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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF IDAHO**

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| DONALD N. DAIEN,<br><br>Plaintiff,<br><br>vs.<br><br>BEN YSURSA, in his official capacity as Secretary of State of the State of Idaho,<br><br>Defendant. | ) | Case No. 09-022-S-REB<br><br>**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND NON-TAXABLE COSTS (DKT 45)** |

COMES NOW Defendant the Hon. Ben Ysursa, Secretary of State of the State of Idaho, by and through his undersigned counsel of record, and hereby submits this Opposition to Plaintiff's Motion for Attorneys' Fees and Non-Taxable Costs (Dkt. 45).

## INTRODUCTION

Plaintiff Donald Daien's counsel (who own Plaintiff's right to seek fees) request fees and costs in the amount of $96,419.66 for a case decided on cross-motions for summary judgment with only the barest of discovery. (Memorandum in Support of Nader[1] and Daien's Motion for Attorneys' Fees and Non-Taxable Costs) ("Plaintiff's Memorandum"), Dkt. 45-1, p. 15.) Defendant Ysursa respectfully asserts that the costs and fees claimed by Plaintiff are excessive and should be reduced on the following grounds:

- The hourly rates of Plaintiff's out-of-state counsel are unreasonably high and are not in accordance with the prevailing rates of the relevant community: Idaho;
- The amount of hours expended by Plaintiff's attorneys on this litigation was not reasonable, as it included duplication of efforts, excessive time devoted to research and briefing given the simple nature of the case, and time billed for travel of out-of-state counsel; and
- Plaintiff's claimed costs for Westlaw charges and travel expenses for out-of-state counsel should be excluded or significantly reduced as excessive and unnecessary costs.

## STANDARD OF REVIEW

"The general rule in our legal system is that each party must pay its own attorney's fees and expenses." Perdue v. Kenny A. ex rel. Winn, __ U.S. __, 130 S.Ct. 1662, 1671 (2010). However, 42 U.S.C. § 1988(b) provides that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 of this title, . . . the court, **in its discretion**, may allow the prevailing party . . . **a reasonable attorney's fee** as part of the costs . . .." 42 U.S.C. § 1988(b) (emphasis added).

[1] It is unclear why Mr. Nader is included in the title of the Memorandum, as he is not a party to this action and is therefore not entitled to costs and fees. Perhaps the document was cloned from a prior case.

The predominant method of calculating reasonable attorneys' fees pursuant to Section 1988(b) is the lodestar method. See, e.g., Perdue, __ U.S. __, 130 S.Ct. at 1672; Gisbrecht v. Barnhart, 535 U.S. 789, 802 (2002). "The most useful starting point for [court determination of] the amount of a reasonable fee . . . is the number of hours **reasonably** expended on the litigation multiplied by a **reasonable** hourly rate." Gisbrecht, 535 U.S. at 802 (emphasis added) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)); see also McCown v. City of Fontana, 565 F.3d 1097, 1102 (9th Cir. 2009) ("Typically, a district court begins its calculation of fees by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate.") "A district court acts within its discretion in awarding fees when the amount is reasonable and the court fully explains its reasoning in making the award." McCown, 565 F.3d at 1102.

## ARGUMENT

### A. Plaintiff's Claimed Hourly Rates Are Not Reasonable

Plaintiff seeks attorneys' fees that are based upon unreasonably high hourly rates. Five attorneys represented Plaintiff in this matter: Robert Bernhoft, Robert Barnes, Daniel Treuden, Richard DeVries, and local counsel Christ Troupis. Mr. Bernhoft and Mr. Barnes seek to recover fees based upon an hourly rate of $450. (Declaration of Daniel J. Treuden ("Treuden Decl."), Dkt. 45-4, ¶ 14.) Mr. Treuden's claimed hourly rate is $350, while Mr. DeVries' claimed hourly rate is $250. (Id.). Mr. Troupis claims an hourly rate of $250 as local counsel. (Affidavit of Christ Troupis, Esq. in Support of Plaintiff's Motion for Attorney Fee Award ("Troupis Aff."), Dkt. 45-20, ¶ 8.) As explained below, the rates claimed by out-of-state counsel (Mr. Bernhoft, Mr. Barnes, Mr. Treuden, and Mr. DeVries) are excessive under the circumstances.

