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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LORIE ANN GUZMAN, Plaintiff and Respondent, v. MANDARICH LAW GROUP, LLP, Defendant and Appellant.	H049562 (Santa Clara County Super. Ct. No. 18CV322871)
LORIE ANN GUZMAN, Plaintiff and Appellant, v. MANDARICH LAW GROUP, LLP, Defendant and Respondent.	H049824 (Santa Clara County Super. Ct. No. 18CV322871)

Mandarich Law Group, LLP (Mandarich) appeals a judgment after a jury awarded damages to the designated class, represented by nominal plaintiff Lorie Ann Guzman,[1] based on a violation of the Rosenthal Fair Debt Collection Practices Act (the Rosenthal Act) (Civ. Code, § 1788 et seq.).[2] As part of the verdict, the jury determined that

[1] Guzman represented the class in the action. Given the procedural history of the case, discussed *post*, the class is the true party to these appeals, and we thus refer to the class throughout our opinion.

[2] Undesignated statutory references are to the Civil Code unless otherwise indicated.

Mandarich's violation was unintentional but not bona fide. It awarded damages consistent with evidence concerning Mandarich's net worth. On appeal, Mandarich contends that the trial court erred by improperly instructing the jury regarding the "bona fide error defense," and that the jury's verdict was inconsistent and "against the law." (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 673.) Mandarich also alleges that the trial court improperly admitted evidence concerning its net worth. Finding no error, we affirm the judgment.

The class separately appeals a post-judgment attorney fees order.[3] After the class prevailed at trial, it sought to recover $486,843.75 in attorney fees under the Rosenthal Act's mandatory fee-shifting provision. The trial court reduced the hourly rate, declined to apply the requested multiplier, and awarded attorney fees to the class in the amount of $269,325.75. The trial court also refused to award any fees for review of Mandarich's opposition to the attorney fees motion or for the preparation of the reply brief. We determine that the trial court did not abuse its discretion in reducing the fee award, but conclude that it erred in not awarding fees for the review of the opposition and preparation of the reply brief. We reverse and remand the attorney fees cause to the trial court for a supplemental calculation of reasonable attorney fees associated with that work.

I. APPEAL FROM THE JUDGMENT

A. Factual and Procedural Background

1. Background and pre-trial proceedings

Guzman incurred a debt to WebBank, and later defaulted. WebBank assigned the debt to Mandarich's client, CACH, LLC (CACH), who engaged Mandarich to collect on the loan through litigation. Mandarich sent a collection letter to Guzman concerning the debt. The letter notified Guzman of the debt in 12-point type, but provided the notice

[3] We ordered the appeals considered together for purposes of oral argument and disposition.

required by the California Consumer Collection Notice Act (§ 1812.700 et seq.)—a description of debtor rights under the Rosenthal Act and its federal counterpart, the Fair Debt Collection Practices Act (FDCPA, 15 U.S.C. § 1692 et seq.)—in 10-point type.

Guzman filed a class action complaint, alleging one cause of action for violation of section 1812.701, subdivision (b) which specifies the required font size for section 1812.700 disclosures.[4] She contended she was entitled to an award of statutory damages of up to $1,000 pursuant to section 1812.702, and the class was entitled to statutory damages of the lesser of $500,000 or 1 percent of Mandarich's net worth, pursuant to section 1788.17. She also sought an award of reasonable attorney fees and costs.

Upon learning of the lawsuit, Mandarich sent Guzman a cure letter "in the appropriate font."[5] The parties engaged in unsuccessful settlement discussions. The trial court denied Mandarich's motion for summary judgment or summary adjudication, as well as a later renewed request for summary judgment. The trial court certified a class of 443 members, and the case proceeded to jury trial. Because Mandarich timely cured the defect as to Guzman individually, before trial the parties agreed that Guzman would not present evidence as to any monetary damages she claimed to suffer due to Mandarich's actions. The court thereafter dismissed Guzman's individual claim with prejudice.

2. Motions in Limine

Prior to the start of trial, the class sought a ruling in limine allowing it to introduce evidence of Mandarich's net worth. Specifically, the class asked permission to introduce certain of Mandarich's responses to special interrogatories and requests for production of

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[4] "The type-size used in the disclosure [required by section 1812.700] shall be at least the same type-size as that used to inform the debtor of his or her specific debt, but is not required to be larger than 12-point type." (§ 1812.701, subd. (b).)

[5] Section 1788.30, subdivision (d) provides, "A debt collector shall have no civil liability under [the Rosenthal Act] if, within 15 days either after discovering a violation which is able to be cured, or after the receipt of a written notice of such violation, the debt collector notifies the debtor of the violation, and makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor."

documents, including a document entitled "Mandarich Law Group LLP Balance Sheet [a]s of May 31, 2018" (the balance sheet). Mandarich opposed the motion, contending that neither the responses nor the balance sheet were admissible absent the satisfaction of certain foundational elements. Mandarich further argued that the class did not timely identify the balance sheet as an exhibit and did not identify a witness for trial who could testify regarding Mandarich's net worth. Mandarich denied that Ryan Vos, the managing attorney who verified Mandarich's discovery responses, had information necessary to establish foundation as to the balance sheet. Finally, Mandarich questioned the relevance of the balance sheet, as it did not prove Mandarich's net worth at the time of the July 2021 trial.

The trial court agreed with Mandarich that the fact the balance sheet was produced in discovery did not render it admissible per se. However, the court disagreed that Vos necessarily would be unable to lay a proper foundation for the balance sheet, or that the information in the balance sheet was irrelevant because it reflected the net worth at the time of the violation. Thus, the court found the balance sheet would be admissible if Vos was able to lay a foundation. However, the court also recognized that the class might have an issue if Vos was not able to interpret the document. The court overruled Mandarich's objection based on the fact the violation occurred in February 2017 and the balance sheet purportedly reflected the firm's net worth in May 2018, stating, "But these are documents you produced -- right? -- that came from your files. So how else can [the class] get documents? [¶] I mean, I guess, if you had better information, you should've produced it instead of producing it now."

3. Trial Proceedings

a. Evidence

The class's claims proceeded to a jury trial. Following opening arguments, the jury heard testimony from two witnesses, Vos and Guzman.[6] Vos was the primary witness for both parties. He was employed by Mandarich in 2010 as the managing attorney for their Los Angeles office, and held that position when Mandarich sent the demand letter to Guzman, although he no longer worked for Mandarich at the time of the trial. Relevant to this appeal, his testimony concerned Mandarich's process for sending demand letters to consumers/debtors, and Mandarich's net worth for purposes of the class's request for statutory damages.

1. Testimony concerning the demand letter process

Vos testified that CACH, the holder of Guzman's loan, was a subsidiary of SquareTwo Financial (SquareTwo). He received training from SquareTwo concerning the duties they expected Mandarich to fulfill. When CACH sent Mandarich an account for collection, Mandarich had a template demand letter it would send to the consumer. Vos approved the template for the letter that was sent to Guzman, and confirmed at trial that the font size was different on the front and back of the letter Guzman received. Vos understood that the information on the back of the letter consisted of the state-required disclosures, which were required to be in the same font as the information on the front of the letter.

