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9 Attorneys for Plaintiffs

10 **UNITED STATES DISTRICT COURT**  
11 **EASTERN DISTRICT OF CALIFORNIA**

13 **JEFF SILVESTER, BRANDON**  
14 **COMBS, THE CALGUNS**  
15 **FOUNDATION, INC., a non-profit**  
16 **organization, and THE SECOND**  
**AMENDMENT FOUNDATION,**

17 **Plaintiffs,**

18 **v.**

19 **KAMALA HARRIS, Attorney**  
20 **General of California (in her**  
**official capacity), and DOES 1 to**  
**20.**

21 **Defendants.**

**Case No. 1:11-cv-02137-AWI-SKO**

**MEMORANDUM IN SUPPORT OF**  
**PLAINTIFFS' MOTION FOR**  
**ATTORNEYS' FEES**

Date: TBD  
Time: TBD  
Courtroom: TBD

23  
24 **I. Introduction**

25 After three years of litigation, a bench trial, and the presentation of evidence  
26 the Court granted plaintiffs' request for declaratory and injunctive relief under  
27 U.S.C §§ 1983, 1988 as well as the Second and Fourteenth Amendments. Plaintiffs,  
28

1 Jeff Silvester, Brandon Combs, The Calguns Foundation, Inc. and The Second  
2 Amendment Foundation, bring this motion for attorney's fees and court costs  
3 pursuant to 42 U.S.C. section 1988 ("section 1988") and Federal Rule of Civil  
4 Procedure 54.

5 **II. Overview of the Litigation**

6 Since the Court is familiar with the history of this litigation, only a brief  
7 summary of the proceedings is set forth below.

8 **A. The Complaint and Claims**

9 On December 12, 2011 Plaintiffs filed suit challenging the State of  
10 California's ten-day waiting period laws for firearm acquisitions facially and as  
11 applied to individuals who lawfully already have at least one firearm registered in  
12 their name with the State of California. Plaintiffs' asserted that the waiting period  
13 laws violated the Second Amendment and the Fourteenth Amendment of the United  
14 States Constitution and was made through rights granted by 42 U.S.C §§ 1983,  
15 1988.

16 **B. Motions**

17 On September 25, 2013, the Attorney General filed a Motion for Summary  
18 Judgment on all claims raised in the lawsuit. The Attorney General offered two  
19 justifications for the across-the-board waiting period. First, the Attorney General  
20 argued that the delay is required so that a background check can be performed.  
21 Second, the Attorney General argued that a cooling-down period must be imposed  
22 on everyone on the chance that someone might impulsively purchase a gun to do  
23 harm to themselves or others.

24 On December 6, 2013, the Court issued its Order denying the Attorney  
25 General's motion in its entirety.

26 **D. Research & Memorandums**

27 Because this was a novel case in a developing area of Constitutional law,  
28

1 there was an extensive amount of research that was needed. For example, the entire  
2 legislative history of the statues challenged had to be reviewed and analyzed. In  
3 addition, because the Attorney General attempted to get evidence into the record by  
4 taking judicial notice of numerous books, articles and journals, those items had to  
5 be reviewed and objections drafted.

6 **E. Fact Discovery**

7 Written discovery consisted of drafting responses to twenty written  
8 interrogatories for five parties, attending four depositions, and reviewing the  
9 extensive legislative history of the challenged laws. These activities required  
10 numerous hours of meetings with clients and opposing counsel, as well as extensive  
11 travel and research costs.

12 **F. The Trial**

13 Prior to the trial, the plaintiffs had to draft and respond to five motions in  
14 limine, prepare witnesses, comb through at least 1,000 “high priority” documents  
15 to identify a manageable list of trial exhibits, and review thousands of pages of  
16 material listed on defendants exhibit list. The trial, which lasted three days,  
17 included five witnesses for the plaintiffs and seven for the defendants. There were  
18 almost two hundred plaintiffs’ exhibits and one hundred defendants’ exhibits that  
19 were ultimately admitted, drawn from proposed lists that exceeded twelve hundred  
20 documents.