**1. Idaho is the Relevant Community for Purposes of Calculating Reasonable Hourly Rates**

"The Supreme Court has consistently held that reasonable fees 'are to be calculated according to the prevailing market rates in the relevant community . . ..'" Van Skike v. Dir., Office of Workers' Comp. Programs, 557 F.3d 1041, 1046 (9th Cir. 2009) (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984)). As Plaintiff acknowledges, the Ninth Circuit has specifically held: "Generally, the relevant community is **the forum in which the district court sits**," in this case, the District of Idaho. Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997) (emphasis added); (see Plaintiff's Memorandum, Dkt. 45-1, p. 5.) Plaintiff raises the unsupported argument that this clear Ninth Circuit precedent should be ignored in favor of a "national market" rate because, according to Plaintiff, "[t]he law is behind the times." (Plaintiff's Memorandum, Dkt. 45-1, p. 5.) However, the Ninth Circuit's holding on this issue has been consistently – and recently – upheld and applied. See, e.g., Van Skike, 557 F.3d at 1046; Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 979 (9th Cir. 2008); U.S. ex rel. Suter v. Nat'l Rehab Partners Inc., 2007 WL 2790397, *2-3 (D. Idaho Sept. 24, 2007); Briggs v. United States, 2010 WL 1759457, *10 (N.D. Cal. April 30, 2010). Significantly, in the case of Nader v. Brewer, which was so heavily relied upon by Plaintiff for precedent in this case and in which Plaintiff's Wisconsin counsel represented both Plaintiff Daien and Mr. Nader, the United States District Court for the District of Arizona held that the relevant community for purposes of determining attorneys' fees at the district court level was Phoenix, Arizona, not a "national market." Nader v. Brewer, 2009 WL 2365241, *1 (D. Ariz. July 28, 2009); Nader v. Brewer, 2009 WL 811450, *2 (D. Ariz. March 27, 2009) ("The 'relevant community' in this case is Phoenix.")

The Ninth Circuit has clearly delineated narrow circumstances under which rates other than the forum community may be used: only "**if local counsel was unavailable**, either because they are unwilling or unable to perform because they lack the degree of experience, expertise or specialization required to properly handle the case." Barjon, 132 F.3d at 500 (emphasis added) (quoting Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1992)). Plaintiff argues that "the proper market for determine [sic] the lodestar is the national marketplace" because "Daien's attorneys, the Bernhoft Law Firm[,] have extensive experience in this area of the law, and their level of expertise provides a national reputation in the community of independent candidates, minor political parties, and their supporters." (Plaintiff's Memorandum, Dkt. 45-1, p. 6.) The relevant inquiry is not, however, whether the out-of-state attorneys selected by the Plaintiff have "a national reputation" but whether "**local counsel was unavailable**" to represent the Plaintiff. (Id.); Barjon, 132 F.3d at 500 (emphasis added) (quoting Gates, 987 F.2d at 1405). "Section 1988 does not guarantee civil rights plaintiffs the best counsel in the country; it guarantees them competent counsel. Proof that [The Bernhoft Law Firm] has a national reputation for expertise in this litigation does not constitute proof that [their] expertise was necessary in this phase of the litigation." Hadix v. Johnson, 65 F.3d 532, 535 (6th Cir. 1995). As this Court articulated in a prior case, holding that Boise, Idaho was the relevant community for purposes of attorneys' fees:

> The Court does not question the fact that [the prevailing party's] counsel, McDermott Will & Emery LLP ("MWE") are well qualified to handle this matter. However, the fact that MWE attorneys are qualified does not, in itself, mean that Boise lacks available qualified attorneys.

U.S. ex rel. Suter, 2007 WL 2790397, *3. Plaintiff cannot demonstrate that competent local counsel was unavailable.

Plaintiff does not contend that he actively sought local representation for this matter. The only evidence on this issue is Christ Troupis's statement that Daniel Treuden, who had already

been retained by Plaintiff, contacted him and that Mr. Troupis "advised Mr. Treuden that I could only serve in the capacity as local counsel for his client because of economic and time constraints on my practice." (Troupis Decl., Dkt. 45-20, ¶ 3.) Notably absent is any indication that Mr. Treuden or his client actually requested that Mr. Troupis act as lead counsel on the case. (See id.) Neither has Plaintiff offered evidence that he or his out-of-state counsel contacted any other Idaho attorneys to ascertain whether they would be available to represent him in this lawsuit. To the contrary, Plaintiff insinuates that he did not believe he was obligated to take such measures, stating that he was "not a natural participant in the Boise or Idaho marketplace" and did not believe he should "be forced to interview new attorneys thousands of miles away from his residence . . .." (Plaintiff's Memorandum, Dkt. 45-1, p. 5.) This argument is somewhat peculiar given the fact that Plaintiff was choosing to become "a natural participant" in the Boise, Idaho judicial system by filing a lawsuit in this forum in order to assert his right to circulate petitions in a state that is, according to Plaintiff, "thousands of miles away from his residence." (Id.)

