The Honorable David G. Estudillo

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Ilai Kanutu KOONWAIYOU, Plaintiff, v. Anthony BLINKEN, Secretary of State; U.S. DEPARTMENT OF STATE, Defendants.	Case No. 3:21-cv-05474-DGE **PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT** Noting Date: January 5, 2024

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INTRODUCTION

Plaintiff Ilai Koonwaiyou files this motion pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, for time reasonably expended to litigate this case. Plaintiff is entitled to recover for reasonable fees because he is a prevailing party and because Defendants' position in this matter was not substantially justified. As a unanimous Ninth Circuit panel held in this case, Defendants ignored the "plain meaning of the 1986 amendments" to 8 U.S.C. § 1408. *Koonwaiyou v. Blinken*, 69 F.4th 1004, 1012 (9th Cir. 2023). Those amendments established Mr. Koonwaiyou's eligibility to apply for U.S. nationality, which the Court of Appeals explained in a published opinion. Notably, Mr. Koonwaiyou's counsel succeeded after years of pursuing his claims in removal proceedings, ensuring that he preserved his claims through the thicket of jurisdictional hurdles that the Immigration and Nationality Act (INA) created for claims like his. That expertise in removal defense and federal litigation guaranteed Mr. Koonwaiyou's ultimate success and ensured that Defendants will now finally consider his request for a certificate of U.S. nationality based on a correct understanding of the law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mr. Koonwaiyou is a long-time resident of American Samoa and the United States and the son of a U.S. national who lived in American Samoa for many years prior to and following his birth. Mr. Koonwaiyou's quest to obtain recognition as a U.S. national began nearly two decades ago. In 2006, the Department of Homeland Security (DHS) placed Mr. Koonwaiyou in removal proceedings in Eloy, Arizona. At that time, he asserted U.S. nationality under 8 U.S.C. § 1408(4) as a defense against removal. An immigration judge (IJ) ruled in his favor, terminating the case. DHS subsequently appealed to the Board of Immigration Appeals (BIA), which remanded the case back to the IJ to consider the retroactivity of § 1408(4) and whether Mr. Koonwaiyou's nationality claim was undermined because he had not applied for a U.S. passport

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or Consular Report of Birth Abroad. On remand, the case was administratively closed because Mr. Koonwaiyou had been convicted of a crime and was serving his sentence.

Following his prison sentence, DHS re-detained Mr. Koonwaiyou, this time at the Northwest Detention Center in Tacoma, Washington. At that time, the Northwest Immigrant Rights Project began to represent him, and the organization remained his counsel through the end of this case. Once in removal proceedings again, Mr. Koonwaiyou reasserted his claim to U.S. nationality, but an IJ ordered him removed to Samoa. Mr. Koonwaiyou appealed to the Board of Immigration Appeals (BIA), which affirmed the IJ, making Mr. Koonwaiyou's order of removal final.

Following the BIA's decision, Mr. Koonwaiyou filed a petition for review with the Ninth Circuit Court of Appeals. Mr. Koonwaiyou did so because under the INA, there exist significant limitations on raising a claim to U.S. nationality. Pursuant to 8 U.S.C. § 1252(a) and (b)(9), the INA channels review of all final orders of removal to federal courts of appeals and limits those courts as to what issues they may address. Section 1252 also provides for review of claims to U.S. nationality, but states that "[t]he petitioner may have such nationality claim decided only as provided in this paragraph." *Id.* § 1252(b)(5)(C). Mr. Koonwaiyou accordingly raised his claim to U.S. nationality in the petition for review as his sole defense to removal, explaining that his removal proceedings were "the sole and exclusive procedure" for determining his claims. *Id.* § 1229a(a)(3). Nevertheless, Ninth Circuit held that, notwithstanding § 1252(b)(5)(C), Mr. Koonwaiyou must apply to the Secretary of State for a certificate of nationality. *Koonwaiyou v. Barr*, 830 F. App'x 566, 567 (9th Cir. 2020).

