6th Civil No. H016022

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ROBERT MEISTER,

Plaintiff and Appellant

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
GARY LEASE,

Defendants and Respondents

Appeal From The Superior Court Of Santa Cruz County
Honorable Robert B. Yonts, Jr., Judge

RESPONDENTS' BRIEF

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INTRODUCTION

Plaintiff Robert Meister, a professor at the University of California at Santa Cruz ("UCSC") sued the Regents of the University and his former supervisor, Gary Lease, for publicly disclosing information about the termination of his appointment as Coordinator of the Legal Studies Program. Plaintiff alleged violations of the Information Practices Act (Civ. Code, § 1798 et seq.) ("IPA") and his civil rights. An arbitrator, limiting his findings to a violation of the IPA, awarded plaintiff $25,000 in noneconomic damages and $2,500 in punitive damages. The award was amended because defendants were willing to consent to an injunction barring them from violating the law, and the amended award was reduced to a judgment. Plaintiff then turned to his request for attorney fees and costs, the subject of his appeal. Plaintiff sought in excess of $500,000. The trial court awarded him $75,500.96 in fees and $52,000 in costs.

This case presents a textbook example of what fee litigation should not be. Fee-shifting statutes are designed to ensure that persons who would otherwise find redress too costly have their day in court to resolve their grievances. (See, e.g., *Hensley v. Eckerhart* (1983) 461 U.S. 424 [103 S.Ct. 1933, 76 L.Ed.2d 40] [purpose of 42 U.S.C. § 1988 to ensure effective access to justice].) Here, fees were an end in themselves from the outset. Indeed, by plaintiff's own admission, they were a major goal of the litigation, as damages purportedly were not, and early on he retained a second attorney who specialized in extracting substantial fees from public institutions. The result was billing that, in the words of the special master, retired Justice Harry Brauer, "reflected a degree of profligacy . . . no client . . . would countenance" if he had to pay the bills himself.

In determining a reasonable fee award, "the most critical factor is the degree of success obtained." (*Hensley v. Eckerhart*, *supra*, 461 U.S. at p. 436 [103 S.Ct. at p. 1941]; *Farrar v. Hobby* (1992) 506 U.S. 103, 115 [113 S.Ct. 566, 121 L.Ed.2d 494].) As one federal court recently noted, "[N]o reasonable person would pay lawyers $148,000 to win

$34,000." (*McGinnis v. Kentucky Fried Chicken of California* (9th Cir. 1994) 51 F.3d 805, 810.) Similarly, no reasonable person would pay lawyers in excess of $500,000 to win $27,500.

To justify the fees he sought, plaintiff contended he had achieved a level of success not reflected in the damages award. After reviewing the evidence, both the special master and the trial court disagreed. There were two independent theories underlying the trial court's fee award, both of which were informed by its conclusion that plaintiff's success was very limited. First, the trial court awarded fees incurred through December 10, 1993, on the theory that the judgment secured by litigating beyond that date was less favorable to plaintiff than a settlement offer extended on that date. Second, the trial court determined that fees in the sum of $75,500.96 were reasonable in relation to the size of the monetary component of the judgment.

Plaintiff challenges both approaches for determining the fee award, asserting that California and federal law mandate lodestar methodology which, he claims, the trial court in this case failed to employ.[1/] Additionally, he takes issue with the factual findings underpinning the trial court's fee determination, and its failure to compensate him for certain postjudgment services, including his motion for fees.

As discussed more fully below, plaintiff's challenge is without merit. The trial court's methodology was not an abuse of discretion but instead was consistent with governing law in this area: on the facts of this case, lodestar methodology was not mandatory, and in any event, contrary to plaintiff's representation of the record, the trial court explicitly *did* employ lodestar methodology in its analysis and in effect determined that services after December 10, 1993 did not represent hours reasonably expended. Moreover, the trial court did not abuse its

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[1/] Lodestar methodology involves multiplying reasonable number of hours by reasonable rate. (*Farrar v. Hobby*, *supra*, 506 U.S. 103 [113 S.Ct. 566]; *Hensley v. Eckerhart*, *supra*, 461 U.S. at p. 433 [103 S.Ct. at p. 1939]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294.)

discretion with respect to its factual conclusions, because there was substantial evidence to support those conclusions. Plaintiff ignores the substantial evidence rule and carefully omits any mention of defendants' evidence on the subject for the obvious reason that the evidence is fatal to his argument. Nor, finally, did the trial court abuse its discretion by not compensating plaintiff for postjudgment services, because a court could reasonably conclude that the amount awarded was adequate, given the minimal value of the case. The order for attorney fees should not be disturbed.

STATEMENT OF THE CASE

A. SUMMARY OF MATERIAL FACTS PERTAINING TO THE MERITS LITIGATION.

1. The Initiation Of The Lawsuit.

Plaintiff filed his lawsuit against the Regents and Lease in February 1993. The operative First Amended Complaint ("Complaint") alleged that in February 1991, Lease, then Dean of Humanities at UCSC, had terminated plaintiff's appointment as Coordinator of the Legal Studies Program and had copied the termination letter to colleagues at UCSC, to the detriment of plaintiff's reputation. (1AA 2.) Lease's stated reasons for the termination were subsequently published in the campus newspaper and republished on several other occasions. (1AA 3.) Plaintiff alleged the disclosure of personal information, and the Regent's failure to provide adequate administrative remedies under the IPA constituted a violation of the IPA. (1AA 3.)[2] Additionally, he

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[2] The IPA contains procedures for correcting records. (Civ. Code, §§ 1798.35-1798.37.) Prior to the initiation of the lawsuit, plaintiff requested that the Academic Vice Chancellor, Michael Tanner ("Tanner") remove the Lease letter and a related document from University files.

(continued...)

summarily alleged that Lease's conduct constituted a violation of the California and United States Constitutions. (1AA 3, 6.)

In his prayer for relief, plaintiff claimed general damages "in excess of $100,000." (1AA 8-9.) He sought injunctive relief under California and federal law in the form of an order directing defendants (a) to cease conspiring to deprive him of his civil rights, (b) to cease disclosing personal information about him, (c) to apologize publicly for the disclosures giving rise to the Complaint, (d) to grant him any administrative relief required by the IPA, and (e) to establish administrative procedures that complied with the IPA. (*Ibid.*) He also sought attorney fees and costs. (1AA 9.)

2. The Retention Of Rosen, Bien & Asaro.

After initiating discovery, plaintiff's counsel, Gerald Bowden, decided the case "would turn on [his] ability to compel the University to disclose documents the University claimed to be privileged and confidential," and he advised plaintiff of the "need to retain an attorney with specialized experience litigating discovery cases with the University." (2AA 381.) He further recommended plaintiff "find an attorney with experience recovering large attorneys' fees awards." (2AA 382.) In support of his fee motion, plaintiff stated in a declaration that

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[2](...continued)
(1AA 244.) Apparently, he did not do so. (13AA 3754.) The IPA also provides that the violation of its provisions shall constitute a cause for discipline. (Civ. Code, § 1798.55.) Tanner had referred plaintiff's administrative complaint against Lease to the Charges Committee (a committee of three professors—see 1AA 79). (1AA 239, 241.) The Charges Committee found that Lease had violated the Faculty Code of Conduct. (5AA 1362.) Tanner had informed plaintiff generally about the Charges Committee's findings and of his intent to recommend a reprimand. (1AA 244.) Tanner had also provided plaintiff with a letter indicating the termination of his appointment was not prompted by misconduct nor was it to be construed as indicating he was unfit for administrative service. (5AA 1372; 1AA 247.)

recovering such fees to deter University resistance to the claims of its faculty was a major goal of the litigation. (1AA 269; see also Rosen Declaration, 1AA 191 ["Monetary damages were not a principle goal of the litigation. Securing defendants' payment of full attorneys' fees was a principle goal. . ."].)

Plaintiff then retained Sanford Jay Rosen of Rosen, Bien & Asaro. (2AA 382.) Mr. Rosen had represented numerous individuals in lawsuits against colleges and universities, including the University of California. (2AA 441-442.) A significant component of his practice involved "massive discovery," as well as attorney fee litigation. (2AA 442, 444-446.)

3. Settlement Efforts.

Mr. Rosen initiated settlement discussions with a demand letter setting forth alternative proposals. (1AA 198.) Plaintiff demanded, among other things, $100,000, accelerated promotion, public apology for Lease's conduct, the production of various documents,[3/] and all attorney fees and costs. (3AA 814-815.) The alternative demand did not include document disclosure but demanded, among other things, $500,000 in damages and a higher promotion. (3AA 815-816; 8AA 2256-2259.)

On October 13, 1993, defendants served on plaintiff an offer to compromise pursuant to Code of Civil Procedure section 998 in which they offered that judgment be taken against them in the sum of $15,000, plus costs and attorney fees. (3AA 820.) On November 30, 1993, defendants served a second offer to compromise pursuant to Code of Civil Procedure section 998. (3AA 824-825.) They again offered damages in the sum of $15,000, plus fees and costs. (*Ibid.*) In addition, they offered to submit to an injunction ordering that they comply with the IPA, that they remove from University files all copies of Lease's letter

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[3/] Mr. Rosen indicated that, absent settlement, the University could expect document discovery on wide ranging topics, including unrelated allegations of sexual misconduct on the part of Lease. (3AA 814.)

terminating plaintiff from the Legal Studies Program and of a program chronology that included information about the termination, and that Lease not violate plaintiff's rights or retaliate against him. (*Ibid.*)

On December 10, University Counsel David Birnbaum communicated an oral offer of settlement to Mr. Rosen. (8AA 2113.)[4/] It was actually a counter-offer to one made by plaintiff after the November 998 offer. (3AA 829.) The terms were (1) the Regents would grant plaintiff two quarters paid leave not charged to sabbatical, subject only to appropriate notice to the University; (2) they would agree to comply fully with the IPA; (3) they would agree that neither Lease nor the University or its agents would retaliate; and (4) they would pay attorney fees through November 30, 1993. (8AA 2113-2114.)