21 Each party submitted seventy pages of proposed findings and conclusions,  
22 drawn from hundreds of pages of trial transcripts.

23 **III. There Is No Dispute That the Plaintiffs Have Prevailed and Are**  
24 **Entitled to An Award of Attorneys’ Fees and Costs.**

25 The United States Supreme Court has set forth the approach to follow in  
26 evaluating fee requests under 42 U.S.C. § 1988. To be entitled to an award of fees,  
27 the plaintiffs must have prevailed on some significant issue in the litigation.

1 Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Texas State Teachers Ass’n v.  
2 Garland Independent School Dist., 489 U.S. 782, 791-92 (1989). Once the fee  
3 entitlement threshold has been crossed, the prevailing plaintiffs’ fee award is based  
4 upon the familiar lodestar method.

5 The lodestar method of calculating attorney fees is a two-step process. First,  
6 courts multiply the hours an attorney works by the attorney’s hourly rate—this  
7 process yields the lodestar—and then courts adjust the lodestar up or down “to  
8 reflect the characteristics of a given action.” Ferland v. Conrad Credit Corp., 244  
9 F.3d 1145 (9th Cir. 2001). These fees include all time reasonably and necessarily  
10 expended on all phases of the litigation. Anderson v. Director, Office Worker’s  
11 Compensation Programs, 91 F.3d 1322, 1325 (9th Cir. 1996). “Where a plaintiff  
12 has obtained excellent results, his attorney should recover a fully compensatory fee.  
13 Normally this will encompass all hours reasonably expended on the litigation, and  
14 indeed in some cases of exceptional success an enhanced award may be justified.”  
15 Hensley, 461 U.S. at 435.

16 Here, there is no dispute that the plaintiffs have prevailed. The August 22,  
17 2014 Memorandum Decision states:

18 “After considering the evidence and the arguments, the Court  
19 concludes that Penal Code § 26815(a) and § 27540(a)’s 10-day waiting  
20 periods impermissibly violate the Second Amendment as applied to  
21 those persons who already lawfully possess a firearm as confirmed by  
22 the AFS, to those who possess a valid CCW license, and to those who  
23 possess both a valid COE and a firearm as confirmed by the AFS  
24 system, if the background check on these individuals is completed and  
25 approved prior to the expiration of 10 days”.

26 Consistent with federal fee-shifting statutes, and Supreme Court decisions  
27 applying these statutes, the plaintiffs are entitled to recover their attorneys’ fees and  
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1 costs for all time reasonably expended on this case, as well as all expenses  
2 reasonably incurred.

3 **IV. The Time Spent by the Plaintiffs’ Attorneys Is Reasonable and Fully**  
4 **Compensable.**

5 **A. The Plaintiffs Have Exercised Billing Judgment And Have**  
6 **Substantially Reduced the Number of Hours for Which Fees Are**  
7 **Requested.**

8 A central consideration in determining the amount of compensable time is  
9 the determination of whether the plaintiffs have demonstrated billing judgment with  
10 respect to their fee application.

11 “Counsel for the prevailing party should make a good faith effort to  
12 exclude from a fee request hours that are excessive, redundant, or  
13 otherwise unnecessary, just as a lawyer in private practice ethically is  
14 obligated to exclude such hours from his fee submission.... ‘Hours that  
15 are not properly billed to one’s client also are not properly billed to  
16 one’s adversary pursuant to statutory authority.’”

17 Hensley, 461 U.S. at 434 (quoting Copeland v. Marshall, 641 F.2d 880, 891  
18 (D.D.C. 1980) (*en banc*)).

19 The plaintiffs have submitted detailed, contemporaneously-recorded time  
20 records which describe with particularity the date, activity, and time spent on each  
21 litigation task over an almost three year period. See time records of (Declaration of  
22 Victor Otten “Otten Decl.” ¶ 13; Declaration of Don Kilmer “Kilmer Decl.” at ¶¶ 8-  
23 11 and Ex. 4; Declaration of Jason Dave “Davis Decl.” at ¶¶ 5-8 and Ex. 5). Each  
24 entry was recorded daily, as a percentage of an hour, in a computerized time  
25 keeping program. Id.

