

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

NORTHEAST OHIO COALITION	:	
FOR THE HOMELESS, <i>et al.</i> ,	:	CASE NO. C2:06-0896
	:	
Plaintiffs,	:	JUDGE ALGENON MARBLEY
v.	:	
	:	MAGISTRATE TERENCE KEMP
JENNIFER BRUNNER, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**MEMORANDUM OF DEFENDANT JENNIFER BRUNNER, OHIO SECRETARY OF
STATE, IN OPPOSITION TO PLAINTIFFS' SECOND MOTION
FOR ATTORNEYS' FEES AND COSTS**

I. INTRODUCTION

Plaintiffs' Second Motion for Attorneys' Fees and Costs [R-179] seeks an award totaling \$296,115.12, for the work of 18 attorneys, and 2 paralegals on a case in which Plaintiffs were not the prevailing party on any issue. They obtained none of the relief they were seeking; indeed, they abandoned (or lost on the merits) the most fundamental claims in their complaint. Even if Plaintiffs were entitled to some fees, their request for fees relating to the *Skaggs* case has no legal basis whatsoever: the Secretary of State did not initiate that case and has no obligation to pay Plaintiffs' fees, and furthermore the legal position advocated by NEOCH and its fellow Plaintiffs was *rejected* by the Ohio Supreme Court. For these reasons, Defendant Jennifer Brunner, Ohio Secretary of State ("the Secretary"), respectfully asks the Court to deny the motion.

II. PROCEDURAL HISTORY

On October 24, 2006, Plaintiffs, the Northeast Ohio Coalition for the Homeless ("NEOCH") and Service Employees International Union ("SEIU") filed a 13-count Complaint

challenging the constitutionality of Ohio's Voter Identification law, and seeking injunctive relief ahead of the November 7, 2006 election. [R-2]. On September 30, 2008, this Court issued an Opinion and Order in which it concluded that Plaintiffs were the "prevailing party" at least with regard to some issues, and that they were entitled to an award of attorneys' fees, in an amount to be determined.¹ The present motion, seeking a second award of fees, does not relate to the 2006 proceedings. Rather, the second motion for fees, by its terms, seeks fees "reasonably related to the procurement and enforcement of the October 24 and 27, 2008 Court Orders." [R-179, p.1]. The history relating to those Orders is as follows:

On October 17, 2008, Plaintiffs filed a Motion for Leave to Amend their Complaint, along with a proposed Complaint. [R-120].² The Supplemental Complaint contained five new counts: two counts challenging the handling of provisional ballots (Amended Counts Twelve and Thirteen) and three counts challenging the constitutionality of the Voter ID law (Counts Fourteen, Fifteen, and Sixteen). The Supplemental Complaint added three new plaintiffs (Kyle Wangler, James Wise, and the Columbus Coalition for the Homeless). And finally, the Prayer for Relief sought: (1) a declaration that the Voter ID law was unconstitutional facially and/or as applied; (2) a preliminary and permanent injunction against enforcement of the Voter ID law; and (3) a declaratory order establishing a uniform system for handling provisional ballots and monitoring compliance by the local boards of elections. [R-120-2].

In the interest of resolving this litigation, the Secretary issued Directive 2008-101 to the county boards of elections on October 24, 2008. That Directive set forth Ohio law governing the handling and counting of provisional ballots. But as discussed in more detail below, the entire

¹ Contemporaneously with this Brief, the Secretary is filing a Memorandum of Law to address the 2006 fee award and respond to Plaintiffs' Supplemental Brief [R-176, filed January 20, 2009].

² An earlier Motion for Leave to File [R-110] was voluntarily withdrawn by the plaintiffs. [R-118]. The Court formally granted leave to file on November 5, 2008. [R-153].

10-page Directive contained only *one item* that was new, and not simply a restatement of existing law. The same day, Judge Sargus issued an Order in which he “adopt[ed] and annex[ed]” Directive 2008-101 as an Order of the Court. [R. 142].