As is demonstrated by the Declaration of Robert C. Huntley ("Huntley Decl."), filed in connection with this Opposition, Idaho counsel was, in fact, available to represent Plaintiff in this matter. Mr. Huntley, who has 51 years of experience as an Idaho attorney, including service as a Justice of the Idaho Supreme Court, testifies:

> **In my career I have frequently taken plaintiffs' cases on a contingency and have taken cases in which declaratory or injunctive relief but no damages are sought. Many of these cases involved individual's constitutional or statutory rights.** In such cases, it was and is common for the only source or the principal source of funds for my firm's payment for the number of hours invested in the case to be an award of attorneys' fees to the prevailing party or the recovery of sufficient damages to pay a reasonable attorney's fee.

(Huntley Decl., ¶ 3) (emphasis added).

In addition, as Mr. Huntley points out, this case did not constitute particularly complex litigation and was well within the legal capabilities of Idaho counsel. (See id. at ¶¶ 4-5.) As one court articulated with respect to an election law case:

> As a threshold matter, the plaintiffs have not established that this case fits within any reasonable definition of "complex litigation." The Manual for Complex Litigation, for example, while not defining the term, devotes its attention to such classes of cases as antitrust, patents, mass disasters, securities litigation, takeover litigation, superfund litigation, RICO and class actions. *Manual for Complex Litigation (Third)* § 33 (1995). The present case certainly presented a complex legal issue, but it did not involve large numbers of parties, documents or motions - all hallmarks of complex litigation.

Richey v. Tyson, 2001 WL 530700, *5 (S.D. Ala. Apr. 30, 2001). In the case at hand, there were only two parties, extremely minimal exchange of discovery (due to the fact that this case involved legal, rather than factual, issues), no use of expert witnesses, and no trial or trial preparation. (Affidavit of Karin Jones in Support of Plaintiff's Opposition to Defendant's Motion for Attorneys' Fees and Non-Taxable Costs ("Jones Aff."), ¶ 2.) Indeed, this case presented pure questions of law and simply involved an exchange of dispositive motions on these legal issues. (Id.) This was not a case that transcended the boundaries of the average Idaho attorney's abilities. As Mr. Huntley has articulated:

> Both of these questions [raised in Plaintiff's Complaint] present issues of law that do not require factual development and that could be briefed by an Idaho attorney with ordinary access to legal research materials, either on the Internet or a law library. **Neither of these questions is so conceptually difficult that they would require skills beyond those that are available in Idaho.** Other members of firms in which I have practiced and I personally have tackled more challenging questions on a contingency, including issues requiring development of facts for trial and the use of expert witnesses, neither of which was required here. On the contrary, this case required only briefing and a motion practice in an area of the law that could be briefed by an attorney in Idaho.

(Huntley Decl., ¶ 5) (emphasis added).

This Court has previously confirmed that the party seeking fees bears the burden of establishing the narrow exception to the local forum rule:

> [T]he suggestion that Plaintiffs [the losing party] have not met their burden of offering evidence of qualified Boise attorneys of comparable expertise improperly shifts the burden to Plaintiffs - **it is MVRMC [the prevailing party] that must show that the exception applies. In the rare case where the Ninth Circuit has applied this narrow exception, the court relied on numerous declarations of attorneys stating that attorneys and law firms in the relevant community were not available.** MVRMC has failed to provide this Court with such evidence. Accordingly, the Court will reduce MVRMC's attorney rates to Boise community standards.

U.S. ex rel. Suter, 2007 WL2790397, *3 (emphasis added). Plaintiff has not met his burden of demonstrating that an Idaho attorney could not have provided adequate representation in this matter. Therefore, Idaho is the relevant community for the purpose of calculating reasonable fees. Id.; Barjon, 132 F.3d at 500.

**2. Plaintiff's Attorneys' Claimed Hourly Rates Are Significantly Higher Than the Prevailing Rates in Idaho**

"The fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing **in the community** for similar services of lawyers of reasonably comparable skill and reputation." Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987) (emphasis added); see also Carson v. Billings Police Dep't, 470 F.3d 889, 891 (9th Cir. 2006) ("When a party seeks an award of attorney's fees, that party bears the burden of submitting evidence of the hours worked and the rates paid.") Plaintiff has failed to meet this burden with respect to the requested rates for his four out-of-state attorneys.

