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11 (also erroneously sued herein as Sacramento
12 County Sheriff’s Department); Lou Blanas,
13 John McGinness, Timothy Sheehan, and
14 Fred Mason

10 **UNITED STATES DISTRICT COURT EASTERN DISTRICT**
11 **OF CALIFORNIA SACRAMENTO DIVISION**

12 JAMES ROTHERY, Esq.; ANDREA)
13 HOFFMAN,)
14 Plaintiffs,)
15 v.)
16 Former Sheriff LOU BLANAS; SHERIFF)
17 JOHN MCGINNESS; Detective TIM)
18 SHEEHAN; Detective FRED MASON;)
19 SACRAMENTO COUNTY SHERIFF’S)
20 DEPARTMENT, an independent branch of)
21 government of the COUNTY OF)
22 SACRAMENTO; COUNTY OF)
23 SACRAMENTO; STATE OF CALIFORNIA)
24 ATTORNEY GENERAL JERRY BROWN;)
25 DOES 1 through 25, unknown co-conspirators;)
26 ATTORNEY GENERAL MICHAEL B.)
27 MUKASEY,)
Defendants.)

CASE NO. 2:08-CV-02064-JAM-KJM

Date: September 9, 2009
Time: 9:00 a.m.
Ctrm: 6
Judge: Honorable John A. Mendez

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
MOTION FOR ATTORNEYS’ FEES
PURSUANT TO 42 USCS § 1988
AND FOR SANCTIONS PURSUANT
TO 28 USCS § 1927
BY SACRAMENTO COUNTY
DEFENDANTS**

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I.

INTRODUCTION

Defendants County of Sacramento and former Sheriff Lou Blanas, Sheriff John McGinness, and Timothy Sheehan (hereinafter “Sacramento County Defendants”) hereby move the court for an order awarding attorneys’ fees in the amount of \$ 34,500.00, to Defendants as the prevailing party in this 42 U.S.C. §1983 civil rights case pursuant to 42 U.S.C. § 1988 and against Plaintiffs. Defendants also request the Court award attorneys fees to Defendants as against Plaintiffs’ counsel pursuant to 28 U.S.C. § 1927. Defendants are entitled to an award of attorneys’ fees based on this lawsuit as unreasonable, frivolous, meritless, and vexatious and for Plaintiffs’ counsel’s subjective bad faith in the bringing of this lawsuit.

II.

PROCEDURAL HISTORY

This case was brought by Plaintiffs Rothery and Hoffman through their counsel, Gary Gorski and Daniel Karalash, based upon the purported improper denial of their Carry Concealed Weapon (“CCW”) permit applications. Plaintiffs alleged they were denied CCW permits by the Sacramento County Sheriff’s Department because they had not contributed to the Sheriff’s election campaign, and that if they had contributed to the campaign, they would have been granted CCW permits. Plaintiffs also claimed that the County Defendants were involved in RICO activities which affected their rights, and that alleged incidents involving the Sacramento County Deputy Sheriff’s Association legally impacted them. The Complaint was filed on September 3, 2008. Sacramento County Defendants were served on or about January 2, 2009.

On April 2, 2009, Sacramento County Defendants filed and served motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), to strike pursuant to Federal Rule of Civil Procedure 12(f) and for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e), scheduled for hearing on May 6, 2009. Plaintiffs *did not file any opposition* to the motions. The court issued an order filed on May 1, 2009 at 11:30 a.m., taking the hearing off calendar, and stating that the motions would be ruled on based upon the papers. As soon as the

1 court stated it was taking the motions under submission, thirteen minutes later, at 11:43 a.m.,
2 Plaintiffs' counsel filed a "Notice" of intent to file an amended complaint, which would
3 effectively render any action on the motions moot.

