2018 WL 1938367 (Cal.App. 4 Dist.) (Appellate Brief)
Court of Appeal, Fourth District, California,
Division Three.

Fernando MARTINEZ, Plaintiff and Appellant,
v.
Stephen O'HARA, et al., Defendant and Respondent.

No. G054840.
March 12, 2018.

Superior Court of the County of Orange Case No. 30-2012-00614932-Cu-Fr-Cxc Commissioner Carmen Luege, Judge Presiding
Order Denying Award of Attorney's Fees
Orange County Superior Court Case No. 30-2012-00614932-Cu-Fr-Cxc

Respondents' Brief

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***7** I. PREFATORY STATEMENT.

Appellant/Plaintiff Fernando Martinez ("Appellant" or "Plaintiff), after filing filing a Fifth Amended Complaint, sought to recover substantial compensatory damages, punitive damages, and injunctive relief, against Respondents Stephen O'Hara, Career Solutions, Candidate Acquisitions, and Pacific Valley Realty, Inc. ("Respondents" or "O'Hara," given that the other parties were affiliated with him) arising out of claims for fraud, false advertising, unfair business practices, labor code violations (failure to pay wages/waiting time penalties), and sexual harassment as well as appendage alter ego and class certification allegations. 2 AA 805. After about four years of litigation, Appellant was, to say the least, spectacularly unsuccessful in terms of end results. The focus of his litigation was on the fraud and false advertising claims (the latter being the subject of a class certification effort), where Appellant was seeking a mega-class action "cash in" for himself and others similarly situated, though he never could demonstrate an ascertainable class with typical claims. He tried to disqualify Judge Gregory Munoz (now retired), unsuccessfully, and Appellant's appellate writ challenge failed. He brought a discovery motion which resulted in sanctions in favor of Respondents. He filed for class certification on the false advertising claim, but that was denied and his subsequent appeal to this Court did not result in any different result. O'Hara had much earlier paid a small "compensatory" wage hour claim and, then right before trial, paid the waiting time penalty claim to the tune of ***8** $1,300 in order to avoid any fight over it given that the Labor Commission had earlier closed its file. Appellant's major fraud claim was non-suited at trial for failure to prove reliance on the claimed representations. Then, in a jury trial on the single remaining claim for sexual harassment, Appellant won $8,080 in economic and non-economic damages, with no punitive damages awarded by jurors, even though Appellant's counsel asked the jury to return damages in excess of $500,000 (a figure characterized as "outlandish" by the lower court in its fee ruling).

However, given that Appellant's counsel likely took a hit for fees charged on this case for four years of predominantly unsuccessful litigation, Appellant chose to file a motion for fees in which his primary attorney claims to have expended over $400,000 in fees and then wanted an additional $12,747 for "fees on fees." However, Appellant sought about well over a third in "billed" fees (plus some costs) in the sum of a little over $162,000 for fee efforts in "prevailing" on the paltry waiting time penalty claim and discretionary FEHA sexual harassment claim. After an extended hearing in which a large range of issues were entertained relating to the unreliability of billing submissions and lack of success on the merits, Commissioner Luege - in a very detailed minute order that followed a lengthy hearing -- denied Appellant's fee request in entirety, prompting this appeal. 2AA 1105, 2 AA 1052.

***9** Before entertaining the merits of the fee ruling under appeal, we cannot help to observe that Appellant has chosen to make deriding attacks of a contemptuous nature upon the trial judges in this case as well as O'Hara. Appellant, rather than focus on the merits which are squarely against him, decides to continue his harangue against respected jurists and Respondents. Not a good decision. Besides being non-probative in nature, this discussion is disrespectful to the judiciary and the Respondents in this case. We only can discern that this was done to distract attention from the feeble merits arguments being advanced by Appellant on appeal, leaving to this Court exactly how to address these egregious attacks on judges and Respondents. [1]

1 We do not lightly make this argument; but Appellant's arguments clearly are "over the top," judged by any objective standard.

Commissioner Luege's decision to deny fees was fully supported by the record and the governing law.

With respect to the FEHA sexual harassment claim, the conclusion is fully supported by our state supreme court's decision in Chavez v. City of Los Angeles (2000) 47 Cal.4th 970 (Chavez), which allows for a discretionary denial of fees where the record supports that the fee request is unreasonable/inflated in nature, where the results were small or sparse in nature, where there was no public benefit except to the litigant himself/herself, and where the matter was more appropriately litigated as a limited civil matter rather than the four-year litigation saga with de minimis results. Appellants cannot surmount the deferential abuse of discretion standard as guided by the beacon provided in Chavez.

***10** No different result occurs on the $1,300 waiting time penalty issue (with all of the compensatory and penalty amounts being satisfied well before this appeal). The only basis for fee entitlement is the wage and the penalty claim, though the compensatory wage claim was paid long before and the penalty claim was satisfied two days before trial. Commissioner Luege found that fees were not allowable based on the differences between the compensatory wage claim and the penalty aspect, relying on the reasoning in Ling v. P.F. Chang's China Bistro, Inc. (2016) 245 Cal.App.4th 1242 (Ling), an appellate court decision supporting her ultimate conclusion. As a legal matter, there is a difference between compensatory wage awards and penalty awards, as aptly recognized by Ling and the IRS for tax treatment purposes. Though the issue is not completely settled in nature, even the IRS' treatment of the issue supports the rationale reached by the Ling decision. However, even if reliance on Ling was in error (and it was not), the error was harmless in nature.

The overarching problem is that Appellant's fee submissions were unreliable and incredible in nature, in numerous respects. They were based largely on reconstructed, not contemporaneous, time entries, by Appellant's own admission reconstructed to the extent of 50% of time entries so as to lead Commissioner Luege to conclude they were basically "guesses" on hours actually billed and performed. See, e.g., 2 AA 1084:11-23 (November 4, 2016 Reporter's Transcript). The submissions contained numerous vague and block billed entries, which do not allow a court to meaningfully apportion fees between compensable ***11** and non-compensable claims. They were based on wholly unbelievable fee submissions where daily work hours exceeded 15 hours per day on multiple days, and a truly inexplicable 25 hours for one specific day. They were based on a "wild stab" 10% estimate of fees expended on a $,300 penalty claim supposedly resulting in unarticulated fees of either $40,166 or $37,306. Commissioner Luege continually expressed skepticism that somewhere in the nature of $33,000 -- her estimate of the 10% speculative allocation by Appellant's counsel was (or could be reasonably) spent on a small waiting time penalty claim which was by Appellant's own admission not a "big issue" and one which could not justify the Appellant's fee request, keeping in mind that Appellant's original "guessed" apportionment was maybe one-third for the waiting time penalty and FEHA claim combined.

A careful examination of the record in this case shows no abuse of discretion or legal error, but for sure no harmless error. Appellant presented an inflated fee request and was unable to apportion it in reliable matter, especially with respect to the small waiting time penalty issue.

Given these realities, the fee order should be AFFIRMED.

II. AN OPENING BRIEF IS NOT THE PLACE TO VENT AN ATTORNEY'S SPLEEN. AND THEREFORE MOST OF THE OPENING BRIEF SHOULD BE STRICKEN AS SCURRILOUS, IMPROPER. AND IRRELEVANT IN BOTH TONE AND SUBSTANCE.

***12** "[A]n opening brief is not an appropriate vehicle for an attorney to 'vent his spleen'... ." Pierotti v. Torian (2000) 81 Cal.App.4th 17, 32. Yet most of Appellant's Opening Brief (AOB) is precisely that - a venting of spleen. Thus, the brief amounts to a highly personalized attack on the trial judges, the Hon. Geoffrey Munoz, the Hon. Com. Carmen Luege, and the Hon. Kim Dunning, as well as a venomous attack on the reputation of Respondent, Stephen O'Hara. As a consequence, the brief amounts to a rehash of irrelevant battles with courtroom judges, because Appellant has already dismissed with prejudice all the substantive claims or obtained a modest jury verdict nowhere close to what he desired.

An Acknowledgment of Full Satisfaction of Judgment was filed in the trial court on April 24, 2017. 1 RA 5[2]. Appellant's many complaints now about the handling of the proceedings below, regarding sanctions, dismissal of its meritless claims, refusal of Judge Munoz to recuse himself, and refusal of Judge Dunning to certify a class, are now utterly irrelevant, given the resolution of issues through a prior unsuccessful appeal of the class certification issue, and a prior writ petition unsuccessfully attempting to remove Judge Munoz from the case, the filing of the Acknowledgment of Full Satisfaction of Judgment, and Appellant's failure to appeal anything further other than the attorney's fees issue.

