

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

THE NORTHEAST OHIO COALITION	:	Civil Action No. C2-06-896
FOR THE HOMELESS, et al.,	:	
Plaintiffs,	:	Judge Algenon L. Marbley
	:	
vs.	:	
	:	<u>PLAINTIFFS' THIRD MOTION FOR</u>
JENNIFER BRUNNER, in her official	:	<u>ATTORNEYS' FEES AND COSTS</u>
capacity as Secretary of State of Ohio, et al.,	:	
Defendants.	:	

Pursuant to 42 U.S.C. § 1988, Plaintiffs move for an award of attorneys' fees and costs incurred in and after January 2009 that are reasonably related to the briefing and argument of the Plaintiffs' successful prior motions for attorneys' fees, the opposition to and settlement of the State of Ohio's appeal of this Court's decision awarding attorneys' fees, and the negotiation of this Court's April 19, 2010 Consent Decree terminating this litigation. The grounds for this motion are set forth in the attached memorandum in support. Declarations of attorneys' fees and costs are being filed concurrently.

Respectfully submitted,

/s/ Caroline H. Gentry
Caroline H. Gentry, Trial Attorney (0066138)
PORTER, WRIGHT, MORRIS & ARTHUR LLP
One South Main Street, Suite 1600
Dayton, OH 45402
(937) 449-6748 / (937) 449-6820 Fax
Email: cgentry@porterwright.com

and

Subodh Chandra (0069233)
THE CHANDRA LAW FIRM, LLC
1265 W. 6th Street, Suite 400
Cleveland, OH 44113-1326
(216) 578-1700 / (216) 578-1800 Fax
Email: Subodh.Chandra@StanfordAlumni.org

and

H. Ritchey Hollenbaugh (0001072)
CARLILE PATCHEN & MURPHY LLP
366 East Broad Street
Columbus, Ohio 43215
(614) 228-6135 / (614) 221-0216 Fax
hrh@cpmlaw.com

Attorneys for Plaintiffs

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
THIRD MOTION FOR ATTORNEYS’ FEES AND COSTS**

I. STATEMENT OF FACTS.

The Court is well-acquainted with the history of this litigation, and the pertinent facts will be only briefly summarized here. Plaintiffs filed this lawsuit prior to the November 2006 general election to challenge the constitutionality of Ohio’s voter identification and provisional ballot laws. In 2006, Plaintiffs obtained two Court Orders relating primarily to the voter identification laws (Doc. Nos. 51 & 57). Plaintiffs continued to litigate their claims before the November 2008 general election and obtained two Court Orders relating primarily to the provisional ballot laws (Doc. Nos. 142 & 143). Plaintiffs filed two motions for attorneys’ fees for their work performed between October 2006 and January 2009. (Doc. Nos. 96 & 179).

After the motions were fully briefed and argued, this Court granted them and awarded Plaintiffs their fees and costs in the amount of \$505,414.11. (Doc. Nos. 203 & 205). The State of Ohio appealed (Doc. No. 207). During discussions facilitated by the Sixth Circuit mediator, the parties negotiated a Consent Decree that included full payment of the fee award and, in addition, set forth rules governing the processing and counting of provisional ballots for voters who lack the necessary identification. This Court entered that Decree on April 19, 2010 (Doc. 210). The Sixth Circuit dismissed the State of Ohio’s appeal for lack of prosecution (Doc. 211).

Plaintiffs now seek an additional award of fees and costs that are reasonably related to their attorneys’ work briefing and arguing the prior motions for attorneys’ fees, opposing and settling the appeal of this Court’s decision granting those motions, and negotiating the April 19, 2010 Consent Decree that terminated this litigation.

II. LAW AND ARGUMENT.

A. The Legal Standard Relating To Fees And Costs.

The Fees Act, codified at 42 U.S.C. § 1988, provides for fee-shifting in, among others, Section 1983 actions. For private actions brought under 42 U.S.C. § 1983 and other specified measures designed to secure civil rights, Congress established an exception to the “American Rule” that the prevailing litigant is ordinarily not entitled to collect attorneys’ fees from the loser. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). That exception, codified in 42 U.S.C. 1988(b), authorizes federal district courts, in their discretion, to “allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.”

B. Plaintiffs Are Prevailing Parties With Respect To Their Prior Motions For Fees, The Appeal Of The Decision Awarding Fees, And The Consent Decree.

Plaintiffs are prevailing parties under 42 U.S.C. § 1988. This Court awarded their two prior motions for fees, and the State of Ohio’s appeal of that decision was unsuccessful. Instead, the Consent Decree entered by this Court provided for the full payment of the fee award and, in addition, set forth rules governing the processing and counting of provisional ballots for voters who lack the necessary identification, thereby accomplishing a significant portion of the relief Plaintiffs sought in this lawsuit. Under these circumstances, Plaintiffs are entitled to their attorneys’ fees and costs.