The December 10 offer was not accepted. (3AA 829-832.) Settlement efforts continued throughout 1994. (1AA 205.)

4. Arbitration And Judgment.

On November 23, 1994, the court ordered the case to arbitration. (1AA 27.) The half-day arbitration took place on June 30, 1995. (1AA 172, 220.) In July, the arbitrator rendered judgment in favor of plaintiff and against defendants, "by reason of the defendants['] violation of Civil Code Section 1798.24." (5AA 1387.)[5/] The arbitrator awarded no economic damages, $25,000 in noneconomic damages against the Regents and Lease jointly and severally, and $2,500 in punitive damages against Lease (the minimum permitted by the IPA). (*Ibid.*) He also awarded actual fees and costs to be determined. (*Ibid.*) The arbitrator did not reach the issue of whether any federally protected rights were violated. (5AA 1385.)

[4/] Plaintiff disputes that this offer was made. (See, e.g., AOB 8-9; see *infra*, at p. 10, fn. 9 and pp. 29-30.)

[5/] Civil Code section 1798.24, part of the IPA, bars the disclosure of personal information except as specified by the statute.

Because defendants were willing to consent to injunctive relief, an amended arbitration award was filed by which they were enjoined not to conspire or otherwise deprive plaintiff of his state and federal constitutional rights, not to retaliate against him, and not to publish any information meeting the definition of personal and confidential under the IPA, except as provided by the IPA. (1AA 173.) Additionally, plaintiff was awarded "reasonable" attorney fees and costs in an amount to be determined. (*Ibid.*)

Subsequently, plaintiff and defendants stipulated not to seek a trial de novo, and judgment on the basis of the amended arbitration award was entered on September 5, 1995. (1AA 168, 171.)

5. Discovery And Law And Motion.

With respect to written discovery in the underlying merits action, plaintiff propounded four sets each of interrogatories and document requests, and defendants one set of interrogatories and two sets of document requests. (3AA 739-742.) Plaintiff also took depositions before and after the arbitration. (1AA 215, 220-221.)

With respect to law and motion, in April 1995, plaintiff successfully moved to compel the production of nine documents pertaining to the Charges Committee investigation of Lease. (1AA 31, 135-138.)[6] Defendants twice filed a motion for summary judgment/summary adjudication and in each instance it was taken off-calendar without plaintiff's filing an opposition. (1AA 22, 179, 222.) After the arbitration award, plaintiff filed a motion for leave to file a second amended complaint. (1AA 179, 223.)

During the pendency of the fee motion, defendants moved for enforcement of the protective order under which they had produced the nine documents and for a partial sealing of the records. (8AA 2205-2213.) Plaintiff had attached the documents to his fee motion, so they

[6] Defendants had offered to permit plaintiff to *view* the documents as early as October 1994. (4AA 1047.)

had become part of the public record, and the documents were then used by faculty colleagues in arguing their case for changes in the disciplinary process. (8AA 2207; 5AA 1404-1405, 1414-1432, 1436-1437, 1439; see generally 11AA 3213 and exhibits at, e.g., 12AA 3382-3395, 3397-3399; AOB 17, fn. 13.) Plaintiff filed a cross-motion to strike part of the order to produce. (8AA 2214.) The court denied defendants' motion as too late—the toothpaste was out of the tube—and also denied plaintiff's motion. (RT 262; 9AA 2505.)

B. SUMMARY OF MATERIAL FACTS PERTAINING TO THE FEE MOTION.

1. The Amount Claimed.

On October 20, 1995, plaintiff filed a motion for attorney fees and costs seeking $428,851.17 for the work done by Rosen, Bien & Asaro through September 30, 1995 and by Gerald Bowden through October 13, 1995. (1AA 185-186.) The request was then supplemented to account for subsequent time and expenses, and the total sought for fees and costs through April 21, 1996 was $550,231.08. (10AA 2771, fn. 1; 13AA 3774.) The bulk of this sum was incurred by the Rosen firm. (*Ibid.* [Rosen $520,588.08; Bowden $29,643].)

2. Reference To A Special Master.

On November 21, 1995, the court appointed Justice Harry Brauer, a retired justice of the court of appeal, special master to make a recommendation as to reasonable attorney fees. (8AA 2105.) Justice Brauer conducted two hearings on the motion on January 5 and on April 19, 1996, and called for a limited amount of additional briefing and evidence.[7] (10AA 2847-2858, 2862-2871.)

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[7] At the April 16 hearing, Justice Brauer criticized Mr. Rosen for filing declarations beyond the scope of the one requested, yet indicated he had read all the declarations. (10AA 2869.)

3. The Special Master's Report And Recommendation.[8]

Factual Findings. Justice Brauer's Report and Recommendation was served on the parties on May 6, 1996. (10AA 2763.) The disputed and undisputed facts upon which it was based included the following:

(a) The arbitration award that was transformed into a judgment expressly limited findings and relief to violation of the IPA. The injunctive relief was granted because and to the extent the Regents agreed to it. Injunctive relief sought by plaintiff, but not agreed to by the Regents, was not granted (10AA 2739);

(b) On November 30, 1993, pursuant to Code of Civil Procedure section 998, the Regents offered to settle for $15,000 in damages, plus costs and attorney fees incurred through November 30, 1993, as well as for injunctive relief in the form of an order that the Regents and its officers and employees comply with the IPA, that all copies of the letter from Lease to plaintiff removing him as Coordinator of the Legal Studies Program, and of the Legal Studies Program Chronology, be removed from all University files, and that Lease not violate any of plaintiff's constitutional or statutory rights or retaliate against him. The monetary component of the judgment ultimately entered was superior to this offer (10AA 2742-2743);

(c) On December 10, 1993, David Birnbaum orally communicated an offer to Mr. Rosen which was the same as the November 30 offer except that in place of $15,000 in damages, the Regents offered plaintiff two quarters paid leave, not charged to sabbatical, subject only to appropriate notice by plaintiff to the University, and the University, as well as Lease, would refrain from

[8] At the April 16 hearing Justice Brauer advised the parties that, for purposes of his report, he was going to disregard all incompetent and inadmissible assertions in the evidence submitted. (10AA 2869; see also 10AA 2740.)

violating plaintiff's constitutional and statutory rights and would not retaliate against him. The offer was not accepted (10AA 2743-2744);[9/]

(d) Plaintiff's claim that monetary considerations were secondary to his purpose was belied by his settlement demands, especially Mr. Rosen's letter of August 27, 1993, and by his admission that he had mentioned to the arbitrator the sum of $50,000 as a benchmark figure for economic damages but had asked the arbitrator "to make it much higher than that" (10AA 2751, fn. 5, 2864);

(e) The judgment afforded plaintiff less relief both in its monetary and non-monetary aspects than the December 10 offer. (10AA 2741.) The factual bases for this conclusion included the following:

(i) The value of the leave was $44,495.54, of which $4,811.17 was tax exempt (10AA 2744);

(ii) The injunctive features of the judgment were no more than a directive to obey the law (except that the injunction would be easier to enforce than a statute), no broader than the December 10 offer, and perhaps less broad since the judgment did not include a provision to remove the Lease letter from University files (10AA 2747);

(iii) The lawsuit had no catalytic effect.[10/] Procedures for implementing the IPA had not changed since before the Complaint was filed and reformation of the mechanisms for disciplining faculty and administrators was in progress and unaffected by the case. (10AA 2749.)

[9/] The fact of an offer is and was disputed. For example, at the January hearing, Mr. Rosen argued there was no offer on December 10 that could have been accepted. (10AA 2854; see also 8AA 2257 [at no time did plaintiff understand an offer had been made he could accept]; 8AA 2279 [Mr. Rosen's account of his December 10 conversation with Mr. Birnbaum].) At the hearing Justice Brauer stated that Mr. Rosen's December 14 letter in response to the offer made clear that plaintiff was not prepared to accept the offer, not that the offer was incomplete. (10AA 2854.) The evidence is discussed below in section B.1 of the Argument.

[10/] Plaintiff disputes this finding. (See AOB 29 et seq.)

The case did have an impact on plaintiff's "professional partisans," and so plaintiff's lawsuit was at least a factor in the reformation process. (*Ibid.*) There was no evidence, however, that the impact of the case would have been weaker if the December 10 offer had been accepted, because there was no requirement of confidentiality, and plaintiff was free to reveal whatever he knew, such as "the alleged run-around he had received from the Administration." (10AA 2749-2750.) Plaintiff had "most of the ammunition in hand" to assist his faculty colleagues with one exception—the fact that Tanner had been shown and had approved the Lease letter before it was disseminated, but continued to participate in the review arising out of plaintiff's confrontation with Lease.[11] However, the discovery of Tanner's participation did not result in anything that could be characterized as a "catalytic class-wide . . . improvement in the implementation of the IPA or the processes for addressing and remedying faculty complaints." (10AA 2752-2753.)[12]

(f) Attorney fees through November 30 totalled $71,218.76; between November 30 and December 10, counsel billed an additional $4,282.20 of which $1,000 (2.8 hours) was unnecessary (10AA 2745-2746);

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[11] Justice Brauer noted parenthetically that the facts about Tanner were before the arbitrator but did not persuade him to grant a more substantial monetary award. (10AA 2751.)

