

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

M.B. by his next friend Ericka)
Eggemeyer; E.S. and Z.S. by their)
next friend Nina Schunck; K.C.)
by her next friend Kris Dadant;)
A.H. by her next friend Grey)
Endres, for themselves and those)
similarly situated,)

Plaintiffs,)

v.)

Case No. 2:17-cv-04102-NKL

Jennifer Tidball, in her official)
capacity as Interim Director of)
the Missouri Department of)
Social Services; Tim Decker, in his)
official capacity as Director of the)
Children’s Division of the Missouri)
Department of Social Services,)

Defendants.)

**DEFENDANTS’ SUGGESTIONS IN OPPOSITION
TO PLAINTIFFS’ MOTION
FOR ATTORNEY FEES AND COSTS**

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I. INTRODUCTION

The twenty attorneys representing the Plaintiffs have filed a motion seeking \$3,894,975.22 in attorneys' fees and \$132,907.56 in expenses for their work in this matter. (Doc. 285.) On July 28, 2019, the parties filed a joint settlement agreement in which Defendants agreed that Plaintiffs were partially prevailing parties pursuant to 42 U.S.C. § 1988, but reserving the right to contest the amount of any attorneys' fees and costs. (Doc. 280-1, II.P). The amount Plaintiffs' seek for attorney fees and expenses is unreasonable and should be significantly reduced for the reasons outlined below.

II. ATTORNEY FEES

Pursuant to 42 U.S.C. § 1988, courts may award a “reasonable attorney’s fee as part of the costs” to a prevailing party in cases brought under § 1983. 42 U.S.C. § 1988(b). A “reasonable attorney’s fee” should be what the court determines to be “reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less.” *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989). “[A] reasonable attorney’s fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys.” *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (internal quotations omitted). Thus, objective of the attorney’s fee statute is to enforce the pertinent civil rights statutes, not to provide “a form of economic relief to improve the financial of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private arrangement with his client.” *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986). A party

requesting fees in a civil rights action is expected to use the same “billing judgment” with regard to billable hours that they would use when billing a private sector client. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. *Id.* at 434.

The lodestar calculation is the starting basis for the Court to determine attorneys’ fees—multiplying a reasonable hourly rate by what the Court determines to be a reasonable number of hours expended on the litigation. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005). Plaintiffs must establish an “accurate and reliable factual basis for an award of attorneys’ fees”, requiring them to produce evidence supporting both the hourly rates and the number of hours requested. *Philipp v. ANR Freight Sys., Inc.*, 61 F.3d 669, 675 (8th Cir. 1995) (citation omitted).

Federal courts determine the “reasonable” lodestar amount by considering the *Johnson* factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fees; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesireability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar

cases. *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 265 n.25 (8th Cir. 1985); quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

Plaintiffs request attorneys' fees for *twenty* attorneys from four different organizations, including two on opposite sides of the country, at hourly rates ranging from \$225 to \$500, for a total attorneys' fee request of \$3,713,299.72. This amount reflects 10,206.4 hours for a three-year period beginning one year *before* the original complaint was filed. In addition, Plaintiffs request fees of \$181,675.50 for 1,211.2 hours for four paralegals billed at \$150 per hour. Plaintiffs have requested unreasonably hourly rates and an unreasonable number of hours for the work performed in this matter.

Hourly Rates

“As a general rule, a reasonable hourly rate is the prevailing market rate, that is, ‘the ordinary rate for similar work in the community where the case has been litigated.’” *Moysis v. DTG Datanet*, 278 F.3d 819, 828-29 (8th Cir. 2002). “Eighth Circuit law is well-settled on the point that the ‘relevant community’ for the purposes of determining attorneys’ hourly rates is the community in which the case is tried.” *Bousphakeo v. Tyson Foods*, 2013 WL 364789 at *2 (N.D. Iowa Jan. 30, 2013). “When determining reasonable hourly rates, district courts may rely on their own experience and knowledge of prevailing market rates.” *Miller v. Dungan*, 764 F.3d 826, 831 (8th Cir. 2014) (citation omitted). Plaintiffs’ counsel should make “a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary.” *Hensley*, 461 U.S. at 434.