26 The plaintiffs have either not billed or “no charged” hundreds of hours in the  
27 exercise of billing judgment, which is well beyond what is commonplace in private  
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1 commercial litigation and requested far less than would be billed to a paying client.  
2 For example, Otten & Joyce LLP “no charged” 35.20 hours of work. (Otten Decl. at  
3 ¶ 14).

4 Based upon a careful review of these records, each attorney then exercised  
5 billing judgment to delete or reduce various entries. Hensley, 424 U.S. at 434  
6 (good faith effort to exclude hours that are "excessive, redundant, or otherwise  
7 unnecessary"). Id. Each attorney omitted or deleted extensive time spent  
8 communicating with individual plaintiffs, conducting factual and legal research,  
9 reviewing state agency documents and administrative decisions, conferring with  
10 other legal experts, and collaborating with legal and support staff in their offices.  
11 Id.

12 Given these substantial reductions, the plaintiffs' lodestar fairly represents the  
13 reasonable time expended by each attorney, paralegal, and law student in this case.

14 **B. The Novelty and Complexity of This Litigation Required Multiple**  
15 **Attorneys With Discrete Responsibilities and Expertise.**

16 An additional factor to be considered when evaluating the reasonableness of  
17 the time expended is the novelty and complexity of the case. As the Supreme Court  
18 noted in City of Burlington v. Dague, 505 U.S. 557, 562 (1992), the difficulty of a  
19 case “is ordinarily reflected in the lodestar – either in the higher number of hours  
20 expended to overcome the difficulty, or in the higher hourly rate of the attorney  
21 skilled and experienced to do so.” The legal and factual complexity of this case is  
22 unique, both for the attorneys involved and in terms of the relief obtained. The area  
23 of Second Amendment litigation is rapidly developing in light of the Supreme  
24 Court decisions in District of Columbia v. Heller (2008) 554 U.S. 57 and  
25 McDonald v. City of Chicago (2010). The application of these cases and the level  
26 of scrutiny to be applied to firearms statutes throughout the country is developing  
27 and few attorneys practice in this area. (Otten Decl. at ¶ 16).

1           **D. The Plaintiffs Have Obtained An Exceptional Result and Are**  
2           **Entitled to Fees for All Time Reasonably Spent on This Civil**  
3           **Rights Case.**

4           As previously set forth, the plaintiffs’ are the prevailing parties in this  
5 litigation. This is one of a very few successful Second Amendment challenges to a  
6 firearms statute.

7  
8           **E. Plaintiffs Are Entitled to Hourly Rates That Reflect Each**  
9           **Attorney’s Experience and Expertise, Consistent With the Private**  
10          **Market for Similarly Qualified Lawyers.**

11          In Blum v. Stenson, 465 U.S. at 893-95, the Supreme Court made clear that  
12 fee awards under 42 U.S.C. § 1988 should “be calculated according to the  
13 prevailing market rates in the relevant community, regardless of whether plaintiff is  
14 represented by private or nonprofit counsel. In support of this conclusion, the Blum  
15 court pointed to the legislative history where Congress explained that fee awards  
16 under § 1988 should “be governed by the same standards which prevail in other  
17 types of equally complex Federal litigation, such as antitrust cases....” S.Rep. No.  
18 94-1011 at 6, 1976 U.S. Code Cong. & Admin. News at 5913. Where private  
19 counsel are involved, “the best evidence [of their reasonable hourly rate] is the  
20 hourly rate customarily charged by counsel....” Tomazzoli v. Sheedy, 804 F.2d 93,  
21 98 (7th Cir.1986); accord, Rakestraw v. Corporation for Community Housing, 2005  
22 WL 2030868 at \*2 (N.D. Ind., Aug. 18, 2005). While the attorneys’ own affidavits,  
23 standing alone, are insufficient to establish that their billing rates fit within the  
24 prevailing rates in the relevant community for lawyers of similar skill and  
25 experience, Bordanaro v. McLeod, 871 F.2d 1151, 1168 (1st Cir.1989), if  
26 additional documentation confirms that their rates conform to the market, those  
27 rates should be utilized in the lodestar calculation.

