APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 14-56832

D.C. No. 8:11-cv-00278-DOC-RNB

[Filed October 11, 2017]

JOSE FLORES; RYAN REYES; BRIAN PEREZ,
Plaintiffs-Appellees,

v.

CITY OF WESTMINSTER; MITCHELL WALLER; ANDREW HALL; RON COOPMAN; KEVIN BAKER, in their individual capacities,
Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted August 11, 2017
Pasadena, California

Filed October 11, 2017

Before: Jerome Farris, Consuelo M. Callahan, and John B. Owens, Circuit Judges.

Opinion by Judge Farris

SUMMARY*

Employment Discrimination

The panel affirmed in part and vacated in part the district court's judgment, after a jury trial, in favor of three police officers of Latino descent who alleged discrimination and retaliation in violation of 42 U.S.C. § 1981 and the California Fair Employment and Housing Act.

The panel affirmed the district court's denial of the defendant City of Westminster's motions for a new trial and judgment as a matter of law on Officer Jose Flores's claim of retaliation in violation of FEHA. Viewing the evidence in the light most favorable to Officer Flores and drawing all reasonable inferences in his favor, the panel held that Officer Flores established that the City subjected him to one or more adverse employment actions, that his protected conduct was a substantial motivating factor behind the adverse employment actions, and that the City's proffered reasons for its actions were pretextual. The panel also affirmed the jury's award of damages to Officer Flores on the FEHA retaliation claim. The panel concluded that Officer Flores was not awarded a double recovery

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

because the FEHA damages award did not necessarily overlap with the damages awarded against the defendant police chiefs for their individual retaliatory actions in violation of § 1981.

The panel held that the district court did not err in denying the officers' discrimination and retaliation claims against the police chiefs under § 1981, which prohibits discrimination in the making and enforcement of contracts by reason of race. The panel held that California law providing that the employment relationship between the state and its civil service employees is governed by statute rather than contract should not be read to bar public employees from bringing claims under § 1981. The panel distinguished *Judie v. Hamilton*, 872 F.2d 919 (9th Cir. 1989), which predated the 1991 amendments to § 1981 expanding the reach of the statute's "make and enforce contracts" term.

The panel held that the district court did not abuse its discretion in evidentiary rulings. The panel held that there was no prejudicial error in allowing a jury instruction on the Uniform Services Employment and Reemployment Rights Act.

The panel held that the jury's verdict against two police chiefs for race discrimination in violation of § 1981 was not fatally inconsistent. In addition, the verdict finding the chiefs individually liable, and awarding punitive damages, was not against the clear weight of the evidence. The panel declined to reduce the punitive damages awards as unconstitutionally excessive.

The panel vacated the judgment against Chief Mitchell Waller, who died before trial, and remanded for the district court to grant two officers leave to substitute Chief Waller's estate pursuant to Fed. R. Civ. P. 25(a)(1).

COUNSEL

Justin Reade Sarno (argued), Steven J. Rothans, and Jill Williams, Carpenter Rothans & Dumont, Los Angeles, California, for Defendants-Appellants Mitchell Waller, Andrew Hall, Ron Coopman, and Kevin Baker.

Alison McIlvaine Turner (argued) and Timothy T. Coates, Greines Martin Stein & Richland LLP, Los Angeles, California; Leighton D. Henderson, Jeffery E. Stockley, and Melanie M. Poturica, Liebert Cassidy Whitmore, Los Angeles, California; for Defendant-Appellant City of Westminster.

Oliver B. Dreger (argued), Michael L. Kibbe, and Joseph M. Preis, Godes & Preis LLP, Irvine, California, for Plaintiffs-Appellees.

OPINION

FARRIS, Senior Circuit Judge:

Jose Flores, Ryan Reyes, and Brian Perez, three police officers of Latino descent (collectively, "Plaintiffs"), sued their employer and, after a nine-day jury trial, they won. The officers alleged that the City of Westminster ("the City" or "the Department") as well as current and former Westminster Police Chiefs Mitchell Waller, Andrew Hall, Ronald Coopman, and Kevin Baker ("the Chiefs"), discriminated and retaliated against them on the basis of race and national origin. As relevant here, the officers alleged causes of action for violation of the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12900–12996, and 42 U.S.C. § 1981. Specifically, they claimed they were denied special assignments that could increase their chances of promotion. Officers Flores and Reyes also alleged that the defendants retaliated against them for filing administrative complaints, in violation of FEHA and 42 U.S.C. § 1981.

After reviewing the evidence, the jury largely sided with the officers, finding that: 1) the City had retaliated against Officer Flores in violation of FEHA; 2) Chiefs Coopman and Hall had racially discriminated against all three officers in violation of 42 U.S.C. § 1981; and 3) Chiefs Coopman and Waller had retaliated against Officers Flores and Reyes and Chief Baker had retaliated against Officer Flores in violation of section 1981. The jury awarded the officers a total of $3,341,000.00 in general and punitive damages, and the court awarded $3,285,673.00 in attorney fees, $40,028.49 in expert fees, and $18,684.12 in costs. The City and the Chiefs[1] appeal numerous aspects of the trial, the judgment, and the resulting award of fees and costs. We affirm in part, and vacate and remand in part.

---

[1] Throughout this opinion we will refer to Appellants either as "the City" or "the Chiefs" in order to distinguish between the various points of appeal raised by each. We will refer to the City and the Chiefs, collectively, as "Defendants."

I

Our review of this case is circumscribed by the evidence presented to, and the facts as found, by the jury. The following evidence was adduced at trial:

A. Officer Jose Flores

Officer Flores was hired by the City of Westminster in 2002, after serving for ten years as a police officer with the City of South Gate. In 2004 or 2005, he applied for, but did not receive, a detective position with the fraud unit. He applied for one of three "motors" special assignments in 2006, but withdrew from consideration because he felt "demeaned" after the first two positions were awarded to others with less experience, and after he saw a sergeant asking another officer if she would be interested in testing out a motorcycle. In 2008, Officer Flores applied for, but did not receive, a domestic violence detective position, and in 2009 did not receive the juvenile detective position for which he applied. Again, he felt those positions were awarded to officers with less experience. Officer Flores received only one special assignment—a mall assignment—in twelve years with the Department. At times, he was called names by other officers, including "Dirty Sanchez," "Jorge," and "Silver" or "Silverback," and he was told that the gray streak in his hair was his "INS mark." In July 2010, Officer Flores filed an administrative complaint with the California Department of Fair Employment and Housing ("DFEH") in which he alleged discrimination on the basis of national origin. After that, he did not apply for further special assignments. On December 6, 2011, eighteen months after filing his first complaint, Officer

Flores filed a second complaint with DFEH alleging retaliation.

According to Officer Flores, the following incidents were retaliation for his discrimination complaint:

- In November 2010, five months after Officer Flores filed his discrimination complaint, Chief Waller removed him from the list of available Field Training Officers ("FTO") (officers chosen to perform the collateral duty of mentoring and training new recruits).
- In June 2011, following an internal affairs ("IA") investigation, Officer Flores and Reserve Officer Phan received a written reprimand for failing to take reasonable action while on duty. The reprimand stemmed from a domestic violence call in April 2011 to which the officers did not respond, instead returning to the station to book evidence from a different crime scene. Although Officers Flores and Phan were the closest unit to the scene of the domestic violence incident, the dispatcher sent three other cars, and Officer Flores assumed those cars were closer than he was and that he did not need to respond. The incident resulted in serious injuries to the victim, and the perpetrator fled.
- In July 2011, Officer Flores received a Supervisor's Log entry[2] for a remark he made to a 14-year-old boy during a domestic violence call. As Officer Flores was working to deescalate the

---

[2] A Supervisor's Log entry documents verbal counseling given to an officer by a supervisor.

situation, he instructed the boy to go inside, whereupon the boy asked: "When did you become my dad?" Officer Flores responded: "I would not want to be your dad." The remark was deemed "mean spirited and discourteous," "not necessary," and "disrespectful."

- In June 2012, Officer Flores received a Supervisor's Log entry for his accidental discharge of a Taser during testing.
- In late 2013 or early 2014, Officer Flores was interviewed as part of an IA investigation into the failure to report criminal and/or policy violations, and was asked whether he was surreptitiously recording co-workers or knew of anyone doing so.

Before he filed his first DFEH complaint, Officer Flores had never been disciplined as a police officer or the subject of an IA investigation during his tenure with the City.[3] Officer Flores also continued to receive commendations after filing his DFEH complaints, and was chosen by Chief Baker in August 2012 to serve on a patrol advisory group. He received regular pay increases throughout his employment with the City.

---

[3] Although the parties stipulated to this fact before trial, the record includes an Administrative Memorandum dated February 22, 2007, describing another instance of Officer Flores accidentally discharging his Taser during testing, for which he was verbally counseled on the proper handling, testing, and use of the Taser. The record does not indicate whether the memo constituted discipline, non-disciplinary verbal counseling, or simply administrative paperwork required when a Taser is discharged.

B. Officer Ryan Reyes

Officer Reyes was hired by the City in 1998 after graduating at the top of his class at the police academy, was named "Rookie of the Year," and performed collateral duties as an FTO and on the Department's SWAT team. Between 2002 and 2007, he applied for fourteen special assignments but received only a mall assignment. A more junior, white officer was selected over Officer Reyes as a narcotics detective,[4] despite feedback from some supervisors that the junior officer was not ready for the position. Another white officer, whom Officer Reyes had trained as an FTO, was selected over Officer Reyes for a detective position in 2009. In January 2010, Officer Reyes filed a DFEH complaint alleging discrimination on the basis of national origin.

According to Officer Reyes, he suffered retaliatory actions after filing his discrimination complaint including Supervisor's Log entries, written reprimands, and a 10-hour suspension for late submission of daily logs, traffic citations, and an accident report. He was also placed into an IA investigation and disciplined in December 2010 for untimely booking of a pen into evidence, despite the fact that during the period of the delay Officer Reyes was away from the Department testifying in federal court in an unrelated work matter.

C. Officer Brian Perez

Officer Perez, an officer in the U.S. Marine Corps Reserve, was hired by the City in January 2004. He performed collateral duties including serving as an

---

[4] Officer Perez also applied for, but did not receive, this position.

FTO and on SWAT, and creating, formalizing, and serving on the Department's Honor Guard. Between 2004 and 2014, Officer Perez applied for, but was denied, twelve special assignments. In particular, on four occasions special assignments for which he applied were awarded to allegedly less-qualified white officers, one of whom had lied extensively on his resume. Officer Perez was also threatened with termination when Chief Hall believed Officer Perez was not testifying truthfully regarding a use of force incident involving another officer. That officer was ultimately cleared, but the charge that Officer Perez lied remained in his record with a finding of "not sustained" rather than a full exoneration, and he was removed from his SWAT and Honor Guard duties by Chief Hall. Officer Perez spent considerable time away from the Department fulfilling his duties with the Marine Corps, and the jury heard evidence that he was not informed of potential openings within the Department while he was away on deployments.

D. Defendants

The City and the Chiefs disputed Plaintiffs' evidence and presented evidence that all officers, whether white, Latino, or Asian, had to apply numerous times before being promoted to Sergeant. The jury heard testimony that eight sergeants applied between two and five times before receiving their promotions. Defendants also presented evidence that at least seven officers identified by the City as Latino received special assignments between 2006 and 2013.

II

We first address the City's contention that as a matter of law Officer Flores failed to establish his claim of retaliation in violation of FEHA. After the jury returned its verdict, the City moved for a new trial and renewed its motion for judgment as a matter of law on this issue. The record reflects that the district court properly denied both motions.

The district court's denial of a motion for a new trial is reviewed for abuse of discretion. *Martin v. Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1046 (9th Cir. 2009). We will grant a new trial only if the verdict is against the clear weight of the evidence, and not simply because the evidence might have led us to arrive at a different verdict. *Id.* The denial of a renewed motion for judgment as a matter of law is reviewed de novo, viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Id.* "A renewed motion for judgment as a matter of law should be granted if the evidence permits only one conclusion and that conclusion is contrary to the jury's verdict." *Id.* The district court's interpretation of state law also is reviewed de novo. *See Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 865 (9th Cir. 1996).

FEHA makes it unlawful to "discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden [by FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under this part." Cal. Gov't Code § 12940(h). To succeed on his FEHA retaliation claim, Officer Flores was required to show that the City subjected him to one or more adverse employment actions and that his filing of a DFEH complaint was a substantial motivating reason behind those actions. *See Harris v. City of Santa Monica*, 56 Cal. 4th 203, 232 (2013); *Alamo v. Practice Mgmt. Info. Corp.*, 219 Cal. App. 4th 466, 479 (2013). The City contends that none of its conduct with respect to Officer Flores constituted adverse employment actions under California law, that Officer Flores failed to prove his protected conduct was a substantial motivating factor behind those actions, and that Officer Flores failed to show that the City's proffered reasons for its actions were pretextual.

California defines adverse employment actions as those "materially affect[ing] the terms, conditions, or privileges of employment." *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1052 (2005). FEHA does not just protect against "adverse employment actions that impose an economic detriment or inflict a tangible psychological injury upon an employee." *Id.* Rather, "[a] discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.* at 1053 (emphasis omitted) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1995)). "[T]he phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." *Id.* at 1054. Actions that are "reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion fall[] within the reach of

[FEHA's retaliation provisions]." *Id.* at 1054–55. Further, alleged acts of retaliation may be considered collectively to determine whether, taken together, they constitute an adverse employment action under the statute. *See id.* at 1055, 1060.

Here, the evidence at trial—viewed in the light most favorable to Officer Flores and with all reasonable inferences drawn in his favor—would permit a trier of fact to conclude he was subjected to adverse employment actions. After filing his DFEH complaint, Officer Flores was removed from the FTO list, received negative Supervisor's Log entries, and received his first written reprimand. Although the City argues that removal from the FTO list was a "relatively trivial incident" and the Log entries and reprimand did not impact Officer Flores's job duties or performance, the jury could infer otherwise from the evidence. For example, the jury was shown written supervisor feedback for officers seeking special assignments wherein their performance of collateral duties as FTOs was considered and discussed. The jury also saw supervisor feedback recommending against awarding a detective position to an officer because of performance issues. At the very least, the jury could infer that Officer Flores's removal from the FTO list, written reprimand, and negative Log entries would have been reviewed as part of any decision whether or not to award him special assignments or promote him, and would have harmed his prospects. *See Yanowitz*, 36 Cal. 4th at 1055; *see also Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1456 (2002) (negative evaluation and counseling memorandum constituted adverse employment actions because they potentially rendered employee "no longer 'promotable,'" or at least reduced her opportunities for promotion). The jury's determination that the City subjected Officer Flores to one or more adverse employment actions was reasonable and not against the clear weight of the evidence.

The jury's finding that the filing of Officer Flores's discrimination complaint was a substantial motivating reason for the adverse employment actions taken against him likewise was reasonable and not against the clear weight of the evidence. To establish a prima facie case of retaliation, Officer Flores was required to show that the adverse employment actions were linked to his protected activity. *See McRae v. Dep't of Corr. & Rehab.*, 142 Cal. App. 4th 377, 388 (2006). This causal link "may be established by an inference derived from circumstantial evidence." *Id.* Accordingly, Officer Flores could satisfy his initial burden "by producing evidence of nothing more than the [City]'s knowledge that [he] engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." *Id.* (citing *Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 69 (2000)). Here, it was undisputed that the City knew of Officer Flores's DFEH complaint. And the first alleged adverse action by the City occurred in November 2010, five months after the DFEH filing, when Officer Flores was removed from the FTO list.

Without citation to any supporting case law, the City asserts this time period is too attenuated to establish causation.[5] However, we have held that,

---

[5] We are unpersuaded by the City's citation to *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590, 615 (1989), for the

"[d]epending on the circumstances, three to eight months is easily within a time range that can support an inference of retaliation." *Coszalter v. City of Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003) (declining to adopt "any bright-line rule about the timing of retaliation"); *see also Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (plaintiff made a sufficient prima facie showing where the adverse employment actions "began less than three months after he filed his first administrative complaint"); *George*, 179 Cal. App. 4th at 1492 (describing four months as "relatively close timing," from which supporting inferences could be drawn). Accordingly, the jury could conclude this evidence demonstrated the necessary causal link between Officer Flores's discrimination complaint and the subsequent adverse employment actions he suffered.

In light of this evidence, the City was "required to offer a legitimate, nonretaliatory reason for [its] adverse employment action[s]" in order to shift the burden back to Officer Flores to prove intentional retaliation. *Yanowitz*, 36 Cal. 4th at 1042. On this record, we are not convinced the City successfully countered Officer Flores's evidence, as it failed to provide a legitimate reason for at least one of the adverse employment actions it took against him.

---

proposition that proximity in time for a prima facie case means "a relatively short time" between protected conduct and adverse action. *Fisher* does not analyze the timing issue at all, and at least one subsequent California case has held that a period of several months constitutes "relatively close timing." *See George v. Cal. Unemployment Ins. Appeals Bd.*, 179 Cal. App. 4th 1475, 1492 (2009).

Specifically, the City provided no evidence explaining why Officer Flores was removed from the FTO list five months after he filed his DFEH complaint. Instead, the City admits that "it seems to have happened," but that it was a "relatively trivial incident." Yet the jury could have found otherwise; as we note above, there is evidence in the record to support the view that removal from the FTO list affected Officer Flores's chances of receiving special assignments and promotions.

Regardless, the evidence presented by Officer Flores permits a finding of intentional retaliation by the City. For example, the jury heard testimony that workplace policies were inconsistently applied to Officer Flores—specifically, that Officer Flores was disciplined for his failure to respond to a domestic violence call while other officers who also failed to respond escaped discipline; and that Officer Flores received Supervisor's Log entries for discourteous language and for discharging a Taser, while others did not. *See Coszalter*, 320 F.3d at 978 (concluding a "reasonable fact finder could find from the inconsistent application of [an employment] policy that the defendants' motivation for enforcing the policy" was retaliatory). Further, evidence of a series of adverse employment decisions over the course of several years may "itself [be] probative of . . . the elusive factual question of [intent]." *Yartzoff*, 809 F.2d at 1377 (internal quotation marks omitted). Officer Flores presented evidence of alleged adverse employment actions spanning approximately three years, and the jury permissibly could have inferred from this evidence that the actions taken against Officer Flores constituted intentional retaliation.

Viewing the evidence in the light most favorable to Officer Flores and drawing all reasonable inferences in his favor, we affirm the district court with respect to Officer Flores's FEHA retaliation claim. To conclude otherwise would be "to intrude on the province of the jury," as this is not a case where "a rational trier of fact could not find evidence in the record of . . . retaliation." *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1286–87 (9th Cir. 2001).

III

Next, the City seeks a new trial on damages, arguing Officer Flores was awarded a double recovery. According to the City, the $150,000 the jury awarded to Officer Flores for the City's retaliation against him in violation of FEHA necessarily overlaps with the damages awarded against Chiefs Coopman, Waller, and Baker for their individual retaliatory acts in violation of 42 U.S.C. § 1981. Generally, we review a jury verdict of compensatory damages for substantial evidence. *See In re Exxon Valdez*, 270 F.3d 1215, 1247 (9th Cir. 2001). We reject the City's position here, as the verdict is not "hopelessly ambiguous" with respect to the damages awarded to Officer Flores, *Woodcock v. Fontana Scaffolding & Equipment Co.*, 69 Cal.2d 452, 457 (1968), but rather can be satisfactorily explained to avoid double recovery, *see Roby v. McKesson Corp.*, 47 Cal. 4th 686, 705 (2009).

As the district court noted: "The jury heard a wide range of evidence spanning many years, including conduct by many different employees of the Police Department. The Court is aware of no reason that the jury could not have identified conduct rendering the City liable [for retaliation in violation of FEHA] but not constituting personal participation or ratification by a Chief." For instance, the jury saw evidence that Officer Flores received a Supervisor's Log entry from Sergeant Knauerhaze for his accidental Taser discharge. Likewise, the Supervisor's Log entry for Officer Flores's discourteous remark to a teenage boy was written by Lieutenant Panella. Sergeant Vandergrift investigated Officer Flores for his failure to respond to a domestic violence call, and Lieutenant Panella concurred with the resulting Administrative Report and recommended a written reprimand. It is conceivable that the jury's verdict awarding $150,000 to Officer Flores from the City was for the retaliatory conduct of supervisors other than the Chiefs, and therefore does not overlap with the separate award of damages against the Chiefs in their individual capacities.

