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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

HEALTH FREEDOM DEFENSE FUND, INC., a Wyoming Not-for-Profit Corporation; **CALIFORNIA EDUCATORS FOR MEDICAL FREEDOM**, an unincorporated association; **MIGUEL SOTELO; JEFFREY FUENTES; SANDRA GARCIA; HOVHANNES SAPONGHIAN; and NORMA BRAMBILA,**

Plaintiffs,

v.

ALBERTO CARVALHO, in his official capacity as Superintendent of the Los Angeles Unified School District; **ILEANA DAVALOS**, in her official capacity as Chief Human Resources Officer for the Los Angeles Unified School District; **GEORGE MCKENNA, MONICA GARCIA, SCOTT SCHMERELSON, NICK MELVOIN, JACKIE GOLDBERG, KELLY GONEZ**, and **TANYA ORTIZ FRANKLIN**, in their official capacities as members of the Los Angeles Unified School District governing board,

Defendants.

Case No.: 2:21-cv-08688-DSF-PVC

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND SANCTIONS

Date: April 3, 2022
Time: 1:30 pm
Courtroom: 7D

Judge: Hon. Dale S. Fischer

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I. INTRODUCTION

Defendants' counsel never previously indicated an intent to seek sanctions or purported excess fees/costs against Plaintiffs' attorneys under either this Court's inherent authority or 28 U.S.C. § 1927. Nevertheless, Defendants request sanctions against Plaintiffs *and their attorneys* in the form of the defense's costs/fees/expenses allegedly incurred in defending against Plaintiffs' California state law claims (Counts III, V, VI, and VII of the Second Amended Complaint ("SAC")) and the claim brought under the Americans with Disabilities Act ("ADA") (Count IV) (hereinafter, the "State/ADA claims").[1]

As a threshold matter, Defendants' Motion omits that the Court cannot grant § 1927 sanctions against a lawyer's client. As to the lawyer, the Court can only grant sanctions under § 1927 or its inherent authority upon a finding of bad faith. On its face, Defendants' motion fails to meet this high bar. Indeed, far from vexatiously multiplying the proceedings, Plaintiffs' counsel made reasonable efforts to simplify the case: *first*, by reducing the scope of the factual allegations; *second*, by proposing to simplify the taking of depositions; and *third*, by agreeing to dismissal of the State/ADA claims, *once defense counsel had clarified the grounds for doing so under the 11th Amendment*.

At the same time, Defendants fail to account for their own conduct of the case. According to Defendants' own logic, the State/ADA claims could have been dismissed on *legal grounds* "at the onset of [this] lawsuit." *See, e.g.*, Dkt. 93 at 7, 16, 18. But Defendants instead chose to engage in discovery, rebuffed suggestions to simplify the taking of depositions, failed to effectively communicate their legal position when conferring on their Rule 12(c) motion, then failed to cooperate when Plaintiffs offered to dismiss the State/ADA claims without prejudice. None of this was reasonable.

Finally, Defendants' claim of having incurred 5/7th of their costs and fees in defending against the State/ADA claims is absurd. Plaintiffs' general factual allegations pertained to their 14th Amendment claims, thus the vast bulk of discovery would have been incurred

[1] Counts III-VII are collectively referred to herein as the "State/ADA Claims" and separately referred as the "State Claims" and "ADA Claim."

regardless. Also, Defendants unreasonably chose to continue taking discovery on the State/ADA claims even after Plaintiffs had agreed to dismiss them.

II. FACTUAL BACKGROUND

A. Defense Counsel's Lack of Candor in "LAUSD I" Multiplied the Proceedings.

The complaint in this case's predecessor, *California Educators for Medical Freedom, et al v. The Los Angeles Unified School District, et al*, Case No. 2:21-cv-02388 ("LAUSD I"), was filed on March 17, 2021. The very next day, LAUSD circulated a memorandum "clarifying" that vaccination was not mandatory. Plaintiffs' counsel disclosed that fact in the First Amended Complaint. LAUSD I at Dkt. 25 ¶86. LAUSD subsequently filed a motion to dismiss in LAUSD I, arguing that, *inter alia*, the issues were not ripe for adjudication because there was no mandatory vaccination policy in effect at that time. *Id.* at Dkt. 33, 34.

Notably, defense counsel filed Defendants' Reply in support of the District's ripeness argument on July 19, 2021. *Id* at Dkt. 41. The Court relied on LAUSD's representations and, on July 27, 2021, granted the MTD in LAUSD I based on ripeness. *Id.* at Dkt. 44.

Plaintiffs to this instant case later discovered, through the deposition testimony of Defendant Ileana Davalos that, despite Defense counsel's representations to the Court in LAUSD I, Davalos and others had been instructed in early July 2021 by interim Superintendent Megan Reilly to draft the mandate that became the subject of the instant lawsuit. *See Decl. of B. Hadaway*, attached as Ex. 1, at ¶25. The implication of this cannot be ignored: At the same time defense counsel was telling this Court that there was no mandate and that the controversy was unripe, the District's top HR officers were already drafting the mandate that Defendants said did not exist. Had Defense counsel disclosed this fact to the Court, the Court might not have dismissed LAUSD I based on ripeness and the instant lawsuit may have never been filed. Thus, any multiplication of the proceedings in this dispute was at least arguably due to defense counsel's lack of candor in LAUSD I.

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B. Plaintiffs' Efforts to Simplify This Case.