One of Vos's duties as managing attorney was to ensure compliance with state and federal laws. He worked with an employee from SquareTwo, Jessica Snodgrass, to review and approve the template demand letter that was sent to Guzman. Mandarich used a template rather than drafting an individual letter to each consumer in order to

[6] Guzman's testimony primarily served to establish that the back page of the letter she received from Mandarich was in a smaller type-size than the front of the letter. On appeal, Mandarich does not dispute this contention.

"control the information that was being sent to the consumers. . . . [¶] [T]he templates allowed for efficiency and . . . for the guardrails on what was being submitted to consumers, and especially because you can see here that there's so much regulation that's required." An attorney at Mandarich would draft the template letter. It was then reviewed by an outside attorney certified through an international trade organization (a "MAP attorney") that is part of the debt collection industry. The template would come back to Mandarich for submission to SquareTwo. After "quite a bit of back and forth" between Mandarich and SquareTwo, Mandarich would give final approval of the template. SquareTwo then worked with a vendor to develop the template, populate the forms, and print and mail the letters to the consumers.

Regarding the template that was used to send the demand letter to Guzman, the evidence at trial included an e-mail chain between Vos, Snodgrass, and others concerning the approval process. Snodgrass sent to Vos several documents to review for approval, including four versions of the first demand letter, referred to by Mandarich as DM1P, one of which was specific to California (DM1P CA). Snodgrass also attached templates for several other types of letters, as well as a "backer" that would be sent with all letters. The backer included the disclosures required by the Rosenthal Act; these disclosures were not part of the DM1P CA. Vos responded to Snodgrass, "DM1P CA approved assuming all font is 12 pt. . . . [¶] . . . [¶] Backer approved assuming you intended to remove the Western Union disclosures. . . . [¶] Disclosures approved." Snodgrass confirmed that the template was "programmed to be 12pt for all DM1P being processed with a CA address." Vos then approved the templates.

Vos testified that while nothing in the e-mail chain expressly directed that the backer be in the same font size as the DM1P CA first demand letter, when he indicated that the form was "approved assuming all font is 12 point," he meant that the whole letter, front and back, should be in 12 point because of the California requirements. Vos did not believe he needed to provide specific direction regarding the backer, although he

conceded that there is a reference in his e-mail to Snodgrass approving the backer separate from the DM1P CA. He contended that there were different versions of the backer based on the state in which the recipient of the letter resided. When Snodgrass responded that the template was programmed for 12-point for all California addresses, he assumed she was referring to the whole letter, including the backer.

Vos represented that Mandarich did not intend that the back of the letter deviate in type-size from the front of the letter. The first time Vos heard from a consumer that the front and back of the letter were in different fonts was when Guzman complained. Vos attested that the firm had policies and procedures in place that were designed to avoid such a mistake, some of which were in writing, and others were conveyed orally. None of the written procedures admitted into evidence indicated that any part of the letter must be in 12-point type. Vos did not receive any indication that there was an error attributable to the printer in the letter sent to Guzman.

The trial court allowed the jurors to submit questions for Vos. The jury inquired whether each of the e-mails in the chain between Vos and Snodgrass included the attachments, and whether the final version of the backer was attached for approval before printing. The jury also asked whether the DM1P CA template and the backer template that Snodgrass attached to the e-mail were in one document, or if they were separate attachments. In response to these questions, Vos stated he could not recall and deferred to the copy of the e-mail admitted into evidence. The jury asked Vos to explain what in the e-mail chain clarified that his instruction that the DM1P CA should be in 12-point font also applied to the backer. Vos indicated that he "would not normally talk about a letter without addressing the entire letter."

2. Testimony concerning Mandarich's net worth

Vos testified that he did not know Mandarich's net worth in 2018. He verified Mandarich's discovery responses, which included a copy of the balance sheet. Vos did not ask anyone at the firm to prepare the balance sheet; someone else at the firm

requested the document at Vos's insistence that the firm respond to the class's discovery requests. He believed someone in the accounting department provided it. Vos had authorization to produce the document as a balance sheet for the company. The balance sheet included the net worth for the firm, stating that the equity was $488,741.93. The trial court admitted the balance sheet into evidence over Mandarich's objection as to lack of foundation.

b. Jury instructions

Mandarich lodged proposed jury instructions with the trial court, including the following instruction regarding the bona fide error defense under the Rosenthal Act, citing section 1788.30, subdivision (e) as authority: "A debt collector shall have no civil liability to which such debt collector might otherwise be subject for a violation of the Rosenthal Act, if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation. [¶] In order to find that [Mandarich] has no civil liability for the alleged violation of the Rosenthal Act, [Mandarich] must prove the following by a preponderance of the evidence: [¶] (1) [Mandarich] did not intend to send the Rosenthal Act Notice in a smaller font than required; [¶] (2) The smaller font size occurred despite the maintenance of procedures reasonably adapted to avoid using an inappropriate font size." Mandarich asked for an instruction defining the term "bona fide error," which the court declined, electing instead to allow the parties to argue the meaning of the term to the jury in closing argument.

In instructing the jury regarding the Rosenthal Act, the trial court included the following instruction regarding the bona fide error defense: "A debt collector shall have no civil liability to which such debt collector might otherwise be subject to for a violation of the Rosenthal Act if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted not withstanding [*sic*] the maintenance of procedures reasonably adapted to avoid such violation. [¶] In order to find that

[Mandarich] has no civil liability for its alleged violation of the Rosenthal Act, [Mandarich] must prove all the following by a preponderance of the evidence. First, that [Mandarich] violated the Rosenthal Act unintentionally; two, that the violation resulted from a bona fide error; and, three, that [Mandarich] maintained procedures reasonably adapted to avoid the violation. [¶] To show it maintained procedures reasonably adapted to avoid such error, [Mandarich] must explain the specific procedures used and how they were reasonably adapted to avoid the error."

During deliberations, the jury submitted two questions to the court. Outside the presence of the jury, the court described the questions as "one relating to bona fide error, one related to maintaining procedures."[7] Regarding the "maintained procedures question," the trial court "said something along the lines of 'This is a question that you need to decide based on the jury instructions you have and the evidence.' " As to the bona fide error question, the court responded, " 'A bona fide error is an error made in good faith.' " Neither party objected to the court's responses to the questions.

4. Verdict and post-trial proceedings

The jury returned a special verdict in favor of the class, in the amount of $4,887.41, the maximum statutory damages permitted under the statute.[8] The jury determined that Mandarich violated the Rosenthal Act. While it found that the violation was not intentional, it also found that it was not the result of a bona fide error. As such, the special verdict form directed the jury not to answer the question, "Did [Mandarich] maintain procedures reasonably adapted to avoid the violation?" and instead move straight to the determination of damages.

After seeing the special verdict form, but before reading the verdict on the record, the court asked to conference with the attorneys. Because the jury found Mandarich's

[7] The specific questions were not included in the record on appeal.

