No. 04-16866

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MIRANDA DEFENBAUGH,

Plaintiff-Appellee,

v.

JBC & ASSOCIATES, P.C., and JACK BOYAJIAN

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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# BRIEF FOR APPELLEE MIRANDA DEFENBAUGH

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Paul Arons
Law Office of Paul Arons
685 Spring Street, #104
Friday Harbor, WA, 98250
(360) 378-6496

Adina H. Rosenbaum
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

O. Randolph Bragg
Horwitz, Horwitz & Associates
25 East Washington, Suite 900
Chicago, IL 60602
(312) 372-8822

Counsel for Appellee Miranda Defenbaugh

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## STATEMENT OF JURISDICTION

The district court had jurisdiction of this action pursuant to 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The notice of appeal regarding the fee order entered August 11, 2004 was filed on September 9, 2004. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

## STATEMENT OF ISSUE

Whether the district court abused its discretion in determining the amount of plaintiff's attorneys' fees and expenses.

## INTRODUCTION

Defendants/appellants JBC & Associates, Inc., and Jack Boyajian (collectively JBC) are high-volume debt collectors who collect debts throughout the United States. In their opening brief, defendants significantly misstate the case in an attempt to convince this Court to throw out the lodestar method of calculating attorneys' fees awards in cases involving private attorneys general and fee-shifting statutes. JBC ignores the record below that establishes that plaintiff/appellee Miranda Defenbaugh filed this lawsuit as a class action, litigated it as a class action, settled it as a class action, and obtained relief for a putative class. [ER 2;

389-90; 461-62].[1] In the settlement, defendants agreed that they would not oppose plaintiff's fee application on the ground that the court had not certified a class. [ER 390]. As a direct result of this litigation, JBC made a full refund of the approximately $30,000 in unlawful fees it collected as a result of a letter it sent on February 27, 2002. Defendants agreed to pay any refunded amounts not claimed by California consumers who received the letter into a *cy pres* fund for California Consumer Action, a consumer advocacy organization. And defendants agreed to pay named plaintiff Defenbaugh $1,000, the maximum statutory damages permitted by the Fair Debt Collection Practices Act (FDCPA). [ER 123; 461-62]. These results stemmed not from JBC's altruism, but from plaintiff's aggressive prosecution of the lawsuit.

Although defendants now contend that they wanted to end this litigation early, they did not take the action necessary to do so while the case was being prosecuted. The parties could have quickly concluded this case if JBC had consulted its own records, or those of its printing and mailing service, to identify putative class members and determine how much they had paid. However, JBC failed to produce information identifying class members or collection fees paid until a month after plaintiff deposed defendants' outside printing service, who testified that defendants had sent their offending dunning letter to more than 5,700

[1] References to "ER" are to Appellants' Excerpts of Record filed with Appellants' Opening Brief.

California check writers. Until plaintiff obtained this information, defendants had repeatedly misrepresented the number of consumers they had victimized by their collection practices as a mere "handful" of debtors. More significantly, they had underrepresented by more than 3,000% the amount of illegal fees they had collected. [ER 310]. Defendants further prolonged the litigation by repeatedly asserting a *bona fide* error defense as a complete bar to liability. And, significantly, defendants never made a Rule 68 offer to conclude the litigation. Appellants' Brief at 10 n.1.

Having lost its argument in the lower court that plaintiff should be awarded only minimal attorneys' fees, JBC now brings this appeal. Defendants do not claim that the district court's findings and conclusions sustaining plaintiff's fee award are unsupported by the evidence. Instead, defendants display their displeasure with choices Congress made in enacting the FDCPA and with binding legal precedent mandating the use of the lodestar method in calculating attorneys' fee awards. Although defendants chafe at having to pay the attorneys' fees awarded to plaintiff for litigating this case to settlement, their complaints do not demonstrate any abuse of discretion by the district court below.

## STATEMENT OF THE CASE

### A. Litigation and Settlement of the Underlying Action

On February 27, 2002, JBC sent a letter to Miranda Defenbaugh, informing her that she owed $753.48 because a $182.12 check she wrote to Toys "R" Us had been not been honored. In the letter, JBC threatened Ms. Defenbaugh with a civil or criminal action if she did not pay the amount demanded. [ER 3-4].

On February 14, 2003, Ms. Defenbaugh filed the complaint in the underlying action, alleging that JBC violated the FDCPA, 15 U.S.C. § 1692 et seq., and the California Business and Professions Code § 17200 et seq. Believing that others had received similar letters, plaintiff brought the case as a class action, defining the class as "all persons who wrote checks in California . . . from whom any defendant has made demands or threats that are the same or similar to those made to the named plaintiffs." [ER 5].

In their answer to Ms. Defenbaugh's complaint, filed almost three months later, defendants denied that they violated the FDCPA or the California Business and Professions Code, and asserted 27 affirmative defenses. [ER 11, 16]. Soon after, JBC offered to refund any money it had unlawfully collected because of the February 27, 2002 letter. The offer was illusory, however, because JBC claimed it did not know to whom it had sent the letter or how much money it had collected. In conversations with plaintiff's counsel, defendants' counsel represented that the

letter had gone out to only a handful of people and that defendants had collected very little money as a result. At one point, defendants' counsel represented that total collections were probably about $700. [ER 310].