Significantly, the U.S. Supreme Court has held that attorneys’ fees may be awarded following the entry of a consent decree, without an adjudication on the merits or determination that the plaintiff’s constitutional rights were violated. *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 604 (2001) (noting that court-ordered consent decrees create the requisite material alteration in the parties’ relationship, even though the consent decree does not

always include an admission of liability by the defendant, because “[i]t nonetheless is a court-ordered ‘chang[e] [in] the legal relationship between [the plaintiff] and the defendant.’” (citations omitted). These authorities apply squarely to the Consent Decree obtained by Plaintiffs in this action.

Accordingly, Plaintiffs are prevailing parties under 42 U.S.C. § 1988 and are entitled to an award of reasonable attorneys’ fees and costs.

C. Plaintiffs Are Entitled To Recover Those Fees And Costs That Are Reasonably Related To Their Prior Motions For Fees, The Appeal Of This Court’s Decision Awarding Fees, And The Consent Decree.

Although the Court cannot “order a defendant to pay fees for time spent on matters unrelated to the issues on which plaintiff prevailed, efforts on matters related to the plaintiffs’ success are compensable.” *Gautreaux v. Chicago Housing Auth.*, 491 F.3d 649, 661 (7th Cir. 2007) (citing *Hensley*, 461 U.S. 424). “So long as the lawyers’ activities are factually related to issues on which the plaintiffs have achieved ... judicial relief and the work was reasonably calculated to result in relief, the district court may grant attorneys’ fees.” *Id.* at 661-62.

Plaintiffs’ counsel seek to recover fees and costs that are reasonably related to work performed between January 2009 and April 2010 with respect to the successful briefing and argument of their prior motions for fees and costs, the successful settlement of the State of Ohio’s appeal of this Court’s award of fees, and the negotiation of the Consent Decree that terminated this litigation. Plaintiffs are properly seeking to recover these fees and costs. *Abner v. Kansas City Southern R.R. Co.*, 541 F.3d 372 (5th Cir. 2008).

D. Plaintiffs Are Entitled To Recover Their Fees And Costs Incurred In Reasonable Efforts To Protect And Enforce The Court Orders.

Post-decree efforts to monitor and enforce a consent decree also entitle a prevailing party to attorneys’ fees. *Johnson v. City of Tulsa*, 489 F.3d 1089, 1090 (10th Cir. 2007). *Accord*

Thompson v. HUD, Case No. MGJ-95-309, 2002 U.S. Dist. LEXIS 23875, at *16-17 (D. Md. Nov. 21, 2002) (holding that a prevailing party “can obtain attorney’s fees for appropriate time spent in monitoring and enforcing a consent decree”) (collecting and citing cases); *Gonzalez v. Felker*, 964 F. Supp. 251, 254 (N.D. Ohio 1997) (“A reasonable attorneys’ fee may include post-judgment monitoring of a consent decree.”).

Plaintiffs’ counsel also spent a small amount of time monitoring compliance with the October 2008 Court Orders. Plaintiffs are entitled to recover their fees and costs reasonably related to this enforcement activity. *Johnson*, 489 F.3d at 1090.

E. No Special Circumstances Render An Award Of Fees And Costs Unjust.

When a party prevails in a civil rights lawsuit, the court’s discretion in determining whether to award fees is narrowly limited. In such a case, the prevailing party “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1986). This exception is “narrowly construed” to avoid interfering with the purposes of the fee statutes, namely, to encourage civil rights enforcement, penalize obstructive litigation by civil rights defendants, and deter civil rights violations. *Martin v. Heckler*, 772 F.2d 1145, 1150 (11th Cir. 1985); *Jones v. Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986); *Anderson v. Morris*, 658 F.2d 246, 248 (4th Cir. 1981). As the Sixth Circuit has recognized, “awards of attorney fees are an integral part of the remedies necessary to obtain compliance with the civil rights laws.” *Price v. Pelka*, 690 F.2d 98, 101-02 (6th Cir. 1982).

The burden of establishing the existence of special circumstances that would render an award of fees unjust falls upon the party opposing the award. A defendant “must make a strong showing to justify denial of section 1988 fees to prevailing plaintiffs.” *Martin*, 773 F.2d at 1150

(internal quotations and citation omitted). No special circumstances exist in this case which would render an award unjust.¹

F. Plaintiffs Have Properly Computed The Award To Which They Are Entitled.

Attorneys' fees are properly determined through the lodestar method of multiplying the number of hours the attorneys for the prevailing party "reasonably expended on the litigation" by "a reasonable hourly rate." *Hensley*, 461 U.S. at 433; *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994). This amount, or "lodestar," is "presumed to be the reasonable fee." *Blum v. Stenson*, 465 U.S. 886, 897 (1984).

