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10 LAW SCHOOL ADMISSION COUNCIL

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 THE DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING,

15 Plaintiff,

16 v.

17 LAW SCHOOL ADMISSION COUNCIL,

18 Defendant.

No. CV 12-1830-JCS

**LSAC'S OPPOSITION TO DFEH'S
MOTION FOR ATTORNEYS' FEES
AND COSTS**

Date: October 19, 2018

Time: 11:00 a.m.

Location: Courtroom G (15th Floor)

Judge: Hon. Joseph C. Spero

20 THE UNITED STATES OF AMERICA,

21 Plaintiff-Intervenor,

22 v.

23 LAW SCHOOL ADMISSION COUNCIL,

24 Defendant.

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1 DFEH is entitled to reasonable attorneys' fees and costs for its work on the contempt
 2 motion. *See* Consent Decree ¶ 21(b) (providing that DFEH is entitled "to reasonable attorney
 3 fees and costs for work performed on any prevailing motion to enforce the Consent Decree")
 4 (emphasis added); Order Regarding Motion for Contempt and Motion to Exclude Conclusions of
 5 Decree Monitor (Dkt. 278), at 53. DFEH, however, is seeking *over a half a million dollars* in
 6 fees and costs (\$529,341 in fees and \$4,077.54 in costs) on its motion, based on 983.6 hours of
 7 attorney work (with an additional 832.8 hours purportedly eliminated in the exercise of "billing
 8 judgment").

9 DFEH's request exceeds what it is entitled to recover under the Consent Decree and the
 10 bounds of reasonableness. It seeks to recover fees for hundreds of hours of work that were not
 11 spent on the contempt motion, and the attorney hours it reports for work on the motion itself
 12 reflect inefficiencies and overstaffing. DFEH also seeks to recover market rates for its attorneys,
 13 despite public statements from the DFEH Director that the agency would seek the California
 14 Attorney General rate when pursuing any fee recovery.

15 Finally, in filing its motion, DFEH failed to abide by its obligations under the Consent
 16 Decree to attempt to informally resolve the fee dispute with LSAC and, if necessary, jointly
 17 submit the fee matter to the Court. In doing so, DFEH has needlessly increased the time and
 18 expense of addressing the fee issue. Any "fees on fees" to DFEH must therefore be reduced.

19 BACKGROUND

20 **I. DFEH'S REQUEST FOR ATTORNEYS' FEES**

21 **A. Attorneys' Fees Under the Consent Decree**

22 DFEH is "entitled to reasonable attorney fees and costs for work performed on any
 23 prevailing motion to enforce the Consent Decree." Consent Decree ¶ 21(b). Before DFEH seeks
 24 such payment, it must send LSAC "a statement of its work on any such motion." *Id.* If LSAC
 25 disagrees with DFEH's statement, it must notify DFEH within 5 business days, and after that,
 26 LSAC and DFEH must attempt to informally resolve the dispute. If an informal resolution cannot
 27 be reached, the parties must submit the matter to this Court for binding determination. *See id.*
 28

B. DFEH's Fee Statement, Subsequent Communications, and Motion

1 In its March 5, 2018 order Regarding Motion for Contempt and Motion to Exclude
2 Conclusions of Decree Monitor, the Court found that DFEH "is entitled to its fees and costs
3 pursuant to Paragraph 21(b) of the Consent Decree," and ordered the parties to engage in the
4 procedures stated in the Decree for determining the amount of such fees and costs. Dkt. 278 at
5 53.

6 DFEH sent its attorneys' fee statement to LSAC on May 7, 2018, seeking **\$492,466.50** in
7 fees and **\$4,077.54** in costs, based on **829** hours of attorney work. *See* Mayeda Decl. Ex. G.
8 DFEH took the position that its work on the motion to enforce the Decree began with its review
9 of California test taker files at LSAC's office. DFEH was not required to provide, and did not
10 provide, time records with its fee statement, but its statement suggested that DFEH was seeking to
11 recover for time spent in the five-month period that preceded the filing of DFEH's motion, *see id.*
12 at 1-2, during which the parties engaged in discussions that the Decree contemplates as the
13 routine manner in which agency questions and concerns are to be addressed, *see* Consent Decree
14 ¶ 31. DFEH concluded by stating:

15 We hope to be able to resolve this motion without resort to litigation and that this
16 letter is of assistance to LSAC in evaluating our request. Having gone through the
17 effort to individually review each time entry and exercise substantial billing
18 judgment, we do not view this as an opening offer but as our reasonable and
justifiable request for fees and costs. We look forward to your response.