Plaintiffs have the burden of establishing the appropriate rate. *See Blum v. Stenson*, 465 U.S. 886, 895 n. 11, (1984) (“To inform and assist the court in the exercise of its

discretion, the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney’s own affidavits – that the requested rates are in line with those prevailing in the community for similar service by lawyers of reasonably comparable skill, experience, and reputation.”). Plaintiffs request hourly rates ranging from \$225 to \$500, arguing that they would be “justified” to seek higher out-of-town rates but instead use what they argue are “local Missouri rates”. In fact, Plaintiffs would not be justified in requesting higher non-local rates and they are not, as they strongly imply, lowering their rates to those of Missouri attorneys. The hourly rates they are requesting are excessive in light of the hourly rates charged by Missouri attorneys and the same should be reduced as to each of the *twenty* attorneys billing for this matter.

“The Eighth Circuit has instructed that out-of-town rates may be awarded only when a plaintiff is ‘unable to find local counsel able and willing to take the case’ despite his ‘diligent, good faith efforts.’” *Ladd v. Pickering*, 783 F.Supp.2d 1079 (E.D. Mo., 2001); *citing Emery v. Hunt*, 272 F.3d 1042, 1048 (8th Cir. 2001). If local attorneys “adequately versed in civil rights litigation, would have sufficed to attain the result that [the party’s attorney] received while charging the ordinary [local] rate,” the court may base the hourly rate on the rates in the local market. *Miller v. Dugan*, 764 F.3d at 831-32. Plaintiffs’ attorneys make the vague statement that they “reached out to firms in the Missouri area” in an attempt to find local counsel but that they were “not able to identify other attorneys who were willing to partner on this case”. Doc. 285-3 ¶ 31. This is not sufficient evidence to establish that they could not find competent, capable local counsel for this litigation.

Children’s Rights, based in New York, sought out and “recruited” Missouri plaintiffs to prosecute this case. Doc. 285-2 ¶ 26. They should not be permitted to purposefully and intentionally seek out clients in a certain area and then demand anything other than the average hourly rates of the competent and capable attorneys that practice in that area. The Plaintiffs and Class Members are Missouri citizens, and it is Missouri taxpayers who will ultimately pay Plaintiffs’ counsels’ fees. It is therefore appropriate to calculate the lodestar based on the hourly rates charged by Missouri attorneys.

When considering fee requests for non-local counsel in class action cases litigated in Missouri, courts have considered the average hourly rates charged by Missouri attorneys as determined by Missouri Lawyer’s Weekly in their annual billing rates survey. *See, e.g., Snider v. Peters*, 928 F.Supp.2d 1113, 1117 (E.D.Mo. 2013); *Comas v. Schaefer*, 2012 WL 5354589, at *3 (W.D. Mo. Oct. 29, 2012); *Buzzanga v. Life Ins. Co. of N. Am.*, 2013 WL 784632 at *1 (E.D.Mo. March 1, 2013); *Albright v. Bi-State Dev. Agency of Missouri-Ill. Metro. Dist.*, 2013 WL 4855304 at *7 (E.D.Mo. Sept. 11, 2013). In *St. Louis Effort for AIDS v. Lindley-Myers*, the court reduced the requested rates of the two attorneys requesting the highest hourly rates from \$540 and \$400 per hour to \$390 and \$360 per hour, respectively. 2018 SL 1528726 at *4 (W.D. Mo. Mar. 28, 2018). In doing so, the Court noted that even though the attorneys had significant experience, “the record does not establish their experiences merit higher rates than the rates typically charged by mid-Missouri attorneys.” *Id.* at *4. Also, in *Stallsworth v. Staff Management SMX SMX, LLC*, the Court reduced an attorney’s hourly rate because the hourly rate requested had been “well above the Kansas City-area average”. 2018 WL 2125952 at *4 (W.D. Mo. May 8, 2018). Defendants ask this Court to

use the average rates of Missouri attorneys to cap Plaintiffs' counsels' maximum hourly rate.

