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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY ISAACS, Dr., Plaintiff-Appellant, v. USC KECK SCHOOL OF MEDICINE, Defendant-Appellee, and DARTMOUTH HITCHCOCK MEDICAL CENTER; et al., Defendants.	No. 20-55633 D.C. No. 2:19-cv-08000-DSF-RAO MEMORANDUM* (Filed Apr. 22, 2021)
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Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding
Argued and Submitted April 14, 2021
Pasadena, California

Before: M. SMITH and IKUTA, Circuit Judges, and
STEELE,** District Judge. Dissent by Judge IKUTA

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

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Appellant Jeffrey Isaacs challenges the district court's award of attorneys' fees and costs to Appellant University of Southern California Keck School of Medicine (USC). Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to our ruling. The district court's application of state law to the facts is reviewed de novo. *Price v. Seydel*, 961 F.2d 1470, 1475 (9th Cir. 1992). Where the district court applies the correct legal standard, we review a district court's award of attorneys' fees for abuse of discretion. *Marsu, B. V. v. Walt Disney Co.*, 185 F.3d 932, 939 (9th Cir. 1999). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The district court based its award of attorneys' fees on the 2008 settlement agreement between Issacs and USC. That contract provides that Isaacs "will not file any lawsuits, charges, claims for arbitration, complaints, or appeals at any time hereafter based on, referring to, or incorporating any events, acts or omissions through and including the date hereof." The agreement further provides that if Isaacs violates the above provision and files a complaint against USC "based on any events, acts or omissions through and including the date hereof, Isaacs will pay for all costs and losses, including attorneys' fees, incurred by USC in connection with said lawsuit, charge, complaint, or appeal." As the district court correctly noted, both the instant action and Isaacs's prior, voluntarily dismissed action refer and incorporate acts that occurred before

2008.¹ Accordingly, USC is entitled to attorneys' fees and the district court did not err in granting USC's motion.

AFFIRMED.

Isaacs v. USC Keck School of Medicine, No. 20-55633
IKUTA, Circuit Judge, dissenting:

The majority today affirms the district court's award of attorneys' fees on the ground that the 2008 settlement agreement entitles USC to legal fees for any lawsuit that "refer[s] and incorporate[s] acts that occurred before 2008." I disagree with both the interpretation and the result.

I

Jeffrey Isaacs enrolled in USC but was expelled during his first year for nonacademic reasons. After Isaacs brought legal action against USC and other defendants relating to the expulsion, Isaacs and the defendants entered into two settlement agreements. In the first settlement agreement in 2007, USC agreed

¹ Our dissenting colleague raises an argument not raised by either party or considered by the district court below. Whether Isaacs is precluded from enforcing either settlement agreement to which he is a party is not relevant to the question before this court, which is whether, pursuant to the 2008 settlement agreement, USC is entitled to the attorneys' fees it incurred in litigating against Isaacs's wide variety of claims, some of which relate to and refer to pre-2008 events.

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not to “release or disclose Isaacs’ disciplinary records to any third party.” In the second settlement agreement in 2008, Isaacs agreed “that he will not file any lawsuits, charges, claims for arbitration, complaints, or appeals at any time hereafter based on, referring to, or incorporating any events, acts or omissions through and including the date hereof.” If he violated this promise and filed a lawsuit against USC “based on any events, acts or omissions through and including the date hereof, Isaacs will pay for all costs and losses, including actual attorneys’ fees, incurred by USC in connection with said lawsuit, charge, complaint, or appeal.”

In September 2019, Isaacs brought a legal action against USC alleging, among other things, that USC had breached its agreement in the 2007 settlement agreement not to disclose his disciplinary records. After the district court dismissed the complaint with prejudice, it granted USC’s motion for all attorneys’ fees and costs it had incurred in connection with Isaac’s operative complaint (as well as for fees and costs incurred in connection with a prior complaint that Isaacs had voluntarily withdrawn). This attorneys’ fees award is the subject of this appeal.

II

The majority today affirms the district court on the ground that the language in the 2008 settlement agreement entitles USC to legal fees for any lawsuit brought by Isaacs that “refer[s] to, or incorporat[es]” or

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is “based on any events, acts or omissions through and including the date [of the agreement].” Apparently, the majority interprets this language as precluding Isaacs from bringing a lawsuit to enforce either the 2007 or 2008 settlement agreement, because such a lawsuit would necessarily refer to an act that occurred before (or on the date of) the 2008 settlement agreement—namely, the execution of the settlement agreements themselves. Such an interpretation is unreasonable. The parties clearly did not intend that by entering into the 2008 settlement agreement, Isaacs would be precluded from enforcing it.

As indicated above, USC is only entitled to attorneys’ fees in response to lawsuits prohibited by the settlement agreement. Contrary to the majority, Majority at 3 n.1, Isaacs’ central argument is that the attorneys’ fees provision does not apply to his complaint in this case, because it focuses on USC’s breach of the settlement agreements, which he claims is not a prohibited lawsuit. The majority’s ruling that USC is entitled to attorneys’ fees here is necessarily based on its conclusion that the 2008 settlement agreement prohibits a lawsuit for breach of the settlement agreements. This conclusion makes the settlement agreements unenforceable.

