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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEVERLY WALKER, et al.,) Civil No. 97-1547-LSP
))
) ORDER GRANTING IN PART AND
) DENYING IN PART PLAINTIFFS'
v.) MOTION FOR ATTORNEYS FEES
) (DOC. # 246)
CITY OF SAN DIEGO, et al.,)
)
) Defendants.)

Plaintiffs filed their original Complaint in 1997, alleging a plethora of Americans with Disabilities Act ("ADA") violations at Qualcomm Stadium ("the Stadium"). The claims asserted in the Complaint were settled and the terms of the settlement were memorialized in a Settlement Agreement, effective February 12, 2001. The Court approved the Settlement Agreement and, pursuant to the stipulation of the parties, retained jurisdiction to enforce its terms.

The Settlement Agreement contained dates for completion of modifications to be made to the Stadium, the majority of which were

1 to be completed by April 1, 2001.¹ Other modifications to the
2 Stadium were to be completed by April 1, 2002.² April 1, 2002 was
3 expected to be the "Modification Completion Date."³ Once the
4 Modification Completion Date was established, the "Discount
5 Expiration Date" would also be established.⁴ The Discount Expira-
6 tion Date determines the commencement of the "testing procedures."⁵
7 The testing procedures would last for the Term⁶ of the Settlement
8 Agreement.

9 Plaintiffs now seek attorney's fees incurred from June 14,
10 2001 to January 29, 2009 for assuring and monitoring that Defendant
11 completed the modifications to the Stadium, and for preparation of
12 the Motion for Attorney's Fees. Defendant City of San Diego
13 ("Defendant") opposes Plaintiffs' Motion for Attorney's Fees.
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17 ¹ These modifications included the designation and creation of
18 transfer seats, installation of accessible seating in the suites,
19 lowering of railings, creation of semi-ambulatory seats,
installation of television monitors, restroom modifications and path
of travel modifications.

20 ² These modifications included wheelchair location modifications not
located in the Stadium's suites and skyboxes.

21 ³ As late as January 2009, the Court was informed that all of the
22 modifications to the Stadium had not been completed. On January 15,
23 2009, the Court ordered that the final modifications to the Stadium
that had not been completed as of that date, were to be completed by
April 1, 2009.

24 ⁴ The Discount Expiration Date is defined in Section 19 of the
Settlement Agreement as the date which is twelve (12) months after
25 the date which is the later to occur of (i) April 1, 2002 or (ii)
the Contract Modification Completion Date.

26 ⁵ The purpose of the testing procedures was to determine the accuracy
of ticket availability and "sell-out" information.

27 ⁶ The Term of the Settlement Agreement is until (i) April 1, 2006 or
28 (ii) four years after the Contract Modification Completion Date,
which is the later to occur. Therefore, the testing procedures
would last for four years after the date on which the modifications
to the Stadium were completed.

1 Attorney's Fees Provisions of the Settlement Agreement⁷

2 Sections 12, 13, 14 and Exhibit U of the Settlement Agreement
3 form the basis on which Plaintiffs request an award of attorney's
4 from the Court.

5 Exhibit U states, in pertinent part:

6 City shall pay the sum of (a sum certain)... as
7 reimbursement for all legal fees... and costs
8 incurred in connection with the Lawsuit for
9 the ten-year period beginning with the initiation
10 of the Lawsuit in 1997 through the Effective date,
11 and as full payment for any and all such fees and
12 costs which will or may be incurred by
13 Plaintiffs in connection with this Agreement,
14 through September 1, 2007, or such later
15 date as is determined to be the later of the final
16 termination date of the Agreement or the
17 enforcement provisions of the Agreement, **except as**
18 **provided in Sections 13 and 14** hereof.
19 (emphasis added)

20 Section 12 of the Settlement Agreement states in pertinent
21 part:

22 ... City shall reimburse Plaintiffs for the fees...
23 as well as other costs in accordance with Exhibit U...
24 This amount shall be in complete satisfaction of any
25 and all claims for reimbursement for such items
26 incurred by or on behalf of Plaintiffs in connection
27 with the Lawsuit through the final disposition and
28 termination of this Agreement, **except as otherwise**
provided in Sections 13 and 14 hereof.
(emphasis added)

Section 13 of the Settlement Agreement states in pertinent
part:

... In the event of any litigation or **further**
proceedings between the parties hereto relating
to this Agreement, the decision of the Court shall
be final and non-appealable. In the discretion of
the Court, the **prevailing party** in any such action
may be entitled to recover reasonable attorney's
fees and costs incurred in connection therewith...

