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3:04-CV-00370 CARLOCK V. COLLINS MOTOR CO

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CLERK OF DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY 

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GAYNOR CARLOCK,

Plaintiff,

v.

COLLINS MOTORS, INC., ET AL.,

Defendants.

Civil No. 04CV0370-J (RBB)

ORDER:

(1) GRANTING DEFENDANTS' MOTION FOR ATTORNEY'S FEES; and

(2) DENYING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES.

[Doc. Nos. 75, 90.]

Currently before the Court are Defendants' Collins Motor Company, Richard H. Collins' Sr., Richard H. Collins, Jr., Rita A. Collins, and Kristen Collins' ("Defendants") Motion for Attorney's Fees and Costs ("Defendants' Motion") and Plaintiff Gaynor Carlock's ("Plaintiff") cross Motion for Attorney's Fees ("Plaintiff's Motion"). Pursuant to Civil Local Rule 7.1.d.1, the Court decides the Motions on the pleadings submitted and without oral argument. For the reasons set forth below, the Court **GRANTS** Defendants' Motion and **DENIES** Plaintiff's Motion.

Background Facts

On February 20, 2004, Plaintiff filed a Complaint alleging violations of the Americans With Disabilities Act ("ADA") and related state law claims. [Doc. No. 1.]

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1 On March 28, 2005, this Court issued an order denying Plaintiff's Motion for Summary
2 Judgment on his ADA and state law claims and granting partial summary judgment on certain
3 factual issues. [Doc. No. 44.] The March 28, 2005 Order also required Plaintiff to show cause
4 why his claims should not be dismissed for lack of standing and mootness. (March 28, 2005
5 Order at 8.)

6 On May 2, 2005, this Court ordered that Plaintiff be declared a vexatious litigant and
7 issued a pre-filing injunction against Plaintiff. [Doc. No. 70.] The Court found that Plaintiff was
8 filing an inordinate number of ADA and related state law claims with the bad faith motive of
9 harassing businesses in order to extract quick cash settlements. (May 2, 2005 Order at 10.)

10 Finally, on May 4, 2005, this Court issued an Order dismissing Plaintiff's ADA claim for
11 lack of standing and mootness and dismissing Plaintiff's state law claims for lack of subject
12 matter jurisdiction. [Doc. No. 71.]

13 *Legal Standards*

14 **I. Attorney's Fees and Costs Pursuant to the ADA**

15 The ADA provides that "the court in its discretion, may allow the prevailing party... a
16 reasonable attorney's fee, including litigation expenses, and costs[.]" 42 U.S.C. § 12205. When
17 the prevailing party is the defendant, attorney's fees should be awarded only if "the plaintiff's
18 action was frivolous, unreasonable, or without foundation." *Brown v. Lucky Stores*, 246 F.3d
19 1182, 1190 (9th Cir. 2001) (internal citations omitted).

20 **II. Attorney's Fees and Costs Pursuant to 28 U.S.C. § 1927**

21 Title 28, United States Code, Section 1927 ("Section 1927") provides that "[a]ny
22 attorney...who so multiplies the proceedings in any case unreasonably and vexatiously may be
23 required by the court to satisfy personally the excess costs, expenses, and attorneys' fees
24 reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section 1927 does not permit
25 sanctions for the initial filing of the complaint; rather, the sanctions only apply to subsequent
26 filings and tactics which multiply the proceedings. *Moore v. Keegan Mgmt. Co.*, 78 F.3d 431,
27 435 (9th Cir. 1996).

1 To award sanctions under Section 1927, the court must make a finding of recklessness or
2 bad faith. *See Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001); *see also West Coast Theater*
3 *Corp. v. City of Portland*, 897 F.2d 1519, 1528 (9th Cir. 1990).

4 **III. Attorney's Fees and Costs Pursuant to the Court's Inherent Power**

5 In addition, a federal court has the inherent power "to levy sanctions, including attorneys'
6 fees, for willful disobedience of a court order . . . or when the losing party has acted in bad faith,
7 vexatiously, wantonly, or for oppressive reasons." *Fink*, 239 F.3d at 992 (citing *Roadway*
8 *Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980)); *see also Chambers v. NASCO*, 501 U.S. 32,
9 44-45 (1991) (stating that as an "appropriate sanction for conduct that abuses the judicial
10 process," "an assessment of attorney's fees is undoubtedly within the court's inherent power.").

11 Sanctions under the court's inherent power are only warranted when an attorney has acted
12 in bad faith. *Id.* at 993; *see also Keegan*, 78 F.3d at 436. Bad faith is found where an attorney
13 "knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the
14 purpose of harassing an opponent." *Primus Auto Fin. Servs. v. Batarse*, 115 F.3d 644, 649 (9th
15 Cir. 1997); *see also Fink*, 239 F.3d at 992 (bad faith includes a broad range of improper conduct,
16 including actions are not frivolous, yet are "substantially motivated by vindictiveness, obduracy,
17 or mala fides.").