[12] Justice Brauer implied his conclusion would be the same even had the affair resulted in a conflict of interest rule because such a rule would only "state[] the obvious." (10AA 2752.) A report by off-campus faculty (the Middlekauff Report) criticized Tanner for mistakes, but found his conduct fell "far short" of misconduct or of unethical conduct (i.e., it found no conflict of interest). (13AA 3752, 3755.) The Middlekauff Report postdates the Report and Recommendation and thus was presumably unavailable to Justice Brauer who may have concluded on incomplete evidence there had been a conflict. (13AA 3747; 10AA 2762.)

(g) The hourly rates of Rosen, Bien & Asaro law firm were reasonable (10AA 2756);

(h) The case was not complex (10AA 2757);[13/]

(i) The billing records of the Rosen firm as a whole "reflect[ed] a degree of profligacy in the expenditure of time which no client, however well-heeled, no corporation, no insurance company, would countenance if it knew that it ultimately would have to pay the freight." (10AA 2756.)[14/] The following examples illustrated excessiveness:

- $26,439 for one contested discovery motion by Mr. Rosen, "a recognized specialist in the field [who] . . . doubtless had all the applicable law at his fingertips when Plaintiff entered his office" (10AA 2757; see 1AA 31-91, 98-133);[15/]

- Almost $10,000 for the preparation of a motion for leave to file a second amended complaint after counsel had stipulated to do no further work until the parties decided whether to accept or reject the arbitrator's award (10AA 2757-2758; see 7AA 1833);

- 29.6 hours for a settlement conference statement never filed because it was taken off-calendar eight days before its scheduled date (10AA 2758);

- Hours of an associate devoted to training (10AA 2758);

13/ Plaintiff apparently disputes this factual conclusion (see AOB 24 ["Largely as a consequence of the lawsuit's complexity . . . plaintiff incurred substantial attorneys' fees"] and fn. 17 [referring to his expert's testimony about "the difficulty of academic litigation"].)

14/ The excessiveness of the time was disputed. (AOB 24-25, fn. 17; see 6AA 1711-7AA 1796 [defendants' expert on reasonableness]).)

15/ Justice Brauer indicated that "in [his] extensive experience since 1989 as court appointed discovery master, [he had] routinely see[n] resistance to discovery and obstructionism of far greater magnitude than the record in this case reflect[ed]." (10AA 2757.)

- Hours that Justice Brauer questioned were actually spent, such as 35 hours on the August 27, 1993 letter, 10 hours for a "boiler plate" case management statement, and $625 for a six sentence status conference statement (10AA 2759-2760; see 3AA 809-816; 6AA 1744-1752);

(j) The costs sought were in line with what Justice Brauer had seen in other cases (10AA 2760-2761).

Recommendation. Relying on *Hensley v. Eckerhart*, *supra*, 461 U.S. 424 [103 S.Ct. 1933], Justice Brauer recommended in the alternative that (a) plaintiff recover only the attorney fees and costs incurred on or before December 10, 1993, less the unnecessary $1,000, or (b) plaintiff's request be granted with a one-quarter to one-third reduction for overbilling on fees pre-August 1, 1995 and with no reductions for fees after August 1, 1995, because Mr. Rosen had discounted those fees by 50%. (10AA 2740, 2761-2762.) As to post-judgment cross-motions regarding the sealing of records, Justice Brauer suggested the fees claimed could be awarded if the trial court was persuaded the dispute would have arisen even if the case had settled in 1993. (10AA 2762, fn. 10.)

4. The Award Of Attorney Fees.

On May 29, 1996, plaintiff moved to set aside the Report and Recommendation. (10AA 2764.) In support of the motion, plaintiff filed additional evidence, including new evidence of the purported catalytic effect of his lawsuit. (10AA 2772-2822, 2902-2904.)[16]

In an order filed October 7, 1996, the trial court adopted Justice Brauer's Report as its statement of decision, except that it rejected the finding that plaintiff's case "was at least one factor in reforming the University's internal grievance and disciplinary process and the

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[16] The trial court criticized plaintiff for the additional declarations but indicated that it had considered all the evidence submitted, as well as the evidence that had been before Justice Brauer. (13AA 3761-3762.)

implementation of the Information Practices Act." (13AA 3775.) The trial court found that although the case resulted in "much discussion in scholarly circles and resolutions of academic committees, it has not been a catalyst for change in that it did not contribute to improvement in the implementation of the IPA or the process for addressing the remedying of faculty complaints . . . . [L]ittle has been accomplished, especially anything that can be described as 'catalytic.'" (*Ibid.*) It noted that plaintiff's own brief conceded the only result was public debate, and it found that the debate had been in progress before plaintiff's case started. (*Ibid.*; Respondents' Appendix, ("RA") 16.)

The trial court agreed with Justice Brauer's conclusion that the judgment recovered by plaintiff was less favorable to him than the offer communicated on December 10, 1993. (13AA 3775.) Adopting Justice Brauer's citation to *Hensley v. Eckerhart*, the trial court awarded attorney fees incurred through December 10, 1993, i.e., $75,500.96, with interest from September 5, 1995.[17] As an independent ground for the decision, the trial court found in its discretion that given the very limited success achieved by plaintiff, $75,500.96 was a reasonable sum, being approximately 2.75 times the monetary component of the judgment. (13AA 3776.)

Additionally, the trial court denied fees in connection with the cross-motions relating to the sealing of records on the rationale that if the December 10 offer had been accepted, the motion would not have been made or the attorney fees incurred. (13AA 3777.) It ordered costs to plaintiff in the sum of $52,000 with interest from September 5, and it ordered Justice Brauer's fee to be split between the parties. (*Ibid.*)

Notice of appeal was timely filed on October 25, 1996. (13AA 3780.)

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[17] The order of October 7, 1996 was corrected nunc pro tunc by an order filed October 24, 1996. (13AA 3779.)

LEGAL ARGUMENT

THE FEE AWARD SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DETERMINING A REASONABLE AMOUNT.

Plaintiff accuses the trial court of being arbitrary in its purported failure to apply the law and to grasp the facts. However, plaintiff's disagreement with the trial court does not render its determination an abuse of discretion. In fact, the trial court acted within the bounds of applicable legal criteria, and the factual conclusions upon which it based its decision were supported by substantial evidence.

A. The Trial Court Used Proper Methodology In Calculating The Fee Award.

1. Contrary to Plaintiff's Contention, The Trial Court Did Employ The Lodestar Method To Determine The Amount Of The Award.

Plaintiff contends that the trial court "utterly disregarded the lodestar method" in calculating the fee award. (AOB 27.) That is simply not the case. Justice Brauer expressly agreed with plaintiff that "the time reasonably expended by counsel at a reasonable hourly rate is the 'lode star' [sic] or starting point in the analysis." (10AA 2740.) He based his recommendations on *Hensley v. Eckerhart*, *supra*, 461 U.S. at p. 433 [103 S.Ct. at p. 1939] ["[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate"], and the trial court adopted his approach. (*Ibid.*; 13AA 3763.)[18]

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[18] California courts interpreting California law regarding fees may look to federal precedent. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, (continued...)

In *Hensley*, the Supreme Court explained that a trial court "should exclude from this initial fee calculation hours that were not 'reasonably expended.' S. Rep. No. 94-1011, p. 6 (1976)." (461 U.S. at pp. 433-434 [103 S.Ct. at p. 1939].) When the trial court limited plaintiff to fees incurred through December 10, 1993, it was following *Hensley*'s directive and excluding hours not reasonably expended, that is, hours it determined were not necessarily expended insofar as the judgment secured by plaintiff brought no greater benefit than could have been obtained by accepting the December 10 offer. (See also *Clark v. City of Los Angeles* (9th Cir. 1986) 803 F.2d 987, 993 [hours should be excluded which do not "contribute[] to any favorable result achieved by the litigation"].) That left plaintiff with an award based on the number of hours reasonably expended on the litigation (i.e., the hours expended through December 10) multiplied by the hourly rates of counsel.

Contrary to plaintiff's assertion that reductions can only be made after calculating a lodestar figure (AOB 28), it is perfectly proper to reduce the number of claimed hours before multiplying hours by a reasonable rate. (See, e.g., *Cabrales v. County of Los Angeles* (9th Cir. 1988) 864 F.2d 1454, 1465, vacated by *County of Los Angeles v. Cabrales* (1989) 490 U.S. 1087 [109 S.Ct. 2425, 104 L.Ed.2d 982], reinstated by *Cabrales v. County of Los Angeles* (9th Cir. 1989) 886 F.2d 235 ["it is inconsequential whether the lodestar figure itself is adjusted . . . or . . . the reasonable hours component . . .]; see *Gates v. Deukemejian* (9th Cir. 1992) 987 F.2d 1392, 1404 [favored procedure to consider extent of success in initial determination of hours reasonably expended at a reasonable rate, not in subsequent adjustment of lodestar

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[18/](...continued)
638-639, fn. 27 [fashioning rule to avoid differing substantially from federal rule] and fn. 29 [California "follow[s] the lead of federal courts" as having "analogous precedential value" in construing Code of Civil Procedure section 1021.5]; *Green v. Obledo* (1984) 161 Cal.App.3d 678, 683 [criteria for calculating fees under state and federal law substantially the same].)

figure].) In sum, the trial court did not ignore lodestar analysis when it calculated plaintiff's fee award.

2. In Any Event, California Law Did Not Mandate The Lodestar Method In This Case.

The trial court's second independent approach to the fee award, based on the amount of damages, did not employ the lodestar method, but was equally within legal parameters, given the facts of this case.

