UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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MICHAEL G. DELEW, et al., Plaintiffs, v. STATE OF NEVADA, et al., Defendants.	2:00-cv-00460-LRL **O R D E R**

This case comes before the court on plaintiffs' Application for Attorneys' Fees (#290). The court has considered the Application (#290), Plaintiffs' Submission in Support of Attorneys Fees and Expenses (#291), Exhibit A (#295), First Supplement to Plaintiffs' Submission in Support Attorneys' Fees and Expenses Award Under Settlement Agreement and Release (#303), defendant's Opposition (#304), and plaintiffs' Reply (#305). Plaintiffs seek an award of attorneys' fees and expenses incurred during the course of the fourteen years of litigation that ultimately resulted in the settlement of this case.

Background

During the early evening hours of September 27, 1994, Erin DeLew, a young woman in her late 20s, was riding her bicycle home on a wide, lightly traveled road in Las Vegas, Nevada. An hour earlier, Janet Wagner, who lived in Erin's neighborhood, had left work and, over the course of the next hour, had consumed two large beers in her SUV while running errands. As they both headed for home, Erin and Mrs. Wagner found themselves traveling up the same wide road approaching a cross street that led into their subdivision. Erin was pedaling her bicycle; Mrs. Wagner was driving 45 miles an hour in a 35 mile an hour zone. As Erin began to turn left

at the cross street, Mrs. Wagner slammed into her from behind, propelling her through the air and onto the street, where Erin died moments later.

Neighbors called 911. Mrs. Wagner called her husband, David Wagner, who was a traffic officer with the Las Vegas Metropolitan Police Department ("Metro"). Two Metro patrol officers and Officer Wagner arrived shortly thereafter. When the Metro detectives who investigate fatal auto accidents arrived, they expressed discomfort investigating a vehicular homicide involving a fellow officer's wife, and asked that the Nevada Highway Patrol ("NHP") be called in to conduct the investigation. During the initial call to NHP, the NHP dispatcher learned that Metro required assistance with a fatal traffic accident involving a Metro officer's wife who'd been drinking and driving. Seven NHP officers ultimately arrived at the scene.

Instead of investigating this fatal accident in accordance with standard investigative protocols, NHP and Metro engaged in a cover-up in order to protect Mrs. Wagner, a cover-up that ultimately cost Erin DeLew's survivors the ability to gather critical evidence in support of a state wrongful death action against Mrs. Wagner. For example, despite a detectable odor of alcohol on Mrs. Wagner's breath, NHP troopers did not subject her to field sobriety tests. Nor did they giver her a preliminary breath test to measure the amount of alcohol in her breath. They allowed Metro officers, including her husband, to accompany Mrs. Wagner to her nearby home and to enter the home by herself for several minutes before returning her to the accident scene. When the coroner arrived, the troopers told him that alcohol was not a factor in the accident, and that the accident was entirely Erin DeLew's fault. Two eye-witnesses to the accident were not interviewed that day; indeed, one of those witnesses was never interviewed because she was allowed to leave without giving her name or address. More than three hours after the accident Officer Wagner allowed his wife to undergo a blood alcohol test at a hospital. On the first attempt at a draw, the nurse was unable to pull a complete blood sample. The trooper advised the nurse that a second sample was unnecessary, notwithstanding that a second sample was the required protocol in investigations of fatal traffic accidents so that rates of absorption and

dissipation can be determined. The result of the one incomplete sample was .05 well more than three hours after the accident. Additionally, NHP did not interview Mrs. Wagner until several days later. The entire interview was conducted in the presence of Mrs. Wagner's husband, and was memorialized in a four-sentence report.

The fourteen year history of the litigation that arose out of Erin's death began in late 1994, when Erin's husband, Michael DeLew, and her parents, Roy and Vicki Mayberry, retained Daniel T. Foley to pursue a wrongful death action against Mrs. Wagner in Nevada state court. When evidence of a police cover-up surfaced, Foley recognized that additional counsel experienced in pursuing federal claims related to law enforcement cover-ups were needed. He selected Timothy M. Rastello of Holland & Hart in Denver, Colorado and Brian Panish of Panish Shea & Boyle in Los Angeles, California because of their experience in successfully litigating police cover-up cases. In March 1995, Rastello and Panish agreed to join Foley on a contingency basis for the purpose of investigating and, if warranted, litigating any valid claims for violations of plaintiffs' civil and constitutional rights under 42 U.S.C. § 1983.

Plaintiffs conducted discovery to determine whether viable § 1983 claims existed. As a result, they moved to amend the state wrongful death complaint to add § 1983 claims against Metro and NHP, including the relatively novel claim of denial of access to the courts. On November 4, 1996, the state court denied the motion to amend, and directed plaintiffs to file the § 1983 claims separately. Plaintiffs did so, and at the same time petitioned the Nevada Supreme Court for a writ of mandamus. NHP removed the § 1983 claim to federal court, and the Nevada Supreme Court denied plaintiffs' mandamus petition without prejudice pending the outcome of the federal action.

