IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ERNEST F. HEFFNER, et. al,	:	No. 08-cv-990
	:	
Plaintiffs,	:	
	:	
v.	:	Hon. John E. Jones III
	:	
DONALD J. MURPHY, et. al,	:	
	:	
Defendants.	:	

ORDER

August 22, 2012

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Pending before the Court is Plaintiffs' Motion for Interim Award of Attorney's Fees. (Doc. 183). For the reasons that follow, we shall grant in part and deny in part the motion.

I. Procedural History

As the parties are intimately familiar with the extensive background and procedural history of this litigation, and in the interests of judicial economy, we shall only provide a brief recitation of the most pertinent procedural history as a foundation for our discussion thereafter.

Plaintiffs[1] initiated the instant action by lodging a massive Complaint

[1] The named Plaintiffs are: Ernest F. Heffner; Harry C. Neel; Bart H. Cavanagh, Sr.; John Katora; Brian Leffler; Rebecca Ann Wessel; Mark Patrick Dougherty; Cynthia Lee Finney; Nathan Ray; Todd Eckert; Ben Blascovich; Matthew Morris; Greg Achenbach; Karen Eroh;

against the Defendants[2] on May 20, 2008 alleging claims pursuant to 42 U.S.C. § 1983[3] and 28 U.S.C. § 2201[4] for deprivations of rights secured by the United States Constitution and the Pennsylvania Constitution.[5] (Doc. 1). On July 25

William Pugh; William Sucharski; John McGee; Amber M. Scott; Arika Haas; Nicholas Wachter; David Halpate; Patrick Connell; Eugene Connell; Matthew Connell; James J. Connell, Jr.; Jefferson Memorial Park, Inc.; Jefferson Memorial Funeral Home, Inc.; Wellman Funeral Associates, Inc. D/b/a Forest Park Funeral Home; East Harrisburg Cemetery Company d/b/a East Harrisburg Cemetery & Crematory; Robert Lomison; Craig Schwalm; Gregory J. Havrilla; and Betty Frey (collectively "Plaintiffs").

[2] The named Defendants are: Donald J. Murphy; Joseph A. Fluehr III; Michael J. Yeosock; Bennett Goldstein; James O. Pinkerton; Anthony Scarantino; Basil Merenda; Michael Gerdes; Peter Marks; and C.A.L. Shields (collectively "Defendants").

[3] This statute states, in pertinent part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983 (1996).

[4] This provision states, in relevant part, "In a case of actual controversy within its jurisdiction any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201 (1993).

[5] The Complaint contains the following counts:

Count I–Plaintiffs Heffner, Cavanagh, Patrick Connell, Eugene Connell, James Connell, Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Sucharski, McGee, Scott, Haas, Wachter, Halplate, and Jefferson Memorial Funeral Home, Inc. v. All Named Defendants alleging Fourth Amendment violations as a result of 63 Pa. Stat. Ann. § 479.16(b).

Count II–Plaintiffs Heffner Cavanagh, Patrick Connell, Eugene Connell, Sucharski, Leffler, Jefferson Memorial Park, Inc., Jefferson Memorial Funeral Home, Inc., Robert Lomison, and Wellman Funeral Associates v. All Named Defendants alleging deprivations of rights

secured by the Substantive Due Process Clause, Commerce Clause, and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.8(a), (b), (d), and (e).

Count III–Plaintiffs Neel, Havrilla, Lomison, Schwalm, Frey, Wellman, Scott, Haas, and Wachter v. All Named Defendants alleging deprivations of rights secured by the Substantive Due Process Clause, Equal Protection Clause, Commerce Clause, and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.8(a), (b), and (d).

Count IV–Plaintiffs Scott, Haas, and Wachter v. All Named Defendants alleging deprivations of their rights secured by the Substantive Due Process Clause, Equal Protection Clause as a result of 63 Pa. Stat. Ann. § 479.8(a), (b), and (d).

Count V–Plaintiffs Heffner, Cavanagh, Katora, Leffler, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Haas, Wachter, Halpate, and Wellman v. All Named Defendants alleging deprivations of the rights secured by the Substantive Due Process Clause, Commerce Clause and Article I §1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.8(e).

Count VI–Plaintiffs Heffner, Cavanagh, Patrick Connell, Eugene Connell, Mathew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Sucharski, McGee, Scott, Haas, Wachter, and Halpate v. All Named Defendants alleging deprivations of rights secured by the Substantive Due Process Clause and Article I §1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.2(11).

Count VII–Plaintiffs Heffner and Cavanagh v. All Named Defendants alleging deprivations of the rights secured by the Substantive due Process Clause and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.7.

Count VIII–Plaintiffs Heffner Cavanagh Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Sucharski, McGee, Scott, Haas, Wachter, Halpate, Havrilla, Neel, and Jefferson Memorial Funeral home, Inc. v. All Named Defendants alleging deprivations of the rights secured by the Substantive Due Process Clause and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.7.

Count IX–Plaintiffs Heffner, Sucharski, Sucharski Cremation Service, Inc., and Jefferson Memorial Park, Inc. v. All Named Defendants alleging deprivations of the rights secured by the First Amendment Free Speech Clause and the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.8 (a), (b), and (d).