Without credible information on class size or class damages, plaintiff's counsel could not responsibly consider settlement. In addition, because of their experience with high-volume debt collectors, counsel were skeptical of JBC's claims that it had not kept track of who had received the letters and how much had been collected. Knowing how high-volume debt collectors run their businesses, they also found it highly unlikely that JBC had sent the letter to only a handful of check writers. [ER 310].

Because JBC was either unwilling or unable to provide Ms. Defenbaugh with information on who had received the letter or how much money it had collected, plaintiff's counsel proceeded with discovery. In June 2003, plaintiff served written interrogatories, requests for production, and requests for admission on JBC.

While the discovery requests were pending, the court held a telephonic case management conference. In preparation for the conference, counsel for the parties drafted and filed a joint case management conference statement. In its portion of the statement, JBC asserted that an outside mailing company had inadvertently sent the February 27, 2002 letter to California residents without JBC's authorization,

and that these circumstances would constitute a *bona fide* error, relieving JBC of liability pursuant to 15 U.S.C. § 1692k(c). [ER 157-58]. Defendants' assertion of the *bona fide* error defense while this lawsuit was being pursued in district court contradicts the defendants' current assertion that "liability was never contested." Appellants' Opening Brief at 5.

Defendants' responses to the discovery requests made clear that they were not eager to provide additional information to plaintiff. In its response to the interrogatories, for example, JBC objected to identifying other class members to whom it sent letters, specifying the charges it had collected from class members, or explaining how it had calculated the "balance" it claimed Ms. Defenbaugh owed. JBC also claimed it did not authorize the mailing of the letter. [ER 318-25].

Because defendants' responses to discovery had not provided any information on the number or identity of putative class members, plaintiff's counsel prepared and served a subpoena duces tecum on defendants' mailing service, Dantom Specialized Services, Inc. [ER 311]. On September 17, 2003, plaintiff's counsel deposed Dantom's representative in Detroit, Michigan for nine and a half hours. [ER 81]. Although the document production had directed Dantom to produce documents a few days prior to the deposition, the documents were not delivered to counsel until late afternoon on the day before the deposition. Paul Arons, lead counsel for plaintiff, stayed up until around midnight reviewing

and copying the approximately 1,000 pages provided. [ER 312]. At the deposition, Dantom's representative testified that the offending letter had been sent to over 5,700 consumers, not the mere "handful" of people that JBC had claimed. [ER 310-11; 339]. Notably, while JBC claimed it was having trouble determining to whom the letter was sent [ER 388-89] and, eighteen months after sending the letter, still had not provided any information on the putative class size to plaintiff, plaintiff was able to learn this information through taking one deposition.

On October 13, 2003, defendants finally revealed, in attachments to a letter to plaintiff's counsel, that they had collected approximately $30,000 from California residents who were sent the offending letter and who paid JBC more than the face value of the check plus $25. [ER 152; 312]. The next day, Paul Arons participated in a court-ordered mediation session with defendants. Defendant Jack Boyajian walked out of the session after two and a half hours. [ER 312].

Throughout October and November 2003, defendants' and plaintiff's counsel engaged in settlement discussions. [ER 57-60]. Around this time, Paul Arons began a lengthy period of hospitalization and recovery for serious medical problems, and co-counsel Randolph Bragg assumed lead counsel responsibilities and handled the settlement negotiations. [ER 297].

On October 31, 2003, the court held another telephonic case management conference. In its portion of the Further Joint Case Management Conference Statement, JBC continued to assert that the letter had been sent only because of mistakes made by the outside mailing company and that it therefore had not violated the FDCPA. [ER 167-68]. In its Further Case Management and Pretrial Order, the court permitted the parties to take discovery on the *bona fide* error defense and ordered that the discovery be completed by December 31, 2003. [ER 175]. In late November, as settlement negotiations continued, Randolph Bragg, plaintiff's counsel, began preparing for a scheduled deposition of the defendants on the bona fide error defense. [ER 56-57].

On November 15, 2003, well over a year and a half after sending the original letter, and seven months after plaintiff filed this lawsuit, JBC refunded the illegal fees to the putative class members. One month later, the parties settled the case. [ER 122-23]. As part of the settlement, the parties agreed that JBC would: a) pay Miranda Defenbaugh $1,000, the maximum statutory damages to which she was entitled under the FDCPA; b) pay any refund sums not claimed by California consumers into a *cy pres* fund for California Consumer Action, a consumer advocacy organization; c) provide a copy of its tax returns for the purpose of determining its net worth; and d) pay the reasonable attorneys' fees and costs claimed by plaintiff's counsel, as determined by the court. [ER 123; 314].

Defendants agreed not to contest plaintiff's right to fees on the basis that a class was not certified in the case. [ER 390].

**B. Fee Application**

For her counsel's efforts in litigating and settling this case, plaintiff requested compensation for 101.05 attorney hours and 4.4 legal assistant hours. She explained that Paul Arons had spent 63.35 hours on the case, and that his reasonable hourly rate was $400 per hour; that O. Randolph Bragg had spent 33.6 hours on the case, and that his reasonable hourly rate was $435 per hour; that Peter Caron had spent 4.1 hours on the case, and that his reasonable hourly rate was $275 per hour; and that Mr. Bragg's law clerk, Craig Shapiro, had spent 4.4 hours on the case, and that his hourly rate was $100 per hour. Ms. Defenbaugh therefore sought an award of attorneys' fees totaling $41,523.50, along with costs and expenses of $6,335.68. [ER 28-29; 38]. Attached to the Brief in Support of Plaintiff's Motion for an Award of Costs and Attorneys' Fees were declarations by Messrs. Arons, Bragg, and Caron, detailing their education and experience and providing time records for the hours they spent working on the case. [ER 42-67; 75-83; 86-89] Also attached was a copy of an order in a case in which Mr. Bragg's and Mr. Arons' fee rates were determined to be similar to the rates they requested in the fee application. [ER 69-72].