[8] Guzman was not permitted to partake in this recovery because of Mandarich's cure letter. (§ 1788.30, subd. (d).)

violation to be both unintentional and not bona fide, the court stated, "it's difficult for me to see a situation where the jury could find that the violation was not intentional but also not made in good faith." The court recognized that the special verdict form set forth intention and bona fide error as separate elements, but worried that allowing the verdict to proceed as indicated would "lead to problems at the appellate court. I frankly think the jury is trying to say that it was not done in good faith because the procedures that existed were either inadequate or existed only on paper. . . ."

The class argued that the elements of intent and bona fide error are separately delineated in the statute and, given the jury's questions about maintaining and following procedures, the jury could have decided that there were procedures in place that Mandarich did not follow in good faith. Mandarich contended that it had asked the court during the process of drafting the jury instructions to eliminate the "bona fide error" language, arguing that it was "inherently inconsistent to find something [ ] was intentional but then at the same time find that it was not a bona fide error." While the court "[didn't] dispute it's a problem," it ruled that it would accept the verdict, as Mandarich could move for a new trial if appropriate.

The trial court entered judgment in the class's favor in August 2021. Mandarich thereafter moved for a new trial pursuant to Code of Civil Procedure sections 657 and 659.[9] The trial court denied the motion, following which Mandarich timely filed its notice of appeal from the judgment. (Code Civ. Proc., § 904.1, subd. (a)(1); Cal. Rules of Court, rule 8.108(b).)

[9] Aside from the notice of Mandarich's intention to move for new trial, none of the pleadings related to the motion are part of the record on appeal. Mandarich does not raise for review any issues concerning the trial court's ruling on the motion.

II. DISCUSSION

A. Judgment

Mandarich cites three bases in support of its appeal from the judgment entered against it. First, Mandarich contends the trial court erred by declining to instruct the jury regarding the bona fide error defense using the language of section 1788.30, subdivision (e). Mandarich next argues that the " 'bona fide' instruction" "confused and misled the jury," resulting in a verdict that was "inconsistent" and "against the law." Finally, Mandarich maintains that the trial court erred in admitting the balance sheet into evidence.

1. Governing Law

Both the Rosenthal Act and FDCPA govern debt collection in California. (*Timlick v. National Enterprise Systems, Inc.* (2019) 35 Cal.App.5th 674, 680 (*Timlick*).) A violation of the provisions requiring debt collectors to provide written notice to debtors that includes a description of the debtor's rights (§ 1812.700) in the same type-size as that used to notify the debtor of the debt (§ 1812.701, subd. (b)) is considered a violation of the Rosenthal Act (§ 1812.702).

The Rosenthal Act did not initially permit class actions. (*Timlick, supra,* 35 Cal.App.5th at p. 681.) Section 1788.30, subdivision (a) states, "Any debt collector who violates this title with respect to any debtor shall be liable to that debtor *only in an individual action,* and his liability therein to that debtor shall be in an amount equal to the sum of any actual damages sustained by the debtor as a result of the violation." (Italics added.) In 1999, the Legislature added section 1788.17 to the Rosenthal Act, which incorporates provisions of the FDCPA. "Notwithstanding any other provision of [the Rosenthal Act], every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code." (Civ.

Code, § 1788.17.) Section 1692k(a) of Title 15 of the United States Code authorizes both individual and class action remedies.

Under the FDCPA, the amount of damages a debt collector owes for a violation of the act depends on whether the action was brought by an individual or as a class action. "[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—[¶] (1) any actual damage sustained by such person as a result of such failure; [¶] (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or [¶] (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector." (15 U.S.C. § 1692k(a)(1), (2)(B).) "A debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." (15 U.S.C. § 1692k(c).) The statute does not define "bona fide error."

Section 1788.30 similarly includes a defense to liability. "A debt collector shall have no civil liability to which such debt collector might otherwise be subject for a violation of [the Rosenthal Act], if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation." (§ 1788.30, subd. (e).) Section 1788.30, subdivision (e) does not require the debt collector to demonstrate that the error was "bona fide."

2. Standards of review

Generally, the appellate court applies the substantial evidence standard to its review of a jury verdict, resolving conflicts in the evidence in favor of the prevailing

party, and drawing reasonable inferences in a manner that upholds the verdict. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) However, "[t]he propriety of jury instructions is a question of law that we review de novo. [Citation.]" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) In reviewing the alleged instructional error, we view the evidence and draw inferences in favor of the appealing party. (See *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 4-5.) However, we will not reverse a civil judgment for instructional error unless the error was prejudicial. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 (*Soule*); accord *Choochagi v. Barracuda Networks, Inc.* (2020) 60 Cal.App.5th 444, 467 (*Choochagi*).) "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule*, at p. 580.)

We review the trial court's evidentiary rulings for abuse of discretion. We will not disturb the trial court's exercise of discretion absent a showing by Mandarich that " ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citation.]" (*K.M. v. Grossmont Union High School Dist.* (2022) 84 Cal.App.5th 717, 760 (*K.M.*).)

3. Mandarich has not demonstrated that the trial court committed reversible instructional error

The trial court instructed the jury on the availability of the bona fide error defense using the language of the FDCPA (15 U.S.C. § 1692k(c) ["A debt collector may not be held liable . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."] rather than the Rosenthal Act language of section 1788.30, subdivision (e) ["A debt collector shall have no civil liability . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation."]. Mandarich contends this was

reversible error, as it required Mandarich to unnecessarily demonstrate that the violation resulted from bona fide error in order to avoid liability, and precluded the jury from considering the second element of the defense under section 1788.30, subdivision (e)—whether the violation of the Rosenthal Act "resulted notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation." Mandarich also argues that the jury's special verdict that the violation was unintentional but not bona fide was internally inconsistent and therefore unlawful.

We need not determine whether a defendant in a class action suit brought pursuant to the Rosenthal Act must demonstrate a bona fide error in order to raise a defense to liability in this instance. Here, even if the trial court erred in including the bona fide element of section 1692k(c) of Title 15 of the United States Code in its instructions to the jury, Mandarich has not shown that such an error was prejudicial. Viewing the evidence in the light most favorable to Mandarich, there is not a "reasonable probability that in the absence of the error, a result more favorable to [Mandarich] would have been reached." (*Soule*, *supra*, 8 Cal.4th at p. 574.) Had the jury been instructed under section 1788.30, subdivision (e), and reached the "maintenance of procedures" element of the defense set forth therein, it is not reasonably probable that the jury would have reached a different conclusion concerning Mandarich's liability.

Our Supreme Court's decision in *Soule* provides the structure for our analysis. "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.] Of course, that determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury." (*Soule*, *supra*, 8 Cal.4th at p. 580.) This assessment must consider the individual trial record. "Thus, when deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's

arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580-581, fn. omitted.)

