers present at nearly all court proceedings, depositions, and mediation sessions. (*See* Gluck Decl. ¶¶ 19-20).

Despite only being actively involved in the case for about three months and delegating perhaps half or more of the work to the City, M4 quickly blew through its $150,000 budget. M4 was not even retained until November, well after this case was already underway and after Plaintiffs' counsel had investigated and drafted the complaint, litigated a TRO, developed substantial additional evidence in the month of October, drafted a comprehensive preliminary injunction motion, and taken several critical

depositions. (Kacprowski Decl. ¶ 17.) M4 did not appear to author a single legal brief submitted to the Court, yet still managed to incur just under $100,000 in fees in just over six weeks – between November 25, 2015 and February 10, 2016. (*See* ECF No. 59-62 (Notices of Appearance); Gluck Decl. ¶ 16 and Ex. 9 (stating that M4 had already billed $98,971.00 by February 10)). On February 17, 2016, the City authorized M4 to expend an additional $50,000 in attorneys' fees on this case. (*See* Gluck Decl. ¶ 16 and Exs. 8-9). After M4 appeared, the City appeared to divide the legal work between M4 and up to five other Corporation Counsel. Corporation Counsel defended or appeared at some depositions and appeared to have drafted all the briefs the City filed after M4's retention. (Kacprowski Decl. 17.)

The hourly rates of the City's chosen lawyers from M4 are instructive. The firm assigned two partners and two associates to this case: (1) Lisa Cataldo (partner), a 1990 law school graduate, billing between $350 and $500 an hour, (2) William McCorriston (partner), a 1970 law school graduate, presumably billing $500 an hour; (3) Troy Andrade (associate), a 2011 law school graduate, billing between $180-$215 an hour, and (4) Jessica Wan (associate),

a 2014 law school graduate, billing between $180-$215 an hour. (*See* Gluck Decl. Ex. 8 at 2; M4's website, http://www.m4law.com/Attorneys/Lisa-W-Cataldo.shtml, http://www.m4law.com/Attorneys/William-C-Mccorriston.shtml, http://www.m4law.com/Attorneys/Troy-J-Andrade.shtml, http://www.m4law.com/Attorneys/Jessica-M-Wan.shtml.) Paralegals billed between $60 and $135 an hour. (Gluck Decl. Ex. 8). Unlike Plaintiffs' counsel, M4's recovery of these fees was not contingent upon the attorneys' success in this case. (*See* Gluck Decl. ¶ 44.)

III. ARGUMENT

A. Plaintiffs Are Entitled to an Award of Attorneys' Fees

There is no dispute that Plaintiffs are prevailing parties in this litigation. They are entitled to recover their fees under 42 U.S.C. § 1988. Plaintiffs' fee request is based on a traditional lodestar calculation. It should be granted in its entirety, as Plaintiffs request reasonable rates and have expended a reasonable number of hours. Moreover, Plaintiffs only request 80% of their actual lodestar fees, which already deducts substantial write-offs, further showing the reasonableness of Plaintiffs' fee request.

Plaintiffs' counsel also requests a modest multiplier of 1.25x, to account for the extreme undesirability of this case and the success achieved.

1. Plaintiffs Are Prevailing Parties

The Ninth Circuit determines "prevailing party" status using a three-part test requiring: (1) judicial enforcement; (2) material alteration of the legal relationship between the parties; and (3) actual relief on the merits of plaintiffs' claims. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010). Plaintiffs' suit has resulted in a permanent court order requiring Defendant City to alter its practices regarding SPO/SNO enforcement. The City has now stipulated that each of the three required factors for recognition as a prevailing party are satisfied here. (ECF No. 96-2 ¶ 6.) Plaintiffs are the prevailing party and are entitled to their attorneys' fees.