Defendants' opposition argued that the requested fees were unreasonable in light of the extent of success in the case, that the time spent on mediation was futile and should be excluded, that time spent communicating with co-counsel should be excluded, that Caron's time should be reduced because he did not keep contemporaneous time records, that the hourly rates cited by the attorneys were excessive, and that the costs requested should be reduced. They asserted that the court "should award no more than a few thousand dollars to plaintiff's counsel, at best." [ER 100].

Plaintiff's reply explained that the time spent by her attorneys was necessitated by defendants' failure to provide essential data about the size and composition of the class until October 2003, and that defendants' offer in May 2003 to return the money JBC had collected from California consumers was a meaningless settlement offer because JBC denied that it could identify its victims or the amounts they had paid. Plaintiff asserted that the mediation was not futile because the groundwork for the ultimate settlement was laid there, that the time counsel spent on drafting discovery requests was reasonable, that plaintiff's counsel should be compensated for travel time and time spent communicating with co-counsel, that counsel's time was not duplicative, and that Mr. Caron had understated the amount of time he spent on the case and should be compensated even though he did not keep contemporaneous time records. The reply also sought

fees for the time spent seeking reasonable attorneys' fees and costs. [ER 287-306]. As rebuttal to defendants' contentions, the reply memorandum also included a supplemental declaration by Paul Arons, with exhibits that included a case in which attorneys with similar levels of experience to plaintiff's counsel were awarded hourly fees at rates similar to those requested by plaintiff's counsel and a case from 2001 in which Mr. Bragg's hourly fee was determined to be $300 per hour. [ER 309-16; 355-369]. Plaintiff also filed declarations by Mark A. Chavez and James C. Sturdevant, local lawyers familiar with the rates charged by class action attorneys in the Northern District of California, who discussed hourly rates for attorneys practicing in the district and stated that the rates sought by Mr. Arons and Mr. Bragg were within the range of hourly rates for attorneys with their levels of experience. [ER 257-275].

**C. The Decision Below**

On July 9, 2004, Magistrate Judge Spero held a hearing on attorneys' fees and costs. [ER 385]. The Magistrate Judge expressed concern over defendants' contention that plaintiff, instead of conducting discovery, should have trusted defendants to hand over information on the putative class. He requested that the parties let him know, within a day, whether they agreed to waive their rights to appeal from the court's order on attorneys' fees. [ER 390-92]. In letters submitted to the court, plaintiff agreed to waive her right to appeal, but defendants did not.

[ER 507]. The Magistrate Judge permitted defendants to file a supplemental brief opposing plaintiff's request for attorneys' fees for time spent working on the fee application, which they did the following week. [ER 391-92; 507].

On August 10, 2004, in a detailed and carefully reasoned decision, the district court granted in part and denied in part Ms. Defenbaugh's motion for attorneys' fees and costs. First, the court explained that the starting point in determining reasonable fees is the "lodestar," the result of multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. The court recognized that, in determining the reasonableness of hours, it should review detailed time records to ascertain whether the hours were adequately documented and whether any of them were unnecessary or duplicative. It also explained that, in determining a reasonable hourly rate for each attorney, it had to look at the "rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." [ER 459]. It recognized that the party seeking the award had the burden to submit evidence supporting the hours worked and rate claimed, and that, once the lodestar was determined, it had the discretion to depart upward or downward depending on the factors considered in *Kerr v. Screen Extras Guild,* Inc., 526 F.2d 67 (9th Cir. 1975), and the extent of success. [ER 460].

Turning to the question of the extent of success, the court rejected defendants' claim that the fees were excessive given plaintiff's minimal monetary recovery, explaining that plaintiff's recovery of $1,000 "does not reflect a lack of success. To the contrary, Plaintiff received the maximum statutory damages allowable under the FDCPA." [ER 461]. The court also noted that, in response to the litigation, defendants sent a curative letter to 5,770 people, refunded approximately $30,000, and agreed to place unclaimed refunds into a *cy pres* fund. Thus, plaintiff obtained benefits for putative class members as well as for herself. [ER 462; 458].

The court also rejected defendants' argument that plaintiff should not recover for any hours spent on the case after May 2003, when defendants first offered to settle. It found that "the evidence does not suggest that Plaintiff's counsel acted unreasonably given the information that was available at the time" and noted that "Plaintiff's counsel were able to obtain very little specific information about the size of the class or the potential damages until September 2003, when Plaintiff's counsel deposed Defendants' printing and mailing service, Dantom." [ER 462].

Next, the court discussed the reasonableness of the hourly rates requested by each of plaintiff's attorneys. With regard to Paul Arons and Randolph Bragg, the court noted that plaintiff had submitted declarations by counsel themselves, as well

as by attorneys Mark A. Chavez and James C. Sturdevant, and that plaintiff "points to a series of cases decided in the Northern District of California in which this Court awarded hourly rates of up to $450/hour to attorneys with experience comparable to that of Arons and Bragg." [ER 463]. Based on this evidence, the court found Mr. Arons's and Mr. Bragg's requested rates reasonable. [ER 464]. It similarly found reasonable the rate requested by Peter Caron, but it reduced the hourly rate for law clerk Craig Shapiro from $100/hour to $75/hour because "Plaintiff has not produced any evidence substantiating Bragg's assertion that $100/hour is reasonable compensation for Shapiro's time." [ER 465].