On April 3, 1997, the federal court granted Mrs. Wagner's motion to dismiss and dismissed with prejudice all claims as to all defendants on the ground, among others, that plaintiffs had failed to allege that the defendants had infringed upon any cognizable protected right under § 1983. Plaintiffs appealed that decision to the Ninth Circuit Court of Appeals,

which heard oral argument in San Francisco on March 12, 1998. On May 11, 1998, the Ninth Circuit reversed, holding that plaintiffs had "indeed alleged a constitutional violation, namely, that the defendants violated the DeLews' right of meaningful access to the courts by covering up the true facts surrounding Erin Rae DeLew's death." *DeLew v. Wagner*, 143 F.3d 1219, 1222 (9thCir. 1998) ("*DeLew I*"). The court remanded the case to the federal district court with instructions to dismiss the claim *without* prejudice in order to give plaintiffs "the opportunity to re-file their section 1983 action if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective." *Id.* at 1223.

Due to the lack of available evidence, plaintiffs were significantly limited in their ability to properly litigate the wrongful death claim. Consequently they were forced to settle the state action for Mrs. Wagner's liability insurance policy limit of $100,000, an amount substantially less than the real value of the case. Based on this outcome, in January, 2000, plaintiffs filed the instant case in state court against NHP and Metro, asserting claims for denial of access to the courts in violation of their right to due process of law under § 1983. Defendants removed the case to federal court. Plaintiffs moved unsuccessfully to remand the case to state court.

Substantial discovery ensued. On March 26, 2001, plaintiffs filed a 108-page Motion to Compel Discovery from NHP (#43). NHP responded with a Counter-Motion for Protective Order (#46). On June 26, 2001, the undersigned Magistrate Judge granted the Motion to Compel, denied NHP's Counter-Motion, and ordered sanctions against NHP. On October 18, 2001, the Honorable Roger L. Hunt affirmed the undersigned's order, which directed NHP to pay sanctions in the amount of $7,000.

On December 17, 2002, Judge Hunt granted defendants' motions for summary judgment as to all defendants. Order (#199). However, on November 15, 2005, in response to plaintiffs' post-judgment motions, Judge Hunt vacated his grant of summary judgment for Metro as a sanction for its discovery abuses. The grant of summary judgment in favor of NHP, however, stood. Order (#228). The plaintiffs and Metro ultimately reached a settlement agreement in

April 2007. On April 20, 2007, the court entered judgment (#261) for NHP.

Plaintiffs appealed the judgment to the Ninth Circuit on May 31, 2007; arguments were held in August, 2008. On September 17, 2008, the Ninth Circuit reversed the grant of summary judgment for NHP, holding that plaintiffs had "adduced sufficient evidence to place in dispute whether Appellees, in conspiracy with the members of [Metro], covered up the true facts surrounding Erin DeLew's death so as to deprive Appellants of meaningful access to the courts in violation of their right to Due Process." *DeLew v. Adamson*, 293 Fed. Appx. 504, 505 (9th Cir. 2008). The court found that "a reasonable jury could infer the participation of NHP officers in a conspiracy to deny the Appellants access to the courts." *Id.*

The parties thereafter entered into extensive settlement discussions. On February 19, 2009, they executed a formal Settlement Agreement and Release. *See* Exh. A (#295). Under the Agreement, plaintiffs and NHP agreed to submit the determination of plaintiffs' attorneys' fees and costs pursuant to 42 U.S.C. § 1988 to the undersigned Magistrate Judge, whose determination would be final and non-appealable. The parties further agreed that the award will be at least $1.25 million, but not more than $2.75 million.

Discussion

Section 1988 authorizes district courts to award attorney's fees to prevailing parties in civil rights litigation. "The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The first step to calculating a reasonable attorney fee under § 1988 is to calculate the "lodestar" amount, which equals "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433; *Dang v. Cross*, 422 F.3d 800, 812 (9th Cir. 2005); *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995). While a strong presumption exists that the lodestar figure represents a reasonable fee, the court may adjust the figure upward or downward on the basis of any of twelve factors that are "not already subsumed in the initial lodestar calculation." *Morales v. City of San Rafael*, 96 F.3d

359, 363 n.8, 363 (9th Cir. 1996).[1] The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Hensley*, 461 U.S. at 437. Hours that are excessive, redundant, or otherwise unnecessary, should be excluded from the lodestar amount. *Id.* at 434; *Van Gerwen v. Guar. Mt. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).

I. Reasonable Fee

The parties agree that $194 per hour is a reasonable "blended rate" for attorneys' fees in this matter. Opp'n (#304) at 8; Reply (#305) at 13. It should be noted, however, that a lodestar rate of $194 per hour is significantly lower than the hourly rate Mr. Rastello would otherwise be entitled to charge, given his experience, expertise and success in this type of litigation. Nonetheless, because the parties agree on this point, the court will not disturb the proposed hourly rate.