First, we consider the state of the evidence. (*Soule*, *supra*, 8 Cal.4th at pp. 580-581.) The evidence before the jury regarding Mandarich's process for sending out the first demand letter at issue was undisputed. Vos was the only witness who testified regarding the creation of the template and the approval process. He confirmed that there was no written procedure instructing that the backer containing the disclosures required by section 1812.700 should be drafted and printed in 12-point type. The e-mails between Vos and Snodgrass similarly did not include specific instructions that the backer should be printed in 12-point type. Vos instructed Snodgrass to prepare the DM1P CA form in 12-point, but did not provide a separate similar instruction when addressing the backer despite his admission that the backer varied according to location of the recipient. He believed that his reference to the DM1P CA included the front and back of the letter, but did not provide any evidence confirming this fact apart from his own belief.

Vos testified that in general, after initially approving the template, if Snodgrass adopted the changes suggested in his e-mails, Vos did not review the final version of the template before it was sent to the vendor for printing and mailing. There was no evidence of any audit process, a process to clearly communicate the need for the specific font required by statute, or a process to check the letters sent by the firm before issuance. Viewing this evidence in the light most favorable to Mandarich, it is not reasonably probable that the jury would have determined that Mandarich had maintained "procedures reasonably adapted to avoid" the violation of section 1812.701, subdivision (b). To the contrary, the evidence demonstrates no established procedures adopted by the firm to ensure compliance with the statute's font-size requirements, other than the expectation that informal communication between the managing attorney and his employee with no further inquiry would result in statutory compliance.

Looking to the effect of the trial court's other instructions (*Soule, supra,* 8 Cal.4th at p. 581), although the jury did not reach the "maintenance of procedures" question on the verdict form, the court did instruct the jury regarding that element: "To show it maintained procedures reasonably adapted to avoid such error, [Mandarich] must explain the specific procedures used and how they were reasonably adapted to avoid the error." Thus the instructions did not "cause an entire absence of instructional support" for Mandarich's proposed defense that the procedures it had in place to ensure the correct font size were reasonable and any error in the font size in the collection letter was the result of an honest and reasonable mistake in this instance. (*Soule,* at p. 581.) Vos provided no explanation of how Mandarich's procedures were adapted to avoid the printing of the required disclosures in a smaller font than was used on the front of the initial demand letter. We note that the jury specifically addressed questions to Vos requesting that he indicate where in his e-mails to his employee he had instructed that the DM1P CA backer should be in 12-point font. The jury's multiple questions clearly focused on whether Mandarich had procedures in place to avoid errors in statutory compliance, particularly with respect to the requisite font size.

The court in *Soule* also considered the effect of counsel's arguments in the outcome of the case. (*Soule, supra,* 8 Cal. 4th at p. 581.) Here, the class's attorney conceded that the violation of the Rosenthal Act was not intentional, arguing that despite Mandarich's intent to create a system where such a violation would not happen, they did not create a proper process. Class counsel also called into question the lack of a procedure to check the final document before it was sent to the printing vendor. Mandarich's attorney argued that the violation was an honest mistake, and resulted from reasonable, if flawed, procedures. Counsel contended that the statute did not require every policy to be written, noting that Vos clearly knew that it was Mandarich's policy for all correspondence to be in 12-point font. But counsel did not cite any evidence that Snodgrass, who had final responsibility for the issued letter, knew of that statutory

requirement or policy. In short, the class did not focus on the instructional element of bona fide or intentional acts, but argued their case based on Mandarich's failure to implement processes meeting the law firm's stated goal of statutory compliance, which was the defense Mandarich itself proffered. Thus, counsel's arguments did not exploit the alleged instructional error Mandarich asserts.

Finally, we consider any indication that the jury was misled by the trial court's instruction. (*Soule, supra,* 8 Cal. 4th at p. 581.) Prior to obtaining the jury's verdict, the trial court indicated that the jurors submitted several questions during deliberations, without providing detail about the questions, aside from stating that one related to "bona fide error," and one to "maintaining procedures." Mandarich did not designate any of the minute orders from the trial, or any written jury questions, or the court's corresponding answers, as part of the record on appeal.[10] While we are required to view the evidence in the light most favorable to Mandarich in considering their claim of instructional error, that does not obviate their duty to provide a complete record for review. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 609 (*Jameson*).) Absent evidence of the nature of the jury's questions, we cannot infer that the jury was misled by the court's instruction as we have no basis for determining the impact of the inquiries on the issues before us.

The record reflects that the trial court stated that it found it "difficult . . . to see a situation where the jury could find that the violation was not intentional but also not made in good faith." Specifically, the court thought "the jury is trying to say that it was not done in good faith because the procedures that existed were either inadequate or existed only on paper, which seems to me going more towards Element Number 3. . . . [¶] I mean, my sense, although I don't know, is the jury is trying to say it was

[10] We infer from the record on appeal that both the questions and the court's answers were in writing. Prior to starting deliberation, the trial court instructed the jury to write questions it had on a piece of paper to give to the deputy. On the record, the trial court stated that it wrote out its answers to the jury's questions.

unintentional. It really was in good faith because it was unintentional, but that the last elements, maintaining procedures reasonably adapted to avoid the violation, is where they think [Mandarich] slipped." Absent evidence of the jury's questions, we are unable to infer from the court's statements that the jury was misled by the instruction.

Having examined the entire cause within the context of the trial record, we conclude that it is not reasonably probable that a result more favorable to Mandarich would have been reached had the trial court instructed the jury based on section 1788.30, subdivision (e), rather than including the bona fide error language of section 1692k(c) of Title 15 of the United States Code. (See *Choochagi*, *supra*, 60 Cal.App.5th at p. 467.) Thus, the judgment is not subject to reversal on this basis.

Nor do we find that the verdict was inconsistent and thus "against the law." Mandarich contends that the jury "expressed its confusion as to the [bona fide] instruction in questioning the court as to whether an error could be both unintentional and 'bona fide', a question the court did not answer." Further, Mandarich argues that it is inherently inconsistent for the jury to determine that the violation was unintentional but not bona fide. As already discussed, the record on appeal does not include the specific questions the jurors raised to the trial court during deliberations. Aside from indicating that one of the questions "relat[ed] to bona fide error," the trial court did not state on the record that the jury asked if an error could be both unintentional and bona fide. Mandarich did not include in the record any additional evidence regarding the jurors' questions. We thus are precluded from considering those questions in determining whether the trial court erred. (See *Jameson*, *supra*, 5 Cal.5th at p. 609.) Nor does the legal authority Mandarich cites in support of the contention that the verdict is inconsistent compel reversal here, relying solely on a definition from Black's Law Dictionary. As we have already discussed, if the trial court erred in including the bona fide language, Mandarich has not demonstrated prejudice as a result.

4. The trial court did not err in admitting Mandarich's balance sheet into evidence

Mandarich argues that the trial court abused its discretion in admitting the balance sheet into evidence because the class did not lay a sufficient foundation to demonstrate that the business records hearsay exception applied. It further contends the document is irrelevant to proper determination of Mandarich's net worth at either the time of the violation, or the time of trial. We disagree.

a. Business records exception

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271.)