4 Plaintiffs then followed through and filed an amended complaint on May 2, 2009 (a
5 Saturday). The amended complaint was essentially the same as the original, but with a few
6 added minor allegations which, upon review, made no difference in the substance of the issues or
7 causes of action pled. The amended complaint contained no substantive changes to the original,
8 and appears to have been filed in order to delay the proceedings in this case, which caused
9 unwarranted legal expenses to Defendants.

10 Defendants for the second time, prepared and filed a motion to dismiss pursuant to FRCP
11 12(b)(6), a motion to strike, FRCP 12(f) and for a more definite statement, FRCP 12(e), on May
12 11, 2009, for hearing on July 1, 2009. Plaintiffs served their opposition to the motion(s) three
13 days late. Hearing was continued by the court from July 1 to July 15, when oral argument was
14 heard.

15 The complaint was dismissed against Sacramento County Defendants by motion pursuant
16 to FRCP 12(b)(6) by court order on July 27, 2009.

17 Defendants, State of California and Attorney General Edmund G. Brown were dismissed
18 by motion pursuant to FRCP12(b)(6) by court order on July 29, 2009.

19 III

20 FACTUAL BACKGROUND OF LITIGATION

21 Plaintiffs' counsel, Gary W. Gorski and Daniel M. Karalash, filed and litigated the case
22 of *Mehl, et al. v. Lou Blanas, et al.*, United States District Court for the eastern District of
23 California, Civ. No. S03-2682 MCE KJM. In that lawsuit, based upon identical premises that
24 Plaintiffs were denied their applications for CCW permits because they did not contribute to the
25 Sheriff's election campaign, and had they done so, they would have received their permits, the
26 court granted Sacramento County Defendants' motion for summary judgment and entered
27 judgment in favor of Defendants in February of 2008. This current action was filed in

1 September of 2008. The only difference between the *Mehl* case and the current litigation, was
2 the inclusion of the RICO cause of action.

3 Plaintiffs' original complaint was 74 pages long, containing 758 paragraphs, many of
4 which were nonsensical or merely listed individuals who had been granted gun permits during
5 the past twenty years by the Sheriff's Department, or contained purported case law. The
6 amended complaint was 78 pages long, containing 808 paragraphs. Along with several
7 additional paragraphs within the RICO cause of action, the amended complaint added a cause of
8 action for declaratory and injunctive relief.

9
10 **IV**
ARGUMENT

11 **A. Plaintiffs' Claims Against Sacramento County Defendants Were Unreasonable,**
12 **Meritless, Frivolous, or Vexatious, and Brought In Bad Faith, Entitling Defendants**
13 **to Attorneys' Fees.**

14 42 U.S.C. §1988(b) allows a prevailing party to recover attorneys' fees as part of a
15 recovery of costs. 42 U.S.C. § 1988(b) states in pertinent part, "In any action or proceeding to
16 enforce a provision of [. . .] the Revised Statutes [42 USCS §§ 1981-1983 . . .], . . . the court, in
17 its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs,
18" When the plaintiffs' action is frivolous, unreasonable, or without foundation, a prevailing
19 defendant in § 1983 litigation may be entitled to an attorney's fee award.

20 Plaintiffs brought this lawsuit pursuant to 42 USCS § 1983 based upon allegations of
21 violation of their constitutional and civil rights. As County Defendants have prevailed upon the
22 motion to dismiss, this court may therefore order an award of attorney's fees to Defendants and
23 against Plaintiffs. Sotomura v. County of Hawaii, 679 F.2d 152 (9th Cir. 1982).