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In light of the Ninth Circuit's decision, Mr. Koonwaiyou applied to the Secretary of State for a passport.[1] The Department of State denied his application, asserting that Mr. Koonwaiyou is not a U.S. national, and cannot become one, because his U.S. national mother "did not acquire nationality until after [his] birth." Mr. Koonwaiyou subsequently filed this lawsuit under 8 U.S.C. § 1503(a), which provides federal district courts with jurisdiction and Mr. Koonwaiyou with a cause of action to seek a declaration of U.S. nationality. *See* Dkt. 6.

In response, Defendants filed a motion to dismiss, which this Court granted. In its decision, the Court held that "Plaintiff's mother's status as a national of the United States commenced on the date it was conferred and was not retroactive to her date of birth." Dkt. 23 at 12. Mr. Koonwaiyou subsequently appealed. In a published decision, the Ninth Circuit panel unanimously held that the "plain meaning" of § 1408(4) "makes clear that Congress intended for it to apply retroactively and to bestow the same status on those born before, on, or after the date of enactment." *Koonwaiyou*, 69 F.4th at 1012. To reach that conclusion, the Court pointed to "[t]he structure of § 1408," noting that Defendants' argument would "read the phrase 'at birth' out of § 1408" for people like Mr. Koonwaiyou and his mother, who apply for that status after their birth. *Id.* at 1007. That approach would "violate the well-established canon against surplusage." *Id.* In addition, the Court noted that the statutory note to subsection (4) "makes clear that § 1408(4) applies retroactively," and contains a "clear statement" to that effect, contrasting the provision with others where Congress instead limited retroactivity. *Id.* at 1008–10. Finally, the Court turned to "other indicia of meaning," noting, inter alia, that Congress intended "to eliminate, once and for all, the gap in eligibility for people born abroad to a single non-citizen national parent." *Id.* at 1010. The Court further explained that the Government's arguments to

[1] The Department of State adjudicates claims to U.S. nationality by requiring applicants to apply for a passport, which the Department issues in place of a certificate of nationality.

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the contrary "contravene . . . common sense," as it would "split the status of family's like Koonwaiyou's" and create "second-class non-citizen national status" that limited the ability to pass on that status. *Id.* at 1011. The Court also explained that the "limited legislative history supports our view that Congress aimed to establish equal status for all American Samoans who qualify for non-citizen national status under § 1408." *Id.*

Following remand to this Court, the parties negotiated a remand to the agency so that Defendants could reconsider Mr. Koonwaiyou's passport application based on a correct understanding of the law. This Court ordered that remand on November 16, 2023. Dkt. 36.

ARGUMENT

I. Plaintiff Is a Prevailing Party.

To qualify for an EAJA award, Mr. Koonwaiyou must first establish that he is the prevailing party.[2] 28 U.S.C. § 2412(d)(1)(B). Prevailing parties must show that they (1) have achieved a "material alteration of the legal relationship of the parties," and that (2) the alteration was "judicially sanctioned." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604–05 (2001) (citation omitted). Here, Mr. Koonwaiyou satisfies those requirements. This case required Defendants to change their legal position regarding Mr. Koonwaiyou's eligibility for U.S. nationality, and that change was the result of a published Ninth Circuit opinion and this Court's remand order requiring Defendants to comply with the decision. Mr. Koonwaiyou can thus "point to a resolution of the dispute which changes the legal relationship between [himself] and the defendant[s]." *Texas State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989). In fact, even in cases not decided on the merits, the Ninth Circuit has repeatedly explained that a remand order (even a stipulated one) to an administrative

[2] Mr. Koonwaiyou satisfies the requirements of 28 U.S.C. § 2412(d)(2)(B), as his net worth does not exceed $2,000,000. *See* Dkt 1; Dkt. 5.