"A trial judge is vested with wide discretion in determining whether a proper foundation has been laid for admission of business records under the business records exception. [Citation.] 'Where the trial court has determined that the foundation laid was sufficient to support the introduction of evidence under the business records exception, and the record reasonably supports this determination, its conclusion is binding on the appellate court.' [Citation.]" (*People v. Zavala* (2013) 216 Cal.App.4th 242, 245-246.) We base our determination of admissibility on the trustworthiness of the evidence by considering the circumstances surrounding the creation of the business record on a case-by-case basis. (*Ibid*.) " 'The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.' [Citation.]" (*Ibid*.)

The court was entitled to find that Vos could lay the foundation for the balance sheet even though he did not prepare it. (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 798.) He was not required to identify the specific Mandarich employee who prepared the balance sheet. (See *People v. Williams* (1973) 36 Cal.App.3d 262, 275 (*Williams*).) Vos was the managing attorney of Mandarich and directed that the balance sheet be provided to respond to the class's discovery requests, which included requests for information about Mandarich's net worth. Mandarich produced the balance sheet in those discovery responses, as verified by Vos. Vos confirmed that he was authorized to produce the document as a balance sheet for the company. He represented that the document, which he indicated was given to him by the firm's accounting department at the time he prepared Mandarich's discovery responses, contained the net worth of the company. Regarding the time of preparation, the balance sheet itself states it provides the information as of May 31, 2018. Vos verified Mandarich's discovery responses in July 2018. There is sufficient evidence to demonstrate that the balance sheet was prepared between May and July 2018.

While Vos did not testify that the balance sheet was prepared in the ordinary course of business, the reasonable inference was that the firm's accounting department did so. (*Unifund CCR, LLC v. Dear* (2015) 243 Cal.App.4th Supp. 1, 8 ["[T]he criteria for establishing that a document is subject to the business records exception to the hearsay rule may be inferred from the circumstances."]; see *Williams*, *supra*, 36 Cal.App.3d at p. 275.) Based on Vos's role as managing attorney with Mandarich, his understanding of the purpose of the balance sheet and the information contained within, and the source of the information (the firm's accounting department), we cannot say that the trial court abused its wide discretion by admitting the document into evidence under the business record hearsay exception. (See *K.M.*, *supra*, 84 Cal.App.5th at p. 760.)

b. Relevance

Because the trial took place in July 2021, Mandarich argues that the balance sheet reflecting the firm's net worth as of May 31, 2018, is not relevant to the determination of damages under section 1692k(a)(2)(B) of Title 15 of the United States Code. That statute allows the class to recover 1 percent of the debt collector's net worth. It does not specify at what point in time the determination of the net worth should take place. While Mandarich cites caselaw in which "courts have taken a net worth from a date within the class period," none of the cases cited preclude the court from allowing evidence of the debt collector's net worth at a time after the violation but before the trial on the matter. (See *Klewinowski v. MFP, Inc.* (M.D.Fla. Apr. 11, 2014, No. 8:13-cv-1204-T-33TBM) 2014 U.S.Dist.LEXIS 50434; *Dalton v. Cardworks Servicing, LLC* (S.D.Ala. Nov. 18, 2010, No. CA 09-00563-CB-C) 2010 U.S.Dist.LEXIS 135136.) Rather, in each of these cases, the federal district court approved a class settlement in which the defendant specified its own net worth without objection, and without a judicial determination of the relevant date. Mandarich has not demonstrated that the trial court abused its discretion in admitting the balance sheet into evidence over Mandarich's relevance objection.[11]

II. APPEAL FROM ATTORNEY FEES ORDER

Finding no error in the judgment, we turn to the class appeal of the post-judgment attorney fees award.

A. Factual and Procedural Background

After the court entered judgment in favor of the class, the class filed a motion for attorney fees and costs. In the motion, class counsel sought fees in the amount of $486,843.75. Class counsel arrived at this number by applying "the required lodestar-

[11] We observe that while the class did not request updated discovery of Mandarich's net worth close to the trial date (see Code Civ. Proc., §§ 2030.070, 2031.050), Mandarich also did not proffer any rebuttal evidence that reflected its net worth on or about the date of trial.

multiplier method . . . based on a $326,732.50 lodestar (hours times rates) and a 1.5 lodestar enhancement for contingent risk." Actual hours included the time spent through the date of the motion and time counsel anticipated spending on reviewing any opposition to the motion and on drafting a reply. The motion included supporting declarations from each of the four attorneys who worked on the case, billing statements, as well as the expert opinion of Richard Pearl, who surveyed the billing rates in "San Jose Area courts," and concluded that "counsel's hourly rates for their work in this class action are well within the range of rates charged by and awarded to comparably qualified attorneys in the Santa Clara County legal community for similar services."

Mandarich opposed the motion on the ground that the rate requested by class counsel was too high. Mandarich argued that class counsel was entitled to "no more than $160,174.92 total," which it arrived at by reducing the hourly rates sought, reducing the number of hours sought, and declining to impose a lodestar multiplier. Mandarich provided a survey of relevant market rates that showed the "average market rates charged to litigate a case of similar complexity" ranging between $300-$550 per hour. Mandarich also provided evidence that other recent fee awards class counsel had received ranged between $325-$550 per hour. Thereafter, the class filed a reply to Mandarich's opposition and requested $9,300 for the additional 15.5 hours counsel spent reviewing the opposition and preparing the reply.[12]

The trial court granted the motion for fees and costs and awarded fees in the amount of $269,325.75.[13] The court concluded that the number of hours billed in this

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[12] In the declaration he submitted with the motion, attorney Steven A. Simons, one of the attorneys representing the class, included in his statement of the time he spent on the matter "the estimated time that I will spend in reviewing the defendant's opposition, preparing a reply brief and attending the hearing on this matter. . . ." In reply to Mandarich's opposition to the attorney fee request, a different attorney representing the class, Raeon R. Roulston, declared that he had read the opposition and prepared the reply.

[13] The court also denied Mandarich's motion to tax costs as untimely. Mandarich did not appeal that order.

matter was reasonable. However, relying in part on the informal market rate survey set forth in *Bidwal v. Unifund CCR Partners* (N.D. Cal., Aug. 27, 2019, No. 3:17-cv-02699-LB) 2019 U.S. Dist. Lexis 147004 (*Bidwal*), the court reduced attorney Fred Schwinn's hourly rate from $700 to $550; attorney Raeon Roultson's hourly rate from $600 to $500; and attorney Matthew Salmonsen's hourly rate from $500 to $350. The court also reduced Steven Simons's hourly rate from $850 to $700, and concluded that Mr. Simons's trial and appellate experience warranted the higher $700 rate.

The court declined to impose a 1.5 lodestar multiplier, finding it inappropriate for this case. Citing *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1139 (*Ketchum*), the trial court held that the market rates adequately compensated the attorneys' contingency risk and skill. While the court generally found that the hours class counsel billed to the matter were reasonable, it declined to award fees for any time counsel spent on reviewing the opposition or preparing their reply to the fees motion, because the court believed there was no notice in the motion that the class would seek these additional fees. A timely notice of appeal followed.