24 A prevailing civil rights defendant should be awarded attorneys' fees where the action
25 brought is found to be unreasonable, frivolous, meritless or vexatious. Patton v. County of King,
26 et al., 857 F.2d 1379, 1381 (9th Cir.1988) citing, Christiansburg Garment Co. v. EEOC, 434 U.S.
27 412, 421, 54 L.Ed.2d 648, 98 S.Ct. 694 (1978). Pursuant to 42 USCS § 1988, attorney fees may
be awarded to a prevailing defendant upon a finding that the plaintiff's action was frivolous,

1 unreasonable, or without foundation, even though not brought in subjective bad faith.
2 Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). An action is frivolous if it
3 lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct.
4 1827, 104 L.Ed.2d 338 (1989). Likewise, an award of attorneys fees is appropriate when the
5 court finds that the plaintiff's actions were "frivolous, unreasonable, or groundless, or that the
6 plaintiff continued to litigate after it clearly became so." Hughes v. Rowe, 449 U.S. 5, 15
7 (1980). A lawsuit is frivolous if it is "so lacking in arguable merit as to be groundless or without
8 foundation." Walker v. City of Bogalusa, 168 F.3d 237, 240 (5th Cir. 1999).

9 Courts have awarded attorneys fees to prevailing defendants where no evidence supports
10 the plaintiff's position or the defects in the suit are of such magnitude that the plaintiff's ultimate
11 failure is clearly apparent from the beginning or at some significant point in the proceedings
12 after which the plaintiff continues to litigate. Smith v. Smythe-Cramer Co., 754 F.2d 180, 183
13 (6th Cir. 1985). Courts which have awarded fees to prevailing defendants have emphasized the
14 lack of evidence of unconstitutional acts presented by the plaintiff. Id. at 184; See, e.g., Lewis v.
15 Brown & Rood, Inc., 711 F.2d 1287 (5th Cir. 1983) (no evidence of discrimination and want of
16 prosecution), on reconsideration, 722 F.2d 209 (5th Cir.), cert. denied, 467 U.S. 1231, 104 S.Ct.
17 2690, 81 L.Ed.2d 884 (1984).

18 As set forth above, Plaintiffs' counsel knew or should have known that Plaintiffs' § 1983
19 claims lacked any merit based upon the Mehl v. Blanas, lawsuit litigated by Plaintiffs' counsel
20 previously in this court. "[B]ehavior is "vexatious" when it is harassing or annoying, regardless
21 of whether it is intended to be so, since it is enough that attorney acts in disregard of whether his
22 conduct constitutes harassment or vexation, thus displaying serious and studied disregard for
23 orderly process of justice." Cruz v. Savage, 896 F.2d 626 (CA1 Puerto Rico, 1990).

24 The court herein found that Plaintiffs' claims lacked any factual and legal basis for the
25 constitutional claims made in its adjudication of County Defendants' motion to dismiss, an
26 assessment made at the time the complaint was filed. See Tutor-Saliba Corp., et al. v. City of
27 Hailey, et al., 452 F.3d 1055, 1060 (9th Cir. 2006).

1 **B. Plaintiffs' counsel should be jointly and severally liable for an award of attorneys'**
2 **fees to Defendants.**

3 28 USCS § 1927 states:

4 Any attorney or other person admitted to conduct cases in any court of the United
5 States or any Territory thereof who so multiplies the proceedings in any case
6 unreasonable and vexatiously may be required by the court to satisfy personally
7 the excess costs, expenses, and attorneys' fees reasonable incurred because of
8 such conduct.