19 Mayeda Decl. Ex. G at 6.

20 LSAC sent its response on May 14. *See* Mew Decl. Ex. C. LSAC challenged the breadth
21 of work for which DFEH sought fees and the number of hours and requested rates underlying the
22 request. *See id.* LSAC asked DFEH to provide a revised fee request, capturing work performed
23 solely on the contempt motion and reflecting the exercise of reasonable billing judgment. In the
24 alternative, LSAC offered DFEH a substantial payment--\$175,000--in the interest of promptly
25 and efficiently resolving the dispute. *See id.* at 5. LSAC stated: "We look forward to hearing
26 from you soon and reaching a reasonable resolution, mindful of the Decree's requirement that the
27 parties attempt to informally resolve the dispute." *Id.*

1 On June 19, DFEH sent a confidential communication to LSAC regarding its fee request,
 2 presumably to initiate the informal resolution process. Before LSAC responded to the June 19
 3 letter from DFEH, DFEH sent an email to LSAC on July 5, indicating that there was an error in
 4 its original fee statement, and that it was increasing the hours for Joni Carrasco's work from
 5 177.9 hours to 316 hours. *See* Mayeda Decl. Ex. H. DFEH slightly decreased other hours
 6 represented in its earlier fee statement, but nevertheless sought an additional \$36,874.50 in fees.
 7 At this point, DFEH was now seeking \$529,341 in fees, based on 983.6 hours of attorney work.
 8 *See id.* The next day (July 6), LSAC acknowledged receipt of the email and indicated that it
 9 would respond to DFEH's June 19 informal resolution communication the following week. *See*
 10 Mew Decl. Ex. D.

11 On July 13, DFEH filed its motion with the Court. It filed its motion without waiting for
 12 LSAC's response to its June 19 letter, which LSAC had indicated was forthcoming that week. In
 13 her declaration supporting DFEH's motion, counsel for DFEH states:

14 The DFEH provided LSAC with a statement of DFEH's work on the motion to
 15 enforce the Consent Decree on May 7, 2018. Attached hereto as **Exhibit G** is a
 16 true and correct copy of the May 7, 2018 email and letter to LSAC. Upon
 17 additional review of our time records, we discovered a clerical error that resulted
 18 in miscalculating the total number of Attorney Carrasco's hours expended on work
 19 to enforce the Decree. Additionally, we decided to further eliminate additional
 20 hours from our request. We provided LSAC an email amending the hours
 21 eliminated and hours requested on July 5, 2017, which reflects the hours listed
 22 above in paragraph 17. Attached hereto as **Exhibit H** is a true and correct copy of
 23 the July 5, 2018 email to LSAC. *As of the signing of this declaration in the*
 24 *morning of July 13, 2018, DFEH has not received a response from LSAC.*

25 Mayeda Decl. ¶ 23 (emphasis added). The highlighted statement could be misleading. It fails to
 26 note that LSAC responded to DFEH's statement of work on May 14, that LSAC had
 27 acknowledged receipt of DFEH's July 5 email, that LSAC indicated it would be responding to
 28 DFEH's June 19 informal resolution letter the following week, and that DFEH did not wait to
 receive LSAC's response to the informal resolution letter before filing its motion.

ARGUMENT

DFEH's entitlement to fees is both established and circumscribed by the Consent Decree.
 The Consent Decree provides that DFEH "shall be entitled to reasonable attorney fees and costs

1 for work performed on any prevailing motion to enforce the Consent Decree.” Consent Decree
 2 (Dkt. 203) ¶ 21(b). This provision should be interpreted under ordinary contract principles. *See*
 3 Order Granting in Part and Denying in Part Appeal of Best Practices Panel Report (Dkt. 245), at 9
 4 (“A consent decree, which has attributes of a contract and a judicial act, is construed with
 5 reference to ordinary contract principles.”) (citations omitted); *Gil v. Mansano*, 121 Cal. App.
 6 4th 739, 743 (2004) (applying ordinary rules of contract interpretation to attorneys’ fee provision
 7 in contract).