Seventeen days after the Court granted dismissal in LAUSD I, Defendants implemented the Covid-19 "vaccine" mandate (the "Mandate") that is the subject of this action. *See* Dkt. 65 ¶4. Plaintiffs filed the instant lawsuit on November 3, 2021. Dkt. 1. Plaintiffs filed their Amended Complaint on November 17, 2021. Dkt. 8. Both the Complaint and Amended Complaint asserted seven causes of action against Defendants in their official capacities, including the state law claims and ADA claim upon which Defendants base the instant Motion. Defendants answered the Amended Complaint on December 8, 2021, without raising any Rule 12(b) objection to either the merits of those claims or to the Court's jurisdiction. Dkt. 21

In early 2022, Florida attorney Brant C. Hadaway, acting as special counsel to the Davillier Law Group ("DLG"), was assigned responsibility for handling the case on behalf of Plaintiffs. *See Hadaway Decl.* at ¶1. As one of his first actions after appearing in the case, Mr. Hadaway proposed filing the SAC in order to, among other things, simplify the factual allegations for purposes of discovery and trial. *Id*. at ¶¶8-10. This significantly reduced the scope of expert testimony that would be required from the Parties. *Id.* at ¶ 9. Defendants' counsel Connie Michaels was clearly aware of this because she agreed and executed the Parties' Stipulation, again without raising any objections to the merits of Counts III through VII or to the Court's subject matter jurisdiction over those claims. *Id*. at ¶10; *see also Joint Stipulation*, Dkt. 63, at 3 ("in the interest of [] narrowing the factual issues for discovery and trial")

Mr. Hadaway subsequently attempted to simplify the taking of Plaintiffs' depositions, repeatedly suggesting they should be conducted via Zoom on a two-a-day basis. *Id*. at ¶¶31-36. Ms. Michaels rebuffed those efforts, only to later change her mind after Plaintiffs had notified the Court of their consent to dismiss the state law/ADA claims, and after Mr. Hadaway had traveled all the way to Los Angeles to attend. *Id.*

Defendants' counsel are thus clearly aware that, far from multiplying the proceedings (much less vexatiously), Plaintiffs' attorney Brant Hadaway and the DLG team sought in good faith to simplify this case from the outset of their involvement.

C. Plaintiffs' Good Faith Conferral Efforts Regarding Defendants' MJOP.

Defendants first initiated conferral efforts regarding their intent to file a Rule 12(c) motion as to all seven claims in the SAC on May 2, 2022. *See* Dkt. 93-5. Those efforts were confounded, however, by defense counsel's fixation on the incorrect notion that the Eleventh Amendment completely immunized Defendants from suit, even in their official capacities, as to all claims. *See Hadaway Decl*. at ¶¶13-15; *see also* Dkt. 93-5. Defense counsel reiterated this assertion of complete Eleventh Amendment immunity in a follow-up email. *Id.* at ¶14.

When asked for clarification, Defense counsel incorrectly asserted that Plaintiffs had sued Defendants for damages. *Id.* at ¶15. Mr. Hadaway repeatedly sought to disabuse counsel of the notion that Plaintiffs were seeking damages, but counsel nevertheless persisted in taking that position. *Id*. at ¶16.

Subsequently, on July 8, 2022, Plaintiffs engaged in a good faith conferral meeting with Defendants to further discuss the grounds for their then-anticipated MJOP. During this meeting, Defendants finally clarified that federal courts cannot grant any relief against state officials based on state law. *Id.* at ¶17. Mr. Hadaway thanked defense counsel for the clarification and promised to look into the matter, which he did. *Id*.

Plaintiffs' counsel then confirmed that Defendants were immune from the state law claims in federal court. *Id*. at ¶18. Although Plaintiffs disagreed with Defendants' arguments regarding the ADA Claim, Plaintiffs' counsel ultimately determined that the claim was procedurally unripe and thus agreed to dismiss it without prejudice. *Id.* at ¶20. Accordingly, Plaintiffs notified defense counsel of their agreement to dismiss Counts III through VII without prejudice on July 15, 2022—*a deadline that had been expressly set by Defendants*. *See* Dkt. 93-7; *see also Michaels 7/8/22 Email,* attached as Ex. 2.

Plaintiffs' counsel's July 15, 2022 email was met with silence. *Id.* at ¶21. Five days later, on July 20, 2022, Plaintiffs attempted to confer with Defendants regarding a proposed third amended complaint ("TAC") that would dispose of Counts III-VII. *See Shoff 7/20/22 Email*, attached as Ex. 3. That was likewise met with silence. *See Shoff 7/25/22 Email*, attached as Ex. 4.

Defendants finally acknowledged Plaintiffs' agreement to dismiss without prejudice on July 25, 2022, but would not agree to the filing of a TAC. *See* Dkt. 94-2 at 1. Contrary to Defendants' insinuation, however, Plaintiffs' agreement to dismiss was not contingent upon the filing of a TAC. *Hadaway Decl.* at ¶21-22. Actually, Plaintiffs again advised Defendants later that same day (July 25th) that they maintained their agreement to dismiss the State/ADA Claims without prejudice. *See Shoff Decl.*, attached as Ex. 5, at ¶¶9-10; *c.f.,* Dkt. 93-1 at ¶11. Defendants never sent a proposed stipulation of dismissal, as required by Rule 41, but emailed demands for Plaintiffs to "dismiss" the claims. *Hadaway Decl*. at ¶27. Plaintiffs' counsel were unaware of how they were supposed to accomplish that without a joint stipulation. *Id*. at ¶28.

Defendants' MJOP heavily focused on the State/ADA Claims and, in particular, the incorrect notion that Plaintiffs were purportedly suing Defendants for damages in their individual capacities. *See* Dkt. 74 at 1-2, 5-9, 12-14 18-23. Defendants did so despite Plaintiffs' repeated explanations to the contrary. The Court subsequently agreed with Plaintiffs in its September 2, 2022, Order. Dkt. 82 at 5-7, 8.[2] In their opposition brief, Plaintiffs consented to dismissal without prejudice of the State/ADA Claims as previously agreed. *See* Dkt. 79 at 9.

