

1 on their Motion to Stay and Discretionary Review. Motion at 1. Rather, Plaintiffs said that it
2 made more sense to wait until the appellate court decided Plaintiffs' Motion to Stay Proceedings
3 since the order compelling the deposition and an award of fees was also being appealed in
4 Plaintiffs' Motion for Discretionary Review. Needle Declaration, at ¶2.

5 The Court order awarding attorney fees clearly states: "Plaintiffs shall pay the reasonable
6 attorneys' fees and costs incurred by the City in making this motion. If the parties cannot agree
7 on the amount of such fees and costs, then the City may apply for them to the Court by motion."
8 DKT 99. There is no enforceable order to pay attorney fees until such time as the court rules that
9 an amount of attorney fees must be paid. Plaintiffs made it explicitly clear to the Defendant that
10 they would obey an order of the Court to pay a sum certain for attorney fees entered prior to a
11 stay of proceedings or if the appellate court denied Plaintiffs' Motion for a Stay. Needle
12 Declaration at ¶3.
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14 Contrary to the Defendant's representation, Plaintiffs did not say simply that the fee
15 request was excessive. Plaintiffs explained that neither the facts nor the law were disputed in the
16 Defendant's the Motion to Compel Ms. Ferreiro's deposition. Neither legal scholarship nor
17 extensive citations to the record were required. *Id.* at ¶4. Plaintiffs further explained, for
18 example, that the Defendant's Reply was five pages long and the Defendant's counsel were
19 attempting to recover for 29.9 hours for those five pages. *Id.* at ¶5. Plaintiffs explained that the
20 Motion to Compel the Ferreiro Deposition was a simple motion and that the request of \$16,153
21 was wildly excessive regardless of the number of hours Defense counsel has managed to log. *Id.*
22 The Court should award no more than \$4,000 in attorney fees.
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1 **II. ARGUMENT**

2 **A. Procedural History.**

3 On November 16, 2022 the Court granted in part the City’s Motion for a Determination
4 of Privilege. DKT 66. On November 18, 2022, Plaintiffs filed a Revised Motion for *In Camera*
5 review based upon the Defendant’s 46-page privilege log. DKT 67. Also, on November 18,
6 2022, the Defendant filed its Motion to Compel the Ferreiro deposition. DKT 72.

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8 On December 2, 2022, the Court denied Plaintiffs’ Motion to Reconsider the Revised
9 Order. DKT 88. On January 3, 2023, Plaintiffs filed a Notice of Discretionary Review appealing
10 from the Court’s Revised Order Granting In Part the Defendant’s Determination of Privilege and
11 the Denial of Reconsideration. DKT 97. On January 6, 2022 the Court denied Plaintiffs’ Revised
12 Motion for an *In Camera* review, DKT 101, and on that same day also granted the Defendant’s
13 Motion to Compel Ferreiro’s deposition. DKT 99.

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15 On January 12, 2023, Plaintiffs filed an Amended Notice of Discretionary Review of the
16 Court’s Order Denying Plaintiffs’ Revised Motion to Compel Discovery and for an *In Camera*
17 Review and the Appointment of a Special Master entered January 6, 2023. DKT 105. On
18 January 17, 2023 Plaintiffs filed a second Amended Notice of Discretionary Review to include
19 on appeal the Court’s order compelling Ferreiro’s deposition and awarding attorney fees. DKT
20 107.

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22 On January 18, 2023 Plaintiffs filed their Motion for Discretionary Review addressing: 1)
23 the Revised Order Granting In Part the Determination of Privilege, 2) denial of Plaintiffs’
24 Motion for an *In Camera* Review and Appointment of a Special Master, and 3) the order
25 compelling the Ferreiro deposition and awarding attorney fees. Needle Declaration, at ¶6. *In its*
26 *Motion for Fees, the Defendant conspicuously omits that Discretionary Review includes the*

1 *order compelling the Ferreiro deposition and fees.* DKT 110 at 4 n.1; Balanda Declaration at 5.
2 Also, on January 18, 2022, Plaintiffs filed with the appellate court a Motion to Stay Proceedings.

3 On January 30, 2023, the Defendant took Ms. Ferreiro’s deposition for seven hours.
4 Needle Declaration, at ¶7.

5 **B. The Defendant’s Fee Request is Wildly Excessive.**

6 **1. The Defendant’s Motion to Compel Discovery.**

7 The Defendant’s motion to compel consisted of six pages, not including the Conclusion
8 and the signature page. The Defendant claims 21.1 hours including attorney and paralegal hours
9 for this motion. The first 2.5 pages of the Defendant’s Motion to Compel are entitled “nature of
10 the case.” Virtually all of these facts had been previously presented to the court and virtually
11 none of these facts are contested. These facts are apparently included to support the self-evident
12 conclusory paragraph that “[o]bviously, discovery of the Plaintiffs, including their deposition, is
13 important.” DKT 72 at 3. The next two pages of the motion comprise alleged facts which are
14 mostly correct and not disputed but fail to disclose that until November 4, 2022, the status of
15 scheduling Ms. Ferreiro’s deposition was in substantial doubt.
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18 The parties engaged in a meet-and-confer discovery conference on October 27, 2022, at
19 which scheduling of depositions was discussed as well as a possible stipulation to move the
20 Court for a partial or whole stay of discovery pending the outcome of the privilege issues. It was
21 not until November 4, 2022 when Mr. Savitt responded: “The City plans to move to compel Ms.
22 Ferreiro’s deposition unless the parties mutually agree by Tuesday, November 8 at Noon upon a
23 date for Ms. Ferreiro’s deposition (or alternatively unless the parties agree by then that the
24 deposition should be put off further as part of a mutually acceptable stay).” DKT 73 (Response
25 to Motion to Compel). Because the parties could not agree to an acceptable date for Plaintiff’s
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1 deposition or a mutually acceptable stay, the Defendant insisted that she appear the following
2 day, November 9, 2022. The Defendant understood that it would be impossible for Plaintiff
3 appear for a deposition on November 9, and on November 18, 2022 moved to compel her
4 deposition based upon her failure to appear on November 9, 2022.