B. Discussion

1. Standard of Review

" '[T]he determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court. . . . [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.]' [Citation.]" (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1096 (*PLCM Group*).) Because an experienced trial judge is in the best position to determine the value of professional services rendered in the judge's court, we will not disturb the trial court's exercise of discretion unless we are " 'convinced [the award is] clearly wrong.' [Citation.]" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49 (*Serrano III*).) We will presume the order is correct, indulging all inferences and presumptions in support of the order. (*Cavalry SPV I, LLC v. Watkins* (2019) 36 Cal.App.5th 1070, 1097 (*Cavalry*).)

However, "discretion must not be exercised whimsically, and reversal is appropriate where there is no reasonable basis for the ruling or the trial court has applied 'the wrong test' or standard in reaching its result. [Citation.]" (*Nichols v. Taft* (2007) 155 Cal.App.4th 1233, 1239.) If there is a reasonable basis for the order, we will uphold the ruling even if " 'a contrary ruling would also be sustainable. We cannot substitute our own judgment.' [Citations.]" (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 428.)

2. Reducing Counsel's Hourly Rates was not an Abuse of Discretion

"[A] court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.' (*Serrano III, supra,* 20 Cal.3d at p. 48.)" (*Ketchum, supra,* 24 Cal.4th at pp. 1131-1132.) What constitutes a "reasonable hourly rate" depends on the "experience, skill, and reputation of the attorney requesting fees. [Citation.]" (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009 (*Heritage Pacific*).) It is generally the rate "prevailing in the community for similar work," which can then be adjusted based on factors that are specific to the case. (*PLCM Group, supra,* 22 Cal.4th at p. 1095; accord *Camacho v. Bridgeport Financial Inc.* (9th Cir. 2008) 523 F.3d 973, 980 (*Camacho*).)

" 'Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate.' [Citation.]" (*Heritage Pacific, supra,* 215 Cal.App.4th at p. 1009; accord *Camacho, supra,* 523 F.3d at p. 980.) However, "[t]he trial court is not bound by an attorney's evidence in support of his requested fee," particularly where the "record [] reflects that the trial court weighed and considered many factors in determining the value of the attorney's services." (*Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 524 (*Vella*); *Camacho,* at p. 980 ["[D]eclarations filed by the fee applicant do not conclusively

establish the prevailing market rate."].) To the contrary, " '[t]he value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' [Citation.]" (*PLCM Group*, *supra*, 22 Cal.4th at p. 1096.)

At the threshold, the class argues that the trial court applied the "wrong legal standard" in determining class counsel's hourly fees. We reject this contention, concluding that the trial court applied the correct legal standard—namely the lodestar method—in reaching its conclusion. A careful review of the trial court's order makes clear to us that the trial court understood the lodestar method, properly articulated said method in its order, and applied it in setting class counsel's hourly rates. Because we reject the class's assertion of legal error, we review the trial court's application of the lodestar method for an abuse of discretion.

On the merits, the class argues that the trial court erroneously applied the lodestar method because it "based its hourly rate determination for this class action in part on the 2019 *Bidwal* case–an individual, as opposed to a class action lawsuit–and, more egregiously, simply did not consider Class Counsel's expert evidence regarding fee awards at all." The class further argues that in setting class counsel's hourly rates, the trial court considered only cases under the Rosenthal Act and the FDCPA, "instead of more complex class actions."

We discern no error in the trial court looking to *Bidwal* simply because *Bidwal* represented an individual, as opposed to a class action. In determining reasonable hourly rates for a fee applicant, the trial court must look to the " 'rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and

reputation.' [Citation.]" (*Camacho, supra,* 523 F.3d at p. 979.) The *Bidwal* court did just that in determining the prevailing rate for attorneys practicing FDCPA/Rosenthal Act cases in Northern California. (*Bidwal, supra,* 2019 U.S. Dist. LEXIS 147004, at pp. 17-23.) In so doing, the *Bidwal* court examined more than a dozen cases alleging violations of the FDCPA and Rosenthal Act. Those cases ranged from 2012 through 2019, and included matters in various stages of proceedings and attorneys of varying skills/experience levels. (*Id*. at pp. 18-21.) The cases surveyed by the *Bidwal* court, contrary to the class's characterization, were also not limited to individual, as opposed to class actions, but included a representation of both. (*Ibid*.) Given the recency and comprehensive nature of the *Bidwal* analysis, as well as the overlapping forum (Northern California/Bay Area), it was within the trial court's discretion to look to the case for guidance in determining class counsel's reasonable hourly rates.

It is clear that the trial court here did not end its analysis of reasonable hourly rates with consideration of the *Bidwal* case. To the contrary, after noting that *Bidwal* "surveyed market rates in Northern California . . . and concluded that $475 per hour was a reasonable market rate for an attorney with 28 years of experience and $375 per hour was a reasonable market rate for an attorney with approximately 20 years of experience," the trial court did not simply set class counsel's rates at these numbers. Instead, the trial court moved on to consider the declaration of the class's fee expert, Richard Pearl, which opined that class counsel's stated rates were reasonable. Contrary to the class's assertion on appeal, the trial court did consider, but simply did not find persuasive, Pearl's opinion, in part because Pearl "d[id] not cite rates awarded in similar cases under the [Rosenthal Act] or FDCPA."[14] Having considered Pearl's declaration, the trial court was under no

[14] The class does not cite any evidence in the record demonstrating that the trial court failed to consider Pearl's declaration, or any other evidence it offered, aside from implicitly contending that the court could not have ruled as it did if it had considered the evidence. We presume that the trial court's order is correct, and that the trial court

obligation to accept it, and it did not abuse its discretion by declining to do so. "The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.]" (*PLCM Group, supra*, 22 Cal.4th at p. 1096; see also *Vella, supra*, 151 Cal.App.3d at p. 524 ["[t]he trial court is not bound by an attorney's evidence in support of his requested fee"].)

The trial court also considered the declaration of June Coleman offered by Mandarich, who opined that $300–$550 per hour was the average market rate charged in "this region of California" to litigate cases with similar complexity to this case. Coleman highlighted relatively recent awards made to the class's attorneys in other, similar actions in the range she identified as reasonable. In addition, the court acknowledged that it was "permitted to rely, at least in part, on its experience" in evaluating the attorney fees request.