The October 24, 2008 Order expressly reserved two issues for later consideration: the effect of poll-worker error and the validity of addresses for persons without permanent residences. [*Id.*]. The Court then followed up with a second Order, dated October 27, 2008, which resolved those two issues. [R-143]. Once again, the Court’s Order merely restated pre-existing Ohio law. The first conclusion set forth in the Order, a statement of Ohio law governing poll worker error, was later adjudged to be an incorrect statement of Ohio law by the Ohio Supreme Court. *State ex rel. Skaggs v. Brunner*, Case No. 2008-2206, 2008 Ohio LEXIS 3470 (Ohio Dec. 5, 2008).

As mandated by the Court’s October 27, 2008 Order, the Secretary issued Directive 2008-103 on October 28, 2008.

As noted, the Second Motion for Attorneys’ Fees seeks an award of fees “reasonably related to the procurement and enforcement of the October 24 and 27, 2008 Court Orders.” [R-179, p.1]. This motion should be rejected because Plaintiffs are not “prevailing parties.” They obtained none of the relief sought in the Amended Complaint, and failed to secure a court order which in any way “changed the legal relationship” between themselves and the Secretary or conferred any benefit upon them. Alternatively, if Plaintiffs are found to be a prevailing party, they should be denied attorneys’ fees because they merely acquired a nominal victory.

In addition, Plaintiffs’ counsel asks the Court to award fees and costs incurred (1) trying to settle the claims; (2) opposing the Secretary’s motion to dismiss for lack of standing; and (3) protecting the two Orders in the *Skaggs* litigation. These requests should be denied for a host of

reasons, which all boil down to the same thing: Plaintiffs did not prevail. But there are other reasons to deny the request, such as the fact that there is no authority under §1988 for this Court to order the Secretary pay NEOCH's attorneys' fees for defending against claims brought by a third party (and especially not where that third-party prevailed).

Finally, should the Court decide an award of *some* fees is appropriate, the Secretary respectfully requests an evidentiary hearing concerning the reasonableness and appropriateness of the requested fees. Section II(C) briefly sets forth some of the more questionable items in the bills submitted by Plaintiffs' counsel.

III. LEGAL ARGUMENT

42 U.S.C. §1988 permits the district court, in its discretion, to award reasonable attorneys' fees to parties who have prevailed in litigation brought under §1983. The Courts have specifically delineated between the "prevailing party" analysis and that of determining "reasonable fees" by employing a two step analysis: "first, whether the moving party is a 'prevailing part'; and second, whether the moving party's victory was sufficient to justify a fee award of a particular amount." *D.L.S., Inc. v. City of Chatanooga*, Case No. 97-6029, 1998 U.S. App. LEXIS 11647, *9 (6th Cir. May 28, 1998) (citing *Farrar v. Hobby*, 506 U.S. 103 (1992) ("although the 'technical' nature of nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988")). By no stretch of the imagination, however, should this Court find that Plaintiffs established that they were a prevailing party. Nevertheless, in the event this Court finds Plaintiffs were a prevailing party, this Court should still deny, or at least limit, attorneys' fees because it was merely a nominal victory.

A. Plaintiffs Are Not Entitled To Attorneys Fees Because They Are Not A Prevailing Party.

Although a plaintiff need not to prevail on *all* claims asserted in the complaint to be awarded attorneys' fees, *Berger v. City of Mayfield Heights*, 265 F.3d 399, 406 (6th Cir. 2001), Plaintiffs still failed to qualify as a "prevailing party." Plaintiffs may be considered "prevailing parties" if they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir. 2005) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). In other words, "[t]he plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). A voluntary change in conduct due to the filing of the suit itself is not sufficient to confer prevailing party status. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600-10 (2001) (rejecting the "catalyst theory" as a basis for prevailing party status); *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 29-30 (1st Cir. 2002). Rather, the benefit achieved must be a "judicially sanctioned change in the legal relationship between the parties." *Buckhannon*, 532 U.S. at 605. Finally, the modification of the defendant's behavior must in some way directly benefit the plaintiff. *Women's Med. Profl Corp. v. Baird*, 438 F.3d 595, 615 (6th Cir. 2006) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)).

Applying this analytical framework, the Court should deny the motion for attorneys' fees, for three reasons. First, the Plaintiffs did not succeed on any significant issue or achieve any of the benefits for which they filed suit. Second, while it is true that the Court issued two Orders, those Orders merely restated existing law (and the prior position of the Secretary), which means (with one extremely minute exception), they resulted in no change in the legal relationship between the parties. And thirdly, the Orders did not in any way directly benefit the Plaintiffs.