Relying on cases where fees were awarded under Code of Civil Procedure section 1021.5, the private attorney general statute, plaintiff contends California law "requires" trial courts to use lodestar methodology to determine an appropriate fee under every fee statute.[19] (AOB 24-25.) However, while the amount of fees awarded under Code of Civil Procedure section 1021.5 must be determined by calculating a lodestar figure (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322), the lodestar method is *not* mandatory where fees are awarded under other statutes. (See, e.g., *Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807, 814-815 [rejecting the argument that lodestar methodology must be employed in determining fees under the Song-Beverly Consumer Warranty Act]; see also 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 263, pp. 805-806 [where statute merely gives a general right to reasonable fees, amount awarded within discretion of court].)

In this case, plaintiff sought fees under California law pursuant to section 1021.5 and the IPA. The trial court did not specify the statutory basis of the fee award. However, to be entitled to fees under section

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[19] There is only one case among those listed by plaintiff where fees were not awarded pursuant to section 1021.5, but it does not support plaintiff's argument. In *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, the reviewing court simply held it was not an abuse of discretion to rely on section 1021.5 precedent for a fee award under a Government Code provision. (*Id.* at p. 996.)

1021.5, a plaintiff must show, among other things, that "a significant benefit . . . has been conferred on the general public or a large class of persons." (Code Civ. Proc.. § 1021.5.) The trial court found that plaintiff's lawsuit "did not contribute to improvement in the implementation of the IPA or the process for addressing the remedying of faculty complaints." (13AA 3775.) That finding conclusively negates the "significant benefit" element of a section 1021.5 claim.[20] Thus, it may reasonably be inferred that the trial court awarded fees based solely on the IPA, not section 1021.5, so that lodestar methodology was not mandatory. (See *Levy*, *supra*, 4 Cal.App.4th at p. 814 [affirming reduced award where nothing in record entitled plaintiff to section 1021.5 fees, and thus nothing mandated use of the lodestar method].)[21]

Moreover, the mere fact that plaintiff prevailed under a statute designed to protect the public interest does not bring him within the purview of section 1021.5 for fee purposes. Noting that the private attorney general doctrine "was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest' [citation]," the *Levy* court explained that "[w]hile the Song-Beverly Act [was] obviously designed to protect the public interest, it does not follow that every action brought thereunder will meet the standard set forth in Code of Civil Procedure section 1021.5." (*Levy v. Toyota Motor Sales, U.S.A., Inc.*, *supra*, 4 Cal.App.4th at p. 814.) In this case, by adopting Justice Brauer's report, the trial court found plaintiff's claim that his pecuniary interests were secondary to public concerns was not credible in view of his settlement demands and the statements of counsel to the arbitrator regarding

[20] The evidence supporting the finding is addressed below in section B.3.

[21] In *Levy*, the trial judge imposed a 78% reduction in the amount of fees requested. (*Id.* at pp. 810-811.) In this case, the trial court imposed a 77% reduction on fees and costs combined. (See 10AA 2771, fn. 1; 13AA 3774, 3776-3777.)

damages. (10AA 2751, fn. 5, 2864; 13AA 3775.) Merely enforcing the IPA through a lawsuit is not enough to meet the standards of the private attorney general doctrine.

In sum, plaintiff's entitlement to fees under California law derives solely from the success of his IPA claim. Under the IPA, he is entitled to fees "reasonably incurred" (Civ. Code, § 1798.53), and the trial court's discretion in determining that sum was not circumscribed by any rules developed in the context of section 1021.5.

3. Federal Law Did Not Mandate The Lodestar Method Or Even Any Fee Award.

Plaintiff also sought fees pursuant to 42 U.S.C. § 1988 which allows parties prevailing on federal civil rights claims "a reasonable attorney's fee as part of the costs." Notwithstanding plaintiff's assertions to the contrary, the lodestar method of computing fees is not mandatory under federal law. The Supreme Court held in *Farrar v. Hobby* that where an award is *de minimis* or "technical" in nature (e.g., nominal damages of $1), "the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness [citation] or multiplying 'the number of hours reasonably expended . . . by a reasonable hourly rate' [citation]." (*Farrar v. Hobby*, *supra*, 506 U.S. at p. 115 [113 S.Ct. at p. 575].) In her concurring opinion, Justice O'Connor elaborated: "As a matter of common sense and sound judicial administration, it would be wasteful indeed to require that courts laboriously and mechanically go through [lodestar analysis] when the *de minimis* nature of the victory makes the proper fee immediately obvious. Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to 'award low fees or no fees' at all [citation]." (*Id.* at pp. 117-118 [113 S.Ct. at p. 576]); see also *Stewart v. Gates* (9th Cir. 1993) 987 F.2d 1450, 1452 [basic fee "may" be calculated by multiplying reasonable hours by reasonable rate, but "[i]n an appropriate case, such as one involving a very large or very small fee request, the court may determine the basic fee through a percentage

reduction of the claimed fee"]; see also *Earth Island Institute v. Southern Cal. Edison* (S.D.Cal. 1993) 838 F.Supp. 458, 464 [lodestar method not mandatory though it may be appropriate in particular case].)

As mentioned, the trial court in this case did not specify the statutory basis of the fee award. In light of *Farrar* and the judgment, however, it may reasonably be presumed that the trial court did *not* award any fees under section 1988: as the trial court noted, the judgment did not contain a finding that defendants had violated plaintiff's federal civil rights, an issue the arbitrator did not reach; it simply included injunctive relief barring violations of federal civil rights laws in the future. (13AA 3774; 5AA 1385; 1AA 173.) Thus, at best, plaintiff's degree of success on federal claims was *de minimis*, as Justice Brauer clearly implied when he found the injunctive relief was little more than a directive to obey the law. (10AA 2747.) Given the *de minimis* nature of the injunctive relief, whether or not the fee award was made under section 1988, lodestar analysis was not required, and the trial court could award low fees or no fees at all in its discretion.

4. <u>The Trial Court Acted Within Its Discretion In Comparing The Judgment To The December 10 Offer To Determine Whether Counsel's Hours Were Reasonable</u>.

Plaintiff expends much energy arguing that the trial court incorrectly treated the December 10 offer as a modified offer pursuant to Code of Civil Procedure section 998. (AOB 35-39.)[22] This effort was apparently triggered by Justice Brauer's statement that the December 10 offer "modified the 998 in the following particulars and in none other." (10AA 2743; AOB 35.) However, it is clear from the report that Justice

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[22] Under Code of Civil Procedure section 998, a plaintiff who has rejected an offer made pursuant to its provisions and who fails to obtain a more favorable result may not recover his post-offer costs from a defendant and must pay the defendant's post-offer costs. (Code Civ. Proc., § 998, subd. (c).)

Brauer was simply stating that the *terms* of the December 10 offer were the same as the *terms* of the 998 offer except in two respects, not that the December 10 offer *was* a 998 offer. Indeed, as plaintiff acknowledges (AOB 35), the trial court expressly foreclosed any conclusion to that effect when it stated, "Neither the Special Master nor this court conclude[s] that [998] analysis is necessary to reach the decision herein. The statutory CCP 998 sanctions do not apply in this case." (13AA 3776.)[23/] That is, the trial court did not limit fees because it concluded it was statutorily required to do so. Rather, in its discretion, it limited fees to what it determined was a *reasonable* amount considering the result plaintiff obtained by continuing to litigate the case after rejecting the December 10 offer—a judgment no more favorable than what plaintiff would have achieved had he accepted the offer. (10AA 2747.)

Plaintiff contends that, even assuming the court did not actually view the December 10 offer as one pursuant to section 998, to apply a cost cut-off concept to a nonstatutory offer should not be permitted. (AOB 35.) Plaintiff in effect contends there must be no consequence in terms of fee recovery when a plaintiff turns down a nonstatutory offer and continues to litigate to a less favorable judgment; that is, a trial court must entirely disregard as a factor in the reasonableness analysis any offer that is not a formal section 998 offer. This position, however, ignores the sensible mandate of the Supreme Court that a court's central responsibility is to "make the assessment of what is a reasonable fee under the circumstances of the case." (*Blanchard v. Bergeron* (1989) 489 U.S. 87, 96 [109 S.Ct. 939, 946, 103 L.Ed.2d 767]; *Farrar v. Hobby*, *supra*, 506 U.S. at p. 115 [113 S.Ct. at p. 575].) Obviously, the results obtained from continuing litigation after a settlement offer, and how they measure up against the offer, are part of the circumstances of a

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[23/] Justice Brauer rejected the argument that his use of the December 10 offer as a benchmark turned it into a section 998 offer, explaining that any fee-shifting impact was discretionary and section 998 sanctions did not apply. (10AA 2753.)

case and so must be considered as an integral part of the reasonableness analysis.

In fact, the Ninth Circuit has rightly held that a district court *must* consider the reasonableness of an award in light of the results obtained after a settlement offer: "[T]he reasonableness of an attorney fee award . . . will depend, at least in part, on the district court's consideration of the results the plaintiff obtained by going to trial compared to the . . . offer." (*Haworth v. State of Nev.* (9th Cir. 1995) 56 F.3d 1048, 1052.)[24] As the court explained, clients who refuse an offer "should know that their refusal to settle the case may have a substantial adverse impact on the amount of attorney fees they may recover for services rendered after a settlement offer is rejected. Just because a plaintiff has a [violation of the law] in her pocket does not give her a license to go to trial, run up the attorney fees and then recover them from the defendant." (*Ibid.*)

Similarly, the Seventh Circuit has held in an action under the Age Discrimination In Employment Act that a district court has the discretion to deny any fees at all on the ground that counsel's refusal to settle for an amount only slightly less than the amount subsequently agreed upon unreasonably prolonged the litigation. (*Vocca v. Playboy Hotel of Chicago, Inc.* (7th Cir. 1982) 686 F.2d 605, 608.)

