IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Richard Brakebill, Dorothy Herman, Della Merrick, Elvis Norquay, Ray Norquay, and Lucille Vivier, on behalf of themselves, Plaintiffs, vs. Alvin Jaeger, in his official capacity as Secretary of State, Defendant.	)	**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR ATTORNEY'S FEES** Case No. 1:16-cv-008
Spirit Lake Tribe, on its own behalf and on behalf of its members, et al., Plaintiffs, vs. Alvin Jaeger, in his official capacity as Secretary of State, Defendant..	)	Case No. 1:18-cv-222

Before the Court is the *Brakebill* Plaintiffs' motion for attorney's fees and costs filed on April 17, 2018. See Doc. No. 107. They seek $832,977 in attorney's fees and $299,482.41 in costs and expenses. The Defendant, North Dakota Secretary of State Alvin Jaeger ("State"), filed two responses in opposition to the motion. See Doc. Nos. 108 and 113. The Plaintiffs filed two reply briefs. See Doc. Nos. 111 and 118. The case having now been concluded, the matter is ripe for consideration. For the reasons set forth below, the motion is granted in part and denied in part.

I. BACKGROUND

This case involves a series of challenges to North Dakota's voter ID laws. In 2013, the North Dakota Legislature enacted a series of voter ID laws (HB 1332) that the Plaintiffs believed disproportionately burdened Native American voters. HB 1332 limited the types of identification allowed to be used to prove qualifications to vote and required that each identification list a residential address but excluded the use of P.O. boxes even though some Native Americans living in rural areas lacked residential addresses and were reliant on P.O. boxes. During the 2014 election cycle, Plaintiffs and others had difficulty voting due to the new law. The Plaintiffs decided to pursue litigation in order to preserve their right to vote.

The Plaintiffs commenced this action for declaratory and injunctive relief on January 20, 2016. In a forty-five (45) page complaint, the Plaintiffs brought four claims that newly enacted "Voter ID" laws in North Dakota (N.D.C.C. § 16.1-05-07) violated both Section 2 of the Voting Rights Act (52 U.S.C. § 10301) and the Equal Protection Clauses of the United States and North Dakota constitutions. The Plaintiffs also claimed N.D.C.C. § 16.1-05-07 violated Article II, § 1 of the North Dakota Constitution.

Plaintiffs' counsel also engaged experts in order to secure evidence needed to prove their claims. The Plaintiffs retained Dr. Gabriel Sanchez and Dr. Matthew Barreto to conduct a survey to gather statistical evidence of the voter ID law's effect on Native Americans; Dr. Dan McCool to provide sociological research and context to the law's passage; Professor Gerald Webster to establish how geography affects Native voters, and Professor Michael Herron to establish that Native Americans in North Dakota vote in a racially polarized manner.

On February 3, 2016, the Defendant filed a motion to dismiss for failure to state a claim. On April 5, 2016, the Court denied the Defendant's motion to dismiss.

On June 20, 2016, the Plaintiffs moved for their first preliminary injunction. Included in the Plaintiffs' motion were the expert reports of Drs. Sanchez and Barreto, Dr. Webster, Dr. McCool, and Dr. Herron, as well as the declarations of numerous Plaintiffs and a community member detailing their experiences of discrimination in North Dakota. The Defendant did not challenge any of Plaintiffs' evidence.

On August 1, 2016, this Court granted the Plaintiffs' request for a preliminary injunction and enjoined the Defendant "from enforcing N.D.C.C. § 16.1-05-07 without any adequate 'fail-safe' provisions" because the Plaintiffs were "likely to succeed on the merits of their claim against the Defendant under the Equal Protection Clause of the 14th Amendment to the United States Constitution." The Court relied extensively upon the Plaintiffs' experts and the uncontested evidence, and cited to the Barreto/Sanchez survey throughout its order, repeatedly relying upon Dr. McCool and Dr. Webster's declarations.

Following additional briefing by both parties, this Court issued a supplemental order on September 20, 2016, making available an affidavit fail-safe option, whereby a voter "swears (or affirms) to the fact of being a qualified elector of the precinct." Because of this order, North Dakota was forced to offer an affidavit option to all qualified voters during the 2016 election. The State never appealed or challenged the issuance of the preliminary injunction.

In response to the order, the State of North Dakota repealed N.D.C.C. § 16.1-05-07 and replaced the law with HB 1369, codified as N.D.C.C. § 16.1-01-04.1. Still, the Court's first preliminary injunction remained in effect. The Defendant then moved to dissolve the first preliminary injunction on January 1, 2018. The Plaintiffs opposed the motion to dissolve and in the alternative sought a second preliminary injunction preventing enforcement of the new law. On April 3, 2018, the Court mooted its August 1, 2016, order when it issued a second preliminary injunction

enjoining the Defendants from enforcing the new law. On April 4, 2018, the Defendant filed a notice of appeal as to the second preliminary injunction.