Plaintiffs mention the *median* hourly rates of Missouri attorneys according to the *Missouri Lawyer's Weekly* 2018 special billing survey section as evidence that the hourly rates they seek are reasonable. However, the largest portion of the actual litigation in this case was performed in 2017, and Plaintiffs admit that the pre-filing investigation occurred in the year prior to June 2017. As the largest portion of the work performed in this case took place prior to 2018, the Court should consider the average hourly rate for Missouri attorneys in 2017 according to the *Missouri Lawyer's Weekly*. The average Missouri attorney's hourly rate was \$382 in 2017. *2017 Billing Rates, Mo. Law. Wkly.*, Aug. 7, 2017, at BR2-BR6. The average support staff hourly rate was \$134. *Id.* The highest hourly rate for the Plaintiffs' attorneys should be capped at the 2017 average hourly rate for Missouri attorneys. Plaintiffs' highest requested hourly rate is \$500, thus a rate cap of \$382 is roughly a 25% reduction. It is reasonable and common practice to charge clients a lower hourly rate for less-senior attorneys, requiring the non-senior attorneys' rates to be reduced by an identical percentage. Likewise, the paralegals should not be billed higher than the average Missouri 2017 support staff rate. The resulting maximum hourly rates for each of the *twenty* attorneys and four paralegals billing on this case would then be as follows:

<u>Attorney</u>	<u>Requested Rate</u>	<u>Reasonable Rate</u>
John Ammann	\$400	\$300
Samantha Bartosz	\$500	\$382
Stephen Dixon	\$375	\$281
Aaron Finch	\$325	\$244
Catherine Frizell	\$325	\$244

Daniele Gerard	\$300	\$225
Elizabeth Gretter	\$375	\$281
Amanda Grill	\$225	\$169
Bill Grimm	\$500	\$382
Ning He	\$275	\$206
Poonam Juneja	\$375	\$281
Jonathan King	\$325	\$244
Courtney J. McCormick	\$325	\$244
Erin McGuinness	\$225	\$169
Freya Pitts	\$300	\$225
Danielle Rosenthal	\$300	\$225
Stephanie Schuster	\$325	\$244
Scott T. Schutte	\$500	\$382
Jacqueline Stolzenberg	\$225	\$169
Leecia Welch	\$450	\$338

Paralegals

Genevieve Caffrey	\$150	\$134
Hailey Cherepon	\$150	\$134
Meghan Kacsmar	\$150	\$134
Kira Setren	\$150	\$134

Number of Attorney Hours

Plaintiffs, as the fee applicants, have “the burden of substantiating the claimed number of hours expended. Hours that are ‘excessive, redundant, or otherwise unnecessary’ are not to be included in an award of fees.” *Van Booven v. PNK (River City), LLC*, 2015 WL 3774043 at *2 (E.D. Mo. June 17, 2015); *quoting Hensley* 461 U.S. at 434. Plaintiffs’ attorneys state that they have exercised their billing judgment as to the hours billed. However, Plaintiffs request attorney fees for *twenty* attorneys from four separate organizations. Plaintiffs do not explain why it was necessary to staff this case with twenty attorneys. Defendants posit that the sheer number of lawyers billing on this matter reflects significant overstaffing, inefficiency and redundancy of effort. The requested attorney

hours for three years of work (including *one year* exclusively spent on “investigation” by New York attorneys) is 10,206.4 and that is excessive. Doc. 285-1¶ 7.

Plaintiffs are required to provide documentation supporting the hours expended with sufficient detail and specificity to permit the court to determine whether the hours claimed are excessive, redundant, or otherwise unnecessary. “Incomplete or imprecise billing records preclude any meaningful review by the district court of the fee application for ‘excessive, redundant, or otherwise unnecessary’ hours and may make it impossible to attribute a particular attorney’s specific time to a distinct issue or claim.” *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991); *quoting Hensley*, 461 U.S. at 437 n. 12. “Inadequate documentation may warrant a reduced fee.” *Id.*

Travel Time

The thirteen New York and California attorneys seek payment for 814.4 hours of “travel time”. If they were awarded that number of hours at one-half of their requested hourly rates, (which is what they are seeking), the total, for thirteen attorneys’ travel time alone, would be \$158,822.88. Given that it was unnecessary for out-of-state attorneys to litigate this wholly Missouri case, the travel time for the thirteen out-of-state attorneys should not be borne by Missouri taxpayers. Further, although Plaintiffs did secure one attorney as local counsel in this matter, they utilized local counsel very little and seemingly not at all for the numerous depositions that were taken in Missouri. Almost all of the travel time was for travel from New York and California to Missouri in order for multiple attorneys to “attend” all of the depositions taken in Missouri. Further, the submitted billing records do not indicate what, if anything, each attorney might have been doing while sitting

in airports or on planes or otherwise “in transit” for the requested 814.4. Missouri taxpayers should not be required to pay for the 814.4 hours of “travel time” requested when non-local counsel was unnecessary and Plaintiffs submitted no evidence that the attorneys spent travel time in any way productive to this litigation. Defendants request that the Court disallow the entire number of hours billed for “travel time” for the Plaintiffs’ out-of-state attorneys.