The City argues that whether this is actually what the jury intended "cannot be determined to a reasonable certainty" from the verdict and therefore a new trial on damages is required under *Roby*, 47 Cal. 4th at 705. In *Roby*, however, the California Supreme Court explained that a new trial was required because even the plaintiff's proposed approach to interpreting the verdict so as to avoid double recovery created "an inconsistency" in the amounts actually awarded, and the plaintiff admitted there was "no *evidence* of an act of discrimination that [wa]s separate from her failure-to-accommodate and wrongful-termination claims." *Id.* at 704–05. Here, by contrast, Officer Flores's proposed interpretation of the verdict does not create an inconsistency, and there is evidence in the record to support a finding that retaliatory acts were committed by other City employees in addition to the Chiefs.

Accordingly, *Roby* does not require a remand in this case.

When appellate courts review a verdict, "reasonable inferences may be drawn which will support rather than defeat a judgment." *Weddle v. Loges*, 52 Cal. App. 2d 115, 119–20 (1942). We hold Officer Flores's $150,000 award against the City for FEHA retaliation may stand because substantial evidence permits "a correct interpretation" that avoids double recovery. *Roby*, 47 Cal. 4th at 705 (quoting *Woodcock*, 69 Cal. 2d at 457).

IV

Moving next to the issues specifically raised by the Chiefs, we first address their argument that the district court erred in refusing to dismiss Plaintiffs' claims under 42 U.S.C. § 1981. We review questions of statutory interpretation de novo. *Ileto v. Glock. Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009). The district court's interpretation of state law likewise is reviewed de novo. *See Strother*, 79 F.3d at 865.

Section 1981 prohibits discrimination in the making and enforcement of contracts by reason of race, including color or national origin differences. 42 U.S.C. § 1981. "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* The Chiefs argue that because, under California law, the employment relationship between the state and its civil service employees is governed by statute rather than contract, Plaintiffs cannot seek recovery under section 1981. We disagree, and we hold—in a matter of first impression—that California law should not be read to bar public employees from bringing section 1981 claims in cases such as this one.

In *Judie v. Hamilton*, 872 F.2d 919, 922–23 (9th Cir. 1989), we outlined the proper analytical framework for determining whether a state public employee can recover under section 1981. In that case, a Washington state civil service employee claimed he was not permitted to perform all of the supervisory duties included in his job description. We examined whether state or federal law controlled the determination of the legal status of the plaintiff's job description. *Id.* at 922. As the language of section 1981 provides no specific guidance, we applied the Supreme Court's three-step process, based on 42 U.S.C. § 1988, for borrowing an appropriate rule. *Id.* (citing *Burnett v. Grattan*, 468 U.S. 42, 47 (1984)).

First, we explained, courts must look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." *Id.* (quoting *Burnett*, 468 U.S. at 48). If, as here:

> no suitable federal rule exists, courts undertake the second step by considering application of state common law, as modified and changed by the constitution and statutes of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not inconsistent with the Constitution and laws of the United States.

Id. (quoting *Burnett*, 468 U.S. at 48 (internal quotation marks omitted)). Following this procedure, we determined that under Washington law the plaintiff in *Judie* could not bring a cognizable claim for violation of the right to contract under section 1981. *Id.* at 923. We reach a different conclusion here.

Like Washington law, California law provides that "public employment is not held by contract but by statute." *Miller v. State of Cal.*, 18 Cal. 3d 808, 813 (1977). According to the Chiefs, *Judie* therefore dictates dismissal of Plaintiffs' section 1981 claims. But, as the district court recognized, the *Judie* decision predates the 1991 amendments to section 1981 expanding the reach of the statute's "make and enforce contracts" term following the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *See* 42 U.S.C. § 1981(b). Moreover, in *Judie* we analyzed Washington rather than California law, and did not have occasion to consider the California Supreme Court's decision in *White v. Davis*, 30 Cal. 4th 528, 564–65 (2003), declaring that "a long line of California cases establishes that with regard to at least certain terms or conditions of employment that are created by statute, an employee who performs services while such a statutory provision is in effect obtains a right, *protected by the contract clause*, to require the public employer to comply with the prescribed condition." This language indicates a broader view of the applicability of section 1981 to public employees under California law than under Washington law at the time we decided *Judie*. *See* 872 F.2d at 923. California law weighs in favor of allowing Plaintiffs' section 1981 claims to proceed in this case.

The third step of the test set forth in *Judie*—assessing the predominance of the federal interest at stake—also leads us to conclude Plaintiffs' section 1981 claims are proper. The Civil Rights Act of 1866 implemented the Thirteenth Amendment, which was enacted with an intent to remedy "the most self-evident deprivation of slavery, the right to contract freely for one's labor." 2 Joseph G. Cook & John L. Sobieski, Jr., Civil Rights Actions ¶ 5.13 (Lexis-Nexis 1983 & Supps.). *See also Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383–88 (1982) (summarizing legislative history of section 1981). Reading California law to bar all public employees from bringing section 1981 claims hinders a preeminent federal interest: preventing discrimination on the basis of race in the "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Such an interpretation of California law would be inconsistent with the Constitution and laws of the United States—specifically, with the 1991 amendment expansively defining the meaning of the term "make and enforce contracts" in section 1981. In light of these considerations, we hold Plaintiffs' discrimination and retaliation claims were properly brought under section 1981.[6]

[6] We reject the Chiefs' alternative argument that because Plaintiffs were employed by the City rather than by the Chiefs, and because the jury did not find section 1981 liability against the City, the judgment against the Chiefs cannot stand. Numerous cases, including our own, have allowed individual liability under section 1981. *Cf. Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 711 (1989) (noting jury verdict finding individual supervisor violated plaintiff's rights under section 1981); *Bell v. Clackamas County*,

V

The Chiefs next argue the district court erred by denying several of Defendants' motions in limine and by allowing submission of an instruction to the jury on the Uniform Services Employment and Reemployment Rights Act ("USERRA"). We review evidentiary decisions for an abuse of discretion. *Hill v. Rolleri*, 615 F.2d 886, 891 (9th Cir. 1980). Evidentiary errors will not lead to reversal absent some resulting prejudice. *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983). We review a district court's formulation of civil jury instructions for abuse of discretion in light of the instructions as a whole, *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1087 (9th Cir. 2005), and must determine whether any error was "more probably than not harmless," *Swinton v. Potomac Corp.*, 270 F.3d 794, 805 (9th Cir. 2001).

The Chiefs claim they were prejudiced by the district court's denials of motions in limine to exclude: 1) evidence of events that occurred outside of the statute of limitations period; 2) evidence of racial slurs used within the Department; 3) evidence of Sergeant Mize's alleged unprofessional emails to women and involvement with a co-worker and a bar employee; 4) evidence of Officer Turner's involvement with a bar employee; and (5) evidence of a prior discrimination claim from 1997 involving a "Whites Only" sign posted

---

341 F.3d 858, 867 (9th Cir. 2003) (upholding jury verdict imposing individual liability against defendants under section 1981). *See also, e.g.*, *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2d Cir. 2000) (collecting cases and holding that individual liability under section 1981 is permitted).

in the police station. The district court did not abuse its discretion in denying these motions.

Allowing the jury to hear evidence of Defendants' acts outside the statute of limitations was not reversible error. This evidence was relevant to Plaintiffs' claims that they were discriminated against under a custom or policy of the Department. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (explaining a statute of limitations does not "bar an employee from using the prior acts as background evidence in support of a timely claim"); *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1192 (9th Cir. 2003) (same).[7] Similarly, evidence regarding the alleged inappropriate conduct and resulting disciplinary histories of Sergeant Mize and Officer Turner was properly admissible because both men served as appropriate comparators to Plaintiffs for the jury. Each received special assignments and promotions despite serious violations of the Department's policies, and the district court did not abuse its discretion in finding their similarities with Plaintiffs sufficient for the evidence to survive the balancing test under Federal Rule of Evidence 403. *Cf. Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (explaining that "individuals are similarly situated when they have similar jobs and display similar conduct").

---

[7] *Cherosky v. Henderson*, 330 F.3d 1243, 1246 (9th Cir. 2003), cited by the Chiefs, addresses the "continuing violations doctrine" where the plaintiffs had not brought a pattern or practice claim, and does not stand for the proposition that evidence outside the statute of limitations cannot be admitted to support such a claim.

The district court denied the motions to exclude the evidence of racial slurs and the lawsuit stemming from the "Whites Only" sign without prejudice. The Chiefs did not renew their objections to the introduction of evidence on these subjects at trial, therefore their objections are waived. *See Palmerin v. Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986) (holding that unless a trial court's ruling concerning introduction of evidence is "explicit and definitive," an unsuccessful motion in limine must be renewed at trial to be preserved for appeal). Regardless, allowing the jury to hear this evidence was not an abuse of discretion, as in both instances the evidence was relevant to discriminatory intent, and to the City's knowledge, customs, and policies.

Finally, delivering a USERRA instruction to the jury was not prejudicial error. The instruction to which the Chiefs objected states:

> *Military Leave*
>
> The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law that prohibits discrimination against service members and protects their job rights while in military service.
>
> Under USERRA, a service member has the right to reemployment in the job position that the service member would have obtained with reasonable certainty if not for absence due to uniformed service. USERRA also requires that a service member be treated the same way

> that the employer treats other employees on leave or furlough. The rights protected by USERRA can include the right to be notified of an open job opportunity.
>
> There is no USERRA claim before you, and you are not deciding any questions associated with USERRA. You should consider any evidence about whether Westminster notified Plaintiff Perez of open job opportunities only in terms of the stated race discrimination claims.

The Chiefs argue this instruction left the jury "with the conflicted, uninformed impression that [Defendants] must have violated Perez's USERRA rights," and explains why the jury awarded Officer Perez more punitive damages than Officer Reyes even though Officer Reyes prevailed on more claims.

We conclude the USERRA instruction was more probably than not harmless. The instruction informed the jury it was *not* to consider Officer Perez's military service except to the extent the evidence demonstrated the City failed to notify Officer Perez of open job opportunities because of race discrimination.[8] Furthermore, the jury heard sufficient evidence from which it could have concluded that Chiefs Coopman and Hall discriminated against Officer Perez absent any reference to his military service, including that he was denied twelve special assignments for which he

[8] Given Officer Perez's extensive testimony about his military deployments, the limiting instruction may actually have lessened the harm Defendants otherwise might have suffered from this potentially prejudicial line of testimony.

applied between 2004 and 2014 and that Chief Hall removed Officer Perez from his SWAT and Honor Guard duties because he continued to believe Officer Perez was lying about a use of force incident. As for the difference in punitive damages awarded, the jury may have determined Officer Perez was entitled to greater damages because the Chiefs' actions against him were more egregious than those against Officer Reyes—for instance, the jury may have concluded that some of the actions taken against Officer Reyes were justified because of his prior poor record of turning in paperwork on time, or his relationship with a female officer that culminated in unproven rape charges and a reprimand for engaging in sexually explicit conversations at work. We affirm the district court's denials of the motions in limine and delivery of the USERRA instruction.

VI

The Chiefs also seek a new trial because of what they claim are irreconcilable special verdict findings returned by the jury. They contend the jury's verdict against Chiefs Coopman and Hall for race discrimination in violation of section 1981 is fatally inconsistent because, while it includes findings that Chiefs Coopman and Hall personally participated in decisions to select non-Latino applicants with qualifications comparable to or worse than Plaintiffs', it does not include a finding of intentional discrimination. We review the district court's denial of a motion for a new trial for abuse of discretion, *Jorgensen v. Cassiday*, 320 F.3d 906, 918 (9th Cir. 2003), and its reconciliation of the special verdict form de novo, *California v. Altus Fin. S.A.*, 540 F.3d 992, 1004 (9th Cir. 2008). We conclude the district court properly denied the Chiefs' motion.

At the outset, we note the complexity of the verdict form presented to the jury in this case. The Federal Rules of Civil Procedure provide for special verdicts (where the jury returns written findings on each issue of fact and the court then draws legal conclusions) or general verdicts with interrogatories (where the jury makes factual findings but also applies the law to those findings). *See* Fed. R. Civ. P. 49(a), (b). As the district court correctly noted, the jury form in this case falls somewhere between the two. Like a special verdict form, it included a series of questions that referred the jury to answer further questions, or not, based upon their responses. Nowhere did the form ask the jury to find "for" or "against" Plaintiffs or Defendants. On the other hand, like with a general verdict with interrogatories, the jury was given lengthy instructions on the applicable law, setting out the elements and directing the jury how to apply those elements. This suggests the jury was asked to apply law to its factual determinations, not just find facts. *See Floyd v. Laws*, 929 F.2d 1390, 1395 (9th Cir. 1991); *cf. R. H. Baker & Co. v. Smith-Blair, Inc.*, 331 F.2d 506, 511 (9th Cir. 1964) ("Use of the special verdict eliminates the necessity for and use of complicated instructions on the law[.]") (internal citations and quotation marks omitted). Whether interpreted as a special verdict or as a general verdict with interrogatories, however, the answers returned by the jury here do not require a new trial.

Significantly, the form posed questions to the jury in a cascading sequence, where some elements were presented with respect to one claim early in the form and then incorporated in later claims without repeating them. Thus, the question of intent was presented to the jury in the portion of the form addressing the City's potential liability under section 1981, and the jury was instructed to answer that question only if it first found that Plaintiffs were discriminated against due to a policy or custom of the City. The form next addressed the section 1981 claims against the individual chiefs, but did not repeat the question regarding intent. The jury ultimately found Chiefs Coopman and Hall had discriminated against Plaintiffs in violation of section 1981 without an explicit finding of intent, but this resulted from the parties' imperfect drafting of the jury form.

If we interpret the jury form in this case as a special verdict, the district court properly reconciled this alleged inconsistency in the jury's findings. Courts have a duty under the Seventh Amendment to harmonize a jury's special verdict answers, "if such be possible under a fair reading of them. A court is also obligated to try to reconcile the jury's findings by exegesis, if necessary." *Floyd*, 929 F.2d at 1396 (citing *Gallick v. Baltimore & O.R.R. Co.*, 372 U.S. 108, 120 (1963)). A new trial should be granted only "in the case of fatal inconsistency," *id.*, and in attempting to reconcile the verdict, the court must "view[] the case in any reasonable way that makes the verdicts consistent."[9]

---

[9] We hesitate even to characterize the issue here as one of inconsistency. As the district court put it, "This is not a problem of inconsistency, per se; it is a problem of the parties developing a jury verdict form that did not present an element to the jury in both of the claims for which the Defendants wanted it presented."

Anheuser-Busch, Inc. v. John Labatt Ltd., 89 F.3d 1339, 1347 (8th Cir. 1996). Moreover, Rule 49(a)(3) of the Federal Rules of Civil Procedure provides that a party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury if submission is not requested before the jury retires to deliberate. "If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict." Fed. R. Civ. P. 49(a)(3).

Here, neither party requested a specific finding of intentional discrimination by the Chiefs in their individual capacities. Accordingly, it was not error for the district court to conclude that, "considered in light of [its] instructions to the jury," *Altus Fin.*, 540 F.3d at 1004 (citation omitted), including the instructions setting forth the elements of section 1981 discrimination claims,[10] the jury's failure to answer the question on intent in the portion of the jury form dealing with the City's liability merely indicated it intended to find the individual Chiefs liable, but did not find municipal liability under a custom or policy.

Alternatively, if we interpret the jury form as a general verdict with interrogatories, the Chiefs still are not entitled to a new trial. As the district court correctly concluded, the Chiefs waived any objection to the jury's allegedly inconsistent answers when they

---

[10] The jury instructions clearly stated that Plaintiffs were required to prove that Defendants intentionally discriminated, and included as an element that any purported legitimate business reason given by Defendants for their actions must be false.

failed to object before the jury was discharged.[11] *See, e.g.*, *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995); *Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010). We affirm the district court's denial of the Chiefs' motion for a new trial for alleged inconsistencies in the verdict.

VII

The Chiefs also moved for a new trial on the grounds that the jury verdict finding them individually liable was against the clear weight of the evidence and that Plaintiffs failed to present evidence of malicious conduct sufficient to support punitive damages. The district court declined to order a new trial on these grounds; we review its decision for abuse of discretion. *See Kode*, 596 F.3d at 611; *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). "An appellate court generally will not reverse the denial of a new trial motion if there was some reasonable basis for the jury's verdict." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (internal quotation marks omitted).

The Chiefs properly can be held liable in their individual capacities: 1) if they participated in the deprivation of Plaintiffs' constitutional rights; 2) for their own culpable action or inaction in the training, supervision, or control of their subordinates; 3) for their acquiescence in the constitutional deprivations; or 4) for conduct that showed a reckless or callous

---

[11] The parties were twice asked if they saw any reason the jury could not be discharged and did not object. *See L.A. Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1354–55 & n.3 (9th Cir. 1987) (discussing cases appropriately applying waiver).

indifference to the rights of others. *See Watkins v. City of Oakland, Cal.*, 145 F.3d 1087, 1093 (1998) (explaining instances in which a supervisor can be held individually liable). The jury heard evidence from which it could reasonably conclude that all four Chiefs either discriminated against or retaliated against Plaintiffs with malice, and we therefore uphold the jury's verdict.

The jury reviewed the following evidence that reasonably supports a finding that Chief Coopman retaliated against Officers Flores and Reyes in violation of section 1981:

- Chief Coopman oversaw multiple potentially retaliatory IA investigations against Officer Reyes, and imposed a ten-hour unpaid suspension against him for submitting late reports, even though another officer testified that he frequently did not turn in daily logs on the day he worked without suffering any consequences, and that officers can hold collision reports without permission and submit them as they are completed. Chief Coopman also participated in the review hearing Chief Waller held for Officer Reyes.

- Chief Coopman opened an IA investigation against Officer Flores for failing to respond to a domestic violence incident and issued a written reprimand but did not investigate the dispatcher or other units who did not respond to the call.

Even though the evidence demonstrates Chief Coopman signed a commendation for Officer Flores, and testified that his wife is Hispanic and he does not discriminate against Latinos, the jury was free to accord this evidence whatever weight it saw fit, and the Court "cannot substitute its evaluations for those of the jurors." *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1084 (9th Cir. 2009) (internal quotation marks omitted).

The jury reviewed the following evidence supporting a finding that Chief Hall discriminated against all three Plaintiffs in violation of section 1981:

- Chief Hall, the "ultimate authority" regarding which officers received special assignments, repeatedly promoted white officers with serious disciplinary histories, as well as less qualified white officers, over Plaintiffs.
- Chief Hall issued a notice of intent to terminate Officer Perez based on his testimony regarding a use of force incident he witnessed and, although the charge was dropped, removed him from SWAT and Honor Guard, stopped assigning him FTO trainees, and would not give him a position on the Patrol Rifle Officer team.
- Chief Hall recommended that Officer Reyes receive a written reprimand for an unproven rape allegation, and authorized a written reprimand for entering into an ongoing inappropriate conversation between two white officers, but did not reprimand the white officers.

As for the finding that Chief Baker retaliated against Officer Flores in violation of section 1981, the jury was presented with evidence that:

- Chief Baker felt "sandbagged" by Officer Flores's DFEH Complaint, and thereafter refused to overturn the written reprimand Officer Flores received for his discourteous remark to a teenager.
- Chief Baker was in charge during the IA investigation into whether Officer Flores failed to report criminal and/or policy violations.[12]

The jury also was presented with evidence supporting its finding that Chief Waller retaliated against Officer Flores in violation of FEHA, and Officers Flores and Reyes in violation of section 1981, including that:

- Chief Waller removed Officer Flores from the FTO list five months after Officer Flores filed his DFEH complaint.
- Chief Waller was in charge during the period leading into the IA investigations of Officer Flores for failure to respond to a domestic violence call and for the discourteous remark he made to a teenager.
- Chief Waller was in charge when Officer Reyes filed his DFEH complaint in January 2010, and Officer Reyes was thereafter placed into multiple IA investigations and received

[12] The evidence against Chief Baker admittedly is weaker than against some of the other defendants, but that is reflected in the jury's verdict finding him liable only for retaliation under section 1981 and awarding lesser damages against him. Again, we will not substitute our evaluation of the evidence for that of the jury. *See Tortu*, 556 F.3d at 1084.