2 The Acknowledgement of Full Satisfaction of Judgment is found in Respondent's Appendix (RA). All references to other documents are to Appellant's Appendix (AA).

***13** So why the venting of spleen? Appellant's brief is an example of the old adage: "When the facts are on your side, pound the facts. When the law is on your side, pound the law. When neither is on your side, pound the table." Graves v. Standard Ins. Co. (W.D. Ky. Nov. 21, 2016) 2016 WL 6875786, at *8. Appellant is pounding the table and is violating numerous principles of civility emphasized in appellate opinions. See, e.g., In re S.C. (2006) 138 Cal.App.4th 396, 412, citing Chong and Stone v. Foster (1980) 106 Cal.App.3d 334, 355 ["Indeed, unwarranted personal attacks on the character or motives of the opposing party, counsel or witnesses are inappropriate and may constitute misconduct."]; In re S.C, 138 Cal.App.4th at p. 422, citing In re White (2004) 121 Cal.App.4th 1453, 1478 ["Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court. Counsel better make sure he or she has the facts right before venturing into such dangerous territory because it is contemptuous for an attorney to make the unsupported assertion that the judge was 'acting out of bias toward a party.".[3]

3 "There are also compelling practical reasons for avoiding the use of personal attacks in appellate advocacy. Use of such tactics implies lack of confidence about the legal merits of the issue. bespeaks a certain desperation, as if victory was seen as possible only by abandoning legal argumentation and ramping up the invective. It is counterproductive because it deeply offends many of the people you are trying to persuade, i.e., the appellate court judges. Almost all state appellate court judges have been trial judges and understand the difficulties of the job and the tendency of losing parties and their attorneys to blame their losses on a perceived bias or lack of integrity on the part of the judge, rather than any defect in the case or its presentation. Insinuations of bias or lack of integrity on the part of trial judges, based on little more than the fact that rulings adverse to the client were made, will tend to promote a feeling of identification and solidarity with the trial judge, a feeling not helpful when you are seeking a reversal." (M. Kresser & P. Couenhoven, "Avoiding Common Pitfalls in Appellate Practice," available for reading at www.sdap.org/downloads/research/criminal/pitfalls.pdf.)

A. Examples Of Appellant's Attorney Pavone Smearing Judge Munoz, Judge Dunning, Commissioner Luege, And Respondent Stephen O'Hara.

***14** Most of Appellant's Opening Brief is simply a distraction from the only issue: whether it was reversible error for Commissioner Luege to deny a request for attorney's fees. We explain in the item-by-item analysis below.

Item No. 1. Attacks on Judge Munoz: Much of the brief is spent attacking the Hon. Gregory Munoz, for no good reason, because Judge Munoz's rulings have been upheld on appeal, and because Judge Munoz's rulings are not the subject of this appeal.

● Judge Munoz is attacked for not personally attending to the details of his docket. AOB 8.

● Judge Munoz is attacked for "an increasing exercise in abdication." AOB 8.

● Judge Munoz is attacked for purportedly managing "to corrupt the ruling being reviewed herein," AOB 8, without explanation.

● Judge Munoz is attacked for not providing legal analysis (though he wasn't obligated to do so). AOB 17.

● Judge Munoz is attacked as "potentially unfit to continue sitting on the bench." AOB 17, 18.

● Judge Munoz is attacked for changing the subject "to defend the ruling." AOB18.

***15** ● Judge Munoz is attacked for 'try[ing] to BS his way out of the problem." AOB 19.

● Judge Munoz is attacked as having "deteriorated into a sort-of invocation of his Fifth Amendment rights." AOB19.

● Judge Munoz is attacked as "struggling" (AOB 19) and for "dodging and deflecting" (AOB 20).

● Judge Munoz is attacked for "crossing lines into abdication, while simultaneously trying to pin the dysfunction on the litigant." AOB 20.

● Continuing the very personal attack, "counsel had cause to feel aggrieved in light of the fact Judge Munoz had disrespected him," gratuitously adding to the insult, "and perhaps many litigants... AOB 20.

● Sanctions, which Judge Munoz twice levied for Appellant's counsel's conduct, are jocularly described as a "speeding ticket so to speak." AOB 20.

● Appellant's counsel, continuing his vendetta, opines that he performed a public service by "triggering a review of [Judge Munoz's] continued fitness," though there is no evidence of unfitness to serve, or of a review of Judge Munoz's fitness to serve. AOB 31. All this is beside the point, however, as Judge Munoz did ***16** not rule on the attorney's fees issue, and his own rulings are beyond the reach of any appeal, nor are they appealed. Appellant's writ of mandate to disqualify Judge Munoz was summarily denied by this Court on July 11, 2017. Martinez v. Superior Court County of Orange, Case No. G048651.

Item No. 2. Attacks on Judge Dunning: The brief gratuitously attacks the Hon. Kim Dunning, whom Appellant disrespectfully attacks with a disingenuous embedded disclaimer: "Judge Dunning, ruled, respectfully, as an advocate." AOB 9.

Appellant then promises to detail the errors, "[l]ike Judge Dunning's certification ruling." AOB 9. But this is utterly irrelevant. Judge Dunning's denial of certification was the subject of an appeal to this Court, *Martinez v. O'Hara et al.,* G050710, which affirmed her order in full on June 25, 2017, and it is not a subject of the current appeal. Also, Judge Dunning made no rulings on the subject of attorney's fees, nor are any of her rulings the subject of the current appeal.

Item No. 3. Attacks on Commissioner Luege: Martinez gratuitously and personally attacks Commissioner Luege, questioning her motivation: "[T]he underlying motivation for issuing this wrongful ruling was also wrong." AOB 10. Of course, there is no evidence that the Commissioner was motivated by anything other ***17** than adherence to the law. She is smeared with an accusation that she "overreact[ed] by circling the wagons around Munoz and abandoning her duty to fairly and accurately analyze the legal issues before her," and for a "resort to advocacy by mercilessly attacking Martinez's case in her ruling."

Item No. 4. Attacks on Appellant O'Hara: Martinez spends pages presenting a tabloid picture of Mr. O'Hara. AOB 11-14. He misstates the record, contending that Mr. O'Hara committed to the court "to shut down the fraudulent enterprise,"

AOB 12, yet the two citations of Appellant to the record to 2 AA 135 and 3 AA 1803-1804, do not support any so-called commitment to shut down a "fraudulent enterprise." The repeated irrelevancies and overreaching in Appellant's brief distract from the issue on appeal and are undercut by the fact that Commissioner Luege was extremely patient and conscientious in her consideration of the fee motion which is the true focus of this appeal.

Thus, the problem with much of the brief is that it does not focus on the legal issue raised by the appeal: whether it was reversible error to deny fees to Martinez. Instead, the Appellant seeks to refight old battles, such as the class certification motion lost by Appellant, sanctions issued against Appellant, and causes of action dismissed or lost in the trial court - yet all of this is wholly ***18** irrelevant to the appeal, except insofar as such past litigation conduct once again demonstrates the wasteful way in which the case was litigated by Appellant and supported the lower court's denial of fees as a result of such conduct.

B. This Court May Disregard Any Unsupported Statements That Are False. Improper. Or Irrelevant.

Appellant's gratuitous and irrelevant attacks on the motivations and conduct of Judges Dunning and Munoz, and Commissioner Luege, along with pointless efforts to smear Mr. O'Hara, can be disregarded by the Court, given that statements are not supported by proper citations -- as the items highlighted above show - and thus are subject to nonconsideration. (See Cal. Rules of Court, rule 8-204, subd. (e)(2)(B); Doppes v. Bentley Motors Inc. (2009) 174 Cal.App.4th 967, 990. It should do so by striking the invective (and, possibly more, in its discretion) for purposes of properly focusing on the solitary attorney's fees issue involved in this cause.

III. BACKGROUND: APPELLANT ENGAGED IN WASTEFUL LITIGATION THAT ACCOMPLISHED LITTLE AT TRIAL.

By way of background, Appellant's extraordinarily wasteful litigation resulted in an extremely modest outcome and one that justified denial of fees altogether -- a resulted reinforced based on the flawed fee billing substantiation submitted by Appellant.