In fact, affidavits submitted by Plaintiff confirm that the requested rates are far higher than the prevailing rates in Idaho. Plaintiff's own local counsel, Mr. Troupis, testifies that he has practiced law for 34 years and is "an experienced civil litigator in state and federal cases

involving questions of constitutional law and specifically within th[e] subject area [of] Idaho election law," yet his hourly rate is $250. (Troupis Decl., Dkt. 45-20, ¶¶ 2, 8.) Another Idaho attorney, Allen Ellis, states that "the usual and customary rates charged by law firms in the Boise, Idaho area for representation in litigated matters in federal court cases . . . range from $200/hour to $250/hour." (Affidavit of Allen B. Ellis, Esq. in Support of Plaintiff's Motion for Attorney Fee Award ("Ellis Aff."), ¶ 2.) Idaho attorney Bob Huntley, who has previously testified as an expert on the issue of reasonable attorneys' fees in Idaho, testifies: "I consider rates of $350-$450/hour for attorneys who have been out of law school ten or fewer years to be excessive." (Huntley Decl., ¶ 7.) Mr. Huntley states that a reasonable hourly rate for an Idaho attorney with ten years of experience is in the range of $225-$250, while a reasonable hourly rate for an Idaho attorney with five years of experience is in the range of $175-$200. (Id.)

Mr. Bernhoft and Mr. Barnes (who are claiming rates of $450/hour) have only nine years of legal experience; Mr. DeVries (who is seeking a rate of $250/hour) has been licensed only four years; and Mr. Treuden (who is claiming a rate of $350/hour) is a brand new attorney, who has been practicing for only a year and a half. (Declaration of Robert G. Bernhoft ("Bernhoft Decl."), Dkt. 45-3, ¶ 8); (Declaration of Robert E. Barnes ("Barnes Decl."), Dkt. 45-2, ¶ 3); (Declaration of Rchard A. DeVries ("DeVries Decl."), Dkt. 45-19, ¶ 3); (Treuden Decl., Dkt. 45-4, ¶¶ 3, 14.) In contrast, Mr. Troupis, who has **34** years of legal experience, including relevant litigation in the areas of constitutional law and Idaho election law, charges only $250/hour. (Troupis Aff., Dkt. 45-20, ¶¶ 2, 8.) The rates of Mr. Bernhoft, Mr. Barnes, Mr. DeVries, and Mr. Treuden must be significantly reduced to reflect the reality of the Idaho market.

Out-of-state counsel's claimed expertise in this area of law does not justify a rate higher than that of Idaho attorneys with comparable experience, such as Mr. Troupis. "Election law, of

course, is a difficult and worthy field, but there is no evidence before the Court that it is one to command abnormally high billing rates." Project Vote v. Blackwell, 2009 WL 917737, * 12 (N.D. Ohio March 31, 2009). "Fee-shifting statutes . . . do not permit an award of fees charged by the 'best attorneys that money can buy' if those rates exceed the prevailing market rate for similar services." Robinson v. City of Edmond, 160 F.3d 1275, 1288 (10th Cir. 1998). "Section 1988 only guarantees civil rights plaintiffs 'competent counsel.'" Gratz v. Bollinger, 353 F.Supp.2d 929, 947-48 (E.D. Mich. 2005). Defendant "should not be required to pay for a limousine when a sedan could have done the job." Simmons v. New York City Transit Auth., 575 F.3d 170, 177 (2d Cir. 2009).

In addition, as this Court has previously articulated: "The high rates charged by specialized attorneys are typically balanced by the fact that such specialization requires less time researching and reviewing relevant information. Any specialization attributed to [the] attorneys is undone by the considerable time spent addressing the issues in this matter." U.S. ex. rel Suter, 2007 WL 2790397, *3. As is discussed in more detail later in this Memorandum, Plaintiff's attorneys spent significant time researching issues related to this case, incurring almost $8,000 in Westlaw charges, even though this case presents similar legal issues to prior litigation in which these same attorneys have been involved. See Nader v. Brewer, 531 F.3d 1028 (9th Cir. 2008); (Exhibit B to Plaintiff's Motion for Attorneys' Fees and Non-Taxable Costs ("Exhibit B"), Dkt. 45-5). Any claimed expertise "is undone by the considerable time spent addressing the issues in this matter." U.S. ex. rel Suter, 2007 WL 2790397, *3.

In sum, the rates of Plaintiff's out-of-state counsel must be reduced to comport with the prevailing rates in the relevant community of Boise, Idaho.

### 3. Even if a "National Market" Rate Were Applied, Plaintiff's Attorneys' Claimed Rates are Unreasonably High

As discussed above, the relevant community for purposes of calculating reasonable fees is that of the forum: Idaho. However, a review of cases from throughout the country demonstrates that even if "national market" or "national community" rates were applied to the case at hand, Plaintiff's attorneys' claimed hourly rates are not reasonable.