2. The Requested Attorneys' Fees Are Reasonable

Both AHFI and the ACLU request a reasonable hourly rate and a reasonable number of hours expended given the scope and complexity of this litigation. They have further agreed to take a

voluntary reduction of 20% of their lodestar. Their fee request of 80% of their lodestar fees is reasonable and should be granted.[3]

a. Reasonable Hourly Rate

AHFI's requested rates are based upon their standard market rates. The hourly rates requested are not "standard" in name only, with actual clients receiving large discounts, but the rates are the rates AHFI actually bills its paying clients. (Kacprowski Decl. ¶ 18, 26.) The Ninth Circuit has specifically held that this is compelling evidence of the market rate for the attorneys in question. *Carson v. Billings Police Dept.*, 470 F.3d 889, 892 (9th Cir. 2006) ("That a lawyer charges a particular hourly rate, and gets it, is evidence bearing on what the market rate is, because the lawyer and his clients are part of the market.")

Moreover, the Ninth Circuit has made it clear that the "prevailing market rate" for an attorney is not simply the average rate for an attorney with the same number of years of experience.

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[3] The ACLU of Hawaii is entitled to recover fees under the same calculation as private law firms such as AHFI and M4. *See Blum v. Stenson*, 465 U.S. 886, 894 (1984) (prevailing market rate does not vary "depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization"). *See also Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) (fee awards encourage "the legal services organization to expend its limited resources in litigation aimed at enforcing the civil rights statutes").

Rather, the Court should use the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Christensen v. Stevedoring Serv. of America*, 557 F.3d 1049, 1053 (9th Cir. 2009) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)). In other words, the Court needs to look at 1) the type of case at issue, in order to determine what lawyers in the community charge for "similar services"; 2) the skill of the attorneys at issue; 3) the experience of the attorneys at issue; and 4) the reputation of the attorneys at issue. Applying each of these factors supports adopting Plaintiffs' counsels' standard rates as the prevailing rates in the community "for similar services by lawyers of reasonably comparable skill, experience and reputation."[4]

First, "similar services" in the context of this case should mean complex, evidence-intensive, class action litigation, not simply the average market rate in Honolulu or rates for garden-variety civil rights cases. There is no dispute here that this class action involved complex issues of law and fact. The City Council

[4] As to AHFI, the standard rates requested are those actually charged its paying client. As to the ACLU, Mr. Gluck describes the determination of the requested ACLU rates in his declaration at Paragraphs 38 to 43.

has issued a unanimous resolution establishing that fact.[5] (*See* Gluck Decl. Ex. 8.) The Ninth Circuit has held that "billing rates should be established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients ***for legal work of similar complexity***." *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 946-947 (9th Cir. 2007) (reversing district court for not considering and awarding the market rates for "ERISA plaintiffs' lawyers of comparable skill") (emphasis added). Here the actual rates for Plaintiffs' attorneys are particularly instructive as to the market rates for complex, class action litigation. The rates that M4 is charging the City are comparable to the rates Plaintiffs' attorneys request here. This is further evidence that Plaintiffs' requested rates are the reasonable rates for this case.

Second, the skill, reputation, and experience of the attorneys at issue should also be considered. Otherwise, it would be impossible to apply the standard promulgated by the Supreme Court to find the prevailing rates for lawyers of like skill, experience,

[5] "WHEREAS, the Class Action Lawsuit involves complex issues of law and fact pertaining to civil rights and constitutional law and requires specialized legal knowledge and expertise in those areas."

and reputation. Here the number of years of experience is just one of a number of factors driving the analysis. Indeed, to look at ***only*** the number of years of experience would be arbitrary. *Jadwin v. County of Kern*, 767 F. Supp. 2d 1069, 1130 (E. D. Cal. 2011) ("In this Circuit, the reasonable hourly rate is ***not*** made by reference to…the number of years spent as a practicing lawyer. Rather, a reasonable hourly rate is determined by experience, skill, and reputation") (internal quotations and citations omitted) (emphasis added).