Finally, considering counsel's time records in detail, the court examined the reasonableness of the time spent by each of plaintiff's attorneys. The court reduced the compensable time spent on drafting discovery requests from 6.2 to 2.1 hours, the time spent on drafting subpoenas from 3.2 to 0.6 hours, the time spent by Mr. Bragg reviewing a deposition transcript from 7.6 to 4.0 hours, and the time spent by Mr. Arons on a particular phone call with defendant's lawyer from 1.2 to 1.0 hours. It also eliminated 1.2 hours spent by Mr. Shapiro on non-legal work, decided not to compensate Mr. Arons and Mr. Bragg for time spent keeping Mr. Caron up-to-date on developments in the case, and reduced the compensable time spent on the motion for attorneys' fees. Furthermore, it reduced the costs requested by $259.16, finding a second set of discovery documents was

unnecessary and that plaintiff had failed to justify certain in-house photocopying expenses. On the other hand, the court decided it was reasonable to compensate the attorneys for attending the mediation, traveling to depositions and court-ordered mediation, communicating with each other for strategic or decision-making reasons, and spending 1.9 hours downloading and reading court documents. It also found that Mr. Caron's time records were not inflated and that plaintiff was entitled to receive hard copies of documents produced in discovery. [ER 466-473].

After considering all of these items, the court awarded Ms. Defenbaugh $35,820 in attorneys' fees and $5,546.32 in costs for work on the merits of the case, approximately 86% of the initial fee and expense request. It also awarded her $5,130 for work preparing and litigating the motion on attorneys' fees. [ER 472; 475].

## STANDARD OF REVIEW

This Court reviews an attorneys' fee award for an abuse of discretion. "'A district court abuses its discretion if its decision is based on an erroneous conclusion of law or if the record contains no evidence on which it rationally could have based its decision.'" *Association of Cal. Water Agencies v. Evans*, 386 F.3d

879, 883 (9th Cir. 2004) (quoting *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1005 (9th Cir. 2002)).

## SUMMARY OF ARGUMENT

The district court did not abuse its broad discretion in awarding plaintiff attorneys' fees and expenses reasonably incurred in successfully prosecuting her action under the FDCPA. Congress enacted the FDCPA after finding that "there is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a), and that existing laws failed adequately to protect consumers. *Id.* § 1692(b). "Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.* § 1692(a).

Congress intended that private enforcement actions would be the primary means of enforcing the Act. *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780-81 (9th Cir. 1982). To that end, the Act includes a fee-shifting provision that entitles successful plaintiffs to "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. §1692k(a)(3). By this provision, Congress intended to encourage able counsel to undertake FDCPA cases. *Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995). Thus, "it is necessary that counsel be awarded fees commensurate with those which they could

obtain by taking other types of cases." *Id.* "Given the structure of the section, attorney's fees should not be construed as a special or discretionary remedy; rather, the Act mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general." *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991).

The district court in this case followed well-settled law in awarding attorneys' fees to the plaintiff. Following the direction of the Supreme Court and this Court, it began with the "lodestar" – the product of the reasonable number of hours worked times a reasonable hourly rate. It carefully looked over all of the hours recorded by the attorneys on their time records, only compensating counsel for the amount of time it considered reasonable to perform a given task. And it considered the evidence in the record to determine each counsel's reasonable hourly rate. In short, the district court neither erred on the law nor abused its broad discretion in finding facts. Its award should be upheld.

## ARGUMENT

### I. The District Court Did Not Abuse Its Discretion in Calculating the Fee Award by the Lodestar Method.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This

calculation, the lodestar, "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Id.* This Court considers the lodestar method "the customary method of determining fees" in statutory fee-shifting cases. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). *See also Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th Cir. 2000) (explaining that "[t]his circuit requires a district court to calculate an award of attorneys' fees by first calculating the 'lodestar'"). In conducting the lodestar analysis, Magistrate Judge Spero followed controlling precedent and did not commit legal error.

Although they do not say so overtly, defendants, citing purported public policy concerns, seem to argue that the lodestar method should not be applied in FDCPA cases. *See* Appellant's Brief at 20-21 (criticizing lodestar method and calling for a "Critical Review of the Methodology to Determine a Reasonable Attorneys' Fee Amount in Non-Complex FDCPA Cases"). Yet this Court has stated, in the context of an FDCPA case, that "[d]istrict courts *must* calculate awards for attorneys' fees using the 'lodestar method.'" *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001) (emphasis added). Furthermore, the concerns expressed by the defendants are taken into account in determining the lodestar. *See Fischel*, 307 F.3d at 1007 n.7 (explaining that, to the degree they are relevant, a district court must consider the factors presented in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), which include the novelty and

difficulty of the questions involved, in determining the lodestar figure). If a case is truly non-complex, then it will not require many hours to resolve, and the lodestar amount will be low. If an attorney is truly abusing the system to gain extra attorneys' fees, the hours spent on the case will not be deemed reasonable and will not be included in calculating the lodestar.