> discipline for infractions not enforced against other officers.

We conclude all of this evidence provided a reasonable basis for the jury's verdict against the Chiefs. Likewise, the jury's determination that clear and convincing evidence demonstrated the Chiefs' actions were malicious, oppressive, or in reckless disregard of Plaintiffs' rights was not against the great weight of the evidence. Accordingly, the district court did not abuse its discretion in allowing the jury's award of punitive damages to stand.[13]

VIII

Alternatively, the Chiefs seek a reversal or remittitur of the punitive damages awards against them as unconstitutionally excessive. We review whether punitive damages are excessive de novo. *Bains LLC v. Arco Prods Co., Div. of Atl. Richfield Co.*, 405 F.3d 764, 775 (9th Cir. 2005). We conclude the amount of punitive damages awarded in this case is not "grossly excessive" to the point of arbitrariness in violation of the Due Process Clause of the Fourteenth Amendment. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 454 (1993).

Whether an award of punitive damages exceeds the bounds of due process is determined on a case-by-case basis by examining: (1) the reprehensibility of the conduct being punished; (2) the ratio of the punitive damages award to the compensatory damages award;

---

[13] Additionally, the Chiefs argue the jury's failure to explicitly find intentional discrimination forecloses punitive damages, but we reject this argument for the reasons explained in Part VI, *supra*.

and (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 575, 580–83 (1996). The degree of reprehensibility of the conduct at issue is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* at 575. The Chiefs argue that several of the punitive damages awards in this case exceed a 4:1 ratio, which "might be close to the line of constitutional impropriety." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).[14] The punitive damages awarded here do not cross that line.

First, the Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *BMW*, 517 U.S. at 582, and the single-digit ratios here are in line with our precedent. *See, e.g.*, *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding a 7:1 ratio and noting "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages"); *Swinton*, 270 F.3d at 818–19 (upholding a ratio of 28:1 and noting that "where the injury is primarily personal, a greater ratio may be appropriate" (citation omitted)).

Second, we have recognized that intentional discrimination on the basis of race or ethnicity is especially reprehensible and "a different kind of harm, a serious affront to personal liberty." *Zhang*, 339 F.3d

---

[14] A chart setting forth the damages awarded to each plaintiff is included in an appendix to this opinion.

at 1043 ("There can be no question of the importance of our society's interest in combating discrimination; this nation fought the bloodiest war in its history in part to advance the goal of racial equality, adding several amendments to the Constitution to cement the battlefield victory."); *see also Swinton*, 270 F.3d at 817–18. Accordingly, a more substantial punitive damages award may be justified in intentional discrimination cases than in cases involving "purely economic" harms. *Cf. BMW*, 517 U.S. at 576.

As to the third factor, we observed in *Swinton* that "[t]here are no 'civil penalties' for the type of conduct for which [Defendants were] held liable in this case." *Id.* at 820. While Title VII's damages cap of $300,000 may sometimes serve as a guidepost, "Congress has not seen fit to impose any recovery caps under § 1981 . . . , although it has had ample opportunity to do so since the 1991 amendments to Title VII." *Id.* And in any event, only a few of the punitive awards here are in excess of $300,000, and only the awards against Chiefs Coopman and Hall significantly so. On balance, the differential between the compensatory and punitive damages is not so large as to be constitutionally excessive on the facts of this case. We decline to reduce the jury's punitive damages awards.

IX

The final issue we must decide is whether the verdict against Chief Waller is valid notwithstanding the fact that he died before trial. Waller was the City's Chief of Police from January 2010 to March 2011. On June 28, 2013, he was struck and killed by a motorist while riding his bicycle. It is undisputed that the parties knew of Chief Waller's passing; the proposed

Final Pre-Trial Conference Order filed in November 2013 indicated in a footnote that, "Defendant Mitchell Waller is recently deceased." Likewise, it is undisputed that no statement of death was served on any party or Chief Waller's estate, and that neither party filed a motion to substitute the estate as the defendant under Rule 25(a) of the Federal Rules of Civil Procedure.[15] The jury assessed a total of $466,500 against Chief Waller for retaliating against Officers Flores and Reyes in violation of section 1981—$395,000 was compensatory and $71,500 punitive.

Rule 25(a)(1) allows any party to move for substitution in the case of a party's death, within ninety days of filing a statement of death on the record, provided the underlying "claim is not extinguished." Section 1988 directs courts to apply state survival laws in civil rights actions when not inconsistent with the Constitution and federal law. *See Robertson v. Wegmann*, 436 U.S. 584, 588–90 (1978) (holding the survivability of section 1983 claims is governed by state law). State law therefore governs the survivability of section 1981 claims. In California, no cause of action is lost "by reason of" a defendant's death, as long as the

---

[15] Federal Rule of Civil Procedure 25(d), providing for automatic substitution of a decedent's successor when a decedent is sued in his official capacity, does not apply here. An individual official's actions in violation of federal law cannot establish liability in an official capacity action; instead, a governmental policy or custom must be the "moving force" behind the official's unlawful actions. *See Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658, 694 (1978). But the jury found in this case that the discrimination suffered by Plaintiffs was not due to a custom or policy of the City. Accordingly, Chief Waller was found liable only in his individual capacity.

statute of limitations for the claim has not expired and the claim is filed against the decedent within a year of death. Cal. Civ. Proc. Code §§ 377.20, 366.2. Thus, the section 1981 claim against Chief Waller survives because it was timely filed before his death.

Complicating matters, however, is the fact that Rule 25(a)(1)'s ninety-day period to move for substitution of the estate was never triggered in this case because no party filed and served a formal statement noting Chief Waller's death. *See Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994); *see also* Fed. R. Civ. P. 25(a)(3).[16] And the Chiefs contend that because more than a year has passed since Chief Waller's death, it is now too late to substitute his estate under California Code of Civil Procedure section 366.2. We note, however, that California courts may grant leave to amend a complaint to name a decedent's estate, even where that amendment occurs after the expiration of the one-year period in section 366.2. *See Burgos v. Tamulonis*, 28 Cal. App. 4th 757, 761–63 (1994). Accordingly, we reject the Chiefs' argument that a remand to the district court for substitution of Chief Waller's estate under Rule 25(a) would be futile.

---

[16] The incidental reference to Chief Waller's death in the parties' pre-trial conference order was insufficient to constitute a formal statement of death. *See, e.g.*, *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 595 F. Supp. 326, 330 (N.D. Cal. 1983) *aff'd on other grounds*, 781 F.2d 1393 (9th Cir. 1986) (incidental mentions of death in the interrogatories were insufficient to establish a formal statement of death on the record); *see also Blair v. Beech Aircraft Corp.*, 39 Fed. R. Serv. 2d 1410 (W.D. Pa. 1984) *aff'd without opinion*, 787 F.2d 580 (3d Cir. 1986) (a passing reference to death in the pleadings was insufficient).

The Chiefs also argue, however, that Officers Flores and Reyes are time-barred from seeking recovery from Chief Waller's estate under the requirements of the California Probate Code. Enforcement of federal judgments, they correctly point out, is subject to procedures in the forum state. *See* Fed. R. Civ. P. 69(a); *Duchek v. Jacobi*, 646 F.2d 415, 416 (9th Cir. 1981). In California, surviving causes of action may be continued against a decedent's personal representative, subject to the requirements of section 9000 et seq. of the California Probate Code. *See* Cal. Civ. Proc. Code §§ 377.40–41. Probate Code section 9370(a) in turn states that actions or proceedings pending against a decedent "may not be continued against the decedent's personal representatives" unless: "(1) A [probate] claim is first filed as provided in this part"; "(2) The claim is rejected in whole or in part;" and "(3) Within three months after the notice of rejection is given, the plaintiff applies to the court in which the action or proceeding is pending for an order to substitute the personal representative in the action or proceeding."

On this record, we cannot determine whether the provisions of the Probate Code bar recovery of Plaintiffs' claims against Chief Waller's estate. The parties have provided no evidence indicating whether administration of the estate was ever initiated or whether Officers Flores and Reyes filed a claim. Accordingly, we vacate the judgment against Chief Waller and remand to the district court to grant Officers Flores and Reyes leave to substitute the estate, provided they properly follow the procedures set forth in Rule 25(a). The district court may then—after reviewing additional evidence submitted by the parties as necessary—determine whether Officers Flores and Reyes can recover damages from Chief Waller's estate.

On remand, the district court also should determine in the first instance whether Plaintiffs may recover from the estate the punitive damages awarded against Chief Waller, or whether the parties waived any argument regarding those damages by not raising the issue before trial. The general rule in California is that punitive damages are not recoverable against a decedent's personal representative. *See* Cal. Civ. Proc. Code § 377.42 ("In an action or proceeding against a decedent's personal representative . . . on a cause of action against the decedent, all damages are recoverable that might have been recovered against the decedent had the decedent lived except . . . punitive or exemplary damages.").[17] Here, however, the parties put the question of whether to award punitive damages against Chief Waller to the jury, all the while knowing full well that Chief Waller had died almost seven months before the trial began. The district court may review any additional evidence submitted by the parties on this issue and decide, on the unique facts of this case, whether or not it will allow the punitive damages award against Chief Waller to stand.

---

[17] Plaintiffs argue California courts have at times permitted exceptions to this rule, however in those cases, the decedent died after the case had reached final judgment. *See Whelan v. Rallo*, 52 Cal. App. 4th 989, 991–95 (1997) (citing California cases and statutes supporting the proposition that punitive damages awards are only enforceable if the defendant dies after final judgment). In this case, Chief Waller died over a year before the district court entered judgment.

X

For the reasons set forth above, we **AFFIRM IN PART, AND VACATE AND REMAND IN PART.**

Each party shall bear its own costs.

APPENDIX

Defendant	**Plaintiff**	**Punitive**	**Compen-satory**	**Ratio**
Coopman	Flores	$396,000	$218,000	2:1
Coopman	Reyes	$176,000	$40,000	4:1
Coopman	Perez	$308,000	$50,000	6:1
Hall	Flores	$459,000	$65,000	8:1
Hall	Reyes	$220,000	$45,000	5:1
Hall	Perez	$385,000	$100,000	4:1
Baker	Flores	$49,500	$42,000	1:1
Waller	Flores	$49,500	$210,000	1:4
Waller	Reyes	$22,000	$185,000	1:8

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 11-0278-DOC(RNBx)

[Filed October 23, 2014]

JOSE FLORES, ET AL.	)
	)
V.	)
	)
CITY OF WESTMINSTER, ET. AL.	)
	)

CIVIL MINUTES – GENERAL

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Goltz	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): ORDER DENYING MOTION FOR NEW TRIAL [254]; DENYING DEFENDANTS'

RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW [256] [257] [258] [259] [261]; GRANTING ATTORNEY FEES [253]; DENYING MOTION TO STRIKE DECLARATION OF ROBERT M. BRUNING [274]

Before the Court are:

- Defendant City of Westminster's Motion for New Trial ("New Trial Mot.") (Dkt. 254);
- Defendant City of Westminster's Renewed Motion for Judgment as a Matter of Law (Dkt. 256);
- Defendant Mitchell Waller's Renewed Motion for Judgment as a Matter of Law (Dkt. 257);
- Defendant Andrew Hall's Renewed Motion for Judgment as a Matter of Law (Dkt. 258);
- Defendant Kevin Baker's Renewed Motion for Judgment as a Matter of Law (Dkt. 259);
- Defendant Ron Coopman's Renewed Motion for Judgment as a Matter of Law (Dkt. 261);
- Plaintiffs' Motion for Attorney Fees, Expert Fees, and Costs ("Fees Mot.") (Dkt. 253); and
- Plaintiffs' Motion to Strike the Declaration of Robert M. Bruning (Dkt. 274).

The Court finds these matters appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the record and the papers, the Court DENIES the Motion for New Trial; DENIES the Renewed Motions for Judgment as a Matter of Law; and GRANTS the Motion for Attorney Fees.

I. BACKGROUND

This case arose from allegations by Plaintiffs Jose Flores, Ryan Reyes, and Brian Perez, three Westminster police officers of Latino descent, that the Defendant City of Westminster ("City") as well as current and former Westminster police chiefs Mitchell Waller, Andrew Hall, Ron Coopman, and Kevin Baker discriminated against them on the basis of race and national origin. Plaintiffs originally alleged causes of action against Defendants for violation of the California Fair Employment and Housing Act ("FEHA"), California Government Code § 12940, et seq.; 42 U.S.C. § 1981, and 42 U.S.C. § 1983. Specifically, Plaintiffs allege that they were denied special assignments that could increase their chances of getting promoted. Plaintiffs Flores and Reyes also alleged that the Defendants retaliated against them for filing administrative complaints regarding the discrimination, in violation of 42 U.S.C § 1981 and Title VII. *See* Second Amended Complaint ("SAC") (Dkt. 35).

Trial began on February 20, 2014 and lasted 9 days. On March 3, 2014, Defendants filed motions for judgment as a matter of law. (Dkts. 178-182). The Court denied those motions. Order Denying Judgment as a Matter of Law, Mar. 6, 2014 (Dkt. 185).

Plaintiffs dismissed several claims before submitting the case to the jury. On March 6, 2014, after three days of deliberation, the eight-member jury unanimously found as follows on the remaining claims:

(1) the City did not racially discriminate against Plaintiffs in violation of FEHA, Cal. Gov. Code §12940(a);

(2) the City retaliated against Plaintiff Flores, but not Plaintiff Reyes, in violation of FEHA, Cal. Gov. Code § 12940(h);

(3) the City did not racially discriminate against Plaintiffs in violation of 42 U.S.C. § 1981;

(4) Defendants Coopman and Hall racially discriminated against all three Plaintiffs in violation of 42 U.S.C. §1981, and Defendants Waller and Baker did not racially discriminate as to any plaintiff; and

(5) Defendants Coopman and Waller retaliated against Plaintiffs Flores and Reyes in violation of 42 U.S.C. § 1981, Chief Hall did not retaliate against any Plaintiff, and Chief Baker retaliated against Plaintiff Flores in violation of 42 U.S.C. § 1981.

(6) The jury awarded compensatory and punitive damages.

Following the verdict, Plaintiffs filed a proposed final judgment (Dkt. 239). The parties then engaged in several rounds of briefing regarding Defendants' objections to the proposed final judgment based on inconsistencies in the verdict form (Dkts. 242, 244, 245, 246). After considering those objections, the Court ordered final judgment for Plaintiffs. Order on Final

Judgment After Jury Verdict, Aug. 11, 2014 ("Final Judgment Order") (Dkt. 247). In its order, the Court noted that the parties' objections to inconsistencies in a verdict form are normally brought in a motion for a new trial after judgment is entered. The Court's order stated, "The parties may incorporate their objections by reference in any subsequent motions for a new trial in order to preserve those objections, but should not further brief any issues raised in their filings up to this point." Final Judgment Order, at 2.

The instant motions were filed on August 28-29, 2014.

II. MOTION FOR A NEW TRIAL

A. Legal Standard

Rule 59 provides that a new jury trial may be granted under certain conditions. Fed. R. Civ. P. 59(a). Granting a new trial is left to the sound discretion of the trial court. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). Bases for a new trial include: (1) a verdict against the clear weight of the evidence, *see Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987); (2) evidence, discovered after trial, that would not have been uncovered earlier through the exercise of due diligence and that is of such magnitude that its production at trial would likely have changed the outcome of the case, *see Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992-93 (9th Cir. 2001) (quoting *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 929 (9th Cir. 2000)); (3) jury misconduct, *see United States v. Romero-Avila*, 210 F.3d 1017, 1024 (9th Cir. 2000); and (4) error in law that has substantially prejudiced a party, *see*

Ruvalcaba v. City of Los Angeles, 64 F.3d 1323, 1328 (9th Cir. 1995). Because the task of weighing conflicting evidence and making credibility determinations is the job of the jury and not the court, *Lucent Techs., Inc. v. Microsoft Corp.*, 837 F. Supp. 2d 1107, 1126 (S.D. Cal. 2011), it is expected that judges will grant motions for a new trial only when the judge has given full respect to the jury's findings but is left with the firm conviction that a mistake has been committed. *Landes*, 833 F.2d at 1371–72; *see also Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000).

B. Analysis

The Court addresses each of the Defendants' arguments for a new trial in turn.

1. Irreconcilable Special Verdict Findings

The parties incorporated by reference their arguments regarding the alleged irreconcilability of the jury's special verdict findings from their briefing on the proposed final judgment (Dkts. 239, 242, 244, 245, 246). The jury verdict form, which was agreed to by both parties, was not without problems. Final Judgment Order at 9-12. However, the Court already addressed these arguments in issuing its Final Judgment Order (Dkt. 247). For the same reasons, the Court declines to order a new trial on the ground of irreconcilable verdict findings.

2. Clear Weight of the Evidence

Defendants argue that they are entitled to a new trial because the jury verdict and awards were against the clear weight of the evidence and were irreconcilably inconsistent. Specifically, Defendants challenge the jury's verdict for (a) Plaintiff Flores on his FEHA retaliation claim against the City; (b) Plaintiffs on their § 1981 race discrimination claim against Defendants Coopman and Hall; and (c) Plaintiffs Flores and Reyes on their § 1981 retaliation claim against Defendants Coopman, Waller, and Baker.

Regarding the FEHA retaliation claim, Defendants argue that Flores failed to establish (1) that he suffered any adverse employment actions, (2) that his filing of an administrative complaint had anything to do with any of Defendants' actions toward him, or (3) that he was harmed. Regarding the other two claims, Defendants essentially argue that Plaintiffs' evidence regarding the individual Defendants' personal participation in racial discrimination and retaliation was too weak to justify the verdict. Relatedly, Defendants also argue that Plaintiffs failed to present evidence of malicious conduct by the individual Defendants to justify the punitive damages awards against them.

Having heard the evidence at trial and having considered the parties' briefs, the Court is not persuaded that the verdict regarding the above-listed claims was against the clear weight of the evidence. Thus, the Court declines to order a new trial on these grounds.

3. Substantial Prejudice as a Result of Errors of Law

Defendants' third argument for a new trial is on the basis that Defendants were substantially prejudiced by errors of law, including the following:

a. Allowing the § 1981 claim to proceed to trial

In their Motion to Dismiss and/or Strike Portions of Plaintiffs' Complaint, Defendants argued that, because Plaintiffs hold their employment by statute and not by contract, their § 1981 claims must fail because § 1981 does not apply to them. The Court rejected that argument in its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and to Strike Portions of Plaintiffs' Complaint, May 9, 2011 (Dkt. 13). For the same reasons outlined in its May 2011 Order, the Court finds that Defendants were not prejudiced by an error of law and declines to grant a new trial on this ground.

b. Allowing introduction of irrelevant and inflammatory evidence going back to 1996

Defendants filed a number of motions in limine to preclude claims and evidence that dated back to 1996, including (1) MIL No. 1 to Preclude Claims That Occurred Outside the Relevant Statute of Limitations Periods; (2) MIL No. 2 to Preclude Stray Comments; (3) MIL No. 7 to Preclude Richard Mize's Alleged Non-Professional Emails to Women and Involvement with Bar Employee and Officer Naranjo; (4) MIL No. 14 to Preclude Officer Turner's Involvement with Bar Employee; and (5) MIL No. 16 to Preclude Prior Discrimination Claim from 1997. (Dkts. 52, 53, 58, 65, 67). Defendants argued then that the information was irrelevant, inadmissible hearsay, character evidence, unduly prejudicial, misleading, and/or a waste of time. The Court already considered Defendants' arguments when the Court denied those motions in limine. Order on Motions in Limine, Jan. 31, 2014 (Dkt. 151). The Court is not persuaded now that the Court's denial of those motions was legally erroneous. Thus, the Court declines to grant a new trial on this ground.

c. Providing a USERRA instruction despite the fact that there was no USERRA claim in this case

The Court read Jury Instruction No. 22 to the jury:

> Military Leave
>
> The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law that prohibits discrimination against service members and protects their job rights while in military service.
>
> Under USERRA, a service member has the right to reemployment in the job position that the service member would have obtained with reasonable certainty if not for absence due to uniformed service. USERRA also requires that a service member be treated the same way that the employer treats other employees on leave or furlough. The rights protected by USERRA can include the right to be notified of an open job opportunity.
>
> There is no USERRA claim before you, and you are not deciding any questions associated with USERRA. You should consider any evidence about whether Westminster notified Plaintiff Perez of open job opportunities only in terms of the stated race discrimination claims.