Other things that are relevant when considering experience, skill, and reputation include, for example, the fact that the two attorneys who spent the largest amount of time on this case both served as law clerks for judges on this court.[6] (Kacprowski Decl. ¶22.) Given that this is a complex class action, it is also relevant that Plaintiffs' counsel has extensive experience litigating other complex class actions. *See Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, *19 (N.D. Cal. April 1, 2011) (considering counsels' specific experience in litigating over 20 class actions and comparing it to "attorneys with similar

[6] Mr. Gluck clerked for Chief Judge Seabright and Mr. Kacprowski clerked for Judge Gillmor.

experience, skill, and reputation for comparable work in complex class actions in this community"); (*See* Kacprowski Decl. ¶¶ 24; Alston Decl.) (describing class action experience of counsel). Once again, the market rates for the attorneys' in question are also compelling evidence of the prevailing rates for lawyers of similar skill, reputation, and experience. Indeed, the evidence submitted shows that because of those factors, some of the attorneys in question are able to command a higher market rate than attorneys of a greater number of years of experience in their own firms who practice in different areas of law. (Kacprowski Decl. ¶ 27.)

Evidence of rates other law firms charge support the rates Plaintiffs' request. Plaintiffs request is supported by evidence of market rates from Pacific Business News 2014 Book of Lists, which lists and highlights the current prevailing rates in the community charged by various law firms in the State of Hawai`i.[7] As the list indicates, rates ***higher*** than those requested by the three attorneys spending the most time on this case are charged by attorneys at the 25 largest firms in Hawai`i. Moreover, the highest

[7] This list is admissible under Federal Rules of Evidence 803(17) regarding market and commercial publications, including lists, that are generally used and relied upon by the public or by persons in particular occupations.

rates charged are the most appropriate comparison, given that complex class action litigation like this would generally be handled by attorneys at the high end of the billing spectrum at these firms. Once again, the rates the M4 firm is charging the City in this case are also direct evidence of the market rates for this case.

Accordingly, Plaintiffs request the following hourly rates, which are representative of (1) the attorneys' customary fees for like work; and (2) the customary fees for like work prevailing in Honolulu, Hawai`i:

Timekeeper	**Rate**	**Explanation**
Daniel Gluck (attorney time)	$375	Gluck Decl. ¶¶ 39-40
Daniel Gluck (paralegal time)	$125	Gluck Decl. ¶ 39
Lois Perrin	$375	Gluck Decl. ¶ 41
Sarah Recktenwald	$125	Gluck Decl. ¶ 42
Katie Mullins	$125	Gluck Decl. ¶ 43
Holly Berlin	$125	Kacprowski Decl. ¶ 44
Mandy Finlay	$185	Kacprowski Decl. ¶ 44
Paul Alston	$785	Alston Decl.
Nickolas A. Kacprowski	$395	Kacprowski Decl. ¶¶ 20-27
Kristin Holland	$395	Kacprowski Decl. ¶ 28-30
Kee M. Campbell	$210	Kacprowski Decl. ¶ 31

Kirstin Blume	$160	Kacprowski Decl. ¶ 32
Iris Takane	$160	Kacprowski Decl. ¶ 33

These rates are reasonable in light of the experience, background and skills of the attorneys and staff involved. (*See* Gluck Decl. ¶¶ 32-43 (discussing skills and experience of ACLU of Hawaii staff); Alston Decl.; and Kacprowski Decl. ¶¶ 19-34 (discussing skills and experience of AHFI staff)). They are particularly reasonable considering that Plaintiffs' counsel has agreed to voluntarily request only 80% of their lodestar, meaning they will not be compensated for all their actual work at their actual rates, unless the Court adopts a multiplier.

b. Hours Reasonably Expended

Plaintiffs staffed this case leanly and by all measures, litigated it efficiently, particularly compared to the City's staffing at various hearings, depositions, and mediation sessions. For example, approximately 80% of the work was performed by just four timekeepers. The City had a practice of sending two or more lawyers to virtually every deposition, hearing, and mediation session. Indeed, the City sent ***six*** lawyers to one of the mediations. (Gluck Decl. ¶ 20.) This practice is understandable given the

complexity of the litigation and the fact that it was so fast-paced, with so much motions practice and discovery done on an extraordinarily expedited basis. Nonetheless, Plaintiffs staffed key events much more leanly. Indeed, given how quickly the case was progressing and the press of other business, it was Plaintiffs' practice not to send an attorney to something unless it was considered necessary. (Kacprowski Decl. ¶ 29.)