⁷ The parties entered into a "First Amendment to the Settlement Agreement & Mutual Release." That document became effective on September 2, 2005. The Court refers to the original Settlement Agreement and the "First Amendment to the Settlement Agreement" as "Settlement Agreement."

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(emphasis added)

Section 14 of the Settlement Agreement states in pertinent part:

In the event of any dispute regarding the Agreement or any Modifications made, or to be made by the City pursuant to the terms thereof, the parties agree to confer for the purpose of resolving, if possible, the dispute. If the parties hereto are unable to resolve such disputes, the matter may be referred to the Court as provided in and in accordance with the terms of Section 13 hereof.

The Court Held "Further Proceedings" Regarding the Settlement Agreement

Plaintiffs argue that Section 13 of the Settlement Agreement allows for the award of additional attorney's fees over and above the sum certain referred to in Exhibit U to the Settlement Agreement. Specifically, at the time the Settlement Agreement was executed, Plaintiffs assert that they were concerned about future problems that might arise with regard to the completion of the modifications to the Stadium, above and beyond the anticipated completion effort. Therefore, they envisioned that their attorney would have to spend more time than anticipated by the parties to ensure that Defendant complied with the Settlement Agreement. As a result, the parties included Section 13 in the Settlement Agreement, which contemplates compensation for "further proceedings" needed to enforce compliance with the Settlement Agreement.

Defendant contends that the sum certain referred to in Exhibit U to the Settlement Agreement was intended to include future attorney's fees that might be incurred by Plaintiffs' in connection with the lawsuit and Settlement Agreement, except as provided in Sections 13 and 14 of the Settlement Agreement. Specifically,

1 Section 13 provides that "(i)n the event of any litigation or
2 *further proceedings* between the parties relating to the Settlement
3 Agreement, the decision of the Court shall be final and non-
4 appealable. In the discretion of the Court, the *prevailing party* in
5 any such action may be entitled to recover reasonable attorneys fees
6 and costs..." Therefore, Defendant asserts that, in order for
7 Plaintiffs to collect additional attorney's fees under Section 13,
8 the Court would have had to issue a "final and non-appealable"
9 decision. Additionally, Defendant contends that in matters where
10 the Court has not made such a decision, Section 13 is inapplicable.

11 The Court agrees and disagrees with Defendant's interpreta-
12 tion of Section 13. A fair reading of Sections 13 and 14 of the
13 Settlement Agreement indicates that the parties contemplated that
14 Plaintiffs might be required to undertake additional effort, and
15 thus incur additional attorney's fees, over and above the sum
16 certain referred to in Exhibit U. Exhibit U's original purpose was
17 designed to compensate Plaintiffs for the effort needed to monitor
18 and ensure that the delineated and agreed-upon modifications to the
19 Stadium would be made timely and consistent with their agreement
20 with Defendants. Section 13 was intended by the parties to serve
21 some purpose and it appears to the Court that it was designed to be
22 invoked only if the parties could not resolve disputes regarding
23 those modifications by themselves without Court involvement.
24 However, if the Court's intervention for resolution of those
25 disputes became necessary, such intervention would trigger the
26 provisions of Section 13 and could result in an award of attorney's
27 fees to the prevailing party.

28 The Court agrees with Defendant's observation that, "... in

1 order for Plaintiffs to collect additional attorney's fees under
2 Section 13, the Court would have to issue a 'final and non-
3 appealable' decision." If, as described above, the parties were
4 unable by themselves to resolve disputes regarding modifications to
5 the Stadium without Court intervention, then any decision by the
6 Court to resolve any such dispute brought before it would, consis-
7 tent with Defendant's observation, become a "final and non-
8 appealable" decision. Any such decision would be consistent with
9 the parties' stipulation and agreement that the Court's decisions
10 would be final and non-appealable. The Court would then be required
11 to determine whether there was a prevailing party and grant or deny
12 attorney's fees accordingly. The Court is mindful of circumstances
13 falling into both categories: disputes that were resolved between
14 the parties without Court involvement and disputes that required
15 Court intervention. It is only the latter category that the Court
16 addresses in this Order. (See p. 10 of this Order)