On September 2, 2022, this Court granted Defendants' MJOP but gave Plaintiffs leave to amend their 14th Amendment equal protection claim (Count II). *See* Dkt. 82 at 12.

[2] Defendants still appear to mistakenly believe that Plaintiffs were suing them in their individual capacities. *See* Dkt. 93 at 13 (claiming the defense had "to develop arguments to respond to *Plaintiffs' efforts to. . . render liable the individuals named as Defendants*.") (emphasis added).

The Court did not dismiss the State/ADA Claims on their merits, but acknowledged and relied on Plaintiffs' agreement to dismiss them without prejudice. *See id.* at 7-8, 12-13.

D. The Parties' Conferral Process Regarding Defendants' Intent To Seek Post-Judgment Fees/Costs.

On September 9, 2022, Defendants advised Plaintiffs that they would seek fees/costs if Plaintiffs decided to amend their equal protection claim (Count II) pursuant to the Court's September 2, 2022, Order—*not because any of Plaintiffs' claims were purportedly "frivolous,"* let alone asserted or maintained in bad faith. *See Hadaway Decl.* at ¶39. Plaintiffs relied on defense counsel's September 9th threat in deciding not to amend the SAC and to rather appeal this Court's dismissal of Counts I and II. *Id.* at ¶40. But after Plaintiffs decided to forego amending the SAC, defense counsel reneged on their position.

On October 27, 2022—nearly two months after this Court's September 2nd Order—Defendants initiated conferral efforts regarding their intent to (at the time) recover the "fees and costs" purportedly incurred in defending against each claim in the SAC. *See* Dkt. 94-4. Defendants' October 27, 2022, conferral letter argued, for the first time, that all the claims in the SAC were "frivolous" and therefore provided grounds for a fee award under F.R.C.P. 54 and 42 U.S.C. § 1988. *See id*. No mention was made of § 1927, bad faith, or the Court's inherent authority. To avoid doubt, Plaintiffs' counsel requested clarification as to "against whom [Defendants] [sought] fees and costs[,]" to which defense counsel answered: "*Our motion for fees and costs is against the Plaintiffs." Hadaway Decl.* at ¶40 (emphasis added).

On November 18, 2022, Plaintiffs sent a detailed letter explaining why there are no grounds for Defendants to seek fees, and summarized Plaintiffs' objections to the billing entries in the Joint Statement. *See* Dkt. 94-6. Defendants later withdrew their threat to move for fees/costs for defending against the 14th Amendment claims, indicating on December 8, 2022, that they were only going to seek fees/costs for defending against the State/ADA Claims. *See* Dkt. 94-7 at 2.

1 Defendants' December 8th letter, however, failed to address the arguments raised in
2 Plaintiffs' November 18th letter while aknowledging that the defense's "Final" Joint
3 Statement failed to segregate the billing entries based on the specific claims being
4 addressed. *See id*. This was so despite representing they were only seeking fees/costs for
5 defending against the State/ADA Claims. Not only that, but Defendants stated without
6 explanation that they would (and indeed their present Motion now does) seek an arbitrary
7 award of 5/7ths of the total fees/costs incurred in defending against Plaintiffs' entire
8 lawsuit. *Id*.; *see also* Dkt. 93 at 14; Dkt. 93-1, at ¶22.
9 Even more, Defendants' counsel still to this day have not provided a declaration
10 describing the nature of the substantial redactions riddled throughout the Joint Statement,
11 as required by this Court's Standing Order Regarding Motions For Fees. *See* Dkt. 93-1, at
12 ¶20; *c.f., generally*, Dkt. 95. Notably, Plaintiffs requested said declaration on several
13 occasions, to no avail. *See* Dkt. 94-6, at 6, 7; *see also Dimarco 12/14/22 Email*, attached
14 as Ex. 6; Dkt. 94-8 at 1.
15 Plaintiffs nevertheless provided their portion of the Joint Statement on December
16 20, 2022, in an effort to confer in good faith while maintaining their right to object to any
17 redacted entries. *See* Dkt. 94-8 at 1-2. Defendants sent *another* "final" Joint Statement on
18 January 12, 2023, but Plaintiffs considered the matter closed and forewent any further
19 attempt to confer. Defendants subsequently filed this Motion on January 19, 2022, despite
20 having changed their legal basis for doing so and having never conferred with Plaintiffs
21 about moving for sanctions against Plaintiffs' attorneys.

22 **III. LEGAL STANDARDS**

23 **A. Excess Costs, Expenses, and Attorneys' Fees Under § 1927.**

24 Title 28 U.S.C. § 1927 provides that "[a]n attorney. . . who so multiplies the
25 proceedings in any case unreasonably and vexatiously may be required by the court to [pay]
26 the excess costs, expenses, and attorneys' fees reasonably incurred because of such
27 conduct." Section 1927 sanctions are intended to prevent "unnecessary filings and tactics
28 once a lawsuit has begun." *In re Keegan Mgmt. Co., Securities Litigation*, 78 F.3d 431, 435

(9th Cir.1996). "District courts have substantial discretion to decide whether to award sanctions under § 1927. . . [] and in what amount." *Horvath*, 2022 WL 9569264 at *2.

