

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS**

| | | |
|---|---|---------------------------------|
| STEVEN WAYNE FISH, <i>et al.</i> , |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Case No. 16-2105-JAR-JPO |
| v. |) | |
| |) | |
| KRIS KOBACH, in his official capacity as |) | |
| Secretary of State for the State of Kansas, |) | |
| |) | |
| Defendant. |) | |
| |) | |

**PLAINTIFFS’ APPLICATION FOR
ATTORNEYS’ FEES AND LITIGATION EXPENSES
IN CONNECTION WITH THEIR MOTION FOR CONTEMPT**

Pursuant to this Court’s Order granting Plaintiffs’ motion for contempt, Plaintiffs are now entitled to seek attorneys’ fees and non-taxable costs in connection with that motion. *See* Mem. and Order dated April 18, 2008 (“Contempt Order”), Doc. 520. For the reasons that follow, this Court should award Plaintiffs’ attorneys’ fees and non-taxable expenses in the total of \$51,646.16.

I. Computation of the Lodestar

The general principles governing the award of attorneys’ fees are well-settled. First, the number of hours reasonably expended are multiplied by the attorneys’ reasonable hourly rates to determine the product or “lodestar” figure. *Hensley, v. Eckerhart*, 461 U.S. 424, 433 (1983). The “resulting product is *presumed* to be the minimum reasonable fee to which counsel is entitled.” *Pennsylvania v. Del. Valley Citizens Council for Clean Air*, 478 U.S. 546, 564 (1986) (internal quotation marks omitted); *see also Blum v. Stenson*, 465 U.S. 886, 897 (1984). In this regard, the Supreme Court stated: “We . . . take as our starting point the self-evident proposition

that the ‘reasonable attorney’s fee’ provided by [§ 1988] should compensate” for “the work product of an attorney.” *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 285 (1989). “[T]here is a ‘strong presumption’ that the lodestar figure is reasonable[.]” *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553-54 (2010).

A. Hours

Litigating the underlying contempt motion required the investment of a significant number of attorney and paralegal hours. Plaintiffs’ attorneys spent 133.5 actual hours on the underlying contempt motion and related correspondence, in addition to 19.41 hours contributed by paralegals. This is not surprising given the complexity of this type of case. However, the number of hours was exacerbated by the Defendant’s repeated refusals to cooperate on, and instead choosing to litigate, the relatively simple matters underlying the contempt motion. *See City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) (“The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff[s] in response.”) (internal quotation marks and citation omitted); *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1575 (11th Cir. 1985) (“While [defendant] is entitled to contest vigorously [plaintiffs’] claims, once it does so it cannot then complain that the fees award should be less than claimed because the case could have been tried with less resources and with fewer hours expended.”).

Indeed, the hours expended prosecuting this motion were largely due to Defendant’s unnecessary recalcitrance, which is exactly why this Court found it appropriate to hold Defendant responsible for Plaintiffs’ fees. The issue of Defendant’s non-compliance with the Preliminary Injunction in this case was addressed by this Court almost two years ago, in September 2016. Since that time, Plaintiffs have continued to receive reports of non-compliance

by Defendant that they have had to investigate, monitor, and work to resolve. Plaintiffs first notified Defendant of the specific issues underlying the contempt motion—*i.e.* the failure of Defendant to ensure that covered voters receive a postcard informing them of their polling location—by letter on November 10, 2017; but rather than address this issue, defense counsel repeatedly responded by taking the position that sending these postcards was unnecessary. *See* Contempt Order, Doc. 520, at 6-7. Defendant maintained that position after Plaintiffs filed the underlying contempt motion. *See id.* at 8.