17 Almost immediately after April 1, 2001 (the first date that
18 certain modifications to the Stadium were to be completed),
19 Plaintiffs advised Defendant about several violations of the
20 Settlement Agreement. Plaintiff also advised Defendant that
21 Defendant's construction drawings (which Defendant was required to
22 present to Plaintiffs for review) violated the terms of the
23 Settlement Agreement. The parties could not resolve these disputes
24 by themselves and Plaintiffs sought the Court's intervention. On
25 August 7, 2001, the Court held a Settlement Conference with regard
26 to the disputes and ordered the parties to meet and confer regarding
27 the disputes and by August 30, 2001, bring any unresolved disputes
28 to the Court's attention. Thereafter, the Court conducted numerous

1 Settlement Conferences and Status Conferences, and issued numerous
2 Orders regarding Defendant's compliance with the Settlement
3 Agreement and completion of the modifications to the Stadium. The
4 Settlement and Status Conferences regarding Defendant's compliance
5 with the Settlement Agreement and modifications to the Stadium
6 continued to January 15, 2009. At that time, Defendant had not
7 fully complied with the Settlement Agreement and had not completed
8 the modifications to the Stadium. Therefore, on January 15, 2009,
9 the Court ordered that all modifications that need to be made to the
10 Stadium shall be completed by April 1, 2009. During the 7 1/2 year
11 time period from August 2001 to January 2009, Defendant acknowledged
12 that it had not fully complied with the Settlement Agreement and had
13 not completed the modifications to the Stadium. The Court's efforts
14 in these regards have been prompted by Plaintiffs' bringing the
15 compliance and modification issues to the Court's attention as a
16 result of the parties' inability to resolve the disputes. Virtually
17 all the disputes resulted in the need for Defendant to undertake
18 remediation efforts pursuant to an oral or written order of the
19 Court. Moreover, the decisions made by this Court with regard to
20 these issues were final.

21 It is abundantly clear to the Court that "further proceed-
22 ings," pursuant to Section 13 of the Settlement Agreement, were
23 required and conducted, and final decisions were issued by the
24 Court, to ensure compliance with the Settlement Agreement. The
25 decisions by the Court resolved disputes between the parties
26 regarding completion of the modifications to the Stadium. Even with
27 the Court's intervention, Settlement Conferences, Status Conferences
28 and Orders, Defendant has still not fully complied with the

1 Settlement Agreement and has not completed the modifications to the
2 Stadium.

3 Plaintiffs Are the Prevailing Parties With Respect To Enforcement of
4 the Settlement Agreement

5 Plaintiffs argue that, pursuant to Section 13, they are the
6 prevailing parties with respect to enforcement of the Settlement
7 Agreement. Therefore, they argue that they are entitled to
8 additional attorney's fees related to involving the Court to ensure
9 enforcement of the modifications to the Stadium. Specifically,
10 Plaintiffs contend that since 2001, they have sought, through
11 judicial intervention to resolve disputes, to enforce the Settlement
12 Agreement and force Defendant to modify the Stadium to comply with
13 the Settlement Agreement. Further, they assert that Defendant's
14 violations of the Settlement Agreement have been continuous since
15 2001, and that judicial intervention to enforce the Settlement
16 Agreement has been the only effective way to achieve their goal.

17 Defendant argues that, pursuant to the Settlement Agreement,
18 attorney's fees and costs may only be awarded, in the Court's
19 discretion, to the prevailing party in a situation where the Court
20 has made a decision relating to the Settlement Agreement, which is
21 "final and non-appealable." In situations where the Court has not
22 made such a decision, Section 13 of the Settlement Agreement is not
23 applicable and Plaintiffs would not be entitled to attorney's fees.