II. Reasonable Hours

Plaintiffs calculate reasonable hours starting from May 17, 1995, when they first began to investigate and prosecute the § 1983 claims against NHP and Metro. Reply (#305) at 3. Plaintiffs maintain that NHP and Metro are jointly and severally liable for all attorneys fees related to the § 1983 claims dating back to May 1995 on the ground that NHP and Metro "conspired from inception to deprive the DeLews of their civil and constitutional rights, and in so doing, jointly caused indivisible injuries to the DeLews." App. (#290) at 26. Even without joint and several liability, plaintiffs argue, the vast majority of attorneys' fees and expenses are awardable against NHP, inasmuch as the fees cannot be reasonably apportioned between NHP

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[1] The twelve factors as set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1996) are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *McGrath*, 67 F.3d at 252 n.4 (citing *Kerr*, 526 F.2d at 70). These same factors are also set forth in *Hensley v. Eckerhart* as noted by NHP. 461 U.S. at 430 n.3.

and Metro "on any meaningful or principled basis," and moreover, "roughly 90% of the attorney fees expended by the DeLew's counsel were either directly related to establishing liability against both law enforcement agencies or solely the NHP defendants." *Id.* at 30. Alternatively, plaintiffs argue, because prosecution of the wrongful death action was a mandatory condition precedent to their § 1983 claims, expenses and fees incurred from the time plaintiffs attempted to amend their complaint to include the § 1983 claim forward must be included in the calculation of the fee award. Plaintiffs cite numerous authorities to support their alternate positions.

NHP maintains that the reasonable starting date from which to award fees should be April 11, 2000 – the date on which NHP removed this action from state to federal court. Further, NHP contends that the fee award should not include any hours from November 15, 2005 through April 20, 2007, when it was uninvolved in the action as a result of the (later overturned) grant of summary judgment. NHP also questions whether post-settlement expenses may be included in the fee calculation. In addition, NHP specifically challenges 110.9 of plaintiffs' claimed hours and $901.13 of plaintiffs' claimed expenses, as well as plaintiffs' customary charge for copying ($.15/copy) and phone charges.[2] Notably, NHP cites virtually no authority to support its positions or to challenge plaintiffs' claims.

A. Joint and Several Liability

Plaintiffs maintain that joint and several liability for attorneys' fees is proper where, as here, defendants are joint tortfeasors who together caused an indivisible injury. Indeed, plaintiffs view NHP as having taken an equal, if not leading, role in the cover-up. *See e.g*, Affidavit of Foley (#291) at ¶¶ 30-32; Affidavit of Rastello (#291) at ¶ 24; Affidavit of Bryson

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[2] Hours claimed post-settlement in preparing this claim for attorneys' fees and a protective order total 369.7, or $71,721.80. *See* First Supp. (#303). Hours claimed for all counsel preceding April 11, 2000 total 2768.3, or $537,050.20. Hours claimed for all counsel for the Summary Judgment time period from November 15, 2005 thru April 20, 2007 total 461.4, or $89,511.60. Multiplying the contested 110.9 hours by the blended rate yields a total of $21,514.

(#291) at ¶ 6. Moreover, plaintiffs argue that there is no reasonable way to apportion fees between Metro and NHP because "the fees and expenses are 'intertwined' between the two defendant groups, and as a practical necessity, awardable in full against NHP," and "roughly 90% of the attorney fees expended by the DeLew's counsel were either directly related to establishing liability against both law enforcement agencies or solely the NHP defendants." App. (#290) at 30.

Significantly, NHP does not substantively challenge plaintiffs' numerous arguments and authorities in support of joint and several liability. Rather, NHP contends that it cannot be jointly and severally liable for plaintiffs' claimed fees because "there was no finding of liability by NHP." Opp'n (#304) at 3. While NHP cites no authority in support of its contention, it states, "The cases Plaintiffs cite ... are inapposite," inasmuch as "every case cited by Plaintiffs to support their argument is based on a finding of liability ... after a jury verdict or determination on a dispositive motion." *Id.* at 4. NHP specifically challenges 32.1 hours on grounds that the hours were incurred solely on issues related to Metro and 3.8 hours on grounds that the time entries do not distinguish between the time spent on Metro and the time spent on NHP. *See id.* at 6-7. Confusingly, however, in its conclusion, NHP bases its final calculation of fees on plaintiffs' total claimed hours, stretching back to 1995. *See id.* at 9 ("Even if the court were to simply cut in half the unreasonable amount of hours, 13,385 hours spend [sic] and multiplied by $194 this equals $1,298,345."). Additionally, NHP asserts that an award of 100% of attorneys' fees would be a "windfall" to plaintiffs inasmuch as plaintiffs have likely received some fees from their settlement with Metro. *Id.* at 4.