It was not until the contempt hearing on March 20, 2018 that “Defendant changed course,” *id.* at 17, and claimed that he in fact directed that such postcards be mailed—which, if true, would mean that Defendant had “waited until Plaintiffs exhausted informal channels to remedy the problem, and allowed Plaintiffs to fully brief a contempt motion and prepare for a show cause hearing,” before coming forward with purported material evidence about his compliance with the Preliminary Injunction. *Id.* at 20. And, at the contempt hearing on March 20, Defendant made multiple “disingenuous[.]” arguments; elicited testimony that the Court determined was “not . . . credible,” and “strains credulity”; and “fail[ed] to take responsibility for violating this Court’s orders. . . .” *Id.* at 15, 18, 19. As set forth in the Contempt Order, had Defendant been more cooperative, “Plaintiffs (and the Court) could have avoided significant time and expense in litigating this motion.” *Id.* at 24.

In sum, Defendant displayed a willful defiance of this Court’s authority, and has unnecessarily multiplied proceedings. He should be assessed for of the total attorney time for which Plaintiffs seek fees.

By contrast, Plaintiffs' counsel attempted to keep its hours working on this issue to a minimum. *See* Ho Decl., attached hereto as Ex. A, at 9. As the Ninth Circuit has explained, there is no incentive to over-lawyer an issue like this:

It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

Moreno v. City of Sacramento, 534 F.3d 1106, 1112 (9th Cir. 2008).

The hours for which Plaintiffs seek fees are as follows:

| | <u>Hours</u> |
|-------------------|--------------|
| Neil Steiner | 8.40 |
| Dale Ho | 32.76 |
| Doug Bonney | 8.50 |
| Angela Liu | 5.10 |
| R. Orion Danjuma | 8.90 |
| Sophia Lin Lakin | 14.03 |
| Tharuni Jayaraman | 55.80 |
| Lila Carpenter | 11.31 |
| Delaney Berman | 8.10 |

As set forth in the declarations of Mr. Ho and Mr. Steiner, the hours set forth above represent various reductions and exclusions, in an exercise of billing judgment. These exclusions include work performed by attorneys in connection with the underlying contempt motion if they performed very little work on the motion (*i.e.*, worked fewer than two hours on the motion).

B. Hourly Rates

In setting reasonable attorneys’ fees, the general touchstone is whether the rate is in line with those prevailing in the community for comparable services by lawyers of reasonably comparable skill, experience, and reputation. *See, e.g., Lippoldt v. Cole*, 468 F.3d 1204, 1224-1225 (10th Cir. 2006) (considering the “prevailing market rate in the relevant community” in determining what constitutes reasonable rate) (quoting *Malloy v. Monahan*, 73 F.3d 1012, 1018 (10th Cir. 1996)). “The hourly rate should be based on the lawyers’ skill and experience in civil rights or analogous litigation.” *Id.* (internal quotation marks and citation omitted). Various factors can justify a departure from market rates, including “[t]he novelty and difficulty of the questions”; “[t]he skill requisite to perform the legal service properly”; “[w]hether the fee is fixed or contingent”; “[t]he amount involved and the results obtained”; and “[t]he experience, reputation, and ability of the attorneys.” *Mkt. Ctr. E. Retail Prop., Inc. v. Barak Lurie, Lurie & Park*, 730 F.3d 1239, 1247 (10th Cir. 2013) (describing the 12 “*Johnson* factors” regarding fee determinations, as set forth in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714 (5th Cir. 1974)).

The hourly rates requested for the attorneys and paralegals who performed work on the underlying contempt motion are as follows:

| <u>Attorneys</u> | <u>Rate</u> |
|--|-------------|
| Neil Steiner, Dale Ho, Doug Bonney | \$450.00 |
| Angela Liu, R. Orion Danjuma, Sophia Lin Lakin | \$350.00 |
| Tharuni Jayaraman | \$275.00 |
| Lila Carpenter, Delaney Berman (Paralegals) | \$110.00 |

As set forth below, these requested rates are reasonable for complex civil litigation in the Kansas City market. *See* Hallquist Decl., hereto attached as Ex. B, at 3; *cf. Fox v. Pittsburg State Univ.*, 258 F. Supp. 3d 1243, 1264 (D. Kan. 2017) (finding, for employment litigation before this Court, that “the relevant market is the Kansas City metropolitan area, which includes Missouri and Kansas”).