Plaintiffs' counsel has already written off a substantial amount of time in the exercise of billing judgment. The ACLU has written off 33.7 hours amounting to $5,732.50 in fees. (*See* Kacprowski Decl. ¶ 36). AHFI has written of $7,472.50 in attorney time and 31.9 hours for tasks that it would normally charge paying clients, but which it is excluding from this fee petition in the exercise of billing judgment. (*Id.*) On top of these write-offs, counsel has agreed to a 20% across-the-board deduction to its lodestar.

Accordingly, pursuant to the requirements of Local Rule 54.3, the following items showing the amount of time expended are attached as Exhibit 13 to the Declaration of Daniel M. Gluck and Exhibits 16 and 17 to the Declaration Nickolas A. Kacprowski. The

time entries are itemized and summarized as required by Local Rule 54.3 in those exhibits. The attorneys' fees incurred break down as follows:

AHFI SUMMARY OF FEES

	DESCRIPTION	TIME	AMOUNT
A.	Case Development, Background Investigation, Case Administration (including Initial Investigation, File Set Up, Preparation of Budgets, and Routine Communication with Clients, Co-Counsel, Opposing Counsel and the Court)	236.70	$87,845.00
B.	Pleadings	57.50	$22,751.50
C.	Interrogatories, Document Production, and Other Written Discovery	110.60	$41,741.50
D.	Depositions	125.00	$48,294.50
E.	Motions Practice	466.90	$146,113.00
F.	Attending Court Hearings	46.20	$18,522.00
	TOTAL:	1042.9	$365,267.50

ACLU SUMMARY OF FEES

	DESCRIPTION	TIME	AMOUNT
A.	Case Development, Background Investigation, Case Administration (including Initial Investigation, File	467.8	$112,579.00

	Set Up, Preparation of Budgets, and Routine Communication with Clients, Co-Counsel, Opposing Counsel and the Court)		
B.	Pleadings	16.7	$4,127.50
C.	Interrogatories, Document Production, and Other Written Discovery	62.7	$14,657.50
D.	Depositions	76	$22,770.00
E.	Motions Practice	244.4	$49,631.00
F.	Attending Court Hearings	24.3	$6,157.50
	TOTAL:	891.9	$209,922.50

These hours were reasonably expended and necessarily incurred in achieving success on Plaintiffs' claims. The number of hours is reasonable in particular considering the massive undertaking this case involved. The work includes: 1) investigating claims of approximately 15 clients, half of whom cannot speak English, and who were mostly homeless at the time; 2) drafting and researching a comprehensive complaint; 3) preparing a TRO motion, which was only unsuccessful because of the inaccurate testimony from the City; 4) retaining professionals to develop video and photographic evidence and then reviewing and organizing over a thousand photographs and videos; 5) taking or defending eight

depositions; 6) fighting for access to and then reviewing hundreds of City videos of homeless sweeps going back several years; 7) drafting a comprehensive preliminary injunction motion with extensive evidence; 8) drafting and filing a motion for class certification; 9) retaining an expert and drafting an expert report; 10) participating in four mediation sessions with Judge Seabright and negotiating and drafting a comprehensive settlement agreement and stipulated injunction; 11) procedural work necessary for certification of a class settlement, including drafting class notice and formulating notice procedures; and 12) drafting this fee petition. (*See* Kacprowski Decl. ¶ 12.) Many of the hours expended in litigating this action were necessitated by Defendant's undue delays, failures in communication, unreasonable objections to discovery requests, and inaccurate testimony. (Gluck Decl. ¶¶ 14-15, 31.)

c. Plaintiffs Are Entitled to a Multiplier on Their Fees

Plaintiffs request a multiplier of 1.25 on their fees. This multiplier, if applied, would mean that ***at most*** Plaintiffs can recover only their actual lodestar amount based on their counsels' actual hours and rates. This is because Plaintiffs have voluntarily reduced their lodestar to 80%. If the Court awards that lodestar

without further reductions, the most Plaintiffs will be awarded is their actual lodestar if a multiplier is applied. If the Court makes further reductions to Plaintiffs' lodestar beyond Plaintiffs' large voluntary reduction, then even with a 1.25 multiplier Plaintiffs would receive less than the actual market value of their time.