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[24] *Haworth* was an action under the Fair Labor Standards Act (FLSA). As a preliminary point, the court noted that the "'case law construing what is a reasonable fee applies uniformly' to all federal fee-shifting statutes." (*Haworth*, *supra*, 56 F.3d at p. 1051, citing *City of Burlington v. Dague* (1992) 505 U.S. 557, 562 [112 S.Ct. 2638, 2641, 120 L.Ed.2d 449], internal quotations omitted.) The defendant in *Haworth* made a formal offer pursuant to Federal Rule of Civil Procedure 68 (the federal counterpart to section 998) which was greater than the judgment obtained. The Ninth Circuit held Rule 68 was inapplicable in the FLSA context and did not *bar* the plaintiff from receiving fees incurred after the offer, but it was mandatory that the results obtained be compared to the offer. (*Haworth*, *supra*, 56 F.3d at p. 1051.)

Plaintiff offers a number of policy arguments in an attempt to support his contention that it was error to compare the results obtained by litigating to judgment with the December 10 offer. None of these has merit. He first argues that if post-998 nonstatutory offers may operate to cut off fees, the public policy of encouraging settlement which underlies section 998 will be subverted because plaintiffs will be reluctant to negotiate. (AOB 37.) This argument does not withstand scrutiny. As a threshold matter, it is unclear why a plaintiff would be reluctant to negotiate, except to avoid the risk that a reasonable offer might be made which could end the litigation and the fees it generates. In any event, it is not "offer" divorced from "content of offer" that would impact on fee recovery; it is only the offer as a realistic assessment of a case's value that counts in the determination of reasonableness. Encouraging a party to take a hard look at what he may realistically obtain can only encourage the public policy favoring settlement—because what is the point of incurring the expense of further litigation? Unless the point *is* fees, as an end in themselves. In the fee-shifting context, to deem the results-to-offer comparison irrelevant for purposes of fee determination encourages the *rejection* of a realistic offer, because fees can be counted on to make up for any deficiencies in the damages award.

Second, plaintiff faults the results-offer comparison as somehow permitting guilty defendants to "punish" victorious plaintiffs, as though some sort of unfairness arises when results are considered in relation to an offer that could have achieved those same results, or better, earlier in the litigation and for less cost. (*Ibid.*) Plaintiff does not explain, nor can he, why it is unfair to encourage litigants to assess the value of their cases realistically. Litigants *without* the benefit of fee-shifting statutes are compelled to do so all the time.

Finally, he argues that comparing results to offer would needlessly draw courts into complex factual determinations of valuation regarding offers not made pursuant to section 998. (*Ibid.*) However, valuating an offer pursuant to section 998 may be just as complex, or simple, a process as valuating any other offer.

Plaintiff also draws on legal authority in an attempt to restrict the trial court's discretion to consider a settlement offer in determining a reasonable fee. Thus, he relies on *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692 and *Randles v. Lowry* (1970) 4 Cal.App.3d 68 and argues that an approach demanding complex factual determinations regarding the value of an offer is not only bad policy but is barred as a matter of law as "inherently speculative and imprecise." (AOB 44-45). The reliance is misplaced.

In *Valentino*, the reviewing court reversed the trial court's order that the plaintiff pay the defendant's costs because the personal injury verdict ($9,750) was less than a section 998 offer of $15,000. The $15,000 had been conditioned on the release of any bad faith claim against the defendant's insurer and any claim against the defendant's lawyer. Noting the possibility that a condition attached to a monetary offer could reduce its actual value, making the damages verdict more favorable than the offer, the court held costs could not be shifted because there was no way to allocate the monetary offer between the personal injury lawsuit and other potential lawsuits such as one against the insurer or attorney. (*Valentino*, *supra*, 201 Cal.App.3d at pp. 698-701.) In *Randles*, the valuation problem arose from a single 998 offer made by the defendant to several plaintiffs with different injuries, and the court had found it impossible to allocate the offer between their respective causes of action. (*Randles v. Lowry*, *supra*, 4 Cal.App.3d at p. 74.)

In this case, the question of a release and uncertainty as to the value of other potential lawsuits was not an issue addressed below with evidence or argument and so is waived for purposes of appeal. (See *Planned Protective Services, Inc. v. Gorton* (1988) 200 Cal.App.3d 1, 12-13 [party may not raise new theory for recovery of attorney fees on

appeal].)[25] Nor was there any allocation problem comparable to that presented in *Randles*. The only valuation issue regarding the offer concerned the monetary value of the leave component. (RA 27-29.) Since there was evidence of that value and since the evidence was effectively undisputed, there was nothing inherently speculative about the trial court's approach.[26]

Plaintiff also relies on *Ortiz v. Regan* (2d Cir. 1992) 980 F.2d 138, for the proposition that a trial court has no discretion to consider a settlement offer in determining reasonableness. (AOB 38.) This court should decline to follow *Ortiz*, as did Justice Brauer. (10AA 2754.)

In *Ortiz*, the plaintiff alleged a procedural due process violation and was awarded nominal damages of $1 when she litigated the case to conclusion after the defendants offered her a hearing. The district court refused fees for services after the date of the offer, and the Second Circuit reversed. The court found two problems with the district court's ruling. First, it stated that "more was at stake" than a hearing, namely the vindication of plaintiff's civil rights. (*Ortiz v. Regan*, *supra*, 980 F.2d at p. 140.) Such reasoning, however, would permit full recovery of all fees, reasonable or not, in every successful civil rights case simply by virtue of the constitutional issues at stake and is highly dubious in light of *Farrar v. Hobby* which was decided three weeks later and which, if it had been applied in *Ortiz*, would probably have resulted in no fees at all.

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[25] The terms of the December 10 offer as set forth in the Birnbaum declaration did not include a release. (8AA 2113-2114.) Nor does the fact of a general release necessarily affect the value of an offer. (See *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 908 [distinguishing *Valentino*].)

[26] Justice Brauer's finding that the value of the leave was $44,495.54 was supported by the declaration testimony of Julia Armstrc
1801; see also 8AA 2125-2127 [regarding tax consequences
value of settlement offer and arbitration award]; see also de
plaintiff's witness, Pavel Machotka, 8AA 2092 [Ms. Armstr
numbers may be correct].)

Second, the *Ortiz* court held that the denial of fees after a nonstatutory offer was improper because it might dissuade a plaintiff with meritorious claims from pressing forward. (*Id.* at pp. 140-141.) Such reasoning should be rejected: the same could be said about the consequences of a formal statutory offer, and, more importantly, it begs the question of just how meritorious—or valuable—the claim is.

The *Ortiz* court agreed with the district court in *Cowan v. Prudential Ins. Co. of America* (cited by plaintiff at AOB 38), that "'[a] rule giving trial judges discretion to deny such fees where the refusal of an offer is shown after the fact to have been unwise might well lead to very uneven results and even misuse in cases in which judges become involved in settlement negotiations.' (D.Conn. 1990) 728 F. Supp. 87, 92, rev'd on other grounds, (2d Cir. 1991) 935 F.2d 522." (*Ortiz, supra*, 980 F.2d at p. 141.) But uneven results may be a risk inherent in the exercise of discretion, and discretion—rather than bright line rules—is mandated by statutes which grant courts the power to determine "reasonable" fees. As to "misuse," such a concern is speculative and of limited import to the extent that it arises only where the judge who is deciding the fee motion was involved in settlement discussions and might have some investment in a particular offer, as was not the case here.

In this case, the trial court was well within its discretion when it used the December 10 offer as a benchmark in determining a reasonable fee.

5. <u>The Trial Court Acted Within Its Discretion In Setting Fees at 2.75 Times The Monetary Component Of The Judgment</u>.

Plaintiff contends that for the trial court to assess fees in proportion to damages was contrary to law. (AOB 28-29, 34.) Thus, in his view, the Supreme Court's decision in *City of Riverside v. Rivera* (1986) 477 U.S. 561 [106 S.Ct. 2686, 91 L.Ed.2d 466] was "written for this case" because it states, "a rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously

undermine Congress' purpose in enacting § 1988." (*Id.* at p. 576 [106 S.Ct. at p. 2695]; AOB 29.) At most, *Rivera* stands for the proposition that proportionality between fees and damages is not *required*, but that is not to say a court may not, in its discretion, given the results and other evidence in the record, determine that a certain sum in relation to damages is reasonable or unreasonable. In fact, *Farrar v. Hobby*, a case nowhere mentioned by plaintiff, holds the amount of damages is the most critical factor in fee analysis. (*Farrar v. Hobby*, *supra*, 506 U.S. at p. 114 [113 S.Ct. at p. 574].)

Rivera was a plurality opinion (4:1:4). Justice Powell, concurring, was the swing vote. His opinion became the majority holding in *Farrar*. (*Ibid.*) Powell joined to affirm in *Rivera* because of the particular facts of the case before him, and stated that a district court "is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought" except in "special circumstances" where facts found by the district court indicate the case served the public interest. (*County of Riverside v. Rivera*, *supra*, 477 U.S. at pp. 585-586 [106 S.Ct. at pp. 2699-2700] (conc. opn. of Powell, J.) In this case, there was no finding that the public interest was served, and the injunctive relief (including relief under the IPA) was no more than a directive that defendants comply with the law. Thus, nothing in the record demonstrates this is the "rare case" where fees disproportionate to the damages awarded (and overwhelmingly so) may be justified. (*Id.* at p. 586, fn. 3 [106 S.Ct. at p. 2700] (conc. opn. of Powell, J.).[27/]

Plaintiff also relies on *Morales v. City of San Rafael* (9th Cir. 1996) 96 F.3d 359, modified (9th Cir. 1997) 108 F.3d 981, for the proposition that it is error to depart from lodestar methodology and base a fee award on the amount of damages obtained. (AOB 34.) In *Morales*, the court held that *Farrar* applies only to nominal damages

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[27/] At issue in *Rivera* was a fee award that was 7 times the damages award. (*Id.* at p. 564 [106 S.Ct. at p. 2689.) In this case, the fees sought were nearly 18 times the damages awarded.

cases; *Morales* appears to stand for the proposition that the lodestar amount controls, even if it is much higher than the damages obtained. (*Morales*, *supra*, 96 F.3d at p. 365.) In this respect, however, *Morales* clearly conflicts with other Ninth Circuit decisions, for example, *Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 18-19 (finding proper exercise of discretion where court weighed amount recovered against amount sought and number of successful claims against claims asserted), and *McGinnis v. Kentucky Fried Chicken of California*, *supra*, 51 F.3d at p. 810 (reversing a district court which refused to reduce a fee award to be commensurate with compensatory damage award). *Harris* and *McGinnis* correctly apply *Farrar*, and this court should be guided by them rather than *Morales*.