1. Joint and Several Liability for Attorneys' Fees Applies in This Case

There is no question that plaintiffs are entitled to recover their reasonable attorneys' fees pursuant to the parties' settlement agreement, which released all related claims in this matter. *See* Settlement Agreement, Exh. A (#295). Contrary to NHP's assertion, resolution of a claim by settlement is not an automatic bar to a determination of joint and several liability or of joint

and several liability with respect to attorneys' fees. *See e.g. Oberson v. United States Dep't of Agriculture, Forest Service, et al.*, 514 F.3d 989, 996 (9th Cir. 2008) (finding two defendants 50% liable, although one defendant had already settled, and assigning the full 50% share of liability to the remaining defendant, on grounds that both defendants acted in concert); *Koster v. Perales, et.* al., 903 F.2d 131, 138 (2d. Cir. 1990) (affirming district court holding settling state and county defendants jointly and severally liable for attorney's fees). "The only limitation on the district court's discretion to award fees jointly and severally is that it must do so consistently with the pre-existing liability rules." *Koster*, 903 F.3d at 139 (citing *Dean v. Gladney*, 621 F.2d 1331, 1339-40 (5th Cir. 1980) *cert. denied*, 450 U.S. 983 (1981) (defendants must be joint tortfeasors).

Plaintiffs' § 1983 claim alleged a conspiracy involving NHP and Metro which caused an intertwined, indivisible injury to plaintiffs. "In cases where two or more defendants actively participated in a constitutional violation, it will frequently be appropriate to hold all defendants jointly and severally liable for the attorney's fees." *Council for Periodical Distributors Ass'ns. v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987); *see also Molnar v. Booth*, 229 F.3d 593, 605 (7th Cir. 2000) ("When two or more defendants actively participated in a constitutional violation, they can be held jointly and severally responsible for indivisible attorney's fees."). Moreover, while the Ninth Circuit has ordered the apportionment of attorney's fees in cases involving multiple defendants, it has done so only when a challenging defendant can show that the time expended by plaintiff in pursuing each defendant was "grossly unequal." *See Corder v. Gates*, 947 F.2d 374, 383 (9th Cir. 1991) (surveying attorneys' fee apportionment cases and finding that the time expended in pursuing each defendant was the key factor in deciding whether apportionment was proper); *accord* Restatement (Second) of Torts, § 433B(2) (1971) (The actor who "seeks to limit his liability on the ground that the harm is capable of apportionment among them" has "the burden of proof as to the apportionment.").

Plaintiffs made § 1983 claims against NHP and Metro as joint tortfeasors, for which

plaintiffs view NHP as having taken an equal, if not leading, role. *See e.g*, Affidavit of Foley (#291) at ¶¶ 30-32; Affidavit of Rastello (#291) at ¶ 24; Affidavit of Bryson (#291) at ¶ 6. Plaintiffs first investigated the § 1983 claims in May, 1995, and drafted the first § 1983 claims in January, 1996. Plaintiffs did not stop developing the case until reaching settlement in February 2009. Second Rastello Aff. (#305-2) at ¶6. NHP's role in the conspiracy cannot be characterized as passive. *See Molnar*, 229 F.3d at 605 (explaining that in deciding whether to apportion or to use joint and several liability, the court should consider the "relative active or passive role each defendant played"). Moreover, throughout this litigation NHP fought the case tenaciously every inch of the way, actively resisting discovery – leading to the imposition of sanctions by this court – and continued to resist settlement even after Metro had reached an agreement with the DeLews. "The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) (plurality opinion).

NHP does not take issue with the proposition that NHP bears the burden of demonstrating that litigation time expended by plaintiffs as between NHP and Metro was grossly unequal. Instead, it argues that *Corder* simply doesn't apply here because it involved a trial by jury. As noted above, resolution of a claim by settlement is not an automatic bar to joint and several liability for attorneys' fees. Indeed, in reaching its conclusion that "time expended in pursuing each defendant was the key factor in deciding whether apportionment was proper," *Corder* specifically cites to a case in which the district court held settling defendants jointly and severally liable for attorney's fees. *See* 947 F.2d at 382 (citing *Koster*, 903 F.3d at 138) ("... given the interrelationship and overlap between [the state and county defendant's] responsibilities and obligations ... an attempt to precisely balance the amount of responsibility rightfully placed upon either side would seem both a futile and wasteful task") (citation omitted). Accordingly, inasmuch as NHP has not substantively challenged plaintiffs' arguments or authorities regarding joint and several liability for attorneys' fees, and inasmuch as the court's

own research does not demand a different result, NHP will, with one exception, be held jointly and severally liable for fees and expenses dating back to the inception of the § 1983 claim.

2. NHP Is Not Jointly and Severally Liable for Fees Incurred During Between November 15, 2005 and April 20, 2007

NHP maintains that the fee award should not include any hours plaintiffs' counsel devoted to this case between November 15, 2005, when Judge Hunt vacated his grant of summary judgment for Metro, and April 20, 2007, when Judge Hunt entered judgment for NHP. The court agrees. During this period virtually no work was done relating to NHP. Metro became the only active defendant when the summary judgment order in its favor was vacated. NHP, on the other hand, was essentially out of this case until Judge Hunt, pursuant to his summary judgment order, entered a Final Judgment in a Civil Case in favor of NHP, following which, on May 31, 2007, plaintiffs launched the appeal that ultimately overturned the grant of summary judgment. Clearly, under Corder's "grossly unequal" test, apportionment for the period between November 15, 2005 and April 20, 2007 is not difficult and is required. Accordingly, the court will exclude from the fee award all fees and expenses incurred by plaintiffs' counsel during the period in question in the amount of $89,511.60.