1 Each attorney's rate was calculated using The Laffey Matrix. The Laffey  
2 Matrix rates for the Washington, D.C., area (which is approximately equivalent to  
3 Los Angeles and San Francisco) and is available at  
4 <http://www.laffeymatrix.com/see.html>. The methodology of calculation and  
5 benchmarking for this Updated Laffey Matrix has been approved in a number of  
6 cases. See, e.g., McDowell v. District of Columbia, Civ. A. No. 00-594 (RCL),  
7 LEXSEE 2001 U.S. Dist. LEXIS 8114 (D.D.C. June 4, 2001); Salazar v. Dist. of  
8 Col., 123 F.Supp.2d 8 (D.D.C. 2000). The Laffey Matrix calculates relative fees  
9 based on the time litigation took place and each participating attorney's number of  
10 years of experience at the time. Additionally, each attorney's rate was then  
11 compared to average rates listed for attorney practicing between 2010 and 2013 by  
12 the National Law Journal. (Otten Decl. at ¶ 17; Kelmer Decl. ¶ 8; Davis Decl. ¶ 8).

13 Plaintiffs had attorneys primarily bill on the Litigation as follows, each  
14 primary attorney in turn had a number of partners, clerks and associates billed as  
15 well as described below:

16 **Primary Attorneys:**

17 Victor Otten – Partner, 20 years of experience – \$640/hour

18 Jason Davis – Partner, 11 years of experience – \$640/hour

19 Don Kilmer – Partner, 15 years of experience – \$640/hour

20 **Secondary Attorney's and Law Clerks:**

21 Brigid Joyce – Partner, 11 years of experience – \$350/hour

22 Micheal Ruttle – Associate Attorney. – \$175/hour

23 Denise Quartermaine – Law Clerk/First Year Attn. – \$110/hour

24 Jenifer Tamura – Law Clerk/First Year Attn. – \$110/hour

25 Justin Otten –First Year Attn. – \$175/hour

26 All four attorneys fit comfortably into what the National Law Journal  
27 statistics show as the “averages” for both partners and associates over the last  
28



1 several years in Los Angeles in addition to conforming to the Laffey Matrix.

2 Victor J. Otten has been practicing complex civil litigation for over 19 years.  
3 (Otten Decl. at ¶ 2). He has extensive litigation and first chair trial experience. He  
4 obtained a published appellate opinion in the case Michel v. Moore and Associates  
5 Inc., Case No. B183165. 8. He was selected as an Environmental Super Lawyer,  
6 Southern California Super Lawyers Magazine, in 2009 and has an AVVO rating of  
7 9.4. (Otten Decl. at ¶ 1).

8 Mr. Otten was employed by Trutanich-Michel LLP as special counsel from  
9 2000 through May 2009, where he handled complex business, environmental, real  
10 estate, and firearms matters in state and federal courts from inception through trial  
11 and appeal. While employed at Trutanich-Michel LLP, a small part of his job  
12 involved working on firearms matters. His practice became more focused on  
13 firearm and related litigation about two years ago when co-counsel, Jason Davis,  
14 and he started working together on various firearm related matters. (Otten Decl. at ¶  
15 5) Plaintiffs' requests his billing rate at \$640 per hour based upon his upper level  
16 of experience and skill. (Otten Decl. at ¶9).

17 Don Kilmer was lead counsel in first case in the nation to incorporate the  
18 Second Amendment as against state action through the Fourteenth Amendment's  
19 "due process" clause. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009), vacated, 611  
20 F.3d 1015 (9th Cir. 2010)(en banc). This was exactly the same result achieved in  
21 McDonald v. City of Chicago, 130 S.Ct. 3020 (2010). (Kilmer Decl. at ¶ 6-7) Mr.  
22 Kilmer also has several published opinions as lead or co-counsel in other firearms  
23 cases have been resolved by or are pending in the Ninth Circuit and/or the  
24 California Court of Appeals, including the California Supreme Court. (Kilmer Decl.  
25 at ¶ 6-7).