For purposes of the lodestar calculation, "a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." Perdue, __ U.S. __, 130 S.Ct. at 1672. Section 1988's fee-shifting provision is not intended, however, to create a windfall for the Plaintiff's attorneys. "Section 1988's aim is to enforce the covered civil rights statutes, not to provide 'a form of economic relief to improve the financial lot of attorneys.'" Id. at 1673. "[A] reasonable attorney's fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys." Blum, 465 U.S. at 897 (internal ellipses, brackets, and quotation marks omitted).

Plaintiff claims that if he could not have retained Idaho counsel, then "The Bernhoft Law Firm was Daien's only option," arguing that the rates quoted by his attorneys must be accepted by this Court. (Plaintiff's Memorandum, Dkt. 45-1, p. 7.) Plaintiff fails to demonstrate, however, why The Bernhoft Law Firm would have been his "only option" in the entire nation or how the firm's high rates represent the prevailing market rate for experienced election law attorneys in the national market. Plaintiff has presented no evidence other than his attorneys' own Declarations regarding the rates they charge that would demonstrate that such fees are in accord with prevailing "national" rates for attorneys of comparable experience. See Jordan, 815 F.2d at 1263 ("The fee applicant has the burden of producing satisfactory evidence, **in addition to the affidavits of its counsel**, that the requested rates are in line with those prevailing in the

community for similar services of lawyers of reasonably comparable skill and reputation.") (emphasis added). Instead, a review of fee petitions from other jurisdictions reveals that even those attorneys with greater experience in the area of election law than the attorneys of The Bernhoft Law Firm recover fees at much lower rates. See, e.g., Project Vote, 2009 WL 917737, * 14 (awarding $310-$450/hour for partners specializing in election law with more experience than Plaintiff's counsel in the case at hand[2] and $125-$175/hour for associates with four to eleven years of experience); Colorado Right to Life Comm., Inc. v. Kaufman, 2008 WL 4197790, *1 (D. Colo. Sept. 10, 2008) (awarding $300/hour for a partner specializing in election and civil rights law with more experience than Plaintiff's counsel in the case at hand[3] and $185-$240/hour for associates).

Perhaps most significantly, the United States District Court for the District of Arizona, in the case of Nader v. Brewer, held with respect to the very attorneys at issue in this case that "**$200** is an appropriate hourly rate for attorneys' fees based on Barnes' and Bernhoft's experience, skill, and reputation." Nader, 2009 WL 2365241, * 1 (emphasis added); see also Nader, 2009 WL 811450, *2. The court held that "**$125** is an appropriate hourly rate for Treuden's services following his admission to the practice of law." Nader, 2009 WL 2365241, *

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[2] See, e.g., http://www.mctiguelawgroup.com/Donald_J._McTigue__Esq.html (last visited July 8, 2010) (containing profile of Donald McTigue, a partner of the Ohio firm of McTigue and McGinnis, who has specialized in election law for more than twenty years and teaches election law at Capital University Law School, and for whom the Court awarded fees based on a rate of $400/hour); see also http://www.perkinscoie.com/melias/ (last visited July 8, 2010) (containing profile of Marc Elias, a shareholder with the Washington, D.C. firm of Perkins Coie, who specializes in election law, graduated from Duke University School of Law, and had 16 years of legal experience at the time this case was decided, and for whom the Court in this case awarded fees based on a rate of $340/hour).

[3] See, e.g., http://www.jamesmadisoncenter.org/firmbio.html (last visited July 8, 2010) (containing profile of James Bopp, Jr., a partner at the Terre Haute, Indiana law firm of Bopp, Coleson & Bostrom, who specializes in First Amendment, constitutional, and election law and had 35 years of legal experience at the time the case was decided); see also Richey v. Tyson, 2001 WL 530700 (S.D. Ala. April 30, 2001) (awarding fees based upon a rate of $200/hour for the same attorney, James Bopp, Jr., and noting his "extensive experience and substantial reputation" in the areas of First Amendment and election law).

2 (emphasis added). Although the rates cited in Nader were Arizona rates, due to the court's appropriate conclusion that the "relevant community" was the local forum, Plaintiff has not claimed that **Wisconsin** rates should apply to this case, but rather that the Court should look to the "national market." (Plaintiff's Memorandum, Dkt. 45-1, pp. 5-7.) The "national market," as demonstrated in cases such as those cited above, does not support the Plaintiff's claimed high rates. Neither, for that matter, does the Wisconsin market, where the United States District Court for the Western District of Wisconsin held that $200 was a reasonable hourly rate for Mr. Bernhoft in an election law case and noted that the "prevailing billing rate for legal services involving constitutional claims in the Madison/Milwaukee area is $225-$340 per hour for experienced lawyers." Frami v. Ponto, 2003 WL 23120023, * 3-4 (W.D. Wis. July 7, 2003). Even allowing for increased rates since the Frami order, the Plaintiff's claimed rates are unreasonably high for Wisconsin. See Teresa R. v. Madison Metro. Sch. Dist., 615 F.Supp.2d 860, 864-65 (W.D. Wis. 2009) (awarding fees at an hourly rate of $275 for a civil rights attorney with 24 years of experience, following a detailed analysis of prevailing rates in Wisconsin); Faraca v. Fleet 1 Logistics, LLC, 693 F.Supp.2d 891, 895-96 (E.D. Wis. 2010) (awarding fees at hourly rates of $200-$250 for attorneys); Alexander v. City of Milwaukee, 2006 WL 277114, *6 (E.D. Wis. Feb. 3, 2006) (awarding fees at an hourly rate of $250 for an experienced civil rights attorney).