3. Joint and Several Liability for Fees Will Not Result in a "Windfall" to Plaintiffs

NHP takes the position that "[a]ll fees regarding any and all prior cases should have been handled in those now closed matters.... Plaintiffs would have received attorney's fees in their Settlement Agreement with Metro and should not be able to garner a windfall by collecting 100% of fees claimed in this matter." Opp'n (#304) at 4. NHP's fear of a "windfall" is amply addressed by the settlement agreement itself. Plaintiffs and NHP engaged in several lengthy settlement conferences, producing an agreement which incorporates all seven civil and appellate actions, which the parties characterized as "'related adversarial actions arising from events that began on September 27, 1994'" and which established a floor and ceiling for the award of attorneys' fees and expenses. Exh. A (#295). It is important to note that plaintiffs have reduced

their fee submission by nearly 1000 hours. *See infra* Section E. Redundancy in Billing. Moreover, plaintiffs' agreement to accept the blended hourly rate of $194/hour was not a minor concession. Based on their own rates, plaintiffs calculate the lodestar amount to be in excess of $4 million. An award of even the ceiling of $2.75 million could hardly be considered a "windfall."

B. Attorney's Fees for Prosecution of Wrongful Death Action

Plaintiffs next argue that because prosecution of the wrongful death action was a mandatory condition precedent to plaintiffs' § 1983 claims, expenses and fees incurred from the time plaintiffs attempted to amend their complaint to include the § 1983 claim forward must be included in the calculation of the fee award. NHP contends that plaintiffs untimely attempted to amend the wrongful death suit, and thus all fees related to it and all action preceding this § 1983 claim should not be included in the fee award. Opp'n (#304) at 5. NHP argues again that "[a]ll fees regarding any and all prior cases (Plaintiff refers to 8 other cases that have since closed) should have been handled in those now closed matters.... Plaintiffs would have received attorney's fees in their Settlement Agreement with Metro in this case and therefore should not be awarded here for the work in which they already have been paid." *Id.* at 4-5.

While plaintiffs cite cases which stand for the proposition that attorney's fees may be available "where a state proceeding is a necessary preliminary action to the enforcement of a federal claim," *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 255 (5th Cir. 2000), none actually award fees for the non-federal proceedings. *See e.g. Simi v. Harris County*, 236 F.3d at 255 (holding that attorneys' fees relating to state suit which preceded federal section 1983 action were unrecoverable where plaintiff did not allege a 1983 violation in its initial state court suit and failed to "demonstrat[e] that this state suit was part of the enforcement of the 1983 claim."); *Rock Creek Ltd. P'ship v. State Water Res. Control Bd.*, 972 F.2d 274, 279 (9th Cir. 1992) (denying attorney's fees for administrative action which preceded federal § 1983 claim because it "lacked the 'intimate connection' which sustains awards of attorneys fees in administrative

or state court proceedings outside of the federal action itself"); *Barrow v. Falck*, 977 F.2d 1100, 1104 (7th Cir. 1992) (acknowledging "when proceedings in state courts or agencies are part of the enforcement of Section 1983, then time reasonably devoted to them is compensable," but directing the district court to "reevaluate the claim for fees, excluding time devoted to seeking remedies before the state commission and court"); *Brantley v. M.F. Surles, ETC., et al.*, 804 F.2d 321, 325 (5th Cir. 1986) (holding that attorney's fees resulting from state court litigation that does not seek to enforce federal constitutional rights, but which does precede a successful § 1983 suit, are not attorney's fees contemplated by §1988). Because a § 1983 claim is brought directly in state or federal court, there generally is no action which must necessarily precede it as a procedural matter. *Compare e.g.* Section 706 of Title VII, codified at 42 U.S.C.S. § 2000e-5, which requires a complainant to exhaust state remedies before filing a federal claim; *see New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980) (permitting recovery of "an award for attorney's fees for work done by the prevailing complainant in the proceedings to which the complainant was referred pursuant to the provisions of Title VII"); *see also Webb v. Bd. of Educ. of Dyer County*, 471 U.S. 234, 240-41 (1985) (denying attorneys' fees for administrative proceedings because § 1983, unlike Title VII, does not require the claimant to exhaust state remedies).

Plaintiffs maintain that this court should reach a different result than the cases they cite, because "the state court proceeding against the Wagners was a necessary *condition precedent* to plaintiffs' § 1983 claim." Reply (#305) at 8 (emphasis in original). Plaintiffs' argument fails, however, inasmuch as the state court proceeding was necessary only to the extent that plaintiffs had to first establish a factual basis for their § 1983 claim before they could re-file it. *See DeLew I*, 143 F.3d at 1222-23 ("To prevail on their claim, the Delews [had to] demonstrate that the defendants' cover-up violated their right of access to the courts by rendering 'any available state remedy ineffective.'") (quoting *Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997). To file "an 'access to courts' claim, a plaintiff must make some attempt to gain

access to the courts." *Swekel*, 119 F.3d at 1264.