A. Wasteful Litigation Efforts.

***19** 1. Appellants' Various Complaints.

Martinez filed his original complaint on November 28, 2012, with causes of action alleging rape (dismissed), sexual harassment, fraud, labor code violations, and wrongful termination. 1 AA 11-35; 2 AA 479. Following demurrers and motions to strike, Martinez filed a First Amended Complaint on March 25, 2013, with causes of action for fraud, false advertising, unfair business practices, labor code violation, and sexual harassment, deleting the claim of rape. 3 AA 1902. Martinez describes a Second and a Third Amended Complaint as "not filed but merged into a Fourth Amendment." AOB 16. On May 20, 2013, that Fourth Amended Complaint was filed, with causes of action for fraud, false advertising, unfair business practice, labor code violations (now including a reference to a Labor Code § 2699.3 and a PAGA claim), and sexual harassment. 1 AA 285. Following the Fourth Amended Complaint, a Fifth Amended Complaint was filed, on August 5, 2013, with cause of action for fraud, false advertising, unfair business practices, labor code violations (Labor Code § § 203/2699.3), sexual harassment, and a request for alter ego findings. 2 AA 806. The Fifth Complaint became the operative complaint, with only the causes of action for fraud and sexual harassment ultimately going to trial. 2 AA 805, 2 AA 1105.The fraud claim was dismissed at trial, because Appellant did not rely on the representations of Respondent. 2 AA 1105.

2. Appellant's Drawn Out/Abandoned Discovery Efforts and Adverse Discovery Sanctions.

***20** During its four-year trudge to trial, Appellant initiated a drawn-out discovery dispute by filing a motion for a protective order. 1 AA 71 - AA 193. This dispute came to an end when Appellant took its motion off calendar. 1 AA 194, 1 AA 197. Appellant was subsequently sanctioned for causing Respondent to have to oppose Appellant's motion for a protective order that Appellant took off calendar. 1 AA 252.

3. Appellant's Ill-Founded Efforts To Disqualify Judge Munoz.

One ill-considered move by Appellant led to another. After the sanctions order, Appellant's counsel filed a "Verified Written Statement Objecting to Further Hearings Or Trial Before Judge Munoz." 1 AA 381 - 1 AA 385. Following this effort to force Judge Munoz's disqualification, Judge Munoz issued an "Order Striking Statement of Disqualification and, in the Alternative, Verified Answer of Hon. Gregory Munoz." 1 AA 397. But it didn't end there, for Appellant then filed a petition for writ of mandate, seeking again to disqualify Judge Munoz, 1 AA 49. Appellant's petition for a writ of mandate was summarily denied by this Court. Martinez v. Superior Court County of Orange, Case No. G048651.

4. III-Conceived Class Certification Activities Given The Transparent Lack of An Ascertainable Class Or A Class Representative With Typical Claims.

Just as wasteful were Appellant's efforts to certify a class. On November 4, 2013, Appellant filed a notice of motion for certification of a class. 1 AA 490. On July 18, 2014, Judge Dunning denied the motion to certify the class based in part on the lack of an ascertainable class or the lack of a representative with claims ***21** typical of the class. 2 AA 758. This had serious consequences, for as we shall see, it was the prospects of obtaining the class certification and pursuing a fraud claim that drove the litigation, not the trivial wage and separate penalty claim against Mr. O'Hara, which Appellant would subsequently and candidly admit "doesn't itself generate a lot of litigation." 2 AA 1056:2-5. Without class certification, the value of the case plummeted long before trial.

Next, Appellant appealed the denial of class certification to this Court. This Court affirmed Judge Dunning's denial of class certification in an unpublished opinion. 2 AA 1105.

This recitation of procedure buttresses Commissioner Luege's conclusion, which she supported by chronicling operative case events, when Appellant brought its motion for fees, that the case was "over litigated." 2 AA 1106.

B. The Trifling Outcome Before And After Trial. Four Years of Litigation Later.

The original complaint was filed on November 12, 2012. 1 AA 10. After more than four years of litigation, including an appeal, a writ petition, Appellant's discovery abuses for which it was sanctioned, and a jury trial, the Appellant cracked a peanut with a steamroller, obtaining a jury verdict on a single cause of action for sexual harassment. The jury verdict yielded damages well under the limited jurisdiction of the court: $1,080 in economic damages, and $7,000 in non-economic damages, for a grand total of $8,080. No punitive damages were awarded. 2 AA 1105; 3 AA 1867-1870 (Special Verdict Form).

***22** Appellant's wage claim did not go to trial, and Appellant recovered $1,300 shortly before trial, paid by Respondent without conceding any liability, in connection with Appellant's contention that it was entitled to penalties for wages that were not timely paid.

Specifically, O'Hara made a $975.00 payment on the wage/hour claim way earlier, as far back as January 23, 2013. The Labor Board closed its file on the case, but there was a later determination that a $1,275 penalty was owed, with O'Hara wisely determining to pay it through a February 26, 2016 check for $1,300. (2 AA 1106, and 2 AA 930 [Pavone Decl. at ¶3].)

Thus, by the time the amount claimed as penalties was paid, the wage claim had long been paid earlier. The penalty issue was never adjudicated, the wage claim did not go to trial, and the judgment never adjudicated the untried penalty or wage issue, both of which were moot by the time of trial. 2 AA 1105. Nor can the penalty issue be adjudicated, because an Acknowledgment of Full Satisfaction of Judgment as to all its causes of action was filed in the trial court on April 24, 2017. 1 RA 5.

IV. THE FEE PROCEEDING: COMMISSIONER LUEGE EXPRESSES CONCERNS OVER BILLINGS AND AMOUNT OF REUESTED FEES GIVEN MEAGER RESULTS. WITH APPELLANT MAKING DETERMINATIVE ADMISSIONS DURING EXTENSIVE ORAL ARGUMENT TO SHOW WHY NO FEE WAS JUSTIFIED.

A. The Fee Motion. Opposition, and Reply Papers.

***23** In the fee motion papers, Appellant, through Mr. Pavone, claimed to have expended 969.6 hours totaling $401,660 for "base" fees and 44.7 hours totaling $12,747 for "fees on fees." (2 AA 952, 2 AA 933, ¶¶ 11 & 12.)

O'Hara, through opposition papers directed by his attorney Mr. Teeple, provided a detailed analysis demonstrating that the claimed pared-down request of $162,600 suffered from numerous infirmities, among others, requesting compensation for work unrelated to the FEHA/wage hour claims, requesting excessive fee recovery, and submitting billing substantiation which was unreliable based on reconstruction of time worked, vague time entries, and block billed items. From a substantive perspective, O'Hara opposed the fee request based on the following main arguments: (1) fee recovery for obtaining the waiting time penalty payment was not recoverable based on Ling; (2) the requested fee for FEHA work was excessive/inflated so as to fall within the lower court's discretion to deny or reduce dramatically within the wide discretion allowable under Chavez; (3) the fee request either could not be apportioned based on the billing records but should have been apportioned (likely impossible) due to limited success/unrelated work; and (4) the request was founded on vague, reconstructed, and block billed fee items of a suspect nature. (2 AA 966-984, 2 AA 990-1000.)

In reply, Appellant argued primarily that Ling was inapt and that something should be awarded for the FEHA work. (2 AA 1005.)

B. November 4. 2016 Hearing on Appellant's Fee Motion.

***24** Appellant's fee motion was heard on November 4, 2016. [4] Both Commissioner Luege and the parties' counsel made key observations, with Appellants' counsel also making admissions which make it easy to resolve this appeal through an affirmance.

4 In the record, the fee motion hearing can be found at 2 AA 1052-1103.

Commissioner Luege first observed that the case contained a number of different types of counts, but there was only one count upon which Appellant prevailed. (2 AA 1056:25-1057:1.) She next inquired of Mr. Pavone about what impact followed from the fact Appellant was largely unsuccessful in the case in relationship to what is reasonable for a fee request. (2 AA 1058:25-1059:10.)

Mr. Pavone, in response, skirted the issue and engaged in argument about the case really being a Business and Professions Code section 17200 case. (2 AA 1059:11-1060:4.)