Count X–All Plaintiff Funeral Directors v. All Named Defendants alleging deprivations

2008, the Defendants filed a Motion to Dismiss Plaintiffs' Complaint. (Doc. 11). Following full briefing of the motion, and oral argument on December 15, 2008, we issued a memorandum and order granting in part and denying in part Defendants' motion. (*See* Doc. 32 at 30-32). After numerous motions to extend the trial term were granted, the Pennsylvania Funeral Directors Association filed a Motion to Intervene on March 9, 2010, (doc. 50), which we denied on June 25, 2010. (Doc. 80).

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of the rights secured by the Substantive Due Process Clause and Equal Protection Clause as a result of 63 Pa. Stat. Ann. § 479.10(b).

Count XI–Plaintiffs Lomison, Schwalm, East Harrisburg, and Jefferson Memorial Park, Inc. v. All Named Defendants alleging deprivations of the rights secured by the substantive Due Process Clause, Free Speech Clause, Contract Clause as a result of interpretations of the Funeral Director Law and Regulations that preclude properly licensed crematories that are not licensed funeral establishments from contracting with the general public to provide cremation services for either at need or pre-need.

Count XII–Plaintiffs Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Sucharski, McGee, Scott, Haas, Wachter, Halpate, and Jefferson Memorial Funeral Home, Inc. v. All Named Defendants alleging deprivations of the rights secured by the Substantive Due Process Clause, Equal Protection Clause, Free Speech Clause, Contract Clause, and the Pennsylvania Constitution as a result of interpretations of the Funeral Director Law and Regulations to preclude licensed funeral directors from having a legal interest in a merchandise company that sells funeral merchandise either at need or pre-need; or having a legal interest in a company that performs cremations unless those companies are licensed as funeral establishments.

Count XIII–All Plaintiffs v. All Defendants challenging the legality of 63 Pa. Stat. Ann. § 479.11(a)(8) and 49 Pa. Code § 13.202(5).

Count XIV–All Plaintiffs v. All Named Defendants requesting injunctive relief and continuing jurisdiction from this Court.

On August 25, 2010, Plaintiffs filed a Motion for Leave to File an Amended Complaint. (Doc. 91). We granted the motion on November 5, 2010, (doc. 100), and Plaintiffs filed an Amended Complaint on November 9, 2010. (Doc. 101).[6]

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[6] The amended complaint contains the following counts:

Count I – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James Connell, Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Sucharski, McGee, Scott, Haas, Wachter, Halpate, and Jefferson Memorial Funeral Home, Inc. v. All Defendants (Warrantless, Limitless Inspections).

Count II – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Sucharski, Leffler, Jefferson Memorial Park, Inc., Jefferson Memorial Funeral Home, Inc., Robert Lomison, and Wellman Funeral Associates, Inc., d/b/a Forest Park Funeral Home v. Defendants (Undue Restriction on Ownership).

Count III – Plaintiffs, Neel, Havrilla, Lomison, Schwalm, Frey, Wellman, Scott, Haas and Wachter v. Defendants (Undue Restriction on Ownership to Licensed Funeral Directors).

Count IV – Plaintiffs, Scott, Haas and Wachter v. Defendants (Ownership Restrictions Violate Equal Protection of the Law).

Count V – Plaintiffs, Heffner, Cavanagh, Katora, Leffler, Ray, Eckert, Balscovich, Morris, Haas, Wachter, Halpate and Wellman Funeral Associates, Inc. D/b/a Forest Park Funeral Home v. Defendants (Undue Restriction on Place of Practice).

Count VI – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Wellman, Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Sucharski, McGee, Scott, Haas, Wachter and Halpate v. Defendants (Undue Requirement of "Full Time" Supervisor).

Count VII – Plaintiffs, Heffner, Cavanagh, and Wellman v. Defendants (Undue Requirement that Every Establishment Include a Prep Room).

Count VIII – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Sucharski, McGee, Scott, Haas, Wachter, Halpate, Havrilla, Neel and Jefferson Memorial Funeral Home, Inc. v. Defendants (Undue Restriction on Food).

Count IX – Plaintiffs, Heffner, Sucharski, McGee, and Jefferson Memorial Park, Inc. v.

The Pennsylvania Funeral Directors Association ("PFDA") filed a Motion for Leave to File an Amicus Brief on June 20, 2011, (doc. 111), which we granted on June 22, 2011. (Doc. 112). On July 19, 2011, the parties filed a Stipulation of Dismissal of Count X of the Amended Complaint, agreeing to dismiss the same with prejudice. (Doc. 113). Thereafter, on August 10, 2011, Defendants filed a Motion for Summary Judgment and brief in support thereof. (Docs. 117, 126). On August 15, 2011, Plaintiffs filed a cross Motion for Summary Judgment and supporting brief. (Docs. 137, 140).

Additionally, on August 23, 2011, we granted the International Cemetery, Cremation and Funeral Association leave to file an amicus curiae brief in support

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Defendants (Infringement on Commercial Speech).

Count X – All Plaintiff Funeral Directors v. Defendants (Arbitrary Restrictions on Continuing Education Course Availability). This Count was dismissed with prejudice by stipulation of the parties on July 19, 2011. (Doc. 113).

Count XI – Plaintiffs, Lomison, Wellman, Schwalm, East Harrisburg and Jefferson Memorial Park, Inc. v. Defendants (Unlawful Interference with Trade).

Count XII – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Sucharski, McGee, Scott, Haas, Wachter, Halpate, and Jefferson Memorial Funeral Home, Inc. v. Defendants (Unlawful Restriction on Ownership of Merchandise Company).

Count XIII – All Plaintiffs v. Defendants (Challenge to Section 11(a)(8) of the Funeral Directors Law and Section 13.202(5) of the Regulations).