This case presents the rare example of a situation where a multiplier is appropriate given the uniquely challenging and undesirable nature of the case. Courts are required to consider awarding a multiplier, and must apply a multi-factor test, known as the *Kerr* factors. *See Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir. 1975) ; *Stetson v. Grissom*, 821 F.3d 1157, 1166-67 (9th Cir. 2016) (reversing and instructing that the district "court must explicitly discuss why the *Kerr* reasonableness factors do or do not favor applying a multiplier (positive or negative) in this case").

The Ninth Circuit has specifically approved multipliers based on the undesirability of the case, which is one of the *Kerr* factors. *Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 695 (9th Cir. 1996) (affirming 2x multiplier where "the district court also found that plaintiffs would have faced substantial difficulty in securing other counsel to represent them

and that this was an undesirable case given its visibility and controversial nature…"). Plaintiffs urge the Court to follow the Ninth Circuit's example in the *Ada* case and hold that given the controversial and unpopular nature of this case, a multiplier is justified. Each of the *Kerr* factors, beginning with the undesirability of the case, is discussed below and supports the use of the modest multiplier Plaintiffs request.

i. Undesirability of the Case

This was an unpopular and undesirable case, and a multiplier is justified under *Ada*. In *Ada*, the district court awarded a 2x multiplier to counsel who brought a constitutional challenge to a Guam law prohibiting abortions. *Id.* at 694. The district court found that the case was undesirable for attorneys, because the plaintiffs' counsel challenged a popular law "in the face of a unanimous Legislature, as well as a Governor who had taken a strong personal and political stand on the issue." *Id.* at 698. The court further found that "most lawyers on Guam would not have taken this case." *Id.* at 699.

The case presents a number of parallels with *Ada*. The homeless sweeps are a popular practice. Public polling showed that

over half of Oahu residents supported Defendant City's unconstitutional sweeps, "even if personal property was taken," and almost three quarters supported the sit-lie laws and sweeps of Kakaako. *See Expert says Hawaii Poll shows public is engaged and frustrated by homelessness*, Hawaii News Now (Aug. 10, 2015), *available at* http://www.hawaiinewsnow.com/story/29755340/expert-says-hawaii-poll-shows-public-is-engaged-and-frustrated-by-homelessness. Indeed, even after the Court entered the first stipulated injunction in November 2015, the Star Advertiser editorialized that it was "unfortunate" that the Court ordered a halt to immediate destruction of property.[8] Almost every time there is a new story about this case, it generates a flurry of hateful comments on social media. (Kacprowski Decl. ¶ 6.)

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[8] *See State and City Efforts to Help Homeless See Gains, Setbacks*, Honolulu Star Advertiser (Nov. 22, 2015) ("An even deeper crater surfaced Thursday, when U.S. District Judge Helen Gillmor ordered city officials to stop the immediate disposal of property seized when clearing homeless from sidewalks—and to start videotaping items they destroy, then tagging before impounding what's not trashed. The ruling, put in place until a January hearing, will no doubt hinder, if not bring to a screeching halt, the city's and the state's needed efforts to clear encampments—and that's unfortunate.") *available at* http://www.staradvertiser.com/editorial/state-and-city-efforts-to-help-homeless-see-gains-setbacks-2/

The City and State's political leaders were also opposed to this case or the relief that Plaintiffs sought. Like the situation in *Ada*, here the Mayor made it clear by the time this lawsuit began that conducting homeless sweeps, particularly in Kakaako, were a priority of his administration. *See e.g. Timing is Crucial for Clearing Camps, Sheltering Homeless*, Honolulu Star Advertiser (Aug. 30, 2015) http://www.staradvertiser.com/hawaii-news/timing-is-crucial-for-clearing-camps-sheltering-homeless-2/ ("Caldwell had wanted to start sweeping the homeless out of Kakaako weeks ago, but at Gov. David Ige's request agreed to delay what he calls 'compassionate enforcement' until enough beds became available."). Immediately upon the filing of this case, the Corporation Counsel for the City announced that "the Department of the Corporation Counsel will defend the city in this lawsuit vigorously."[9] Moreover, as noted above, the City's response to this lawsuit was to escalate its sweeping in Kakaako, continuing its unconstitutional destruction of property.