The lower court then attempted to turn back the discussion to the lack of success on the class certification effort given that Appellant did not have multiple victims from an ascertainability or numerosity standpoint. Mr. Pavone then conceded,

in his answer to the court's inquiry, that O'Hara was only planning more email solicitations, not that he actually sent anything outimplicitly conceding the lack of proof of multiple victims. (2 AA 1060:5-1062:1.)

***25** Subsequently, Appellant argued that he did prevail on the waiting time penalty claim so as to garner fee recovery. In doing so, Mr. Pavone admitted that O'Hara earlier paid the base amount (before the Labor Commission closed the file, as he testified in his opening fee declaration) and later paid the penalty amount to moot the issue for purposes of adjudication before the jury. (2 AA 1066:21-1067:17.) [5]

5 At the fee motion hearing, there was some confusion as to what happened in earlier appearances in order to ascertain if Appellant preserved the ability to argue he was the prevailing party on the waiting time penalty issue, confusion resulting from the fact that the lower court did not have a transcript of earlier appearance activities before the jury received the case. (2 AA 1067:13-1070:22.) The augmented pre-verdict proceedings demonstrated that this prevailing party issue was preserved. (3/9/16 RT 27:8-29:26.) Even without the benefit of the March 9, 2016 transcript, Commissioner Luege recognized the waiting time penalty issue was in play for purposes of the fee motion. (2 AA 1070:23-25.)

There was then a very illuminating discussion on apportionment of the requested fees being sought by Appellant. Mr. Pavone indicated that he apportioned about a third of the total work activity to the wage hour and FEHA issues combined. But, upon questioning from the lower court (which Mr. Pavone must have anticipated), he speculated (if not outright guessed) that "10 percent maybe" could be allocated, though he truthfully stated: I don't know. (2 AA 1070:25-1071:22.) In response, Mr. Teeple argued that (1) the case was never about the wage claim, but the fraud and class action efforts such that Appellant did not realize his true litigation objectives, and (2) Ling demonstrated that penalties, rather than wages, are not compensable in the wage hour setting. (2 AA 1071:23-1073:22.). Mr. Pavone disputed that Ling was apt. 2 AA 1073:23-1074:18.

Mr. Teeple then concentrated his argument on the nature of the fee substantiation submitted by Appellant with respect to apportionment. He stressed that the billings were inherently unreliable, given there was block billing, given ***26** opposing counsel's claim to work 25-26 hour days on at least one or a couple of occasions, given reconstructed billings, and given failure to allocate how much time was really spent on the wage claim producing a $1,300 payment before trial. (2 AA 1074:22-1075:16.)

Commissioner Luege did turn to the wage claim, expressing her views that it was such a small claim, stripped of the fraud and sexual harassment claims, to generate a large expenditure of work effort - akin to a small claims case. Mr. Pavone somewhat agreed, responding this way: "I agree that the wage claim doesn't itself generate a lot of litigation. It's just sort of the - it's sort of the requirements. You know, again, this is part of a larger case." 2 AA 1076:2-5. The lower court again expressed skepticism that a litigant would spent $100,000 to litigate a $1,300 case, such that the only real justification was that the real fee request was tethered to the fraud, sexual harassment, and class certification activities. Mr. Pavone agreed with Commissioner Luege's assessment, reiterating that he apportioned two-thirds of his time to the injunctive/ website/fraud claims. The lower court then did the math and questioned whether $33,000 was spent on the $1,300 wage penalty claim, and Mr. Pavone agreed that was the case. Mr. Pavone then went on to provide a confusing "guess" on what was expended on the wage penalty claim: he estimated it was 10% of the total hours claimed to be worked ($40,166), then later said it was 23% of the apportioned claim work of $162,600 ($37,306). (2 AA 1075:21-1078:21.)

***27** The lower court then asked each side to highlight specific items being claimed as fees, either correctly or incorrectly, given that it did not have time to go through the billings at the time of the hearing - but indicated that this would be done afterwards. O'Hara's counsel Mr. Teeple went first, telling the court that he had provided a "roadmap" through an analytical chart which was attached to opposition papers showing a matrix challenge to specific time entries challenges such as unrelated work, block billing, transparently excessive billing (very long daily work entries), and reconstructed time. (2 AA 1078:22-1082:21.) [6] Mr. Pavone did respond, admitting that not all of the time entries were contemporaneous

and were partially reconstructed, estimating that "probably" half of the time entries were reconstructed at the end of the case and inspiring Commissioner Luege to observe "[i]t feels a little bit like a guess." 2 AA 1084: 19-20. With respect to block billing, Mr. Pavone somewhat apologized but tried to indicate that he had a 90% confidence range in terms of what was submitted, despite using an associate to do some of the reconstruction. (2 AA 1083:1-1085:11.)

6 Even at the hearing, the lower court examined some entries and indicated an opinion that the hours recorded looked to be "recreated." (RT 28:18-21.)

Mr. Pavone, at the hearing, clarified that the base fee request was for $133,000 plus $12,000 for fees on fees, a lowering of what was claimed in earlier papers out of what he said were the total expended efforts of $400-500,000. (2 AA 1086:1-1087:4.) Actually, if one went by this lowered demand, the 23% ***28** apportionment on the penalty claim would be $33,350 - lower than the prior "estimates."

The defense then offered its closing thoughts on Appellant's fee request. Mr. Teeple stressed these points: (1) the FEHA claim was "an afterthought" claim brought into the lawsuit two years later; (2) there was no written discovery on the FEHA claim; (3) only ten questions in a deposition were asked on the FEHA claim, with the fraud/unfair competition counts being the major focus of discovery; (4) the reasoning and discretion given in Chavez was determinative; (5) Appellant was seeking fee recovery for unrelated, unsuccessful work; (5) the case was overlitigated; (6) the bills did not particularize work for the FEHA claim; (7) Appellant obtained nominal recovery; and (8) billings were inflated and created after the fact. (2 AA 1088:3-1093:20.)

In response, Appellant argued that (1) Chavez involved an even more inflated fee request; (2) Judge Munoz was "so bad," "so wrong," "his actions were so incompetent he was suddenly off the bench after that," and he "was off in a crazy place" in relations to a prior adverse sanctions award; [7] and (3) the wage hour penalty issue was still alive, an issue which the lower court said it would revisit. (2 AA 1094:19-1095:2, 1098:18-1100:12.)

7 This attack on Judge Munoz prompted Commissioner Luege to defend his credibility on the record and to indicate it was not a persuasive way of addressing any of the substantive issues. (2 AA 1095:22-1096:26.)

Commissioner Luege did state on the record that she did not believe the wage penalty issue involving $1,300 was a big issue and could not justify the fee ***29** request by Appellant. (2 AA 1098:23-1099:5, 1100:10-12.) She concluded by indicating that a careful reading of the briefs was in order and that she needed time to study the record. (2 AA 1100:13-1101:12.)

C. Commissioner Luege's November 30, 2016 Fee Motion Ruling.

Commissioner Luege was good on her word: she took over three weeks to issue a ruling on the fee motion, through a detailed November 30, 2016 minute order. (2 AA 1104-1108.)

In setting forth the procedural history, the lower court observed that Appellant's class certification request was denied, Appellant's fraud action was jettisoned on a non-suit motion, Appellant's sexual harassment claim was the only one tried before the jury (producing a relatively small award), and that Appellant's request for injunctive relief was denied.

On the Labor Code section 218.5 fee claim (which she mistakenly described as a 281.5 fee claim, a simple clerical mistake), Commissioner Luege determined that only the waiting time penalty claim was in play (though paid before trial), but found it lacked merit based on the reasoning in Ling.

***30** Given that the FEHA fee request is a discretionary one for purposes of an award, the lower court agreed that Appellant over-litigated the case such that Chavez was on point so as to justify a denial of fees altogether. The lower court also found that the fee request and substantiation was suspect, given that (1) Appellant's counsel admitted not maintaining contemporaneous records and relying on reconstructed time (even mentioning specific entries of large daily hour work days to support the conclusion that the reconstruction was accurate); (2) the requested fees of over $160,000 were excessive given the limited success and the lack of broad public impact to anyone one other than Appellant; (3) most of the litigation had nothing to do with the FEHA claim, but related to the false advertising claim and unsuccessful efforts to obtain class certification; (4) the requested damages of over $500,000 before the jury constituted "an outlandish figure"; and (5) the case was worth no more than $25,000 and should have been pursued as a civil limited matter. [8]

8 It also bears noting that the lower court found that Appellant's cost requests also were "unreasonably inflated" in nature, though it is not an issue which is the subject of this appeal. 2 AA 1107.

