

1 W. JAMES YOUNG, Esq.
2 c/o National Right to Work Legal
3 Defense Foundation, Inc.
4 8001 Braddock Road, Suite 600
5 Springfield, Virginia 22160
6 (703) 321-8510

7 STEVEN R. BURLINGHAM, Esq.
8 California Bar No. 88544
9 Gary, Till & Burlingham
10 5330 Madison Avenue, Suite F
11 Sacramento, California 95841
12 (916) 332-8122
13 Facsimile — (916) 332-8153

14 ATTORNEYS FOR PLAINTIFFS AND
15 THE CLASSES THEY REPRESENT

16 UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA

18 DIANNE KNOX; *et al.*, ON BEHALF OF
19 THEMSELVES AND THE CLASSES THEY
20 REPRESENT,

21 Plaintiffs,

22 v.

23 JOHN CHIANG, Controller, State of California; *et*
24 *al.*,¹

25 Defendants.

CASE No. 2:05-cv-02198 MCE KJM

**PLAINTIFFS' UNOPPOSED MOTIONS
FOR PARTIAL RECONSIDERATION
(LOCAL RULE 78-230(k)) AND/OR
FOR RELIEF FROM JUDGMENT (RULE
60, FED.R.CIV.P.) AND TO STAY
BRIEFING AND CONSIDERATION OF
AN AWARD OF ATTORNEYS' FEES
AND COSTS PURSUANT TO 42 U.S.C.
§ 1988 PENDING APPEAL OR, IN THE
ALTERNATIVE, FOR AN EXTENSION
OF TIME IN WHICH TO FILE THEIR
APPLICATION (LOCAL RULE 54-293)**

**HEARING DATE: Friday, 30 May 2008
TIME: 9:00 a.m.
COURTROOM OF JUDGE ENGLAND,
COURTROOM 3, 15TH FLOOR**

26 COME NOW Plaintiffs, Dianne Knox, *et al.*, on behalf of themselves and the classes they
27 represent (collectively, "the Nonmembers"), and respectfully move the Court as follows:

28 1. Pursuant to Local Rule 78-230(k), the Nonmembers respectfully move the Court to

¹ Pursuant to Rule 25(d)(1), FED.R.CIV.P., State Controller John Chiang is automatically substituted as a Defendant in this action in place of his predecessor, Steve Westly.

1 reconsider partially its Memorandum and Order dated 27 March 2008, Clerk’s Docket No. 139
2 (entered on 28 March 2008), pursuant to Local Rule 78-230(k), and/or in the alternative, for relief from
3 judgment, pursuant to Rule 60, FED.R.CIV.P. (permitting corrections based upon oversight).

4 a. Specifically, in its Memorandum and Order, Clerk’s Docket No. 139, this Court
5 held that “the proper remedy for the current wrong is a new *Hudson* notice,” Clerk’s Docket
6 No. 139 at 26, and did not award nominal damages; however, the Court did not specifically
7 consider and reject an award of nominal damages in this case.

8 b. Among the relief sought by the Nonmembers, nominal damages were
9 specifically requested, both in their Complaint (Clerk’s Docket No. 1 at 14, Prayer for Relief,
10 ¶ E), and as part of their Motion for Summary Judgment (Clerk’s Docket No. 119 at 9:14-17).

11 c. The Ninth Circuit has specifically held, in the context of a union’s violation of
12 the requirements of *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306-10 (1986), that “each
13 class member whose constitutional rights were violated is entitled to nominal damages.”
14 *Cummings v. Connell*, 402 F.3d 936, 944 (9TH CIR. 2005).

15 d. Defendants have authorized the Nonmembers’ undersigned counsel to represent
16 to the Court that they do not oppose the Nonmembers’ instant motion, although they reserve
17 the right to contend on appeal that no nominal damages are warranted because they did not
18 violate the First Amendment, or the requirements of the First Amendment as interpreted by
19 *Hudson*, and/or that no nominal damages are warranted with regard to the members of any
20 class or subclass that was improperly certified. The Nonmembers agree that they will not
21 contend on appeal that Defendants have waived any such argument by not opposing the
22 Nonmembers’ instant Motion.

23 2. Pursuant to 42 U.S.C. § 1988, Rule 54(d)(2)(B), FED.R.CIV.P., and Rule 54-293,
24 E.D.CAL., the Nonmembers also respectfully move the Court to Stay Briefing and Consideration of an
25 Award of Attorneys’ Fees and Costs Pursuant to 42 U.S.C. § 1988, pending decision on Local 1000’s
26 anticipated appeal from this Court’s final judgment in this action. In the alternative, the Nonmembers
27 respectfully move the Court for an Extension of Time in Which to File Their Application for
28 Attorneys’ Fees and Costs Pursuant to 42 U.S.C. § 1988. In support of this Motion, the Nonmembers

1 show the following:

2 a. Local 1000 has expressed to the Nonmembers' counsel its intent to appeal from
3 this Court's judgment.

4 b. Obviously, the outcome of the above-referenced appeal likely will affect the
5 ultimate determination of a § 1988 fee award, insofar it impacts upon the extent to which the
6 Nonmembers are "prevailing parties" within the meaning of the statute and relevant Supreme
7 Court and Ninth Circuit precedent on that issue. See *Texas State Teachers Ass'n v. Garland*
8 *Indep. School Dist.*, 490 U.S. 782 (1989); *Hewitt v. Helms*, 482 U.S. 755 (1987); *Blum v.*
9 *Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); see also *Doty v.*
10 *County of Lassen*, 37 F.3d 540, 547-48 (9TH CIR. 1994); *Martinez v. Wilson*, 32 F.3d 1415,
11 1422 (9TH CIR. 1994); *Rock Creek Limited Partnership v. State Water Resources Control*
12 *Board*, 972 F.2d 274, 277 (9TH CIR. 1994).