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agency requiring the agency to take some new action on the case satisfies the prevailing party requirement. *See, e.g.*, *Li v. Keisler*, 505 F.3d 913, 917–18 (9th Cir. 2007); *Carbonell v. I.N.S.*, 429 F.3d 894, 901–02 (9th Cir. 2005). Thus, the remand order alone—even apart from the published decision on the merits—satisfies the prevailing party requirement.

II. Defendants' Positions Were Not Substantially Justified.

A prevailing party is entitled to attorneys' fees unless Defendants can show that the government's pre-litigation conduct *and* its litigation positions were substantially justified. *See Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998) ("The government's position must be substantially justified at each stage of the proceedings." (internal quotation marks omitted)); 28 U.S.C. § 2412(d)(1)(A). "The government bears the burden of demonstrating substantial justification." *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005); *see also* H.R. Rep. No. 96-1418, at 10, 13–14 (1980) ("[T]he strong deterrents to contesting government action require that the burden of proof rest with the government."); *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991) (similar). "'Substantial justification' under the EAJA means that the government's position must have a reasonable basis in law and fact." *Corbin*, 149 F.3d at 1052.

Here, the government cannot meet its burden to demonstrate substantial justification. Both Defendants' pre-litigation conduct and their litigation position lacked reasonable justification. Courts have repeatedly held that "[w]here . . . the government interprets a statute in a manner that is contrary to its plain language and unsupported by its legislative history, it will prove difficult to establish substantial justification." *Patrick v. Shinseki*, 668 F.3d 1325, 1330–31 (Fed. Cir. 2011). For example, in *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (9th Cir. 1992), the Ninth Circuit held that the government's position was not substantially justified where the Court determined that the "statutory language and legislative history were clear." 980 F.2d at 1332; *see also Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C.

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Cir. 2004) (government not substantially justified where its position "was wholly unsupported by the text of the applicable regulations" (internal quotation marks omitted)); *Halverson v. Slater*, 206 F.3d 1205, 1212 (D.C. Cir. 2000) (no substantial justification where the government ignored "the easily ascertainable plain meaning of" a statute); *Marcus v. Shalala*, 17 F.3d 1033, 1038 (7th Cir. 1994) (government's position was not substantially justified where it was "manifestly contrary to the [controlling] statute" (citations omitted)); *Butts v. McDonald*, 28 Vet. App. 74, 80 (2016) (same as *Patrick*); *Diamond Sawblades Mfrs. Coal. v. United States*, 36 C.I.T. 148, 161 (2012) (awarding EAJA fees where government's position rested on "an unreasonable interpretation of law").

These principles apply here. As noted above, a unanimous Ninth Circuit "reject[ed] the Government's interpretation in favor of the plain meaning of the 1986 amendments." *Koonwaiyou*, 69 F.4th at 1012. As the court explained, that "interpretation is also consistent with similar provisions in the INA, with the statute's purpose, and with the available legislative history." *Id.* Notably, the court described Defendants' position as one of "strained statutory construction" that "nullif[ied] . . . key words" in the statute. *Id.* at 1011. The Ninth Circuit also observed how "the Government's interpretation would split the status of families like Koonwaiyou's in two," thereby "perpetuat[ing] the very problem the statute was designed to solve." *Id.* The court of appeals then explained: "We find it implausible, to say the least, that Congress hid a second-class non-citizen national status within a statute explicitly expanding eligibility for American Samoans to become non-citizen nationals." *Id.* And in other places, the court repeatedly described the statutory language as "clear" and containing a "clear statement" regarding what Congress intended. *Id.* at 1008; *see also id.* at 1011 (noting that Defendants' position "contravene[d] . . . common sense"). These statements regarding Defendants' position demonstrate that their position was not substantially justified; instead, their position was one

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where such justification was lacking because the "statutory language and legislative history were clear." *Oregon Nat. Res. Council*, 980 F.2d at 1332. Critically, such repeated "strong language criticizing the Government's position in an opinion discussing the merits of a key issue is evidence in support of an award of fees." *Former Emps. of Invista, S.A.R.L. v. U.S. Sec'y of Lab.*, 34 C.I.T. 781, 791 (2010).