As defendants note, district courts do have the discretion to "adjust the lodestar upward or downward using a 'multiplier' based on factors not subsumed in the initial calculation of the lodestar." *Van Gerwen v. Guarantee Mut. Life Ins. Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000). However, "[t]here is a 'strong presumption' that the lodestar figure represents a reasonable fee." *Fischel*, 307 F.3d at 1007 (internal quotation marks and citation omitted). Particularly here, where the factor that the defendants seem to believe requires adjustment of the lodestar – the complexity of the case – has been subsumed in the lodestar, *see Blum v. Stenson*, 465 U.S. 886, 898-99 (1984), Magistrate Judge Spero did not abuse his discretion in not departing downward from the lodestar.

## II. The District Court Did Not Abuse Its Discretion in Determining the Number of Hours Reasonably Spent on the Litigation.

In determining a reasonable number of hours spent on a case, plaintiff's counsel bears the burden of submitting detailed time records to the court. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). Here,

plaintiff's attorneys all submitted such records. The district court can then reduce the number of hours claimed by the attorneys if it finds the hours duplicative, the documentation inadequate, or the hours excessive or otherwise unnecessary. *Id*. Here, the district court reduced the number of hours, choosing not to compensate plaintiff's counsel for approximately 14% of the time they actually spent on the case and compensating counsel's law clerk for only 14% of the time he spent on the case. Finally, the district court must articulate how it arrived at the number of hours to be compensated. *Id*. at 1211. Here, the district court detailed the amount of time the attorneys spent on various litigation activities and explained at length why it thought certain hours were reasonably spent while others were not. [ER 465-72].

In short, the district court followed the exact procedure it was supposed to use in determining a reasonable number of hours, combing through counsel's time records and determining how much time was reasonable for counsel to spend on each task required for the litigation. Nonetheless, defendants assert, over and over again, that plaintiff's counsel are being reimbursed for an excessive number of hours.

Defendants do not point to specific places where the district court purportedly abused its discretion in finding the hours worked by plaintiff's counsel reasonable. *See Armstrong v. Davis*, 318 F.3d 965, 975 (9th Cir. 2003) ("[W]e

find no reason to believe that the district court abused its discretion in any of its awards. Defendants do not point to any *particular* fee entries or claimed hours as being too high. Each of the district court's orders reflects careful consideration of Plaintiffs' billing statements and proper evaluation of the billing rates."). Instead, they simply claim that, given the purportedly minimal amount of litigation activity in the case, the number of hours awarded was unreasonable. However, considerable litigation activity occurred here. Plaintiff's attorneys consulted with Ms. Defenbaugh to obtain the facts and her input, and they revised a complaint, interrogatories, requests for productions, and requests for admissions to reflect those facts. They prepared for and participated in two telephonic case management conferences and an out-of-state mediation session. They worked on two case management conference statements. They conducted a 9½ hour out-of-state deposition for which they reviewed approximately 1,000 pages of documents. They scheduled a deposition and prepared to depose the defendant. They reviewed defendants' answer with its 27 affirmative defenses and researched the cases cited by defendants. They reviewed defendants' discovery responses with their numerous objections and produced a detailed letter to opposing counsel regarding those responses. And they engaged in extensive settlement negotiations that resulted in a successful settlement. For all this work, they were compensated for fewer than 88 lawyer hours, or less than nine hours per month over the course of

the lawsuit. The district court did not abuse its discretion in finding less than 88 hours a reasonable amount of time for counsel to have spent on these activities.

Defendants' complaints about the time spent on litigation seem to be concerned less with the amount of time it took plaintiff's lawyers to conduct the litigation activity in which they engaged and more with the fact that plaintiff's counsel engaged in any litigation activity at all, besides settling, after filing the complaint. In *Berkla v. Corel Corp.*, 302 F.3d 909, 922 (9th Cir. 2002), however, this Court stated its agreement "with the reasoning of our sister circuits" that rejected reducing attorneys' fees awards based on settlement negotiations in which the defendants did not make a Rule 68 offer of judgment. The Court held that a district court erred in denying a plaintiff costs even though he had rejected a settlement offer that was far greater than the amount he eventually recovered at trial. *Id*. Thus, the district court did not err here in allowing plaintiff attorneys' fees incurred after her rejection of the first settlement offered to her, particularly given that the final settlement included provisions – such as the *cy pres* provision – that were not included in the original settlement offer.

Moreover, as the district court concluded, plaintiff's decision to continue litigating was reasonable given the lack of information that was available at the time and defendants' recalcitrance in providing that information. As the district court found, "[p]laintiff's counsel were able to obtain very little specific

information about the size of the class or the potential damages until September 2003, when Plaintiff's counsel deposed Defendants' printing and mailing service, Dantom." [ER 462]. Plaintiff could not reasonably settle a case it brought as a class action when defendants were unable or unwilling to provide information on the size of the putative class or on the amount of money collected from the class members. Indeed, at the time defendants first offered to settle, they claimed that the offending letter had gone out to only a "handful" of California residents and that JBC had collected little money due to the letter. In truth, as plaintiff learned through discovery – the same discovery that comprises a large percentage of the number of hours plaintiff's counsel spent on this case – the letter went out to over 5,700 individuals, and defendants illegally collected approximately $30,000 as a result. Although defendants pay lip service to their desire to settle early, the case would have settled far earlier – and the hours spent on the Dantom deposition would have been unnecessary – had JBC identified the recipients of the offending February 27, 2002 letter at any point prior to the fall of 2003. The district court did not abuse its discretion in determining that, given the paucity of information defendant was able (or willing) to supply to plaintiff within the first six months of the lawsuit, plaintiff did not act unreasonably in not settling immediately.