The Mayor was not the only prominent politician to endorse the homeless sweeps; when the Kakaako sweeps last year

[9] *See http://www.hawaiinewsnow.com/story/30044937/aclu-to-sue-city-over-homeless-sweeps*

were announced the Mayor gave a joint press conference with the Governor, a U.S. Congressperson, and a U.S. Senator. *See Sweep Notices coming Monday*, Honolulu Star-Advertiser (August 28, 2015), available at http://www.staradvertiser.com/newspremium/20150828_sweep_notices_coming_monday.html?id=323193761; *'Compassionate disruption' of Kakaako homeless encampment begins next week*, khon 2, available at http://khon2.com/2015/09/01/compassionate-disruption-of-kakaako-homeless-encampment-begins-next-week-2/

The record demonstrates how unlikely it is that other lawyers in Hawai`i would have had the ability or desire to take on this case. The Declaration of Mr. Gluck, the former legal director of the ACLU, describes at length how hard it is for the ACLU to find co-counsel on large, resource-intensive cases like this in general, and even more so when the cause is unpopular. (Gluck Decl. ¶ 45.) He states that AHFI is almost unique among the large firms in Hawai`i in being willing and able to take on a commitment like this case. Counsel for AHFI has also described how the attorneys working on this case feared that taking it on would harm their careers and were subject to actual, personal criticism for

representing the homeless in this case, including from attorneys in the community who they respect. (Kacprowski Decl. ¶ 5.) AHFI incurred significant risks in alienating clients in the business community when it agreed to represent Plaintiffs.

This case was also undesirable because of the particular challenges working with the Plaintiffs in this case. It was difficult for counsel to meet with their clients anywhere other than homeless encampments. Over the course of the litigation, Plaintiffs' counsel spent significant time in various homeless encampments on Oahu (including Kakaako) interviewing witnesses and searching for and meeting with Plaintiffs before and after filing suit. (*See* Gluck Decl. ¶ 30.) Local media have extensively reported on the alleged dangers within these encampments. (*See Id.* (collecting news articles)). The possibility of being subject to personal danger is another factor favoring a multiplier under *Ada*. *Id*. at 699.

The Ninth Circuit has recognized the appropriateness of a multiplier in particularly challenging, unpopular cases that few attorneys are willing to take on. This is such a case. The Court should follow the example of *Ada* and award counsel a multiplier. *See also Gonzales v. City of San Jose*, Case No. 13-cv-00695-BLF,

2016 WL 3011791, *8 (N.D. Cal. May 26, 2016) (awarding multiplier in case that was factually complex and "not an attractive case for attorneys to take.") Indeed, if a multiplier is not appropriate in this case under *Ada*, it is hard to imagine what case would be suitable for a multiplier in this district. The other *Kerr* factors, discussed below, also demonstrate the appropriateness of a multiplier.

ii. Time and Labor Involved

As detailed above and in their declarations, Plaintiffs' counsel has expended a substantial amount of time and labor in litigating this case. *See Kerr*, 526 F.2d at 70 (considering time and labor expended in the course of litigation).

iii. Novelty and Difficulty of the Questions Involved

Plaintiffs' Complaint brought claims under the Fourth and Fourteenth amendments to the United States Constitution. (ECF No. 1). Questions of law surrounding the application of the Fourth Amendment to homeless persons' possessions were novel and complex. Little precedent exists for this type of case, and the City vigorously disputed the applicability Plaintiffs' main case on the issue, *Lavan v. City of Los Angeles*, 693 F.3d 1022, (9th Cir. 2012). (ECF No. 16 at 18-19, 23.)