The declarations of actual attorneys' fees and costs and attached exhibits, being filed concurrently with this motion, demonstrate the number of hours spent in work reasonably related to the briefing and argument of Plaintiffs' prior motions for fees and costs, opposition to and settlement of the State of Ohio's appeal of this Court's award of fees, and the negotiation of the Consent Decree that terminated this litigation. These detailed declarations set forth the tasks performed and the time devoted to each task, based on contemporaneous time records. All of the identified tasks were factually related to, and reasonably calculated to result in or enforce, the relief obtained in this Court's prior award of fees and the Consent Decree. Under the foregoing authority, Plaintiffs are entitled to a fully compensatory fee and costs.

In assessing the reasonableness of a fee award, courts also look to the factors identified in *Johnson v. Ga. Hwy. Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).² *Hensley*, 416 U.S. at

¹ Notably, courts have rejected defenses of special circumstances based on the fact that an award would "fall on the taxpayers," *Johnson v. Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979), that defendants "were merely performing their duty by enforcing the statute controlling," *Graves v. Barnes*, 700 F.2d 220, 221 (5th Cir. 1983), that the law was uncertain, *Northcross v. Bd. of Educ. of Memphis City Schs.*, 611 F.2d 624, 635 (6th Cir. 1979), or that a defendant acted in "good faith," *Hutto v. Finney*, 437 U.S. 678, 693 (1978). Courts have also rejected special circumstances defenses based on a plaintiff's ability to bring suit without a fee award. *Ellwest Stereo Theater, Inc. v. Jackson*, 653 F.2d 954 (5th Cir. 1981); *Jones v. Wilkinson*, 800 F.2d 989, 991-92 (10th Cir. 1986).

² The *Johnson* factors are: (1) time and labor expended; (2) novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the

434 n.9. But as the Supreme Court made clear in *Blum*, these *Johnson* factors are generally considered as part of the lodestar calculation itself and are rarely used to change the lodestar amount. *Blum*, 465 U.S. at 898-99. For example, the novelty and complexity of the questions raised in the lawsuit will ordinarily be reflected in the number of hours spent on the litigation. *Id.* Where an attorney takes less time because she is an expert in those complex issues, that expertise, as well as the “quality of representation” more generally, will typically be reflected in her hourly rate. *Id.* This does not diminish the importance of the *Johnson* factors, however, as those factors are appropriately considered in evaluating the reasonableness of the hours and rates claimed by plaintiffs’ attorneys. *See Daly v. Hill*, 790 F.2d 1071, 1078 (4th Cir. 1986).

Overall, “[w]here 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[.]” *Hensley*, 461 U.S. at 435. In this case, Plaintiffs obtained an excellent result that vindicated important constitutional rights and conferred a significant benefit on all voters who will lack identification and will cast provisional ballots during elections in Ohio while the Consent Decree is in effect. Accordingly, Plaintiffs are entitled to a fully compensatory award.

Although Plaintiffs were represented by several attorneys, it is not unreasonable for more than one lawyer to appear in a case and fees may not be denied or discounted merely on that basis. *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137 (8th Cir. 1982). Indeed, a complex case will often require multiple attorneys. *Kim v. Fukikawa*, 871 F.2d 1427, 1435 n.9 (9th Cir. 1989). That is particularly true in a complicated and time-sensitive election case such as the one at bar. A party may recover fees for multiple attorneys so long as the work is not unreasonably

litigation; (5) the customary fee for similar work; (6) the attorney's expectations at the outset of litigation; (7) time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the attorney-client relationship; and (12) fee awards in similar cases. *Id.*

duplicative. *Johnson v. Univ. College*, 706 F.2d 1205, 1208 (11th Cir. 1983). The time records submitted by Plaintiffs' counsel in this case show that there was no unreasonable duplication, as each lawyer often performed different tasks. The complex and expedited nature of this litigation clearly warranted the use of multiple attorneys.

The number of hours for which Plaintiffs seek compensation is extremely reasonable, especially in light of these *Johnson* factors: the labor required; the complexity and novelty of the legal issues; the time limitations under which counsel worked; the experience, reputation and abilities of the attorneys in this case; and the excellent results obtained.