Jury Instruction No. 22, Mar. 6, 2014 (Dkt. 198).

Defendants argue that this instruction was legally improper and caused substantial prejudice to the Defendants because it created the impression that the City violated Plaintiff Perez's USERRA rights and resulted in the jury awarding Perez more punitive damages than Reyes even though Reyes had a retaliation claim and Perez did not. New Trial Mot. at 14-15. The fact that the jury awarded a greater amount of punitive damages to Perez than to Reyes by itself does not show that Defendants were substantially prejudiced by the USERRA instruction. Although Reyes had a retaliation claim and Perez did not, the jury could have found that the nature of Defendants' conduct toward Perez was more egregious than the Defendants' conduct toward Reyes for reasons other than Perez's military background, thus justifying the higher award for Perez. Thus, the Court declines to grant a new trial on this ground.

4. Punitive Damages

Defendants seek a new trial on the issue of damages on the grounds that the punitive damages were the result of passion and prejudice, grossly excessive, and oppressive. In the alternative, Defendants ask that the punitive damages be stricken or reduced by remittitur. Specifically, Defendants ask that the Court grant Defendants' motion for a new trial unless Plaintiffs accept a remittitur of all the punitive damage awards or at least limiting Defendants Coopman and Hall's punitive damage awards to $200,000 per Defendant (approximately one year's salary).

The Supreme Court set out three guideposts for determining whether punitive damages are excessive in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-85 (1996). Those three guideposts are (1) reprehensibility of conduct, *id.* at 575; (2) ratio of the punitive damages award to the compensatory damages award, *id.* at 580; and (3) the difference between the punitive damages award to the civil penalties authorized or imposed in comparable cases, *id.* at 583.

To the extent that Defendants' arguments regarding passion and prejudice and reprehensibility are based on the weight of the evidence regarding each individual Defendant's individual participation or malicious behavior against the Plaintiffs, the Court rejects these arguments for the same reasons described above.

Regarding the ratio between punitive and compensatory damages, the jury awarded the following:

Defendant	**Plaintiff**	**Punitive Damages**	**Compen-satory Damages**	**Ratio**
Coopman	Flores	$396,000	$218,000	2:1
Coopman	Reyes	$176,000	$40,000	4:1
Coopman	Perez	$308,000	$50,000	6:1
Hall	Flores	$495,000	$65,000	8:1
Hall	Reyes	$220,000	$45,000	5:1
Hall	Perez	$385,000	$100,000	4:1
Baker	Flores	$49,500	$42,000	1:1

Baker	Reyes	\$22,000[1]	N/A	N/A
Baker	Perez	\$22,000[2]	N/A	N/A
Waller	Flores	\$49,500	\$210,000	1:4
Waller	Reyes	\$22,000	\$185,000	1:8
Waller	Perez	\$38,500[3]	N/A	N/A

Several of these awards are at or above a 4:1 ratio, which the Supreme Court has suggested "might be close to the line of constitutional impropriety." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). However, the Supreme Court has also stated that there is no "bright-line ratio" between punitive and compensatory damages that precisely establishes when a punitive damages award crosses the constitutional line. *Id.* This is particularly so in cases like this one, given the context-sensitive nature of employment discrimination and given that it is difficult to put a monetary value on harm to a person's dignity and liberty. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir. 2001). It bears noting that the jury was properly instructed on the standard for setting the amount of punitive damages and that Defendants did not object to this instruction. *See* Jury Instruction No. 34, Mar. 6, 2014 (Dkt. 198); Defs.' Objections to Pls.' Separate Proposed Jury Instructions (Dkt. 172); RT, 03/03/14, Vol. I, 5:8-16. In this circumstance, the Court is reluctant to disturb the jury's weighing of the

[1] This award was stricken by the Court. *See* Final Judgment Order, at 12-15.

[2] *Id.*

[3] *Id.*

evidence that they heard and their ultimate decision with regard to the punitive damages awards. Having also listened to all of the evidence, the Court does not find the awards grossly excessive such that they violate the Constitution.

With regard to oppressiveness, Defendants have cited no authority requiring the Court to consider a defendant's ability to pay in determining whether punitive damages are excessive, only an out-of-district case in which the court decided to do so. *See Kemp v. Ervin*, 651 F. Supp. 495, 506-08 (N.D. Ga. 1986). The Court is not inclined to do so here.

Thus, the Court declines to order a new trial on the bases that punitive damages were the result of passion or prejudice, excessive, or oppressive.

C. Conclusion

In conclusion, the Court DENIES Defendants' motion for a new trial.

III. RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW

A. Legal Standard

If, after the evidence is closed, there is only one reasonable conclusion that a jury may reach, the Court may grant judgment as a matter of law ("JMOL") as to any claim or defense in issue. Fed. R. Civ. P. 50(a); *see also Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998). The standard for granting JMOL mirrors the standard for granting summary judgment. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 250 (1986)). If there is substantial evidence to support a contention, the court may not grant a JMOL. *Watec Co. v. Liu*, 403 F.3d 645, 651 n.5 (9th Cir. 2005). Substantial evidence must be sufficient for reasonable minds to accept it as support for a conclusion, even when the evidence might also support a contrary conclusion. *George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir. 1992) (citing *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir.1987)). In making its determination, the court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Berry v. Bunnell*, 39 F.3d 1056, 1057 (9th Cir. 1994).

If the Court does not grant the relief and instead allows the case to go to the jury, a party may make a renewed motion for judgment as a matter of law ("RJMOL") within ten days after the entry of judgment. Fed. R. Civ. P. 50(b). A party cannot raise arguments in its RJMOL motion that it did not raise in its Rule 50(a) JMOL motion. *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003).

B. Analysis

Defendants raise a number of arguments in their RJMOL motions that were not raised in their original JMOL motions, including: (1) that Plaintiffs failed to show that the individual Defendants acted with malice, (2) that the jury did not make a finding of racial discrimination because the jury did not find that Defendants' reasons for their conduct were pretextual, (3) that Plaintiffs' § 1981 claims fail because they are employees by statute and not by contract; and (4) that punitive damages against Defendant Waller are inappropriate because he is deceased. Because arguments that were not raised in a JMOL motion cannot be raised in an RJMOL motion, the Court denies Defendants' RJMOL motions as to these arguments.

Defendant also properly "renewed" a number of arguments, including: (1) that Plaintiffs Flores and Reyes were no subject to adverse employment actions; (2) that Plaintiffs Flores's and Reyes's complaints against the department were not a substantial motivating factor in Defendants' conduct toward them; (3) that Plaintiffs failed to demonstrate personal participation by the individual Defendants in racial discrimination or retaliation; (4) that Plaintiffs Flores and Reyes never applied to be a sergeant and Perez applied once but failed the exam; (5) that Plaintiffs failed to show that it would have been futile to apply for special assignments; (6) that Plaintiffs failed to demonstrate that Defendants' reasons for their conduct was pretextual; and (7) that Plaintiffs' § 1981 claims were barred by the statute of limitations. Having considered the evidence presented at trial, the Court finds that there was substantial evidence to support the jury's findings and verdict. Thus, the Court denies Defendants' RJMOL motions as to these arguments.

C. Conclusion

Therefore, Defendants' RJMOL motions are DENIED in their entirety.

IV. MOTION FOR ATTORNEY FEES, EXPERT FEES, AND COSTS

A. Legal Standard

Under 42 U.S.C. § 1988, the Court may, in its discretion, grant a reasonable attorney's fee, including expert fees, as part of the costs to the prevailing party in any action to enforce 42 U.S.C. § 1981. 42 U.S.C. § 1988(b), (c). Under California Government Code § 12965(b), the Court may, in its discretion, grant a reasonable attorney's fee and costs, including expert witness fees, to the prevailing party in an action under the California Fair Employment and Housing Act.

A plaintiff is considered the prevailing party if it succeeds on any significant issue in litigation which gives some benefit that plaintiff sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). To satisfy this requirement, the suit must have produced a material alteration of the legal relationship between the parties. *Buckhannon Board & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.,* 532 U.S. 598, 604 (2001). This alteration may be the result of an enforceable judgment. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992).

In the Ninth Circuit, the customary method for determining a reasonable figure for an attorney's fees award is the lodestar formula. A lodestar figure is calculated by "multiplying the hours spent on a case by a reasonable hourly rate of compensation for each attorney involved." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986). "'In setting a reasonable attorney's fee, the district court should make specific findings as to the rate and hours it has determined to be reasonable.'" *Gracie v. Gracie*, 217 F.3d 1060, 1070 (9th Cir. 2000) (quoting *Frank Music Corp. v. Metro-Goldwyn Mayer, Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989))

The lodestar figure is presumed to represent an appropriate fee, *see City of Burlington v. Dague*, 505 U.S. 557, 562 (1992), but the Court may subsequently adjust the figure upward or downward to take into account special factors. *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006).

B. Analysis

Plaintiffs seek attorney's fees totaling $4,863,701.25 ($3,242,467.50 lodestar x 1.5 multiplier) plus $40,028.49 in expert fees and $18,684.12 in costs. Defendants argue that there is no justification for a multiplier and that, for various reasons, the lodestar should be reduced to $2,523,503.50. The Court addresses each of Defendants' reasons below.

1. Reasonable Hourly Rate

a. Legal Standard

It is well-established that "a reasonable hourly rate is the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (citation and internal quotation marks omitted). "'[R]easonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The fee applicant can satisfactorily prove the prevailing rate using affidavits from the plaintiffs' attorneys and other attorneys as well as rate determinations in other cases, especially those setting a rate for the plaintiffs' attorneys. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

b. Analysis

The parties submit that Plaintiffs' attorneys' reasonable hourly rates should be as follows:

Attorney/ Staff	**Year of Bar Admittance**	**Hourly Rate – Proposed by Plaintiffs**	**Hourly Rate – Proposed by Defendants**
Bernard Alexander	1987	$750	$675
Victor Viramontes	2001	$625	$525
Martha L. Gomez	2010	$390	$300
Matthew Barragan	2012	$340	$275
Tracy L. Fehr	2005	$475	$350
Marvin Krakow	1978	$750	$550
Miranda Galindo	2012 (grad)	$435	$200
Adriana Garcia	2012 (grad)	$250	$200

Ana Mendoza	(law clerk)	$200	$200
Gustin Ham	(paralegal)	$175	$175
Juan Rodriguez	2011	$340	N/A

Fees Mot. at 12-13; Fees Opp'n at 22 n.12; Fees Reply at 15.

Plaintiffs support their claimed rates with declarations from each of these attorneys/staff, outlining each individual's educational background and legal work experience. *See* Dkts. 253-2 to 253-5, 253-7 to 253-9, 273-1 to 273-24. In addition, Plaintiffs filed declarations from James DeSimone, David deRubertis, Bill Lan Lee, and Carol Sobel, experienced employment law and civil rights attorneys who have practiced in Southern California. *See* Dkts. 253-10 to 253-13. Based in particular on the Sobel, DeSimone, and DeRuberis declarations and the fee awards attached as exhibits, the Court finds that Plaintiffs' claimed hourly rates are on the high end but within the range of reasonableness.

The one exception is Galindo's rate. Like Garcia, Galindo had graduated from law school but had not yet been admitted to the bar at the time that she worked on this case. The only apparent explanation for her rate being $435/hour as opposed to $250/hour like Garcia's, is that Galindo is formally employed by Fried, Frank, Harris, Shriver & Jacobson LLP, a New York law firm. *Compare* Reply Declaration of Miranda Galindo in Support of Fees Mot. (Dkt. 273-21) *with* Reply Declaration of Adriana Garcia in Support of Fees Mot. (Dkt. 273-23). Even if $435/hour is the prevailing rate for law clerks in New York, there is no evidence that

that is the prevailing rate in Southern California. The Court understands, moreover, the MALDEF Fried Frank Fellowship program in which Galindo was participating is designed to allow fellows to participate in MALDEF litigation. Thus, there is no basis here to argue that New York attorneys in general must be awarded a higher fee in order to incentivize New York attorneys to take California cases. The Court also notes that $435/hour is 30% higher than Barragan's and Rodriguez's claimed rate of $340/hour. Barragan and Rodriguez graduated from law school before Galindo and were admitted to the bar before they began working on this case. *Compare* Hallihan Declaration (Dkt. 253-6) ¶ 3 *with* Declaration of Matthew J. Barragan (Dkt. 253-5) ¶¶ 3-4 *and* Reply Decl. of Juan Rodriguez (Dkt. 273-19) ¶¶ 3-4. Thus, the Court finds that a reasonable rate for Galindo, considering her level of experience, skill, and reputation, is $250/hour.

Defendants object that Plaintiffs' attorneys' rates are too high because Plaintiffs are comparing themselves to the most expensive and renowned lawyers in the area rather than estimating the market rate necessary to induce competent lawyers to undertake the representation. Fee Opp'n at 21. Defendants' attorney fees expert Robert Bruning opines based on his telephonic survey of seven Southern California employment law firms that Plaintiffs' attorneys' hourly rates should be between $65-$200/hour lower. Declaration of Robert M. Bruning in Opp'n to Fees Mot. (Dkt. 269) ¶ 17.[4] Although the

[4] Plaintiffs argue that Bruning's declaration should be stricken because (1) Bruning is not qualified to be an expert under Federal Rule of Evidence 702 because he has no experience in complex civil

Court appreciates the information provided by Bruning, the Court does not find Defendants' argument persuasive enough to reduce Plaintiffs' attorneys' rates. Overall, Bruning's survey reveals general information about the survey respondents' charged hourly rates for "partners" or "senior associates," with some references to an individual comparator's year of admittance to the bar, along with two cases in which Bruning had submitted declarations. *Id.* ¶¶ 4, 16. In contrast, the declarations submitted by Plaintiffs contain a wealth of information about each attorney, staff member, and comparator's experience, reputation, and skill. They also include numerous past fee awards which demonstrate actual rates awarded to some of the Plaintiffs' attorneys in this case and to their identified comparators. *See, e.g.*, Declaration of J. Bernard Alexander, III in Support of Fees Mot. (Dkt. 253-2) ¶¶ 41-43; Declaration of Carol Sobel in Support of Fees

---

rights litigation; (2) Bruning provides erroneous legal opinions on questions of law that are reserved for the Court; and (3) Bruning's opinions lack foundation because he insufficiently describes his methodology. Although Bruning may or may not have represented plaintiffs, he has litigated civil rights cases as well as business, torts, and contracts cases for 37 years. Bruning Decl. ¶ 3. Although Bruning's declaration does interpret the legal standard for attorney's fees, that is somewhat inevitable as the legal standard impacts the methodology for calculating reasonable attorney's fees. The Court gave no weight to the portions of Bruning's declaration that appeared to be merely an extension of Defendants' brief. *E.g.*, *id.* ¶¶ 6-10. The Court also finds that Bruning has adequately described his methodology. *See id.* ¶¶ 5, 16. It appears to the Court that Plaintiffs' arguments mostly go to the weight that should be given to the information in Bruning's declaration rather than to admissibility. Accordingly, the Court DENIES Plaintiffs' Motion to Strike.

Mot. (Dkt. 253-13) ¶¶ 19, 21, 22, 33, 34. Although many of the cases used by Plaintiffs as comparators were class action cases while this case was not a class action, this case was also complex, involving a complicated fact pattern and with dozens of claims going to trial. Although higher than the hourly rates charged by the employment law firms surveyed by Bruning, the hourly rates proposed by Plaintiffs are on par with or below the reasonable rates awarded in those cases.

Thus, the Court finds that the Plaintiffs' claimed hourly rates are reasonable, except that Galindo's reasonable rate is $250/hour.

2. Reasonable Number of Hours

a. Legal Standard

The fee applicant carries the burden of submitting evidence in support of the claimed hours. *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1993). "Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . ." *Hensley*, 461 U.S. at 434. The opposing party has the burden of rebuttal, requiring submission of evidence challenging the accuracy and reasonableness of the hours charged or facts asserted. *Gates*, 987 F.2d at 1397-98.

b. Analysis

Plaintiffs submit that the following hours were reasonably expended in preparing and litigating this case:

Attorney/ Staff	Hours	Hours Post-Trial	Total Hours[5]
Bernard Alexander	634.8	2.1	636.9
Victor Viramontes	1341.1	71.6	1412.7
Martha L. Gomez	2856.3	82	2938.3
Matthew Barragan	1889.1	160.6	2049.7
Tracy L. Fehr	64.9	30.7	95.6
Marvin Krakow	16.4	0	16.4
Miranda Galindo	132.9	0	132.9
Adriana Garcia	115.5	0	115.5
Ana Mendoza	27.0	20.0	47.0
Gustin Ham	209.8	0	209.8
Juan Rodriguez	0	29.7	29.7

Defendants make a number of objections to the number of hours claimed by Plaintiffs. The Court addresses each in turn.

i. Clerical Tasks

Defendants argue that Plaintiffs' attorney hours should be reduced by 7.9 hours for clerical and administrative tasks. Plaintiff does not respond to this argument. The Court has discretion to reduce claimed time for clerical tasks that should be part of normal overhead. *Davis v. City & Cnty. of San Francisco*, 976 F.2d 1536, 1543 (9th Cir. 1992) *opinion vacated in part on denial of reh'g,* 984 F.2d 345 (9th Cir. 1993). The Court agrees with Defendants that the time entries

[5] This amount includes the hours spent on post-trial motions, which were claimed by Plaintiffs in their Reply. Fees Reply at 15.

listed in Bruning Decl. Ex. N should be cut. Since Defendants have not cited any support for the proposition that association of counsel is a clerical task, the Court declines to discount the time entries in Bruning Decl. Ex. O. Thus, the Court agrees that 4.3 hours should be cut from Barragan's hours and 1.5 hours should be cut from Gomez's hours.

ii. Time Spent on Separate State Court Matter

Defendants argue that 0.8 hours spent by Viramontes and 6.7 hours spent by Gomez assisting Plaintiff Perez in prosecuting a state court case should be cut. Plaintiffs do not respond to this argument. The Court agrees with Defendants that this time should be cut, as it does not appear that the state court matter was directly related to this case.

iii. Overstaffing and Duplication of Efforts

Defendants argue that Plaintiffs' attorneys' hours should be reduced for overstaffing and duplication of efforts. Specifically, Defendants object to Plaintiffs' attorneys unnecessarily having more than one attorney attend depositions, mediation, court hearings, and trial. Defendants also object to Plaintiffs' attorneys spending excessive amounts of time preparing for mediation and drafting a mediation brief, preparing for deposition, preparing deposition summaries, and preparing demonstrative and trial exhibits. Fees Opp'n at 18.

The Court does not find it unreasonable for two attorneys to attend the same deposition, particularly in a complex case like this one. The Court also notes that

Viramontes and Gomez conducted most of the depositions on their own and only served as second-chair for one another in a relatively small percentage of the total hours spent in deposition. *See* Reply Declaration of Victor Viramontes in Support of Fees Mot. ("Viramontes Reply Decl.") (Dkt. 273-8) ¶ 7.

The Court also does not find it unreasonable in this case for Gomez and Barragan to attend mediation and court hearings with Viramontes and Alexander. Given the duration of the mediation and hearings, they appeared to have been contentious. *See* Bruning Decl. Ex. H (listing, among others, time entries for two-day final pretrial conference and five-hour mediation). Since Gomez and Barragan were immersed in the case, it was reasonable for them to be in attendance at the mediation and at the hearings, particularly at the hearings immediately leading up to trial.