iv. Skill Required

Litigating this case required substantial skills which exceeded those required in the normal scope of civil rights litigation. As detailed above, the case is a factually and legally complex class action. Moreover, the civil rights aspect of this case was far more challenging than usual. Representing and communicating with the homeless or formerly homeless Plaintiffs in this case required patience, sensitivity, and investigative skills far above and beyond those typically associated with representation of civil rights plaintiffs. (*See* Gluck Decl. ¶¶ 27-29.)

v. Preclusion of Other Employment

Plaintiffs' counsel agreed to represent Plaintiffs at no cost and to advance all litigation expenses. (*See* Kacprowski Decl. ¶ 3; Gluck Decl. ¶ 44.) The recovery of any costs and/or fees was entirely dependent on the degree of Plaintiffs' success and the award of attorneys' fees and costs. *Id.* AHFI could have accepted *non-contingent* commercial litigation work instead of pursuing public interest litigation. (Kacprowski Decl. ¶ 30.); *see Kerr*, 526 F.2d at 70

vi. Customary Fee

As discussed above, the hourly rates of counsel for Plaintiffs in this matter are their customary rates. The hourly rates requested are also commensurate with those charged by outside counsel hired by Defendant City.

vii. Time Limitations Imposed by the Client or Circumstances

The City's impending sweeps imposed substantial time limitations in this case, and Plaintiffs' counsel expended significant effort in repeated attempts to enjoin publicly-announced future sweeps. There is no dispute that this case was litigated on an extremely expedited basis. The Court itself recognized the need for quick relief when it strongly encouraged the parties to immediately submit a stipulation providing Plaintiffs temporary relief on November 16, 2015. (Kacprowski Decl. Ex. 22, 10-14, 10, 23-24, 30.)

viii. Amount Involved and Results Obtained

Plaintiffs have obtained overwhelming success in this case (both for themselves and for homeless families and individuals throughout the City and County of Honolulu), which is the "most

critical factor" in considering the amount of attorneys' fees. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

Counsel for Plaintiffs obtained permanent injunctive relief which imposed significant new requirements on the City's disposal and storage of homeless persons' possessions. In fact, the injunctive relief obtained *exceeded* the scope of Plaintiffs' Complaint. It is also far beyond the informal commitments that Plaintiffs first proposed as part of a settlement before filing the case. (Gluck Decl. Ex. 1.) This injunctive relief also inures to the benefit of *all* the thousands of unsheltered homeless individuals in the City and County of Honolulu.

ix. Experience, Reputation, and Ability of the Attorneys

As discussed above and in the declarations of Messrs. Gluck, Kacprowski, and Alston, Plaintiffs' counsel at the ACLU and AHFI have substantial skills in litigating class actions and civil rights lawsuits.

x. Nature and Length of the Professional Relationship with the Client

Plaintiffs' counsel ACLU has invested considerable time and effort in maintaining relationships with fifteen named homeless

or formerly homeless plaintiffs, their extended families, and various witnesses for a 19-month period. (Gluck Decl. ¶¶ 26-28).

xi. Awards in Similar Cases

The Ninth Circuit and district courts within it have awarded multipliers under § 1988 in appropriate cases. *See Ada,* 100 F.3d at 695; *Gonzalez*, 2016 WL 3011791 at *8; *Gomez v. Gates*, 804 F. Supp. 69, 78-79 (C.D. Cal. 1992) (awarding multiplier in particularly undesirable excessive force case where clients were "undeniable serious wrongdoers"); *Oberfelder v. City of Petaluma*, C-98-1470 MHP, 2002 WL 472308 at *11 (N.D. Cal. Jan. 29, 2002) (awarding multiplier under § 1988 in case where counsel represented a "an unsympathetic plaintiff," an incarcerated, convicted drug dealer, because "most private attorneys" would not have taken on the matter); *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 746 (6th Cir. 2005) (awarding multiplier based on novelty and difficulty of the case, extraordinary result, and the fact that the case involving discrimination against a male-to-female transsexual was high controversial and "few lawyers locally or nationally would take such a case."); *Villegas v. Metropolitan Gov. of Davidson Cnty./Nashville-Davidson Cnty. Sheriff's Office*, No. 3:09-0219, 2012

WL 4329235, *15 (M.D. Tenn. Sept. 20, 2012) (awarding multiplier pursuant to § 1988 where counsel undertook a "highly controversial action" representing an undocumented immigrant that subjected counsel and its law practice to criticism in the community and on social media). This case fits the mold of a difficult and controversial case that few attorneys would take and where counsel obtained excellent results.