The attached declarations constitute sworn evidence that the Plaintiffs' attorneys actually expended the time for which compensation is sought. "Sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case...." *Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 738 (11th Cir. 1988). To deny or reduce compensation, "it must appear that the time claimed is obviously and convincingly excessive under the circumstances." *Id.*

The rates requested for each attorney are reasonable. "A district court has broad discretion to determine what constitutes a reasonable hourly rate for an attorney." *Hudson v. Reno*, 130 F.3d 1193, 1208 (6th Cir. 1997). When "calculating the reasonable hourly rate, the court should consider the prevailing market rate in the relevant community." *Libertarian Party of Ohio v. Brunner*, Case No. 2:04-cv-08, 2007 U.S. Dist. LEXIS 88623, at *11-12 (S.D. Ohio Nov. 20, 2007) (citing *Adcock-Ladd v. Sec. of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000)). "The 'prevailing market rate' is the rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Id.* at *12.

In this case, the rates requested for Porter Wright's trial counsel, Caroline Gentry, are \$280 and \$290 per hour. The \$280 rate was previously approved by this Court and both rates are lower than the \$300/hour rate approved by this Court. *Libertarian Party of Ohio v. Brunner*, Case No. 2:04-cv-08, 2007 U.S. Dist. LEXIS 88623, at *10-11 (S.D. Ohio Nov. 20, 2007) (\$300/hour for all attorneys); *Stahl v. Taft*, Case No. 2:03-cv-597, 2006 U.S. Dist. LEXIS 17014, at *12 (S.D. Ohio Feb. 8, 2006) (\$300/hour for all attorneys); *Warren v. City of Athens*, Case No. 2:02-cv-559, 2005 U.S. Dist. LEXIS 23233, at *18-19 (\$300 for one attorney, \$250 for the other attorney). The hourly rates requested by Porter Wright are reasonable and should be awarded.

Also in this case, the rates requested for The Chandra Law Firm, LLC's are reasonable. As stated in the Declaration of Subodh Chandra, his standard rate of \$400 is amply justified by his substantial career experience in section 1983 and public-law litigation.

Finally, the rates requested for Carlile Patchen & Murphy LLP are at or below \$325 per hour. Under the foregoing authorities, the hourly rates requested by Carlile Patchen & Murphy LLP are reasonable and should be awarded.

G. Plaintiffs Are Entitled To Recover Expenses And Costs Reasonably Incurred.

Plaintiffs also seek to recover their expenses and costs under 28 U.S.C. §§ 1821 and 1920 and the fee-shifting statutes. Reasonable attorneys' fees recoverable under the fee-shifting statutes include "reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Northcross v. Bd. of Ed. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979). Items such as photocopying charges, fax and telephone costs, travel, telephone, postage, and secretarial costs have been held to be compensable under the fee-shifting statutes. *Id.* at 639.

These expenses are identified in the spreadsheets attached to the declarations filed by Plaintiffs' counsel. The expenses and costs that were incurred were reasonable and related to the briefing and argument of Plaintiffs' prior motions for fees and costs, opposition to and settlement of the State of Ohio's appeal of this Court's award of fees, and the negotiation of the Consent Decree that terminated this litigation. They should therefore be awarded to Plaintiffs.

III. CONCLUSION.

For the foregoing reasons, Plaintiffs respectfully requests that the Court grant them their attorneys' fees and costs, under 42 U.S.C. § 1988, that were reasonably incurred in work related to the briefing and argument of Plaintiffs' prior motions for fees and costs, opposition to and settlement of the State of Ohio's appeal of this Court's award of fees, and the negotiation of the Consent Decree that terminated this litigation. Those fees and costs are detailed in the declarations filed concurrently with this motion.

Respectfully submitted,

s/ Caroline H. Gentry
Caroline H. Gentry, Trial Attorney (0066138)
PORTER, WRIGHT, MORRIS & ARTHUR LLP
One South Main Street, Suite 1600
Dayton, OH 45402
(937) 449-6748 / (937) 449-6820 Fax
Email: cgency@porterwright.com

and

Subodh Chandra (0069233)
THE CHANDRA LAW FIRM, LLC
1265 W. 6th Street, Suite 400
Cleveland, OH 44113-1326
(216) 578-1700 / (216) 578-1800 Fax
Email: Subodh.Chandra@StanfordAlumni.org

and

H. Ritchey Hollenbaugh (0001072)
CARLILE PATCHEN & MURPHY LLP
366 East Broad Street
Columbus, Ohio 43215
(614) 228-6135 / (614) 221-0216 Fax
hrh@cpmlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 4th, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

s/ Caroline H. Gentry
Caroline H. Gentry
PORTER, WRIGHT, MORRIS & ARTHUR LLP
One South Main Street, Suite 1600
Dayton, OH 45402
(937) 449-6748 / (937) 449-6820 Fax
Email: cgency@porterwright.com

Attorneys for Plaintiffs