9 Pursuant to 28 USCS § 1927, a prevailing defendant's attorney fees may be taxed to the
10 opposing attorney "when an attorney has engaged in some sort of conduct that, from an objective
11 standpoint, falls short of the obligations owed by a member of the bar to the court and which, as
12 a result, causes additional expense to the opposing party." Wilson-Simmons v. Lake County
13 Sheriff's Dep't, 207 F.3d 818, 824 (6th Cir. 2000) (internal citations omitted). An award of
14 sanctions pursuant to 28 USCS § 1927 may be made for harassing litigation tactics and a finding
15 of subjective bad faith is sufficient. In re Peoro, 793 F.2d 1048 (9th Cir. 1986)(emphasis added);
16 Salstrom v. Citicorp Credit Services, Inc., 74 F.3d 183, 184-185 (9th Cir. 1995). See also,
17 United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983) (Sanctions awarded pursuant to §
18 1927 must be based upon a finding that the sanctioned attorney acted in subjective bad faith.)
19 The court may make its determination of subjective bad faith based upon a combination or
20 cumulation of factors, e.g., number and length of pleadings, the timing of the filings and the
21 substance of the subject claims. Salstrom, supra, at 185. Bad faith on the part of a litigant can
22 be evidenced, not only by bringing meritless claims, but by asserting meritorious claims for the
23 purpose of harassing the opponent. In re Keegan Management Co., 78 F.3d 431, 436 (9th Cir.
24 1995); See also, East Cascade Women's Group, P.C. v. Tutthill, 216 F. Supp. 2d 1159 (D.Or.
25 2002); Kurz v. Chase Manhattan Bank, 324 F.Supp.2d 444, 451 (S.D.N.Y. 2004). "A finding of
26 bad faith 'does not require that the legal and factual basis for the action prove totally frivolous;
27 where a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides*, the
assertion of a colorable claim will not bar assessment of attorneys' fees.'" Mark Ind., Ltd. v. Sea
Captain's Choice, Inc., 50 F.3d 730, 732 (9th Cir. 1995)(quoting Lipsig v. National Student

1 Marketing Corp., 214 U.S. App. D.C., 663 F.2d 178, 181 (D.C.Cir. 1980).

2 In the case of Royal Oak Entertainment, LLC v. City of Royal Oak, et al., 486 F.Supp.2d
3 675 (E.D. MI. 2007), the court found that when it became clear upon defendants' motion to
4 dismiss that plaintiffs and their counsel should have known that their federal claims had no basis
5 in the law, that the plaintiffs and their counsel should be held jointly and severally liable to
6 defendants pursuant to both 42 USCS § 1988 and 28 USCS § 1927 for attorneys fees related
7 thereto. The court in Wilson-Simmons stated,

8 "An attorney's ethical obligation of zealous advocacy on behalf of his or her
9 client does not amount to carte blanche to burden the federal courts by pursuing
10 claims that are frivolous on the merits. Accordingly when an attorney knows or
11 reasonably should know that a claim pursued is frivolous, or that his or her
12 litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a
13 trial court does not err by assessing fees attributable to such actions against the
14 attorney."
15 Wilson-Simmons v. Lake County Sheriff's Dep't, 207 F.3d 818, 824 (6th Cir. 2000).

16 Under § 1927, the decision to award sanctions is a matter within the court's sound discretion.

17 Wages v. Internal Revenue Service, 915 F.2d 1230, 1235 (9th Cir. 1991), cert denied, 498 U.S.
18 1096, 111 S.Ct. 986, 112 L.Ed.2d 1071.

19 In this case Plaintiffs' counsel litigated the *Mehl* case in this court and received and
20 reviewed the Court's order granting County Defendants' motion for summary judgment. Within
21 months of that ruling, Mr. Gorski and Mr. Karalash filed a complaint on the identical basis as the
22 *Mehl* case, included allegations from a case they also has previously litigated, entitled,
23 *Barnsdale, et al. v. Polete, et al*, United States District Court for the Eastern District of
24 California, Case No. 07-CV-01636-LKK-KJM¹, which pertained to the Sacramento County
25 Deputy Sheriff's Association, and added a RICO cause of action, which by the face of the
26 complaint was barred by the statute of limitations, and standing, if not by the lack of factual
27 basis. It is interesting to note that Plaintiffs did not make any opposition to several portions of
28 Defendants' motion to dismiss. Further, Plaintiff refers to "Plaintiff Mehl" in his argument in
29 opposition to Defendants' motions, indicating a "cut and paste" from that case to this for the

¹ Judgment in favor of the defendants in the *Barnsdale* case was entered on February 12, 2008.

1 arguments.