24 In a case pursued under the American With Disabilities Act,
25 a court, "in its discretion, may allow the prevailing party... a
26 reasonable attorney's fee." 42 U.S.C. §12205 "For a litigant to be
27 a 'prevailing party' for the purpose of awarding attorneys' fees, he
28 must meet two criteria: he must achieve a material alteration of the

1 legal relationship of the parties, and that alteration must be
2 judicially sanctioned." Jankey v. Poop Deck 537 F.3d 1122, 1129-30
3 (9th Cir. 2008) citing Buckhannon Bd. & Care Home, Inc. V. W. Va.
4 Dept. Of Health & Human Res. 532 U.S. 598, 605 (2001)

5 "A settlement agreement providing that the court will retain
6 jurisdiction to enforce the agreement satisfies the requirements to
7 render plaintiff a prevailing party under the (American With
8 Disabilities Act)." Jankey, supra at 1130, Skoff v. Meridien North
9 America 506 F.3d 832, 844, n. 12 (9th Cir. 2007) "The settlement
10 meaningfully alters the legal relationship between the parties if it
11 allows one party to require the other party 'to do something it
12 otherwise would not be required to do.'" Jankey, supra at 1130,
13 citing Fischer v. SJB-P.D., Inc. 214 F.3d 1115, 1118(9th Cir. 2000)

14 Here, the Court dismissed Plaintiffs' case pursuant to the
15 Settlement Agreement between the parties and retained jurisdiction
16 over the Settlement Agreement and its enforcement. The post-
17 Settlement Agreement efforts by Plaintiffs' counsel, conferences
18 held, and Orders issued by the Court have virtually all focused on
19 Plaintiffs' attempts to force Defendant to comply with the Settle-
20 ment Agreement and complete the modifications to the Stadium. The
21 result of almost every conference with the Court, and almost every
22 Order issued by the Court, came after the parties themselves were
23 unable to resolve their disputes and required Defendant to comply,
24 in some way, with the Settlement Agreement and/or make modifications
25 to the Stadium that had not, or have not, been made. In that
26 respect, the Court made final non-appealable decisions. To this
27 day, the legal relationship of the parties is meaningfully being
28 altered because the Court is issuing these decisions in which

1 Plaintiffs are asking the Court to require Defendant "to do
2 something it otherwise would not be required to do." Consequently,
3 Plaintiffs are the prevailing parties in this case, and have been
4 the prevailing parties in virtually all post-Settlement Agreement
5 decisions issued orally and in writing by this Court.

6 Plaintiffs Are Entitled to Post-Settlement Agreement Attorney's Fees

7 Plaintiffs' counsel seeks an award of \$368,760.00 in
8 attorney's fees at the rate of \$375.00 per hour for post-Settlement
9 Agreement work from June 14, 2001 to January 29, 2009. Plaintiffs'
10 counsel has submitted orders of the court and declarations of
11 counsel in other cases in which Plaintiffs' counsel was involved,
12 which indicate that Plaintiffs' counsel's rate of \$375.00 per hour
13 is reasonable and appropriate. Defendant does not dispute Plain-
14 tiffs' counsel's hourly rate. Therefore, the Court finds that
15 Plaintiffs' counsel's hourly rate of \$375.00 per hour is reasonable.
16 Further, Defendant does not dispute the number of hours claimed by
17 Plaintiffs' counsel for the work performed.

18 Plaintiffs' counsel has indicated that Plaintiffs do not
19 request attorney's fees for:

20 1. Fee Agreement Benefits

21 After the execution of the Settlement Agreement, Plaintiffs
22 were entitled to certain ticket and other benefits including
23 selecting seating locations over a two season period. Plaintiffs'
24 counsel spent a significant amount of time coordinating and
25 completing these benefits transactions.

26 2. Plaintiff Walker Estate Damages

27 After Plaintiff Beverly Walker ("Walker") passed away,
28 Plaintiffs' counsel spent a significant amount of time researching

1 whether Walker's estate beneficiaries could continue her damage
2 claims. Plaintiffs' counsel drafted extensive correspondence to
3 Walker's estate executor regarding Walker's damage claims.
4 Ultimately, the estate decided not to pursue any remaining damage
5 claims.

6 3. Plaintiff Robert Hann Special Needs Trust

7 Plaintiffs' counsel spent a significant amount of time
8 obtaining the Court's approval of the Special Needs Trust for
9 Plaintiff Robert Hann.

10 4. Ticket Availability

11 Plaintiffs' counsel spent a significant amount of time
12 communicating with Stadium representatives about the availability of
13 free tickets for events.