Section 1988, however, provides for attorney's fees "in any action or proceeding to enforce a provision of ... section 1983." Here, the state suit could not have been an action or proceeding to enforce the § 1983 access to courts claim, inasmuch as its outcome was the very basis of the claim. Accordingly, the court declines to award fees dating back to plaintiffs' first attempt to amend their complaint with a § 1983 claim on the basis of this theory. To do so would be to redefine a "proceeding to enforce" a § 1983 claim to mean a "proceeding which will serve as the factual basis to establish a future § 1983 claim." These concepts are not analogous.

C. Block-Billing

NHP criticizes plaintiffs for the use of "block billing," a "time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1129 (9th Cir. 2008) (citation omitted). Use of block billing is a legitimate ground "for reducing or eliminating certain claimed hours, but not for denying all fees," *Mendez*, 540 F.3d at 1129. Though NHP accuses plaintiffs of block billing, it fails to point the court to any specific entries which may in fact constitute block billing. NHP cannot expect the court to comb the record in search of evidence to support NHP's accusation. It is simply inappropriate for NHP to "delegate to the Court the work of analyzing all billing entries line-by-line in an effort to identify ... entries [that the party] might find similarly objectionable." *See Ellison v. Balinski*, 2009 U.S. Dist. LEXIS 60363 at *4 (E.D. Mich. July 15, 2009) (quoting *Former Emples. of BMC Software, Inc. v. United States Sec'y of Labor*, 519 F. Supp. 2d 1291, 1326 n.51 (Ct. Int'l Trade 2007)). Nevertheless, the court's review of the billing statements for Holland & Hart, Foley & Foley, and Brian J. Panish reveals that the attorneys have maintained sufficiently detailed billing records.

To be sure, counsel are "not required to record in great detail how each minute of [their]

time was expended. But at least counsel should identify the general subject matter of [their] time expenditures." *Hensley*, 461 U.S. at 437 n.12 (citation omitted). As another court has put it, "a fee petition should include some fairly definite information as to the hours devoted to various general activities, *e.g.*, pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, *e.g.*, senior partners, junior partners, associates." *Rode v. Dellarciprete*, 892 F.2d 1177, 1190 (3d Cir. 1990) (citation and quotation marks omitted). "However, 'it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.'" *Id.* (citations and quotation marks omitted); *see also id.* at 1191, 1191 n.13 (rejecting argument that billing entries such as "settlement" and "miscellaneous research, telephone conversations, and conferences concerning facts, evidence, and witnesses" were insufficiently specific); *Davis v. City of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992) (rejecting argument that billing records were insufficiently specific, and emphasizing that Supreme Court's decision in *Hensley*, *supra*, requires only that counsel "identify the general subject matter of his time expenditures"), *vacated on other grounds by* 984 F.2d 345 (9th Cir. 1993).

At the very least, NHP should have contested specific entries. NHP does not even suggest to the court an amount, based on its own review of the record, which would represent a fair deduction. Instead, it merely states "the use of block billing should reduce the amount of attorney's fees." Opp'n (#304) at 7. In the absence of evidence or argument, the court declines to analyze the records line-by line to guess at what NHP might find objectionable. Plaintiffs concede that some block billing does appear in the fee statements. Having reviewed the records, however, it appears that use of block billing was rare, involved only small amounts of time, and as a whole, the billing entries provide sufficiently detailed information to allow the court to determine whether the time plaintiffs' attorneys devoted to various tasks was not excessive or otherwise unreasonable. Such a limited amount of block billing cannot justify a wholesale reduction in fees as NHP suggests. *See id.* at 7.

D. Fees for Representation by Multiple Firms

Contrary to NHP's implication, "there is nothing at all out of the ordinary about staffing significant, high-impact litigation with multiple attorneys. The courts have recognized that the retention of multiple counsel in complex cases is understandable and not a ground for reducing the hours claimed because the use in involved litigation of a team of attorneys who divide up the work is common for both plaintiff and defense work." *Former Emples. of BMC Software, Inc.*, 519 F. Supp. 2d at 1333 (quoting *Jean v. Nelson*, 863 F.2d 759, 772-73 (11th Cir. 1988)). "An award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation." *Johnson v. Univ. Coll. of Univ. of Ala.*, 706 F.2d 1205, 1208 (11th Cir. 1983) (acknowledging typical staffing practices in major litigation, and reversing trial court's exclusion of time based on retention of multiple attorneys and "unnecessary duplication of effort") (citations omitted).