1. Plaintiffs achieved none of the relief sought in the amended complaint.

Before considering what relief, if any, plaintiffs *did* obtain, it is important to indicate what relief plaintiffs *failed* to win. The Court did not declare the Voter ID law unconstitutional or enjoin its enforcement in the November, 2008 election. Clearly, Plaintiffs cannot claim to have prevailed on Counts Fourteen, Fifteen, or Sixteen of the Supplemental Complaint or on the first two (of three) prayers for relief.

Nor did the Plaintiffs achieve the relief sought in their complaint regarding provisional ballots. The Court made no finding that the provisional ballot laws, as applied, violated the Fourteenth Amendment's Due Process Clause (Count Twelve of Supplemental Complaint) or Equal Protection Clause (Count Thirteen of Supplemental Complaint). As a result, Plaintiffs did not obtain any of the three forms of relief requested in their Prayer for Relief: the Court issued no declaratory judgment, mandated no standards and procedures, and established no system for monitoring compliance. All of which begs the question, what if anything did Plaintiffs achieve through their Amended Complaint?

2. Directive 2008-101 and the October 24, 2008 Order did not change the legal relationship between the parties.

The resolution of the Amended Complaint involved the issuance of four documents, none of which "changed the legal relationship between the parties." On the contrary, these documents merely restated the language of the Ohio Revised Code; in other words, they reaffirmed the *pre-existing* legal relationship between the parties, without imposing any changes.

The key document is Directive 2008-101, issued by the Secretary on October 24, 2008. A close reading of that Directive shows that its provisions simply tracked the provisions of the Revised Code, albeit in a more "reader-friendly" format. For example, Section II, the timeframe

for processing provisional ballots, restated R.C. 3505.183(E).³ Of most importance, section VI of the Directive described a 5-step process for counting or invalidating provisional ballots, and as the Directive noted, that 5-part procedure was created not by the Secretary, but by R.C. 3505.183.

Even within Section VI, the specific details mirror the language of the Revised Code. Section VI(A)(2)(a) describes four circumstances under which a provisional voter must provide additional information to the board of elections within 10 days of the election, and not surprisingly, those four categories directly track the Code: the individual who has no ID but does have a social security number is dealt with in R.C. 3505.181(A)(3); R.C. 3505.181(A)(7) deals with challenged voters; and the final two categories, relating to provisional voters who refuse to sign an affirmation or provide information, are discussed in R.C. 3505.181(A)(12) and (13).

Not to belabor the point, but the same can be said for every substantive provision of Directive 2008-101 concerning the counting of provisional ballots. So when the Court issued its Order on October 24, 2008 “adopt[ing] and annex[ing]” Directive 2008-101, the Order effected no change in the legal relationship between the parties.

As this Court recognized in its previous First Attorney Fees Order (concerning the 2006 election proceedings), a plaintiff has not “prevailed on the merits” when it secures a consent order that merely incorporates pre-existing law. [Order, R-108, p. 19]. This conclusion is consistent with the holding and logic of *Buckhannon*, in which the Supreme Court held that the plaintiff was not the prevailing party because the end result was achieved not through the litigation, but by the West Virginia legislature independently deciding to change the statute. 532 U.S. 598; See also *Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008).

³ The reference to R.C. 3501.183(E)(2) in Section II of the Directive appears to be a typographic error.

One additional point must be made about the First Attorney Fees Order, and how it differs from the Second Fee Request. In opposing the first fee award, the Secretary argued that the Plaintiffs had not prevailed because the 2006 Consent Order just incorporated pre-existing law, specifically Directive 2006-78. This Court disagreed, and ruled that the Plaintiffs *had* secured something they did not have before. Before the Consent Order, the Secretary was free to amend or rescind Directive 2006-78 at will, but once it became an Order of the Court, the Secretary was required to maintain and abide by its terms. The situation in 2008 is different: since, as shown above, Directive 2008-101 repeated the Revised Code without alteration or interpretation, the Secretary did not have the same freedom to rescind Directive 2008-101, or, to be more accurate, rescinding the Directive would have been a meaningless gesture since its terms would have remained the law of the state. Codification of the Directive into a Court Order gave Plaintiffs no greater rights or protections than they already enjoyed under existing statute, and thus, unlike the situation in 2006, they cannot be adjudged prevailing parties.⁴