Accordingly, to the extent Isaacs’ September 2019 complaint brought claims for breach of the settlement agreements, USC was not entitled to attorneys’ fees. USC would be entitled to attorneys’ fees, however, to the extent the complaint alleges non-breach-of-contract claims based on actions or events associated with

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USC's expulsion of Isaacs. Therefore, the district court should have apportioned the fees between covered and uncovered claims. *See Reynolds Metals Co. v. Alperson*, 25 Cal. 3d 124, 129 (1979) (the prevailing party may recover attorneys' fees only as they relate to some causes of action but not others); *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 811 (2004) (the court must apportion the attorney fees in a mixed contract/tort case). Because I would remand this case to the district court for apportionment of fees, I respectfully dissent.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DR. JEFFREY ISAACS, Plaintiff, v. USC KECK SCHOOL OF MEDICINE, et al., Defendants.	CV 19-8000 DSF (RAOx) Order GRANTING Motion for Attorney's Fees and Costs (Dkt. No. 99) (Filed May 15, 2020)
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Defendant USC Keck School of Medicine (USC) has moved for attorney's fees and costs incurred in this action and a previous related action. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

USC's request for fees and costs incurred in this action is based on (1) the 2008 settlement agreement between the parties and (2) its successful motion to strike under California Code of Civil Procedure § 425.16. Its request for fees and costs incurred in the previous case is based on Federal Rule of Civil Procedure 41(d).

USC is entitled to reasonable fees incurred in filing the anti-SLAPP motion under § 425.16. USC represents that those fees are \$5,092.64 for 6.2 hours of work. The number of hours billed and the total fees for the motion are eminently reasonable.

The Court will also award fees and costs pursuant to the 2008 settlement agreement. The fees provision in that contract is not a typical fees provision that

applies to enforcement of the contract itself. The provision at issue instead reflects an agreement by Plaintiff to pay fees and costs associated with cases he might bring in the future “based on any events, acts or omission through and including the date [of the contract].” Dkt. 1-2 at 35 of 53. This provides fee shifting for Plaintiffs attempts to litigate (or re-litigate) matters that happened before the settlement agreement but does not provide fee shifting for disputes over interpretation or enforcement of the 2008 settlement agreement itself.

While some of the claims and issues raised by this case involve USC’s alleged failure to comply with the settlement agreement, a large proportion of the case involves matters that occurred before the 2008 settlement. Most obviously, the “constructive fraud” and “fraud” claims, which allege that USC never intended to comply with the settlement agreement and thereby fraudulently induced Plaintiff to enter into that agreement through its false promises, are entirely based on actions prior to the consummation of the settlement. And while the other claims technically are based on actions subsequent to the 2008 settlement, references to and claims about acts prior to the 2008 settlement are pervasive throughout the complaint. See, e.g., Compl. 9, 22, 56, 61, 62, 184, 249, 254, 256, 276, 277, 314, 326.

Rule 41(d) states that a court “may order the plaintiff to pay all or part of the costs of [a] previous action” “based on or including the same claim against the same defendant.” The Court finds that Rule 41(d) “costs” can include attorney’s fees under appropriate

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circumstances, including the circumstances of this case. For the same reasons discussed above, USC would have been entitled to fees in the prior case except that it was unable to prevail in that case due to Plaintiffs voluntary dismissal. But that dismissal was illusory. This case is a direct continuation of the prior case. Plaintiff could have—and should have—simply filed an amended complaint in the prior case rather than filing a new case. In this context, it is reasonable to treat the later case as a continuation of the earlier one, and Rule 41(d) allows costs, including attorney’s fees, to be awarded for the earlier case given that fees and costs are available under the 2008 settlement agreement.

The requested amount of fees and costs is reasonable.¹ USC’s counsel’s hourly rate is on the higher side, but within the range charged in the local market for attorneys of comparable quality and size. Plaintiff provides no evidence or argument to support a different rate. The hours billed—226.2 total hours for both cases—are quite reasonable given the need to oppose a motion for a preliminary injunction and to file three motions to dismiss involving a lengthy complaint with numerous claims. As counsel notes, Plaintiff had sufficient time to challenge specific entries, but did not do so. The Court has reviewed the billing and finds that it is sufficiently detailed to allow the Court to evaluate the reasonableness of the work performed. There was no “block billing,” and counsel billed in tenths of an

¹ James P. Fogelman, the Gibson, Dunn & Crutcher LIP partner in charge of the litigation, declared that no fees were sought for defending the firm itself.

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hour, in accord with the Court's requirements. The matter was very efficiently staffed, with the work being performed primarily by a single associate.

The motion for fees and costs is GRANTED. Plaintiff is ordered to pay \$182,925.97 in fees and \$1,009.32 in costs to Defendant University of Southern California, Keck School of Medicine.

IT IS SO ORDERED.

Date: May 15, 2020 /s/ Dale S. Fischer
Dale S. Fischer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY ISAACS, Dr., Plaintiff-Appellant, v. USC KECK SCHOOL OF MEDICINE, et al., Defendant-Appellee. and DARTMOUTH HITCHCOCK MEDICAL CENTER; et al., Defendants.	No. 20-55633 D.C. No. 2:19-cv-08000-DSF-RAOx ORDER (Filed May 28, 2021)
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Before: M. SMITH and IKUTA, Circuit Judges, and
STEELE,* District Judge.

Judges M. Smith and Steele voted to deny the petition for panel rehearing. Judge M. Smith voted to deny the petition for rehearing en banc, and Judge Steele so recommends. Judge Ikuta voted to grant the petition for panel rehearing, and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

* The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

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The petition for panel rehearing and the petition
for rehearing en banc are **DENIED**.