2 From the very onset of this case, Plaintiffs and their attorneys knew that their claims were
3 without merit. Plaintiffs' counsel had all the information necessary to evaluate the legal validity
4 in bringing this case at the time it was initially filed. Yet, knowing the legal and procedural
5 background, Plaintiffs' counsel set out again to sue the Sheriff, former Sheriff, and the Sheriff's
6 Department.

7 Even after having been educated in the prior *Mehl* litigation and placed in a position
8 which Plaintiffs' counsel should have recognized the objectively baseless nature of his clients' §
9 1983 claims, Plaintiffs' counsel knowingly put Defendants' to the expense of preparing and
10 filing a motion to dismiss twice. Plaintiffs' counsel knew or should have known that the claims
11 of Plaintiffs had no merit, especially after having reviewed Judge England's rulings in the *Mehl*
12 litigation. It is significant upon review of Judge England's order granting Defendants' motion
13 for summary judgment in the *Mehl* case, that the ruling there established that Plaintiffs' claims
14 were without merit. One can only wonder why Plaintiffs' counsel were pursuing this action on
15 identical issues but for the RICO claim.

16 Knowing what he did about his clients' cases at the time of the complaint, what other
17 explanation could there be for the continuing litigation by these attorneys against the Sheriffs
18 and the Department on the same issue, but bad faith, frivolousness and harassment. The only
19 logical, inescapable conclusion is that Plaintiffs' attorneys used this Court and the authority of an
20 attorney practicing in this Court, to harass the Sheriff's Department and past and present Sheriffs
21 because of their personal animosity and disdain for management of the Department. The use of
22 this Court and the Court process in this manner violates any sense of common decency and
23 respect, not to mention the lawful duties of attorney admitted to practice before this Court. At
24 the end of the day, under such circumstances, the government should not be required to foot the
25 bill for attorneys' fees and costs to defend against frivolous and meritless claims and the
26 unnecessary and unreasonable litigation employed by Plaintiffs' attorneys in this and other like
27 cases.

C. Defendants are Entitled to \$ 34,500.00 As Reasonable Attorneys' Fees.

Defense counsel has represented defendants in this case since receiving notice of Plaintiffs' the complaint in September of 2008. Defendants have incurred a total of \$ 34,500.00 in attorneys' fees.

The Ninth Circuit in Intel Corporation v. Terabyte International, 6 F.3d 614 (9th Cir. 1993) set forth the guidelines for district courts in setting attorneys' fees. The Intel court laid out the procedure as follows:

“When it sets a fee, the district court must first determine the presumptive lodestar figure by multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983). Next, in appropriate cases, the district court may adjust the ‘presumptively reasonable’ lodestar figure based upon the factors listed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), [citations omitted], that have not been subsumed in the lodestar calculation. [citations omitted]. The Kerr factors are: 1. The time and labor required; 2. The novelty and difficulty of the questions; 3. The skill requisite to perform the legal services properly; 4. The preclusion of other employment due to acceptance of the case; 5. The customary fee; 6. The contingent or fixed nature of the fee; 7. The limitations imposed by the client or the case; 8. The amount involved and th results obtained; 9. The experience, reputation and ability of the attorneys; 10. The undesirability of the case; 11. The nature of the professional relationship with the client; and 12. Awards in similar cases. Intel at 623.

The detailed breakdown of the attorney hours expended in defending this action is as follows:

September 2008	22.5 x \$150.00 = \$ 3,375.00
October 2008	1.3 x \$150 = \$ 195.00
November 2008	0
December 2008	0.4 x \$150 = \$ 60.00
January 2009	16.4 x \$150 = \$ 2,460.00
February 2009	26.1 x \$150 = \$ 3,915.00
March 2009	77.1 x \$150 = \$ 11,565.00
April 2009	7.0 x \$150 = \$ 1,050.00
May 2009	37.9 x \$150 = \$ 5,685.00
June 2009	14.3 x \$150 = \$ 2,145.00