But, to the extent that this Court determines that these rates exceed or are at the high range for the Kansas City market, an upward departure and consideration of the higher home market rates of Plaintiffs’ attorneys would be appropriate given the presence of numerous *Johnson* factors here. Generally speaking, voting rights litigation is highly specialized. According to a district court time study conducted by the Federal Judicial Center measuring the complexity and time needed to handle matters by the district courts, voting rights cases were among the top five most complex cases and were given a weight of 3.86 compared to 1.0 for an “average” case. Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, at 5 tbl.1 (2005), <https://www.fjc.gov/sites/default/files/2012/CaseWts0.pdf> (“hereinafter “Case-Weighting Study:”).

Accordingly, Plaintiffs relied on out-of-state counsel with civil rights and voting rights experience, and specifically, substantial experience with litigating cases under the NVRA. *See* Bonney Decl., hereto attached as Ex. C, at 2-3 (describing need for out-of-state counsel); Ex. A, Ho Decl. at 3-9 (describing qualifications and background of ACLU counsel); Steiner Decl., hereto attached as Ex. D, at 2-5 (describing qualifications and background of Dechert counsel). Indeed, while various courts have addressed issues that relate to matters in this litigation, *see, e.g., Arizona v. Inter-Tribal Council of Ariz.*, 570 U.S. 1 (2013); *Kobach v. U.S. Election Assistance Comm’n.*, 772 F.3d 1183 (10th Cir. 2014), no court had previously considered the

precise question underlying this case, *i.e.*, whether Section 5 of the NVRA prohibits a documentary proof of citizenship requirement for voter registration during the motor-voter process. And no court in this District has ever adjudicated an NVRA case prior to this litigation. In sum, the participation of out-of-state counsel with substantial voting rights and NVRA experience were critical for the prosecution of this matter generally, and for the underlying contempt motion specifically. Under these circumstances, it is appropriate for the Court, in calculating the lodestar, to consider the home rates of Plaintiffs' attorneys. *See Jeffboat, LLC v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 490 (7th Cir. 2009) (“[O]ur cases have consistently recognized that an attorney’s actual billing rate for comparable work is presumptively appropriate for use as a market rate when making a lodestar calculation.”).

Specifically, the four tiers of rates requested by Plaintiffs for their counsel are reasonable for the following reasons:

First, the rate of \$450 per hour is a reasonable rate for Mr. Steiner, Mr. Ho, and Mr. Bonney. Mr. Steiner is a partner at the law firm Dechert, LLP; Mr. Ho is the Director of the ACLU Voting Rights Project, a position akin to partner at a private law firm; and Mr. Bonney is the former Legal Director of the Kansas ACLU, also a position akin to a law firm partner. *See* Ex. A, Ho Decl. at 3-5. Each of them has more than 10 years of experience as an attorney. *See id.*; Ex. D, Steiner Decl. at 2-3, 8; Ex. C, Bonney Decl. at 1-2 (21 years for Mr. Steiner, 13 years for Mr. Ho, and 33 years for Mr. Bonney). Mr. Steiner and Mr. Ho have substantial experience litigating voting rights matters and cases under the NVRA in particular, and Mr. Bonney has substantial general civil rights experience. *See id.*

A rate of \$450 per hour is reasonable for attorneys of their experience and skill working on complex civil litigation in the Kansas City area. *See* Ex. B, Hallquist Decl. at 3. This Court

has approved a rate of \$450 for plaintiffs' attorneys working on civil rights matters. *See Riordan v. ASAP Expert Counseling, LLC*, No. 16-CV-2011-JAR-TJJ, 2017 WL 2225223, at *2, n.11 (D. Kan. May 19, 2017) (approving rate of \$450.00 for plaintiffs' lawyer in Kansas employment matter).¹ And it is within the range of what Mr. Bonney has been awarded for civil rights work in the District of Kansas. *See Bonney Decl., Marie v. Mosier*, No. 14-cv-2518, (D. Kan. Sept. 9, 2016), Doc. 148-1 at 2 (requesting fees at a rate of \$400 per hour for Doug Bonney); Order, *Marie v. Mosier*, No. 14-cv-2518, (D. Kan. Sept. 27, 2016), Doc. 150 (granting attorney's fees, in the total amount of \$295,000.00).