8 The determination of “reasonable” attorneys’ fees is generally conducted under the
 9 traditional lodestar method: the number of hours reasonably expended multiplied by a reasonable
 10 hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Ketchum v. Moses*, 24 Cal. 4th
 11 1122, 1131-32 (2001); *PLCM Group v. Drexler*, 22 Cal. 4th 1084, 1095-96 (2000); *Press v.*
 12 *Lucky Stores, Inc.*, 34 Cal. 3d 311, 322 (1983). The lodestar may then be adjusted upward or
 13 downward, based on relevant factors. *See Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 985
 14 (2010); *Stonebrae, L.P. v. Toll Bros., Inc.*, 2011 WL 1334444, at *6 (N.D. Cal. 2011), *aff’d*, 521
 15 Fed. App’x 592 (9th Cir. 2013). Federal and state authority regarding operation of the lodestar
 16 analysis may be considered. *Cf. Stonebrae*, 2011 WL 1334444, at *5 (relying on federal and state
 17 authority on attorneys’ fee award where parties agreed that federal and state law did not differ
 18 materially and cited both federal and state cases) *aff’d*, 521 Fed. App’x 592 (9th Cir. 2013).
 19 DFEH bears the burden of “documenting the appropriate hours expended and hourly rate,”
 20 *Hensley*, 461 U.S. at 437; *see also 569 East Country Blvd. LLC v. Backcountry Against the*
 21 *Dump, Inc.*, 6 Cal. App. 5th 426, 432 (2016), and the district court has discretion in determining
 22 the amount of a fee award, *PLCM Group*, 22 Cal. 4th at 1096.

23 **I. DFEH’S FEE REQUEST EXCEEDS ITS RIGHTS UNDER THE CONSENT**
 24 **DECREE**

25 **A. DFEH Is Not Entitled to Recover Fees for Time Spent on File Review, During**
 26 **Discussions Contemplated as the Normal Process for Addressing any**
 27 **Compliance Questions or Concerns, or in Settlement Discussions Post-Filing**
 28 **of its Contempt Motion**

Under the Consent Decree:

1 The DFEH shall be entitled to reasonable attorney fees and costs for *work*
 2 *performed on any prevailing motion* to enforce the Consent Decree. If the DFEH
 is entitled to seek payment of such fees and costs hereunder, the DFEH agrees to
 send LSAC a statement of its work *on any such motion*.

3 Consent Decree ¶ 21(b) (emphases added). These two sentences are clear: DFEH is entitled to
 4 recover fees for its work on the prevailing *motion*. This unambiguous provision must be given
 5 effect. See *People ex rel. Lockyear v. R.J. Reynolds Tobacco Co.*, 107 Cal. App. 4th 516, 524
 6 (2003) (“In interpreting an unambiguous contractual provision we are bound to give effect to the
 7 plain and ordinary meaning of the language used by the parties.”) (citation omitted). DFEH is not
 8 entitled under the Decree to recover fees for its time reviewing files at LSAC, for time during
 9 which the parties attempted to resolve any disputes about LSAC’s compliance, or for time
 10 relating to settlement communications after the contempt motion was filed.

11 In its motion, DFEH ignores the language of paragraph 21(b) that limits fee recovery to
 12 work performed on the motion. Instead, pointing to the phrase “reasonable attorney fees” in
 13 isolation and relying on inapposite case law, DFEH argues that it is entitled to recover fees for
 14 “services that were necessary and useful to the successful action, including investigation or pre-
 15 complaint work.” DFEH Mot. at 11. This presumably is a reference to the time related to
 16 DFEH’s review of files at LSAC’s office. Going further, DFEH also argues that it is entitled to
 17 recover fees for its time in the dispute resolution process, because this was a “prerequisite” to
 18 filing the motion to enforce the Decree. See *id.* at 12. DFEH’s argument is inconsistent with the
 19 language and structure of the Decree. DFEH was allowed to review files at LSAC pursuant to
 20 paragraphs 23 and 26(a) of the Decree. Nothing in these provisions allows DFEH a right to
 21 recover attorneys’ fees for this work. Dispute resolution is addressed in paragraph 31 of the
 22 Decree. Paragraph 31 clearly separates the informal dispute resolution process in which the
 23 parties address questions regarding compliance with, interpretation of, or implementation of, the
 24 terms of the Decree from the pursuit of any enforcement motion with the Court, which occurs
 25 only after the informal resolution process has been completed (signified by the provision of a
 26 final written position statement). And paragraph 21(b) explicitly refers to an award of fees solely
 27 for work on a “motion” to enforce the Decree--not once, but twice (“The DFEH shall be entitled
 28