14 5. Ticket Distribution

15 When Plaintiffs' counsel received free tickets pursuant to
16 the Settlement Agreement, she and her assistant spent significant
17 amounts of time delivering the free tickets to the "will call"
18 window at the Stadium, to aid in the distribution of those tickets.

19 6. Tracking Ticket Use

20 Plaintiffs' counsel spent a significant amount of time
21 communicating with Stadium representatives regarding trying to track
22 the use of wheelchair location free tickets due to problems
23 experienced in the years after the execution of the Settlement
24 Agreement.

25 7. Bollards

26 Stadium representatives wanted to install bollards at curb
27 cuts around the Stadium for security reasons. Plaintiffs' counsel
28 spent a significant amount of time discussing the issue with Stadium

1 representatives.

2 8. Plaintiff Walker and Plaintiff Neudeck Communications

3 Since the execution of the Settlement Agreement, Plaintiffs
4 Walker and Neudeck raised numerous Stadium-related issues that were
5 not addressed in the Settlement Agreement. Plaintiffs' counsel
6 spent a significant amount of time discussing these issues with
7 Plaintiffs.

8 (Supplemental Declaration of Amy B. Vandeveld at 2-3)

9 Defendant states that the items identified above do not
10 represent an exclusive nor exhaustive list of activities performed
11 for which attorney's fees and costs may not be recovered.

12 The Court has discretion to determine the amount of the fee
13 award. Jankey, supra at 1132, quoting Hensley v. Eckerhart 461 U.S.
14 424, 437 (1983) "If the court believes the overall award is too
15 high, it needs to say so and explain why, rather than (make) summary
16 cuts in various components of the award." Jankey, supra at 1133,
17 Moreno v. City of Sacramento 534 F.3d 1106, 1113 (9th Cir. 2008)

18 Here, is clear that Plaintiffs' counsel's additional work,
19 over and above the sum certain noted in Exhibit U, was primarily
20 dedicated to enforcement of the Settlement Agreement and ensuring
21 that modifications to the Stadium were completed timely and in
22 accordance with the Settlement Agreement. However, not all of
23 Plaintiffs' counsel's efforts resulted in "further proceedings" in
24 which the Court had to resolve a dispute that could not be resolved
25 by the parties themselves. Further, if these disputes were not
26 presented to the Court for resolution, Plaintiffs could not be the
27 "prevailing parties" because any material alteration of the legal
28 relationship of the parties was not judicially sanctioned. These

1 efforts include Plaintiffs' counsel's work performed to: produce a
2 brochure regarding a disabled person's access to purchase of tickets
3 for events at the Stadium and access to the Stadium and its seats
4 for the disabled⁸, to review and correct construction plans for
5 modifications to be made to the Stadium⁹, to negotiate the number and
6 placement of parking places for disabled drivers¹⁰, to negotiate the
7 procedure by which a non-disabled person could purchase disabled
8 access seating¹¹, to obtain free tickets to events at the Stadium as
9 referenced in the Settlement Agreement¹², and to remedy disruptions
10 caused by one of the Plaintiffs during Stadium events.¹³ The total
11 amount of attorney's fees for these efforts total \$5,857.25.
12 Therefore, the Court reduces an attorney's fee award to Plaintiffs
13 by that amount.

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21 ⁸ Plaintiffs' counsel's attorney's fees regarding the brochure total
22 \$1,695.75.

23 ⁹ Plaintiffs' counsel's attorney's fees regarding the construction
24 plans total \$3,037.00.

25 ¹⁰ Plaintiffs' counsel's attorney's fees regarding the parking spaces
26 total \$150.00.

27 ¹¹ Plaintiffs' counsel's attorney's fees regarding the procedure for a
28 non-disabled person's purchase of disabled access seating total
\$787.00.

¹² Plaintiffs' counsel's attorney's fees regarding the free tickets
total \$75.00.

¹³ Plaintiffs' counsel's attorney's fees regarding remedying the
disruptions total \$112.50.

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As a result, Plaintiffs are awarded the sum of \$362,902.75 as attorney's fees. ($\$368,760.00 - \$5,857.25 = \$362,902.75$) Defendant shall pay that sum to Plaintiffs forthwith.

Plaintiffs' Motion for Attorneys Fees is GRANTED in part and DENIED in part.

DATED: April 15, 2009



Hon. Leo S. Papas
U.S. Magistrate Judge