## III. The District Court Did Not Abuse its Discretion in Finding Counsel's Hourly Rates Reasonable.

Reasonable hourly rates are determined by looking to "the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Chalmers,* 796 F.2d at 1210-11. "The abilities of an attorney appearing before the district court and the prevailing local rates are factual matters best left to the district court." *Greater Los Angeles Council on Deafness v. Cmty. Television of S. Cal.,* 813 F.2d 217, 221 (9th Cir. 1987). Thus, the district court's determination of a reasonable hourly rate can be overturned only if the record contains no evidence on which the district court rationally could have based its decision. *Association of Cal. Water Agencies,* 386 F.3d at 883.

### A. The Record in this Case Contains Abundant Evidence on which the District Court Rationally Based Its Decision.

In this case, the record below contains abundant evidence on which the district court rationally could have based, and did base, its determination of the prevailing market rates in the community. This Court has stated that "[a]ffidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

Here, plaintiff's counsel submitted all three types of evidence: personal declarations, declarations by other attorneys, and rate determinations from other cases. First, attorneys Arons, Bragg, and Caron declared that their reasonable hourly fees were, respectively, $400, $435, and $275. [ER 51, 76, 86].

Second, attorney Mark A. Chavez declared that he practices in the Northern District of California, is familiar with hourly rates charged by attorneys who practice in the area of consumer class actions before that court, and is familiar with the work of Mr. Bragg and Mr. Arons. He declared that the hourly rates of attorneys with Mr. Bragg's and Mr. Arons's experience and expertise in class action litigation who practice in the Northern District are equal to or in excess of, respectively, $435 and $400 per hour. [ER 261-62]. Attorney James C. Sturdevant declared that he was familiar with the abilities and experience of Randolph Bragg and Paul Arons and with the hourly rates of class action attorneys throughout California and the Bay Area, and that $435 for Mr. Bragg and $400 for Mr. Arons were within the range of prevailing market rates for attorneys of their experience and abilities in class action litigation in the Northern District of California. He further noted that his own hourly rate was $510 per hour. [ER 274-275].

Finally, plaintiff submitted cases setting hourly rates either for plaintiff's counsel themselves or for similarly experienced attorneys. In *Irwin v. Mascott*, the district court for the Northern District of California determined that, as of 2002, the

prevailing market rate for work performed by Mr. Bragg was $400 per hour and for work performed by Mr. Arons was $350 per hour. [ER 70]. And in *Oberfelder v. City of Petaluma*, the district court for the Northern District of California determined that hourly rates of $400 and $275 per hour were reasonable for attorneys with thirty and thirteen years of experience respectively. *Oberfelder* also cited a declaration in that case that mentioned attorneys with 30 or more years of service charging between $365 and $560 per hour. [ER 358-59]. In addition, plaintiff's briefs cited *Hearn v. Barnhart*, 262 F. Supp. 2d 1033, 1037 (N.D. Cal. 2003), in which the district court found an effective hourly rate of $450 per hour reasonable in a contingency case.

In sum, the record contained the exact type of evidence this Court has declared sufficient to determine prevailing rates. Therefore, the district court did not abuse its discretion in determining that plaintiff's counsel's requested hourly rates were reasonable.

Seeking to counter plaintiff's evidence, defendants cite cases in which attorneys received lower rates. Defendants' focus on these other cases demonstrates a basic misunderstanding of the standard of review in this appeal. The role of this Court is not to consider and balance all of the evidence, but to determine whether there was evidence on which the district court rationally could have based its decision. As discussed above, plaintiffs submitted substantial

evidence upon which the district court rationally could have based its decision. Moreover, the cases cited by defendants are not relevant. The vast majority of them are from other parts of the country, while the only case on hourly rates in San Francisco, *Yahoo!, Inc. v. Net Games, Inc.*, 329 F.Supp.2d 1179, 1192 (N.D. Cal. 2004), discusses an approximate average market rate for *all* attorneys in the city and says nothing about the prevailing rate for attorneys with comparable skill, experience, and reputation to plaintiff's counsel here. *Compare id. with In Re Sulzer Orthopedics, Inc.*, 398 F.3d 778 (6th Cir. 2005) (upholding a district court's determination that $500 per hour was a reasonable uniform hourly rate for attorneys with fifteen or more years of practice).

### B. Defendants' Arguments to Discredit the Evidence Relied on by the District Court Are Meritless.

Defendants' additional arguments to undermine the evidence submitted by plaintiff and relied on by the district court are similarly misguided. First, defendants repeatedly and conclusorily insist that plaintiff's attorneys' declarations did not "establish" a "market" for their fees. Defendants seem to be arguing that the declarations are irrelevant because the attorneys cannot show they have been paid their rates "by an actual fee paying client." Appellants' Brief at 38-39. However, because statutory damages under the FDCPA are capped at $1,000 and individual actual damages may not be large, it is unlikely that a plaintiff in an FDCPA case will be willing to pay prevailing market rates for representation.