1 to reasonable attorney fees and costs for work performed on any *prevailing motion to enforce the*
2 *Consent Decree*”; “If the DFEH is entitled to seek payment of such fees and costs hereunder, the
3 DFEH agrees to send LSAC a statement of its work *on any such motion . . .*”) (Emphases
4 added).

5 None of the cases cited by DFEH address an award of attorneys’ fees in contexts that are
6 analogous to this situation, where the Consent Decree language and structure carefully delineate
7 the scope of work for which fees may be awarded. Under the Decree, DFEH has the right to
8 recover attorneys’ fees for its work on a prevailing motion to enforce the Decree, but nothing
9 more. *See 511 S. Park View, Inc. v. Tsantis*, 240 Cal. App. 4th Supp. 44, 46-48 (2015)
10 (reconciling contractual fee provision allowing for “reasonable attorney fees” along with cap on
11 fees to mean that the fees must be reasonable *and could not exceed the cap*); *see also Hemphill v.*
12 *Wright Family, LLC*, 234 Cal. App. 4th 911, 915 (2015) (“Courts must interpret contractual
13 language in a manner which gives force and effect to *every* provision, and not in a way which
14 renders some clauses nugatory, inoperative or meaningless.”) (citation omitted; emphasis in
15 original); *cf. 569 East County Blvd.*, 6 Cal. App. 5th at 433 (addressing fee award under statute
16 allowing prevailing defendant “to seek fees and costs ‘incurred in connection with’ the anti-
17 SLAPP motion itself, but . . . not . . . attorney fees and costs incurred for the *entire* action” and
18 limiting award accordingly).

19 Pointing to snippets of prior arguments made by LSAC, DFEH contends “the significant
20 work required for the contempt motion is undisputed.” *See* DFEH Mot. at 12. Whether the
21 contempt motion required significant work, however, has nothing to do with whether DFEH is
22 entitled under the Consent Decree to recover for its time spent reviewing files at LSAC, in the
23 dispute resolution process, or in work relating to settlement discussions after its motion was filed.
24 Under the plain language of the Decree, it is not entitled to recover fees for those activities.
25 DFEH also takes LSAC’s prior statements out of context. LSAC was not seeking additional time
26 simply to prepare its opposition to DFEH’s contempt motion, but also (among other things) to
27 allow LSAC’s new president and new general counsel sufficient time to more fully understand
28

1 the long history of the litigation as well as the intricacies of the Consent Decree. See Dkt. 259-1
2 at 1; Dkt. 261 at 4; Mayeda Decl. Ex. E.

3 Finally, DFEH points to three cases where courts awarded attorneys' fees based on
4 hundreds or thousands of hours of attorney time in litigating contempt motions. See DFEH Mot.
5 at 12-13. Once again, these cases, which arise under different facts and circumstances as well as
6 different attorneys' fee provisions, are irrelevant to whether DFEH is entitled to recover fees for
7 its time on activities other than preparing its contempt motion. Under the language of paragraph
8 21(b) of the Decree, it is not.

9 **B. The Hours Underlying DFEH's Fee Request Are Unreasonable**

10 DFEH seeks fees of **\$529,341** based on **938.6 hours** of attorney time. See DFEH Mot. at
11 1. By LSAC's calculations, DFEH is seeking \$85,382.50 in fees based on 149.6 hours of
12 attorney time for its work traveling to LSAC and reviewing files; \$93,585.00 in fees based on
13 162.1 hours of attorney time for its work in the dispute resolution process for addressing
14 compliance questions and issues as required under the Decree, and in settlement-related work
15 after the filing of its contempt motion; \$17,042.50 in fees based on 20.4 hours of attorney time for
16 work that, as recorded, relates both to the dispute resolution process and the contempt motion;
17 and \$330,696.00 in fees based on 603.4 hours of attorney for work on the actual contempt motion
18 and hearing.¹ See Mew Decl. ¶ 3 and Ex. A. As discussed above, DFEH is only entitled to fees
19 for work in this last category -- *i.e.*, work on the motion to enforce the Consent Decree.