"A fee reduction is appropriate where, for example, a case is overstaffed such that hours spent by one lawyer are unnecessarily duplicative of those expended by another, or where excessive staffing leads to a practice of engaging in long daily conferences." *Former Emples. of BMC Software, Inc.*, 519 F. Supp. 2d at 1334 (citing *Spell v. McDaniel*, 852 F.2d 762, 767 (4th Cir. 1988) and A. Hirsch & D. Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 26-27 (Federal Judicial Center 2d ed. 2005) (noting that courts have reduced fee awards in instances of "duplication of services," "use of too many attorneys," and "too much conferencing")). However, "[w]hile duplication of effort is a proper ground for reducing a fee award, 'a reduction is warranted only if the attorneys are unreasonably doing the same work.'" *Jean*, 863 F.2d at 772-73 (quoting *Johnson*, 706 F.2d at 1208).

NHP makes a blanket assertion that plaintiffs' counsel, Foley & Foley, and Brian J. Panish, have made duplicative efforts, and that all of their fees should be excluded as repetitive and unnecessary. Opp'n (#304) at 8. Once again NHP points the court to no evidentiary support for this proposition. As noted above, it is inappropriate for NHP to "delegate to the

Court the work of analyzing all billing entries line-by-line in an effort to identify ... entries the [g]overnment might find ... objectionable." *Former Emples. of BMC Software, Inc.*, 519 F. Supp. 2d at 1326 n.51. "Where, as here, a party fails to 'raise more than a generalized objection' to a category of fees, it is typically unnecessary for the prevailing party to mount an entry-by-entry defense of the challenged claims. Nor in such cases is the court generally required to review entries other than those which can be 'eliminated through a cursory examination of the bill.'" *Id.* at 1337 (citing *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1176 n. 14 (6th Cir. 1990), *overruled on other grounds by DiLaura v. Twp. of Ann Arbor*, 2007 U.S. App. LEXIS 15263, at *3 (6th Cir. 2007)). Upon such a review, the court finds no instance of attorneys unreasonably duplicating services or otherwise performing the same work. Therefore, reduction is not warranted in this respect.

E. Redundancy in Billing

NHP next complains that "upon the initial removal of this instant matter, the redundancy in billing begins." Opp'n (#304) at 5. NHP makes specific challenges to six date entries related to the removal, a general challenge to all hours plaintiffs' billed challenging the removal, billing related to plaintiffs' pro hac vice application, and Rastello's research of Local Rule 26. *See id.* Plaintiffs specifically respond to each questioned billing on a date by date basis. *See* Leffler Aff. (#305-3) at 1-4. In addition, plaintiffs counsel have already subtracted 966.5 hours from their fee submission to account for any unnecessary or redundant billing and to avoid unnecessary challenges. Rastello Aff. (#291) at ¶¶ 14-16 (deducting 777 hours); First Supp. (#303) at 22 (deducting 34.5 hours); Foley Aff. (#291) at ¶ 28 and Summary of Fees (deducting 155.9 hours). Accordingly, plaintiffs maintain that, inasmuch as an award of even the ceiling of $2.75 million falls far below its actual fees and expenses, any redundancy is more than accounted for by its own deductions. Reply (#305) at 7.

The court does not agree that these billings are unnecessarily redundant. Many of the time blocks cited by NHP represent more than just the disputed activity. In regard to NHP's

dispute of "61.4 on [removal] from 6/12 - 10/24/00," the court cannot find a relationship between the hours quoted and its own tabulation of hours for the time period. NHP's specific challenges related to removal proceedings total 39.5 hours, which is not a patently unreasonable amount of time given that "removal papers were filed on behalf the two dozen defendants," the "DeLews moved to remand, and the NHP defendants challenged the motion to remand on hyper-technical grounds." Second Rastello Aff. (#305-2) at 2. Moreover, NHP does not support its contentions on this issue with legal authority or evidentiary affidavits.

The court further disagrees that the pro hac vice application and Rastello's research of Local Rule 26 were redundant simply because plaintiffs' local counsel "already knows" the Local Rules. *See* Opp'n (#304) at 5-6. NHP does not point to specific billing entries it disputes as to the pro hac vice application but does specify 7.3 hours from 11/13/00 - 11/15/00, which it claims Rastello unreasonably spent reviewing Local Rule 26. *Id.* First the court notes that out-of-state counsel have a duty to familiarize themselves and comply with local rules; therefore Rastello's time spent researching the Local Rules is not in itself time poorly spent. Additionally, a closer review of the entries from 11/13/00 - 11/15/00 reveals that Rastello did more than just "familiarize himself with the local rules" in those 7.3 hours. For example, in addition to reviewing the local rule on those days, Rastello "reviewed correspondence from Ms. Brannigan regarding filing for Answer for individual defendants," "review[ed] State's Disclosures," and "draft[ed], revise[d], and finalize[d] correspondence to opposing counsel regarding Rule 26(f) meeting," among other tasks. *See* Appendix I at 67. Because the court does not find that time spent related to the removal proceedings, the pro hac vice application, or Rastello's research of Local Rule 26 to be unduly redundant, these billings will not be deducted from the fee award.

F. Post-Settlement Fees

NHP next argues that "billings post-settlement conference should not be included in the attorney's fees application." Opp'n (#304) at 8. Specifically, NHP states "the tax issues and issues regarding the protective order should have been discussed in the settlement conference."

