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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

MATTHEW HAMBY and CHRISTOPHER SHELDEN, a married couple, CHRISTINA LABORDE and SUSAN TOW, a married couple, SEAN EGAN and DAVID ROBINSON, a married couple, TRACEY WIESE and KATRINA CORTEZ, a married couple, and COURTNEY LAMB and STEPHANIE PEARSON, unmarried persons, Plaintiffs, v. SEAN C. PARNELL, in his official capacity as Governor of Alaska, MICHAEL GERAGHTY, in his official capacity as Attorney General of the State of Alaska, WILLIAM J. STREUR, in his official capacity as Commissioner of the State of Alaska, Department of Health and Social Services, and PHILLIP MITCHELL, in his official capacity as State Registrar and Licensing Officer, Alaska Bureau of Vital Statistics, Defendants.	Case No. 3:14-cv-00089-TMB **OPPOSITION TO MOTION FOR RECONSIDERATION OF COURT'S ORDER ON MOTION FOR ATTORNEY'S FEES (42 U.S.C.§ 1988)(FRCP § 59(e))**

Two of the plaintiffs' three counsel have filed a motion for reconsideration of the court's April 15, 2015 order on attorney's fees.[1] The motion was filed pursuant to FRCP 59(e).[2] The motion is without merit as it is based largely on an effort to supplement the record with evidence that was readily available at the time counsel chose to submit a motion for attorney's fees, and it otherwise alleges that the Court erred in applying the law which is not correct and that the Court made errors of fact which is also not correct. Accordingly, the motion should be denied.

A. Standard for granting a motion for reconsideration under Federal Rule of Civil Procedure 59(e).

Rule 59(e) authorizes the district court to reconsider a judgment only in very limited circumstances. "[A]mending a judgment after its entry remains 'an extraordinary remedy which should be used sparingly.'" *Allstate Ins. Co. v. Herron,* 634 F.3d 1101, 1111 (9th Cir. 2011) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999). The four basic grounds upon which a Rule 59(e) motion may be granted are (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion

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[1] It is not apparent that Ms. Gardner and Ms. Shortell have standing to bring their motion. "The Supreme Court has held that Section 1988 vests the right to seek attorney's fees in the prevailing party, not her attorney, and that attorneys therefore lack standing to pursue them." *Pony v. County of Los Angeles*, 433 F.3d 1138, 1142 (9th Cir. 2006). While the original motion for fees was brought by the plaintiffs, the plaintiffs are not a party to this motion, which is brought solely by Ms. Gardner and Ms. Shortell.

[2] Local Rule 59.2 limits the length of motions filed pursuant to Federal Rule of Civil Procedure 59 to ten pages. Counsels' motion is 28 pages long.

is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law." *Herron*, 634 F.3d at 111.

It is improper for a party to use "Rule 59(e) to 'raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'" *Id*. at 1112 (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). This type of use of the procedure would "raise the concern that a party has abused" Rule 59(e)." *Herron*, 634 F.3d at 112. The moving party has a "high hurdle" to meet. *Weeks v. Bayer*, 246 F3d 1231, 1236 (9th Cir. 2001). "Ultimately, a party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *Cachil Dehe Band of Wintun Indians v. California*, 649 F.Supp.2d 1063, 1070 (E.D. Cal. 2009)(citation and internal quotation marks omitted). Evidence submitted cannot meet the requirements of Rule 59 if it "was in the moving party's possession at the time of trial or could have been discovered with reasonable diligence." *Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 212 (9th Cir. 1987). "The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late file documents into 'newly discovered evidence.'" *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *See also Hopkins v. Andaya*, 958 F.2d 881, 887 n. 5 (9th Cir. 1992)("A defeated litigant cannot set aside a judgment because he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the court").

B. Counsels' review of the "Kerr Factors" does not support the granting of their motion for reconsideration because it is simply a re-argument of the original motion, buttressed by affidavits that not be considered because they are not newly discovered or previously unavailable evidence.

Counsels' motion merely reargues the *Kerr* factors, which were thoroughly addressed in the Court's order. The Court's order is twenty pages in length and it addresses all of the *Kerr* factors and does not give any of them short shrift. It is clear that Ms. Gardner and Ms. Shortell disagree with some of the Court's conclusions. They rely on more evidence in the form of affidavits from other attorneys in the Anchorage area and the Boston area and supplements to their own affidavits to support their argument that the court should reconsider its attorney's fees order and grant them greater fees. However, the rules do not permit such "do-overs" through the production of more evidence except in the very limited circumstances in which the evidence is newly discovered or previously unavailable. *Allstate Ins. Co. v. Herron,* 634 F.3d 1101, 1111 (9th Cir. 2011). Plaintiffs have made no showing that these affidavits or information in the affidavits were not previously available and thus under Rule 59 they cannot be used to support a reconsideration of the court's attorney's fees order. As plaintiffs' note, the movants "bear the burden of producing affidavits"[3] to support their requested hourly rates. The plaintiffs chose how to attempt to meet that burden when they filed their motion. They should not now be permitted to supplement that evidence with more and different evidence in an effort to obtain a different result.

As best as can be discerned from counsels' motion, the only apparent justification for not submitting the evidence originally is to point at Ms. Mendel as being responsible for not

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[3] Pl. Mot at 5.

filing additional affidavits. P's Motion at 2. This justification is insufficient. Ms. Gardner and Ms. Shortell argue that they should be entitled to a "do-over" because they were not involved in the drafting of the original fees motion and were not aware of the alleged shortcomings in the motion, which the Court thoroughly discussed in its order. There is simply no support for plaintiffs' position. Counsel's alleged ignorance surrounding the contents of the original motion and its evidentiary support does not add up. The movants separately signed both the original motion and the subsequent reply brief and have stated that Ms. Gardner drafted the reply brief. Similarly, the movants provided their own declarations in support of the motion. The fact that they may regret not including more support before signing it is not a valid justification under Rule 59.