Count XIV – All Plaintiffs v. Defendants (Request for Injunctive Relief and Continuing Jurisdiction).

of Plaintiffs' motion for summary judgment. (Doc. 142). On October 12, 2011, the National Funeral Directors Association ("NFDA") filed a motion for leave to file an amicus curiae brief regarding the cross motions for summary judgment. (Doc. 152). We granted the motion in part on October 17, 2011 to the extent we limited petitioners to twenty (20) pages and directed them not to expand the factual record given the potentially duplicative nature of petitioner's filing with that of the PFDA. (Doc. 155).

Defendants also filed a Motion to Strike, (doc. 163), and brief in support thereof, (doc. 164), on October 21, 2011. After full briefing on the cross motions for summary judgment, and the motion to strike, we issued a memorandum and order on May 8, 2012 granting summary judgment in favor of Plaintiffs on eleven (11) out of twelve (12) counts that remained in Plaintiffs' amended complaint, (doc. 182), and denying Defendants' motion to strike. To provide the parties with an opportunity to rectify some of the constitutional deficiencies identified in our memorandum, we stayed our mandate for a period of ninety (90) days. (Doc. 182 at 158). During the ninety (90) day period, Plaintiffs filed a Motion for Interim Award of Attorney's Fees, (doc. 183), and a brief in support thereof. (Doc. 184). On June 28, 2012, Defendants filed a brief in opposition to the motion for attorney's fees, (doc. 188), and on July 6, 2012, Plaintiffs filed a reply brief in

further support of their motion. (Doc. 192). At the end of the ninety (90) days, we held a telephone conference with the parties to review any steps that had been taken by Defendants to effectuate such changes.

Therefore, the pending motion has been fully briefed and is ripe for disposition.

II. Discussion

A. Prevailing Party

At the outset, 42 U.S.C. § 1988(b) states "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, ..." 42 U.S.C. § 1988(b). Plaintiffs contend that because they are the "prevailing parties," they are entitled to fees under § 1988(b) provided "they succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." (Doc. 184 at 10 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983))). Plaintiffs also emphasize that in *Fox v. Vice*, the Supreme Court stated that "[w]hen a plaintiff succeeds in remedying a civil rights violation . . . , he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority, and "should ordinarily recover an attorney's fee from the defendant – the party whose misconduct created the need for legal action." (*Id*. at 9 (citing 131 S. Ct. 2205, 2213 (2011))). They

further highlight the *Fox* Court's holding that "plaintiffs may receive fees under § 1988 even if they are not victorious on every claim. A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes." (*Id*. at 10 (citing 131 S. Ct. at 2214)). In the case *sub judice*, Plaintiffs argue they are entitled to attorney's fees because they prevailed on nineteen (19) of the claims they asserted. (Doc. 184 at 10).

On the other hand, Defendants maintain that Plaintiffs must establish they are a prevailing party which requires "point[ing] to a resolution of the dispute which changes the legal relationship between itself and the defendant." (Doc. 188 at 8 (citing *Singer Management Consultants v. Milgram*, 650 F.3d 223, 228 (3d Cir. 2011))). They highlight that the Supreme Court recognizes two types of resolution where parties are deemed prevailing parties: (1) judgment on the merits, and (2) court-ordered consent decrees. (*Id*. at 9 (citing *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001))). Although Defendants premise much of their argument against an award of attorneys' fees on the fact that we stayed the effect of our May 8, 2012 order for ninety (90) days, we find this argument to be unavailing given the Court's stated intention during the August 8, 2012 status conference to make our order final

pending submissions from the parties concerning appropriate relief. Accordingly, we find any argument on behalf of Defendants regarding the lack of finality in our prior order, and the consequent lack of an enforceable judgment, to be immaterial to our analysis of the pending motion herein. Concerning the prevailing party analysis, Defendants assert that the Third Circuit has established a two-prong test to evaluate whether a party has in fact prevailed. They note that the first prong is whether the plaintiff achieved relief, and the second is whether there is a causal connection between the litigation and the relief achieved from the defendant. (*Id*. at 9 (citing *J.O. v. Orange Bd. Of Ed.*, 287 F.3d 267, 271 (3d Cir. 2002))).

Given the disposition of the parties' cross motions for summary judgment in our May 8, 2012 order, (doc. 182), and the Court-ordered relief as outlined in our August 22, 2012 memorandum and order, (docs. 201, 202), we find that the instant case has reached a final adjudication and Plaintiffs' motion for attorneys' fees is therefore ripe for disposition. Furthermore, under the two-prong test established by the Supreme Court in *J.O. v. Orange Board of Education*, we find that given our prior order enjoining Defendants from enforcing the provisions of the FDL we found to violate the United States Constitution, we conclude that Plaintiffs have achieved relief under the first element, and there is a causal connection between the litigation and the relief achieved from Defendants under the second element.

See 287 F.3d at 271. As a result, we shall proceed to analyze whether the fees requested by Plaintiffs are reasonable.