Regarding trial attendance, the Court does not find it unreasonable for Gomez and Barragan to attend the trial, as they had spent many pre-trial hours deposing witnesses and preparing trial exhibits and assisted Viramontes and Alexander in running the trial. The Court is not persuaded that the hours spent in court during jury deliberations should be cut. Even if hours spent during jury deliberations are uneventful in hindsight, there is no way to know at the time if the jury will have questions (as the jury did in this case, *see* Jury Notes #1-5 (Dkts. 191-195)), when the jury will reach a verdict, or any other number of events might occur that will require the attorneys to spring into action. The Court does agree with Defendants that it is unclear what role Mendoza, a law clerk, played at closing arguments. *See* Bruning Decl. ¶ 40. Thus, the Court will cut the 5 hours spent by Mendoza.

Defendants object to the 693.5 hours spent by Plaintiffs' attorneys preparing for mediation and drafting a mediation brief. In Bruning's opinion, those hours should be reduced to no more than 80 hours by Gomez and 20 hours by Viramontes. Bruning Decl. ¶¶ 42-43. Plaintiffs respond that the hours spent on preparing the very long and comprehensive mediation brief constituted a large part of trial preparation because it involved reviewing the evidence and consolidating vast amounts of information into a single brief, which contained succinct summaries of the evidence supporting Plaintiffs' claims. Plaintiffs argue that, had they not spent those hours on the mediation brief, they would have claimed more hours for trial preparation. Viramontes Reply Decl. 8-9. Not having seen the mediation brief, the Court cannot judge for itself its comprehensiveness. However, both sides agree this was a document-heavy case. Bruning Decl. ¶ 22. The Court also notes there was no motion for summary judgment in this matter nor have Defendants identified an inordinate amount of time spent on doing a similarly comprehensive analysis of the evidence, suggesting that the time spent preparing for mediation was indeed the main period during which Plaintiffs put together their case. In this circumstance, the Court declines to reduce Plaintiffs' hours on mediation preparation.

Defendants argue that the attorney hours spent preparing deposition summaries should be reduced to the paralegal rate because such tasks could have been done by a paralegal. Fees Opp'n at 18; Bruning Decl.

¶¶ 44-45. Plaintiffs' general response is that MALDEF does not employ paralegals and that AKG's paralegal Ham is only trained on some aspects of paralegal work. Reply at 7-8. Since Ham did 82.5 hours of deposition summaries, Bruning Decl. ¶ 44, Ham was trained to do this type of task and could have been assigned more. The Court has no desire to tell the attorneys which tasks they should and should not do or who they need to hire. However, without further explanation for why attorneys had to write the deposition summaries when they could have been done by a paralegal, it is unreasonable to charge an attorney's rate for that work, even if it was done by an attorney. Thus, the Court will reduce the rate for the 124.5 attorney hours spent on deposition summaries to the paralegal rate of $175/hour.

Defendants argue that the 496.6 hours billed by Barragan in reviewing documents and preparing for 30 depositions was duplicative because Gomez and Viramontes, who actually took the depositions, also spent 453.1 and 226 hours, respectively, preparing for those depositions. Fees Opp'n at 18; Bruning Decl. ¶¶ 46-48. Having three attorneys collectively spend an average of 39 hours to prepare for each deposition is generous. Given that MALDEF does not employ paralegals, the Court is inclined to assume that Barragan's tasks did include tasks that a paralegal could have done or were unnecessarily duplicative. Thus, the Court will cut Barragan's hours by 15% or 74 hours.

Defendants also argue that Plaintiffs' attorneys spent excessive amounts of time preparing demonstrative and trial evidence. Fees Opp'n at 18.

Bruning opines that Gomez and Barragan should have spent no more than 80 hours on demonstrative and trial evidence, respectively, although he finds the number of hours spent by lead counsel Viramontes and Alexander and paralegal Ham to be reasonable. Bruning Decl. ¶¶ 51-53. Given that Defendants have cited no persuasive support for their contention that 80 hours is sufficient and given that this case involved an extensive exhibit list, the Court declines to make the cuts requested by Defendants.

iv. Vague Billing

Defendants also argue that Plaintiffs' hours should be reduced for vague billing. Plaintiffs did not respond to this argument. Fees Opp'n at 16-17. The Court agrees for the most part, except for the entries dated 4/25/2012, 12/11/2012, 2/28/2013, 10/24/2013, 12/2/2013, and 7/17/2014. *See* Bruning Decl. Ex. M. Thus, the Court reduces Plaintiffs' claimed hours as follows: 0.5 hour from Garcia; 0.8 hour from Barragan; 69.5 from Gomez; and 1.1 hours from Viramontes.

3. Conclusion re: Lodestar Calculation

In summary, the Court finds the following lodestar calculation appropriate:

Attorney/Staff	Hourly Rate	Total Hours Spent[6]	Amount
Bernard Alexander	$750 $175	535.9 101	$401,925.00 $17,675.00
Victor Viramontes	$625	1411.9	$882,437.50
Martha L. Gomez	$390 $175	2919.6 10.5	$1,138,644.00 $1,837.50
Matthew Barragan	$340 $175	1958.4 13	$665,856.00 $2,275.00
Tracy L. Fehr	$475	95.6	$45,410.00
Marvin Krakow	$750	16.4	$12,300.00
Miranda Galindo	$250	132.9	$33,225.00
Adriana Garcia	$250	115.5	$28,875.00
Ana Mendoza	$200	42.0	$8,400.00
Gustin Ham	$175	209.8	$36,715.00
Juan Rodriguez	$340	29.7	$10,098.00
TOTAL			**$3,285,673.00**

4. Lodestar Adjustment for Partial Success

a. Legal Standard

If a plaintiff achieves only partial success, the reasonable hours expended on the action as a whole multiplied by a reasonable rate may be an excessive amount. *Hensley*, 461 U.S. at 436. To determine whether the lodestar should be reduced to account for a plaintiff's only partial success, courts must apply a

[6] This amount includes the hours spent on post-trial motions, which were claimed by Plaintiffs in their Reply. Reply at 15.

two-part analysis. First, a court should ask first whether the plaintiff "fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded." *Id.* at 434. To assess whether one claim is related to another, a court should consider whether the relief sought for the unsuccessful claim was "intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised." *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986) (citation and internal quotation marks omitted). Courts also consider whether the claims are based on different facts and legal theories. If the claims are related, the court should proceed to the second part of the test, which asks whether the plaintiff "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley*, 461 U.S. at 434. "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." *Id.* at 436-37.

b. Analysis

Plaintiffs succeeded on some claims but not others, as shown in the chart below. The parties dispute whether the Court should reduce Plaintiffs' lodestar calculation because of Plaintiffs' failure on some claims.

	Flores	**Reyes**	**Perez**
FEHA discrimination claim against City	Failed	Failed	Failed
FEHA retaliation claim against City	Succeeded	Failed	N/A
§ 1981 discrimination claim against City	Failed	Failed	Failed
§ 1981 discrimination claim against Coopman	Succeeded	Succeeded	Succeeded
§ 1981 discrimination claim against Waller	Failed	Failed	Failed
§ 1981 discrimination claim against Hall	Succeeded	Succeeded	Succeeded
§ 1981 discrimination claim against Baker	Failed	Failed	Failed
§ 1981 retaliation claim against Coopman	Succeeded	Succeeded	N/A
§ 1981 retaliation claim against Waller	Succeeded	Succeeded	N/A

§ 1981 retaliation claim against Hall	Failed	Failed	N/A
§ 1981 retaliation claim against Baker	Succeeded	Failed	N/A

Here, the claims on which each Plaintiff failed was related to the claims on which he succeeded. Flores and Reyes both failed on their retaliation claims against some Defendants but succeeded against others. All three Plaintiffs failed on their racial discrimination claims against some Defendants but succeeded against others. The retaliation and discrimination claims have different elements; the claims against the City also have slightly different elements than the claims against the individual Defendants; and the facts regarding each of the parties were somewhat different. However, those differences are not enough to make the claims unrelated for attorney fee purposes because the claims all arose from a common core of facts and some from related legal theories.

As to the second part of the *Hensley* test, the Court declines to reduce the lodestar on the ground of Plaintiffs' limited success. Collectively, Plaintiffs succeeded on 11 of 28 claims. Each Plaintiff succeeded against multiple Defendants. Each Defendant was found liable for at least one claim. The jury awarded Plaintiffs over $3 million in compensatory and punitive damages. Although Plaintiffs did not achieve a perfect record, they did achieve "excellent results" in their impact litigation, which justifies including their work on related successful and unsuccessful claims in the lodestar calculation. *See Thorne*, 802 F.2d at 1141.

5. Lodestar Multiplier

a. Legal Standard

Under both state and federal law, the trial court "is not *required* to . . . [but] retains discretion to" apply a multiplier to the lodestar figure after considering certain factors specific to the lawsuit. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-34 (2001); *see also Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1158 (9th Cir. 2002) ("[I]n appropriate cases, the district court *may* adjust the 'presumptively reasonable' lodestar figure based upon the factors listed in *Kerr v. Screen Extras Guild, Inc*. . . .") (quoting *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622 (9th Cir. 1993)). Under both state and federal law, "the party seeking a fee enhancement bears the burden of proof." *Ketchum*, 24 Cal. 4th at 1138; *see also Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010).

In considering whether the lodestar figure should be adjusted, the trial court considers factors specific to the case. *Ketchum*, 24 Cal. 4th at 1134; *Cairns*, 292 F.3d at 1158 (citing *Kessler v. Assocs. Fin. Servs. Co. of Hawaii*, 639 F.2d 498, 500 n.1 (9th Cir. 1981)). These factors include but not are limited to whether the litigation precluded other employment by the attorneys, the novelty and difficulty of the questions involved, the skill displayed in presenting them, the results obtained, the experience of the attorney, and the undesirability of the case. *See Ketchum*, 24 Cal. 4th at 1132; *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006) (federal courts look at twelve *Kerr* factors).

At the same time, however, under both state and federal law, the trial court should not consider factors that have already been considered in calculating the lodestar figure. *See Ketchum*, 24 Cal. 4th at 1138; *Morales v. City of San Rafael*, 96 F.3d 359, 363-64 (9th Cir. 1996), *opinion amended on denial of reh'g,* 108 F.3d 981 (9th Cir. 1997). Factors that are often subsumed in calculating the lodestar figure include "the novelty and complexity of a case," or "the quality of an attorney's performance," *Perdue,* 559 U.S. at 553; *Ketchum*, 24 Cal. 4th at 1138-39, and the results obtained, *see Blum v. Stenson*, 465 U.S. 886, 900 (1984). After the U.S. Supreme Court opinion *City of Burlington v. Dague*, consideration of contingency risk is still permitted under California law but are disallowed under federal fee-shifting statutes like 42 U.S.C. § 1988 because an enhancement for contingency likely duplicates factors subsumed in the lodestar. *Compare Ketchum*, 24 Cal. 4th at 1138 ("[T]he purpose of a fee enhancement is primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases as a class.") *with City of Burlington v. Dague*, 505 U.S. 557, 567 (1992) *and Davis*, 976 F.2d at 1549 (holding that *Dague* constitutes an outright rejection of contingency as a factor in calculating or adjusting the lodestar figure).

b. Analysis

Plaintiffs seek a 1.5 multiplier on their lodestar (excluding time spent on post-trial motions) based on (1) contingency risk; (2) preclusion of other work; (3) difficulty of the issues and skill displayed in presenting them; and (4) results obtained. Fees Mot. at 20-22. The Court declines to grant Plaintiffs a multiplier.

Regarding the contingency risk, the Court can only consider contingency risk as to the single state law claim on which Plaintiffs prevailed, the FEHA retaliation claim by Plaintiff Flores against the City. However, it is impossible for the Court to separate out hours spent on the state law claim versus the federal claims because the state law claim arose from the same set of facts as the federal claims and neither party treated them as distinct. Since the burden is on Plaintiffs to justify the multiplier and Plaintiffs have not identified the number of hours on which a contingency risk-based multiplier could be applied, the Court is not inclined to grant a multiplier based on contingency risk.

As to preclusion of other work, Plaintiffs have not identified other work that they gave up in order to prosecute this case.

As for the difficulty of the issues and skill displayed in presenting them, the Court already accounted for these factors in finding reasonable a higher hourly rate and a higher number of hours than would be necessary in a less complex case or a case with an untimed trial.

With regard to the results obtained, the Court found that the results obtained were excellent enough not to justify a downward adjustment on the lodestar. However, the results were not so excellent as to justify an upward adjustment. Although Plaintiffs largely accomplished their goal of making an impact on the Westminster Police Department with this impact litigation, the Court notes that Plaintiffs lost on 15 out of the 28 claims that went to trial and that the City itself was only found liable on one claim by one Plaintiff. Moreover, the jury verdict form, which was agreed to by both parties, was not without problems. Final Judgment Order at 9-12.

For these reasons, the Court declines to grant a multiplier.

6. Expert Fees and Costs

Plaintiffs request $40,028.49 in expert fees and $18,684.12 in costs. Defendants do not oppose these amounts. The requested fees and costs appearing reasonable, the Court grants Plaintiffs' request for expert fees and costs.

V. DISPOSITION

For the reasons stated above, the Court DENIES Defendants' Motion for a New Trial and their Renewed Motions for Judgment as a Matter of Law. The Court GRANTS the following fees and costs: $3,285,673.00 in attorney fees, $40,028.49 in expert fees, and $18,684.12 in costs.

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11
CIVIL-GEN Initials of Deputy Clerk: djg

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 11-0278-DOC(RNBx)

[Filed August 11, 2014]

JOSE FLORES, ET AL.)
)
V.)
)
CITY OF WESTMINSTER, ET. AL.)
)

CIVIL MINUTES – GENERAL

PRESENT: THE HONORABLE DAVID O. CARTER, JUDGE

Julie Barrera	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): ORDER ON FINAL JUDGMENT AFTER JURY VERDICT

Before the Court are objections and responses to the proposed judgment filed by Plaintiffs Ryan Reyes, Jose Flores, and Brian Perez (Dkt. 240). The Court finds the issues presented appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Upon considering the arguments of both sides, the Court overrules the objections by Defendants and enters judgment in the accompanying order.

I. Background

The jury in this case returned a verdict on March 6, 2014. *See* Jury Verdict (Dkt. 199). The jury decided five claims against the City of Westminster and four Chiefs of the Westminster Police Department, all brought by three Latino police officers alleging race discrimination and retaliation. The Plaintiffs dismissed several claims before submitting the case to the jury, and the jury found as follows on the remaining claims: (1) the City of Westminster did not racially discriminate in violation of FEHA, Cal. Gov. Code §12940(a); (2) the City of Westminster retaliated against Plaintiff Flores, but not Plaintiff Reyes, in violation of FEHA, Cal. Gov. Code § 12940(h); (3) the City of Westminster did not racially discriminate against any plaintiff in violation of 42 U.S.C. § 1981; (4) Chiefs Coopman and Hall racially discriminated against all three plaintiffs in violation of 42 U.S.C. §1981, and Chiefs Waller and Baker did not racially discriminate as to any plaintiff; (5) Chiefs Coopman and Waller retaliated against Plaintiffs Flores and Reyes in violation of 42 U.S.C. § 1981, Chief Hall did not retaliate against any plaintiff, and Chief Baker retaliated against Plaintiff Flores in violation of 42 U.S.C. § 1981. The jury awarded compensatory and punitive damages.

After the verdict, the parties requested that the Court delay entry of final judgment to permit mediation. *See* Stipulation (Dkt. 190). The Court did so, and the parties did not resolve the dispute. The Court therefore ordered Plaintiffs to submit a proposed judgment for the Court's approval. *See* Order (Dkt. 239). Plaintiffs did so, and Defendants filed objections to the judgment (Dkt. 242). Plaintiffs responded to those objections (Dkt. 244), Defendants replied (Dkt. 245), and Plaintiffs again responded (Dkt. 246).

Normally, objections to inconsistencies in a verdict form are brought in a motion for a new trial after judgment is entered. *See Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1054 (9th Cir. 2003); *Tanno v. S.S. President Madison Ves*, 830 F.2d 991, 992 (9th Cir. 1987). However, because the parties have raised their concerns at this juncture, the Court will take them into consideration in entering judgment. The parties may incorporate their objections by reference in any subsequent motions for a new trial in order to preserve those objections, but should not further brief any issues raised in their filings up to this point. As a result, any motions for new trial, oppositions, and replies will be **limited to twenty pages** instead of twenty-five pages.

II. Nature of the Verdict

The type of verdict returned by the jury is a relevant consideration to determining the disputes over the verdict. Jury verdicts may be of three types: general verdicts, general verdicts with interrogatories, and special verdicts. *See Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1031 (9th Cir. 2003). There is no dispute that the verdict at issue here is not solely a general verdict. However, a crucial question is whether the verdict constitutes only a special verdict, or a general verdict with interrogatories.

The distinctions between a general verdict with interrogatories and a purely special verdict are easy to state and difficult to apply. Rule 49(a) describes a special verdict as follows:

> 1) *In General.* The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:
>
> > (A) submitting written questions susceptible of a categorical or other brief answer;
> >
> > (B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or
> >
> > (C) using any other method that the court considers appropriate.

Fed. R. Civ. P. 49(a)(1).

Rule 49(b) in turn describes a "General Verdict with Answers to Written Questions" as "forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide." Fed. R. Civ. P. 49(b)(1). The Ninth Circuit acknowledges that "[t]hese terms are not adequate to capture every answer that a jury may give," and a jury "may make legal conclusions as to subsidiary issues, such as affirmative defenses, or the amount of damages owed, which are neither findings of fact nor quite 'verdicts.'" *Zhang*, 339 F.3d at 1031. Although these quasi-verdicts bear some similarities to general verdicts, "we have found no precise label for them." *Id*. "From a substantive perspective, whether a verdict is general or special is of critical importance because inconsistent general verdicts on separate claims are typically permitted to stand, whereas irreconcilably inconsistent special verdicts require a new trial." *Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, 818 F. Supp. 2d 1193, 1219 (E.D. Cal. 2011) (citing *Zhang*, 339 F.3d at 1036-38).

Perhaps the only universally clear tenet on the categories of verdict forms is that they are very hard to tell apart. Many courts have commented that distinguishing among these groups, particularly between special verdicts and general verdicts with interrogatories, is trying. *See Mason v. Ford Motor Co., Inc.,* 307 F.3d 1271, 1274-75 (11th Cir. 2002) ("Categorizing a verdict as a general verdict, or as a special verdict under Rule 49(a), or as a general verdict with special interrogatories under Rule 49(b), should be—but too often seems not—a simple matter."); *Turyna v. Martam Const. Co., Inc.*, 83 F.3d 178, 179 (7th Cir. 1996) ("The case was submitted to the jury on a form that wasn't quite a general verdict form, but it wasn't special verdicts under Federal Rule of Civil Procedure 49(a) or a general verdict with interrogatories under Rule 49(b) either."); *Loughman v. Consol-Pennsylvania Coal Co.,* 6 F.3d 88, 104 n.16 (3d Cir. 1993) ("as in many cases, it is not entirely clear whether the verdict is governed by Fed. R. Civ. P. 49(a) or 49(b)"); *Floyd v. Laws*, 929 F.2d 1390, 1395 (9th Cir. 1991) ("As a practical matter, it seems that the form of a general verdict with interrogatories is virtually indistinguishable from that of a special verdict. . . . Often courts are unable to decide whether a verdict is a special verdict under Rule 49(a) or a general verdict with interrogatories under Rule 49(b).”); *Dawkins v. City & Cnty. of Honolulu*, CIV. 10-00086, 2012 WL 1982461, at *5 (D. Haw. May 31, 2012) (“The distinction between general and special verdicts is sometimes unclear in practice[.]”); *Duhn Oil Tool*, 818 F. Supp. 2d at 1219 (“The verdict form submitted by the parties in this case is located in the twilight zone of this spectrum.”).