On April 16, 2018, the Plaintiffs filed a motion for an extension of time to file a motion for attorney's fees related to the first preliminary injunction. On April 17, 2018, the Court found the motion for an extension of time moot citing the local rules which permit the filing of a motion for attorney's fees until 14 days after final judgment is entered. Misconstruing the Court's order, the Plaintiffs moved the Court for an award of attorney's fees and costs as related to the now moot first preliminary injunction on April 17, 2018. Deeming the motion premature, the Court withheld a decision on the motion.

On April 24, 2020, the Court ordered *Richard Brakebill, et. al. v. Alvin Jaeger* (Case No. 1:16-cv-008) and *Spirit Lake Tribe, et. al. v. Alvin Jaeger* (Case No. 1:18-cv-222) consolidated, with the *Spirit Lake* case deemed the lead case. On April 27, 2020, a consent decree was approved by the Court which settled the cases. Consequently, the Plaintiffs' motion for costs and attorney's fees is now ripe for consideration.

II. LEGAL DISCUSSION

The Plaintiffs, as the prevailing party in a civil rights lawsuit, bring this motion to recover attorney's fees and costs from the State under 42 U.S.C. § 1988. The State raises several objections to the motion, each of which the Court will address in turn.

A. PREVAILING PARTY

The parties dispute whether the Plaintiffs are a prevailing party. The Court finds the Plaintiffs are, at least in part, a prevailing party.

42 U.S.C. § 1988 permits, but does not require, the award of reasonable attorney's fees to the "prevailing party" in an action to enforce a provision of Section 1983. To qualify as a prevailing party, "a civil rights plaintiff proceeding under § 1983 'must obtain at least some relief on the merits of his claim.'" North Dakota v. Lange, 900 F.3d 565, 567 (8th Cir. 2018) (Colloton, J., concurring) (quoting Farrar v. Hobby, 506 U.S. 103, 111 (1992)). A plaintiff need not prevail on every claim or theory as long as it succeeds on "any significant claim." Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 793 (1989). An injunction typically qualifies as a victory granting prevailing party status to the plaintiff. See Lefemine v. Wideman, 568 U.S. 1, 4 (2012).

In cases that are mooted or where the last determination is a preliminary injunction and there is no final determination on the merits, courts consider a two-part test to determine the prevailing party, requiring both a "material alteration of the legal relationship of the parties" and that the relief be "judicially sanctioned." Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res., 532 U.S. 598 at 604-05; Coates v. Powell, 639 F.3d 471, 474 (8th Cir. 2011). The Court finds that the Plaintiffs meet both standards. The Plaintiffs prevailed and were granted a preliminary injunction which was never challenged by the State of North Dakota. The Court reached the merits of the Plaintiffs' claims finding "[i]t is undisputed that the more severe conditions in which Native Americans live translates to disproportionate burdens when it comes to complying with the new voter ID laws." See Doc. No. 50 at p. 7. The Court made its decision based upon unchallenged evidence presented by the Plaintiffs. The Court further found "the lack of any 'fail-safe' provisions to be dispositive in this matter" and issued an order guaranteeing North Dakota voters would have access to a "fail-safe" by requiring an affidavit system be available. See Doc. Nos. 50 at p. 1 and Doc. No. 62 at p. 2. The requirement of a "fail-safe" option and the implementation of the affidavit system materially changed the relationship between the Defendant

and the Plaintiffs, ensuring the Plaintiffs were able to vote in the 2016 election without the identification cards mandated by HB 1332 and HB 1333. This material change was the result of a court order and was thus judicially sanctioned. As such, the Plaintiffs were a prevailing party. See Bishop v. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n, 686 F.2d 1278, 1290-91 (8th Cir. 1982) (plaintiff was a prevailing party because it obtained declaratory and injunctive relief, even though the case was later rendered moot); Rogers Group, Inc. v. City of Fayetteville, 683 F.3d 903, 911 (8th Cir. 2012) (finding the plaintiff was a prevailing party because it obtained a preliminary injunction which blocked the defendant from enforcing the challenged ordinance and thus altered the relationship between the parties).

The Defendants cannot escape liability for costs and attorney's fees by changing the intervening law and "taking steps to moot the case after plaintiff has obtained the relief he sought, for in such a case mootness does not alter the plaintiff's status as a prevailing party." Young v. City of Chicago, 202 F.3d 1000, 1000-01 (7th Cir. 2000). The Court finds that the Plaintiffs remain the prevailing party and are entitled to an award of attorney's fees under 42 U.S.C. § 1988.