The requested rate is also a reasonable rate for civil rights work in Mr. Steiner and Mr. Ho's home market of New York. *See Saylor Decl.*, attached hereto as Ex. E, at 2-3. Indeed, it is less than what ACLU attorneys with comparable skills and experience have been awarded. *Simonds v. N.Y. City Dep't of Corrections*, No. 06 Civ. 5298(NRB), 2008 WL 4303474, at *1 n.2, *10 (S.D.N.Y. Sept. 16, 2008) (July 2008 decision awarding attorney's fees at a rate of \$425/hour to the Director of the ACLU Women's Rights Project, which would translate into approximately \$482.17 per hour in March 2018 dollars²). This rate is substantially less than

¹ Notably, the Federal Judicial Center rated employment cases as 1.67 in terms of complexity and time, which is more than the average federal matter (1.0), but substantially less than the rating given to voting rights cases (3.86). *See Case-Weighting Study*, at 5 tbl.1, *available at* <https://www.fjc.gov/sites/default/files/2012/CaseWts0.pdf>.

² *Cf. Bruce v. Colvin*, Civ. Action No. 14-1166-JWL, 2015 WL 7078939, at *4 (D. Kan. Nov. 13, 2015) (Court "used the Bureau of Labor Statistics CPI Inflation Calculator" to calculate appropriate rate for attorney's fees); *Culler v. Massanari*, No. 96-4164-SAC, 2001 WL 1718033, at *2 (D. Kan. Dec. 20, 2001) ("District courts have been determining the cost-of-living adjustment by multiplying the basic EAJA rate by the current consumer price index . . .") (internal quotation marks and citation omitted). Here, the CPI indicates that \$425, which was awarded to an ACLU Project Director in 2008, translates to \$476.42 in 2018. *See U.S. Dep't of Labor, Bureau of Labor Statistics, Databases, Tables, & Calculators by Subject, CPI Inflation Calculator* (hereinafter, "U.S. Dep't of Labor, CPI Inflation Calculator," https://www.bls.gov/data/inflation_calculator.htm).

what is set forth in the Laffey Matrix—which this Court has cited favorably.³ *See* Laffey Matrix⁴ (setting rates of \$864 per hour for attorneys with 20+ years of experience, and \$717 per hour for attorneys with 11-19 years of experience). This rate is also less than half of what Dechert customarily charges its for-profit clients. *See* Ex. D, Steiner Decl. at 6-7 (Dechert’s customary rate for Mr. Steiner is \$1,140.00 per hour, and would bill a partner with Mr. Ho’s experience at \$915 per hour).

Second, the rate of \$350 per hour is a reasonable rate for Ms. Liu, Mr. Danjuma, and Ms. Lakin. Ms. Liu is a senior associate at Dechert, while Mr. Danjuma and Ms. Lakin are staff attorneys at the ACLU. *See* Ex. A, Ho Decl. at 5-9; Ex. D, Steiner Decl. at 4. All have between 6 and 10 years of experience as attorneys. *See* Ex. A, Ho Decl. at 5-9 (8 years for Mr. Danjuma, and 6 years for Ms. Lakin) ; Ex. D, Steiner Decl. at 4 (9 years for Ms. Liu). All have substantial experience in voting rights and/or civil rights matters. *See* Ex. A, Ho Decl. at 5-9; Ex. D, Steiner Decl. at 4.