B. Attorneys' Fees and Costs

Plaintiffs argue that a reasonable fee has been defined by the Supreme Court as "a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." (Doc. 184 at 12 (citing *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1672 (2010))). They note that courts calculate what constitutes a reasonable fee using the "lodestar," which is "the product of an appropriate hourly rate and a reasonable number of hours expended." (*Id*. at 12-13 (citing *Benjamin v. Dep't of Pub. Welfare*, 807 F.Supp. 2d 201, 210 (M.D. Pa. 2011))). Plaintiffs also claim that while a prevailing party has the burden of establishing prima facie evidence of entitlement to an award, and of documenting the appropriate hours expended, the Supreme Court has stated that "[a] request for attorney's fees should not result in a second major litigation." (*Id*. at 13 (citing *Hensley v. Eckerhart*, 461 U.S. 424,433 (1980))). They highlight that the Supreme Court in *Fox v. Vice* stated:

> [t]he essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of the district court's superior

understanding of the litigation.

(*Id*. (citing *Fox*, 131 S. Ct. at 2216)). Finally, Plaintiffs assert that after the prevailing party satisfies its burden, the opposing party must produce sufficient evidence to challenge the fees requested and that "[i]f the opposing party does not challenge the amount, or does not provide sufficient evidence to challenge the amount, the district court need not make an independent lodestar determination, though the calculation of fees nonetheless is within the court's discretion." (*Id*. at 13-14 (citing *Benjamin*, 807 F.Supp. 2d at 210-11)).

On the other hand, Defendants highlight that awards under fee shifting statutes are "not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client." (Doc. 188 at 14-15 (citing *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, 565 (1986))). They also claim that when the experience and skill of counsel justifies a higher hourly rate, there is a corollary expectation that such expertise will require fewer hours to be expended. (*Id*. at 15 (citing *Bell v. United Princeton Properties*, *Inc.*, 884 F.2d 713, 721 (3d Cir. 1989))). Finally, Defendants emphasize that after the party opposing the fee award raises objections to the request, the district court has a great deal of discretion to adjust the fee award in

light of those objections. (*Id*. at 16 (citing *Bell*, 884 F.2d at 721)).

When evaluating an award of attorney's fees, in most instances courts apply the "American Rule". This bedrock principle requires that each litigant pay his or her own costs or attorneys fees, unless a statute or contract provides otherwise. Since a plaintiff may be a "prevailing party" for attorney's fees purpose "if they succeed on any significant issue in the litigation which achieve some of the benefit the parties sought in bringing suit," the Court has no doubt that Plaintiffs *sub judice* are the "prevailing party" in this litigation because they succeeded on eleven (11) out of twelve (12) counts on the merits by virtue of our summary judgment ruling. Therefore, we shall proceed to evaluate whether the requested fees and costs in the amount of $1,394,713.50 are reasonable.

1. Calculating the Lodestar

At the outset, Plaintiffs contend that "[t]he starting point in determining a reasonable hourly rate is the attorneys' usual billing rate, but this is not dispositive." (Doc. 184 at 14 (citing *Pub. Interest Research Grp. of N.J., Inc. v. Windall*, 51 F.3d 1179, 1185 (3d Cir. 1995))). They also maintain that in determining what constitutes a reasonable rate, a court should look to "the community billing rate charged by attorneys of equivalent skill and experience performing work of similar complexity." (*Id*. (citing *Evans v. Port Auth*., 273 F.3d

F.3d 346, 360-61 (3d Cir. 2001))). In addition, Plaintiffs argue that "[w]hen attorney's fees are awarded, the current market rate must be used. The current market rate is the rate at the time of the fee petition, not the rate at the time the services were performed." (*Id*. (*Lanni v. New Jersey*, 259 F.3d 146, 149-50 (3d Cir. 2001))).

a. Reasonable Hourly Rate

A reasonable hourly rate is typically based on the prevailing rates in the relevant community, and "[t]he court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services. . . ." *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). "Thus determination of the market rate first requires determination of the relevant market." *Windall*, 51 F.3d at 1186. In determining the reasonable hourly rate, courts can start by considering "the attorney's usual billing rate, but this is not dispositive." *Maldonado*, 256 F.3d at 185 (quoting *Windall*, 51 F.3d at 1185). As previously mentioned, the prevailing party bears the burden of establishing "by way of satisfactory evidence in addition to the attorney's own affidavits that the requested hourly rates meet [the above-mentioned] standard." *Id.* (quoting *Washington v. Philadelphia Cty. Ct. of Common Pleas*, 89 F.3d 1031, 1035 (3d Cir. 1996)) (internal quotation omitted).

Applying the lodestar, Plaintiffs assert the following respective hourly rates charged and hours expended by each attorney:

Attorney	Hours	Rate	Lodestar
James J. Kutz	1098.5	$355	$ 389,967.50
Gary L. James	93.4	$350	$ 32,690.00
Barbara A. Zemlock	971.6	$295	$ 286,622.00
Jason G. Benion	1977.8	$245	$ 484,561.00
Jason L. Reimer	93.9	$245	$ 23,005.50
Anne E. Gingrich	161	$210	$ 33,810.00
Heather White	976	$145	$ 141,520.00
Karen Tantay	17.5	$145	$ 2,537.50

(Doc. 183-3 at 16; *see also* Doc. 184 at 14-15 (citing Doc. 183-3 ¶¶ 26, 30, 32, 34; Doc. 183-4 ¶ 11; Doc. 183-5 ¶ 11; Doc. 183-6 ¶ 10; Doc. 183-6 ¶ 9)).