To begin, **"[t]he Court may not . . . impose § 1927 sanctions against an attorney's clients."** *Vang v. Lopey*, No. 2:16-CV-2172-JAM-CMK, 2017 WL 6055771, at *2 (E.D. Cal. Dec. 7, 2017) (citation omitted) (emphasis added). Furthermore, sanctions should not be imposed under Section 1927 unless an "'attorney. . .' created 'needless proceedings' or 'prolonged litigation,' *and* [] the conduct was vexatious *as well as* unreasonable." *Horvath*, 2022 WL 9569264 at *2 (emphasis added). Neither an attorney's alleged ignorance nor negligence will suffice as a basis for sanctions under Section 1927. *See Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001). And an attorney's alleged "recklessness" in multiplying the proceedings can only provide a basis to recover excess costs under Section 1927 "when combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Id.* at 994; *see also Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 852 (9th Cir. 2007). Said differently, Section 1927 sanctions are only appropriate where an attorney acted with "subjective" bad faith. *See Arutyunyan v. Cavalry Portfolio Servs*., No. CV 12-4122 PSG (AJWx), 2013 U.S. Dist. LEXIS 56062, at *4-5 (C.D. Cal. Mar. 7, 2013) ("a finding of subjective bad faith is 'crucial,' as a frivolous argument by itself is insufficient to support an award of sanctions under § 1927.") (citation omitted); *Horvath*, 2022 WL 9569264 at *2; *In re Keegan*, 78 F.3d at 436.

B. Fees, Expenses, and Costs Under 42 U.S.C. § 12205.

"[T]he attorney's fees provision for [claims brought under] the ADA is codified in 42 U.S.C. § 12205 []: 'In any action ... commenced pursuant to this chapter, the court ... in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs.'" *Smith*, 2021 WL 4935973 at *1 (quoting 42 U.S.C. § 12205[3]). Importantly, a defendant must be the "prevailing party" before they can recover

[3] This is the same standard applicable to awarding attorney's fees in Section 1983 cases pursuant 42 U.S.C. § 1988(b). *See Kuper v. Empire Blue Cross & Blue Shield*, No. 99-CV-1190, 2004 WL 97685, at *2 (S.D.N.Y. Jan. 20, 2004).

an award of fees under Section 12205. And even if a defendant does "prevail" in a civil rights action, "[a]n award of fees. . . is properly limited to exceptional circumstances, because federal law seeks to encourage individuals to seek relief for violations of their civil rights." *Alweiss v. City of Sacramento*, No. 2:21-CV-00784-JAM-DB, 2022 WL 1693507, at *1 (E.D. Cal. May 26, 2022).

Thus, a prevailing defendant in a civil rights case may only recover attorney's fees where "a court finds [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly become so." *Id*. (quoting *Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n,* 434 U.S. 412, 422 (1978)); *see also Fish v. Santa Clara Cnty*., No. 18-CV-06671-VKD, 2019 WL 3207826, at *3 (N.D. Cal. July 16, 2019). In that regard, "groundless, without foundation, [and] frivolous" are terms which "do not have appreciably different meanings[,]" and, importantly, a plaintiff's claims can only be found "frivolous" when it is shown that the complaint "'patently fail[s] to state a claim' and lack[s] any factual basis." *See Feldman*, 504 F.3d at 852 (quoting *Price v. State of Hawaii*, 939 F.2d 702, 709 (9th Cir. 1991)).

"In determining [] whether this standard has been met, a district court must assess the claim at the time the complaint was filed, and must avoid *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th Cir. 2006) (internal citations omitted); *see also R.P. ex rel. C.P. v. Prescott Unified Sch. Dist*., 631 F.3d 1117, 1126 (9th Cir. 2011) ("the fact that the [plaintiffs'] arguments were not successful doesn't make them frivolous.") (citations omitted). If it were otherwise, then "[l]awyers would be improperly discouraged from taking on potentially meritorious [civil rights] cases if they risked being saddled with a six-figure judgment for bringing a suit where they have a plausible, though ultimately unsuccessful, argument, as here." *Prescott Unified Sch. Dist*., 631 F.3d at 1126.

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C. Sanctions Imposed Under the Court's Inherent Authority.

The "district court has the inherent power to impose sanctions on counsel who 'willfully abuse[s] judicial processes.'" *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) (citations omitted). However, the court's inherent power "is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function." *Chambers v. NASCO, Inc*., 501 U.S. 32, 42 (1991). Thus, to invoke such power, "[t]here must be 'some indication of an intentional advancement of a baseless contention that is made for an ulterior purpose, *e.g.*, harassment or delay.'" *Doyle v. Illinois Cent. R. Co*., No. CVF08-0971LJOSMS, 2009 WL 224897, at *6 (E.D. Cal. Jan. 29, 2009) (citation omitted).

Stated differently, inherent powers sanctions must be supported by "[a] specific finding of bad faith[.]" *See Fink*, 239 F.3d at 992. "'Bad faith' means a party or counsel acted 'vexatiously, wantonly or for oppressive reasons.'" *Doyle*, 2009 WL 224897 at *6 (citations omitted). And even where the requisite level of culpability is shown, a party can only recover the "excess" costs/expenses/fees directly incurred due to the allegedly sanctionable conduct. *See, e.g., Horvath*, 2022 WL 9569264 at *2; *Blodgett*, 709 F.2d at 610-11; *Skanska USA Civ. W. Cal. Dist. Inc. v. Nat'l Interstate Ins. Co.*, 551 F. Supp. 3d 1010, 1032 (S.D. Cal. 2021) ("Sanctions must bear a financial nexus to the. . . [sanctionable] conduct.") (citation omitted).

As such, fees/expenses which were unnecessarily incurred or could have been reasonably mitigated are not recoverable, such as those incurred for engaging in fact discovery to purportedly defend against or establish questions of law. *See*, *e.g.*, *Calop Bus. Sys., Inc. v. City of Los Angeles*, 984 F. Supp. 2d 981, 1019 (C.D. Cal. 2013). Importantly, "sanctions ... should not be assessed lightly or without a fair notice and an opportunity for a hearing on the record[,]" and "[w]here. . . the conduct giving rise to the imposition of sanctions occurred outside the presence of the court, counsel should be provided an opportunity to explain his conduct." *Blodgett*, 709 F.2d at 610 (citations omitted).

