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 PROJECT OF CALIFORNIA RENEWAL

18 * Admitted *pro hac vice*

19
 20 **UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

21 KRISTIN M. PERRY, SANDRA B. STIER, PAUL
 22 T. KATAMI, and JEFFREY J. ZARRILLO,

23 Plaintiffs,

24 v.

25 ARNOLD SCHWARZENEGGER, in his official
 capacity as Governor of California; EDMUND G.
 26 BROWN, JR., in his official capacity as Attorney
 General of California; MARK B. HORTON, in his
 27 official capacity as Director of the California
 28 Department of Public Health and State Registrar of

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS
 DENNIS HOLLINGSWORTH, GAIL
 J. KNIGHT, MARTIN F.
 GUTIERREZ, MARK A. JANSSON,
 AND PROTECTMARRIAGE.COM’S
 OPPOSITION TO MOTION TO
 ENLARGE TIME**

1 Vital Statistics; LINETTE SCOTT, in her official
2 capacity as Deputy Director of Health Information
3 & Strategic Planning for the California Department
4 of Public Health; PATRICK O'CONNELL, in his
5 official capacity as Clerk-Recorder for the County
6 of Alameda; and DEAN C. LOGAN, in his official
7 capacity as Registrar-Recorder/County Clerk for
8 the County of Los Angeles,

9 Defendants,

10 and

11 PROPOSITION 8 OFFICIAL PROPONENTS
12 DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
13 MARTIN F. GUTIERREZ, HAK-SHING
14 WILLIAM TAM and MARK A. JANSSON; and
15 PROTECTMARRIAGE.COM –
16 YES ON 8, A PROJECT OF CALIFORNIA
17 RENEWAL,

18 Defendant-Intervenors.

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1 Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com
2 (“Proponents”) submit the following opposition to Plaintiffs’ and Plaintiff-Intervenor’s Motion to
3 Enlarge Time. *See* Doc #729, Doc #742.

4 INTRODUCTION

5 Plaintiffs’ motion to delay indefinitely this Court’s consideration of their request for
6 attorney’s fees and costs contradicts the very reasons supporting the 14-day deadline established in
7 Rule 54. Those reasons are stated unambiguously in the Advisory Committee Notes: “One purpose
8 of this provision is to assure that the opposing party is informed of the claim before the time for
9 appeal has elapsed. . . . Prompt filing [also] affords an opportunity for the court to resolve fee
10 disputes shortly after trial, while the services performed are freshly in mind.” Advisory Committee
11 Notes to 1993 Amendments, Fed. R. Civ. P. 54(d)(2)(B). Both of those policy reasons are relevant
12 here.

13 Moreover, the interests in giving opposing parties notice of fees claims and resolving the
14 issue while the case is fresh in the court’s mind easily outweigh any detriment to Plaintiffs here,
15 especially considering the relatively minimal effort needed to file their motion and supporting
16 documents. Plaintiffs have plainly demonstrated that they have more than sufficient staff dedicated
17 to the case. And it should be particularly easy to complete the motion from the contemporaneous
18 time records that they were required to keep.

19 Finally, courts generally view Plaintiffs’ sole reason for delaying their fees motion—the
20 pending appeal in this case—as insufficient to disregard Rule 54’s requirement for prompt
21 resolution of fee disputes. Therefore, the Court should deny Plaintiffs’ motion.

22 ARGUMENT

23 Several circuit courts have recognized that the intent of Rule 54’s time requirement is both
24 to ensure that opposing parties have informed notice of the fees claim before the time for appeal
25 elapses and, importantly, to enable the district court to decide the issue while the case is still in
26 mind. One appellate court, for example, long ago noted that prompt resolution of fee disputes is
27 important because “[a]n adverse party must be able to assess his position following the trial within
28 the time limits prescribed by the rules of the court, and be guided as to his future action

1 accordingly.” *Woods Constr. Co. v. Atlas Chem. Indus., Inc.*, 337 F.2d 888, 891 (10th Cir. 1964).
2 Other courts have followed suit, recognizing the strong policy reasons that support the rule. *See*,
3 *e.g.*, *Tancredi v. Metropolitan Life Ins. Co.*, 378 F.3d 220, 227 (2d Cir. 2004); *United Indus., Inc. v.*
4 *Simon-Hartley, Ltd*, 91 F.3d 762, 766 (5th Cir. 1996) (noting that the 14-day requirement “serves
5 several laudable purposes,” including the purpose of ensuring that opposing parties have notice of
6 the fees claim); *see also Gaskins v. BFI Waste Services, LLC*, 281 Fed. Appx. 255, 259 (4th Cir.
7 2008) (unpublished) (same).