Notably, Defendants do not challenge the hourly rate of $355.00 for Attorney Kutz given his thirty-seven (37) years of experience litigating civil rights cases, complex federal court cases, state regulatory law, and extensive knowledge of the death care industry in light of his representation of numerous clients before the State Funeral Board. (Doc. 188 at 17). Moreover, they do not contest Attorney Zemlock's hourly rate of $295.00 given her experience in complex litigation matters. (*Id.*). Similarly, Defendants do not dispute Ms. White's hourly rate of $145.00. (*Id.*). However, they object to the hourly rate of $245.00 for Attorneys Benion and Reimer. Defendants contend that the responsibilities of these attorneys, who have been practicing for seven and five years respectively,

centered on review and analysis of discovery, research, and drafting of submissions to the Court. (*Id*.). The crux of Defendants' argument against this fee is that Attorney Gingrich, who worked on this case through her employment with Post and Schell during the early stages of the litigation, only billed at a rate of $210.00 while performing many of the same tasks completed by Attorneys Benion and Reimer. (*Id*. at 18). As a result, they claim that Attorneys Benion and Reimer are only entitled to an hourly rate of $210.00.

In support of Attorney Benion and Attorney Reimer's rate, Plaintiffs contend that Benion is a seven-year practitioner and a former federal law clerk with significant experience in complex civil litigation and civil rights matters. (Doc. 184 at 16). Furthermore, they claim that Reimer is a five-year practitioner with antitrust experience that was valuable in responding to Defendants' economic arguments. To support their assertion, Plaintiffs highlight the declarations of Thomas G. Collins, Esq., and Charles I. Artz, Esq., who attested that the prevailing rate for associates in the Harrisburg offices of regional or national law firms is in the mid-to-high $200.00 per hour rate. (*Id*. at 17 (citing Doc. 183-8 ¶¶ 11-13; Doc. 183-9 ¶¶ 11-12)). Therefore, Plaintiffs claim that based upon the exceptional results obtained for their clients at the summary judgment stage, and the experience of the associate attorneys working on this case, the fees claimed by

Attorneys Benion and Reimer are reasonable and consistent with the prevailing rate in the Harrisburg market.

Here, we find that the rates requested by Attorney Benion and Attorney Reimer are not excessive or inconsistent with the prevailing rates charged by associate attorneys engaged in similarly complex constitutional federal court litigation. While Defendants argue that the rates asserted by these attorneys be reduced to $210.00 per hour, their only support for this contention is the fact that a single associate attorney who initially performed work for this litigation, Ms. Gingrich, billed at a rate of $210.00. (Doc. 188 at 18). Despite this assertion, they fail to explain why the rates of two associate attorneys who apparently performed much of the research and drafting of submissions to the Court, must necessarily be reduced to $210.00 to coincide with the rate charged by Attorney Gingrich who worked on the case and performed similar tasks years ago, and who billed at a rate of $210.00 at the time she left employment at Post & Schell. (Doc. 192 at 15). Therefore, we find that the rates charged by Plaintiffs' attorneys, including those requested for Attorney Benion and Attorney Reimer, are reasonable given the complexity of this litigation which we are constrained to reiterate was made even more difficult by Defendants' obdurate conduct at nearly every turn.

b. Reasonable Hours Expended

After determining whether the hourly rate claimed is reasonable, a court must calculate the hours that were reasonably expended by the prevailing party. "Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary." *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). Moreover, "[h]ours that would not generally be billed to one's own client are not properly billed to an adversary." *Windall*, 51 F.3d at 1188.

In the instant case, Plaintiffs claim that while the prevailing party is obligated to provide evidence supporting the claimed fee, "the documentation requirements for time charged are not exacting:

> a fee petition should include some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, . . . but 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.

(Doc. 184 at 18 (citing *Tenafly Eruv Ass'n v. Borough of Tenafly*, 195 Fed. Appx. 93, 100 (3d Cir. 2006))). In addition, they assert that in *Hensley* the Supreme Court stated:

> The district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised

in the lawsuit . . . . The result is what matters.

(*Id*. at 19-20 (citing 461 U.S. at 435)). Although Plaintiffs' counsel allege that they expended a total of 5,953.5 hours on this litigation, they claim that in the exercise of billing judgment they have excised 563.8 hours from 374 separate time entries and thus do not seek fees associated with this time. (*Id*. at 20-21 (citing Doc. 183-3 ¶ 23; Doc. 183-4 ¶ 9)). Of this total, Plaintiffs highlight that 337.4 hours have been cut to eliminate any argument that the time set forth was duplicative or unreasonable. Furthermore, 167.7 hours related to Count XI have been deleted because Plaintiffs did not succeed on this count. (*Id*. at 21). In addition, they claim that 47.7 hours related to Plaintiffs' motion to amend have been reduced because although Plaintiffs were successful in seeking leave to add Commerce Clause claims to counts VI, VII, and XI, all of the time entries related to this motion have been reduced by one-third to account for time associated with their ultimately unsuccessful claim in Count XI. (*Id*. at 22). Finally, they note that eleven (11) hours have been deleted as a result of Plaintiffs' withdrawal of Count X. (*Id*.).

Additionally, Plaintiffs highlight that this extensive litigation involving thirteen (13) constitutional counts, thirty-three (33) Plaintiffs, and ten (10) Defendants, was handled by four attorneys and one paralegal. (*Id*.). They also

contend that each staff member assigned to this case was delegated a specific task, but that due to the complexity and breadth of the case, collaboration and coordination of efforts between staff members was imperative. (*Id*. at 23 (citing *Planned Parenthood of Cen. N.J. v. Att'y Gen. of N.J.*, 297 F.3d 253, 272 (3d Cir. 2002) (noting "careful preparation often requires collaboration and rehearsal"); *Tenafly*, 195 Fed. Appx. at 99 (rejecting non-prevailing parties' objection to the involvement of multiple attorneys because "this was a complicated case with multiple appellants raising important constitutional claims, and those cases often mandate the help of numerous attorneys," and rejecting arguments regarding meetings and conferences "given the complexity of this case and the many parties involved."))).