This verdict is no exception to the general rule of confusion. It could be categorized as either a general verdict with interrogatories or a pure special verdict. On one hand, the form asks a long series of carefully crafted questions that refer the jury to answer further questions, or not, depending on their responses. There is no point at which the jury is asked to state whether they find “for” or “against” the plaintiffs or defendants. This might suggest that the jury was focusing on its “fact-finding role,” and not applying the law to its conclusions. *See Zhang*, 399 F.3d at 1031. The fact that the form is labeled a “special verdict form” has no bearing on whether the jury in fact returned a special verdict. *See Babcock v. Gen. Motors Corp.*, 299 F.3d 60, 63 (1st Cir. 2002) (treating verdict as general verdict despite its being titled “Special Verdict Form”); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 56 (2d Cir. 2002) (quoting *Lavoie v. Pac. Press & Shear Co.,* 975 F.2d 48, 54 (2d Cir. 1992)) (“[T]he answers to the questions submitted to the jury are not special verdicts, despite the use of those words in the title appended to the form, and Rule 49(a) therefore does not apply.”). If a district judge specifically determines that a verdict is of one type or the other, however, and proceeds to treat the verdict as such, a reviewing court may consider that action dispositive. *See Floyd*, 929 F.2d at 1396

("Consequently, as a matter of law, the interrogatories submitted to the jury in this case constituted a special verdict, simply because that is what the trial court declared them to be.").

On the other hand, the jury was given lengthy instructions on the applicable law that set out the elements and directed the jury how to apply those elements. *See generally* Jury Instructions, Given. This suggests that the jury was actually asked to apply law to its factual determinations, not merely find facts. *See Floyd*, 929 F.2d at 1395; *R. H. Baker & Co. v. Smith-Blair, Inc.*, 331 F.2d 506, 511 (9th Cir. 1964) ("Use of the special verdict eliminates the necessity for and use of complicated instructions on the law[.]") (internal citations and quotation marks omitted). The verdict form was divided by the different claims, and the jury instructions described the fundamental requirements for each claim. The verdict form also included several of the not-quite-general verdicts that are referenced in *Zhang*; the jury determined whether the city's action constituted an adverse employment action, and the compensatory damages awards asked the jury to state what damages they found for each specific claim. *See* Verdict at 5, 10-15.

Ultimately, the Court finds that it is unnecessary to determine which type of form is at issue, as the result is the same in either circumstance. The verdict is reconcilable as a special verdict or general verdict with interrogatories, and the objections would be waived with respect to a general verdict with interrogatories.

III. Legal Standard

Inconsistent general verdicts generally may stand. *Zhang*, 339 F.3d at 1035 (quoting *Int'l Longshoremen's Union v. Hawaiian Pineapple Co.,* 226 F.2d 875, 881 (9th Cir. 1955)) ("[L]egally inconsistent verdicts 'may nonetheless stand on appeal even though inconsistent.'"). If a jury returns a general verdict whose legal conclusions conflict with the special interrogatories, "the trial court has the discretion to enter judgment on the factual findings, even if they conflict with the jury's conclusion as to liability, *see* Fed. R. Civ. P. 49(b); only if there is a conflict within the factual findings would a new trial be required." *Zhang*, 339 F.3d at 1038.

If interrogatories within a special verdict have seemingly inconsistent answers, "a court has a duty under the seventh amendment to harmonize those answers, if such be possible under a fair reading of them. A court is also obligated to try to reconcile the jury's findings by exegesis, if necessary." *Floyd*, 929 F.2d at 1396 (citing *Gallick v. Baltimore & O.R.R. Co.,* 372 U.S. 108, 110 (1963)). A court should only conduct a new trial "in the case of fatal inconsistency." *Id*. "The consistency of the jury verdict must be considered in light of the judge's instructions to the jury." *California v. Altus Fin. S.A.*, 540 F.3d 992, 1004 (9th Cir. 2008) (quoting *Toner v. Lederle Labs.,* 828 F.2d 510, 512 (9th Cir. 1987)). In reconciling verdicts, the Court must "view[] the case in any reasonable way that makes the verdicts consistent." *Anheuser-Busch, Inc. v. John Labatt Ltd.*, 89 F.3d 1339, 1347 (8th Cir. 1996).

IV. General Verdict Analysis: Waiver

Plaintiffs argue that Defendants waived any objections to the jury verdict by not making them at the time the verdict was read. This argument only applies to a general verdict with interrogatories, not a special verdict. *See, e.g., Johnson v. Ablt Trucking Co., Inc.*, 412 F.3d 1138, 1141 (10th Cir. 2005).

After the Court read the verdict, the following proceedings took place:

> The Court: Now, Counsel, those are the verdict forms of the jury. Is there any further proceedings or discussion you'd like to have with the Court before I discharge this jury?
>
> [Plaintiffs' Counsel]: No, Your Honor.
>
> [Defense Counsel]: No, Your Honor.
>
> The Court: All right. Then, may I discharge the jury at this time? Counsel?
>
> [Plaintiffs' Counsel]: Yes.
>
> The Court: Counsel?
>
> [Defense Counsel]: Yes, Your Honor.

Hearing Transcript March 6, 2014 (Dkt. 237) at 21.

The rule on this issue is somewhat unclear in the Ninth Circuit. In some cases, the Circuit has held that failing to object to a verdict's inconsistencies at the time the verdict is read results in waiver. *See Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995) ("When counsel is invited to consider whether or not to discharge the jury, counsel risks waiver of objections to any inconsistencies in the jury's findings if counsel does not raise the issue before the jury is excused."); *Philippine Nat. Oil Co. v. Garrett Corp.*, 724 F.2d 803, 806 (9th Cir. 1984) ("First, PNOC waived its claim of jury confusion or compromise when it failed to raise it at the time the verdict was read."). At least one case in the circuit, however, states that there is no blanket waiver rule for failing to object before the jury is discharged. *See Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1354-55 (9th Cir. 1987) (finding no blanket waiver rule under Rule 49(b) because such a rule would be contrary to the language of Rule 49 and would "permit[]the party in whose favor the general verdict runs to prevail merely by remaining silent").

A recent case on the issue, *Kode v. Carlson*, acknowledges that there is value to requiring objection before the discharge of the jury. *See* 596 F.3d 608, 611 (9th Cir. 2010) ("[D]istrict court judges are in a unique position to instruct the jury regarding the meaning of the law, including whether two legal conclusions by the jury are inconsistent."). *Kode* highlights, however, that the Ninth Circuit's waiver rule in *Phillipine National* addresses a zero-damages verdict for liability, arguably an inconsistency that is both particularly obvious on the face of the verdict and particularly amenable to resubmission to the jury. *See id*. ("[W]e hold that motions for a new trial challenging a zero damages award as inconsistent with liability are waived when either: (1) a jury verdict finds liability but no damages and the moving party does not object before jury discharge; or, more generally, (2) the moving party argues that the jury has rendered a verdict that contains two legal conclusions that are inconsistent with one another, and the moving party does not object before jury discharge.").

The circumstances of this case are appropriate for a waiver finding, however. In *Moss*, an insurer sued the law firm that unsuccessfully defended the insurer against an insured. *Moss*, 43 F.3d at 1325. The jury found for the insurer, Home, on malpractice and agency claims, but did not enter a legal finding that Home was entitled to contribution. *Id*. Home cross-appealed, arguing that the jury had found all of the requisite elements of contribution and so its legal conclusion against contribution was inconsistent. *Id*. at 1331. The Circuit held that Home waived this claim because it failed to raise it before the jury was discharged:

> We conclude that the district court properly refused to amend the judgment because Home waived its objection to the jury's verdict on its contribution claim by not objecting to the alleged inconsistency prior to the dismissal of the jury. Before the jury was discharged, the district court expressly asked Home if there was any reason not to excuse the jury, and Home responded negatively.
>
> When counsel is invited to consider whether or not to discharge the jury, counsel risks waiver of objections to any inconsistencies in the jury's findings if counsel does not raise the issue before the jury is excused.

Id. In this case, the Court expressly asked both parties, twice, if there was any reason not to discharge the jury; both declined. Neither party asked for a jury poll, requested an opportunity to discuss the verdict, or raised an objection. Waiver would therefore be appropriate if the jury verdict were construed as a general verdict with interrogatories. *See Los Angeles Nut House*, 825 F.2d at 1354 (discussing waiver case law where parties were asked whether discharge was appropriate).

Therefore, if the Court were to construe the verdict as a general verdict with interrogatories, any inconsistencies would be waived and the Defendants' objections overruled. Ultimately, the Court concludes that the factual interrogatories, even if construed as a special verdict, can be reconciled. The verdict therefore survives whether it is construed as a pure special verdict or general verdict with interrogatories, *see Zhang*, 339 F.3d at 1038.

V. Special Verdict Analysis

a. Question 13 and Racial Discrimination

Defendants object that judgment cannot be entered against the individual Chiefs for violation of 42 U.S.C. § 1981 because the Special Verdict Form does not show a finding of racial discrimination. Because the jury did not answer the question relevant to racial discrimination, Defendants argue, but still awarded damages against the individual Chiefs for discrimination, the verdict is fatally inconsistent. *See* Objections at 5-8.

The basis for this argument is rooted in the series of questions set out for the jury on liability under § 1981 for both the City of Westminster and the individual defendants. The verdict form has a cascading effect, in which some elements are presented with respect to one claim early in the verdict form, and then incorporated in later claims without repeating them. Thus, in Questions 1 and 2 on the verdict form, the jury answered that all three plaintiffs applied for Special Assignments, or that application would have been futile, and that all three plaintiffs were qualified. *See* Verdict at 2. These questions are listed under a heading for the first cause of action, national origin discrimination in violation California's Fair Employment and Housing Act ("FEHA"), but are relevant to other claims as well. *See id*.

Questions 10-13 are listed under the heading for Claim 3, race discrimination by the city of Westminster in violation of 42 U.S.C. § 1981. *Id*. at 6. The form instructs the jury to "answer the following questions" for only those plaintiffs for whom Questions 1 and 2 were answered affirmatively. *Id*. Questions 10-12 correspond to the elements of municipal liability for § 1981 discrimination. Each question states that if the answer is "no" for all plaintiffs, the jury should move on to Question 14. The jury answered "no" for all plaintiffs in response to Question 11, which asked whether the plaintiffs were rejected for promotion or special assignment due to a "custom or policy" of Westminster to deny Latino officers those positions. *Id*. at 7. Because the jury answered "no," it followed the instructions under Question 11 and proceeded to Question 14.

In following these instructions, the jury was not asked to answer the last question under Claim 3: Question 13. Question 13 asks, "Was any purported legitimate business reason given by the City of Westminster for its conduct a false reason?" *Id*. at 8. After Question 13, the form directs the jury to "answer the next question." *Id*.

Question 14 is the first question under the heading for the next cause of action, discrimination by the individual Chiefs in violation of 42 U.S.C. § 1981. *Id*. at 8. The first line under the heading reads, "If your answer to question No. 13 is 'yes,' answer the next question. If your answer to question 13 is 'no,' go to question 18." *Id*. Questions 14-17 ask whether each individual chief personally participated in or ratified "one or more decisions to select non-Latino applicants with qualifications comparable to or worse than Plaintiffs." *Id*. at 8-9. The form instructed the jurors that, if they answered "no" for all plaintiffs for *any* of Questions 10-12, they should go to Question 14 without answering Question 13. A separate note before Question 14 told them, "If your answer to question No. 13 is 'yes,' answer the next question. If your answer to question 13 is 'no,' go to question 18."

First, Defendants argue that the jury never should have reached Question 14 without answering Question 13, and so the liability verdict against the Chiefs is inconsistent. *See* Objections at 5-8. But in fact, the jury did exactly as they were told. The instructions affirmatively directed the jury to skip to Question 14 if their answer to Question 11 was "no" for all Plaintiffs. The note above Question 14 only tells the jury what to do *if* it reached Question 13; it is silent on how the jury should proceed if Question 13 was never reached. Therefore, the note at Question 14 is not inconsistent with the instructions following Question 11. The Court therefore rejects any argument that the jury did not follow the directions on the form or that the jury was directed to take inconsistent actions.

Defendants' interpretation of the form is also flawed because it assumes that the jury could not find individual liability without finding all of the elements of municipal liability. This is not legally accurate—the prerequisite of a "custom or policy" to discriminate is not an element of racial discrimination by an individual defendant; the individual Chiefs could have individually discriminated on the basis of race independent of a custom or policy by the City of Westminster; the elements for the two claims are distinct. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736 (1989); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). The jury's interrogatories finding liability against the Chiefs and not the City are therefore not inconsistent. Furthermore, the jury instructions themselves stated the law this way. *Compare* Jury Instructions, Given at No. 20 *with* Jury Instructions, Given at No. 21. It was therefore proper for the jury to answer Question 14 not only because they were directed to do so after answering Question 11, but also because the Court's instructions made clear that individual liability did not share all of the elements of City liability.

Second, Defendants argue that Question 13 served as the determining element showing racial discrimination; it required the jury to find that the City did not have alternative, legitimate bases for the promotion decisions. *See* Objections at 5-7. The jury instructions did clearly state that Plaintiffs must prove that Defendants discriminated on the basis of race, and included the legitimate business reasons as an element. *See* Jury Instructions, Given at No. 21. Defendants argue that the failure to answer Question 13 creates a fatal inconsistency because the jurors could not have awarded damages for individual liability without deciding Question 13. *See* Objections at 5-8. The fact that the jurors did not answer Question 13 appears to be a drafting issue—the question was presented to them only in the context of liability for the City, not the individual defendants, and the form was set up to only include that element if municipal liability was found. Question 4, under the heading for City liability under FEHA, did ask about the City's motivation for its actions. *See* Verdict at 3. But Question 4 was not set out in the form as a prerequisite for answering the questions related to § 1981 liability, as were Questions 1 and 2. *See* Verdict at 6.

The Court rejects Defendants' argument that the jury's failure to consider Question 13 with respect to the individual Chiefs is somehow dispositive. This is not a problem of inconsistency, per se; it is a problem of the parties developing a jury verdict form that did not present an element to the jury in both of the claims for which the Defendants wanted it presented. The parties wrote and agreed to this verdict form; neither had any objection to the content or structure of the form. With respect to a special verdict form, Rule 49(a) specifically provides that the parties are responsible for including all relevant factual inquiries:

> (3) *Issues Not Submitted.* A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a

> finding consistent with its judgment on the special verdict.

Fed. R. Civ. P. 49(a)(3). These provisions were implemented specifically to place the burden of the contents of the verdict form on the parties and end the practice of requiring a new trial whenever a jury form omitted "a fact necessary to the judgment." *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 915 (1st Cir. 1988). "To this end, Rule 49(a) ensures that, if the submitted questions omit any material issue of fact, the district court may itself make a finding (or, if it fails to do so, shall be deemed to have made a finding) consistent with the judgment entered pursuant to the special verdict." *Id*. at 915-16. "[F]ailure to challenge the omission of an issue from a Rule 49(a) verdict form before the jury retires to deliberate constitutes a waiver of the right to a trial by jury on that issue." *Barrett v. Orange Cnty. Human Rights Comm'n*, 194 F.3d 341, 349 (2d Cir. 1999) (quoting *Bradway v. Gonzales,* 26 F.3d 313, 317 (2d Cir. 1994)).

The Court therefore finds that the failure to answer Question 13 does not render the verdict fatally irreconcilable or otherwise void. The jury intended to find the individual Chiefs liable, but did not find municipal liability under a custom or policy.

b. Inconsistent Monetary Awards

The jury made four awards of damages that were unsupported by the jury's factual interrogatories. One of these four addressed compensatory damages: the jury found that the City of Westminster did not violate FEHA's retaliation provisions, but awarded Plaintiff Reyes $110,000 in general damages for FEHA

Retaliation by the City of Westminster. The other three erroneous awards are for punitive damages: two are against Defendant Baker, whom the jury found did not engage in discrimination or retaliation against Plaintiffs Reyes or Perez, and one is against Defendant Waller, whom the jury found did not engage in discrimination or retaliation against Plaintiff Perez. Although the jury found that Defendant Baker did not engage in discrimination or retaliation against Plaintiff Perez or Plaintiff Reyes in violation of § 1981, it awarded Plaintiff Perez $38,500 in punitive damages and Plaintiff Reyes $22,000. The jury also found that Defendant Waller did not engage in discrimination or retaliation against Plaintiff Perez in violation of § 1981, but awarded Plaintiff Perez $38,500 in punitive damages against Defendant Waller.

Regarding the compensatory retaliation damages awarded to Plaintiff Reyes, the jury's action appears to be the result of a misreading of Questions 8 and 9. In Question 8, the jury found that Plaintiff Flores's filing of a complaint was a substantial motivating factor in Westminster's taking adverse employment action against him. Verdict at 5. However, the jury found that the filing of a complaint was not a substantial motivating factor in the City's actions against Plaintiff Reyes. *Id*. After Question 8, the verdict form reads, "If your answer to question 8 is 'yes' for any plaintiff, answer the next question for that plaintiff. If your answer to question 8 is 'no' for a plaintiff, go to question 10." *Id*. The jury then erroneously answered Question 9 for both Plaintiffs Flores and Reyes, finding that the City's conduct was a substantial factor in causing harm to both plaintiffs. The jury then awarded compensatory damages to Plaintiff Reyes in Question

28, which directed the jury to answer Question 28 "if your answer was 'yes' to Question 9 as to Ryan Reyes." *Id*. at 14. The jury, therefore, appears to have awarded damages because it found that the City's action did cause Plaintiff Reyes financial harm, but the actions were not motivated by retaliation. This presents the issue of how the Court should handle a damages judgment that is not premised on a finding of liability.

In *Floyd*, the Ninth Circuit resolved an almost identical issue. In Question 13 of the special jury verdict, the *Floyd* jury found that the defendants had not caused the plaintiff's harm. *Floyd v. Laws*, 929 F.2d 1390, 1393 (9th Cir. 1991). The verdict instructed the jury not to answer Question 14, regarding the amount of damages, if it answered "no" to Question 13. Nevertheless, the jury answered Question 14 with a damages award of $7,500. *Id*. Addressing an apparent question of first impression, the Ninth Circuit held that "superfluous answers in violation of a trial court's express instructions contained in the special verdict form" were "surplusage" that the district court was right to disregard. *Id*. at 1397-98. *Floyd* further explained that Question 14 must be ignored as surplusage because the jury's answer to Question 13 "disposed of the legal issue before the trial court and obviated the need for any further finding of fact." *Id*. at 1399. Indeed, the Circuit held that because it should never have been answered, Question 14 "never became part of the special verdict," and "the trial court was bound by law to disregard any answer to question 14 as surplusage." *Id.* Facing a similar issue, the Fourth Circuit ordered judgment entered for a defendant when a jury awarded damages after finding no liability in a special verdict form. *See McCollum v. Stahl*, 579 F.2d

869, 871 (4th Cir. 1978) (holding that the verdict was "an unequivocal finding of no wrongful conduct," and the damages interrogatories were "surplusage"). Therefore, the erroneous compensatory damages award to Plaintiff Reyes is surplusage and will not be entered in the final judgment.

The Court finds that the same analysis is appropriate for the erroneous punitive damages awards. The verdict form's directions to the jury on when punitive damages may be awarded were less obvious than the instructions on liability. Nevertheless, the punitive damages awards did not create a logical impossibility or inconsistency; rather, the jury may have believed that the defendants' conduct was malicious, but lacked the causal elements that would create liability. These findings are therefore "surplusage" as in *Floyd*, not a legal or logical impossibility. *See Frey v. Alldata Corp.*, 895 F. Supp. 221, 224 (E.D. Wis. 1995) (citing *Floyd,* 929 F.2d at 1390) ("The answer on punitive damages is superfluous, it is legally impossible, not logically inconsistent."). Courts handle nearly identical scenarios by striking superfluous punitive damages awards. *See Freeman v. Chicago Park Dist.*, 189 F.3d 613, 616 (7th Cir. 1999) (finding that jury's award of damages after finding that harassment was not due to racial discrimination was not a fatal inconsistency because, in a special verdict, damages awards are factual findings and not liability findings as in a general verdict, and so a legally impossible damages finding is merely a "measure of loss" not tied to liability); *E.E.O.C. v. Foot Locker Retail, Inc.*, C07-5472BHS, 2009 WL 1174640, at *5 (W.D. Wash. Apr. 28, 2009) (finding that legally impossible punitive damages award was not a fatal inconsistency because the jury had ignored explicit instructions, and there were multiple explanations for the jury's damages finding that would not imply a finding of liability, including believing that the conduct was "contemptible," even if not a legal violation).