V. STANDARD OF REVIEW: THE TRIAL COURT'S JUDGMENT CAN BE AFFIRMED ON ANY REASONABLE GROUNDS BUT ABUSE OF DISCRETION IS THE PREDOMINANT BENCHMARK.

The sole issue on appeal is whether Commissioner Luege committed reversible error when she denied Appellant's request for attorney fees under FEHA (the sexual harassment claim) or the de minimis wage/hour claim which was paid.

Commissioner Luege's order, fully supported by the facts, is subject to an abuse of discretion standard. After examining the entire record, she concluded there was no factual basis for allocating fees based upon Appellants' limited success at trial.

She also reached two conclusions that are subject to variant standards for review: (1) Whether FEHA claim for sexual harassment supported the inflated fee ***31** claim, with no proper allocations, under Chavez (abuse of discretion); and (2) whether after the wage claim was fully paid, the untried waiting time penalty was not a claim giving rise to fee entitlement (de novo, but subject to harmless error review based on a review of the entire record). However, as we shall explain, even if there was any legal error on the trifling wage/hour issue, it would be harmless error rather than reversible error, because her denial of fees was fully supported by the record establishing that there was no rational basis for allocating fees to the untried wage and penalty claims.

A. Abuse Of Discretion - Appellant Admits Court Can Affirm Based On This Standard.

Though he would be displeased by such an outcome, Appellant admits, "And like the 17200 ruling [ruling on unfair business count, not challenged here], if this Court so desires, it can find a way to affirm it for no other reason than through discretionary deference to the lower court." AOB 9. True, as numerous authorities confirming, most saliently Chavez.

In light of the fact that Appellant's fee request expressly was found inflated and unreliable in nature in light of limited success and failure to apportion out unrelated work of an inflated nature, Chavez does allow the trial judge in FEHA cases considerable discretion to decide how it is going to handle the fee request including denial altogether. Here is how Chavez framed the lower court's discretion:

"Whether plaintiff was entitled to an award of attorney fees for time spent litigating the single successful claim requires consideration ***32** of another established principle governing attorney fee awards: A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.' [Citations omitted.] Here, the trial court reasonably could and presumably did conclude that plaintiffs fee request... was grossly inflated when considered in light of the single claim on which plaintiff succeeded, the amount of damages awarded on that claim, and the amount of time an attorney might reasonably expect to spend in litigating such

a claim. This fact alone was sufficient, in the trial court's discretion, to justify denying attorney fees altogether." (Chavez, 47 Cal.4th at p. 991, emphasis added.)

Chavez itself recognized that a ruling which denies attorney's fees to plaintiff is subject to the abuse-of-discretion standard of review, which we believe Appellant has conceded. (Id. at p. 989; see also AOB 24.) As the California Supreme Court reiterated in Harris v. City of Santa Monica (2013) 56 Cal.4th 203, 235: "An award of attorney's fees is discretionary under [Government Code] section 12965, subdivision (b). An award may take into account the scale of the plaintiffs success, and it must not encourage 'unnecessary litigation of claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak.' [Citation.] Like Congress in enacting Title VII, our Legislature did not 'enact[] legislation whose benefit inures primarily to lawyers in the form of a substantial fee recovery, even if relief to the plaintiff is otherwise trivial and the lawsuit promotes few public goals.'"

This discretion has even more leeway where the situation involves an unreasonably inflated fee request, as here. Cases at both the state and federal levels have recognized this is the case and a significant factor to consider on ***33** appeal. (See, e.g., Serrano v. Unruh (Serrano IV) (1982) 32 Cal.3d 621, 635 [after acknowledging that an unreasonably fee request is a special circumstance, our state supreme court observes that the trial court can reduce the requested fees or deny an award altogether]; Christian Research Institute v. Alnor (2008) 165 Cal.App.4th 1315, 1323 [4th Dist., Div. 3; Aronson, J.] ("Alnor") a trial court substantially reduces a fee or cost request, we infer the court has determined the request was inflated"); Elec. Privacy Info. Center v. U.S. Department of Homeland Sec. (D.D.C. 2011) 811 F. Supp.2d 216, 240-241 ["courts have discretion... to completely deny a fee award in order to deter parties from making 'unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place," and "[i]f a party has less egregiously overbilled, courts may 'impose a lesser sanction, such as awarding a fee below what a "reasonable" fee would have been""].)

Of course, the abuse-of-discretion standard is deferential, given that the trial judge has a good gauge of the litigation history and professional services rendered by the requesting attorneys on behalf of their clients. "Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.]... [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court." (***34** In re Marriage of Connolly (1979) 23 Cal.3d 590, 597-598.) This Court, in Alnor, reiterated these principles, but just as saliently observed (as applied to the pending cause) that Commissioner Luege was entitled to make credibility determinations from the attorney declarations, with it being clear that she did not credit Appellant's declarations but gave substantial credence to the defense proof and arguments showing why no fees should be awarded under the circumstances. (See Alnor, 165 Cal.App.4th at p. 1323.)

B. De Novo - Only If There Is A Mistake Of Law.

"[A] determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo. " Carver v. Chevron U.S.A., Inc. (2002) 97 Cal. App. 4th 132, 142. In other words, the threshold question of fee entitlement is a legal one subject to review, as compared to factual issues, such as whether there is any factual basis for allocating reasonable fees to some particular result in the lawsuit.

C. The Judgment Can Be Affirmed Because It Reached The Correct Result, And If Harmless Error Occurred, That Would Not Be A Basis For Overturning A Correct Result.

As even Appellant concedes in his AOB, a judgment can be affirmed if the correct result was reached. This is the law in California. (See e.g. Hoover v. American Income Life Ins. Co. (2012) 206 Cal.App.4th 1193, 1201 [a judgment is presumed correct, and if it is correct on any theory, it must be affirmed regardless of the court's reasoning]; In re Conservatorship of McQueen (2014) 59 Cal. 4th 602, 612 [trial court's order will ordinarily be upheld if it is legally correct on any ***35**

basis]; Chalmers v. Hirschkop (2013) 213 Cal.App.4th 289, 299 [under abuse of discretion standard, must uphold trial court ruling correct on any basis, regardless of whether such basis was actually invoked]; William M. Lyon Associates, Inc. v. Superior Court (2012) 204 Cal.App.4th 1294, 1300 [concluding "motion for summary judgment was correctly denied, but for reasons different than those articulated by the trial court."].)

Similarly aligned, a reversal is not required where a trial court action resulted in harmless error. California Constitution, article VI, section 13, states: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." This constitutional provision generally "prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial" (People v. Chun (2009) 45 Cal.4th 1172, 1201), whether constitutional or nonconstitutional errors are under scrutiny (People v. Cahill (1993) 5 Cal.4th 478, 501).

VI. COMMISSIONER LUEGE DID NOT COMMIT REVERSIBLE ERROR BECAUSE HER ORDER DENYING FEES WAS BASED ON A COMPLETE EXAMINATION OF THE RECORD. AND THE EXPLANATION PROVIDED IN HER RULING IS NOT ONLY THOROUGH BUT CORRECT.

***36** Appellant filed its motion for attorney's fees on October 10, 2016 (2 AA 910), well in advance of a signed judgment on February 21, 2017 (2 AA 1109). Commissioner Luege addressed fee entitlement in detail in her November 30, 2016 Minute Order. 2 AA 1104-1108. We already have taken some time to showcase the trial court's own explanation for denying fees, because its reasoning stands up well on its own, and because Appellant barely touches upon the extensive reasoning Commissioner Luege provided when she denied the fee request. We now capsulize this analysis by correlating it to specific factors showing why no abuse of discretion was committed with respect to both claims.

A. Commissioner Luege Correctly Concluded The Case Was Over-Litigated.

First, the Commissioner described the wasteful procedural history engineered by Appellant. Appellant amended his complaint five times, seeking class certification for false advertising in his fifth amended complaint. The Court denied class certification, in part because Appellant never showed there were multiple victims of the alleged false advertising. 2 AA 1105. Appellant appealed the denial of class certification, and the Court of Appeal affirmed the trial court's decision, an appellate ruling never challenged further. 2 AA 1105.