Many typical FDCPA plaintiffs may not even be able to afford to pay attorneys' fees at hourly rates as fees are incurred. Yet defendants cannot sensibly claim that attorneys who litigate under consumer protection statutes should not be compensated at market rates. Congress inserted fee-shifting provisions into the FDCPA precisely to ensure that attorneys would not be penalized for working to protect consumers' rights. "In order to encourage able counsel to undertake FDCPA cases, as Congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases. . . . Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law." *Tolentino*, 46 F.3d at 652-53. Along with evidence of what attorneys have been paid in other fee-shifting cases, plaintiff submitted evidence of the prevailing market rate of class-action attorneys with similar levels of experience. This evidence demonstrates what rates plaintiff's counsel could receive in the marketplace.

Second, defendants argue that the declarations are not "competent" or "relevant" because they discuss prevailing market rates for attorneys who do similar types of work as plaintiff's counsel and do not focus on "what actually occurred in this case." Appellants' Brief at 39. Similarly, defendants claim that the cases cited are not good evidence because their facts are distinguishable from

the facts here. The thrust of defendants' argument is that this case was not as complex as the cases cited by plaintiff or as most cases involving attorneys who do work similar to that of plaintiff's counsel.

In presenting a case's complexity as the most important factor in determining the prevailing hourly rate, defendants rely almost entirely on one decision by a magistrate judge in the Northern District of California, *Finkelstein v. Bergna*, 804 F.Supp. 1235 (N.D. Cal. 1992). In contrast, *this* Court has recognized complexity as only one of a number of factors that a lower court *may* consider in determining the lodestar. *See Davis v. City and County of San Francisco*, 976 F.2d 1536, 1548 (9th Cir. 1992) (explaining that the difficulty of the case is one of the *Kerr* factors to which a district court may refer in setting an appropriate rate), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993).

In any event, defendants err in portraying this case as simple. This case was brought as a class action and involved the violation of complex consumer protection statutes. Plaintiff's attorneys were able to conduct the litigation efficiently – and make it look simple – because of their expertise in the FDCPA and in class action lawsuits. This level of experience helped determine the prevailing market rate for counsel's time.

Furthermore, defendants never explain in what way the legal theories of the cases submitted with the fee application were more complex than the legal theories

in this case. Instead, in discussing complexity, they focus on the factual and procedural intricacies of the submitted cases, and on the amount of time they took to litigate. For example, in contrasting this case with *Irwin v. Mascott,* the Northern District of California case that determined that the prevailing market rates in 2002 for work performed by Mr. Bragg and Mr. Arons were, respectively, $400 per hour and $350 per hour, defendants note that *Irwin* was certified as a class action, that it involved at least ten collection letters, and that it settled "after years of tough, grinding litigation, including dozens of motions, depositions, and the like." Appellants' Brief at 41. However, these differences have already been accounted for in the lodestar, in the determination of reasonable hours spent litigating the case. Because of its factual and procedural intricacies, *Irwin* took far more time to litigate than did this case. Whereas the *Irwin* attorneys were compensated for 1,754.05 hours of work [ER 70], the attorneys in this case were compensated for fewer than 88 hours.

Finally, it is impossible, in submitting evidence of prevailing market rates, to find examples in which attorneys of the *exact* same skill, reputation, and experience as plaintiff's attorneys were compensated for performing the *exact* same work on the *exact* same claims. Since every case is different, there will always be some ground on which the work performed by the attorneys in two separate cases can be distinguished. The evidence submitted to the court can only

"inform and assist the court in the exercise of its discretion." *Blum*, 465 U.S. at 896 n.11. And, because there is not even a suggestion in this record that the district court abused that discretion, the decision below must be affirmed.

Next, defendants argue that the "Ninth Circuit has rejected [declarations of the kind submitted by Mr. Chavez and Mr. Sturdevant] because [they do] not establish the reasonable market rate for 'similar legal services.'" Appellants' Brief at 44 (emphasis removed). This statement is not supported by this Court's case law. Defendants cite *Widrig v. Apfel*, 140 F.3d 1207, 1210 (9th Cir. 1998), but *Widrig* dealt with declarations that conclusorily stated that the fee being requested was reasonable. The Court found that such declarations "do[] not establish the prevailing market rate." *Id*. Mr. Chavez's and Mr. Sturdevant's declarations, however, do not simply state that the requested rates are reasonable. Instead, they state that the rates are within the range of prevailing market rates for attorneys of their experience and abilities doing class action litigation in the Northern District of California. This Court has found that declarations that state that the requested rate is the prevailing market rate in the community are sufficient to determine the appropriate lodestar rate. *Bouman v. Block*, 940 F.2d 1211, 1235 (9th Cir. 1991).

Defendants' other arguments and accusations against Mr. Chavez and Mr. Sturdevant are similarly unsupported. In particular, defendants claim that Mr. Chavez's and Mr. Sturdevant's declarations are "self-serving," and that they lack

value because the declarants are "'sellers' of legal services, not buyers or disinterested observers of the marketplace [i.e. economists]." Appellants' Brief at 51. However, the Ninth Circuit considers attorney declarations to be good evidence. *See, e.g., Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 696 (9th Cir. 1996) ("In setting the hourly rates, the district court properly considered declarations from Guam attorneys regarding the prevailing market rates."). Moreover, it is highly ironic for defendants to claim that the declarations of Mr. Chavez and Mr. Sturdevant – neither of whom had any role in this case – should be discredited as self-interested, but that the declaration of Ms. Coleman – defendants' own lawyer – should be relied on as "the only direct evidence of reasonable market rates billed and paid." Appellants' Brief at 54. And defendants' contentions that Mr. Chavez and Mr. Sturdevant have a personal interest in the rates set in this case directly contradicts defendants' own assertions that the declarants engage in "markedly different litigation from the case at bar." Appellants' Brief at 51.