26 Jason Davis worked in the firearms industry, including over a decade of  
27 experience in designing and manufacturing firearms for two of the largest firearm  
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1 manufacturers in the United States at that time prior to becoming an attorney. Upon  
2 being admitted to the bar, he practiced almost exclusively in firearms related  
3 matters. At this time, he has over eleven years of legal experience in the area of  
4 firearms related laws, on issues ranging from civil and criminal litigation and  
5 appeals, legislative analysis, drafting of certain Penal Code provisions, lobbying  
6 activities, regulatory compliance and consultation. In 2009, he represented the  
7 interests of firearm owners and associations in the multi-year long California Law  
8 Revision Commission Study on Dangerous Weapons Laws pursuant to ACR 73,  
9 which directed the Law Revision Commission to “study, report on, and prepare  
10 recommended legislation by July 1, 2009, concerning the revision of the portions of  
11 the Penal Code relating to the control of deadly weapons ....” 2006 Cal. Stat. res.  
12 ch. 128. The general purpose of the study was to improve the organization and  
13 accessibility of the deadly weapons statutes, without making any change to criminal  
14 liability under those statutes. This study lead to a complete rewriting of the  
15 California Penal Code, as it relates to “dangerous weapons.” Plaintiffs’ requests his  
16 billing rate at \$640 per hour based upon his upper level of experience and skill.  
17 (Davis Decl. at ¶ 6).

18 Brigid Joyce has ten years of legal experience. (Otten Decl. at ¶18). Ms.  
19 Joyce was a Partner at Otten & Joyce, LLP and an adjunct legal writing professor at  
20 Whittier Law School. (Otten Decl. at ¶18). Plaintiffs request that her billing rate at  
21 \$350 per hour based upon her upper level of experience and skill. (Otten Decl. at  
22 ¶18).

23 Michael Ruttle graduated from Whittier Law School and passed the bar in  
24 2012. Mr. Ruttle worked as a law clerk and an associate at Otten & Joyce, LLP.  
25 Plaintiffs requests his billing rate at \$175 per hour. (Otten Decl. at ¶19).

26 Denise Quartermaine graduated from Whittier Law School and passed the  
27 bar in 2013. Ms. Quartermaine worked as a law clerk and associate at Otten &  
28

1 Joyce, LLP. Plaintiffs requests her billing rate at \$110 per hour. (Otten Decl. at  
2 ¶20).

3 Justin Otten graduated from Santa Clara Law School and passed the bar in  
4 2013. Mr. Otten worked as a law clerk and associate at Otten & Joyce, LLP.  
5 Plaintiffs requests his billing rate at \$110 per hour. (Otten Decl. at ¶21).

6 Jenifer Tamura graduated from UC Davis Law School in May of 2013. She  
7 passed the bar in 2013. Ms. Tamura worked as a law clerk and associate at Otten &  
8 Joyce, LLP. Plaintiffs requests her billing rate at \$110 per hour. (Otten Decl. at  
9 ¶20).

10 Courts have differed over how to define the “relevant” community for  
11 purposes of establishing reasonable hourly rates. Many use the entire federal  
12 district in which the court sits. Luciano v. Olsten Corp., 109 F.3d 111, 115 (2d  
13 Cir.1997); Public Interest Research Group of New Jersey, Inc. v. Windall, 51 F.3d  
14 1179, 1187-88 (3rd Cir.1995); Third Circuit Task Force, Court Awarded Attorney  
15 Fees, 108 F.R.D. 237, 260-62 (1986). Where the case involves state officials, is  
16 brought on behalf of a statewide class, and has a statewide impact, this statewide  
17 approach, and specifically the market rates where the government defendants are  
18 located, usually apply. See Maceira v. Pagan, 698 F.2d 38, 40 (1st Cir. 1983);  
19 Copeland v. Marshall, 641 F.2d at 892.

20 Finally, since civil rights litigation can be lengthy, as this case has been, and  
21 since any fee recovery is often many years after the lawsuit is commenced, the  
22 Supreme Court has determined that an attorney’s current market rate should  
23 normally be applied retroactively, to account for the delay in payment and the lost  
24 value of money. See Missouri v. Jenkins, 491 U.S. 274, 283-84 (1989).