Thus, the issue of class certification is a dead letter, and should not even be an issue in Appellant's appeal. Yet, as further evidence of Appellant's inefficient use of attorney time, Appellant continues to relitigate the issue in its brief, choosing to criticize superior court Judge Dunning, as well as the Court of Appeal:

***37** "In Martinez's case, [Judge Dunning] issued a ruling denying 17200 certification that was little more than a series of adversarial criticisms putatively representing independent judicial analysis. "But this Court, on appeal, apparently did not think Martinez's cause was important enough to merit 17200 relief despite many errors, the certification presentation did have its weaknesses, and found a defensible way to affirm the lower court's decision." AOB 9.

The case, which started out with five causes of action, went to trial on only two: fraud and sexual harassment. The trial court granted Respondent's motion for non-suit on the fraud cause of action, after "defendant testified that he did not rely on defendant's allegedly false representations." 2 AA 1105.

B. Commissioner Luege Correctly Denied The FEHA-Based Claim For Fees Based On A Correct Reading of Chavez And The FEHA Claim Was The Only One On Which Appellant Prevailed At Trial.

Second, the court denied attorney's fees based on the sexual harassment FEHA claim, the only cause of action that was actually tried. Commissioner Luege relied on Chavez, in the process describing the factual similarities in Chavez that she considered to be striking:

"In Chavez, the plaintiff filed an action alleging several FEHA claims. Following a five-day trial the jury awarded Chavez $1,500 in economic damages and $10,000 in noneconomic damages. Chavez then sought attorney's fees in excess of $400,000 which he subsequently amended to approximately $870,000. In Chavez the Supreme Court concluded that 'in light of plaintiff's minimal success and grossly inflated attorney's fee request, the trial court did not abuse its discretion in denying attorney fees.' [47 Cal4th] at 976." (2 AA 1106.)

In reaching this decision, the Commissioner Luege also noted that Chavez's success on a single FEHA claim did not have "' broad public impact or ***38** resulted in significant benefit to anyone other than himself.' Id. at 990." 2 AA 1106.

Commissioner Luege then explained the similarities between Chavez and instant case. The jury awarded Plaintiff/Appellant Martinez $1,080 in economic damages and $7,000 in noneconomic damages. Appellant based his request on a calculation of $414,407 in fees and asked for more than one third of that sum. The lower court here found the figure to be "very unreliable", explaining why this case resembled Chavez and other cases rejected discounting unreliable fee submissions:

"Plaintiff's counsel admitted during the hearing that he had not maintained contemporaneous billable hours and that he based the legal fee calculation on a reconstruction of the amount of hours plaintiffs counsel believes he spent working on the case. Although block billing is not invalid per se, its use may undercut the credibility of the fee application. Christian Research Institute v. Alnor (2008) 165 Cal. App.4th 1325, 1329. In this particular case the reconstructed time sheets plaintiff submitted show that on one specific day counsel billed 25 hours of work performed. On multiple days counsel billed in excess of 15 hours of work performed per day. These entries raise serious questions about the accuracy of counsel's alleged reconstruction of the time he spent working on this case. Taking into consideration the unreliability of the figures provided with the nominal damages the jury awarded, asking the court for more than $160,000 in legal fees, seems as excessive as the legal fees plaintiff requested in the Chavez case. See also Serrano v. Unruh (1982) 32 Cal.3d 621 ("a fee request that appears unreasonably inflated is a specific circumstance permitting the trial court to reduce the award or deny one altogether"). Moreover, like in Chavez, this is not a claim that had a broad public impact or resulted in significant benefit to anyone other than plaintiff Martinez, further justifying the court's decision to deny plaintiff attorney's fees." 2 AA 1106-1107.

***39 C. Commissioner Luege Correctly Denied Fees For The Recovery Of $1,300 Based On Her Application Of Ling v. P.F. Chang.**

Third, Commissioner Luege denied attorney's fees for the wage claim pursuant to Labor Code Section 218.5. (The explanation in her November 30, 2016 Minute Order contains a typo, as it refers to section 281.5, and we have corrected her explanation below, by referring to section 218.5 instead). As she explained:

"Labor Code Section 218.5 provides that the prevailing party in 'any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions' shall be awarded reasonable attorney's fees and costs. It is undisputed that long before this case came before this court for trial, defendant had paid plaintiff all his wages. Thus, the issue of wages was not before the court when the case proceeded to trial and plaintiff cannot be considered the prevailing party on the wages claim.

"The only issue that remained related to the wages claim was a waiting time penalty claim in the sum of $1,300. Before the commencement of the trial, the parties represented that days earlier defendant paid plaintiff an additional $1,300 to resolve the issue of waiting time penalties and thereby eliminate the issue from trial. Under Labor Code Section 203, waiting time penalties are not wages. See Ling v. P.F. Chang's China Bistro, Inc. (2016) 245 Cal. App.4th 1242, 1261. Accordingly, defendant's decision to pay the waiting time penalties does not make plaintiff a prevailing party pursuant to Section 218.5." 2 AA 1106.

***40** Appellant solely argues that Ling, 245 Cal.App.4th 1242, is distinguishable, because in that case, the underlying violation based on section 226.7 involved the prohibition on work during meal or rest periods, for the violation of which the remedy was an extra hour of pay, which, however, the Ling court did not believe was a wage claim. Ling determined that "[f]ollowing Kirby [v. Immoos Fire Protection, Inc. (2012) 53 Cal.4th 1244, 1257], [Labor Code] section 226.7 cannot support a section 2013 penalty because section 203, subdivision (b) tethers the waiting time penalty to a separate action for wages" and that "the fact that the remedy [under section 226.7] is measured by an employee's hourly wage does not transmute the remedy into a wage as that terms is used in section 203." (Ling, 245 Cal.App.4th at 1261.) [9]

9 Though the Autozone federal court classified this as dicta (2016 WL 4208200 at *7), it is persuasive dicta in terms of differentiating penalties (a remedy) from the underlying wage violation (the substantive claim). Beyond that, this Court is not bound to follow unpublished federal decisions. (Brown Bark III v. Haver (2014) 219 Cal. App.4th 809, 822 & 822 n. 4 [4th Dist., Div. 3] (Aronson, J.).)

Appellant argues that here, the claim for $1,300 for waiting time penalties started out tethered to a wage claim that was for unpaid wages, even though the wage claim was fully paid long before trial, and argues that if the penalty claim is viewed as connected to a wage claim, then Plaintiff should be able to collect some fees, because Plaintiff's penalty claim was paid before trial. Respondent does not believe that the penalty claim was transmuted into a wage claim through legal alchemy, and does believe (as does the Internal Revenue Service (IRS), as we shall show), that wages and penalties are very different, alleged unpaid wages being a substantive claim, penalties being in the nature of a remedy. Furthermore, before trial commenced, and the $1,300 amount had been paid, there was no longer even a wage claim to pursue and the supposed "tether" had been broken. ***41** Also, the $1,300 was paid to remove the issue from trial, without any concession of wrongdoing by Respondents.

In fact, this is an unsettled area of law. See, e.g., In re: Autozone, Inc. (N.D. Cal. Aug. 10, 2016) 2016 WL 4208200 at *7 (holding that section 203 penalties are available for wage payments under section 226.7, and distinguishing Ling as a case concerned only with whether "a section 203 waiting time claim based on section 226.7 premium pay is an 'action brought for the non-payment of wages' under section 218.5"').

But more than Ling supports the key differentiation between wages and penalties.

The IRS itself, for federal income tax withholding purposes, has determined that section 203 waiting time penalties are not wages. As we know, Labor Code section 203 imposes penalties on employers that fail to timely pay final wages to terminated employees within a specified time period. These penalties are paid to terminated employees in amounts based on their wages. However, in IRS Chief Counsel Advice Memorandum 201522004 and even more recently in IRS Information Letter 2016-0026, the IRS has clarified that these penalties are not considered "wages" for federal income tax purposes, importantly because they are intended to punish employers for failing to time pay final wages rather than to compensate employees for performed work. Even though the late payment penalty amount is calculated based on the employee's average daily wages, ***42** whether the penalty is owed is entirely dependent on the employer 's conduct in connection with paying the employee's final wages. Beyond that, the IRS has amplified by indicating that these penalties should not be reported on Form W-2, but should be reported on Form 1099 in the same manner as other

non-compensatory liquidated damages. This pragmatic tax treatment of penalties and wage hour violations is further vindication for the result reached in Ling.