III. Enhanced Fees Are Appropriate.

The representation Mr. Koonwaiyou's counsel provided in this case warrants enhanced fees. EAJA authorizes a court to award fees in excess of the statutory rate of $125 per hour, adjusted for inflation, when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). Applying this provision, the Supreme Court has held that a court may increase the statutory rate where there was a limited availability of "attorneys having some distinctive knowledge or specialized skill needful for the litigation in question." *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). "Examples . . . would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language." *Id.* A three-part test exists in the Ninth Circuit to determine whether special factors warrant awarding fees above EAJA statutory rate. Under that test, (1) "the attorney must possess distinctive knowledge and skills developed through a practice specialty"; (2) "those distinctive skills must be needed in the litigation"; and (3) "those skills must not be available elsewhere at the statutory rate." *Love*, 924 F.2d at 1496.

All three factors are met here. First, the Ninth Circuit has previously made clear that the complexities of immigration law may require specialized knowledge and skill from counsel that justify enhanced fees. *See*, *e.g.*, *Nadarajah v. Holder*, 569 F.3d 906, 914 (9th Cir. 2009) (awarding enhanced rates in an immigration case that was complex and resulted in a successful published opinion); *see also Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With

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only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth." (internal quotations marks and citation omitted)).[3] Counsel in this case possess distinctive knowledge and experience in immigration law, as their work history demonstrates and other practitioners explain. *See, e.g.*, Adams Decl. ¶¶ 2–8; Pauw Decl ¶¶ 6–11; Han Decl. ¶ 5; Realmuto Decl. ¶¶ 7–12. They are also nationally recognized experts who have been repeatedly called to present nationwide trainings and testify in court. *See, e.g.*, Adams Decl. ¶¶ 3–5; Pauw Decl. ¶¶ 6–11; Han Decl. ¶ 5; Realmuto Decl. ¶¶ 7–12.

Second, those skills were needed in this litigation. As in other cases, "knowledge of . . . particular, esoteric nooks and crannies of immigration law . . . [was] needed to give the [plaintiff] a fair shot at prevailing." *Nadarajah*, 569 F.3d at 914 (first, second, and third alterations in original). Mr. Koonwaiyou's counsel required a deep understanding of nationality law and related provisions in the INA to litigate this case. *See, e.g.*, *Koonwaiyou*, 69 F.4th at 1010. This included a knowledge of the INA's complex jurisdictional provisions and other nationality and

[3] *See also, e.g.*, *Abdur-Rahman v. Napolitano*, 868 F. Supp. 2d 1158, 1163–64 (W.D. Wash. 2012) (enhanced fees to attorneys with "distinctive knowledge and specialized skill necessary to achieve success in [a] complex case" involving revocation of advanced parole to a noncitizen returning to the United States); *Orantes-Hernandez*, 713 F. Supp. 2d at 958–64 (enhanced rates in litigation opposing motion to dissolve immigration-related injunction); *Osman v. Mukasey*, 553 F. Supp. 2d 1252, 1258 (W.D. Wash. 2008) (enhanced rates for work related to delayed naturalization application requiring "specialized immigration law skills"); *Freeman v. Mukasey*, No. 04–35797, 2008 WL 1960838, at *4–7 (9th Cir. Feb. 26, 2008) (enhanced fees in case with "thorny procedural and jurisdictional questions" due to lack of clarity regarding proper venue for a noncitizen's claims prior to a change in law); *cf. Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 625 F. Supp. 3d 1116, 1125 (W.D. Wash. 2022) (observing that the "Court . . . ha[d] no trouble finding that plaintiff's attorneys . . . are eligible for compensation above the EAJA statutory maximum given their experience with complex federal environmental litigation and the fact that this case required precisely that specialty").