3. **The inclusion of a notice provision in Directive 2008-101 does not make Plaintiffs “prevailing parties”.**

Now for the caveat: Directive 2008-101 did contain one minor term which is not present in the Revised Code. Plaintiffs’ singular victory was the inclusion of Paragraph VI(A)(2)(b), which mandates notice to particular voters from the Board of Elections that they need to submit additional information. This inclusion of this “Notice” provision, however, does not make Plaintiffs “prevailing parties,” and therefore lays no foundation for an award of attorneys’ fees, because (based on their own allegations) Plaintiffs and their members are not among the category of voters who would receive such notice.

⁴ Actually, the same argument applies to Directive 2006-78; it too merely restated the procedures the boards were required by the Revised Code to follow. For a more detailed discussion, see Defendant’s Motion to Reconsider the First Award of Attorney Fees, filed this day.

If one assumes, for purposes of argument, that the “notice provision” changes the legal relationship between the parties (a dubious assumption, as discussed below), Plaintiffs are not prevailing parties because they derive no personal benefit from the new notice obligation. The “telephone notification” provision, by its terms, applies to four categories of provisional voters (who by law have ten days to provide supplemental information). The four categories in question are individuals who:

- (1) have social security numbers but are unable to provide the last four digits;
- (2) are challenged on grounds set forth in R.C. 3505.20 (age, residency, citizenship, etc.);
- (3) do not have social security numbers; or
- (4) refuse to provide the last four digits of their social security numbers.

[Directive 2008-101, p. 4]. Simply stated, Plaintiffs have not even alleged that they fit any of these categories.

To the contrary, Plaintiffs’ entire case was premised on the (erroneous) contention that persons would be barred from voting *even though* they have Social Security numbers, because they lack photo identification. For example, Plaintiff Kyle Wangler alleged that he is a citizen and has a social security number, but may be barred from voting for lack of identification documents. [Amended Complaint, R-120, ¶¶ 9, 13-15]. Plaintiff James Wise made the same allegations. [*Id.*, ¶¶ 18, 22-24]. And NEOCH identified by name seventeen members whose ability to vote in the 2008 election was allegedly threatened by their lack of a state ID or birth certificate. [*Id.*, ¶¶ 108-109]. All seventeen individuals previously submitted declarations to this Court attesting that they have Social Security numbers. [R-111-9]. There has never been an allegation that any Plaintiff or NEOCH member is unable or unwilling to provide the last four digits of his or her social security number. Since none of the Plaintiffs fit any of the four

categories, they are not among the persons who would receive “telephone notice.” Having received no direct benefit, they cannot be “prevailing parties.”

Post-*Buckhannon*, there are three requirements to be a prevailing party, all of which must be satisfied:

A plaintiff must: (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant’s behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement.

Dearmore v. City of Garland, 519 F.3d 517, 521 (5th Cir. 2008). Unless the relief **directly benefits** the plaintiff at the time the relief is granted, he or she is not a “prevailing party.” *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992). In *Rhodes v. Stewart*, 488 U.S. 1 (1988), two inmates filed suit claiming their First and Fourteenth Amendment rights were violated by prison officials, who denied them access to magazine subscriptions. The district court ruled in favor of the inmates, but by the time the decision issued, one of the inmates had died and the other had been released. According to the Supreme Court, the inmates were ineligible for attorneys’ fees because they had won no relief.

[Declaratory judgment] will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff. In this case, there was no such result. The lawsuit was not brought as a class action, but by two plaintiffs. A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order. This case is thus controlled by our holding in *Hewitt [v. Helms]*, 482 U.S. 755 (1987)], where the fact that the respondent had “long since been released from prison” and “could not get redress” from any changes in prison policy caused by his lawsuit compelled the conclusion that he was ineligible for an award of fees.

Id. at 4. The fact that the rulings in *Rhodes* and *Hewitt* might have benefited third parties, i.e., other inmates, was of no moment. *Id.* at 398; See also *Pedigo v. P.A.M. Transp.*, 98 F.3d 396

(8th Cir. 1996) (plaintiff was not prevailing party, even though district court issued declaratory judgment that his employer violated the Americans with Disabilities Act, because plaintiff was no longer employed, and therefore received no material benefit from the judgment).