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IV. ARGUMENTS & AUTHORITIES

As demonstrated below, Defendants are not entitled to an award of fees/expenses or other sanctions for defending against the State/ADA Claims. Neither Plaintiffs nor their counsel engaged in any sanctionable conduct or did anything to unreasonably or vexatiously multiply the proceedings, and Defendants offer no evidence indicating otherwise. In fact, the evidence shows that if anyone acted in bad faith or multiplied the proceedings, it was Defendants and their counsel. Additionally, the fees/costs requested by Defendants were unnecessarily incurred, substantially excessive, and/or not tailored to the allegedly sanctionable conduct and, therefore, unrecoverable.

A. Defendants Are Not "Prevailing Parties" For Purposes of Plaintiffs' State/ADA Claims.

As an initial matter, Defendants did not prevail over Plaintiffs' State/ADA Claims and, thus, cannot recover fees/costs/expenses under F.R.C.P. 54(d) or 42 U.S.C. § 12205, both of which are only available to "prevailing part[ies]." *See* F.R.C.P. 54(d); *see also* 42 U.S.C. § 12205. As detailed above, this Court's September 2, 2022, Order did not inquire into the merits of Plaintiffs' State Claims, *see* Dkt. 82 at 7-8, and Plaintiffs' agreement to dismiss them was *without prejudice* and at all times purely based on the legal (11th Amendment immunity) grounds raised during the conferral process. *See Kloberdanz v. Martin*, No. 98-16686, 1999 U.S. App. LEXIS 38084, at *3 (9th Cir. Nov. 29, 1999).

The same is true with respect to Plaintiffs' ADA Claim—i.e., Defendants are not the "prevailing party" over that claim—even though this Court's September 2, 2022, Order found that Plaintiffs failed to allege a "physical or mental impairment" as required to state a claim under the ADA. Dkt. 82 at 12. To be clear, Plaintiffs' SAC did allege a "physical or mental impairment"[4] but, regardless, the Court dismissed this claim "*without prejudice*" and otherwise did not inquire into the merits of the same. *See id.* at 13 (emphasis added);

[4] *See* ECF 65 at ¶¶122-23; 42 U.S.C. § 12102(1)(C) ("'*disability' means*, with respect to an individual. . . *being regarded as* having [a physical or mental impairment]") (emphasis added); *see also* 42 U.S.C. § 12102(3).

see also Oscar v. Alaska Dep't of Educ. & Early Dev., 541 F.3d 978, 981 (9th Cir. 2008) ("a defendant is not a 'prevailing party' with regard to claims dismissed without prejudice.").

Defendants' Motion attempts to sidestep this issue by relying on this Court's *merits-based dismissal of Plaintiffs' Fourteenth Amendment claims*. *See* Dkt. 93 at 10. But Defendants' Motion is not even seeking fees/costs/expenses or other sanctions for defending against Plaintiffs' Fourteenth Amendment claims. *See id.* at 14, 20. Defendants' conclusory argument that they are the "prevailing party" for purposes of Plaintiffs' State/ADA Claims should thus be rejected.

B. Plaintiffs' State/ADA Claims Were Asserted In Good Faith and Did Not Multiply the Proceedings.

Even if Defendants were the "prevailing party" for purposes of Plaintiffs' State/ADA Claims, that does not mean they are entitled to an award of fees/sanctions. *See Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994) ("the mere fact that a defendant prevails does not automatically support an award of fees."). Rather, for purposes of the present Motion, Defendants have the heavy burden to show, at minimum, that (1) Plaintiffs' State/ADA Claims are "frivolous" and (2) that those claims were asserted and/or maintained in bad faith or in an unreasonable and vexatious manner which multiplied the proceedings. *See*, *e.g.*, *Fink*, 239 F.3d at 992, 994. Defendants have not and cannot make such a showing.

Defendants' Motion is replete with their own conclusory characterization of Plaintiffs' claims and the intent for asserting the same, arguing for instance that "[*n*]*othing proves Plaintiffs and their counsels' intent to pursue frivolous, bad faith claims more than their delayed concession in their opposition to Defendants' JOP Motion that the third through seventh causes of action should be dismissed*." Dkt. 93 at 16 (emphasis added).

Similarly, Defendants contend without evidentiary support that, "*[b]y knowingly filing and continuously litigating meritless* state law claims, *Plaintiffs* [sic] *forced Defendants to litigate these claims through motion practice and discovery exchanges*, all

the while incurring costs and fees." *Id.* at 18 (emphasis added); *see also id.* at 15 ("Plaintiffs' Counsel *Knowingly Filed and Maintained Frivolous* State Law *Claims* Against Defendants *In Bad Faith*[]") (emphasis added); *id.* at 7 ("*Plaintiffs' delay and approach were. . . designed to force Defendants* to *incur substantial additional attorneys' fees and costs*") (emphasis added).

As detailed above and further below, however, Defendants' unsupported and conclusory contentions hold no weight.

1. Plaintiffs' State/ADA Claims Are Not "Frivolous."

The State/ADA Claims were asserted with the good faith belief that this Court had pendent jurisdiction over the same and that they fell within the *Ex Parte Young*[5] Doctrine as they arose from the same nucleus of operative facts as Counts I and II, which sought prospective injunctive relief against Defendants related to their ongoing violation of federal law. *Hadaway Decl*. at ¶11. Furthermore, Plaintiffs' agreement to dismiss Counts III-VII was based solely on the Eleventh Amendment grounds raised by Defendants during the conferral process and Plaintiff counsel's conclusion, after further review, that the ADA claim was not procedurally ripe. Plaintiffs never conceded that those claims somehow lacked factual or substantive merit, as Defendants suggest. *Id*. at ¶¶13, 27.