In sum, even if this Court were to look to the "national marketplace" to calculate Plaintiff's attorneys' reasonable hourly rates, those rates must be significantly reduced to comport with the prevailing "national" rates. As discussed previously, however, Idaho rates, rather than national rates, are the appropriate benchmark for the Court's calculation.

**B. Plaintiff's Claimed Hours Should be Reduced**

"When a party seeks an award of attorney's fees, that party bears the burden of submitting evidence of the hours worked . . .." Carson, 470 F.3d at 891. "In determining the appropriate number of hours to be included in a lodestar calculation, the district court should exclude hours 'that are excessive, redundant, or otherwise unnecessary.'" McCown, 565 F.3d at 1102 (quoting Hensley, 461 U.S. at 434). Plaintiff's claimed hours in this case should be reduced for the following reasons.

Plaintiff retained five attorneys to represent him in this matter. While that was his prerogative, a reduction in the claimed hours is warranted due to the resulting redundancy of services. An example of this redundancy can be found in counsel's work on Plaintiff's Opposition to Defendant's Motion for Summary Judgment between September 10, 2009 and October 2, 2009. (Exhibit B, Dkt. 45-5, pp. 5-6.) Plaintiff's four out-of-state attorneys spent a total of at least 51 hours (more than 8 full days) researching, drafting, revising, and reviewing this single brief. (Id.) Redundancy is evident in entries such as Mr. Treuden's September 25, 2009 indication that he had "[f]inalize[d] Draft for Robert Barnes' review," with Mr. Barnes spending 5.5 hours in "review of SJ motions; review of opposition to SJ draft; research into standing/ripeness issues," followed by Mr. DeVries continuing to "[r]esearch and draft opposition paper" after Mr. Barnes' review, Mr. Barnes "draft[ing] opposition to SJ," and Mr. Trueden "[f]inaliz[ing] and fil[ing] the Opposition Brief." (Id.)

Another example can be found in the seven hours spent by Mr. DeVries drafting the Complaint in this matter, followed by two and a half hours of review of the Complaint by Mr. Barnes, and another hour of revisions by Mr. DeVries. (Id. at 1.) Not only was this redundant, but ten and half hours spent on a simple pleading is excessive in and of itself. (Id.); see, e.g.,

Jones v. Eagle-North Hills Shopping Ctr., L.P., 478 F.Supp.2d 1321 (E.D. Okla. 2007) (finding that two and a half hours to prepare a Complaint in an area of the law in which the attorneys regularly practiced was "unreasonable").

An overall reduction in hours is appropriate to account for the duplication of efforts that stemmed from four attorneys working on the same projects and reviewing each other's work, as well as time spent by four different attorneys reviewing the same filings by the Defendant. This same reasoning applies to the hours claimed by local counsel Christ Troupis, whose time was primarily spent in reviewing the work of out-of-state counsel and reviewing the same State filings reviewed by the four Wisconsin attorneys. (Exhibit A to Plaintiff's Motion for Attorneys' Fees and Non-Taxable Costs ("Exhibit A"), Dkt. 45-21.) Absent Plaintiff's unnecessary decision to retain out-of-state counsel, Mr. Troupis's redundant services as local counsel would not have been required at all.

Plaintiff's out-of-state counsel spent a significant amount of time conducting legal research in this case. (Exhibit B, Dkt. 45-5.) In fact, they claim to have incurred almost $8,000 in Westlaw charges for that research. (Id. at 8.) This amount of time spent in research was not reasonable given the attorneys' claimed expertise in the field, including their recent involvement in the similar litigation of Brewer v. Nader. (See, e.g., Barnes Decl., Dkt. 45-2, ¶ 6) (noting that the Bernhoft Law Firm represented Mr. Nader in extensive previous litigation). Particularly given Plaintiff's representation throughout this litigation that the Nader case is indistinguishable from the case at hand, the amount of time spent in researching areas that had already been covered in prior litigation was unreasonable. See Brewer v. Nader, 531 F.3d 1028 (9th Cir. 2008).