Plaintiffs further assert that despite the fact that their claims could have been separated into at least a half-a-dozen separate lawsuits each addressing a discrete constitutional issue, they nevertheless consolidated all of the numerous arguments into one case. For example, they argue, the complexity of this case is illustrated by the questions presented, which required a national review of federal caselaw and research of relevant regulatory schemes and precedent in other states. (*Id*. at 24). Plaintiffs also maintain that the attempted intervention of the Pennsylvania Funeral Directors Association, as well as the participation of

multiple *amici curiae*, only served to increase the amount of time Plaintiffs' counsel devoted to this litigation. (*Id*. at 25).

In response, Defendants argue that the extensive experience of Attorney Kutz and Attorney Zemlock, Kutz with 37 years of experience and Zemlock with 20 years of experience, renders the hours they claimed excessive. (Doc. 188 at 19-20 (citing *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983) ("A fee applicant cannot demand a high hourly rate – which is based on his or her experience, reputation, and a presumed familiarity with the applicable law – and then run up an inordinate amount of time researching that same law."))). They also claim that given the substantial experience of Attorneys Kutz and Zemlock, there should have been no need for associate attorneys to work on the case. For example, they claim that Attorneys Benion, Gingrich, and Remier billed for 2,232 hours, amounting to $541,376.50, in addition to the 2,070 hours totaling $676,598.50 billed by Zemlock and Kutz. (*Id*. at 20).

As to Attorney James, Defendants maintain that in his declaration he stated that he would not be seeking reimbursement for the $32,690.00 he billed for assistance in litigation strategy. (*Id*. at 21). However, they highlight that the chart attached to Attorney Kutz's declaration clearly demonstrates that the $32,690.00 attributable to James has been included in the final tabulation of the requested

fees. (*Id*. (citing Doc. 183-3 at 16)). Regarding Attorneys Kutz and Zemlock, Defendants argue that given Kutz's experience, he should have performed the litigation responsibilities without the aid of another partner. (*Id*.). Although Defendants concede there was a large volume of documents in this case, they assert that Kutz was only entitled to the assistance of a paralegal. Thus, since Kutz's hours amounted to 1098.5 at $355.00 for a total of $389,967.50, and Ms. White's hours, a senior paralegal, amounted to 976 at $145.00 for a total of $141,520.00, they claim that a reasonable fee would be $531,487.50. (*Id* at 21-22). As to Attorney Zemlock, Defendants maintain that her services should be discounted by half given the experience, skill, and high hourly rate of Kutz and because she spent most of her time drafting, reviewing, and revising discovery. (*Id*.). Should the Court discount Zemlock's claimed fees totaling $286,622.00 by 50%, Defendants note that the attorneys fees for Zemlock would be $143,331.00, for a total attorney fee award of $674,818.50.

Defendants also contend that the fees Plaintiffs request for particular tasks are excessive and unreasonable. For example, they argue that 162 hours totaling $49,000 associated with filing the complaint is excessive for many of the reasons noted above. (*Id*. at 23). As to discovery, although they concede that the process was arduous, Plaintiffs' claim for 500.66 hours equaling $142,426.80 in 2009,

$216,925.00 in 2010, and $137,442.65 in 2011 constitutes exorbitant billing for such services as the total reaches nearly half a million dollars. (*Id*. at 23-24). Furthermore, Defendants assert that Plaintiffs' requested fees related to the Pennsylvania Funeral Director's Association ("PFDA") are inappropriate because PFDA's motion to intervene was eventually granted by the Court. (*Id*. at 24). They also oppose Plaintiffs' requested fees to the extent they claim that counsel has triple billed for time spent in conferences, meetings, and preparation sessions, which totaled approximately 230 hours and resulted in $50,000 in requested fees. (*Id*. at 25).

Additionally, Defendants maintain that Plaintiffs' fee request associated with the work completed on summary judgment is outrageous. (*Id*. at 25). They assert that $402,275.00 billed for the summary judgment motions and supporting briefs is excessive because Attorney Benion billed for approximately half that amount, $266,796.50, for legal research and drafting of briefs related to the same. Again, Defendants maintain that given Kutz's experience and the 467.30 hours totaling $152,721.50 he billed for work on summary judgment tasks, there was no need for an associate attorney to conduct $266,796.50 worth of research and brief writing. Finally, Defendants argue that the fees Plaintiffs' request for two attorneys in preparing the fee petition should be limited to one attorney and a

paralegal because the services rendered by Attorneys Kutz and Benion were substantially similar. (*Id*. at 26).

We find Defendants' contention that based on their experience, Attorneys Kutz and Zemlock did not require the assistance of associate attorneys on this complex and multifaceted case which spanned over four years, to be untenable. For instance, taking the number of hours billed by the three associate attorneys and dividing it by four, the number of years this case was pending on our docket, the total number of hours billed by the three associates annually is 558. Dividing this number by three (3), the number of associates working on the case at various times throughout the course of the litigation, we arrive at 186 hours billed annually per associate attorney on this case. Given the complexities of this case, and the utter obstinance of Defendants in their refusal to provide consistent interpretation and necessary amendments to the Funeral Director's Law ("FDL"), which forced Plaintiffs to file suit in order to achieve any relief whatsoever even in the face of what Defendants refused to recognize as an absurdly outdated statutory regime, we find that not only was the assistance of associate attorneys entirely appropriate, but the hours expended by those attorneys was reasonable under the circumstances.