The defense seeks to have this Court conduct a *post hoc* analysis of the State/ADA Claims. *See* Dkt. 93 at 17-19; *but see Tutor-Saliba Corp*., 452 F.3d at 1060; *Prescott Unified Sch. Dist.*, 631 F.3d at 1126. The Court should not be so baited, though, especially considering that its September 2, 2022 Order did not dismiss those claims on the merits. *See* Dkt. 82 at 7-8, 12-13. In addition, such a *post hoc* analysis would be inconsistent with "the Supreme Court's warning that attorney's fee motions 'should not result in a second major litigation.'" *Tang v. State of R.I., Dep't of Elderly Affs*., 163 F.3d 7, 15 (1st Cir. 1998) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

Nonetheless, a brief review of Plaintiffs' claims demonstrates that they certainly were not "frivolous." For example, and contrary to Defendants' contentions, Plaintiffs'

[5] 209 U.S. 123 (1908).

"*Skelly*"[6] claim did not assert an independent claim under *Skelly*, itself, but rather a procedural due process claim based on Defendants' failure to provide a pre-termination hearing. *See* Dkt. 65 at ¶¶127-32; *see also Bahra v. Cty. of San Bernardino*, 2018 U.S. Dist. LEXIS 238197, at *30 n.3 (C.D. Cal. Jan. 26, 2018).

Plaintiffs' ADA claim (Count IV) is certainly a viable cause of action. As noted above, although the Court found that Plaintiffs failed to allege a "physical or mental impairment" for purposes of stating a claim under the ADA, Dkt. 82 at 12, Plaintiffs' SAC did in fact allege that the Mandate unlawfully caused them to be "regarded as" having such a "physical or mental impairment"—i.e., not receiving the Covid-19 "vaccine"—which ultimately resulted in their termination. *See* Dkt. 65 at ¶¶122-23; 42 U.S.C. § 12102(1)(C); *see also* 42 U.S.C. § 12102(3). But even if Count IV did fail to state a claim under the ADA, that certainly does not demonstrate the claim is "frivolous," let alone the existence of sanctionable or otherwise bad faith conduct. *See Prescott Unified Sch. Dist.*, 631 F.3d at 1126. Indeed, the Court only dismissed this claim "without prejudice." Dkt. 82 at 13; *see also Oscar*, 541 F.3d at 981.

Plaintiffs' claim brought under the California state constitution (Count III) alleged the Mandate violated their constitutionally protected right to privacy, both in bodily integrity and private medical information. Dkt. 65 at ¶¶107-17. This is a viable cause of action with substantial factual support. *See Am. Acad. of Pediatrics v. Van De Kamp*, 214 Cal. App. 3d 831, 844, 263 Cal. Rptr. 46, 53 (1989) ("California's Constitution. . . provides that the right of privacy is guaranteed[.]").

And finally, Plaintiffs' last two state law claims (Counts VI and VII) were based on the factually supported/well-pleaded allegations that Defendants were disclosing private medical and personal information of LAUSD employees to a company called Fulgent Genetics without the employees' consent. Dkt. 65 at ¶¶133-44; *see also J. Howard Decl.*, at ¶9, attached as Ex. 7.

[6] *Skelly v. State Pers. Bd.*, 15 Cal. 3d 194, 215 (1975).

As demonstrated above, Plaintiffs' State/ADA Claims are clearly not "frivolous." Indeed, Defendants' Motion specifically acknowledges that this case was "untypical [in] nature[]" and one of the "unprecedented situations over the past two years" which stemmed from COVID-19 and "employers' efforts to try to contain the spread of the virus[.]" Dkt. 93 at 13. Given the unprecedented nature of the circumstances, which Defendants acknowledge, it was surely reasonable for Plaintiffs' counsel to seek out ways to apply existing law to those circumstances. *See e.g., Legal Servs. of N. Cal., Inc. v. Arnett*, 114 F.3d 135, 141 (9th Cir.1997).

2. Neither Plaintiffs Nor Their Counsel Acted In Bad Faith or Multiplied the Proceedings.

Contrary to Defendants' unsupported contentions, neither Plaintiffs nor their counsel ever "knowingly" (or recklessly) "pursue[d]" or "litigated" the State/ADA Claims "in bad faith" or in a manner that somehow vexatiously multiplied the proceedings. *See* Dkt. 93 at 7, 15, 16, 18. For starters, vexatious, bad-faith litigants generally do not offer to narrow the factual allegations of their pleadings in order to streamline discovery and trial, which is precisely what Plaintiffs' counsel did when proposing and filing the SAC. *See Hadaway Decl.* at ¶¶7-10.

Defendants' argument is largely based on the unfounded notion that Plaintiffs "delayed" their concession that the State/ADA Claims should be dismissed, which purportedly caused Defendants to incur unnecessary costs and fees. *See*, *e.g.*, Dkt. 93 at 7, 16. But, as detailed above, Plaintiffs' counsel explicitly agreed to dismiss those claims without prejudice on the exact date requested by defense counsel (July 15, 2022). *See Michaels 7/8/22 Email* (Ex. 2); *see also* Dkt. 93-7. Prior to then, and as also detailed above, the defense's arguments during the conferral process were centered on their incorrect notion that Plaintiffs were suing Defendants for damages in their individual capacities, an argument this Court specifically rejected. *See Hadaway Decl.* at ¶¶13-17; Dkt. 82 at 5-7, 12-13.