Indeed, the overall amount of hours claimed by Plaintiff's counsel is unreasonable in light of the simple nature of this litigation. As discussed previously, this case did not involve factual development, extensive discovery, depositions, expert witness preparation, or trial preparation of any kind. (Jones Aff., ¶ 2.) Instead, this case involved only pure legal issues and the exchange of dispositive motions. (Id.) Between Plaintiff's local counsel and out-of-state counsel, a total of approximately 240 hours (nearly an entire month of 8-hour days) was expended on these straightforward legal issues, most of which had already been litigated by counsel in the Nader case. See Nader, 531 F.3d 1028. These hours should be reduced to a more reasonable number in light of the circumstances of this case.

Plaintiff additionally claims 15 hours for Mr. Trueden's travel time between Milwaukee and Boise in January 2010. (Exhibit B, Dkt. 45-5, p. 6.) This time should be excluded or significantly reduced; absent Plaintiff's choice to retain out-of-state counsel, this travel time would not have been necessary in the first place. See Colorado Right to Life Comm., Inc., 2008 WL 4197790, *1-2. At least seven hours of the travel time did not involve Mr. Treuden actually performing any work on the case. (Exhibit B, Dkt. 45-5, p. 6.) Mr. Treuden also billed ten hours on January 7, 2010, the day of the hearing on the cross-motions for summary judgment, which Mr. Treuden designated as a "day rate in Boise." (Id.) While some of that time was undoubtedly spent on preparation for the hearing, as well as the hearing itself, any time billed that did not involve work on the case should be excluded.

Plaintiff also claims time billed by an unidentified individual with the initials MEH, presumably a paralegal, but no accompanying declaration has been submitted by this individual. (See Exhibit B, Dkt. 45-5, p. 7.) Even if it had, Plaintiff should be excluded from recovering

fees for the individual's time, which was apparently spent organizing the client's file and time designated only as "[m]edia." (Id.)

In sum, the hours claimed by Plaintiff are unreasonable, as they are "excessive, redundant, or otherwise unnecessary.'" McCown, 565 F.3d at 1102 (quoting Hensley, 461 U.S. at 434). Defendant respectfully requests that the hours be appropriately reduced by this Court.

**C. Plaintiff's Claimed Costs Should be Excluded**

Plaintiff appears to be claiming a total of $9,652.19 in costs, consisting of the costs set forth in counsel's PreBill minus the $66.03 in Westlaw charges inadvertently attributed to the case. (Exhibit B, Dkt. 45-5, p. 8); (Treuden Decl., Dkt. 45-4, ¶ 21.) The vast majority of these costs consist of Westlaw charges and travel expenses, which Defendant respectfully asserts should be excluded, as discussed below.

***1. Charges for Computer Research Should be Excluded***

Plaintiff claims $7,741.62 in costs for Westlaw charges.[4] (Ex. B to Plaintiff's Motion, Dkt. 45-5, pp. 7-8.) Notably, Plaintiff is also seeking fees for the time spent conducting research on Westlaw. (See id. at 1-7.)

The Ninth Circuit has clarified that "reasonable charges for computerized research **may** be recovered as 'attorney's fees' . . . **if separate billing for such expenses is 'the prevailing practice in the local community**.'" Trustees of Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co., 460 F.3d 1253, 1259 (9th Cir. 2006) (emphasis added). The Westlaw charges should be excluded, because Plaintiff has not demonstrated that it is the prevailing practice in the local community, Boise, Idaho, to bill separately for Westlaw charges. It is not the practice of Defendant's counsel to separately bill its client agencies for Westlaw charges.

[4] This amount does not include the $66.03 that Plaintiff acknowledges represented a Westlaw charge that should not have been attributed to this case. (See Exhibit B, Dkt. 45-5, p. 8); (Treuden Decl., Dkt. 45-4, ¶ 21.)

(Jones Aff., ¶ 3.) Local attorney Bob Huntley, who practices in a private law firm, confirms: "[I]t is my practice to charge for computerized research **only in the most unusual of cases**." (Huntley Decl., ¶ 6) (emphasis added). Plaintiff's local counsel, Christ Troupis, claims fees for time spent conducting legal research, but is not seeking separate costs for any associated computerized research charges. (See Exhibit A, Dkt. 45-21). In short, Plaintiff has presented no evidence that it is the prevailing practice in Idaho to separately bill clients for Westlaw charges.