13 c. The parties agree that judicial economy is best served by staying briefing,
14 argument, and consideration of Plaintiffs' Petition for Attorneys' Fees and Costs Pursuant to 42
15 U.S.C. § 1988, pending determination of the appeal filed in this case. In light of Local 1000's
16 anticipated appeal, to require briefing at this time for an award under 42 U.S.C. § 1988 would
17 open the possibilities of duplicating, or making unnecessary, efforts on that question. That is,
18 if Local 1000 prevails on appeal, in whole or in part, the balancing of factors made in arguing
19 in support of such an award — including the magnitude of such an award — may be
20 significantly altered, or obviated entirely. This potential serves neither the interests of judicial
21 economy, nor the interests of any of the parties to this litigation, particularly Defendants, since
22 time spent in preparation of a second, modified fee petition may be compensable under the
23 statute (and, of course, would require the Defendants to respond to two separate petitions).
24 *Gates v. Rowland*, 39 F.3d 1439, 1448-49 (9TH CIR. 1994).

25 d. Although the Nonmembers are already clearly "prevailing parties" regarding
26 some of the issues raised in the instant lawsuit, they recognize that the novelty of the Court's
27 application of the law to these facts may be resolved differently on appeal, thus making it
28 premature to brief, argue, and adjudicate at this time the issue of an award pursuant to 42

1 U.S.C. § 1988. See, e.g., *Gates v. Rowland*, 39 F.3d at 1450 (suggesting that fee applications
2 in an on-going process should be considered together for purposes of judicial economy).

3 e. This Motion is made within the time required for the filing of fee petitions
4 pursuant to Rule 54(d)(2)(B), FED.R.CIV.P., and Rule 54-293, E.D.CAL., which requires that all
5 motions for attorneys' fees and costs be filed within thirty (30) days after the entry of judgment.

6 f. Should this Motion be denied, and in the alternative, the Nonmembers
7 respectfully request, pursuant to Rule 54(d)(2)(B), FED.R.CIV.P., and Rule 54-293, E.D.CAL.,
8 an extension of time for filing the application, currently due on 28 April 2008, until not earlier
9 than 2 June 2008. In support of said request, the Nonmembers show the following:

10 i. The Nonmembers' undersigned counsel is also Counsel of Record for
11 Petitioners in *Locke v. Karass*, No. 06-710, accepted for plenary review by the United
12 States Supreme Court on 19 February, and Petitioners' Brief is currently due on
13 Monday, 5 May;

14 ii. The Nonmembers' undersigned counsel represents individuals in an
15 action currently pending before the National Labor Relations Board in which exceptions
16 are due to be filed on Wednesday, 30 April 2008; and

17 iii. The Nonmembers' undersigned counsel represents as lead counsel a
18 class of nonunion City of Philadelphia employees in *Mitchell v. City of Philadelphia*,
19 Case No. 99cv6306, in which trial is scheduled to resume on Monday, 14 April 2008,
20 and is anticipated to last at least five more days.

21 g. Counsel for Defendants have authorized the Nonmembers' undersigned counsel
22 to represent to the Court that they do not oppose the Nonmembers' instant Motion.

23 WHEREFORE, the Nonmembers respectfully move the Court for entry of an Order awarding
24 them, in addition to the other relief awarded by the Court, nominal damages to be paid in the amount
25 of one dollar (\$1.00) to each member of the class.

26 AND FURTHER, the Nonmembers respectfully move the Court for entry of an Order directing
27 that briefing and consideration of Plaintiffs' entitlement to an award of attorneys' fees and costs
28 pursuant to 42 U.S.C. § 1988 is stayed pending appeal, and shall be due not later than thirty (30) days

1 after the issuance of mandate or other disposition by the United States Court of Appeals for the Ninth
2 Circuit or, in the alternative, that Plaintiffs' Petition for Attorneys' Fees and Costs Pursuant to 42
3 U.S.C. § 1988 shall be filed not later than 2 June 2008.

4 DATED: 4 April 2008

5 Respectfully submitted,

6 STEVEN R. BURLINGHAM, Esq.
7 California Bar No. 88544
8 Gary, Till & Burlingham
9 5330 Madison Avenue, Suite F
10 Sacramento, California 95841
11 (916) 332-8122
12 Facsimile — (916) 332-8153

13 /s/ W. James Young

14 W. JAMES YOUNG, Esq.
15 c/o National Right to Work Legal
16 Defense Foundation, Inc.
17 8001 Braddock Road, Suite 600
18 Springfield, Virginia 22160
19 (703) 321-8510

20 ATTORNEYS FOR PLAINTIFFS AND THE CLASSES
21 THEY REPRESENT

22 F:\Knox.CA\Summary Judgment\PartReconsider.mot.wpd

23 Friday, 4 April 2008, 18:52:5 PM

CERTIFICATE OF SERVICE

I, W. James Young, counsel for Plaintiffs, hereby certify that I electronically filed with the Clerk of Court the foregoing **Plaintiffs' Unopposed Motions for Partial Reconsideration (Local Rule 78-230(k)) and/or for Relief from Judgment (Rule 60(a), FED.R.CIV.P.) and to Stay Briefing and Consideration of an Award of Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 1988 Pending Appeal or, in the Alternative, for an Extension of Time in Which to File Their Application**, using the CM/ECF system which will send notification of such filing to all counsel of record, this 4th day of April, 2008.

/s/ W. James Young

W. JAMES YOUNG

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28