25 This principle, widely applied by the federal courts, is particularly applicable  
26 here, where the plaintiffs have had to expend hundreds of thousands of dollars in  
27 litigation costs, and have had to wait almost eight years to seek a fee recovery.

1           **i) The Rates Requested Are Reasonable and Consistent with**  
2           **Comparably Experienced Private Attorneys.**

3           The determination of reasonable rates in this case is greatly simplified since  
4 several of the attorneys have established market rates which, pursuant to the  
5 Supreme Court's holding in Blum. For Victor Otten and Micheal Ruttle, the  
6 regular billing rates are \$640/hour and \$175/hour, respectively. For Don Kilmer,  
7 \$640/hour and for Jason Davis, \$640/hour. (Otten Decl. at ¶ 27; Kilmer Decl. at ¶¶  
8 8-11 and Ex. 4; Declaration of Davis Decl. at ¶¶ 5-8 and Ex. 5). Moreover, given  
9 their expertise, area of specialization, accomplishments, and years of experience,  
10 these rates reflected above are clearly what each attorney deems reasonable, since  
11 they are the rates charged to the each firm's paying clients. Id.

12           As provided in Blum, these rates establish the benchmark for similarly  
13 qualified civil rights attorneys. Particularly in light of their unique expertise in the  
14 issues in this litigation, including Second Amendment law, civil rights litigation,  
15 complex civil litigation, and gun law in general, reasonable rates for similar lawyers  
16 should be comparable to their counterparts above. Id. Therefore, the market rate  
17 for each of the above attorneys has been adjusted to reflect their relative experience,  
18 involvement and experience in this case. Id.

19           **VI. The Plaintiffs' Lodestar Is Reasonable and Fully Compensable.**

20           **"The lodestar method is the strongly preferred method by which district**

21           Courts should determine what fees to award prevailing parties in actions that  
22 fall within the ambit of section 1988." Coutin v. Young & Rubicam P.R., Inc., 124  
23 F.3d 331 (1st Cir. 1997). The lodestar is the product of the number of hours  
24 reasonably expended multiplied by a reasonable hourly rate. When a plaintiff  
25 substantially achieves the relief sought, the beginning and end of the calculation of  
26 reasonable attorney's fees is the lodestar.

27           After exercising billing judgment, the plaintiffs' total lodestar in this case, as  
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1 set forth in Exhibit 1, is \$305,526.21 (Otten Decl. at ¶ 21; Kilmer Decl. at ¶¶ 8-11  
2 and Ex. 4; Davis Decl. at ¶¶ 5-8 and Ex. 5). This amount represents the reasonable  
3 time that all attorneys who worked on this case spent achieving the significant  
4 results for plaintiffs and the public at large, multiplied by a reasonable hourly rate  
5 which reflects the relevant market in California for lawyers of similar experience  
6 and special expertise.

7 **VII. The Motivations for Pursuing This Lawsuit by Plaintiffs Was Protect**  
8 **The Second Amendment Rights**

9 The motivation for pursuing this lawsuit by the plaintiffs was to protect the  
10 Second Amendment- protecting gun rights as an important constitutional  
11 component of the fundamental “right to keep and bear arms.” These plaintiffs are  
12 exactly the type of individuals and entities that should receive attorneys’ fees and  
13 costs in order to protect the public health and welfare. (Otten Decl. at ¶ 22).