Finally, defendants assert that the district court should not have considered Mr. Chavez's and Mr. Sturdevant's declarations because they were submitted with plaintiff's reply brief on attorneys' fees. However, defendants waived any objections they may have had to the Chavez and Sturdevant declarations by not raising those objections before the district court. *Cf. Strang v. U.S. Arms Control*

*and Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) ("[B]y her silence in the district court, Strang waived any valid objection she may have had to the late introduction of additional affidavits. She neither objected to the district court's consideration of the additional affidavits, nor asked for time to respond to them."). Defendants had the opportunity to object to the declarations. Plaintiff electronically filed the Chavez declaration on June 25, 2004, and served the Sturdevant declaration by first-class mail that same day. [ER 263-64; 276]. In the time between June 25 and July 9, when the district court held a hearing on fees, defendants could have submitted written objections to plaintiff's reply submissions. Similarly, they could have objected to plaintiff's reply submissions at the fee hearing itself. They also could have voiced their objection during the time given them to file their supplemental brief, or included their objections with their supplemental brief, which, although it was supposed to address "fees on fees," included a reiteration of defendants' arguments opposing plaintiff's request for fees on the merits. [ER 402-404]. Finally, defendants could have moved to file a surreply. *See Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068 n.5 (9th Cir. 1997) ("If the [defendant] wanted a chance to respond to the affidavits [submitted with plaintiffs' reply brief in the district court], it could have moved to file a surreply. It has waived this objection."). Defendants failed to do any of these things.

Moreover, the case cited by defendants to support their argument that the declarations were untimely, *Frederick v. United States*, 163 F.2d 536, 549 (9th Cir. 1947), is not on point. *Frederick* dealt with the introduction of new *arguments* in a reply brief, not with the submission of additional supporting material to rebut arguments made by the responding party. The additional declarations in this case did not raise new arguments or change the hourly rate requested. Defendants also cite Federal Rule of Civil Procedure 6(d), which states that "[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion." Here, the affidavits were submitted on the same day as the reply brief and supported the section of the reply brief entitled "Plaintiff's Counsel Are Seeking Compensation At An Hourly Rate That Is Reasonable For Attorneys of Their Experience In The San Francisco Marketplace." [ER 299-301]. That section was included in the reply brief to respond to defendants' argument that the market rate for plaintiff's counsel's work was in the range of $185 to $200 per hour. [ER 114]. Under these circumstances, even if this Court were to excuse defendants' waiver, the district court did not abuse its discretion in considering Mr. Chavez's and Mr. Sturdevant's declarations.

## IV. The District Court Did Not Abuse Its Discretion in Awarding Plaintiff Her Actual Costs.

Plaintiffs are entitled to recover "out of pocket litigation expenses as part of the attorneys' fee." *United Steelworkers of America*, 896 F.2d at 407. *See also Davis*, 976 F.2d at 1556 ("[A]ttorneys' fees awards can include reimbursement for out-of-pocket expenses including the travel, courier and copying costs that appellees' attorneys incurred here."); *Chalmers*, 796 F.2d at 1216 n.7 (explaining that "out of pocket expenses incurred by an attorney which would normally be charged to a fee paying client are recoverable as attorney's fees"). Here, the evidence in the record shows – and defendants do not dispute – that plaintiff paid defendants' outside contract printing and mailing service $1,790 for documents produced for its deposition. [ER 380].

Nevertheless, defendants assert that the district court should have reduced the award because plaintiff did not submit a copy of the bill and therefore the Magistrate Judge could not determine the reasonableness of Dantom's $1,790 copying charge. The question, however, is not whether Dantom was reasonable in charging that much for the copies, but whether the plaintiff was reasonable in incurring the expense. *See Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir. 1994) (discussing whether the questioned expenses "were necessary and reasonable in this case"). Unlike in-house copying costs, such as those excluded by the Magistrate Judge, plaintiff had no control over how much Dantom charged for

making copies. Given the situation, in which Dantom was the only entity able to provide information on salient issues such as the size of the class and whether the letter was sent by mistake, plaintiff reasonably determined that the papers were necessary and thus paid Dantom the price it charged for making copies. The district court did not abuse its discretion in awarding plaintiff those expenses.

## CONCLUSION

Because the district court did not abuse its discretion in awarding reasonable attorneys' fees and expenses to plaintiff, this Court should affirm the decision below.

Respectfully submitted,

Adina H. Rosenbaum
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Paul Arons
Law Office of Paul Arons
685 Spring Street, #104
Friday Harbor, WA, 98250
(360) 378-6496

O. Randolph Bragg
Horwitz, Horwitz & Associates
25 East Washington, Suite 900
Chicago, IL 60602
(312) 372-8822

March 24, 2005

Counsel for Appellee Miranda Defenbaugh

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 8,281 words in the foregoing brief, exclusive of the certificates and tables.

March 24, 2005 Adina H. Rosenbaum

## STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

## CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on counsel for the parties as follows:

Mark E. Ellis
June D. Coleman
Murphy, Pearson, Bradley & Feeney
88 Kearny Street, 10th Floor
San Francisco, CA 94108-5530
(415) 788-1900

_____

Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

March 24, 2005

Counsel for Appellee Miranda Defenbaugh