Id. It is "well established that time spent preparing fee applications under 42 U.S.C. § 1988 is compensable." *Anderson v. Director, Office of Workers Compensation Programs*, 91 F.3d 1322, 1325 (9th Cir. 1996) (citing *Clark v. City of Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986) ("time spent in establishing entitlement to an amount of fees awardable under section 1988 is compensable"). Thus those fees related to this fee application are plainly awardable. NHP's concern over fees related to tax issues is unwarranted inasmuch as plaintiffs have already excluded them. (Leffler Aff. ¶ 6). Plaintiffs' successful Motion for a Protective Order Regarding Certain Attorney Fee Information (#289) to be produced in support of its application for attorneys' fees was "eminently sensible." Order (#298). NHP's refusal to enter into a stipulated protective order made this court's intervention necessary. The fees plaintiffs incurred regarding the protective order will not be excluded from the fee award.

G. Discovery Sanctions

NHP maintains that it "was sanctioned in this matter and those fees should not be included in the fee application as that would amount to double dipping." Following grant of plaintiffs' Motion to Compel (#43), this court awarded plaintiffs $7,000 in reasonable attorneys' fees and costs incurred in bringing that motion. *See* Order (#96). Because plaintiffs' counsel have already been remunerated for that motion, the court will deduct the $7,000 from this final fee award.

H. Expenses

Plaintiffs claim $341,027 in expenses. First Supp. (#303). NHP makes specific challenges to $901.13 of the claimed expenses: (1) $590.94 for lodging expenses during oral arguments in San Francisco on 08/14/08; (2) $239.75 for Rastello to travel to Las Vegas to present plaintiffs with a check for the Metro settlement on 04/18/07; and (3) $70.44 for dinner at Nine Steakhouse on 03/12/07. Opp'n (#304) at 9. Additionally, NHP challenges plaintiffs' copy costs of 15 cents per page as excessive, as well as unspecified telephone costs. *Id.* The court in reviewing the disputed charges does not agree that the expenses are so unreasonable as

to dismiss them outright but notes that, even if it were to do so, a $901 deduction to this fee submission would be negligible. However, the court will deduct all expenses which occurred prior to March, 1995 and for the period during which NHP was uninvolved in this litigation due to the later overturned order granting summary judgment. Foley & Foley submitted $372 worth of expenses incurred prior to March 1995, which will be deducted from the award. Holland & Hart incurred expenses in the amount of $5,856.84 from November 15, 2005 thru April 20, 2007, which will be deducted from the award of expenses.

CONCLUSION

By enacting 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976, "Congress [] elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large ...." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). Congress' purpose in authorizing fee awards was to encourage compliance with and enforcement of civil rights laws. The Fees Awards Act must be liberally construed to achieve these ends." *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980). The resolution of this case was the culmination of fourteen years of difficult, hard-fought, contentious litigation that included two appeals to the Ninth Circuit Court of Appeals, which recognized that a police cover-up that deprives a victim of the true facts of another's wrongdoing violates a citizen's right of meaningful access to the courts and fundamental due process of law. Through the tireless and skillful efforts of plaintiffs' counsel, this litigation not only brought closure and a measure of justice to plaintiffs, it vindicated important civil and constitutional rights, and served a significant public policy interest. It "constitutes a warning to law-enforcement officers not to treat civilians unconstitutionally." *Morales v. City of San Rafael*, *supra*, 96 F.3d at 365.

Based on the foregoing, the court finds that counsel for plaintiffs have reasonably expended the following number of hours in this matter from May 1995 thru June 2009 (with respect to the merits) and for May 2009 thru July 2009 (with respect to the application for fees and the protective order), and are entitled to compensation for this time at the following hourly

rates:

Attorneys	Reasonable Hours	x	Hourly Rate	=	Awardable Fee
Holland & Hart					
Thru May 2009	12,236.4		$194/hour		$2,373,861.60
May - July 2009	369.7		$194/hour		$ 71,721.80
Foley & Foley					
Thru May 2009	685.6		$194/hour		$ 133,006.40
May - July 2009	–		–		
Brian J. Panish					
Thru May 2009	169.5		$194/hour		$ 32,883.00
May - July 2009	–		–		
Total	13,461.2		$194/hour		$2,611,472.80

The court further finds that plaintiffs' counsel are entitled to reasonable expenses incurred in the amount of $334,797.73.

Total Reasonable Hours plus Expenses $2,946,271.53

Total, less Sanction Award of $7,000 **$2,939,271.53**

Accordingly, and in keeping with the upper limit agreed to be the parties,

IT IS ORDERED that plaintiffs' Application for Attorneys' Fees (#290) is GRANTED to the extent that NHP shall, without unnecessary delay, pay to plaintiffs the sum of **$2,750,000.00** as the reasonable attorneys' fees and costs incurred during this litigation.

DATED this 7th day of January, 2010.

LAWRENCE R. LEAVITT
UNITED STATES MAGISTRATE JUDGE