14 **VII. The Costs Incurred In This Case Are Reasonable and Fully**  
15 **Compensable.**

16 **A. Plaintiffs Are Entitled to All Litigation Costs and Expenses,**  
17 **Provided that They Are Reasonable.**

18 Plaintiffs are entitled to all reasonable expenses incurred in the litigation of  
19 this action. Palmigiano v. Garrahy, 707 F.2d 636, 637 (1st Cir. 1983). In  
20 Palmigiano, the First Circuit affirmed an award of out-of-pocket costs for items  
21 such as “transportation, lodging, parking, food and telephone expenses” in a § 1983  
22 action, noting the “unanimous federal circuit court authority that the attorneys’  
23 reasonable and necessary costs and expenses may be awarded to a prevailing party  
24 pursuant to 42 U.S.C. § 1988.” Palmigiano, 707 F.2d at 637; see also Attrezzi,  
25 LLC v. Maytag Corp., 436 F.3d 32, 43 (1st Cir. 2006) (citing Palmigiano with  
26 approval); Brown v. Gray, 227 F.3d 1278, 1297 (10th Cir. 2000). As the Brown  
27 court explained: “[i]tems that are normally itemized and billed in addition to the  
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1 hourly rate should be included in fee allowances in civil rights cases if reasonable  
2 in amount.’ [citations omitted]. In other words, reasonable out-of-pocket expenses  
3 not normally absorbed as part of law firm overhead should be reimbursed as  
4 attorney's fees under section 1988.” Brown, 227 F.3d at 1297 (quoting Ramos v.  
5 Lamm, 713 F.2d 546, 559 (10th Cir.1983).

6 The one exception to this general rule is the cost of experts, which are  
7 generally not considered a permissible cost under § 1988. See West Virginia  
8 University Hospitals v. Casey, 499 U.S. 83 (1991). All other litigation expenses  
9 are normally compensable. These expenses include stenographic transcripts of  
10 depositions; daily trial transcripts; witness fees including necessary travel, meals  
11 and lodging; copying costs; constable fees for service of subpoenas; computer  
12 assisted legal research; attorney travel including parking, meals and lodging;  
13 telephone expenses; and more. See, United States v. Davis, 87 F. Supp.2d 82, 87-  
14 89 (D. R.I. 2000); Palmigiano, 707 F.2d at 637; Attrezzi, 436 F.3d at 43. As long  
15 as the cost is reasonable and it is the type of expense that is routinely billed to  
16 private clients in the relevant market, it is recoverable.

17 The starting point in determining whether a particular cost item is properly  
18 charged to the defendants or should be absorbed in the plaintiff's counsel's overhead  
19 is whether the item was expended in direct pursuant of the litigation. Wheeler v.  
20 Durham City Board of Education, 555 F.2d 618, 623 (4th Cir. 1978) (holding that,  
21 consistent with 20 U.S.C. ' 1617, various costs like copying, attorney travel, and  
22 telephone integrally related to the litigation are compensable); Newberg, Attorney  
23 Fee Awards," 4.43-44 and 2.19 (1986) (hereafter Newberg). As the Eleventh  
24 Circuit explained in Dowdell v. City of Apopka, 698 F.2d 1181, 1191 (11th Cir.  
25 1983):

26 [W]ith the exception of routine office overhead normally  
27 absorbed by the practicing attorney, all reasonable expenses incurred  
28

1 in case preparation, during the course of the litigation, or as an aspect  
2 of settlement of the case may be taxed as costs under section 1988. As  
3 is true in other applications of section 1988, the standard of  
4 reasonableness is to be given a liberal interpretation.

5 The second factor in the analysis is whether a particular cost is customarily  
6 charged separately to billing clients. Daly v. Hill, 790 F.2d 1071, 1082-83 (4th Cir.  
7 1986) (reversing a lower court's holding that copying, postage, telephone and  
8 attorney travel costs expended solely as part of the litigation are part of an  
9 attorney's overhead). Clearly not every expense is regularly charged to a client.  
10 But many are, and those that are, are properly included in costs and expenses in a  
11 fee motion. Of course, the amount of the cost must be reasonable and not  
12 excessive. Based upon the customary practice of private firms California, the  
13 documented, case-related costs incurred for attorney travel, copying of litigation  
14 documents, and computerized research should be allowed as part of reasonable fees  
15 and costs. Newberg, " 4.44 and 2.19 (listing cases approving allowance of travel,  
16 copying, postage, long distance telephone, and computerized legal research as  
17 reimbursable litigation costs under both fee shifting statutes and common fund  
18 lawsuits).