So, it is misleading and inaccurate for Defendants to tell this Court that Plaintiffs somehow delayed their concession/agreement to dismiss Counts III-VII, or that "the flaws of these claims had been brought to Plaintiffs' attention on several occasions before the filing of the JOP Motion." Dkt. 93 at 16, 17. They had not. At most, Defendants can point to a series of miscommunications for which they must bear some responsibility. For Plaintiffs' counsels' part, a mistake or oversight is insufficient to give rise to bad faith. *See Fink*, 239 F.3d at 993.

The same is true for Defendants' untruthful argument that, after agreeing to dismiss the State/ADA claims without prejudice, Plaintiffs "took no action to dismiss those claims, thus forcing Defendants to incur the costs of briefing [those claims] in their JOP Motion. . . [and] the costs of preparing to depose three of the individual Plaintiffs on the third through seventh claims." Dkt. 93 at 7. To the contrary, Plaintiffs did indeed make a good faith attempt to dismiss the State/ADA Claims within just days of expressly agreeing to do so. *See Shoff 7/20/22 Email* (Ex. 3); *see also Shoff 7/25/22 Email* (Ex. 4). That Rule 41 did not allow Plaintiffs to unilaterally dismiss those claims without a joint stipulation in no way suggests that they intended to or did pursue those claims in bad faith. Defendants could have proposed a stipulation of dismissal as required under Rule 41. They did not.

Even more, neither Plaintiffs nor their counsel did anything to continue litigating/pursuing those claims at any time after agreeing to dismiss the same without prejudice. Defendants offer zero evidence to demonstrate otherwise, despite the serious accusations riddled throughout their Motion. As a result, even if the State/ADA Claims were "frivolous," Defendants' Motion still fails because they have made no showing that this is one of the "exceptional circumstances. . . [where Plaintiffs] continued to litigate [those claims] ***after it clearly become so***." *See Alweiss*, 2022 WL 1693507 at *1 (emphasis added); *see also Arutyunyan*, 2013 U.S. Dist. LEXIS 56062 at *4-5 (citing *Estate of Blas Through Chargualaf v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986) for the proposition that awarding fees under Section 1927 would be inappropriate "when the plaintiff's arguments

were not frivolous and, *even if they had been frivolous, it was not shown that they were made in bad faith*") (emphasis added)).

C. Defendants Requested Fees/Costs/Expenses Were Unnecessarily Incurred, Excessive, and/or Not Tailored to the Allegedly Sanctionable Conduct.

As detailed above, Plaintiffs acquiesced to dismissal of the State Claims primarily based on 11th Amendment immunity, and the ADA claim as procedurally unripe, both of which present questions of law that can be raised at any time. *See Clemes v. Del Norte Cty. United Sch. Dist.*, No. C-93-1912 MHP, 1996 U.S. Dist. LEXIS 21883, at *15 (N.D. Cal. May 28, 1996). Nonetheless, Defendants' Motion seeks to recover over $200,000 in fees/costs for activities that relate to fact discovery primarily tailored towards the 14th Amendment claims, such as

> *reviewing subpoenas. . .*; *preparing for and meeting and conferring. . . regarding. . . subpoenas and discovery disputes*; *collecting documents responsive to. . . subpoenas . . .*; *preparing objections to. . . subpoenas*; *preparing. . . for. . . Plaintiffs' depositions*; *preparing. . . for and defending. . . a deposition*;. . . *interviewing. . . witnesses*; . . . *drafting and responding to discovery. . .*; *preparing. . . documents for production*; *reviewing. . . documents produced by Plaintiffs*; *interviewing and conferring with* approximately two dozen *expert witnesses*.

Dkt. 93-1 at ¶6 (emphasis added).

Because Defendants could have, according to their logic, sought dismissal of Counts III-VII on ***legal*** grounds from the outset of the case—*see* Dkt. 93 at 7—the alleged excessive fees/costs incurred for engaging in fact/expert discovery to defend against those claims were unnecessarily incurred. *See*, *e.g.*, *City of Los Angeles*, 984 F. Supp. 2d at 1019-20 ("If any party's conduct generated additional, unnecessary attorney's fees. . . it was [the moving party]" because "it was not necessary for [them] to engage in discovery to establish the law that applied to the case.").

Defendants' Motion specifically acknowledges that defense counsel knew "by June 23, 2022, [that the State/ADA Claims] could not be ***legally*** maintained." Dkt. 93 at 7

(emphasis added). Yet, after June 23, 2022, Defendants' attorneys billed "approximately 448 hours." *Id*. at 14. If Defendants truly believed the State/ADA Claims could have been dismissed on legal grounds from the outset of the case, then there was no need to bill hundreds of hours for consulting with experts, preparing and serving written discovery, or conducting any Plaintiff depositions to defend against the same. *See id.* at 13-14.

Furthermore, Defendants cannot recover the fees/costs that were unnecessarily incurred as a result of defense counsel's unreasonable insistence on conducting the depositions of Plaintiffs Norma Brambila, Jeffrey Fuentes, and Sandra Garcia in person on three separate dates. Plaintiffs' counsel, Brant Hadaway, informed the defense on several occasions that Plaintiffs' claims mainly involved legal issues for which the noticed Plaintiffs had no knowledge and, therefore, requested their depositions be taken via Zoom (and more than one per day) to save the parties time and money. *See Hadaway Decl*. at ¶¶31-36. Notably, Plaintiffs advised Defendants of their agreement to dismiss the State/ADA claims without prejudice well before these depositions took place (in late August 2022). *Id*. So, any fees/expenses incurred as a result of Plaintiffs' depositions were unnecessarily incurred or excessive.

Likewise, the fees/costs that were purportedly incurred to conduct substantial research for and draft a response to a "potential" motion for preliminary injunction were totally unnecessary and thus unrecoverable. *See* Dkt. 95 at 14, 19, 29, 34, 38, 51, 52, 53, 61, 66, 67. Plaintiffs never stated or even indicated a "potential" intent to file a motion for preliminary injunction.