In sum, the trial court's method of assessing an award in relation to the amount of damages was consistent with established legal principles and not an abuse of discretion.[28]

B. Substantial Evidence Supports The Critical Findings Upon Which The Award Was Based.

In applying the abuse of discretion standard to a trial judge's factual finding, reviewing courts ask whether there is substantial evidence to support it. (See, e.g., *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598 [no abuse of discretion where substantial evidence supports trial court's factual determination for purposes of a motion to vacate]; *Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 380 [no abuse of discretion where, among other things, substantial evidence supports trial court's determination of amount of fee award].)

The trial court's award and its methodology turned on two critical findings of fact—that a settlement offer was conveyed on December 10,

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[28] It should be noted that factors besides degree of success implicitly informed the fee decision, such as the findings that the case was not complex, that resistance to discovery was far less than routinely seen, and that the time billed was excessive. (10AA 2756-2757.)

1993, and that the lawsuit was not a catalyst for institutional reform that would justify looking beyond the judgment to assess results.

Plaintiff challenges these findings. (AOB 29-35, 39-43.) However, there was no abuse of discretion because the factual foundation of the award was supported by substantial evidence.

1. There Was Substantial Evidence To Prove The December 10 Settlement Offer.

The December 10 offer served as a benchmark for the reasonableness analysis with respect to one basis of the trial court's award. There was substantial evidence the offer was conveyed, and of its specific terms, in the form of a declaration of David Birnbaum in which he stated that he had conveyed a settlement offer to Mr. Rosen in a telephone conversation on December 10, 1993. (8AA 2113.)[29/] A letter from Mr. Rosen to defendants' counsel, Dennis Howell, dated the same day referenced the offer from Birnbaum, stating, "Today Mr. Birnbaum conveyed that offer . . . ." (3AA 754.) A letter from Mr. Rosen to Mr. Birnbaum dated December 14, 1993 also confirmed that an offer had been made. (3AA 829 [plaintiff and counsel appreciated "the University's present offer"].)

In his brief, plaintiff argues the Birnbaum declaration was the "only evidence" an offer was made on December 10 and, referring to other evidence, insists that no offer was made that could have been accepted and enforced since all discussions between counsel were understood to be preliminary negotiations that left essential terms for future agreement and that were based on an understanding there could be

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[29/] As mentioned, the terms of the offer were that (1) the Regents would grant plaintiff two quarters paid leave subject only to notice to the University (there was no University-imposed requirement that it be devoted to scholarly pursuits), (2) the Regents would comply with the IPA, (3) neither the Regents nor Gary Lease would retaliate against plaintiff, and (4) the Regents would pay plaintiff's attorney fees through November 30, 1993. (8AA 2113-2114.)

no agreement until all terms were resolved. (AOB 40-41.) Besides ignoring his counsel's own letters confirming the December 10 offer, plaintiff ignores the fundamental appellate rule that requires this court to view the record in the light most favorable to defendants and to resolve all conflicts in the evidence in their favor to support the judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123.) Under that rule, even if the Birnbaum declaration *were* the only evidence of a December 10 offer, it would be enough to support the conclusion an offer was made, and the clear and complete terms of that offer that on their face were enforceable.[30/]

2. Plaintiff Has Waived The Substantial Evidence Issue Of Catalytic Effect By His Defective Fact Statement.

The heart of plaintiff's argument that he is entitled to all the fees he asked for is his contention that his lawsuit brought results not reflected in the judgment, namely, institutional reform at UCSC: the lawsuit "acted as a catalyst for reform of the UC Santa Cruz's administrative procedures for redressing misconduct by Administrators, and for improved implementation of the IPA." (AOB 2, 29.) Both special master and trial court found that plaintiff failed to prove catalytic effect. (10AA 2752-2753; 13AA 3775.)

To refute the finding that the lawsuit was not a catalyst for reform, plaintiff implicitly argues that it is not supported by substantial evidence,

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[30/] On the subject of terms, plaintiff faults Justice Brauer's finding that leave was not conditioned on plaintiff's pursuing scholarly work. (AOB 44.) Plaintiff's point and its relevance is unclear. In any event, the finding was supported by substantial evidence. (8AA 2113.) Plaintiff's evidence—e.g., that Mr. Birnbaum stated in a letter, "I understand the purpose of that leave would be to allow Dr. Meister to pursue his scholarly work" (10AA 2880)—does not contradict his declaration testimony that the scholarly purpose was plaintiff's idea, not a University restriction. (8AA 2113.) That a leave was offered in place of damages was also plaintiff's idea. (See 10AA 2744, fn. 3; 3AA 829.)

given all his evidence that there *was* a catalytic effect. (See AOB 20-22, 29, 31.) He then sets out only his side of the evidentiary story, failing to mention any of defendants' evidence, such as evidence that debate about discipline and grievance procedures had predated the lawsuit and that IPA procedures were unaffected by the lawsuit. (7AA 1804-1815, 1825-1826.) This strategy flies in the face of another fundamental tenet of appellate practice: a party raising a substantial evidence issue is "required to set forth in [his] brief *all* the material evidence on the point and *not merely [his] own evidence*. Unless this is done the error is deemed to be waived." (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (internal citations omitted, original italics); *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832; *Pick v. Santa Ana-Tustin Community Hospital* (1982) 130 Cal.App.3d 970, 979.)

Because plaintiff failed to present all the evidence on the issue of catalytic effect in his statement of facts, his challenge to the trial court's findings should be deemed waived.

3. Substantial Evidence Supports The Finding That Plaintiff's Case Had No Catalytic Effect.

Even if plaintiff has not waived this issue, he fails to demonstrate reversible error. Under the catalyst theory of attorney fees, a plaintiff may be entitled to attorney fees where his lawsuit "'was a *catalyst* motivating defendants to provide the primary relief sought . . . ' . . . [or] where an important right is vindicated 'by activating defendants to modify their behavior.' [citation]" (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 353.) Generally, courts resort to the catalyst theory of attorney fees for purposes of determining whether a plaintiff who has not received a favorable final judgment is nonetheless a "successful party" for purposes of fees under Code of Civil Procedure section 1021.5 or a "prevailing party" for purposes of fees under 42 U.S.C. section 1988. (E.g., *Westside Community for Independent Living, Inc. v. Obledo*, *supra*, 33 Cal.3d at pp. 352-353; *Marbley v. Bane* (2d Cir. 1995) 57 F.3d 224, 233-234.) The catalyst

theory may also be applicable where, as here, it is invoked for purposes of determining a reasonable fee. (E.g., *Kilgour v. City of Pasadena* (9th Cir. 1995) 53 F.3d 1007, 1011, fn. 4; *Am. Council of the Blind v. Romer* (10th Cir. 1993) 992 F.2d 249, 250-251.)

In order to establish catalytic effect, a plaintiff must prove a "causal connection between the lawsuit and the relief obtained." (*Westside Community*, *supra*, at p. 353.) That is, the lawsuit must have been a "material factor or have contributed in a significant way to the result achieved." (*Ibid.*, internal citations omitted; see also *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 686 [issue is whether action "substantially contributed" to result or in words of trial court "'whether or not the local politicians would have done what they have done absent the lawsuit'"]; see also *Marbley v. Bane*, *supra*, 57 F.3d at p. 234 ["lawsuit must be a catalytic, necessary or substantial factor in attaining the relief," citations omitted].)

a. The evidence.

Plaintiff contends the trial court erred in assessing the degree of his success solely in relation to the judgment he obtained and in disregarding the purported catalytic effects of his lawsuit. (AOB 29-35.) The trial court disregarded nothing. To the contrary, it weighed the evidence pertaining to catalytic effect and found plaintiff's evidence wanting. (13AA 3755.) Plaintiff's evidence of purported institutional reform was as follows:

— Public debate triggered by facts learned after December 10, 1993, including alleged perjury by Tanner and an assistant vice chancellor. (AOB 19, 29.)[31/]

[31/] Plaintiff presents as "facts" learned after December 10, 1993, the allegations of his allies in the Academic Senate presented in a report to the Academic Senate. (AOB 19-20; 11AA 3213-3226.) Significantly, none of this "evidence" persuaded the arbitrator to grant a more substantial award that would have exceeded the December 10 offer. (10AA 2751.)

— A purported finding of improper conduct by Tanner in resolving the Lease matter. (AOB 20; 13AA 3748 et seq.)[32]

— A resolution by the Academic Senate requiring periodic review of the Executive Vice Chancellor. (AOB 20-21; 11AA 3178, 3183.)[33]

— A report by a special committee of the Academic Senate (the Flatté Committee) recommending changes in grievance and discipline procedures regarding conflicts of interest, and calling for inquiry into ways the Academic Senate and its individual members might obtain legal counsel. (AOB 21; 11AA 3184, 3189-3190.)