20 Moreover, DFEH is only entitled to recover "reasonable" attorneys' fees for that work.
21 See *Concepcion v. Amscan Holdings*, 223 Cal. App. 4th 1309, 1320 (2014) ("[The lodestar]
22 calculation requires the court to determine the reasonable, not actual, number of hours expended
23 by counsel entitled to an award of fees"). Hours that are not "reasonably expended" should be
24 excluded. *Hensley*, 461 U.S. at 434. "The Court may reduce the lodestar where the case was
25 overstaffed and hours are duplicated." *Stonebrae, L.P. v. Toll Bros., Inc.*, 2011 WL 1334444, at
26

27 ¹ Another 3.1 hours of time included in DFEH's lodestar request is time that appears to have been
28 spent on the attorneys' fee issue. See Mew Decl. ¶ 3 and Ex. A.

1 *12 (N.D. Cal. 2011) (citing *Chalmers v. Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986),
2 *amended on other grounds* by 808 F.2d 1373 (9th Cir. 1987).), *aff'd*, 521 Fed. App'x 592 (9th
3 Cir. 2013); *see also, e.g., Rosenfeld v. U.S. Dep't of Justice*, 904 F. Supp. 2d 988, 1005-06 (N.D.
4 Cal. 2012) (same); *569 East Cty. Blvd.*, 6 Cal. App. 5th at 440 (noting that although party's
5 billing statements form the starting point for the lodestar calculation, the trial court should reduce
6 hours representing work that is, *inter alia*, "unnecessary or duplicative or excessive in light of the
7 issues fairly presented") (citation omitted).

8 Here, DFEH seeks to recover fees for the work of four attorneys. This "team" effort led to
9 a significant amount of "team" communications: DFEH seeks to recover \$27,232.00 in fees for
10 51.7 hours spent in internal calls, meetings, or emails relating to the contempt motion, supporting
11 papers, and the hearing. *See* Mew Decl. ¶ 4 and Ex. B. Over half of those hours were recorded by
12 Ms. Carrasco. *See id.* At least ten of Ms. Carrasco's hours should be deducted from the lodestar
13 to account for the inefficiencies. *See In re Taco Bell Wage & Hour Actions*, 222 F. Supp. 3d 813,
14 833 (E.D. Cal. 2016) (finding that approximately two hours of consultation time per month would
15 be reasonable and reducing plaintiff's fee request "to compensate for excessive hours billed for
16 interoffice communication").

17 DFEH is seeking fees for 492.4 hours total time spent on its opening contempt motion and
18 brief, reply brief, and supporting and related papers. *See* Mew Decl. ¶ 4 and Ex. B. It is seeking
19 fees for 59.3 hours spent preparing for and attending the hearing. *See id.* The most senior DFEH
20 attorney on the case, Mari Mayeda, spent more time on the motion papers than any other member
21 of the DFEH team. According to LSAC's calculations, Ms. Mayeda spent 100.7 hours on work
22 related to the opening brief and 98.1 hours on the reply brief, in addition to substantial hours
23 spent by other members of the DFEH team on these same documents and related papers. *See id.*

24 Ms. Mayeda, however, did not argue the motion; Ms. Carrasco did. Ms. Carrasco
25 therefore presumably had to familiarize herself with the cases and argument in advance of the
26 hearing, given that she spent 48.3 hours preparing for and attending the contempt motion hearing.
27 *See id.* This is an unreasonable amount of time. And to the extent that this staffing decision was
28

1 intended as a training opportunity for a more junior attorney, such time is not properly included in
2 an attorney fee petition. *See Gauchat-Hargis v. Forest River, Inc.*, 2013 WL 4828594, at *3
3 (“Time billed by junior associates is not ‘reasonably expended’ where it serves as training rather
4 than productive legal work, and courts are justified in eliminating ‘hours not necessary in light of
5 the experience of the attorney’”) (E.D. Cal. 2013) (citations omitted). At least 20 hours of time
6 spent by Ms. Carrasco preparing for the motion hearing should be deducted from the lodestar.