Finally, the Court notes that the case law supporting an alternative finding is inapposite to the instant case. Defendants cite *Bernardini* to argue that the interrogatories are inconsistent and so the verdict cannot stand. *Bernardini* involved a claim by a longshoreman that an injury caused by a fall on the defendant's ship was the result of negligence and unseaworthiness. *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660, 661 (2d Cir. 1975). The two inconsistent interrogatories were both as to liability; the jury found in one question that the defendants were negligent, but in another question that the plaintiff had not proved that the ship was unseaworthy. But because unseaworthiness and negligence were essentially the same ("unseaworthiness has virtually swallowed up negligence"), the two verdicts could not logically coexist. *Id*. at 664. That is not this case, where the jury simply awarded punitive damages where it should not have. *Bernardini* does not speak to this situation. Similarly, *Bonin* addresses inconsistent interrogatories on the relative negligence of plaintiffs and defendants, crucial to liability and irreconcilable. *See Bonin v. Tour W., Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990). This also does not support a finding of irreconcilability in this case. Therefore, the erroneous punitive damages awards will be stricken as surplusage.

VI. Different Results as to Different Plaintiffs

Defendants argue that it makes no sense for the jury to find liability as to certain claims for Plaintiff Flores, but not Plaintiff Reyes. The Court disagrees; each plaintiff had an independent employment history, disciplinary history, and personal experience at the department. The Court sees no reason to find that the results between Plaintiff Flores and Plaintiff Reyes could not rationally be different. The same reasoning applies to arguments regarding differential results among individual Chiefs.

VII. City of Westminster FEHA Liability

The Court further finds that the jury's conclusions regarding the City's liability, or lack thereof, under FEHA do not render the verdict inconsistent. The jury found that the City had not discriminated in violation of FEHA, and that the City retaliated against only Plaintiff Flores in violation of FEHA. Defendants posit that the individual verdicts for § 1981 discrimination against the individual Chiefs are inconsistent with the FEHA discrimination verdicts in favor of the City because FEHA provides for respondeat superior liability. Defs.' Reply to Pls.' Response (Dkt. 245) at 12. Defendants claim that the Plaintiffs have conceded that the Chiefs were acting in the scope of their employment at all times, and so any discriminatory finding under § 1981 must be sufficient to generate FEHA vicarious liability. *Id*. This reasoning assumes that the elements of § 1981 discrimination are coextensive or sufficient for FEHA liability, which is not entirely clear to the Court.[1] Even assuming for the moment that § 1981 liability is coextensive with the requirements of FEHA in this way, the Court finds that there is no fatal inconsistency.

It does not appear to the Court that Plaintiffs ever presented a vicarious liability theory to the jury. There was no vicarious liability instruction, and the Plaintiffs did not request one. *See generally* Proposed Jury Instructions (Dkt. 135); Jury Instructions, Given. Plaintiffs' trial brief does not describe a vicarious liability theory. *See* Trial Brief (Dkt. 138) at 9-14. Plaintiffs also did not propose or request that the Court find the City liable based on respondeat superior in its motion work regarding the verdict; rather, they mention this positon only in response to one of the Defendants' statements in its papers. *See* Pl's Response (Dkt. 246).

The jury's verdict is therefore reconcilable. The jury was unaware that the City could be held vicariously liable for specific discriminatory acts by its Chiefs, and so it did not find FEHA liability as to the City. The

---

[1] The Court has been unable to locate a clear legal statement of the relationship between discrimination under §1981 and FEHA. There is much discussion of the relationship between § 1981 and Title VII. *See Manatt v. Bank of Am., NA*, 339 F.3d 792, 797 (9th Cir. 2003) ("We also recognize that those legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action."); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987). Similarly, there is much comparison of Title VII and FEHA. *See State Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026, 1040 (2003); *Flait v. N. Am. Watch Corp.*, 3 Cal. App. 4th 467, 475-76 (1992). There is relatively little discussion of how these areas of overlap might interrelate. Because it is not necessary to address this further, the Court does not resolve this issue.

FEHA retaliation claim in favor of Plaintiff Flores does not change this conclusion. The jury heard a wide range of evidence spanning many years, including conduct by many different employees of the Police Department. The Court is aware of no reason that the jury could not have identified conduct rendering the City liable but not constituting personal participation or ratification by a Chief. *See* Trial Brief (Dkt. 138) at 9-14; *Kaulia v. Cnty. of Maui, Dep't of Pub. Works & Waste Mgmt.*, 504 F. Supp. 2d 969, 981 (D. Haw. 2007).

The Court also finds that, even if the individual findings of liability by the Chiefs would generate FEHA liability for the city, modifying the verdict to find that liability would be improper. The Court cannot present a theory of liability to the jury that was not presented or argued by a party. *See Salem v. U.S. Lines Co.*, 370 U.S. 31, 39 (1962) ("Consequently, the District Court's charge that the jury could find the respondent negligent 'in failing to provide railings or other safety devices' had injected into the case a theory of liability which had not been presented to the jury by the evidence introduced at the trial. This has uniformly been held to constitute reversible error."). Therefore, the Court finds it would be similarly improper to impose a theory of liability after the fact in a verdict form when the Plaintiffs did not present that theory, did not argue for that theory, and did not request an instruction on that theory.

This is not contrary to the Ninth Circuit's opinion in *El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1071 (9th Cir. 2005). In that case, the jury found that the defendant CEO had racially discriminated against the plaintiff under § 1981, but did not find the employer liable under Title VII. *Id*. at 1072. The district court noted that the jury instructions had erroneously omitted a vicarious liability instruction, and amended the judgment to find liability against the employer as well. *Id*. The Ninth Circuit affirmed this reconciling of the verdict. *Id*. at 1074. This does not compel the Court to do the same in this case. In *El-Hakem*, the plaintiff alleged discrimination based *only* on statements and actions of the CEO, and nothing else. *See id*. The instant case did not allege only the conduct of the Chiefs; the trial included a wide range of evidence in many forms, allowing City liability (or lack thereof) in numerous ways. Furthermore, the *El-Hakem* plaintiff affirmatively argued in its post-trial motions that respondeat superior liability should apply. *Id*. at 1072.

Therefore, the FEHA verdicts do not render the verdict inconsistent.

VIII. Interest

Under California law, the FEHA claim as to the City of Westminster accrues at the local public entity rate, which is the rate "equal to the weekly average one year constant maturity United States Treasury yield at the time of the judgment plus 2 percent, but shall not exceed 7 percent per annum." Cal. Gov't Code § 970.1. For the two-week period ending August 1, 2014, the one-year constant treasury maturities yield rate was 0.12%. *See* Selected Interest Rates, Board of Governors of the Federal Reserve System (Aug. 4, 2014), *http://www.federalreserve.gov/releases/h15/current/*. The proper interest rate is therefore 2.12% for the FEHA judgment.

For a judgment on a federal civil claim, interest is provided for in 28 U.S.C. § 1961. The statute provides that "interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961(a). As noted above, that rate is 0.12%. *See Aboulhosn v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 940 F. Supp. 2d 1203, 1229 (C.D. Cal. 2013).

IX. Disposition

Defendants' objections are overruled. The Court enters judgment for Plaintiffs in the accompanying final judgment.

The Clerk shall serve a copy of this minute order on counsel for all parties in this action.

MINUTES FORM 11
CIVIL-GEN Initials of Deputy Clerk: jcb

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No.: SACV 11-0278 DOC(RNBx)

[Filed August 11, 2014]

JOSE FLORES, RYAN REYES, BRIAN PEREZ,	)
Plaintiffs,	)
v.	)
CITY OF WESTMINSTER, MITCHELL WALLER, in his individual capacity, ANDREW HALL, in his individual capacity, RON COOPMAN, in his individual capacity, KEVIN BAKER, in his individual capacity,	)
Defendants.	)

JUDGMENT

FINAL JUDGMENT

This action was tried by a jury with Judge David O. Carter presiding, and the jury rendered a verdict on

March 6, 2014 (Dkt. 199). It is ordered that Plaintiffs shall recover from Defendants as follows:

1. Discrimination under 42 U.S.C. § 1981

   a. As to Jose Flores:

      i. Chief Ron Coopman is liable to Plaintiff Jose Flores for general damages in the amount of $50,000; and

      ii. Chief Andrew Hall is liable to Plaintiff Jose Flores for general damages in the amount of $65,000.

   b. As to Ryan Reyes

      i. Chief Ron Coopman is liable to Plaintiff Ryan Reyes for general damages in the amount of $25,000; and

      ii. Chief Andrew Hall is liable to Plaintiff Ryan Reyes for general damages in the amount of $45,000.

   c. As to Brian Perez

      i. Chief Ron Coopman is liable to Plaintiff Brian Perez for general damages in the amount of $50,000; and

      ii. Chief Andrew Hall is liable to Plaintiff Brian Perez for general damages in the amount of $100,000.

2. Retaliation under Gov. Code, § 12940(h) ("FEHA")

a. As to Jose Flores

i. The City of Westminster is liable for general damages in the amount of $150,000.

3. Retaliation under 42 U.S.C. § 1981

a. As to Jose Flores

i. Chief Ron Coopman is liable to Plaintiff Jose Flores for general damages in the amount of $168,000;

ii. Chief Mitchell ("Mitch") Waller is liable to Plaintiff Jose Flores for general damages in the amount of $210,000; and

iii. Chief Kevin Baker is liable to Plaintiff Jose Flores for general damages in the amount of $42,000.

b. As to Ryan Reyes:

i. Chief Ron Coopman is liable to Plaintiff Ryan Reyes for general damages in the amount of $150,000; and

ii. Chief Mitch Waller is liable to Plaintiff Ryan Reyes for general damages in the amount of $185,000.

4. Punitive Damages

   a. As to Jose Flores

      i. Chief Andrew Hall is liable to Plaintiff Jose Flores for punitive damages in the amount of $495,000;

      ii. Chief Ron Coopman is liable to Plaintiff Jose Flores for punitive damages in the amount of $396,000;

      iii. Chief Mitchell ("Mitch") Waller is liable to Plaintiff Jose Flores for punitive damages in the amount of $49,500; and

      iv. Chief Kevin Baker is liable to Plaintiff Jose Flores for punitive damages in the amount of $49,500.

   b. As to Ryan Reyes

      i. Chief Andrew Hall is liable to Plaintiff Ryan Reyes for punitive damages in the amount of $220,000;

      ii. Chief Ron Coopman is liable to Plaintiff Ryan Reyes for punitive damages in the amount of $176,000; and

      iii. Chief Mitch Waller is liable to Plaintiff Ryan Reyes for punitive damages in the amount of $22,000.

c. As to Brian Perez

i. Chief Ron Coopman is liable to Plaintiff Brian Perez for punitive damages in the amount of $308,000; and

ii. Chief Andrew Hall is liable to Plaintiff Brian Perez for punitive damages in the amount of $385,000.

5. Post-judgment motions are due pursuant to the deadlines established in the Federal Rules of Civil Procedure and the Central District Local Rules.

6. It is further ORDERED and ADJUDGED that the judgment here rendered shall bear interest at the following rates from the date of signing of the judgment until paid:

a. As to claims under Cal. Gov. Code § 12940, 2.12% per annum.

b. As to claims under 42 U.S.C. § 1981: 0.12% per annum.

IT IS SO ORDERED,

DATED: August 11, 2014

/s/David O. Carter
DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SACV 11-00278 DOC (RNBx)

[Filed May 9, 2011]

JOSE FLORES, ET AL.	)
	)
V.	)
	)
CITY OF WESTMINSTER, ET. AL.	)
	)

CIVIL MINUTES – GENERAL

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Julie Barrera	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS
(IN CHAMBERS): GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND TO STRIKE PORTIONS OF PLAINTIFFS' COMPLAINT

Before the Court is Defendants' Motion to Dismiss and to Strike Portions to Plaintiffs' Complaint ("Motion") (Docket 7). The Court finds this matter appropriate for decision without oral argument. Fed.R.Civ. P. 78; Local Rule 7-15. After considering the moving, opposing and replying papers, and for the reasons set forth below, the Court GRANTS in part and DENIES in part the Motion.

I. BACKGROUND

Plaintiffs are three police officers of Latino/Hispanic origin employed by Defendant, the City of Westminster, and supervised by Defendants Mitchell Waller and Andrew Hall (Hall and Waller referred to collectively as "Individual Defendants"). Complaint ("Compl."), ¶¶ 4-9. According to their Complaint, Plaintiffs have been denied special assignments and promotions throughout their career at the Westminster police department; Plaintiffs contend that these denials resulted from race discrimination. *Id.*, ¶ 1.

As a result of this alleged discrimination, Plaintiffs filed suit on February 15, 2001. Plaintiffs' Complaint asserts a cause of action under California's Fair Housing and Employment Act, as well as claims under two federal civil rights statutes, 42 U.S.C. §§ 1981 and 1983. Defendants bring the instant Motion to dismiss

Plaintiffs' claims under 42 U.S.C. § 1981 and to strike Plaintiffs' prayer for punitive damages.

II. LEGAL STANDARD

a. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. Dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957)). In order for a complaint to survive a 12(b)(6) motion, it must state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). A claim for relief is facially plausible when the plaintiff pleads enough facts, taken as true, to allow a court to draw a reasonable inference that the defendant is liable for the alleged conduct. *Id.* at 1949. If the facts only allow a court to draw a reasonable inference that the defendant is possibly liable, then the complaint must be dismissed. *Id.* Mere legal conclusions are not to be accepted as true and do not establish a plausible claim for relief. *Id.* at 1950. Determining whether a complaint states a plausible claim for relief will be a context-specific task requiring the court to draw on its judicial experience and common sense. *Id.*

b. Motion to Strike

Federal Rule of Civil Procedure 12(f) provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Motions to strike are disfavored and "will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *Friedman v. 24 Hour Fitness USA, Inc.*, 580 F. Supp. 2d 985, 990 (C.D. Cal. 2008) (internal quotation marks and citation omitted). The Ninth Circuit has defined "immaterial" matter as "that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (internal quotation marks and citation omitted), *rev'd on other grounds*, 510 U.S. 517, 114 S. Ct. 1023 (1994).

III. DISCUSSION

a. Motion to Dismiss Plaintiffs' Claims Under 42 U.S.C. § 1981

Defendants first move to dismiss Plaintiffs' claims under 42 U.S.C. § 1981 ("Section 1981"). Section 1981 provides, in pertinent part, that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens." In other words, Section 1981 authorizes a private right of action to enforce the contract clause of the United States Constitution. The parties dispute the applicability of Section 1981 to Plaintiffs' claims: specifically, Defendants contend that, because Plaintiffs hold their jobs pursuant to California's public service statute, as opposed to a traditional contract, Section 1981 does not protect them.

The Ninth Circuit decision in *Judie v. Hamilton*, 872 F.2d 919 (9th Cir. 1989) offers a three-part test to use in order to determine whether a plaintiff's employment relationship is contractual for the purposes of Section 1981. Under this test, courts first "look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.'" *Id.* at 922 (quoting *Burnett v. Graham*, 468 U.S. 42, 47-48 (1984)). If no suitable federal rule exists, courts "consider the application of state 'common law, as modified and changed by the constitution and statutes' of the forum state." *Id.* Finally, "a third step asserts the prominence of the federal interest; courts are to apply state law only if it is not 'inconsistent with the Constitution and the laws of the United States.'" *Id.* The Court applies this analysis to the case at bar.

With respect to the first factor, federal civil rights statutes do not provide a body of law for interpreting contracts. *Id.*

The Court thus turns to California law – specifically, the opinion of the California Supreme Court in *White v. Davis*, 30 Cal. 4th 528 (2003). In *White*, the California Supreme Court held that "a long line of California cases establishes that with regard to at least certain terms or conditions of employment that are created by statute, an employee who performs services while such a statutory provision is in effect obtains a right, *protected by the contract clause*, to require the public employer to comply with the prescribed condition." *Id.* at 564-65 (emphasis in original). The particular right at issue in *White* was the right to receive pension payments, which the Court characterized as the right to "the payment of salary which has been earned." *Id.* at 565 (citing *Kern v. City* *of Long Beach*, 29 Cal. 2d 848, 853 (1947)). Here, Plaintiffs base their Section 1981 claims on charges of discrimination in promotions and making assignments – issues that the *White* court did not address. Nevertheless, the underlying principle of *White* suggests that California law favors protecting public employees from discrimination in employment decisions through claims brought under Section 1981. *See Peterson v. California Dept. of Corrections and Rehabilitation*, 451 F. Supp. 2d 1092, 1103 (E.D. Cal. 2006) (explaining that "although the holding in *White* is somewhat narrow in scope, [the state law] factor weighs in favor of allowing the Section 1981 claim to proceed" in a discrimination-in-promotion case).

Application of the third factor – the predominance of federal interests – resolves any doubt regarding whether Plaintiffs' Section 1981 claims should be allowed to proceed. Section 1981 seeks to rid the workplace of unlawful discrimination, as "the right to dispose of one's labor freely and by contract is at the heart of the protections afforded by Section 1981." *Sagana v. Tenorio*, 384 F.3d 731, 737 (9th Cir. 2004) (internal citations and quotations omitted). *See also Peterson*, 451 F. Supp. 2d at 1103 (noting that "there is a strong federal policy to pervent employment discrimination against government employees."); *Lukovsky v. City and County of San Francisco*, 2006 WL 436142 at *3 (N.D. Cal. 2006). The type of employment activity implicated by Plaintiff's claims – promotions and assignments – goes to the heart of this federal policy. *Peterson* 451 F. Supp. 2d at 1103; *Lukovsky,* 2006 WL 436142 at *3. Indeed, in 1991, Congress amended Section 1981 specifically to reflect the statute's broad reach in the area employment relations, inserting a provision clarifying that "the term 'make and enforce contracts' includes the making, performance, modification of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981(b). As the Northern District of California explained in *Lukovsky*, "[w]ith this amendment, Congress swept in not only the initiation of the employment relationship but also subsequent modifications during the course of the employment relationship, such as promotion." *Id.* The Supreme Court's analysis of Section 1981 makes clear that Section 1981 extends to discrimination by a government entity. *See e.g. Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 459-60 (treating the application of Section 1981 to government entities as a foregone conclusion); *Peterson* 451 F. Supp. 2d at 1103 ("The Supreme Court has always held that Section 1981 prohibits governmental discrimination . . .") (citing *Runyon v. McCrary*, 427 U.S. 160, 168-72 91976); *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. at 459-60); *Lukovsky,* 2006 WL 436142 at *3 (same). It thus would run contrary to federal interests to deprive California government employees of the protection of Section 1981. Plaintiffs may pursue their claims for violation of this statute.

The Ninth Circuit's finding, in *Judie*, that the plaintiffs in that case were not covered by Section 1981 does not compel a different result. Important distinctions separate *Judie* from the instant case. First, the *Judie* court was applying Washington's civil service law, as interpreted by the Washington Supreme Court in a decision that reads quite differently than the California Supreme Court's opinion in *White. See Judie.*872 F.2d at 923 (discussing *Washington*

Federation of State Employees v. State, 101 Wash. 2d 536 (1984)). More importantly, the *Judie* decision predated the 1991 amendments to Section 1981 that expanded the reach of the statute's "make and enforce" contracts term.

In sum, Plaintiffs have stated a valid claim for violation of Section 1981. Defendants' Motion to dismiss this claim is DENIED.

b. Motion to Strike Plaintiffs' Request for Punitive Damages

Defendants next move to strike Plaintiffs' prayer for punitive damages. The Complaint's Prayer for Relief section requests punitive damages for Plaintiffs' first, second and fourth causes of action. Compl., ¶ 54(c).

Plaintiffs' first cause of action accuses the City of Westminster of violating California's Fair Employment and Housing Act ("FEHA"). Plaintiffs do not oppose Defendants' motion to strike the prayer for punitive damages under this claim. Accordingly, the motion to strike the punitive damages request under Plaintiff's FEHA claim is GRANTED AS UNOPPOSED. The language in paragraph 54(c) of the Complaint requesting punitive damages for cause of action number "one" is hereby STRICKEN.