A rate of \$350 per hour is reasonable for attorneys of their experience and skill working on complex civil litigation in the Kansas City area. *See* Ex. B, Hallquist Decl. 3. The requested rate is also close to, but slightly below market-level for civil rights work in the context of Mr. Danjuma and Ms. Lakin’s home market of New York. *See* Ex. E, Saylor Decl. at 3-4; *Simonds*, 2008 WL 4303474, at *1 n.2, *10 (July 2008 decision awarding attorney’s fees at a rate of \$325/hour to an ACLU attorney with 10 years of experience (Emily Martin), which would translate into approximately \$368.72 per hour in 2018 dollars⁵). This rate is substantially less

³ *See* Appointment Order, *United States v. Black*, No. 16-cr-20032, Doc. 146 at 11-12 (D. Kan. Oct. 11, 2016) (awarding \$500 per hour to special master).

⁴ Available at <http://www.laffeymatrix.com/see.html>.

⁵ *See* U.S. Dep’t of Labor, CPI Inflation Calculator, available at https://www.bls.gov/data/inflation_calculator.htm.

than the rates set forth in the Laffey Matrix (\$636 per hour for attorneys with 8-10 years of experience, and \$440 per hour for attorneys with 4-7 years of experience).⁶ It is also substantially less than what Dechert customarily charges its for-profit clients. *See* Ex. D, Steiner Decl. at 6-7 (Dechert customarily bills Ms. Liu at \$850.00 per hour, and would bill Mr. Danjuma and Ms. Lakin at \$840 and \$795 per hour, respectively).

Third, the rate of \$275 per hour is a reasonable rate for Ms. Jayaraman. Ms. Jayaraman is a junior associate at the law firm Dechert, with significant background in the area of voting rights. *See* Ex. D, Steiner Decl. at 4-5. A rate of \$275 per hour is a reasonable fee for a second-year attorney of her experience and skill working on complex civil litigation in the Kansas City area. *See* Ex. B, Hallquist Decl. at 3. It is less than the rate set forth for attorneys of her experience under the Laffey Matrix (\$359 per hour),⁷ and less than half of what Dechert customarily bills (\$565 per hour) for Ms. Jayaraman's time. *See* Ex. D, Steiner Decl. at 6-7.

Fourth, the rate of \$110 per hour is reasonable for paralegal time. The term "attorney's fees" encompasses paralegal time as well as attorney time. *Cf. Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 580 (2008) (attorney's fees under 42 U.S.C. § 1988 "embrace[s] the fees of paralegals as well as attorneys") (citing *Jenkins*, 491 U.S.). \$110 per hour is a reasonable fee for a paralegal. *See* Ex. B, Hallquist Decl. at 3; Ex. E, Saylor Decl. at 2-3; *Simonds*, 2008 WL 4303474, at *1, *10 (July 2008 decision awarding attorney's fees at a rate of \$100/hour to an ACLU paralegal, which would translate into approximately \$113.45 per hour in 2018 dollars⁸).

⁶ *See* Laffey Matrix, available at <http://www.laffeymatrix.com/see.html>.

⁷ *See id.*, n. 6.

⁸ *See* U.S. Dep't of Labor, CPI Inflation Calculator, available at https://www.bls.gov/data/inflation_calculator.htm.

It is substantially less than what Dechert customarily bills for-profit clients (\$160 per hour) for paralegal time. *See* Ex. D, Steiner Decl. at 6-7.

The lodestar and presumptive attorneys' fee is \$49,637.04, as set forth in the table below:

| | <u>Hours</u> | <u>Rate</u> | <u>Total</u> |
|-------------------|--------------|----------------------|--------------------|
| Neil Steiner | 8.40 | \$450.00 | \$3,780.00 |
| Dale Ho | 32.76 | \$450.00 | \$14,740.00 |
| Doug Bonney | 8.50 | \$450.00 | \$3,825.00 |
| Angela Liu | 5.10 | \$350.00 | \$1,785.00 |
| R. Orion Danjuma | 8.90 | \$350.00 | \$3,115.00 |
| Sophia Lin Lakin | 14.03 | \$350.00 | \$4,911.67 |
| Tharuni Jayaraman | 55.80 | \$275.00 | \$15,345.00 |
| Lila Carpenter | 11.31 | \$110.00 | \$1,244.38 |
| Delaney Berman | 8.10 | \$110.00 | \$891.00 |
| | | <u>Total:</u> | \$49,637.04 |