B. TIMELINESS

The Defendant contends the Plaintiffs' motion for attorney's fees and expenses is untimely because the Plaintiffs did not file it within 14 days after the preliminary injunction was granted on August 1, 2016. Specifically, the Defendant argues Rule 54(d)(2) of the Federal Rules of Civil Procedure requires the Plaintiffs to seek attorney's fees within 14 days after the grant of a preliminary injunction. The Defendant cites no case law to support this novel interpretation of Rule 54. The Court finds the Defendant's interpretation to be unpersuasive.

At least two Courts in the Eighth Circuit Court of Appeals have addressed this issue and

rejected the idea that Rule 54 requires a motion for attorney's fees to be filed 14 days after the filing of an appealable order. In *Planned Parenthood of Minnesota, North Dakota, and South Dakota v. Duagaard* the plaintiffs sued to enjoin the enforcement of a South Dakota statute they alleged unconstitutionally limited access to abortion services. 946 F. Supp. 2d 913, 916-17 (D.S.D. 2013). In June 2011, the district court granted the plaintiffs a preliminary injunction against four provisions of that statute. Id. at 917. An amendment to the statute that "removed the language that was at issue in the preliminary injunction" was signed into law in March 2012, and took effect in July 2012. Id. As a result of the new language, the parties stipulated that the preliminary injunction should be dissolved in part. Id. In August 2012, the plaintiffs moved for attorneys' fees with regard to those issues mooted by the new statutory language. Id. The defendants argued the motion was untimely because it came months after the entry of the preliminary injunction. Id. at 921-22. The court concluded that, notwithstanding the preliminary injunction, "[t]he traditional judgment needed for a triggering event for filing a motion for attorney's [sic] fees has not occurred. Therefore, plaintiffs' motion is timely or good cause exists for any delay in filing the motion for attorneys' fees." Id. at 922.

In *Consolidated Paving, Inc., v. Cty. of Peoria, Illinois*, the plaintiffs sought to enjoin an ordinance governing the use of paving materials. No. 10-CV-1045, 2013 WL 916212, at *1 (C.D. Ill. Mar. 8, 2013). The plaintiffs won a preliminary injunction in April 2010. Id. Five months later the county amended the ordinance. In 2011, the court granted the county's motion to dissolve the preliminary injunction as moot, and ultimately dismissed the case for the same reason. Id. at *1-2. After the case was dismissed, the plaintiffs moved for an award of attorneys' fees; defendant argued that the motion was untimely. Id. The court disagreed:

> A logical reading of Rule 54, and the implications of attorneys' fees precedent, lead to the conclusion that Plaintiff's Petition was not untimely. . . . Though Defendant's reading may not be frivolous, good sense dictates that it cannot be the correct meaning. . . . "It simply makes little sense to require the submission of petitions for attorney's fees before the legal work is done."

Id. (quoting Smith v. Vill. of Maywood, 970 F.2d 397, 399-400 (7th Cir. 1992)).

This Court agrees with reasoning in *Daugaard* and *Consolidated Paving*. It would be illogical to require a motion for attorney's fees to be filed before a final judgment is entered. The Court's reading of Rule 54 and the Local Rules is that such motions are required within 14 days after the entry of a final judgment at the conclusion of the case. The Court finds the Plaintiffs' motion to be timely. Further, even if the motion were arguably considered to be untimely, the Court finds that public policy and "excusable neglect" provide a basis for reaching the same result.

C. REASONABLENESS OF THE REQUESTED FEE

The Plaintiffs seek to recover attorney's fees and expenses in the amount of $1,132,459.41. The State contends the request is unreasonable.

It is well-established that determining the amount of reasonable attorney's fees to award a prevailing plaintiff in civil rights litigation is within the sound discretion of the trial court. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The starting point for a determination of reasonable attorney's fees is a calculation of the "lodestar figure" which is the product of the number of hours reasonably expended times a reasonable hourly rate. Burlington v. Dague, 505 U.S. 557, 559 (1992); Blanchard v. Bergeron, 489 U.S. 87, 94 (1989).

In *Hensley*, the United States Supreme Court defined the role of the lodestar methodology:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial

> estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . . "Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."

Hensley, 461 U.S. at 433-34 (internal citations omitted) (emphasis in original).