5 The Argument and Authority section of the Defendant’s Motion to Compel argues the
6 undisputed proposition that “[t]he City Has the Right to Take Ms. Ferreiro’s Deposition.”
7 Plaintiffs never argued to the contrary. Plaintiffs argued only that the Ferreiro deposition should
8 be *delayed* until the resolution of outstanding attorney-client privilege issues reflected in the
9 Defendant’s 46-page privilege log which was the raised in Plaintiffs then *pending motion* for an
10 *in camera* review. DKT 67, 3, 5-6. Neither did Plaintiffs argue about the sequencing of
11 discovery. DKT 67. Plaintiffs contested neither the applicable law nor the facts. *Id.* As a
12 reflection of the simplicity of the Plaintiffs’ Response, Plaintiffs cited to only one case for the
13 proposition that “Washington courts have held that a privilege claim should be strictly limited for
14 the purpose for which it exists. *Pappas v. Holloway*, 114 Wn.2d 198, 208, 787 P.2d 30 (1990).”
15 DKT 80, at 5.

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18 **2. The Defendant’s Reply to Plaintiffs’ Response.**

19 The Defendant’s Reply consisted of five pages for which they claim 29.9 hours of
20 attorney time. Nothing in this Reply begins to justify the number of attorney hours claimed. In
21 their Reply, the Defendant devotes a page and a half to insist that “Plaintiffs have no right to
22 dictate the order of discovery.” DKT 86, at 2-3. Again, Plaintiffs never argued to the contrary,
23 only that the Court had the right and the power *to delay* the Ferreiro deposition until the
24 resolution of issues in their *pending motion* for an *in camera* review. The Defendant doesn’t
25 dispute that the Court had the discretion to delay the Ferreiro deposition if it had chosen to do so.
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1 The rest of the Reply is simply argument that the Plaintiffs have caused delay, despite the
2 uncertainty of the scheduled deposition until November 4, 2022, that Plaintiffs failed to show
3 prejudice, and that the City has been prejudiced. It appears that the Court has agreed with the
4 City. But nothing in the five-page Reply remotely justified 29.9 attorney hours.

5 Examples of excessive hours include 9.5 hours spent by counsel reviewing and revising
6 what should have been a straightforward, simple motion to compel discovery. Balanda decl., Ex.
7 A. Likewise, Sarah Gohmann Bigelow claims 9.1 hours on November 30, 2022 for “draft reply
8 in support of motion to compel.” On the same day, Duffy Graham lists 6.0 hours on an
9 unidentified task related to Defendant’s reply. *Id.* Graham, Bigelow, and James Savitt then spend
10 a total of 12.7 hours reviewing each other’s work on the five page reply. *Id.*

11 There is no evidence that the defense counsel made any effort to exclude excessive,
12 redundant, or otherwise unnecessary hours. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)
13 (burden is on party petitioning for fees to exclude these hours). “If the court finds an excessive
14 number of hours are incurred in the presentation of a case, the court should deny any
15 compensation for excessive hours.” *Boeing Company v. Sierracin Corporation*, 108 Wn.2d 38,
16 65, 738 (1987). “Particularly in cases where the law is settled, there is a ‘great hazard that the
17 lawyers involved will spend undue amounts of time and unnecessary effort to present the case.’”
18 *Nordstrom, Inc. v. Tampourlos*, 107 Wn. 2d 735, 744, 733 P.2d 208 (1987).

19 Defense counsel will recover their requested fee from the City of Seattle and defense
20 counsel has refused to confirm that it will not recover fees from Plaintiffs in addition to those
21 paid by the City of Seattle. Needle Declaration at ¶8.
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1 **C. The Court should not award a wildly excessive attorney fee that is out of all**
2 **proportion to the nature of the Motion to Compel Deposition.**

3 The Defendant claims an attorney fee of \$16,153 for a seven-page Motion and a five-
4 page Reply. This is a wildly excessive attorney fee considering the nature of the motion, the lack
5 of contested legal issues, and the lack of factual issues. It is unsurprising that Plaintiffs could not
6 agree. Plaintiffs argued only that the Court should have exercised its discretion to *delay* the
7 Ferreiro deposition pending the resolution of its motion for *in camera* review. The Court
8 disagreed and awarded an undetermined amount of attorney fees. The resolution of this issue,
9 however, does not begin to justify an attorney fee of \$16,153.
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11 The Defendant should not now be allowed to recover for approximately 55 attorney hours
12 for a simple and straight forward motion which required neither legal analysis nor extensive
13 citations to the records. The Defendant's requested attorney fee is wildly excessive and not
14 reasonable.

15 Moreover, Ms. Balanda's declaration is legally insufficient to support the usual and
16 customary fees charged by different lawyers in her firm. None of the lawyers who actually
17 worked on the Motion to Compel has submitted a declaration.
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19 **D. Plaintiffs have meager resources to pay attorney fees.**

20 Ms. Ferreiro is unemployed, and Ms. Irwin is employed earning approximately \$70,982
21 per year. They have meager resources with which to pay attorney fees.
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23 **III. CONCLUSION**

24 The Motion to Compel Ferreiro's deposition was simple and straight-forward, and neither
25 the facts nor the law was contested. The Defendant's requested attorney fee is wildly excessive.
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3 Respectfully submitted this 3rd day of February 2023.

4 /s/ Jeffrey Needle

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