7 For the same reason, the fees that DFEH seeks to recover for time spent by Kaitlyn
8 Toyama in preparing research memoranda (39.8) should not be recoverable. *See id.*
9 Accordingly, 39.8 hours of Ms. Toyama’s time should be deducted from the lodestar. *See Mew*
10 *Decl.* ¶ 4. DFEH also seeks to recover fees for time spent by Ms. Toyama for what appears to be
11 the preparation of a declaration from someone named “Enger.” No such declaration was filed
12 with DFEH’s motion papers. The time for this work (3.2 hours) should be deducted from the
13 lodestar. *See Mew Decl.* ¶ 7.

14 Although DFEH is not entitled to recover fees for any of its time relating to file review at
15 LSAC’s office, it should be noted that DFEH is seeking fees for an excessive amount of travel
16 time for this file review. Even with some minor deductions based on “billing judgment,” DFEH
17 is seeking to recover approximately *twenty hours* each for three attorneys to travel between
18 California and Pennsylvania (approximately ten hours each way). *See Mew Decl.* ¶ 5. DFEH
19 may argue that its travel took longer because it did not take more expensive direct flights, *see*
20 *DFEH Mot.* at 16, but this is precisely the type of “billing” approach that private attorneys would
21 never take, because it ends up charging the client more in attorney time than any added cost of a
22 direct flight. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (“Hours that are not properly
23 billed to one’s *client* also are not properly billed to one’s *adversary*”) (citation omitted;
24 emphases in original); *Keith v. Volpe*, 644 F. Supp. 1317, 1323 (C.D. Cal. 1986) (“While the
25 court is aware that some private law firms bill for travel time, many firms do not or charge a
26 reduced rate.”), *aff’d*, 858 F.2d 467 (9th Cir. 1988). Moreover, DFEH was required under the
27 Decree to travel to LSAC to review files, and the Decree does not provide that DFEH is entitled
28

1 to recover for its travel time or expenses. *See* Consent Decree ¶¶ 23, 26(a). The time and
2 expense for DFEH’s travel is not properly charged to LSAC. Thus, although DFEH is not
3 entitled to recover fees for file review-related work in any event, even if it were, its travel time
4 would have to be reduced if not eliminated and its travel expenses (which have not been
5 documented by DFEH) are also not compensable.

6 DFEH argues that it obtained an “excellent” result and is therefore entitled to “full
7 compensation.” DFEH Mot. at 13. DFEH did prevail on many of the arguments it raised, but the
8 Court denied its motion in limine and denied its request to remove the Monitor. In any event,
9 even as a successful party DFEH is only entitled to recover for hours “reasonably expended” on
10 the contempt motion. *Hensley*, 461 U.S. at 435; *Flannery v. Cal. Highway Patrol*, 61 Cal. App.
11 4th 629, 647 (1998) (“As the prevailing party, plaintiff was entitled only to ‘reasonable attorney
12 fees’ . . . not reasonable fees plus a windfall.”).

13 DFEH argues that it “exercised considerable and extensive billing judgment” and
14 eliminated a substantial amount of time from its fee request. DFEH Mot. at 13-14. DFEH’s fee
15 request, however, is based on **938.6 hours** of attorney time **after** time was eliminated. This is an
16 exceptional amount of time to have spent on one motion. It is difficult to conceive what work
17 comprised the other “[a]pproximately **832.8 hours**” that were not included in its fee request.
18 DFEH Mot. at 14 (emphasis added). DFEH should not be credited for “billing judgment” when
19 its initial recorded time was this inflated.

20 LSAC also disagrees with DFEH’s contention that it “staffed this case efficiently.” DFEH
21 Mot. at 15. DFEH states that “[o]nly one senior attorney and two mid-level attorneys worked on
22 the case for Plaintiff,” Mot. at 15, but does not take into account that it is also seeking fees for the
23 work of a fourth time-keeper. The number of hours underlying its request also belies any
24 characterization of its work as “efficient.” DFEH also contends that it “generally did not seek
25 compensation for more than two attorneys at any hearing, meeting, or conference[.]” DFEH Mot.
26 at 13, but a quick review of the time records for the five dispute resolution calls between the
27 parties show that DFEH is seeking fees for the work of three attorneys on three of the five calls,
28

1 *see* Mew Decl. ¶ 8 and Mayeda Decl. Ex. F. And communications during the dispute resolution
 2 process frequently included six attorneys for plaintiffs -- three DFEH attorneys and three DOJ
 3 attorneys. *See* Decl. of Caroline M. Mew in Supp. of LSAC's Opp. to Mot. for Order Holding
 4 Def. in Contempt (Dkt. 268-2) at Ex. F at 11; Ex. G; Ex. K; Ex. L.