In *Hensley*, the United States Supreme Court explained that a trial court may consider the twelve factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), to adjust the lodestar amount. Id. at 434 n.9. The twelve *Johnson* factors include the following: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of 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. Hensley, 461 U.S. at 430 n.3. Trial courts have been instructed to utilize their own knowledge relating to various aspects of the lodestar. "The trial judge should weigh the hours claimed against his knowledge, experience and expertise of the time required to complete similar activities." Gilbert v. City of Little Rock, 867 F.2d 1063, 1066 (8th Cir. 1989).

As a general rule, a reasonable hourly rate is the prevailing market rate, that is, "the ordinary rate for similar work in the community where the case has been litigated." Emery v. Hunt, 272 F.3d 1042, 1048 (8th Cir. 2001). The party seeking an award of attorney's fees bears the burden of

producing sufficient evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). The district court is in the best position to understand what services are reasonable and what hourly rates are appropriate in the relevant market. Al-Birekdar v. Chrysler Group, LLC, 499 F. App'x 641, 648 (8th Cir. 2013) (holding the district court did not abuse its discretion in reducing the requested hourly rates).

The lodestar being sought by the Plaintiffs is the amount of $832,977, which is based upon a total of 2,483.72 hours, billed at hourly rates ranging from $175 to $450. The Native American Rights Fund litigation team's lodestar totals $535,221 and is based upon a total of 1,725.32 hours, billed at hourly rates between $300-$400. See Doc No. 107-1, pp. 3-5. The Morgan, Lewis & Bockius LLP, lodestar totals $297,756 and is based upon work totaling 758.4 hours, billed at an hourly rate between $175-$425. See Doc No. 107-8, pp. 1-3. The billing summaries evidencing the time spent by each attorney, the general subject matter of the time expenditures and the hourly rates being claimed are attached to the declarations of Matthew Campbell (NARF lawyers' claim) (See Doc No. 107-1); Rich de Bodo (Rich de Bodo, Jeffrey L. Arrington, and Monique Gonzaque claim) (See Doc No. 107-8); and Tom Dickson (detailing the market rates) (See Doc No. 107-10).

Reasonable hourly rates to be used in the lodestar calculation are "calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." Blum v. Stenson, 465 U.S. 886, 895 (1984). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." See Norman v. Housing Authority of Montgomery, Ala., 836 F.2d 1292, 1299 (11th Cir. 1988). The relevant legal community to determine the prevailing market rate is generally the place where the case is filed.

Id.

Based on the Court's 40 years of experience in North Dakota as an attorney in private practice and as a federal judge, hourly rates for associates in the $200-$300 range and $300-$425 range for partners are not unusual or unreasonable. The Court finds the hourly rates charged were reasonable but also finds that the total number of hours expended were excessive.

The Plaintiffs also seek $299,482.41 in litigation expenses, as detailed in the declarations of Matthew Campbell. See Doc Nos. 107-1, p. 4 and 107-6. These expenses include payments for court fees, bar admission fees, travel expenses, legal research, and expert witness fees. The Court recognizes that some reasonable expenses must be incurred in civil rights litigation, but the Court finds the total amount of claimed expenses to be excessive.[1]

In sum, the total amount sought for the Plaintiffs' attorney's fees and litigation expenses is $1,132,459.41. This sum represents $832,977 in attorneys' fees and $299,482.41 in litigation expenses. The average hourly rate requested in this case is $335 which is a reasonable rate.[2] In the broad exercise of its discretion, and based on the undersigned's experience in handling civil rights cases over the past 40 years as an attorney and federal judge, the Court finds that the total attorney's fees and costs should be reduced by **60%** which is a reasonable amount for the costs and legal services rendered.

[1]For example, the itemized expenses sought to be recovered include bar admission fees for the out-of-state attorneys who worked on the case which are clearly non-recoverable expenses. Further, on December 9, 2015, there were expert witness fees apparently paid in the amount of $181,576.50 to Pacific Market Records, LLC. There was no itemized billing submitted and no explanation for these expert witness fees. See Doc. No. 107-6. The Court, in the broad exercise of its discretion, could reject the entirety of this claimed expense based simply on the lack of supporting documentation and the excessive nature of the charge. The Court finds such fees to be excessive under the circumstances.

[2]$832,977 in fees divided by 2483 total hours expended equals an average of $335 per hour.

III. CONCLUSION

For the reasons set forth above, the Plaintiffs' motion for attorney's fees (Doc. No. 107) is **GRANTED in part and DENIED in part**. In the broad exercise of its discretion, the Court reduces the Plaintiff's claim by **60%** and awards the Plaintiffs costs and attorney's fees in the amount of **$452,983.76** The result is a total judgment of **$452,983.76**, to be taxed by the Clerk against the Defendant.

IT IS SO ORDERED.

Dated this 7th day of May, 2020.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court