18 **IV. Amount of Reasonable Attorney's Fees**

19 Under fee shifting statutes, courts employ the lodestar method in calculating attorneys'
20 fees. *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003). Fees are assessed by multiplying
21 the hours reasonably expended on the litigation by a reasonable hourly rate. *Morales v. City of*
22 *San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996).

23 Additionally, the court may consider other relevant factors adopted by the Ninth Circuit in
24 *Kerr v. Screen Guild Extra, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951
25 (1976). These factors include:

- 26 (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the
27 skill requisite to perform the legal service properly; (4) the preclusion of other employment by
28 the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or
contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved
and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the

1 “undesirability” of the case; (11) the nature and length of the professional relationship; and (12)
2 awards in similar cases.

3 *Kerr*, 526 F.2d at 70 (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719
4 (5th Cir. 1974)). However, many of these considerations are already factored into the lodestar
5 calculation. *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565
6 (1986).

7 In sum, “a district court has wide latitude in determining the number of hours that were
8 reasonably expended by the prevailing lawyers, but it must provide enough explanation to allow
9 meaningful review of the fee award.” *Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir. 2001).

10 ***Discussion***

11 **I. Plaintiff’s Motion for Attorney’s Fees**

12 Plaintiff seeks attorney’s fees under the ADA, claiming that Plaintiff is the prevailing
13 party in this action based upon the Court’s March 28, 2005 Order granting summary judgment
14 on certain factual issues. (Pl.’s Mot. at 2.) For the reasons set forth below, the Court **DENIES**
15 Plaintiff’s Motion.

16 Plaintiff argues that the Court “determined that defendants had in fact violated the ADA
17 prior to making modifications.” (*Id.* at 2, 4.) Plaintiff’s representation of the Court’s holding is
18 patently erroneous. In the March 28, 2005 Order, the Court made certain *factual* findings
19 regarding the status of Defendants’ car dealership as a public accommodation and the physical
20 existence of certain architectural barriers. (March 28, 2005 Order at 8-10.) However, the Court
21 specifically held that it could not determine whether the removal of barriers was “readily
22 achievable” or whether Defendants’ effectively employed alternative methods of access. (*Id.* at
23 11-12.) Thus, the Court did not make any finding establishing liability on the part of
24 Defendants. Rather, the March 28, 2005 Order explicitly denied Plaintiff summary judgment on
25 his ADA and related state law claims. (*Id.* at 13.)

26 The Court finds that Plaintiff was not the prevailing party in this action and is not entitled
27 to attorney’s fees under the ADA. Accordingly, the Court **DENIES** Plaintiff’s Motion.

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1 **II. Defendants' Motion for Attorney's Fees**

2 Defendants seek attorney's fees in the amount of \$20,452.50, both as the prevailing party
3 under the ADA and as sanctions under Section 1927. (Defs.' Mot. at 2-4.) Based upon the
4 particular circumstances of the present case, the Court finds it appropriate under both the Court's
5 inherent power and Section 1927 to impose sanctions against Plaintiff in the form of reasonable
6 attorney's fees and costs.¹ For the reasons set forth below, the Court **GRANTS** Defendants'
7 Motion and **AWARDS** Defendants reasonable attorney's fees and costs in the amount of
8 \$20,863.70.

9 **A. Recovery of Attorney's Fees and Costs Under 28 U.S.C. § 1927 and the**
10 **Court's Inherent Power**

11 This Court's May 2, 2005 Order ("Vexatious Litigant Order") declared Plaintiff a
12 vexatious litigant and issued a pre-filing injunction against Plaintiff. (*See generally*, Vexatious
13 Litigant Order.) In that Order, the Court specifically found that "Plaintiff's complaints when
14 viewed in the aggregate are contrived and incredible, manifesting *bad faith* and the *improper*
15 *motive* of extracting quick cash settlements" and that "Plaintiff's contrived claims were made in
16 *bad faith* and for the *improper purpose of harassing defendants* and extracting cash settlements."
17 (*Id.* at 9, 10) (emphases added). These explicit findings of bad faith, improper motive, and
18 improper purpose clearly apply to the filing and litigation of the present action, simply the most
19 recent in a long line of vexatious ADA cases filed by Plaintiff.

20 Since the Court has already made specific findings of bad faith by Plaintiff, the Court
21 may properly impose sanctions under both Section 1927 and the Court's inherent power. *See*
22 *Fink*, 239 F.3d at 993. Moreover, although Section 1927 does not permit sanctions for the mere
23 filing of a complaint, the Court may impose such sanctions under its inherent power. *See*
24 *Keegan*, 78 F.3d at 435 ("[t]he filing of a complaint may be sanctioned pursuant to...a court's
25 inherent power[.]").

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28 ¹ Since the Court finds sufficient authority under both Section 1927 and the Court's inherent
power to award Defendants attorney's fees and costs, the Court declines to address whether such
expenses are warranted in the present case under the ADA.