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citizenship provisions that contrast with the nationality provisions at 8 U.S.C. § 1408(4) and its accompanying statutory note.

Notably, Plaintiffs' counsel utilized their experience and expertise in complex removal and immigration litigation to ensure that Mr. Koonwaiyou properly preserved his claims and ultimately prevailed. As described above, Plaintiffs' counsel previously represented Mr. Koonwaiyou in his removal proceedings (time for which they do not seek fees), navigating the INA's complex and notorious jurisdiction-channeling and jurisdiction-stripping provisions. Those efforts preserved Mr. Koonwaiyou's claim to nationality and made clear what he needed to do to pursue that claim properly. As local and national immigration experts attest, this kind of "distinctive knowledge and skills," *Nadarajah*, 569 F.3d at 912, helped ensure Mr. Koonwaiyou could succeed in this case, something only those with the requisite experience and expertise could ensure, *see* Pauw Decl. ¶¶ 10–11; Han Decl. ¶¶ 7–8; Realmuto Decl. ¶ 12.

Finally, Plaintiff's counsel's skills are not available elsewhere at the statutory rate. There are few, if any, other attorneys in Washington that would be able to bring this litigation on behalf of an indigent, detained noncitizen immigrant. However, even if Mr. Koonwaiyou could have afforded the statutory rate (which, as someone in detention for most of this case, he obviously could not), *see* Dkt. 1; Dkt. 5, there are few, if any, other attorneys in the state with the necessary combination of experience and expertise this case requires, and none able to perform this work at the statutory rate. *See, e.g.*, Pauw Decl. ¶ 11; Han Decl. ¶ 6; Realmuto Decl. ¶ 13. Notably, Mr. Koonwaiyou's counsel exercises billing judgment by seeking enhanced rates only for the two attorneys most involved in complex immigration litigation, and requesting only the adjusted EAJA statutory rates for the additional attorneys who worked on the case.

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IV. The Requested Fees Are Reasonable.

Because enhanced fees are appropriate, the Court "instead must award attorneys' fees based on prevailing market rates." *Nadarajah*, 569 F.3d at 916. To determine whether the requested fees are reasonable, courts apply the lodestar method. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar is determined by multiplying a reasonable hourly rate or rates by the number of hours reasonably expended in the litigation. *Id.* There is a "strong presumption" that the lodestar amount constitutes a "reasonable" fee. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010); *see also Wagafe v. Trump*, No. C17-00094 RAJ, 2020 WL 2494726, at *1 (W.D. Wash. May 14, 2020) (similar). Thus, "it should only be enhanced or reduced in rare and exceptional cases." *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1119 n.4 (9th Cir. 2000) (internal quotation marks omitted).

Counsel rely on the updated *Laffey* Matrix, adjusted for inflation, to demonstrate appropriate market rates for attorneys' fees under EAJA for complex federal immigration class actions. *See* Ex. A. The *Laffey* Matrix was initially adopted by the Court in *Laffey v. Northwest Airlines,* 572 F. Supp. 354, 371 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). The *Laffey* matrix "is a widely recognized compilation of attorney and paralegal rate data that is used in the District of Columbia." *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM SHX, 2008 WL 8150856, at *14 (C.D. Cal. July 21, 2008) (internal quotation marks omitted); *see also Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc.*, 731 F. Supp. 2d 937, 948 (N.D. Cal. 2010) (similar).[4]

[4] For many years, the Civil Division of the U.S. Attorney's Office in Washington D.C. maintained a version of the Laffey Matrix. *See DL v. Dist. of Columbia.*, 924 F.3d 585, 589–90 (D.C. Cir. 2019). The D.C. Circuit later rejected another matrix the USAO developed as an alternative to the Laffey Matrix. *Id.* at 591–94. In 2021, the USAO released a new matrix for complex federal litigation in the D.C. area, which the office has continued to update. *See* U.S.

