NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENE EDWARDS, on behalf of herself and all others similarly situated, Plaintiff-Appellee, v. FORD MOTOR COMPANY, Defendant-Appellant.	No. 16-55868 D.C. No. 3:11-cv-01058-MMA-BLM MEMORANDUM*

GENE EDWARDS, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. FORD MOTOR COMPANY, Defendant-Appellee.	No. 16-55935 D.C. No. 3:11-cv-01058-MMA-BLM

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted February 8, 2018
San Francisco, California

Before: TASHIMA, BERZON, and CHRISTEN, Circuit Judges.

Defendant Ford Motor Company ("Ford") appeals, and plaintiff Gene Edwards cross-appeals, from the district court's grant of attorney fees to Edwards. The district court determined that Edwards's lawsuit was a substantial factor contributing to Ford's adoption of a customer satisfaction program for owners of Ford Freestyles, among other cars, and thus Edwards was a successful party under a catalyst attorney fee theory pursuant to Cal. Code Civ. Proc. § 1021.5. *See generally Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004). The court did not apply a contingency fee multiplier to the award, reasoning that the award already accounted for the contingent nature of Edwards's counsel's work. We affirm.

1. Ford argues that the district court applied the wrong burden of proof in its fee analysis. It maintains that the district court did not properly consider that the "presumption" established by the chronology of events in Edwards's lawsuit should have "disappear[ed]" once Ford produced a declaration from its employee, David Ott, stating that Ford's customer satisfaction program was adopted in

response to an investigation by the National Highway Traffic Safety Administration ("NHTSA"), and not in response to the Edwards litigation.

We disagree. In California, the inference from the chronology of events does not evaporate when the defendant introduces relevant and credible evidence to the contrary; rather, the trial court must weigh the evidence and determine on all the evidence, including any inference arising from the chronology, if the plaintiff's story is persuasive. *See Hogar v. Cmty. Dev. Comm'n of City of Escondido*, 157 Cal. App. 4th 1358, 1367 (2008).

That is what the district court in this case did. As the court emphasized when ruling on Ford's motion for reconsideration, it "did not rely solely on the fact that Plaintiff's lawsuit preceded the [customer satisfaction program] in determining whether Plaintiff's lawsuit was a causal factor." Rather, the court took into account factors other than chronology, such as the parallel between the remedies Edwards requested and those eventually provided, the provision of remedies NHTSA could not order, and Ford's own evidence regarding NHTSA's skepticism regarding whether Ford's vehicles had any safety defect. Thus, the inference from chronology was only one of several factors the district court weighed in Edwards's favor when concluding that she had adequately established that her lawsuit was a factor in Ford's decision to institute the customer satisfaction program it ultimately

adopted, and that Ford's evidence introduced to prove to the contrary was not persuasive. This analysis contained no legal error.

2. As to Ford's argument that the trial court erred in its factual findings, we might have reached the opposite conclusion were we the triers of fact. But, we conclude, the district court did not commit clear error in finding that Ford was substantially motivated by Edwards's lawsuit. *See Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1207 (9th Cir. 2009).

The district court carefully explained why it found that this litigation was a substantial factor in Ford's actions, noting that: (1) even though NHTSA had already begun an informal investigation into Ford Freestyles' surging issues in late 2010 or early 2011, Ford did not begin to adopt its remedial program until 2012, after Edwards filed her suit; (2) Ford's customer satisfaction program grants relief that Edwards sought under California law and that NHTSA was not empowered to order, making it unlikely the program was instituted only as a result of the NHTSA investigation; and (3) the primary declaration for Ford, submitted by Ott, included evidence that in part tended to support Edwards's theory of the case, rather than Ford's, and that was otherwise uninformative as to the motivation of the employees at Ford who actually decided to adopt the customer satisfaction program.

As to the last point: Although the declaration demonstrated that the NHTSA investigation was one reason the customer satisfaction program was adopted, under applicable law, a catalyst for fees purposes need not be the only reason for providing a remedy. *Cates v. Chiang*, 213 Cal. App. 4th 791, 807–08 (2013). Because Ott's declaration was not from an actual decision-maker but from an individual whose authority reached only the NHTSA proceeding, it could not competently address the pertinent question—was the lawsuit one reason Ford adopted the customer satisfaction program?

Ford contends that the large scale of its customer satisfaction program, along with its employees' declarations, the timeline of Edwards's failed class certification motion, and Edwards's lack of direct evidence, definitively indicate that Edwards's lawsuit could not have motivated Ford when it adopted its remedial program. But we cannot say that the district court clearly erred in its careful consideration of all the evidence and its resultant finding that Edwards's lawsuit was a substantial motivating factor for its adoption. We thus affirm the district court's finding that Edwards was a successful party under Cal. Code Civ. Proc. § 1021.5.

3. Finally, Edwards contends that the district court erred in denying her request for a 1.5 times contingency multiplier for her attorney fees. We disagree.

"[T]he 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 discretion to do so in the appropriate case . . . ." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1138 (2001); *accord Chaudry v. City of Los Angeles*, 751 F.3d 1096, 1112 (9th Cir. 2014) (under California law, "[t]he choice whether to award a [contingency] multiplier . . . is within the district court's discretion"). Here, the district court found that Edwards's counsel's average hourly rate already compensated for contingent risk. The court compared Edwards's counsel's average rate to similar rates for plaintiffs' contingency attorneys in two cases from the relevant geographic area and time period; the district courts in those comparator cases had found such rates reasonable in light of "the specter of nonpayment . . . in the event [counsel] did not recover for the class." *Shames v. Hertz Corp.*, 2012 WL 5392159, No. 07-CV-2174, at *19 (S.D. Cal. Nov. 5, 2012); *accord Gallucci v. Boiron, Inc.*, 2012 WL 5359485, No. 11-CV-2039, at *9–10 (S.D. Cal. Oct. 31, 2012).

Again, another court could have come to a different conclusion on this record. But we cannot say the district court clearly erred in finding that the lodestar adequately compensated Edwards's counsel for the contingent nature of

her case. We thus affirm the district court's refusal to apply a contingency multiplier to Edwards's attorney fee award.

AFFIRMED.