Plaintiffs second and fourth causes of action allege that the Individual Defendants violated 42 U.S.C. §§ 1981 and 1983, respectively. The Court declines to strike Plaintiffs' prayer for punitive damages under these claims. The Supreme Court has established that punitive damages are available against individual defendants under 42 U.S.C. § 1983 ("Section 1983") "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 35-36 (1983). The Supreme Court has clarified that this standard focuses not on whether the defendant's behavior was objectively "egregious," but rather on the defendant's subjective motive or intent. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999). The Ninth Circuit has determined that this test applies equally to claims against individual defendants under Section 1981 as it does to claims under Section 1983. *Woods v. Graphic Communications*, 925 F.2d 1195, 1206 (9th Cir. 1991).

Here, Plaintiffs have alleged that the Individual Defendants acted with the requisite state of mind to qualify for punitive damages. Whether Plaintiffs are able to prove those allegations remains to be seen, but the Court declines to resolve this issue prematurely by way of a motion to strike. *See Friedman v. 24 Hour Fitness USA, Inc.*, 580 F. Supp. 2d 985, 990 (C.D. Cal. 2008) (explaining that motions to strike are disfavored and "will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties.") (internal quotation marks and citation omitted).

IV. DISPOSITION

In light of the above, the Court DENIES Defendants' Motion to dismiss Plaintiffs' claims under 42 U.S.C. § 1981.

The Court GRANTS as unopposed Defendants' Motion to strike Plaintiffs' prayer for punitive damages against the City of Westminster under Plaintiffs' cause of action under FEHA.

The Court DENIES Defendants' Motion to strike the remainder of Plaintiffs' requests for punitive damages.

The Clerk shall serve this minute order on all parties to the action.

MINUTES FORM 11 DOC Initials of Deputy Clerk: jcb
CIVIL - GEN

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-56832

D.C. No. 8:11-cv-00278-DOC-RNB
Central District of California, Santa Ana

[November 17, 2017]

JOSE FLORES; RYAN REYES; BRIAN PEREZ,

Plaintiffs-Appellees,

v.

CITY OF WESTMINSTER; MITCHELL WALLER; ANDREW HALL; RON COOPMAN; KEVIN BAKER, in their individual capacities,

Defendants-Appellants.

ORDER

Before: FARRIS, CALLAHAN, and OWENS, Circuit Judges.

The panel has voted to deny the City of Westminster's petition for rehearing. Judges Callahan and Owens have voted to deny the petition for rehearing en banc, and Judge Farris so recommends.

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

The petition for panel rehearing and rehearing en banc (Dkt # 105) is DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-56832

D.C. No. 8:11-cv-00278-DOC-RNB
Central District of California, Santa Ana

[November 17, 2017]

JOSE FLORES; RYAN REYES; BRIAN PEREZ,

Plaintiffs-Appellees,

v.

CITY OF WESTMINSTER; MITCHELL WALLER; ANDREW HALL; RON COOPMAN; KEVIN BAKER, in their individual capacities,

Defendants-Appellants.

ORDER

Before: FARRIS, CALLAHAN, and OWENS, Circuit Judges.

Judges Callahan and Owens have voted to deny Appellants' petition for rehearing en banc, and Judge Farris so recommends.

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

The petition for rehearing en banc (Dkt #104) is DENIED.

APPENDIX H

Thomas A. Saenz (State Bar No. 159430)
Victor Viramontes (State Bar No. 214158)
Martha Gomez (State Bar No. 274024)
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
Telephone: 213.629.2512
Facsimile: 213.629.0266
Email: tsaenz@maldef.org
vviramontes@maldef.org
mgomez@maldef.org

Attorneys for Plaintiffs

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

Case No.: SACV 11-00278 DOC (RNBx)

[Filed November 26, 2012]

JOSE FLORES, RYAN REYES,)
BRIAN PEREZ,)
)
Plaintiffs,)
)
vs.)
)
CITY OF WESTMINSTER, RON)
COOPMAN, in his individual capacity,)
MITCHELL WALLER, in his)

individual capacity, ANDREW HALL, in his individual capacity, KEVIN BAKER, in his individual capacity, and DOES 1 to 20, inclusive,	))))
	)
Defendants.	)
______________________________	)

~~[PROPOSED]~~ SECOND AMENDED COMPLAINT FOR NATIONAL ORIGIN DISCRIMINATION AND RETALIATION

Cal. Gov. Code § 12940 et seq.; 42 U.S.C. § 1981; Equal Protection; Title VII

DEMAND FOR JURY TRIAL

Plaintiffs Jose Flores, Ryan Reyes, and Brian Perez allege as follows:

1. This action seeks remedies for unlawful discrimination that Jose Flores, Ryan Reyes, and Brian Perez ("Plaintiffs") experienced in their positions as police officers for the City of Westminster. By denying Plaintiffs special assignments and promotions, the Defendants City of Westminster, Mitchell Waller, Andrew Hall, Ron Coopman, and Kevin Baker discriminated against Plaintiffs on the basis of their Latino national origin and violated California's Fair Housing and Employment Act, the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C § 1981. This action also seeks remedies for unlawful retaliation that Plaintiffs Reyes and Flores have experienced for opposing unlawful discrimination. By retaliating against Plaintiffs Reyes and Flores, Defendant City of Westminster has violated

California's Fair Housing and Employment Act and Title VII of the Civil Rights Act.

2. Venue is proper in this Court because the illegal acts against the Plaintiffs took place in the Central District of California. Defendant City of Westminster is also found in this District.

3. This Court has jurisdiction over this action under 28 U.S.C. § 1343, 28 U.S.C. § 1331, and 42 U.S.C. § 1983.

4. Plaintiff Jose Flores is an individual of Latino/Hispanic origin. He resides in the Central District of California. Plaintiff Flores has worked as a police officer for Defendant City of Westminster since about 2002.

5. Plaintiff Ryan Reyes is an individual of Latino/Hispanic origin. He resides in the Central District of California. Plaintiff Reyes has worked as a police officer for Defendant City of Westminster since about 1999.

6. Plaintiff Brian Perez is an individual of Latino/Hispanic origin. He resides in the Central District of California. Plaintiff Perez has worked as a police officer for Defendant City of Westminster since 2003.

7. Defendant City of Westminster ("City") is a city in the State of California and County of Orange. The Westminster Police Department is an agency of the City of Westminster. The City is Plaintiffs' employer. Decisions to deny Plaintiffs Special Assignments and promotions were made by the City, the Westminster Police Department, and/or their agents and employees.

Decisions to retaliate against Plaintiffs Flores and Reyes were made by the City, the Westminster Police Department, and/or their agents and employees.

8. Defendant Kevin Baker is the current Chief of Police for the City. Decisions to deny Plaintiffs Special Assignments and/or promotions were made by Defendant Baker.

9. Defendant Ron Coopman is a former Chief of Police for the City. Decisions to deny Plaintiffs Special Assignments and/or promotions were made by Defendant Coopman.

10. Defendant Mitchell Waller is a former Chief of Police for the City. Decisions to deny Plaintiffs Special Assignments and/or promotions were made by Defendant Waller.

11. Defendant Andrew Hall is a former Chief of Police for the City. Decisions to deny Plaintiffs Special Assignments and/or promotions were made by Defendant Hall.

12. The true names and capacities, whether individual, corporate, associate, or otherwise, and the true involvement of Defendants sued here as Does 1 through 20, inclusive, are unknown to Plaintiffs who therefore sues these Defendants by fictitious names and will amend this complaint to show the true names, capacities and involvement when ascertained. Plaintiffs are informed and believe and allege that each of the Defendants designated as a Doe is responsible in some manner for the events and happenings referred to here, and that Plaintiffs' injuries and damages were proximately caused by these Defendants.

13. On information and belief, Defendant City has engaged in a pattern or practice of failing to promote Latinos and failing to award Latinos Special Assignments. Plaintiffs have been injured by the pattern or practice.

14. On information and belief, Defendant City engages in a policy or custom of discriminating against Latino officers with regard to Special Assignments and promotions. Plaintiffs have been injured by the City's discriminatory policy or practice.

15. Plaintiffs have performed their duties well as police officers. Despite performing well, Defendants have not awarded Plaintiffs Special Assignments or promotions.

16. On information and belief, Special Assignments include detective assignments in narcotics, burglary, and gangs. In addition, Special Assignments include motor assignments, among others. Defendants also award a Special Assignment for the mall. However, the mall assignment is less prestigious than other special assignments.

17. On information and belief, after police officers receive Special Assignments, their profile for potential promotions becomes stronger.

18. Defendants have denied Plaintiffs Special Assignments and promotions. Plaintiffs understood that applications for promotion were futile, when Defendants would deny Plaintiffs Special Assignments.

19. Plaintiff Flores has applied for special assignments within the Westminster Police Department, and Defendants have denied him all

special assignments, except the mall assignment. Defendants denied Plaintiff Flores Special Assignments even though Plaintiff Flores has received recognition for his work as a police officer in Westminster including the Mothers Against Drunk Driving Award and the Centurian Award.

20. Since about 2005, Plaintiff Flores has applied for about four detective positions during his time as a police officer at the City. Plaintiff Flores did not apply to some Special Assignment positions because he knew it would be futile because Defendants would deny him the position. Plaintiff Flores did not apply for promotion because he understood it would be futile.

21. Plaintiff Reyes has applied for special assignments within the Westminster Police Department, and Defendants have denied him all special assignments, except the mall assignment. Defendants have denied Plaintiff Reyes Special Assignments even though Plaintiff Reyes has received recognition for his work as a police officer including the rookie of the year award and multiple medals of merit.

22. Since about 2002, Plaintiff Reyes has applied for more than twenty Special Assignments during his time as a police officer at the City. Plaintiff Reyes did not apply to some Special Assignment positions because he knew it would be futile because Defendants would deny him the position. Plaintiff Reyes did not apply for promotion because he understood it would be futile.

23. Plaintiff Perez has applied for Special Assignments within the Westminster police department, and Defendants have denied him all

Special Assignments. Plaintiff Perez currently serves as a Major in the United States Marine Corps. He has been promoted multiple times by the United States Marines Corps, but Defendants have not awarded him a single Special Assignment.

24. Since about 2005, Plaintiff Perez has applied for about four detective positions during his time as a police officer at the City. Plaintiff Perez did not apply to some Special Assignment positions because he knew it would be futile because Defendants would deny him the position. Plaintiff Perez did not apply for promotion because he understood it would be futile.

25. Since Plaintiff Flores filed his administrative complaint with the California Department of Fair Employment and Housing ("DFEH"), opposed discrimination with the City, and filed a civil suit in this Court, Defendant City of Westminster has retaliated against him including, but not limited to, subjecting Plaintiff Flores to unfounded supervisor log entries, written reprimands, and internal affairs investigations.

26. Since Plaintiff Reyes filed his administrative complaint with the DFEH, opposed discrimination with the City, and filed a civil suit in this Court, Defendant City of Westminster has retaliated against him including, but not limited to, subjecting Plaintiff Reyes to unfounded supervisor log entries, written reprimands, negative evaluations, internal affairs investigations, and suspension.

27. In or about June 28, 2010, Plaintiff Flores filed a complaint with the DFEH. He received a right to sue notice from the DFEH.

28. In or about January 20, 2010, Plaintiff Reyes filed a complaint with the DFEH. He received a right to sue notice from the DFEH.

29. In or about August 23, 2010, Plaintiff Perez filed a complaint with the DFEH. He received a right to sue notice from the DFEH.

First Cause of Action
Cal. Gov. Code Section 12940 et seq.
(Discrimination against City of Westminster)

30. Plaintiffs reallege paragraphs 1 through 29 of this Complaint.

31. The City discriminated against Plaintiffs based on their national origin, Latino.

32. The City denied Plaintiffs Special Assignments and promotions because of their national origin.

33. The City subjected Plaintiffs to differential treatment in the terms and conditions of their employment because of their national origin.

34. Plaintiffs exhausted their administrative remedies.

35. As a result of the City's conduct, Plaintiffs have suffered damages including economic losses and emotional distress, in an amount to be determined at trial.

Second Cause of Action
Section 1981
(Discrimination against Defendants Coopman, Hall, Waller, and Baker)

36. Plaintiffs reallege paragraphs 1 through 35 of this Complaint.

37. Defendants Coopman, Hall, Waller, and Baker discriminated against Plaintiffs based on their national origin by denying Plaintiffs Special Assignments and promotions.

38. Defendants Coopman, Hall, Waller, and Baker subjected Plaintiffs to differential treatment in the terms and conditions of their employment because of their national origin.

39. As a result of Defendants Coopman, Hall, Waller, and Baker's conduct, Plaintiffs have suffered damages including economic losses and emotional distress, in an amount to be determined at trial.

40. Defendant Coopman, Hall, Waller, and Baker's actions were willful, malicious, fraudulent, oppressive, and made with evil motive and intent or in callous disregard of Plaintiffs' rights.

Third Cause of Action
Section 1981
(Discrimination Against Defendant City of Westminster)

41. Plaintiffs reallege paragraphs 1 through 40 of this Complaint.

42. Defendant City discriminated against Plaintiffs by denying them Special Assignments and promotions based on their national origin.

43. Defendant City subjected Plaintiffs to differential treatment in the terms and conditions of their employment because of their national origin.

44. Defendant City discriminated against Plaintiffs due to a policy or custom.

45. As a result of Defendant City's conduct, Plaintiffs have suffered damages including economic losses and emotional distress, in an amount to be determined at trial.

Fourth Cause of Action
Equal Protection; Section 1983
(Discrimination Against Defendants
Coopman, Waller, Hall, and Baker)

46. Plaintiffs reallege paragraghs 1 through 45 of this Complaint.

47. Defendants Coopman, Hall, Waller, and Baker discriminated against Plaintiffs based on their national origin by denying Plaintiffs Special Assignments and promotions.

48. Defendants Coopman, Hall, Waller, and Baker subjected Plaintiffs to differential treatment in the terms and conditions of their employment because of their national origin.

49. As a result of Defendant Coopman, Hall, Waller, and Baker's conduct, Plaintiffs have suffered damages including economic losses and emotional distress, in an amount to be determined at trial.

50. Defendant Coopman, Hall, Waller, and Baker's actions were willful, malicious, fraudulent, oppressive, and made with evil motive and intent or in callous disregard of Plaintiffs' rights.

Fifth Cause of Action
Equal Protection; Section 1983
(Discrimination Against Defendant City of Westminster)

51. Plaintiffs reallege paragraphs 1 through 50 of this Complaint.

52. Defendant City discriminated against Plaintiffs by denying them promotions and Special Assignments based on their national origin.

53. Defendant City subjected Plaintiffs to differential treatment in the terms and conditions of their employment because of their national origin.

54. Defendant City discriminated against Plaintiffs as part of a policy or custom.

55. As a result of Defendant City's conduct, Plaintiffs have suffered damages including economic losses and emotional distress, in an amount to be determined at trial.

Sixth Cause of Action
Cal. Gov. Code Section 12940 et seq.
(Retaliation Against Defendant City of Westminster)

56. Plaintiffs Flores and Reyes reallege paragraphs 1 through 55 of this Complaint.

57. Defendant City retaliated against Plaintiffs Flores and Reyes because Plaintiffs opposed discriminatory practices by participating in a workplace investigation, filing charges of discrimination with a state agency, and filing a civil suit alleging discrimination, among other actions.

58. As a result of Defendant City's retaliation, Plaintiffs Flores and Reyes have suffered damages including economic losses and emotional distress, in an amount to be determined at trial.

Seventh Cause of Action
Title VII
(Retaliation Against Defendant City of Westminster)

59. Plaintiffs Flores and Reyes reallege paragraphs 1 through 58 of this Complaint.

60. Defendant City retaliated against Plaintiffs Flores and Reyes because Plaintiffs opposed discriminatory practices by participating in a workplace investigation, filing charges of discrimination with a state agency, and filing a civil suit alleging discrimination, among other actions.

61. As a result of Defendant City's retaliation, Plaintiffs Flores and Reyes have suffered damages including economic losses and emotional distress, in an amount to be determined at trial.

Jury Demand

62. Plaintiffs demand a trial by jury.

Prayer For Relief

63. Because of the actions alleged above, Plaintiffs seek judgment against Defendants as set forth below:

a. For general damages including compensatory damages according to proof;

b. An order restoring Plaintiffs to their rightful positions, including promotions and Special Assignments;

c. For punitive damages for causes of action numbered two, and four in this Complaint;

d. For the cost of the suit;

e. For interest at the maximum legal rate on all sums awarded;

f. For an award of reasonable attorney fees and expenses of this litigation;

g. For any additional and further relief as the Court deems appropriate.

Date: November 5, 2011

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

By: /s/Martha L. Gómez
Victor Viramontes
Martha L. Gomez
Attorneys for Plaintiffs.

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE DAVID O. CARTER,
JUDGE PRESIDING

No. SACV 11-0278 DOC
Status Conference

[Filed April 8, 2014]

JOSE FLORES, RYAN REYES, BRIAN PEREZ,	)
Plaintiffs,	)
vs.	)
CITY OF WESTMINSTER, et al.,	)
Defendants.	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Status Conference

Santa Ana, California

Friday, February 28, 2014

Debbie Gale, CSR 9472, RPR
Federal Official Court Reporter
United States District Court

411 West 4th Street, Room 1-053
Santa Ana, California 92701
(714) 558-8141

11cv0278 Flores 2014-02-28 Status

[p.2]

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS JOSE FLORES, RYAN REYES, BRIAN PEREZ:

J. Bernard Alexander, III
ALEXANDER KRAKOW AND GLICK LLP
401 Wilshire Boulevard
Suite 1000
Santa Monica, California 90401
310-394-0888
balexander@akgllp.com

Victor Garcia Viramontes
MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND
634 South Spring Street
11th Floor
Los Angeles, California 90014
213-629-2512
vviramontes@maldef.org

Martha Liliana Gomez
MALDEF
634 South Spring Street
11th Floor
Los Angeles, California 90014
213-629-2512
mgomez@maldef.org

Matthew Jimenez Barragan
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
11th Floor
Los Angeles, California 90014
213-629-2512
mbarragan@maldef.org

[p.3]

APPEARANCES OF COUNSEL (Continued):

FOR DEFENDANTS CITY OF WESTMINSTER, ET AL.:

Melanie M. Poturica
LIEBERT CASSIDY WHITMORE
6033 West Century Boulevard
Suite 500
Los Angeles, California 90045
310-981-2000
mpoturica@lcwlegal.com

Jeffery E. Stockley
LIEBERT CASSIDY WHITMORE LLP
6033 West Century Boulevard
Suite 500
Los Angeles, California 90045
310-981-2042
jstockley@lcwlegal.com

[p.4]

I N D E X

[p.5]

SANTA ANA, CALIFORNIA,
FRIDAY, FEBRUARY 28, 2014

Status Conference

(4:15 p.m.)

THE COURT: Okay. We are on the record. All counsel are present on the Flores et al. matter v. City of Westminster.

The Court and counsel have been discussing jury instructions informally. And it's our hope that the court reporter does not need to be brought in this weekend. So there are two claims that are apparently going to be withdrawn by plaintiffs counsel.

And, Counsel, if you would state them, please.

MR. ALEXANDER: Thank you, Your Honor. The 1983 claim and the Title 7 claims are being withdrawn.

THE COURT: Is that acceptable to the defense?

MS. POTURICA: Yes, Your Honor.

THE COURT: Then, is there anything else that needs to be stated on the record tonight while we have Debbie? Remember, we won't have Debbie again until we have her on Monday.

MS. POTURICA: It's our intention, Your Honor -- so the Court knows, it is our intention to file a judgment -- Motion for Judgment as a Matter of Law.

THE COURT: Okay.

And is there anything else with Debbie here? In

[p.6]

other words, I can work with you informally with instructions, give you some indication, preserve your arguments for Monday when we're back on record, but...

MR. ALEXANDER: Nothing else, Your Honor.

THE COURT: Nothing else tonight?

MS. POTURICA: Nothing that I can think of. I hope I'm not missing anything.

THE COURT: Debbie thank, you very much.

MS. POTURICA: Thank you thank you, Debbie.

MR. ALEXANDER: Thank you.

(Proceedings adjourned at 4:16 p.m.)

-oOo-

[p.7]

-oOo-

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: February 28, 2014

DEBBIE GALE, U.S. COURT REPORTER
CSR NO. 9472, RPR

APPENDIX J

42 U.S.C. § 1981 - Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.