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Plaintiffs rely on the updated *Laffey* Matrix, after further adjusting it for market fluctuations between the Seattle market and the D.C. market. Courts regularly adjust the matrix to account for the local cost of living and rates for attorneys. *See, e.g.*, *Fernandez*, 2008 WL 8150856, at *15 (adjusting matrix to account for higher rates in Los Angeles market). Here, Plaintiffs have "adjust[ed] the rates for the relevant legal market [i.e., Seattle], . . . us[ing] the federal locality pay differentials based on federally compiled cost of living data." *Theme Promotions, Inc.*, 731 F. Supp. 2d at 948; *see also In re HPL Techs., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 921–22 (N.D. Cal. 2005) (similar). This constitutes a reduction of about 3% to the updated *Laffey* Matrix.

Notably, "where use of the *Laffey* matrix has been disapproved, it has been because it produced a rate that the court determined was *too low.*" *Fernandez*, 2008 WL 8150856, at *14. For example, in *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454–55 (9th Cir. 2010), the Ninth Circuit held that the district court did not abuse its discretion in awarding rates higher than those dictated by the *Laffey* Matrix. Similarly, in *Pollinator Stewardship Council v. EPA*, No. 13-72346, 2017 WL 3096105 at *6 (9th Cir. June 27, 2017)–a case from the Western District of Washington—the Ninth Circuit rejected the government's request that the Court impose the *lower* rates from the *Laffey* Matrix instead of Plaintiff's higher proposed market rates. Moreover, here, Mr. Koonwaiyou's counsel has decreased the requested rates to address the locality pay differential between Seattle and the Washington-Baltimore areas. They also have not sought enhanced fees for all attorneys, only those with established expertise. In addition, Mr. Koonwaiyou's counsel has exercised billing judgment to eliminate several billing entries,

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Attorney's Office for the District of Columbia, Civil Division, The Fitzpatrick Matrix, https://www.justice.gov/media/1221881/dl?inline (last accessed Dec. 13, 2023).

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reducing the total request by 5.6 hours. After exercising this billing judgment, Plaintiff's combined request of fees and costs is $81,289.66 at this time.[5] *See* Ex. B (fees and costs tables and calculations); Ex. C (timekeeping entries).

This amount is reasonable. In addition to being based on a matrix approved by many other courts, this Court has previously approved similar rates in other immigration cases litigated in the Western District of Washington. For example, in the *Wagafe* case, the Court approved a rate of $815 an hour for Matt Adams for work performed in 2018. *See Wagafe v. Trump*, No. 2:17-cv-00094-RAJ (filed Jan. 23, 2017), ECF Nos. 231, 356. The Court approved similar rates in *Mendez Rojas v. Wolf*, No. 2:16-cv-01024-RSM (filed June 30, 2016). *See* Ex. D (fee proposal in *Mendez Rojas*, providing for hourly rate for Matt Adams of up to $899 an hour); Ex. E (then-Chief Judge Martinez's approval of the settlement agreement using these rates). In addition, attorneys with knowledge of the rates in this district and nationally attest to the fact that Plaintiffs' requested rates are reasonable. Pauw Decl. ¶ 12; Realmuto Decl. ¶ 14.

CONCLUSION

For all these reasons, Mr. Koonwaiyou requests that the Court grant his requested fees and costs in the amount of $81,289.66.

DATED this 15th of December, 2023.

s/ Matt Adams
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s/ Aaron Korthuis
Aaron Korthuis
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[5] Plaintiffs are entitled to fees for time spent on this motion, including any additional time spent replying to Defendants' opposition.

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WORD COUNT CERTIFICATION

I certify that this memorandum contains 3,902 words, in compliance with the Local Civil Rules.

DATED this 15th day of December, 2023.

s/ Aaron Korthuis
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