5 DFEH's fee recovery should be limited to the time it spent on the contempt motion itself,
 6 and its hours should be further reduced to account for the inefficiencies detailed above.

7 **C. Any Fee Calculation Must Be Adjusted Downward to Address DFEH's**
 8 **Unreasonably Inflated Fee Request**

9 The unreasonableness of DFEH's fee award is underscored by its pursuit of "market"
 10 rates. LSAC is not contesting for purposes of this motion whether the hourly rates sought by
 11 DFEH reflect market rates for similarly-experienced attorneys. LSAC also recognizes that
 12 market rates are typically utilized in a lodestar analysis, including in some cases involving
 13 government attorneys. *See In re Tobacco Cases I*, 216 Cal. App. 4th 570, 581-82 (2013). But
 14 **DFEH's** pursuit of market rates is not reasonable.

15 After the FEHA was amended to authorize DFEH to recover attorney fees, the Director of
 16 DFEH publicly announced that the agency would seek fees based on the "Attorney General's
 17 \$170/hour rate". *See* Mew Decl. Ex. E at 35, 38; Ex. F at 1; *see also* "The New DFEH: Tidal
 18 Wave of Changes You Need to Know," at 30, *available at* <http://slideplayer.com/slide/4576401/>.
 19 Here, however, DFEH is seeking rates here that are as much as **five times higher**. The agency
 20 shrugs this distinction away, arguing that a new DFEH Director under a new California Governor
 21 can set new policies. *See* Mayeda Decl. ¶ 26. Putting aside whether a government agency should
 22 reasonably be expected to act in a manner consistent with how it has told the public it will act, the
 23 fact remains that just a few years ago the agency determined that \$170/hour is a reasonable rate
 24 for the agency to recover as attorneys' fees.²

25 Applying the lower hourly rate here is consistent with DFEH's role as a state agency.

26 ² DFEH references two other unpublished trial court decisions in which DFEH was awarded
 27 attorneys' fees at higher rates, *see* DFEH Mot. at 10, but does not provide a copy of the decisions
 28 to the Court or the parties. It is therefore not known whether the parties or courts addressed in
 those cases whether the \$170/hour rate should be applied.

1 DFEH presumably does not require a monetary incentive to pursue its statutory mandate. *Cf.*
 2 *People ex rel. Brown v. Tehama Cty. Bd. of Supervisors*, 149 Cal. App. 4th 422, 454 (2007) (“The
 3 Attorney General needs no encouragement to pursue litigation that is in the general interest of the
 4 state’s population because, put simply, that is his or her job.”). It also does not face the same
 5 pressures as private attorneys, who rely on significant attorneys to finance the pursuit of civil
 6 rights litigation. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008)
 7 (“Lawyers must eat, so they generally won’t take cases without a reasonable prospect of getting
 8 paid. Congress thus recognized that private enforcement of civil rights legislation relies on the
 9 availability of fee awards . . .”). The DFEH’s own stated \$170/hour fee should be applied.

10 **II. “FEES ON FEES” SHOULD BE REDUCED DUE TO DFEH’S FAILURE TO**
 11 **MEANINGFULLY ENGAGE IN THE ATTORNEY FEE DISPUTE RESOLUTION**
 12 **PROCESS SET OUT IN THE DECREE**

13 LSAC recognizes that parties prevailing on a motion for attorneys’ fees are generally
 14 awarded fees for reasonable time spent on the fee motion. A full award of “fees on fees,”
 15 however, is not justified in this case. The purpose of fees-on-fees is to not “dilute a fees award by
 16 refusing to compensate attorneys for the time they *reasonably* spent in establishing the
 17 entitlement to and amount of the fee[.]” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th
 18 Cir. 2008) (citation omitted; emphasis added), *reconsideration granted in part on other grounds*,
 19 No. 04-cv-00478, 2008 WL 3992715 (N.D. Cal. 2008). DFEH’s failure to meaningfully engage
 20 in informal dispute resolution has caused both parties to incur unnecessary fees to litigate the fee
 21 issue. Its request for fees-on-fees should be adjusted accordingly.