B. Plaintiffs Are Entitled to Their Nontaxable Costs

Plaintiffs' request recovery of $11,988.35 in nontaxable costs. These amounts are reasonable and should be awarded. Under § 1988, a prevailing plaintiff "may recover as part of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19-20 (9th Cir. 1994). "[R]easonable expenses, though greater than taxable costs, may be proper." *Id.* For example, expert witness fees "are recoverable expenses as part of the reasonable attorney's fees award." *Id.*[10] The rest of the costs requested all fall within

[10] Plaintiffs are aware of this court's decision in *Doe v. Keala*, 361 F. Supp. 2d 1171, 1190-91 (D. Haw. 2005) that expert witness fees are not recoverable under 42 U.S.C. § 1988 for cases brought under 42 U.S.C. § 1983. The court relied on a Ninth Circuit decision before *Harris v. Marhoefer*. *See Id.* (citing *Gates v. Deukmejian*, 987 F.2d

expenses that courts have considered reasonable. For example, *Harris* allowed recovery for postage, meals, and messenger service. *Id*. Other courts within the circuit have allowed for recovery of mileage and fees for investigators. *Scruggs v. Josephine County*, Civil No. 06-6058-CL, 2009 WL 650626, *8 (D. Or. Mar. 10, 2009). This court has specifically awarded electronic legal research costs to AHFI, because AHFI bills those expenses to its paying clients. *Sound v. Koller*, Civil No. 09-00409 JMS/KSC, 2010 WL 1992194, *8 (D. Haw. May 19, 2010). The costs of interpreters are also

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1392, 1408 (9th Cir. 1992). This court never cited *Harris* in its decision in *Keala*. The ***prior*** Ninth Circuit case it did cite, *Gates*, in turn relied on the Supreme Court's decision in *West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83, 99 (1991). *Casey*, in turn, was abrogated by statute, as noted in *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994). The Ninth Circuit issued its decision in *Harris* after *Landgraf* recognized the statutory abrogation of *Casey*. The Court in *Keala* did address the abrogation of *Casey* by statute, but did not discuss *Landgraf* or *Harris*. Rather, *Keala* reasoned that the abrogation to provide for recovery of expert witness fees only applies to Section 1981 claims, not Section 1983 claims. The Court's analysis unfortunately overlooked that: 1) *Casey* was a § 1983 case; *see Casey*, 499 U.S. at 85; 2) the Supreme Court explicitly noted that the statutory changes in § 1988 were specifically intended to address the *Casey* decision; *see Landgraf*, 511 U.S. at 251; and 3) the Ninth Circuit has held that expert fees are recoverable as part of a fee award in a 1983 case in *Harris*. 24 F.3d at 19-20.

recoverable, because those costs were necessary and are of the type typically passed on to paying clients. (Kacprowski Decl. ¶ 44.)[11]

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court grant its Motion and award $382,478.90 in attorneys' fees for AHFI and $219,814.05 for the ACLU and $11,988.35 in nontaxable costs.

DATED: Honolulu, Hawai`i, September 9, 2016.

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[11] Indeed the costs of oral interpretation (but not written translation) are recoverable as taxable costs pursuant to 28 U.S.C. § 1920 (6). *Taniguchi v. Kan Pacific Saipan, Ltd.*, __ U.S. __, 132 S.Ct. 1997, 2007 (2012). For simplicity's sake, Plaintiffs submit all their interpretation costs here rather than dividing up oral and written translation between this motion and the bill of costs.