8 Indeed, “[t]he weight of authority . . . is that the usual course is for the Court to consider
9 attorneys’ fees promptly after the merits decision rather than stay the Fee Petition until resolution of
10 the appeal.” *Unisys Corp. Retiree Medical Benefits ERISA Litigation v. Unisys Corp.*, No. 03-3924,
11 2007 WL 4287393, at *2, 2007 U.S. Dist. LEXIS 89317, at *6 (E.D. Pa. Dec. 4, 2007); *see also*
12 *Manual for Complex Litigation, Fourth*, § 14.222 (2004) (recommending that prompt filing of the
13 motion is necessary to give interested parties notice of fee claim before time for appeal has expired
14 and while services are still fresh in mind).

15 The policy reasons for providing notice of claims for fees and costs in anticipation of appeal
16 have particular force in this case. Proponents, to be sure, have already noticed an appeal of the
17 district court’s ruling. But because controlling authority makes clear that Proponents cannot be held
18 liable for attorney’s fees, *see, e.g., Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1288
19 (9th Cir. 2004), *quoting Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989),
20 Plaintiffs’ fee request assuredly will be targeted at parties that have yet to appeal—*i.e.*, the
21 Governor and the other Administration Defendants, the Attorney General, and the County Clerks
22 for Los Angeles and Alameda counties. Particularly given California’s fiscal challenges, these
23 parties—not to mention the voters who put them in office and the legislators who are embroiled in a
24 budget stand-off with the Governor, *see Shane Goldmacher, Holding Budget Ransom May Be*
25 *Schwarzenegger’s Last Hope*, L.A. Times, Aug. 22, 2010, *available at*
26 <http://articles.latimes.com/2010/aug/22/local/la-me-arnold-budget-20100823>—deserve to know
27 before the time to appeal has expired the potential liability they face from attorney’s fees and costs
28 generated by Plaintiffs. And although these parties have not objected to Plaintiffs’ motion to

1 enlarge time, they cannot by doing so evade the clear interest the State and its People have in
2 making a fully informed decision on whether to appeal. *See, e.g.*, Cal. Const. art. II, § 1 (“All
3 political power is inherent in the people.”); *id.* art. I, § 3(a) (“The people have the right to instruct
4 their representatives, petition government for redress of grievances, and assemble freely to consult
5 for the common good.”).

6 The second reason for the 14-day requirement—to ensure that the facts and litigation are
7 fresh in the judge’s mind—is also important in a case like this that involved dozens of attorneys and
8 a 12-day trial with extended closing argument. It is unfair to the parties and to the Court to try to
9 evaluate a fee award in such intense litigation after all appeals are exhausted, which is potentially
10 years away. *See* Rule 54 Advisory Committee Notes to 1993 Amendments (“Prompt filing affords
11 an opportunity for the court to resolve fee disputes shortly after trial, while the services performed
12 are freshly in mind”); *Mazloun v. District of Columbia*, No. 06-0002, 2008 WL 4876156, at *1
13 (D.D.C. Nov. 12, 2008) (finding that “[p]olicy reasons favor pre-appeal fee petitions” including the
14 benefit of resolving fee disputes while the services performed are freshly in mind); *see also Manual*
15 *for Complex Litigation, Fourth*, § 14.222 (2004) (same). Plaintiffs have offered no reason
16 whatsoever for disregarding this important rationale for Rule 54.

17 While it is true that Rule 54 gives courts discretion to modify that timeframe, the only
18 reason Plaintiffs give for their motion is the pending appeal in this case. When the sole reason for
19 delaying a fee application is the mere fact that an appeal has been filed, courts routinely refuse to
20 exercise their discretion to stay the issue of attorney’s fees until all appeals have been exhausted.
21 *See Klein v. Central States, Se. & Sw. Areas Health & Welfare Plan*, 621 F. Supp. 2d 537, 540
22 (N.D. Ohio 2009) (“Generally, an appeal alone does not justify postponing a decision on a request
23 for attorney’s fees. . . . [E]fficiency favors ruling on the motion for fees and costs now.”); *Unisys*
24 *Corp.*, 2007 WL 4287393, at *2, 2007 U.S. Dist. LEXIS 89317, at *6 (“[A] number of courts have
25 found that a pending appeal, standing alone, is insufficient reason to postpone a fee decision for an
26 indefinite period”); *Lyon v. Kimberly Clark Corp. Pension Plan*, No. 15-3201, 2007 WL 1852215,
27 at *1, 2007 U.S. Dist. LEXIS 46424, at *3 (D.N.J. June 26, 2007) (“Defendant has proffered no
28 reason why a pending appeal alone should constitute sufficient grounds for this Court to deny