Hours Billed by Stephen Dixon of Children’s Rights, Inc.

The court may make a reduction in the fees requested for a number of reasons, including the lack of adequate record keeping. *Deadwood Canyon Ranch, LLP v. Fid. Exploration & Prod. Co.*, 2014 WL 11531553 at *3. (D. N.D. June 26, 2014). “Incomplete or imprecise billing records precludes any meaningful review by the district court of the fee application for ‘excessive, redundant, or otherwise unnecessary’ hours and may make it impossible to attribute a particular attorney’s specific time to a distinct issue or claim.” *H.J. Inc. v. Flygt Corp.*, 925 F.2d at 260; *citing Hensley*, 461 U.S. at 434.

The nine Children’s Rights attorneys, seek payment for 6,725.4 attorney hours and 1,037.4 paralegal hours. Stephen Dixon seeks payment for 378.1 hours, including 80.1 travel hours. In Samantha Bartosz’s supporting affidavit, she states that “Mr. Dixon principally directed his efforts to the recruitment, retention and maintenance of Named Plaintiff and Next Friend relationships, a vital element of the attorney/client relationship.” Doc. 285-2 ¶ 26. For his efforts to recruit, retain and maintain Named Plaintiff and Next Friend relationships, Mr. Dixon requests the sum of \$126,769.38. Due to vague billing entries, it is unclear what specific tasks Mr. Dixon performed in this

matter that were necessary to advance the litigation. Because of the lack of specificity, it is impossible to determine why it was necessary for an out-of-state attorney seeking to bill at a rate of \$375 per hour to travel for more than 80 hours in order to “recruit, retain and maintain” relationships. His billing entries consist mostly of notations involving “electronic mail” to unidentified individuals and “telephone calls” with unidentified individuals and numerous hours related to his contacts with “stakeholders” – a term that is undefined anywhere in the voluminous billing records, affidavits or court filings. It is unclear what Mr. Dixon did in this case, with whom he did it, how his involvement furthered the litigation and why it was necessary to use a New York attorney to do the things that he did. All 378.1 hours of time billed for the activities of Mr. Dixon should be disallowed by this Court.

Volume Discount of Fifty Percent of Remaining Hours

The fee applicants have the burden of substantiating the claimed number of hours expended. “Hours that are ‘excessive, redundant, or otherwise unnecessary’ are not to be included in an *award of fees.*” *Van Booven v. PNK (River City), LLC*, 2015 WL 3774043 at *2 (E.D. Mo. June 17, 2015); *quoting Hensley*, 461 U.S. at 434. If all of the travel hours for the New York and California attorneys are removed and all of the other hours billed by Mr. Dixon are removed, Plaintiffs are still seeking compensation for an astonishing 9,091.2 hours for the efforts of the *nineteen* other attorneys billing for work on this matter. Defendants are requesting that the Court make a 50 percent reduction in the hours billed by each of the remaining *nineteen* attorneys in this matter, allowing a total of 4,545.6

attorney hours at reduced hourly rates in addition to the hours billed by the four paralegals, also at reduced hourly rates.

“Hours that are excessive, redundant, or otherwise unnecessary must be excluded from the district court’s determination of reasonable time expended on the case.” *Miller v. Dugan*, 764 F.3d at 832. “In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here. Hours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.” *Hensley*, 461 U.S. at 434. Plaintiffs used an outside consultant, Sterling Analytics, to review the voluminous billing records and make various deductions in an effort to exercise “billing judgment” required of all counsel in requesting fees. However, even after Sterling Analytics recommended various eliminations, reductions and limitations, the request for attorney fees is still problematic in that there are numerous incidents of block billing (especially in the billing entries of Morgan Lewis), vague or non-specific entries generally (and specifically in the billing entries of Children’s Rights regarding “stakeholders”), and inefficiencies evidenced by multiple attorneys billing for excessive amounts of time to prepare for and attend depositions and to excessively confer with one another with regard to matters such as case status and “strategy”. Further, with *twenty* attorneys billing for this matter, overstaffing is a significant consideration in determining the “reasonableness” of Plaintiffs’ requested attorney fees.