II. Non-Taxable Expenses

This court's Contempt Order also entitles Plaintiffs to recover costs incurred in prosecuting their motion for contempt. The ACLU incurred costs totaling \$454.95, *see* Ex. A, Ho Decl. at 14; while Dechert incurred costs totaling \$1,554.17, *see* Ex. D, Steiner Decl. at 8-9. Plaintiffs therefore request collective non-taxable expenses in the total of \$2,009.12.

III. Additional Circumstances

"[T]he general theme of Defendant's [non-]compliance with the preliminary injunction order—that this Court's order is not 'the law.'" Contempt Order, Doc. 520, at 21. That theme has continued, even with this Court's issuance of its Contempt Order. Since that time, Defendant

has continued to deny responsibility for his underlying actions giving rise to the contempt motion, and has displayed disregard for this Court’s authority.

For example, on an interview on April 22, Defendant described this Court’s Contempt Order as “just ridiculous.”⁹ And, in a letter dated April 28, Defendant—through his counsel Sue Becker—again misrepresented the record, by claiming that, “in the weeks preceding the November 2016 Election,” “[t]he Secretary of State’s Office instructed the counties” to send postcards to voters covered by the preliminary injunction.¹⁰ That representation flies in the face of Ms. Becker’s past repeated assertions “that the postcards are unnecessary.” Contempt Order, Doc. 520, at 6; *see also id.* at 7. In the same letter, Ms. Becker also represented that this Court’s contempt ruling was “based on [the Court’s] incorrect understanding that the Secretary of State’s Office has the legal authority to compel the counties to act.”¹¹ She further argued that the premise of the contempt ruling was only that Defendant “was found to be in noncompliance,” rather than any “disrespectful behavior on the part of the Secretary of his legal team”¹²—which directly contradicts this Court’s determinations that Defendant made “disingenuous[]” arguments and “fail[ed] to take responsibility for violating this Court’s orders. . . .” Contempt Order, Doc. 520, at 15, 19.

In light of the foregoing, this Court should award Plaintiffs’ requested attorney’s fees and costs without any further reductions. Defendant’s failure to take responsibility for his actions

⁹ John Binder, *Exclusive: Kris Kobach on Being Held in Contempt During Fight Against Voter Fraud: It’s Just Ridiculous*, Breitbart.com (April 22, 2018), <http://www.breitbart.com/big-government/2018/04/22/kris-kobach-contempt-of-court-ridiculous/> (quoting Defendant Kobach as stating “[a]nd so the judge is holding my office in contempt for the failure of counties to follow the instructions that we gave them. It’s just ridiculous.”) (emphasis in original).

¹⁰ Letter from Sue Becker to Kansas Senate President Sue Wagle at 2, April 28, 2018, *available at* <http://media.kansascity.com/livegraphics/2018/pdf/ContemptLetter.pdf>.

¹¹ *Id.*

¹² *Id.*

and his continued disrespect for the Court's authority suggest that significant monetary sanctions are necessary to deter future non-compliance. Defendant's conduct should also be a factor considered by the Court when it considers whether "[a]ny further remedial measures" are necessary upon deciding the final merits of the case. *Id.* at 24.

IV. Conclusion

For the foregoing reasons, Plaintiffs request this Court award them a total of \$51,646.16, consisting of attorneys' fees in the amount of \$49,637.04, and non-taxable expenses in the amount of \$2,009.12.

DATED this 7th day of May, 2018.

Respectfully submitted,

/s/ Stephen Douglas Bonney
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 7th day of May, 2018, I electronically filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Stephen Douglas Bonney
STEPHEN DOUGLAS BONNEY (#12322)

Attorney for Plaintiffs