1 Plaintiff's motion [to delay the consideration of a request for attorney's fees]"); *McCloud v. City of*
2 *Sunbury*, No. 04-2322, 2006 WL 449198, at *1, 2006 U.S. Dist. LEXIS 9187, at *2 (M.D. Pa. Feb.
3 23, 2006) (noting that the court had never stayed a motion for attorney's fees and expenses simply
4 because an appeal had been filed). In short, Plaintiffs' attempt to revise Congress's policy
5 preference by arguing that it is more appropriate to resolve fee disputes after all the appeals have
6 been fully exhausted has been repeatedly rejected and therefore does not support their motion.

7 Neither does the relatively small burden on Plaintiffs justify their motion. To fulfill their
8 obligation under Rule 54, Plaintiffs simply need to file a motion with supporting evidence and time
9 records. *See* Civil Local Rule 54-5(b). Plaintiffs have demonstrated that they have more than
10 enough staff dedicated to this case to accomplish the work required to file a motion and supporting
11 papers for attorney's fees and costs. This relatively light burden imposed by Rule 54 cannot
12 possibly outweigh Congress's strong policy reasons for prompt consideration of fee disputes. *See*
13 *44 Liquormart, Inc. v. Rhode Island*, 940 F. Supp. 437, 443 (D.R.I. 1996).¹

14 For these reasons, the Court should also deny Plaintiffs' alternative request that they have
15 "45 days of the latter of: (A) the entry of an order resolving the instant motion, or (B) the entry of
16 judgment by this Court." Pl.'s Mot. to Enlarge Time, Doc #729 at 4. First, granting this 45-day
17 extension would ignore that the purpose of Rule 54's 14-day requirement is to give opposing parties
18 notice of the amount of the fees claim before time for appeal elapses, since a party has only 30 days
19 to decide whether to appeal. Second, the relatively easy task of computing a fee total does not
20 justify a 45-day delay any more than it would justify delay until appeals are exhausted. As noted
21 above, the 14-day time limit takes into account that the fees motion is not complicated, especially
22 since Plaintiffs' attorneys are required to keep contemporaneous time records and those records
23 should be relatively easy to compile. *See* Civil Local Rule 54-5(b)(2); *Ackerman v. Western Elec.*
24 *Co., Inc.*, 643 F. Supp. 836, 863 (N.D. Cal. 1986) ("In the absence of contemporaneous time
25 records, the court in its discretion may deny an award of attorney's fees") (citing *Hensley v.*
26

27 ¹ Even if the Court is inclined to grant Plaintiffs' motion to delay submission of supporting
28 evidence for attorney's fees and costs, it should at the very least require Plaintiffs to file their
motion for fees now so that opposing parties have some notice about the nature of their fee claims.

1 *Eckerhart*, 461 U.S. 424, 433 (1983)).

2 **CONCLUSION**

3 In sum, Congress has been clear about why Rule 54 imposes a 14-day timeframe to file a
4 motion for attorney’s fees and costs. Courts have routinely recognized those reasons, holding that
5 delay is not justified simply because there is a pending appeal. This Court should do the same here.

6 Because Plaintiffs have given no good reason for disregarding Rule 54’s 14-day notice
7 requirement, Defendant-Intervenors respectfully request that the Court deny their motion to delay
8 consideration of attorney’s fees and costs.² Even if the Court is inclined to give Plaintiffs additional
9 time to provide their supporting documentation, it should at the very least require Plaintiffs to file a
10 motion stating the total amount of fees requested.

11
12 DATED: August 23, 2010

13 ALLIANCE DEFENSE FUND
14 ATTORNEYS FOR DEFENDANT-INTERVENORS
15 DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
16 MARTIN F. GUTIERREZ, MARK A. JANSSON, AND
17 PROTECTMARRIAGE.COM – YES ON 8, A PROJECT
18 OF CALIFORNIA RENEWAL

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27 By: /s/ Brian W. Raum
28 Brian W. Raum

27 _____
28 ² For the reasons stated herein, the Court should deny both Plaintiffs’ original motion to
enlarge time, Doc #729, and the motion to enlarge time to file a bill of costs they later filed “in an
abundance of caution and for avoidance of doubt,” Doc #742.