— A report by the Academic Senate's Privilege and Tenure Committee concurring with the Flatté Committee regarding the need for reform and legal counsel and reporting on an investigation of whether Tanner had a conflict of interest in handling the complaint. (AOB 21; 11AA 3199.)[34]

— An endorsement of the work of the other committees and a proposal to obtain counsel from UC law schools by The Academic Senate's Committee on Academic Freedom. (AOB 22; 11AA 3193.)

— The pursuit of a complaint about the alleged misuse of University funds in plaintiff's lawsuit to pay Lease's $2,500 punitive

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[32] Contrary to plaintiff's assertion that misconduct was found, as mentioned, the report to which plaintiff refers (the Middlekauff Report) found Tanner's conduct fell "far short" of misconduct or unethical conduct. (13AA 3755; see fn. 12, *supra*.) The Middlekauff Report was referenced by the trial court as persuasive evidence supporting its conclusion of no catalytic effect. (13AA 3775.)

[33] The same documentary evidence indicates that the Chancellor viewed the resolution as merely a "friendly proposal." (11AA 3178.)

[34] Plaintiff's phraseology suggests Tanner's conflict of interest had been established. The Privilege and Tenure Committee indicated only that there was debate on the subject and that it had reached no decision. (11AA 3199.)

damages award and to defend lawsuits in which administrator conduct was at issue. (AOB 22; 10AA 2773-2774, 2903-2904.)

The trial court correctly found that this evidence fell short of demonstrating that the lawsuit was a catalyst for change in that little had been accomplished beyond debate, as plaintiff had conceded in his brief. (13AA 3775; RA 16.)

Moreover, there was substantial evidence that the lawsuit had *not* resulted in changes and that the debate had been in progress before the case started. (13AA 3775.) For example:

— The lawsuit had no effect on the implementation of or procedures regarding the IPA; such procedures had not changed since before the Complaint was filed. (7AA 1825-1826; see also 6AA 1469-1477 [copies of UCSC policies pertaining to compliance with IPA and bearing revision dates predating lawsuit]; 4AA 1052-1073 [UCSC IPA policy and procedure guide].)

— Perceived problems regarding discipline of faculty and administrators were being widely debated before the initiation of plaintiff's lawsuit in February 1993. (7AA 1804-1815.)

— The perceived problems were under study by a University-wide committee (the Prager Committee), and the discipline of administrators was subject to discussion on other campuses before the initiation of plaintiff's lawsuit in February 1993. (7AA 1804-1806, 1812, 1814-1815.)

— Pavel Machotka (a faculty member and one of plaintiff's witnesses) had expressed unhappiness with procedures at UCSC in a letter to Tanner in October 27, 1992, before the lawsuit was filed. (7AA 1805, 1809-1811.)

— Procedural changes in 1995 regarding the processing of complaints against faculty were not in response to plaintiff's lawsuit. (7AA 1806.) The requirement that the Executive Vice Chancellor notify the Charges Committee of action to be taken in response to its recommendation on discipline was under discussion in June 1992 before the suit. (7AA 1806-1807; see 7AA 1814-1815 [participation by faculty

in the review of administrator discipline was under discussion before the suit].) A requirement that the Executive Vice Chancellor transmit all complaints to the Charges Committee codified what had been the prior practice. (7AA 1806.) For example, Tanner had transmitted plaintiff's complaint to the Charges Committee. (*Ibid.*)

b. Plaintiff's meritless challenges to the evidence.

Plaintiff adopts several strategies to discredit the trial court's finding that the lawsuit did not contribute in a significant substantial way to reform. First, he contends it was "plain error," noting that Justice Brauer had found the evidence of catalytic effect conflicting and plaintiff's evidence "more persuasive." (AOB 30.) Besides being inaccurate (ultimately Justice Brauer found no catalytic effect, i.e., did *not* find plaintiff's evidence more persuasive—10AA 2749-2750), this contention ignores the substantial evidence rule: "If . . . substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, emphasis omitted.) Plaintiff simply disagrees with the trial court and in effect inappropriately asks this court to reweigh the evidence. (See *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1587 [court of appeal does not reweigh evidence in reviewing amount of fee award].)

Plaintiff also argues that debate "is of itself a form of catalytic impact which warrants substantial attorney's fees," relying on *Wallace v. Consumers Cooperative of Berkeley, Inc.* (1985) 170 Cal.App.3d 836. (AOB 31, fn. 22.) His reliance is misplaced. In *Wallace*, the lawsuit triggered public hearings that ultimately resulted in the suspension of price controls, i.e., an actual change of behavior. (170 Cal.App.3d at pp. 842, 846.) Here, there is no evidence of such a tangible result or that anything was accomplished beyond debate. At least one court has specifically rejected the notion that debate and publicity is sufficient to demonstrate catalytic effect. In *Urbaniak v. Newton* (1993) 19

Cal.App.4th 1837, 1843, fn. 3, the First District (relying on the Supreme Court's decision in *Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1292) instructed that *actual* change, a modification of the particular defendant's behavior, must be proved, and evidence that publicity would influence entities to change their policies was insufficient.[35]

Plaintiff then contends that his lawsuit, which "brought to light" an alleged conflict of interest by Tanner, may result in a "first time enactment of a conflict interest rule at UC Santa Cruz." (AOB 30-31.) However, the Middlekauff Report is substantial evidence that Tanner did *not* act under the influence of a conflict of interest, as it absolved him of unethical conduct. (13AA 3755-3756.) Thus, even if a rule were enacted some time in the future, there is substantial evidence to support a finding that the lawsuit and any facts uncovered during its course would not be the cause of its enactment.

c. Plaintiff's failure to satisfy the causation requirement.

As discussed above there was no evidence plaintiff's lawsuit impacted IPA policy and procedures in any manner, and while mention of plaintiff's lawsuit was included in the debates of the Academic Senate about discipline of administrators and conflict of interest, there is substantial evidence that the lawsuit did not *cause* debate insofar as the

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[35] Plaintiff's invocation of the Public Records Act as "instructive" in the context of debate (AOB 31, fn. 22) serves little purpose except to highlight the irony that plaintiff's lawsuit purportedly was filed to vindicate his privacy rights in the face of public disclosure of an employment action adverse to him; and yet, having compelled the disclosure of documents regarding an employment action adverse to his supervisor, he was responsible for their release to the public, and now appears to be claiming this in itself is an important achievement warranting full fees. This irony was not lost on Justice Brauer. (10AA 2865.) In any event, public disclosure of documents was not relief sought by the Complaint and cannot be used to justify fees. (See discussion in subsection 3(c), *infra*.)

reform process and the attendant debate were in progress before the lawsuit got under way. Additionally, on a more basic level, the enactment of a conflict of interest rule or procedural changes regarding faculty discipline cannot be factors in the calculation of attorney fees (or for that matter the determination of prevailing party status) because they were not an objective of plaintiff's lawsuit as defined by the Complaint.

To assess causation, a court must look at "the precise factual/legal condition that the fee claimant has sought to change or affect . . . . With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition." (*Folsom v. Butte County Assn. of Governments*, *supra*, 32 Cal.3d at p. 685, internal quotations omitted; *Wallace v. Consumers Cooperative of Berkeley, Inc.*, *supra*, 170 Cal.App.3d at p. 843.)

It is a given that any purported reform or "outcome" of the lawsuit must be relief the plaintiff hoped to obtain as a result of the lawsuit, *as reflected in his prayer for relief.* A decision of the Fourth District Court of Appeal illustrates the principle that the condition the fee applicant seeks to change and changes must be identified in the complaint. In *Leiserson v. City of San Diego* (1988) 202 Cal.App.3d 725, a news cameraman had unsuccessfully sued the city for, among other things, false arrest and assault arising out of his arrest at the scene of a jetliner crash. He nonetheless sought attorney fees because his lawsuit resulted in a published opinion defining the rights of the news media at disaster scenes. The court of appeal affirmed the trial court's denial of fees because the plaintiff had failed to prevail "within his chosen context." (*Id.* at p. 738.) As the court explained, "the relief sought is probative of such entitlement," and the plaintiff had asked only civil damages for himself, not a declaration of the rights of the media. (*Ibid.*) Thus, "the litigation was not intended to promote the rights of the media," and the published opinion defining such rights was "simply fortuitous." (*Ibid*;

see also *Cady v. City of Chicago* (7th Cir. 1994) 43 F.3d 326, 328-329 [causation requirement not satisfied where lawsuit caused the removal of a religious literature rack from outside an airport chapel but plaintiff's objective had been to have his literature displayed on the rack without prior approval]; see also *Marbley v. Bane*, *supra*, 57 F.3d at p. 234 [fees appropriate only where "lawsuit has been the catalyst in bringing about a goal sought in litigation, by threat of victory"].)

By the same token, in this case, any (potential) conflict of interest rule or change in the procedures pertaining to discipline to make it more public or to increase faculty involvement may not be factored into an assessment of the amount of fees to be awarded because such changes would be simply fortuitous. The Complaint alleged injury arising from the unlawful disclosure of personal information and the failure to comply with IPA administrative remedies. (1AA 3.) In addition to damages, plaintiff requested an order of injunction that the Regents apologize for such disclosure, that they stop disclosing and conspiring to disclose, that they establish procedures in compliance with the IPA and grant him administrative relief required by the IPA. (1AA 8-9.) He sought no procedural relief or reform except as to compliance with the IPA. But there is no provision in the IPA addressing disciplinary procedures or even mandating discipline of violators.[36] There is nothing in the IPA that requires disclosure of any discipline imposed on a violator to a complaining party, or others, and indeed section 1798.24 in all likelihood precludes such disclosure. Thus, any changes in such areas would be beyond the scope of the IPA and the Complaint.