However, even if for the sake of argument the penalty claim here was considered to be tethered to a wage anchor, it is worth noting that Commissioner Luege, who reviewed the complete record, specifically stated that it was "undisputed... that long before this case came before this court for trial, defendant had paid plaintiff all his wages. Thus, the issue of wages was not before the court when the case proceeded to trial and plaintiff cannot be considered the prevailing party on the wages claim." 2 AA 1106. In sum, the wage claim had been paid long before, leaving the penalty amount, which was also paid before trial, untethered to the wage anchor and not worthy of separable compensable, especially given no substantial time could be reasonably allocated to this de minimis, vestigial claim.

Furthermore, at this post-judgment point, there would be no basis to declare Appellant a "prevailing party", because the wage claim was paid much earlier, Respondent never admitted liability, the claim was not tried, ***43** an Acknowledgment of Full Satisfaction of Judgment has been filed, and the motion for fees was made before entry of judgment.

Finally, as set forth in part VII below, and this too is dispositive, even if the untried penalties claim provided a basis for fee entitlement, any legal error was harmless error, because there is no way based on the record to allocate reasonable fees to the $1,300 claim, which Appellant admitted on the record did not generate much litigation, and did not drive the lawsuit, and provided no reliable apportionment of any credible nature to boot.

D. Commissioner Luege. Having Reviewed The Complete Record. Correctly Denied The Fee Request.

Fourth, The Commissioner explicitly stated that she had reviewed the complete record in the case, concluding:
"Having spent time reviewing the complete record in this case, including the class certification portion of the litigation, the court finds that plaintiff over litigated this case." (2 AA 469, italics added).

Of course, in addition to reviewing the complete record in the case, the trier of fact was the person best situated to observe the performance of the attorneys, and to evaluate whether the case had been over-litigated. The experienced trial judge is in the best position to evaluate the value of professional services rendered in the trial court. (PLCM Group, 22 Cal.4th at p. 1095.)

***44** In sum, the Commissioner made numerous factual findings, including that the case was over-litigated, that the attorney record keeping was unreliable and lacked credibility, that the claim did not have broad public impact or benefit anyone other than Appellant, that in many ways Appellant had been "spectacularly unsuccessful", that court records made it clear that litigation had been "fruitless", and that large portions of the entries related to unsuccessful litigation having nothing to do with the trial, and that a greedy request that the jury return $500,000 in damages was unrealistic, given that the case could have been pursued as "a civil limited matter." [10]

10 Appellant's assertion that it would have been "impermissible" to file its case as an unlimited case was based on a gross misevaluation of its case, since after nearly four years of litigation, including an unsuccessful appeal and a writ of mandate, it only recovered $8,080 monetarily, obtained no injunctive relief, obtained no class certification, obtained no punitive damages, and failed to recover on its fraud and unfair competition claims. The amount Plaintiff did recover was well below the limited case amount of $25,000, and obtained only by Plaintiff, rather than for any class. While it may have been permissible to bring the case as an unlimited action, based on the fact that Plaintiff misevaluated its case, it certainly would not have been "impermissible" to bring it as a limited action if only Plaintiff had realistically evaluated his case from the outset. In fact, failure to make such a realistic assessment exposes a litigant and its attorney to the Chavez fee denial repercussion. Having

> filed an Acknowledgment of Full Satisfaction of Judgment (1 RA 5), Plaintiff, though it may complain about its failure to recover more than $25,000 on the merits, cannot appeal its failure to obtain a greater recovery at trial based on his claims.

Given the numerous factual findings that formed the basis for denying fees, the circumstance that the trier of fact reviewed the complete record, and the fact that the Commissioner was best situated to judge the performance of the attorneys, Commissioner Luege was well within her discretion to deny the fee request; ***45** indeed, given her sound findings, granting the fee request would have been beyond her discretion.

VII. EVEN IF THE UNTRIED PENALTIES CLAIM PROVIDED A BASIS FOR FEE ENTITLEMENT, ANY LEGAL ERROR ON THIS POINT WAS HARMLESS ERROR BECAUSE THERE IS NO WAY BASED ON THE RECORD TO ALLOCATE REASONABLE FEES TO THE $1,300 CLAIM.

Mr. Martinez's claim for wages and penalties never went to trial. Mr. O'Hara paid the wage claim; and, prior to trial, Mr. O'Hara paid Mr. Martinez an additional $1,300 without admitting wrongdoing. And after judgment, an Acknowledgment of Full Satisfaction of Judgment as to each cause of action was filed in the trial court on April 24, 2017. 1 RA 5. Appellant's motion for fees was made and heard before there was a judgment, and the entered judgment did not identify Appellant as a prevailing party as to the untried claim.

Even if, for the sake of argument, the payment of $1,300 to Mr. Martinez prior to trial provided a legal basis for fee entitlement, no proper factual basis was ever provided for allocating any principled, reliable portion of reasonable attorney fees to the receipt of $1,300 before trial. Instead, Appellant's proffer to the trial court was grossly speculative, as even his counsel admitted, and subject to variant “guesstimates” as described in our summary of the oral argument of the fee hearing (See Section IV.B above [“maybe” 10% of claimed fees could be allocated to wage penalty issue, but with counsel agreeing wage claim did not result in a lot of litigation and subsequently offering “guesses” of apportionment based on ***46** unreliable records].) Thus, the denial of fees would be entirely proper, because there was no factual basis upon which fees could be allocated based upon the payment of the $1,300.

A. Appellant Failed To Carry Its Burden Of Establishing Reasonable Fees Could Be Allocated Reliably To His Receipt Of $1,300.

A recent district court opinion, relying on U.S. Supreme Court authority, has pointed out (in the context of a civil rights case) that the burden to establish a reasonable fee request rests upon the applicant:
“A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hour's expended and hourly rates. The applicant should exercise ‘billing judgment with respect to hours worked... and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

“We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.” *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S. Ct. 1933, 1941,76 L.Ed. 2d 40 (1983).

“Next, this court considers the amount of any attorney's fees it might award Defendant Richards. In his objections, he asserts that he should be awarded attorney's fees in” the amount of $21,139.89. Doc. 242 at 15. In support, he relies upon a bill to his client, Defendant Brenda Wall, itemizing fees from October 31, 2016 through 2017. Doc. 206 at 13-20. But Defendant Wall was voluntarily dismissed on December 5, 2016 (Doc. 81), and has not filed a motion for attorney's fees. Moreover, as noted by the magistrate judge, the itemized bill includes fees previously denied regarding the preliminary injunction. Doc. 238 at 9 n.6. As a prevailing party, Defendant Richards had the burden to properly allocate a reasonable

number of hours at a reasonable hourly ***47** rate. *See Ellis v. Univ. of Kan. Med. Ctr.,* 163 F.3d 1186, 1202 (10th Cir. 1998). While the court recognizes that Mr. Richards was engaged in joint representation, including representing himself pro se, the record makes it clear that he is capable of allocating fees among those clients. See Doc. 86 at 9 (fees billed to himself); Doc. 206 at 12 (Pamela Reynolds). Given the state of the record, Mr. Richards has not met his burden. Accordingly, the court declines to award attorney's fees." *Ross v. Balderas,* (D.N.M. Aug. 11, 2017) 2017 WL 3476065 at *8, on reconsideration in part, (D.N.M. Oct. 2, 2017) 2017 WL 4417603.)

California courts advise the same. (*See e.g. Levy v. Toyota Motor Sales, U.S.A., Inc.,* (1992) 4 Cal App 4th 807, 816 [Appellant fee claimant had the burden to prove that the hours and rates are "reasonably necessary to the conduct of the litigation" and "reasonable in amount"]; *Robertson v. Rodriguez* (1995) 35 Cal App 4th 347, 361 ["The trial court's role is not merely to rubber stamp (the fee claimant's) request, but to ascertain whether the amount is reasonable."]

For several reasons, Appellant failed to submit a fee request reasonably allocating any legal work to the $1,300 so as to justify the fee denial in any event.