As well, any fees/costs incurred as a result of responding to Plaintiffs' discovery requests—including the subpoenas and any conferral efforts regarding the same—would not be related to the State/ADA Claims and, thus, not tailored to the allegedly sanctionable conduct. *See Blodgett*, 709 F.2d at 610-11. This is because essentially all of Plaintiffs' discovery requests served after Defendants first initiated conferral efforts on their MJOP

only sought information/documents which, if produced,[7] would have supported Counts I and II, and Defendants' Motion only seeks fees/costs/sanctions for having to defend against Counts III-VII. *See* Dkt. 93 at 20.

Similarly, Defendants' request for 5/7ths of their total fees and costs is illogical and, again, blatantly disregards the clearly established law that Defendants can only recover fees/costs that are specifically tailored to the allegedly sanctionable conduct. *Blodgett*, 709 F.2d at 610-11. So, even assuming Defendants were entitled to an award of fees/costs (which they are certainly not), merely stating in conclusory fashion that they are only seeking "5/7s (for the 5 state claims) of their total fees ($293,443)" does not demonstrate how or why such an award ($203,410.90) would be "appropriate." *See* Dkt. 93 at 14; *see also Tutor*, 452 F.3d at 1065 (finding defendants "failed adequately to separate out what percentage of fees were incurred on each claim[,]" and reversing the lower court's award of fees where "its order failed to reveal. . . how it reached the conclusion that 20 percent of counsel's time and costs were apportionable to the defense against [plaintiff's] frivolous claims.").

Indeed, as noted above, the primary focus of Plaintiffs' case was always their 14th Amendment claims. Tellingly, the factual allegations in the SAC are primarily tailored toward demonstrating the same—i.e., that the Covid-19 "vaccines" are not really "vaccines" and that, as a result, *Jacobson*[8] and its progeny does not govern the constitutionality of the Mandate. *Hadaway Decl*. at ¶31. Furthermore, as noted above, essentially all of Plaintiffs' discovery requests sought information in support of the 14th Amendment claims (Counts I and II). It is thus impossible to imagine that only 2/7ths of the defense's incurred fees/costs were associated with defending against Plaintiffs primary claims brought under the 14th Amendment.

[7] Defendants provided no information or documents in response to the mere handful of requests seeking information in support of the State Law/ADA Claims and, thus, it is nearly impossible to believe they were "burdened" by Plaintiffs' discovery requests. *See* Dkt. 93 at 15; *see also Hadaway Decl*. at ¶23-25.

[8] 197 U.S. 11.

The same goes for Defendants' request for "1/3 of the total amount billed with respect to expert witnesses." *See* Dkt. 93-1 at ¶22; *see also* Dkt. 93 at 19. As noted above, it was unnecessary to incur expert expenses to defend against Plaintiffs' State/ADA Claims and, regardless, none of Defendants' experts appear to have been retained to offer opinions on the same. *See e.g., Defs. 9/1/22 Expert Disclosures*, attached as Ex. 8, at 3-7. Tellingly, Defendants' only designated testifying expert, Dr. Arthur Reingold, produced a report specifically tailored towards defending against the 14th Amendment claims. *See id.* at Ex. A, p.14. And all three of Plaintiffs' designated experts likewise focused only on the disputed facts underpinning the 14th Amendment claims. *See Hadaway Decl.* at ¶37. So, even had the State/ADA Claims never been brought, Defendants' experts would have been necessary to address the 14th Amendment claims. And curiously, a majority of the defense's expert expenses appear to have been incurred after this Court granted dismissal on September 2, 2022. *See* Dkt. 95 at 240, 242, 246, 249-50, 252-54, 256-58. Thus, Defendants' expert expenses were either unnecessarily incurred or not tailored to the allegedly sanctionable conduct and, as a result, are unrecoverable.

Defendants' Motion states that the allegedly sanctionable conduct only caused them to incur the fees/costs for "briefing [their] MJOP" on Counts III-VII, and "preparing to depose three of the individuals Plaintiffs on [Counts III-VII]." *See* Dkt. 93 at 7. But, as above, it was unnecessary to take all-day, in-person depositions of Plaintiffs, and Defendants could have mitigated the costs of briefing the MJOP on Counts III-VII had they simply communicated more effectively or proposed a stipulation of dismissal as required by Rule 41 after Plaintiffs ultimately agreed to dismiss. As such, an award of over $200,000 for briefing these issues in the MJOP and preparing for three Plaintiff depositions would be, at best, substantially excessive.

<u>CONCLUSION</u>

For the above and forgoing reasons, Defendants' Motion for Attorneys' Fees and Sanctions should be denied.

Respectfully submitted,

Dated: March 13, 2023

ADVOCATES FOR FAITH & FREEDOM

/s/ Robert H. Tyler
Robert H. Tyler

Dated: March 13, 2023

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 11-6.1

The undersigned, counsel of record for Plaintiffs Health Freedom Defense Fund, Inc., California Educators For Medical Freedom, Miguel Sotelo, Jeffrey Fuentes, Sandra Garcia, Hovhannes Saponghian and Norma Brambila, certifies that this brief contains 6,905 words, which complies with the word limit of Local Rule 11-6.1.

Dated: March 13, 2023

ADVOCATES FOR FAITH & FREEDOM

/s/ Robert H. Tyler
Robert H. Tyler

Dated: March 13, 2023

DAVILLIER LAW GROUP

/s/ George Wentz
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Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2023 I electronically filed **PLAINTIFFS MEMORANDUM OF POINTS AND AUTHOITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND SANCTIONS** with the Clerk of the Court by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

Executed on March 13, 2023, at Murrieta, California.

s/ Robert H. Tyler
Robert H. Tyler