Relying primarily on the Ninth Circuit Court of Appeals' decision in *Camacho, supra,* the class argues that the trial court erred by basing its determination of what is a reasonable hourly rate only on cases involving the Rosenthal Act and/or FDCPA litigation, rather than looking at "more complex class actions." In *Camacho,* the district court failed to identify the relevant legal community in determining the reasonable hourly rate, and failed to identify any facts leading to its conclusion that the full hourly rates requested by the attorneys would be unreasonable. Thus, the appellate court remanded the case back to the district court, so it could "determine[e] the prevailing hourly rate in the Northern District for work that is similar to that performed in this case, by attorneys with the skill, experience and reputation comparable to that of [the plaintiff's] attorneys." (*Camacho, supra*, 523 F.3d at pp. 980-981.) In doing so, the court addressed the

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considered all relevant evidence in the record, absent evidence to the contrary. (*Cavalry, supra,* 36 Cal.App.5th at p. 1097; *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 735 ["We will not and do not presume that the trial court disregarded evidence in the record."].)

plaintiff's contention that the district court erred by relying solely on FDCPA cases in determining the appropriate hourly rate. The appellate court agreed that " '[i]n order to encourage able counsel to undertake FDCPA cases, as [C]ongress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases.' [Citations.]" (*Id*. at p. 981.) The appellate court indicated that, on remand, the district court "should not restrict its analysis to FDCPA cases. . . ." (*Ibid*.)

The class contends the trial court here erred because it stated in its order that it discounted Pearl's declaration because he "does not cite rates awarded in similar cases under the [Rosenthal Act] or FDCPA." Thus, the class asks this court to presume that the trial court did not consider cases other than those involving the Roenthal Act or FDCPA in its analysis. But the trial court did not state in its order that it refused to consider any other types of cases in its analysis. The evidence before the court included discussion of Rosenthal Act/FDCPA cases as well as other types of cases. The only conclusion we draw from the court's statement about Pearl's declaration is that the court determined Pearl failed to account for Rosenthal Act/FDCPA cases in his analysis. The court did not err by expecting an expert witness to address such cases in addition to other cases in which the expert determined attorneys performed work similar to that performed by the class's attorneys in this case.[15]

The record reveals that the parties presented the trial court with evidence concerning fee awards in a variety of case types. Pearl's declaration addressed "rates found reasonable for comparably qualified attorneys performing comparable services" in

[15] In his own declaration, Pearl contended that " 'Comparable work' includes all litigation of comparable complexity and difficulty, *not just* individual cases. *Utility Reform Network v[.] PUC* (2008) 166 Cal.App.4th 522, 535 (in determining market rates for similar services, PUC may no limit rates to those awarded PUC practitioners but must *also* take into account attorneys' federal trial and appellate litigation experience). . . ." (Italics added.)

individual and class action non-Rosenthal Act/FDCPA cases.[16] Coleman's declaration opined as to the "average market rates charged to litigate a case of similar complexity to the instant case," based on a review of individual and class action cases in various stages of legal proceedings, with a focus on consumer actions, including Rosenthal Act/FDCPA cases, violations of the Fair Debt Buying Practices Act and the Labor Code, and common-law breaches of contract, "money lent," and "open book account." Because we presume that the trial court considered all relevant evidence, we presume that the trial court considered both the Rosenthal Act/FDCPA cases as well as other types of matters in determining the appropriate hourly rate to apply in this matter.

In addition to considering the various evidence presented by both parties regarding prevailing rates for work of similar complexity, the trial court also considered fee awards that other courts had recently awarded to class counsel in other matters. In particular, the trial court noted, in its order, that " 'at least one court has recently increased rates awarded to Mr. Schwinn, Mr. Roulston, and Mr. Salmonsen to $550, $500, and $350 respectively, to account for the passage of time since *Bidwal*.' [Citation.]" The court then awarded higher rates than those cited from a previous case. While the class correctly contends that the trial court should not simply adopt another court's determination of what constitutes an appropriate rate, appellant has not demonstrated that the court did that in this matter.

Ultimately, the trial court's task was to determine a reasonable hourly rate in the community for similar work, based on its consideration of various factors, including the skill and experience of the requesting attorneys, as well the nature and difficulty of the litigation, the skill required and employed by the requesting attorneys, and other circumstances in the case. (See *PLCM Group*, *supra*, 22 Cal.4th at pp. 1095-1096; *Heritage Pacific*, *supra*, 215 Cal.App.4th at p. 1009.) The record reflects that the trial

[16] Schwinn, Roulston, and Salmonsen did not provide any information about the nature of the cases in which prior courts had awarded them their requested hourly rates.

court weighed and considered many factors in determining the value of class counsel's services. (*Vella*, *supra*, 151 Cal.App.3d at p. 524.) While the record might also support a contrary ruling, the trial court had a reasonable basis to set the hourly rates as it did, and we will not disturb that ruling on appeal.

3. Declining to Apply the 1.5 Lodestar Multiplier was not an Abuse of Discretion

The lodestar figure is the starting point of the attorney fees analysis, and the trial court may adjust it based on the following factors: "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award. . . ." (*Serrano III*, *supra*, 20 Cal.3d at p. 49.) "The purpose of such adjustment is to fix a fee at the fair market value for a particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum*, *supra*, 24 Cal.4th at p. 1132.)

"The economic rationale for fee enhancement in contingency cases has been explained as follows: 'A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.' [Citation.] 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.' [Citations.]" (*Ketchum*, *supra*, 24 Cal.4th at pp. 1132-1133.)

However, "the trial court is not *required* to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains the discretion to do so in the appropriate case; moreover, the party seeking a fee enhancement bears the burden of proof. In each case, the trial court should consider . . . the degree to which the relevant market compensates for contingency risk, extraordinary skill, or other factors under *Serrano III*. We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138, italics in original.) Thus, a contingency adjustment "may be made at the lodestar phase of the court's calculation or by applying a multiplier to the noncontingency lodestar calculation (but not both). ([*Ketchum*,] at pp. 1133-1134.)" (*Horsford v. Bd. of Trustees of California State University* (2005) 132 Cal.App.4th 359, 395 (*Horsford*).) We reiterate for purposes of this analysis that "[t]he ' "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' [*Serrano III*, *supra*, 20 Cal.3d at p. 49.]" (*Ketchum*, at p. 1132.)

The class argues that the trial court abused its discretion by declining to apply a 1.5 lodestar multiplier to its attorney fees award. This argument focuses primarily on contingency risk. Citing to *Gutierrez v. Wells Fargo Bank, N.A.* (N.D.Cal. May 21, 2015, No. C 07-05923 WHA) 2015 U.S.Dist. LEXIS 67298 (*Gutierrez*), *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407 (*Beasley*), and *Pulliam v. HNL Automotive Inc.* (2021) 60 Cal.App.5th 396 (*Pulliam*), the class contends that a risk enhancement is "often an essential component of the plaintiff's reasonable attorneys' fees in consumer cases."

But as Mandarich rightly points out, *Gutierrez*, *Beasley*, and *Pulliam* are all procedurally different from this case. In *Gutierrez*, two law firms litigated a large class action on behalf of plaintiffs; the second firm entered the case as co-counsel after the first firm "nearly wrecked [the] class action." (*Gutierrez, supra,* U.S.Dist. Lexis 67298 at

pp. 3-4, 24.) The federal district court granted attorney fees to plaintiffs based on the lodestar method, applying a 5.5 multiplier to its underlying lodestar figure for the second law firm, after the law firm "rescued the case [that initial counsel] had botched," and "pulled victory from the jaws of defeat" in a multi-million-member class action that culminated in a $203 million judgment. (*Id*. at pp. 24-25.) In doing so, the court considered the many obstacles counsel faced when they entered the case, the exceptional trial performance of one of the firm's attorneys, the notable change to its practices that Wells Fargo introduced in part because of the class action, the risk of nonpayment that the firm accepted, and the delay in payment of the fees. (*Ibid*.)