The situation here is similar to that in *Comas* where the Court, in making a significant percentage adjustment in the fees actually awarded, noted:

[T]he Court notes the strained economic condition of the State of Missouri's budget and on the economy nationally. The attorney fees here will be paid, in effect, by Missouri taxpayers. It is doubtful that plaintiffs (sic) counsel would be able to collect their claimed rate from a private client at their claimed number of hours. Rather, at some point, private clients would begin to expect some sort of a volume discount on their fees, and plaintiffs' counsel would have to reduce their hours as a matter of good billing judgment. This is particularly true here because of the number of attorneys billing hours on behalf of the plaintiffs and because of the strained national economic conditions in the country, which has led to increased client resistance to large attorney fees.

Comas v. Shaefer, 2012 WL 5354589 at *5.

A volume discount is appropriate in this case. "In many cases, attorney's fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services." *Comas v. Shaefer*, 2012 WL 5354589 at *5; citing *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1676-77 (2010). The *Comas* court, following the reasoning in the *Hiltibran v. Levy* decision, 2011 WL 50080118, at *5, (W.D. Mo. Oct. 20, 2011), applied a volume discount, reducing the attorney fee award to a percentage of the initial request. *Id.*

Fee shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys". *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 565. Ultimately, a "'reasonable attorney's fee' contemplates 'reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the

prevailing plaintiff, no more and no less.’’ *Comas*, 2012 WL 5008018, at *6. The circumstances in this case also encompass the fact that the two organizations requesting the lion’s share of the almost-four-million-dollars total fee request are out of state organizations. Children’s Rights’ most recent published financial statement indicates that in 2017 they received \$735,090 in attorney fees, and they received \$1,761,736 in 2016. In this case they are seeking an award of \$2,579,725.22. National Youth Law Center’s last published financial report reflects receipt of \$187,590 in attorney fees in 2018 and \$434,535 in 2017. In this case they are requesting \$990,437.50. The fees both of these out-of-state organizations are requesting in this one case exceed the amounts they received in attorney fees for the last two reported years combined. The fee award in this case should not be a windfall for the attorneys. Awarding the amount they have requested in their fee petition when that amount exceeds their receipts in attorney fees for the last two years combined suggests a windfall at the expense of Missouri taxpayers.

In light of the significant problematic issues with the Plaintiffs’ request for nearly four-million dollars in fees, a fifty-percent volume discount after accounting for reduced hourly rates and the specific hours challenged with regard to Mr. Dixon’s efforts and all travel time for the New York and California attorneys, a further fifty-percent reduction would still compensate the four organizations seeking fees in the approximate amount of \$1.36 million dollars in attorney fees. Plaintiffs’ attorneys are entitled to “reasonable compensation, in light of all of the circumstances, for the time and effort expended” in this case. *Blanchard*, 489 U.S. at 93. One point three-six million dollars is reasonable compensation for Plaintiffs’ attorneys’ work.

EXPENSES

Plaintiffs are entitled to reimbursement for “[r]easonable expenses of the kind a law firm would ordinarily bill to its client.” *Barrett v. Claycomb*, 2013 WL 6920860 at *4 (W.D. Mo. Dec. 9, 2013). Children’s Rights requests reimbursement for \$83,269.19 in out-of-pocket expenses, \$82,269.19 of which are for air-fare, hotel costs and other expenses related solely to travel necessitated by their base being located in New York. NCYL requests reimbursement for a total of \$16,817.9, all of which are travel expenses incurred solely as a result of their base being located in Oakland, California. Defendants request that the Court disallow reimbursement for the travel expenses sought by Children’s Rights and NCYL.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court award Plaintiffs' attorneys fees based upon average hourly rates charged by Missouri attorneys in 2017, disallow all of the hours billed by Mr. Dixon, disallow all of the hours billed for attorney travel time, reduce the remaining number of requested hours by half and grant any further relief the Court deems just and proper.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ Melanie Pennycuff
Melanie Pennycuff
PRO HAC VICE
Assistant Attorney General
Missouri Attorney General's Office
815 Olive Street
St. Louis, MO 63101
Phone: (314) 340-7652
Melanie.Pennycuff@ago.mo.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing is being filed electronically with the Clerk of Court on September 26, 2019, to be served by operation of the Court's electronic filing system upon all parties.

/s/ Melanie Pennycuff
Melanie Pennycuff
Assistant Attorney General