Even if Westlaw charges were allowed, such charges should be significantly reduced in this case, as the amount claimed is excessive. See Farley v. Country Coach, Inc., 2008 WL 905215, *5 (E.D. Mich. March 28, 2008) (reducing party's claimed Westlaw charges of $2,964.93 because "[t]hat amount is excessive" and "much of the legal research claimed was either unnecessary or duplicative.") As discussed previously, Plaintiff's attorneys claim expertise in the field of election law and have previously represented Plaintiff in litigation that shares many of the same legal issues as the case at hand. See Nader, 531 F.3d 1028. The amount of time spent researching was not reasonable under the circumstances, and thus the resulting Westlaw charges are not reasonable.

***2. Charges for Travel Expenses Should be Excluded***

Plaintiff claims $1,665.28 in travel expenses. (Exhibit B, Dkt. 45-5, p. 8.) Where out-of-state counsel was unnecessary to adequately represent the Plaintiff, travel expenses for out-of-state counsel are appropriately denied. See Ramos v. Lamm, 713 F.2d 546, 559 (Ct. App. Colo. 1983); Farberware Licensing Co. LLC v. Meyer Mktg. Co. Ltd., 2009 WL 517378, * 6 (S.D.N.Y. Dec. 30, 2009); Motorola, Inc. v. Abeckaser, 2009 WL 2568529, *7 (E.D.N.Y. Aug. 5, 2009); Cartier Int'l B.V. v. Gorski, 2003 WL 25739624, * 3 (D. Conn. April 30, 2003). "Defendant should not be forced to pay the exorbitant costs associated with Plaintiff's choice of

distant counsel." Zampino v. Supermarkets Gen. Corp., 1994 WL 470338, * 3 (E.D. Pa. Aug. 31, 1994).

In addition, the travel expenses include $946.90 in airfare for Mr. Treuden to travel to Boise on December 13, 2009, returning on December 15, 2009. (Exhibit B, Dkt. 45-5, p.8); (Exhibit F to Plaintiff's Motion for Attorneys' Fees and Non-Taxable Costs ("Exhibit F"), Dkt. 45-9.) However, Mr. Treuden did not actually travel to Boise at that time, because the hearing on the Motions for Summary Judgment was re-scheduled to January 7, 2010. (Amended Notice of Hearing on Motions for Summary Judgment, Dkt. 37); (see Exhibit B, Dkt. 45-5, p. 6.) It is unclear from the documentation submitted by Plaintiff whether this plane ticket was changed to January or whether it was never used at all, as Plaintiff additionally claims later costs in the amount of $718.38 for "**Airfare**, Hotel, meals, ground transportation for Boise hearing." (Exhibit B, Dkt. 45-5, p. 8) (emphasis added). To the extent these charges are duplicative or involve expenses for a plane ticket that was never actually used, these costs should be excluded.[5] See Nader, 2009 WL 2365241, *1 (significantly reducing travel expenses for The Bernhoft Law Firm where those expenses were "both excessive and inadequately described.")

[5] $946.90 also appears to be excessive for airfare between Milwaukee, Wisconsin and Boise, Idaho. According to Plaintiff's documentation, the plane ticket was purchased on www.expedia.com 32 days before the original date of the flight, with a Monday departure date and a Wednesday return date. (Exhibit F, Dkt. 45-9.) A search of www.expedia.com on July 10, 2010 for flights departing 30 days later, on Monday, August 9th, with a return date of Wednesday, August 11th, revealed round-trip ticket prices in economy class between Milwaukee and Boise that ranged from $264 to $445. (Jones Aff., ¶ 4.) None of the airfare prices for economy class came close to approaching $946. With the understanding that ticket prices have some seasonal variations, a price of $946.90 was nevertheless excessive for this particular flight.

## CONCLUSION

For the reasons set forth above, Defendant Ysursa respectfully requests that this Court significantly reduce Plaintiff's claimed attorneys' fees and costs to reflect reasonable hourly rates, reasonable hours spent on the litigation, and reasonable, necessary costs.

DATED this 12th day of July, 2010.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By */s/ Karin D. Jones*
MICHAEL S. GILMORE
KARIN D. JONES
Deputy Attorneys General

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12th day of July, 2010, I electronically filed the foregoing DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND NON-TAXABLE COSTS with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons:

Robert E. Barnes
The Bernhoft Law Firm, S.C.
207 E. Buffalo St., Ste. 600
Milwaukee, WI 53202

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: (414) 276-2822
- ☒ CM/ECF

Christ T. Troupis
Troupis Law Office PA
PO Box 2408
Eagle, ID 83616

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: (414) 276-2822
- ☒ CM/ECF

And, I hereby certify that I served the foregoing document(s) to the following non-CM/ECF Registered Participant(s) in the manner indicated below:

N/A.

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

*/s/ Karin D. Jones*
Michael S. Gilmore
Karin D. Jones
Deputy Attorneys General