1 Accordingly, pursuant to the Court's inherent power and Section 1927, the Court **FINDS**
2 it appropriate to impose sanctions against Plaintiff in the form of reasonable attorney's fees and
3 reimbursement of costs for Defendants' litigation of this action in its entirety.

4 **B. Amount of Reasonable Attorney's Fees and Costs**

5 In support of the requested amounts of \$20,452.50 in reasonable attorney's fees and
6 \$2586.08 in costs, Defendants have submitted a declaration by counsel for Defendants, Don W.
7 Detisch along with contemporaneous billing time sheets. [Doc. No. 77.]

8 The declaration states that the billing rate for Mr. Detisch, who has thirty-five (35) years
9 of experience, is \$150 per hour, and the billing rates for the legal assistants and paralegals are
10 between \$65 to \$85 per hour. (Decl. of Detisch ¶ 5.) The Court finds these billing rates to be
11 reasonable.

12 The billing time sheets for attorney's fees describe the particular tasks worked on, such as
13 "Drafted Answer to Carlock Complaint" or "Telephone Conference with Attorney Landers."
14 (*Id.*, Ex. B.) The billing time sheets for costs describe the particular type of cost, such as
15 "Facsimiles" or "Paulson Reporting-Deposition of Gaynor L. Carlock." (*Id.*, Ex. C.) Mr.
16 Detisch further states that all services provided were "reasonable and necessary in defense of this
17 action." (*Id.* ¶ 3.)

18 Mr. Detisch declares that he personally spent 95.77 hours on this litigation. (*Id.* ¶ 6.)
19 However, the Court's independent review and calculation of the billing time sheets has found a
20 total of 95.17 hours spent by Mr. Detisch.² The Court finds that billed at \$150 per hour, the total
21 fees to be awarded for Mr. Detisch's services amount to **\$14,275.50**.

22 Mr. Detisch also declares that the total number of hours spent by his office was 167.97.
23 (*Id.*) Subtracting the 95.77 hours Mr. Detisch calculated for himself, this amounts to 72.2 hours
24 spent by the legal assistants and paralegals. However, the Court's independent review and
25 calculation of the billing time sheets has found a total of 74.2 hours spent by legal assistants or
26

27 ² The additional .6 hours claimed by Defendants are actually billed to an attorney with the initials
28 "CJB," who is not mentioned in the declaration by Detisch. (*See* Decl. of Detisch, Ex. B at 4-5.) Since
the Court does not have any information as to the identity of this individual, the Court cannot include
these .6 hours in its calculation of attorney's fees.

1 paralegals; 66.2 hours were spent by "JAM" billed at \$65 per hour (totaling \$4,303.00 in fees)
2 and 8 hours were spent by "SAJ" billed at \$85 per hour (totaling \$680.00 in fees). The Court
3 finds that the total fees to be awarded for legal assistant and paralegal services amount to
4 **\$4,983.00.**

5 Mr. Detisch further declares that Defendants incurred costs in an amount of \$2,586.08.
6 (*Id.* ¶ 8.) The Court has reviewed Defendants' billing time sheet for costs and finds that only
7 \$1,605.20 in costs is sufficiently documented. The remaining \$980.88 is attributed to "Expense
8 Miscellaneous," a description too vague for the Court to properly award such costs. The Court
9 finds that the total costs to be awarded amount to **\$1,605.20.**

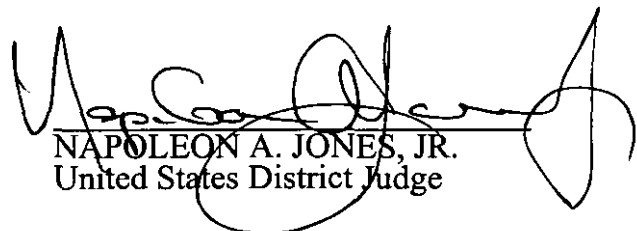
10 Accordingly, the Court **FINDS** that the total amount of reasonable attorney's fees and
11 costs to be paid by Plaintiff to Defendants as a sanction under the Court's inherent power and
12 Section 1927 is **\$20,863.70.**³

13 ***Conclusion and Order***

14 For the reasons stated above, the Court: (1) **DENIES** Plaintiff's Motion for Attorney's
15 Fees and (2) **GRANTS** Defendants' Motion for Attorney's Fees and Costs and **AWARDS**
16 Defendants reasonable attorney's fees and costs in the amount of **\$20,863.70.**

17
18 **IT IS SO ORDERED.**

19
20 Dated: 9-16-05

21 
22 **NAPOLEON A. JONES, JR.**
United States District Judge

23 cc: Magistrate Judge Brooks
24 All Counsel of Record

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27
28 ³ Defendants also seek fees associated with bringing the present Motion. (Defs.' Mot. at 5.) The Court has included such fees in its present calculation.