First, as Commissioner Luege explained, Appellant's record keeping lacked reliability and credibility. The Commissioner found that the total figure for fees was "very unreliable." 2 AA 1106. Appellant billed a 25-hour day, block-billed, and made guestimates based on time records reconstructed after the case a case pending for over four years was over. 2 AA 1106. For example, when asked by the Commissioner what part of his time was recreated, Appellant's counsel replied: *Probably* half." (2 AA 1084:6.) (italics added). And when asked when it was recreated, counsel replied "at the end of the case." (2 AA 1084:11.) ***48** Also, an associate helped to reconstruct lead counsel's time records, further showing unreliability because it was not the associate time. (2 AA 1084:12-14.).

Second, the exorbitant demand for fees made by Appellant, by itself alone, provided the court with a basis to deny its request. Even in the mandatory anti-SLAPP fee context, this District has recognized an unreliable, inflated fee theory can lead to a total denial of the request. (Alnor, 165 CalApp.4th at pp. 1320-1322.)

Third, the wage claim, and the claim for penalties, both of which were not tried, involved entirely different legal issues than the FEHA claim that did go to trial. The wage and penalty claims involved allegations that Appellant had not been fully paid, and had not been timely paid, whereas the FEHA claim involved allegations of sexual harassment. The wage claims were a truly peripheral aside to the entire litigation. (2 AA 1075:21-1078:21, 1098:23-1099:5, 1100:10-12.)

The operative complaint, which was the Fifth Amended Complaint (5thAC), alleged a Seventh Cause of Action for Labor Code § 203.5 violations (failure to promptly pay wages after termination) and failure to pay additional penalties. Labor Code § 2699.3, 2 AA 849-852. In contrast, the Eighth Cause of Action for Sexual Harassment did not even incorporate by reference the allegations in the 7th Cause of Action for Labor Code violations, instead alleging that Mr. O'Hara made unwanted sexual advances toward Mr. Martinez. 2 AA 853-854. These claims are entirely distinct, and there is no legal basis whatsoever for lumping them together and treating them as one cause of action for purposes of claiming 1/3rd of total fees as compensable attorney's fees.

***49** Yet that is precisely what Plaintiffs counsel did:
"Mr. Pavone... We portioned those into thirds and we said, hey, about a third of the case is attributable to the wage claim and the employment claim. So we sought one-third of the hours spent. We thought that was reasonable.

"The Court: The employment claim and the sexual harassment claim?

"Mr. Pavone: Yeah, that's the same thing." (2 AA 1071:9-16.).

But patently, the sexual harassment claim and the employment claim were not the same thing, and could not be lumped together -- not to mention that neither of the employment claims "drove" the litigation. Nor does counsel's casually imprecise statement, "we said, hey, about a third of the case is attributable" to the distinct sexual harassment and labor law claims lumped together as one by Appellant lend any confidence even to the 1/3rd allocation, never mind the necessary further allocation to the untried employment wage claim, as to which no reasonable and supportable allocation was ever made.

It is impossible to see any overlap of the Labor Code and sexual harassment claims; put another way, these are not "inextricably intertwined claims". Yet Appellant's time keeping records did not provide any reasonable basis for allocating time to one claim, rather than the other claim, despite the fundamentally different nature of the claims.

***50** Fourth, and devastatingly, it is apparent from the admissions made by Appellant's counsel in court, that the wage claim did not even drive the litigation. (2 AA 1075:21-1078:21.) Instead, Appellant's counsel was motivated by the desire to certify a class and prosecute fraud-based claims on a class-wide basis, a much larger case unconnected to the paltry wage penalty claim. And, of course, the efforts to certify a class and prosecute fraud-based claims were unsuccessful. Appellant's counsel knew this, Appellant's counsel admitted this, the court understood this, and the record reflects this, as will now be reiterated below.

Commissioner Luege expressed incredulity that Plaintiffs $133,000 fee claim could possibly be based on $1,300 in penalties, stripped of fraud and sexual harassment - a labor claim that could have been brought in small claims court:
"It was such a small claim that it's difficult to believe that if your claim for $1300 it's stripped of the fraud and the sexual harassment. I mean, you're not going to spend much effort on a $1300 claim. That's like a small claims' - that's like a small claims' case." (2 AA 1075:22-1076:1.).

In response, Plaintiffs counsel candidly admitted that the Commissioner was correct:
"I agree that the wage claim doesn't itself generate a lot of litigation. It's just sort of the - it's sort of the requirements. You know, again, this is part of a larger case." (2 AA 1076:2-5.).

Thus, Appellant admitted that the wage claim, which didn't even go to trial, did not "generate a lot of litigation." And an untried $1,300 claim that did not "generate a lot of litigation" is hardly a sound rational basis for allocating a portion of $133,000 in fees in light of the unreliability of records and a speculative ***51** 10% apportionment "guess" made by Appellant's counsel. With the exception of the FEHA harassment claim, which did go to trial and resulted in a recovery of $8,080, the rest of the case - fraud, unfair competition, efforts at class certification, an appeal, and a petition for writ of mandate - went down in flames. And as to the FEHA claim that did go to trial, Chavez is on point: Commissioner Luege acted appropriately within her discretion in concluding that the 8,080 recovery at trial, well within the limited jurisdiction of the court, with no punitive damages, did not justify a $133,000 fee demand in a case that was wastefully litigated, for a fee claim supported by ad hoc reconstructed record-keeping lacking reliability and credibility.

So how much of the attorney's fees was attributable to litigating the wage claim that was never tried? Here, Plaintiff's counsel, "ballparking" (really, "guessing"), gave an improvisatory answer to the Commissioner:
"I think probably, you know, sitting here ballparking, I'd say it's probably 10 percent, 1/10th of the whole thing is probably attributable to the wage claim." (2 AA 1078:6-8.).

This seat-of-the-pants response, qualified by "ballparking" and three "probably's" in one sentence, is rank speculation on its face, and an even more shown to be unreliable based on unsubstantiated $37,306 or $40,166 "pulled from the rabbit"

fee stab. (2 AA 1075:21-1078:21.) Even Commissioner Luege scoffed at the suggestion that her estimate of $33,000.00, based on Plaintiff's counsel's 10% guess, while "ballparking", could have really been spent on a $1,300.00 wage penalty claim. (2 AA 1075:21-1078.21.)

***52** In sum, Plaintiff was not entitled to recover fees for its untried wage claim. However, even if for the sake of argument, the untried wage claim provided a basis for fee entitlement, there was a sound basis for the Court to deny the claim: the attorney fee records, which involved block-billing, a 25 hour day, and after-the fact re-creation at the end of a four-year case, done with the help of an associate, lacked reliability and credibility, and provided no factual basis, other than speculation, for allocating fees to the untried wage claim. Thus, while Respondent does not believe there was legal error, any legal error would be entirely harmless error, because the facts, and the factual explanation made by the Commissioner in her November 30, 2016 Minute Order, fully support the result. "[E]rrors are not reversible per se, but are subject to harmless error review." F.P. v. Monier (2017) 3 Cal. 5th 1099, 1102 (affirming Court of Appeal judgment and holding that a court's error in failing to issue a statement of decision as required by Cal. Code of Civ. Proc., § 632, is not reversible per se).

VIII. CONCLUSION.

This unfortunately, in the words of Justice Wallin (who used to sit on this Court), is one where "[a]ll too often attorney fees become the tail that wags the dog in litigation." (Deane Gardenhome Assn. v. Dentkas (1993) 13 Cal.App.4th 1394, 1399.)

Appellant simply did not prevail on a substantial part of this litigation, except for two minor claims which were pretty much ignored.

***53** None of the bottom conclusions were error, whether reviewed under the abuse of discretion, legal conclusion, or harmless error standards of review.

Appellant sought substantial attorney's fees based on these minor victories, but he did not prevail on a pragmatic scale given that the lower court found that the fees were neither meritorious, based on unreliable submissions lacking credibility, nor justified based on the very meager "success" in the context of the overall litigation.

After all, why should Appellant receive over $162,000 for FEHA fees for an over-litigated case producing small damages? Answer: Not at all. Why should Appellant receive even speculative "guesstimates" of 10% for a $1,300 wage penalty claim paid right away? Answer: Same conclusion, not at all.

The judgment on the fee award should be AFFIRMED.

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