Based on their own allegation – that they all have social security numbers to present to the Board of Elections – Plaintiffs and their members would be ineligible for notification. In addition, as a practical matter, these homeless plaintiffs derive no real benefit from a system of telephone or mail notification when, according to their own declarations, they do not have telephones or permanent addresses, anyway.

Finally, not only has this litigation failed to benefit Plaintiffs, but this litigation by no means altered the Secretary of State's behavior toward the Plaintiffs. Rather, this litigation merely reasserted the rules that were to be followed by local boards of election. Plaintiffs have erroneously focused on what they perceive to be evidence that the local boards of elections misapplied existing law in 2006. This is indicated in Plaintiffs' Motion for Attorneys' Fees, which identifies seven examples of inconsistent standards for counting provisional ballots. [R-179, pp. 5-6]. Even if the local boards did get the law wrong, it would not alter the fact that there were consistent rules and procedures in place. The October Orders and Directives did not change that law in any way; at best the Plaintiffs may have succeeded in changing the conduct of the *local boards*, but not of the Secretary. And to the extent notice created an additional right, this was a duty directed toward the boards of elections, not upon the Secretary of State. In other words, nothing in the 2008 litigation changed the Secretary's behavior as required by *Women's Med. Prof'l Corp.* in order for this to be considered a prevailing party.

4. **The October 27, 2008 Order and Directive 2008-103 Did Not Change The Legal Relationship Between The Parties.**

The October 24, 2008 Order reserved two issues for later consideration: (1) the effect of poll-worker error; and (2) the validity of addresses for persons without permanent residence. [R-142]. On October 27, 2008, the Court followed up with a second Order, addressing those two issues. [R-143]. And in compliance with that Order, the Secretary issued Directive 2008-103 the next day. Plaintiffs seek attorneys' fees for their work in connection with securing the second Order, but once again, a careful study of the Order reveals that Plaintiffs are not "prevailing parties."

The first issue concerned what to do with a provisional ballot that was mishandled by a poll worker, and specifically a ballot that lacked a poll worker signature. Relying solely on state law, this Court decreed that such ballots should be counted. "[P]rovisional ballots may not be rejected for reasons that are attributable to poll worker error, including a poll worker's failure to sign a provisional ballot envelope or failure to comply with any duty mandated by R.C. 3505.181." [R-143, p. 2]. However, that Order was *never fully implemented*.

The reason it was never implemented is that the Ohio Supreme Court rejected this interpretation of R.C. §§3505.181 and 3505.183, and directed that such ballots should not be counted. *State ex rel. Skaggs*, 2008 Ohio LEXIS 3470. The October 27, 2008 Order relied exclusively on an interpretation of state law, not federal law, which necessarily means it became null and void when the Ohio Supreme Court issued a definitive, contrary interpretation of state election law. A plaintiff is not a prevailing party based on achieving preliminary relief that is later reversed by a judgment on the merits. *Sole v. Wyner*, 127 S. Ct. 2188, 2196 (2007). And it is well-established that if a preliminary order is subsequently vacated or overruled, the plaintiff has not prevailed. *Statewide Reapportionment Advisory Comm. v. Beasley*, 99 F.3d 134 (4th Cir. 1996); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 103 F.3d 720 (8th Cir. 1997).

Plaintiffs may argue that they prevailed in part because the county boards of elections applied their interpretation of the law during the period between the election (November 4) and the date the Supreme Court decided *Skaggs* (December 5). At best, however, Plaintiffs would be acknowledging they had a hand in leading county boards in Ohio to apply inconsistent standards to provisional ballots, the very opposite of the result they purported to be seeking. In any case, it would be curious to reward Plaintiffs for convincing this Court to adopt an erroneous construction of state law.⁵

With respect to the remaining portion of the October 27, 2008 Order pertaining to persons lacking permanent addresses, the Court did nothing more than state the rule set forth in R.C. 3503.02(I) and Advisory 2008-25. Once again, since the Court merely recognized a rule that was already codified in state law, Plaintiffs cannot contend they secured an order “changing the legal relationship between the parties.”

B. In The Alternative, Even If Plaintiffs Are A Prevailing Party They Are Not Entitled To Attorneys’ Fees Because It Would Be Unreasonable.