C. Even if the Court considers the new evidence, plaintiffs' argument regarding the "Kerr Factors" does not support reconsideration of the Court's order and judgment regarding attorney's fees.

The new evidence submitted by Gardner and Shortell is nominal in its effect on the Court's analysis of the *Kerr* factors. Similarly, any alleged minor misstatement of the facts by the Court does not weaken the reasoning and support of the Court's conclusions.

Counsels' were clearly offended by any implication that Ms. Mendel was the "lead" attorney on the case.[4] Gardner and Shortell spend a lot of time discussing how they were

[4] If the Court did get that impression, it is understandable. Defendants' attorneys got that impression as well, as a result of Ms. Mendel taking the lead on almost all communication between opposing attorneys and the fact that Ms. Mendel took the lead at the scheduling conference and oral argument.

nothing less than co-counsel and in fact did much of the drafting work.[5] However, while Gardner and Mendel seem to believe the Court did not know this fact and take it into consideration, the Court's award clearly indicates otherwise. Shortell's recovery is double the amount of hours of Ms. Mendel's recovery and Gardner's recovery is much more than that. The Court addressed the differences in workload.

In continuing the comparison between the fees awarded for their time in comparison to Ms. Mendel, the motion argues the Court mischaracterized counsels' experience.
The order mentions when Shortell and Gardner were licensed in Alaska, but did not state that they had already been practicing a few years prior to being licensed in Alaska. Counsels' also argue the Court mischaracterized Ms. Gardner's brief work for the State of Alaska as "focusing on child protection litigation," when in fact that work focused on Medicaid litigation, administrative litigation, and involuntary mental commitments. Neither of these facts, to the extent the Court may have mischaracterized them, changes anything in the Court's thorough analysis. The Court supported the hourly rates awarded with ample evidence.

Gardner and Shortell also argue that they should be entitled to an upward adjustment because when the litigation began they were living in Seattle and had to travel to Anchorage for the purposes of this litigation. There is no legal support for this position. The State should not be liable for additional fees because an attorney chooses to be involved in a matter far from her place of residence. An attorney's involvement in a matter is generally voluntary and in this matter that fact is emphasized by counsels' repeated assertions regarding their alleged

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[5] It is difficult to overlook the irony in Gardner's and Shortell's position about their heavy responsibility for carrying the case in light of how they have distanced themselves from involvement in the attorneys' fees motion.

strategizing surrounding their desire to bring this action long prior to filing the lawsuit and Shortell's recruitment of 6 of the 10 plaintiffs. Counsels made a choice to bring a suit in Anchorage when they were living in Seattle. They are not entitled to an upward adjustment because of their alleged travel between Seattle and Anchorage.

Counsels argue the Court erred when it took into consideration their minimal legal experience working on LGBT issues. They claim the Court's reasoning was "arbitrary and circular." They argue it wasn't their fault that there has been little LGBT litigation in Alaska (they don't discuss their time in Seattle) that could have given them the opportunity to gain experience in the field.[6] Nor was it their fault that their prior employers didn't work on LGBT claims. While it is somewhat unclear, counsels seem to imply that because there has been little opportunity for them to work on LGBT legal issues, they should nevertheless be compensated as experts in the field, because it is not their fault that they have not obtained substantial experience in the relevant field. Counsels' position is without merit.

Counsels also make multiple arguments based on mischaracterizations of the holding in *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008). Counsels attempt to shift their burden to defendants by pointing to *Moreno* stating that defendants have not met their "burden of rebuttal." Pl. Mot. At 25-26. However, *Moreno* addressed a situation in which the party moving for fees met their initial burden. Despite this, the court substantially cut the requested fees with little explanation. The key in *Moreno* is the fact that the court failed to explain and justify the reductions. The Ninth Circuit repeatedly stated that substantial reductions

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6 Counsels don't discuss their Alaskan co-counsel's substantial LGBT legal experience.

in the requested fees can be made by a district court, but the court must give a specific and clear explanation that can be reviewed by a higher court.[7] The court stated that this explanation can be "tedious" for district courts, but attempted to mollify the district court's likely frustration by stating "but the burden of producing a sufficiently cogent explanation can mostly be placed on the shoulders of the losing parties, who not only have the incentive, but also the knowledge of the case to point out such things as excessive or duplicative billing practices."[8] Despite counsels' argument, this statement by the Ninth Circuit did not alleviate a plaintiffs' burden and somehow shift it to defendants. Regardless, defendants made an ample showing of how plaintiffs requested hourly rates and the amount of hours were both excessive.

Similarly, *Moreno* does not stand for the proposition that a district court cannot reduce both the hourly rate and the amount of hours. "It is possible, of course, for a district court to reduce both the hours and hourly rate awarded for some tasks." After the court went on to state that district courts must be careful to avoid "double counting" when making this type of reduction and it must thoroughly explain the decision.[9] In this matter the Court addressed all of the appropriate factors and explained its conclusion thoroughly in a twenty page decision. *Moreno* is distinguishable and provides no support for counsels' motion.

Accordingly, Defendants urge that the motion be denied.

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[7] *Moreno*, 534 F.3d at 112-113.

[8] *Id*. at 1116.

[9] *Id*. at 115-116.

DATED June 3, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2015, copies of the foregoing **OPPOSITION TO MOTION FOR RECONSIDERATION OF COURT'S ORDER ON MOTION FOR ATTORNEY'S FEES (42 U.S.C.§ 1988)(FRCP § 59(e))** were served electronically on the following parties of record pursuant to the Court's electronic filing procedures:

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