19 **B. The Costs and Expenses Requested Are Reasonable in Light**  
20 **of the Complexity of This Litigation.**

21 The pure magnitude of the resources needed to litigate this type of case is  
22 perhaps the best indication of why civil rights cases of this scope are undesirable  
23 for most attorneys, and why a fully compensable fee is appropriate. It also reflects  
24 the staggering amount of unrecoverable out-of pocket expenses. Since any fee  
25 recovery must first be applied to offset this "loss" incurred by the attorney's  
26 involved it further justifies an award of all requested fees.

27 **1. Litigation costs**

1           The most straightforward of compensable costs are those that are part of the  
2 judicial process, such as filing fees, subpoenas, and process servers; deposition,  
3 hearing, and trial transcripts; trial exhibits and related expenses; and depositions of  
4 witnesses taken by the opposing party. Each of these items, (as listed in Otten  
5 Decl. at ¶ 21; Kilmer Decl. at ¶¶ 8-11 and Ex. 4; Davis Decl. at ¶¶ 5-8 and Ex. 5),  
6 is clearly compensable and reasonable in light of the complexity and novelty of this  
7 case.

## 8           **2. Discovery expenses**

9           As noted above, discovery in this case was voluminous. Documents  
10 produced by the defendants, their state agencies, and managed care organizations  
11 exceeded 1,000 pages. All of this information had to be logged, bate stamped,  
12 copied (usually twice), organized, and entered into a database.

13           Additionally, multiple depositions had to be attended resulting in substantial  
14 time expenditure and travel costs.

## 15           **4. Attorney Travel**

16           The First Circuit long ago declared that travel expenses incurred by counsel  
17 to attend hearings, meet with clients or opposing counsel, or attend negotiation or  
18 mediation sessions are compensable under fee shifting statutes. Grendel's Den v.  
19 Larkin, 749 F.2d 945, 956 (1st Cir. 1984) (agreeing that travel and mailing costs are  
20 reimbursable); Ackerley v. City of Somerville, 901 F.2d 170 (1st Cir. 1990)  
21 (allowing reimbursement for travel, computerized research, and photocopying but  
22 reducing the amount claimed due to excessiveness). This rule has been followed by  
23 most other circuit courts. See Redding v. Fairman, 717 F.2d 1105, 1119 (7th Cir.  
24 1983); NEWBERG, ' 2.19, n. 201. The same approach should be applied here, both  
25 because there are considerable travel expenses associated with representing  
26 geographically dispersed defendants throughout the state and because the bulk of  
27 hearing in this litigation took place in Fresno, several hundred miles from the  
28



1 offices of any of Plaintiffs' attorneys.

2 **5. Copying of Litigation Documents**

3 Most courts have also awarded prevailing plaintiffs the reasonable costs of  
4 copying documents, whether done in their offices or at a professional copying  
5 establishment. Ackerley, 901 F.2d at 170; Ramos v. Lamm, 713 F.2d 546 (10th  
6 Cir. 1983); Daly, 790 F.2d at 1083; NEWBERG, ' 2.19 n.200. Since duplication  
7 bills paid to an independent copy center are clearly reimbursable yet more  
8 expensive than in-house copying, there is little logic to awarding reimbursement for  
9 the former but not for the latter under an overhead theory. Given the volume of  
10 such copying as well as its necessity, particularly when enforcement motions are  
11 required as they have been this past year, the actual cost of copying should not be  
12 considered as part of a firm's overhead and, therefore, should be reimbursed as a  
13 cost of the litigation.

14 **VIII. Conclusion**

15 For the reasons set forth above, the Court should award the plaintiffs their  
16 requested fees and costs in the amount of \$305526.21. This request reflects the  
17 unusual novelty and complexity of the case, the extraordinary success achieved, and  
18 the reasonable cost of undertaking and prevailing in litigation of this scope and  
19 impact. From this perspective, as well as that of controlling Circuit decisions on  
20 the award of attorneys' fees and costs in civil rights litigation, the plaintiffs' request  
21 is reasonable and should be allowed in full.

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23 DATED: September 8, 2014

OTTEN LAW, PC

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Victor Otten, Esq.  
27 Attorneys for Plaintiffs

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