Regarding Attorney James' fee request, we again find Defendants' assertion unavailing. A close reading of James' declaration reveals that he "expended 108.8

hours on the above-captioned matter, of which Plaintiffs seek reimbursement of 93.4 hours through the [instant motion]." (Doc. 183-4 ¶ 6). Moreover, although James stated that Plaintiffs, in the exercise of billing judgment, have elected not to seek reimbursement for 22.3 hours, his declaration is clear that the total sum of the hours claimed is 93.4. (*Id*. ¶ 6, 9). Therefore, contrary to Defendants' claim, the Court is unable to discern where in Attorney James' declaration he indicates that Plaintiffs would not be seeking reimbursement for *any* of his services. As noted above, it is clear to the Court that James eliminated 22.3 hours from the total hours expended on this litigation to arrive at 108.8 hours, of which Plaintiffs now seek reimbursement for 93.4. How Defendants were able to make the significant leap in logic from this, to declaring in their brief that Plaintiffs elected not to seek reimbursement for *any* of James' services, is beyond the ability of this Court to comprehend and demonstrates yet again the practically frivolous and baseless arguments Defendants have time and again conjured up and thrust upon this Court in hopes of avoiding the actual work the Board was ordered to assume in remedying the FDL. In fact, the only reduction the Court finds appropriate pertaining to Attorney James concerns his statement that "[m]y current customary and regular billing rate is $350/hour; however, time billed to this matter was charged at $300/hour." (Doc. 183-4 ¶ 11). Therefore, we shall reduce Attorney

James' hourly rate, as reflected in the chart attached to Attorney Kutz's declaration, from $350 to $300 per hour. (*See* Doc. 183-3 at 16). Consequently, his total fee would be $28,020 as opposed to $32,690.00 as reflected in the chart summarizing the fees requested. (Doc. 183-3 at 16).

We also find Defendants' contention that Attorney Kutz should have litigated this case without the assistance of another partner or any associate attorneys, but simply with a paralegal, to be groundless. In reaching this conclusion, it is appropriate to note that in the face of this argument, our docket contains the names of no less than four attorneys from Pennsylvania's Office of Attorney General and the Bureau of Professional and Occupational Affairs who represented Defendants throughout this litigation. We also find Defendants' contention that fees related to meetings and conferences held between Plaintiffs' counsel constitute excessive and unreasonable fees, to be meritless. As the Western District of Pennsylvania held in *Fross v. County of Allegheny*,

> we do not find the fact that more than one attorney worked on the same pleadings and briefs to be an inherent indication of duplicative efforts. The time records reflect that there was some division of labor according to substantive subject matter. Moreover, the involvement of different attorneys in the drafting and editing process resulted in high quality, thorough, and well developed work product that was of assistance to the court.

2012 U.S. Dist. LEXIS 8785, at *19 (W.D. Pa. Jan 25, 2012). We find the

Western District's reasoning in *Fross* to be applicable to the case *sub judice*. For example, Plaintiffs have provided detailed time sheets outlining the distinct responsibilities delegated to each of the attorneys involved in this litigation. (*See* Docs. 183-3, 183-4, 183-5, 183-6, 183-7). Furthermore, as the *Fross* court highlighted, it is not uncommon for attorneys to collaboratively draft pleadings, motions, and briefs submitted to the court. Therefore, we do not find that the work of two or three attorneys on a complaint that totaled 114 pages, and included fourteen (14) counts with nineteen (19) separate constitutional claims, is unreasonable. *See Szafran v. Temple Univ.*, 2003 U.S. Dist. Lexis 7770, at *16 (E.D. Pa. Apr. 16, 2003) ("Time spent by two attorneys on the same general task is not, however, per se duplicative . . . preparation often requires collaboration and rehearsal . . . .").

We also regard Defendants' assertion that Plaintiffs' claim for fees related to the voluminous discovery material produced by this case is excessive, to be unpersuasive. As noted by Plaintiffs in their supporting brief, discovery in this case entailed 866 requests for admission, 693 interrogatories, 55 requests for production, 33,520 pages of documents, and 45 depositions. (Doc. 184 at 25). Moreover, the summary judgment record compiled for the Court by Plaintiffs included 224 individual exhibits numbering more than 10,688 pages of documents

with supporting, opposition, and reply briefs totaling more than 450 pages. Thus, we find Defendants' contention that Attorney Kutz should have litigated the summary judgment motions himself, without the aid of Attorney Benion, to be utterly ridiculous. Specifically, we find their claim that Benion's request for $266,796.50 in fees for research and drafting of the admittedly massive briefs is excessive because it constitutes over half of the $402,275.00 billed for summary judgment, to also present an unavailing argument. Candidly, the Court would be surprised if only one of Defendants' attorneys conducted all of the research, drafting of pleadings, motions, and briefs, review of discovery, depositions, and more, as they expressly suggest Plaintiffs' counsel should have in this case. *See Walker v. Upper Merion Police Dep't*, 1996 U.S. Dist. LEXIS 940, at *17 (E.D. Pa. Jan. 26, 1996) ("It is not uncommon to have more than one attorney research and draft parts of one motion."). The irony, or rather the completely disingenuous nature of Defendants' argument given the number of attorneys representing the Defendants in this matter, is a fact not lost on the Court.