Sound policy reasons mandate strict application of a causation rule focusing on the relief sought in a complaint. First, any other approach would fly in the face of the Supreme Court's admonition that fee awards not produce a "windfall" for attorneys. (*Farrar v. Hobby*, *supra*, 506 U.S. at p. 115 [113 S.Ct. at p. 575].) Without confining the analysis to

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[36] There is simply a penalty provision providing that violation constitutes cause for discipline. (Civ. Code, § 1798.55.)

the objectives explicit in the complaint, it would be all too easy for a plaintiff to contend that, for example, while he alleged grievances for violation of the IPA and sought relief in that regard, his real purpose was something quite apart from the complaint—to reform administrator discipline procedures say, or to bring about the public disclosure of documents regarding his foes. (See 1AA 261-262 [plaintiff filed suit on the basis of advice from Pavel Machotka that a lawsuit would help his effort to change the way UCSC dealt with administrative misconduct]; see AOB 49 [counsel's efforts to ensure public disclosure of documents necessary to achieve plaintiff's litigation goals].) Such post-hoc characterizations of litigation objectives would permit a plaintiff to claim responsibility for virtually any modification of behavior by a defendant however tenuous its relationship to the lawsuit. Second, to permit any other approach to causation would validate litigation as a strategy not to address grievances but to accomplish other collateral purposes and thus would threaten to increase the burden on already overburdened court calendars. Finally, absent a requirement that the complaint be the benchmark of the analysis, the question of whether a result was truly the objective of the litigation becomes more difficult to determine, thereby virtually guaranteeing the undesirable result that a request for attorney fees will turn into "a second major litigation." (*Hensley v. Eckerhart*, *supra*, 461 U.S. at p. 437 [103 S.Ct. at p. 1941].)

Plaintiff lists a number of cases purportedly standing for the proposition that "it is clear error not to award fully compensatory attorneys' fees" where the lawsuit has had a catalytic effect in the sense of an effect other than or beyond the scope of the judgment or of a damages award. (AOB 32.)[37/] In fact, none of the cases requires

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[37/] Plaintiff also lists a number of cases standing for the proposition that the degree of success cannot be assessed solely with respect to damages. (AOB 33-34.) The plaintiffs in the cited cases (with one exception) obtained results other than or more than damages, while plaintiff in this case did not, so these cases add nothing to his argument.

(continued...)

anything other than "reasonable" compensation. Moreover, none of the cases requires a result different from that reached in this case; in all cases mentioned the result obtained was tangible and responded to an articulated grievance and the requested relief. For example, in *Maria P. v. Riles*, *supra*, plaintiffs sought and obtained an injunction preventing the enforcement of a code section subsequently changed. (43 Cal.3d at pp. 1287-1288.) In *Folsom v. Butte County Assn. of Governments*, *supra*, the record was "replete with evidence that [the defendant] dramatically changed its position" under the pressure of the lawsuit. (32 Cal.3d at pp. 686-687.) In *Kilgour v. City of Pasadena*, *supra*, the plaintiff who had sought to enjoin use of a stadium press box that was not up to code for handicapped accessibility obtained a stipulated judgment requiring the renovations. (53 F.3d at p. 1009.) In *Friend*, inmates sued to secure access to Roman Catholic services and obtained a change in policy in that regard. (*Friend v. Kolodzieczak* (9th Cir. 1995) 72 F.3d 1386, 1388, cert. denied (1996) ____U.S.____ [116 S.Ct. 1016, 134 L.Ed.2d 96].) In *Clark v. City of Los Angeles*, *supra*, plaintiffs were business persons seeking to enjoin the selective enforcement of codes amounting to harassment, and the harassment stopped with a jury verdict in their favor. (803 F.2d at p. 989.)

Plaintiff also contends *Wilcox v. City of Reno* (9th Cir. 1994) 42 F.3d 550, makes "crystal clear" that a substantial fee award is warranted. (AOB 33.) The *Wilcox* complaint had alleged a policy of excessive force, the jury found that to be the case, and there was evidence of a change in policy directly attributable to the lawsuit. (42 F.3d at pp. 551-553.) The Ninth Circuit found this tangible result in combination with an enforceable judgment for a nominal sum supported an award for fees. (*Id.* at p. 555.) In this case, however, the trial court found no such

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[37/](...continued)
The one exception is *Morales v. City of San Raphael*, *supra*, where the only apparent result was damages; as discussed (*supra*, pp. 27-28), *Morales* is of dubious value.

tangible result, a finding supported by substantial evidence, and the matters which plaintiff contends support his claim for full compensation—debates and investigations regarding discipline of administrators—have no nexus to the relief sought by the complaint. Thus, the trial court did not abuse its discretion in determining that plaintiff achieved his judgment and no more, and that therefore reasonable fees must be determined solely in relation to that judgment. The award should be affirmed.

C. The Trial Court Acted Within Its Discretion When It Did Not Include Fees For Fee-Related Services In The Award.

Plaintiff faults the trial court for failing to compensate him for the approximately $144,000 in fees incurred in the fee litigation. (AOB 48.) He contends that he is entitled to the fees "as a matter of law." (AOB 47.) However, there is nothing in any of the cases cited by plaintiff that makes an award of such fees mandatory or automatic. (See, e.g., *Commissioner, I.N.S. v. Jean* (1990) 496 U.S. 154, 163 [110 S.Ct. 2316, 2321, 110 L.Ed.2d 134] [no award for fees incurred in fee litigation is automatic].) As the California Supreme Court explained in *Estate of Trynin* (1989) 49 Cal.3d 868, a case under the Probate Code, services to establish a fee claim are compensable, but "[t]his does not mean . . . that an additional award of fees for fee-related services is invariably required. Where the trial court reasonably concludes that the amounts previously awarded [for underlying services on the merits] are adequate, given the value of the estate and the nature of its assets, to fully compensate the attorney for all services, including fee-related services, denial of a request for fee-related fees would not be an abuse of discretion." (*Id.* at p. 880; see also *Levy v. Toyota Motor Sales, U.S.A., Inc.*, *supra*, 4 Cal.App.4th at p. 817 [court could reasonably conclude amounts awarded were adequate to compensate counsel for all services, including those related to motion to tax costs].)

In the federal arena, the Tenth Circuit has held that a trial court has discretion to award *no* fees for fee-related services where the

underlying fee request is unreasonable. (*Cummins v. Campbell* (10th Cir. 1994) 44 F.3d 847, 855.) In affirming the denial of such fees, the court noted that, had the appellant's initial fee request been more reasonable, fee litigation might have been avoided. (*Ibid.*)

In this case, the request for in excess of one-half million dollars in attorney fees and costs was not reasonable, given the minimal value of the underlying merits action, and indeed, since fees were a major goal of bringing this case in the first instance, it is questionable that there was ever any intention to avoid fee litigation. In any event, the trial court could reasonably have concluded that, given the value of the underlying case, the amount awarded (2.75 times the value of the monetary component of the judgment) was adequate to compensate counsel for all his services.

D. The Trial Court Acted Within Its Discretion In Denying Fees For Opposing The Postjudgment Motion To Seal.

Postjudgment services are compensable where they are "'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation. [Citation]." (*Pennsylvania v. Delaware Valley Citizens' Council* (1986) 478 U.S. 546, 559-561 [106 S.Ct. 3088, 3095-3096, 92 L.Ed.2d 439] [permitting compensation for postjudgment monitoring of consent decree to ensure compliance]; see also *Stewart v. Gates*, *supra*, 987 F.2d at p. 1452 [district court should permit compensation for only those postjudgment monitoring activities that were "useful and necessary to ensure compliance with the court's orders"].)

Plaintiff contends it was an abuse of discretion to deny him $12,566.54 in compensation for successfully opposing defendants' motion to seal a portion of the superior court file. (AOB 48-49.)[38] Plaintiff

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[38] The motion was directed at the documents (and testimony regarding them) that defendants had been ordered to produce, that they (continued...)

attempts to meet the applicable standard by arguing that the material in the file was a basis of a report by Machotka and three other faculty members (11AA 3210-3230) and therefore was "useful to plaintiff and very necessary to achieving the results he sought in the litigation." (AOB 49.) However, if providing ammunition to certain faculty members for their ongoing dispute with the administration over faculty "rights and privileges" (11AA 3224) *was* the actual result plaintiff sought in the litigation, efforts by his counsel to protect that result are not compensable because they were not necessary to monitor or ensure compliance with plaintiff's *judgment*, i.e., with "the final result obtained from the litigation." (*Pennsylvania v. Delaware Valley Citizens' Council*, *supra*, 478 U.S. at p. 561 [106 S.Ct. at p. 3098].) Even if plaintiff obtains some political leverage by ensuring the dissemination of the litigation materials throughout the University community, that would not make his attorney's efforts compensable. (See *Daggett v. Kimmelman* (3d Cir. 1987) 811 F.2d 793, 801 [attorney may not be compensated for maximizing client's political leverage in redistricting litigation].

In sum, the trial court was within its discretion when it did not compensate plaintiff for this item in his fee demand.

CONCLUSION

There was nothing arbitrary about the fee award in this case. The record indicates both special master and trial court read, and re-read, a massive amount of evidence, listened to extensive argument, and examined controlling legal authority. The resulting award "[fell] within the permissible range of options set by the legal criteria." (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831.) It was based on a solid evidentiary foundation. For all the

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[38/](...continued)
had produced under a protective order, and that plaintiff had introduced into the public record by attaching them to various documents he filed with the court. (8AA 2131, 2138-2140; 11AA 3226.)

reasons set forth above, the trial court's order for fees and costs should be affirmed.

Dated: October 17, 1997

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