1	July 2009	21.0 x \$150 = \$ 3,150.00
2	Motion for Attorneys' Fees	6.0 x \$150 = \$900.00

3 **GRAND TOTAL FEES: \$ 34,500.00**²

4
 5 Defendants realize that the Court must exercise its discretion in determining whether to
 6 award attorneys' fees and in determining what amount is appropriate. In making this
 7 determination, the Court will undoubtedly consider the financial ability of the Plaintiffs to
 8 comply with any award in the Defendants' favor under 42 USCS § 1988. The Ninth Circuit, in
 9 reviewing this issue has stated:

10 "A district court should consider the financial resources of the plaintiff in
 11 determining the amount of attorney's fees to award to a prevailing defendant in a
 12 1983 action. The award should not subject the plaintiff to financial ruin.
 13 Nevertheless, a district court should not refuse to award attorney's fees to a
 prevailing defendant... solely on the ground of the plaintiff's financial situation."
Patton v. The County of Kings, 857 F.2d 1379, 1382 (9th Cir. 1988).

14 However, in this case, Defendants believe that Plaintiffs' counsel should be jointly and severally
 15 liable for an award of attorneys fees under 28 USCS § 1927.

16 From day one when this case was filed, Plaintiffs' counsel should have known that his
 17 clients had no likelihood of success in this litigation. Plaintiffs claims were barred by statutes of
 18 limitations, standing, and lack of factual basis to support their claims, which their counsel knew
 19 or should have known, and yet Defendants were forced to defend this action, and prepare and file
 20 a motion for dismissal twice. Each complaint filed had to be painstakingly reviewed word by
 21 word, line by line, and compared for any substantive changes - none of which were found. In
 22 both complaints, the majority of the allegations had no connection whatsoever to the named
 23 Plaintiffs. Following a tedious review of the two complaints, Defendants had to fashion their
 24 defense to the action twice.

25 Defendants contend that Plaintiffs' counsel used this court, again, and the availability of
 26

27 ² Defense counsel will comply with a request from the Court for the submission of all detailed client billings in this matter with appropriate redactions for attorney/client privilege and work product, for an *in camera* review.

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1 the public record to attorneys as a venue to name the public employee Defendants as
2 extortionists and purveyors of graft. There should be no free pass to use the court's records in
3 this manner just because one is a licensed attorney. The amended complaint was 78 pages and
4 808 paragraphs. How could any attorney reasonably believe that was acceptable. The
5 complaints contained numerous inappropriate "statements" and allegations. Included were
6 paragraphs that just stated a case cite (¶¶ 16, 42, 48, 624-630, 691, 783), ramblings about the
7 *Freedmen* cases, multiple references to disputes between the Deputy Sheriff's Association, a
8 labor union, and Sheriff's management (which were cut and pasted from Plaintiffs' counsels'
9 complaint filed in the *Barnsdale* case, into this complaint), and paragraphs which labeled
10 Defendants as extortionists (¶¶ 61, 645-675). Plaintiffs' have no standing to make any claims
11 based upon these allegations. They were suing because they did not receive a carry concealed
12 weapon permit. Plaintiffs' attorneys nevertheless used the court to smear Defendants' good
13 names in the public record. The amended complaint also had 40 pages and 502 paragraphs
14 listing persons who had received concealed weapons permits, some going back over 10 years,
15 well beyond any statute of limitations. (¶¶ 95-597). Some paragraphs merely cited to and
16 recited the language of federal statutes. (¶¶ 607, 608, 708). The complaints filed in this case
17 clearly violated Rules 8 and 11 of the Federal Rules of Civil Procedure, and such abuse should
18 not be tolerated, nor the expense of which foisted upon the public coffers.

V

CONCLUSION

21 For the foregoing reasons, Defendants are entitled to recover \$ 34,500.00 in attorneys'
22 fees against Plaintiffs and their counsel, jointly and severally.

24 Dated: August 5, 2009

LONGYEAR, O'DEA & LAVRA, LLP

/s/ Jeri L. Pappone

By: _____

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