In *Beasley* the First District Court of Appeal held that the trial court did not abuse its discretion by applying a 1.5 multiplier to the lodestar attorney fees. (*Beasley*, *supra*, 235 Cal.App.3d at p. 1412, overruled on other grounds in *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142.) The court reiterated an important principle that we have already emphasized here: "the trial judge was in the best position to determine the value of the professional services rendered by plaintiffs' counsel, and we may not disturb the judge's decision on this point unless we are convinced it was clearly wrong." (*Beasley*, at p. 1418.) The trial court relied on a " 'contingency risk factor' " as a basis for the multiplier, saying "this factor, as evidenced in part by the expert witness declarations, demonstrated 'that this kind of consumer class action litigation would not be pursued by counsel but for the expectation of receiving enhanced fee awards in successful cases.' " (*Id*. at p. 1419.)

Similarly, in *Pulliam*, the trial court applied a 0.2 lodestar multiplier, which plaintiff requested based on her attorney's contingent risk. (*Pulliam*, *supra*, 60 Cal.App.5th at p. 408.) The Second District Court of Appeal upheld the multiplier, noting that the defendants did not address the contingent risk issue, "or any other factor that courts may consider when awarding a multiplier enhancement." (*Id.* at p. 409) The court discerned no abuse of discretion based on the record before it, which included a

declaration from counsel indicating that the firm billed at the same rate for both contingent and noncontingent cases and attesting to the "risks associated with contingent cases." (*Ibid*.)

We are cognizant that in litigating this public interest case, class counsel fronted almost 500 hours of work as well as $13,500 of their own money in costs. We are also cognizant of the contingency risk that counsel articulated in its brief, that "[a]ll of this time and money would have been lost if class certification had been denied, or if the case had been lost at trial, or had not been won on fee-shifting grounds." But we are not factfinders tasked with making a fee determination in the first instance, as was the court in *Gutierrez*. Nor are we asked to review the propriety of a lodestar multiplier already imposed below, as was the case in *Pulliam* and *Beasley*. Instead, the limited question before this court is whether the trial court abused its discretion in declining to impose a lodestar multiplier.

In answering that question, we find significant that the trial court "observed the entire trial and ruled on various motions before trial." We also find significant that the trial court found, "based on its experience, that the market rates (as defined previously) for [the class's] attorney adequately compensate for the attorneys' contingency risk and skill." Finally, we find significant that the trial court appeared to have set class counsel's market rates at the higher end of the reasonableness spectrum – meaning, higher than the rates contemplated in *Bidwal*, higher than the rates recommended in the Coleman declaration, and higher than the "increased rates" that class counsel recently received in another action. Based on this record, it is reasonable to infer that in setting these rates, the trial court had already included a "contingency adjustment" at the lodestar phase of its calculation, and thus declined to apply the multiplier. (*Horsford*, *supra*, 132 Cal.App.4th at p. 395.)

Making such an inference does not put the trial court at odds with the holding in *Ketchum*. In its opening brief, the class cites to a portion of *Ketchum* stating, " '[T]he

unadorned lodestar reflects the general local hourly rate for a *fee-bearing case*; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider.' *Ketchum*, [*supra*, 24] Cal.4th at [p.] 1138 (emphasis in original)." The class takes that quote slightly out of context. The Supreme Court stated, "*Under our precedents*, the unadorned lodestar reflects the general local hourly rate for a fee-bearing case. . . ." (*Ketchum*, at p. 1138, italics added and removed.) The court then confirmed, as discussed *ante*, that "the trial court is not *required* to include a fee enhancement," specifying that the trial court can consider "the degree to which the relevant market compensates for contingency risk, extraordinary skill, or other factors under *Serrano III*." (*Ibid*.) Here, the trial court found that the market rates did compensate for contingency risk, such that a fee enhancement was not needed to fully compensate counsel. That decision is not "clearly wrong," and we will not disturb it on appeal.

4. Declining to Award Fees for the Review of the Opposition and Preparation of a Reply was an Abuse of Discretion

Finally, the class argues that the trial court erred when it summarily declined to award fees for reviewing Mandarich's opposition, and for preparing the reply brief. The Court declined to award the additional 15.5 hours based on the conclusion that the class failed to provide notice that they would seek these fees in their moving papers.

While in general points raised in a reply brief for the first time will not be considered (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 765), the trial court was not correct in its conclusion that the class failed to provide notice in their motion of their intent to seek these fees. Simons's declaration in support of the motion asserted that, "The amount of attorney's fees sought in the billing statement is based on actual time expended . . . [and] *includes the estimated time that I will spend in reviewing the defendant's opposition, preparing a reply brief, and attending a hearing in this matter*. . . ." (Italics added.) Additionally, the billing statement attached to Simons's

declaration includes a projected fee of $4,250 for review of an opposition and preparation of a reply brief. Given these references, there was no reasonable basis for the court to conclude that there was no notice of the class's intent to seek these fees. Simons's declaration and corresponding billing statements constituted adequate notice of class counsel's additional fee request, which the class supported through Roulston's supplemental declaration filed prior to the hearing.[17] Summarily denying the request was an abuse of discretion.

Since the court summarily declined to award fees for reviewing the opposition and preparing a reply, it never reviewed the reasonableness of the fees requested. " '[A]bsent circumstances rendering the award unjust, fees recoverable . . . ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim.' [Citation.]" (*Ketchum*, *supra*, 24 Cal.4th at p. 1141.) The original motion projected $4,250 for all motion related work. This request was adjusted upwards to $9,300 promptly after filing the reply. Therefore, we must remand the matter to the trial court to consider the reasonableness of this portion of the request and whether to award reasonable fees solely for this work.

III. DISPOSITION

The judgment awarding damages to the class is affirmed (appeal No. H049562).

The order awarding fees is reversed (appeal No. H049824). The matter is remanded to the trial court for the limited purpose of determining the reasonableness of the fees requested by class counsel for the review of the opposition and the preparation of

[17] At oral argument, Mandarich's counsel suggested the fact that Roulston billed for the reply somehow negated any notice Mandarich might have received from Simons's declaration filed with the initial motion. We find no merit to this argument as it pertains to notice and the trial court's duty to consider the issue at the hearing. This is without prejudice to Mandarich raising to the trial court on remand any concerns regarding the disparity in Simons's estimated time for the reply versus the actual amount billed by Roulston.

the reply. The amount awarded for attorney fees up through the filing of the fee request is affirmed.

The class is entitled to costs on appeal.

_____
Greenwood, P. J.

WE CONCUR:

_____
Grover, J.

_____
Danner, J.

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