Even if the Plaintiffs are found to be a “prevailing party” in this case, the fees should be denied, or at least drastically limited because the Court may, in its discretion, limit or deny fees when a plaintiff merely acquired a nominal or *de minimis* victory. In fact, the Sixth Circuit has found it quite clear that “merely recovering nominal damages or other minimal relief is not sufficient to justify an award of even nominal attorney’s fees.” *D.L.S.*, 1998 U.S. App. LEXIS 11647, *10 (citing *Farrar*, 506 U.S. at 115 (“in some circumstances even a plaintiff who formally ‘prevails’ under § 1988 should receive not attorney’s fees at all”)). “Having considered

⁵ Also curious is Plaintiffs’ contention that they should be awarded attorneys’ fees for briefing the *Skaggs* case in the Ohio Supreme Court. The Secretary did not file the *Skaggs* case, nor did Plaintiffs file *Skaggs* as an effort to enforce or protect any judgment, so it is unclear why the Secretary would be liable for fees associated with that case. Moreover, the position advocated by Plaintiffs was rejected in *Skaggs*, so how can they be prevailing parties?

the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness.” *Farrar*, 506 U.S. at 114. This is because “the degree of the plaintiff’s overall success goes to the reasonableness’ of a fee award.” *Farrar*, 506 U.S. at 114 (quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983)).

Although Plaintiffs point to the lodestar rule to support their request for attorneys’ fees, attorneys cannot rely on the lodestar rule to increase recovery where the scope of relief was significantly less than the lodestar rule might suggest. *D.L.S.*, 1998 U.S. App. LEXIS 11647, *14 (“while the lodestar amount may serve as an upper limit on attorneys’ fee awards in certain circumstances, it is not necessarily supposed to serve as a floor below which fee awards are presumptively invalid”). The lodestar rule was designed to cap attorneys from acquiring windfall benefits greater than the time and capital they actually expended, not as a guarantee for recuperating the entire amount of attorneys’ fees as long as they are reasonable. *D.L.S.*, 1998 U.S. App. LEXIS 11647, *14. In the *D.L.S.* case, although the plaintiff was a prevailing party, “the appropriate fee was significantly below the lodestar amount urged by plaintiffs.” *D.L.S.*, 1998 U.S. App. LEXIS 11647, *16.

As previously mentioned in Section II(A)(3) , at best Plaintiffs have achieved a nominal victory. With one minor addition of a notice provision, the Court Orders that address the new claims presented in Plaintiffs’ 2008 Supplemental Complaint merely restate verbatim the law contained in Title 35 of the Ohio Revised Code. Therefore, even if this Court were to find that such a minimal victory qualifies Plaintiffs as a “prevailing party” the Court must then reach the second step of the analysis, only to find that Plaintiffs’ victory was not sufficient to justify any fee, let alone \$296,115.12. Plaintiffs achieved an extremely minimal (if any) degree of success with the issuance of Secretary of State Directives 2008-101 and 2008-103, which were adopted

by this Court. It is this minimal degree of success that is the most critical factor that this Court should consider in determining whether to award any fees to Plaintiffs. In light of this *de minimis* degree of success, this Court should deny Plaintiffs' request for fees with respect to the 2008 Supplemental Complaint.

C. If Plaintiffs Are Entitled To Attorneys' Fees Defendant's Should Be Afforded An Evidentiary Hearing.

Should the Court conclude the Plaintiffs are "prevailing parties" and elect to award attorney fees, the Secretary respectfully asks for a hearing to address the reasonableness of the bills submitted. Among the questionable items included in the bills are:

(1) A request for reimbursement for hotels and food, when NEOCH is represented by a firm with over 200 attorneys in Columbus;

(2) A request for reimbursement for time spent negotiating a settlement of issues on which Plaintiffs did not prevail;

(3) A request for reimbursement for time spent at the "show cause" hearing ordered by the Court *sua sponte* against one of the Plaintiffs' own lawyers; and

(4) A request for reimbursement for time spent taking depositions that were ultimately meaningless to the outcome of the case.

IV. CONCLUSION

For the foregoing reasons, this Court should deny the Plaintiffs' Second Motion for Attorneys' Fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on this 27th day of February, 2009. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Richard N. Coglianesse
RICHARD N. COGLIANESE