Concerning Plaintiffs' request for fees related to its opposition of PFDA's motion to intervene, we find that Defendants are apparently unable to recall the chronology of this case, or have simply chosen to ignore the reality as clearly reflected on the docket. Our memorandum and order dated June 25, 2010 made

clear that PFDA's motion to intervene was denied. (Doc. 80 at 11). Although we later granted PFDA's motion for leave to file an amicus brief, (doc. 111), by virtue of our June 22, 2011 order, we are at a loss to understand Defendants' apparent confusion[7] between its status as *amicus curiae* which was granted, as opposed to its status as an intervening defendant, which was denied.[8] As such, Plaintiffs' request for fees related to opposing PFDA's motion to intervene shall be granted. Finally, concerning the fees Plaintiffs request for the work expended on the instant petition, and Defendants' position that Plaintiffs should be limited to fees for the work of one attorney and a paralegal on this motion, we agree with Plaintiffs that Defendants' failure to cite to a particular invoice or identify specific time entries is fatal to their argument. *See Polselli v. Nationwide Mut. Fire. Ins. Co.*, 126 F.3d 524, 537 (3d Cir. 1997) ("It is well-settled that under federal law, 'the time expended by attorneys in obtaining a reasonable fee is justifiably included in the attorneys' fee application, and in the court's fee award.'").

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[7] We find Plaintiffs' characterization of Defendants' position on this point, as evidence that Defendants' hindsight is something less than 20/20, to be a charitable description of an argument that is clearly yet another baseless argument in opposition to Plaintiffs' instant request for fees.

[8] We note that although PFDA was initially listed as an "Intervenor Defendant" at the top of the CM/ECF docket sheet for this case, this designation was nothing more than an administrative error and did not serve to confer upon PFDA the status of an intervening defendant as no order from this Court was ever issued granting such status to PFDA. And of course, in any event, Defendants had to have known that.

c. Court's Discretion

The fee award reached by employing this framework and calculating the lodestar is typically "presumptively reasonable." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 703 n.5 (3d Cir. 2005). Nonetheless, after calculating the lodestar, a district court's discretion then comes into play and the court may then increase or decrease the total award based upon other factors such as the relative success of the prevailing party. *See In re Diet Drugs*, 582 F.3d 524, 540 (3d Cir. 2009). As highlight above, the Supreme Court in *Fox v. Vice* recognized that "[t]he essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." 131 S. Ct. 2205, 2216 (2011).

Notwithstanding our analysis above, the Court agrees with Defendants to the extent that we find Plaintiffs' requested fee to be somewhat high. We are making this observation without impugning the terrific quality and obvious impact of Plaintiffs' counsel's good work. Rather, we must end our analysis by applying principles of equity and "rough justice" to arrive at an amount that we believe to be the most fair. Therefore, given the Court's intimate familiarity with the case, and exercising our discretion as appropriate under the governing standards noted

herein, we will reduce Plaintiffs' requested fee by twenty (20) percent from $1,390,043.50 to $1,112,034.80. *See Bell v. United Princeton Props. Inc.*, 884 F.2d 713, 721 (3d Cir. 1989) ("[T]he district court retains a great deal of discretion in deciding what a reasonable fee award is, so long as any reduction is based on objections actually raised by the adverse party."). We find that such a reduction yields a reasonable and appropriate fee under the circumstances that adequately compensates Plaintiffs and their counsel for the hours reasonably expended on this litigation, while at the same time balancing this against Defendants' assertion that the requested fee is too excessive.

III. Conclusion

As the Court has recognized numerous times, the instant case was massive in scope, spanning over four years and three months. What Plaintiffs orchestrated throughout this case was not merely a challenge to an unconstitutional law, but a full frontal assault leveled against an antiqued, sixty (60) year old regulatory regime whose backward nature was matched only by that of the Board tasked with enforcing it. The sweeping relief afforded Plaintiffs by virtue of the order finalizing our May 8, 2012 summary judgment ruling, and enjoining Defendants from enforcing the unconstitutional provisions of the FDL, only serves to underscore the formidable challenge presented to Plaintiffs when the Board,

through its persistent refusal to act, forced Plaintiffs' hand and thus compelled the Court to take an intensive look at the very heart of the FDL en route to declaring many of its provisions invalid based on a host of constitutional grounds. Plaintiffs undertook a calculated challenge of the most objectionable provisions of the FDL and instead of parsing out individual claims significant in their own right into individual cases, they pursued a ruling on all of the offending provisions at once. The fee we award hereby is commensurate with the herculean and focused work by a team of lawyers who are a credit to their profession.

In light of the foregoing, we shall grant in part and deny in part Plaintiffs' Motion for Interim Award of Attorneys' Fees.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Interim Award of Attorneys' Fees (Doc. 183) is **GRANTED in part and DENIED in part** to the following extent:

    a. The motion is **GRANTED** to the extent Plaintiffs are awarded $ 1,112,034.80 in attorneys' fees.

    b. The motion is **DENIED** to the following extent:

        i. Attorney James' fee award shall be calculated at $300 per hour.

        ii. The Court shall reduce Plaintiffs' requested fee total by

twenty (20) percent, after first reducing Attorney James fee to $28,020.00.

s/ John E. Jones III
John E. Jones III
United States District Judge