22 The Consent Decree sets forth a specific process that must be filed when DFEH seeks fees
 23 and costs for work performed on a prevailing motion to enforce the Consent Decree. Dkt. 203 ¶
 24 21(b). DFEH must send a statement of its work on any such motion to LSAC. If LSAC
 25 disagrees with the statement of work or requested payment amounts or rates, it must notify DFEH
 26 in writing within five (5) days after receipt. That happened here -- DFEH sent a statement of
 27 work to LSAC, *see* Mayeda Decl. Ex. G, and LSAC responded, disputing the statement and the
 28 requested payment amounts and rates, *see* Mew Decl. Ex. C. The parties were then required to

1 “attempt to informally resolve any dispute over the statement.” Dkt. 203 ¶ 21(b). DFEH began
2 this process, sending an informal resolution letter to LSAC on June 19. While LSAC was
3 considering its response, DFEH contacted LSAC on July 5, and informed LSAC of newly-
4 discovered errors in its prior fee statement. *See* Mayeda Decl. Ex. H. LSAC acknowledged
5 receipt of DFEH’s email the next day, and informed DFEH that it would respond to DFEH’s
6 informal resolution letter the next week. *See* Mew Decl. Ex. D. Rather than wait for LSAC’s
7 response to the letter, DFEH filed the current motion. There was no meaningful attempt to
8 informally resolve the dispute.³

9 DFEH’s failure to abide by the Consent Decree’s dispute resolution requirements has
10 practical consequences. The parties may or may not have been able to resolve all issues relating
11 to DFEH’s fee request without Court intervention. At a minimum, however, further discussions
12 between the parties likely could have narrowed the issues before the Court. One obvious example
13 is that LSAC is not questioning here whether the hourly rates sought by DFEH represent
14 reasonable “market” rates (although it disputes that market rates should apply). Therefore, there
15 was no need for DFEH to obtain and file a declaration from Richard Pearl to support the rates, to
16 devote attorney time to that exercise, or to prepare other supporting arguments to show that its
17 requested rates are “market” rates.

18 The fee dispute also was supposed to be submitted by the parties jointly to the Court. *See*
19 Dkt. 203 ¶ 21(b) (“In the event LSAC and the DFEH cannot reach an informal resolution of any
20 such dispute, *they* shall submit the matter to this Court for binding determination.”) (emphasis
21 added). If this had occurred, the parties could have discussed whether certain points could be
22 stipulated, and agreed on a briefing and hearing schedule. Instead, DFEH prepared a kitchen-sink
23

24 ³ DFEH may argue that it filed its fee motion because LSAC did not respond to its July 5 email
25 amending its prior fee statement. There is no process under the Decree, however, for responding
26 to an “amended” fee statement. Indeed, it could be argued that DFEH did not have the right to
27 amend its original statement at all (particularly here, where the amendment raised the amount of
28 DFEH’s original statement). The informal dispute resolution process was already underway and
LSAC had informed DFEH that it would be responding to its informal resolution communication,
and yet DFEH unilaterally stopped the process and filed its motion instead.

1 fee motion, and LSAC had to file a motion with the Court to adjust the briefing and hearing
2 schedule.

3 In this context, awarding DFEH full fees-on-fees would not be reasonable. DFEH’s time
4 records filed with the Court for its work on the fee motion do not extend past July 6, although its
5 motion was filed July 13. See Mayeda Decl. Ex. I. DFEH indicates that it will submit
6 “supplemental time records with its Reply memorandum.” Mayeda Decl. ¶ 27. LSAC should
7 have the right to respond to DFEH’s fees-on-fees request in its totality, and will seek leave to file
8 a sur-reply as necessary.

9 **CONCLUSION**

10 For the foregoing reasons, DFEH’s motion for attorney’s fees should be denied in part.
11 DFEH should only be awarded fees for the time it spent on the contempt motion itself, and the
12 hours and/or rate applied should be reduced. DFEH’s requested fees for its work on the fee
13 motion should also be reduced.

14 Respectfully submitted,

15
16 PERKINS COIE LLP

17 By: /s/ Caroline M. Mew

18 Attorneys for the Law School Admission
19 Council