

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

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

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

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**I. INTRODUCTION**

The Consent Decree entered in this case was “final and binding” to the claims set forth in Plaintiffs’ Complaint. Simply put: the Consent Decree ended this litigation. In Plaintiffs’ Third Motion for Attorneys’ Fees and Costs (“Third Motion”), Plaintiffs request that the Court ignore the finality of the Consent Decree’s language, re-open this case, and award them additional attorneys’ fees for litigating whether they were originally entitled to fees. Plaintiffs have waived any opportunity to seek additional fees. Not only does the plain language of the Consent Decree foreclose the possibility of re-litigating claims raised in Plaintiffs’ Complaint, but Plaintiffs’ request is contrary to the policies underlying 42 U.S.C. §1988 and would ultimately disserve civil rights plaintiffs. Plaintiffs’ Third Motion should be denied in its entirety.

**II. STATEMENT OF FACTS AND THE CASE**

On July 30, 2009, this Court awarded Plaintiffs fees and costs totaling \$504,414 resulting from Plaintiffs’ First and Second Motions for Attorneys’ Fees and Costs. Doc. 205. As the Ohio Secretary of State and Intervenor State of Ohio (“State Defendants”) argued in their previous two

motions in opposition to Plaintiffs' interim fee requests (Docs. 99 and 192), and the State Defendants' motion to reconsider the Court's decision awarding fees (Doc. 191), State Defendants do not believe that Plaintiffs were legally entitled to the interim fee award. Consequently, the State Defendants appealed the Court's Order granting fees to the Sixth Circuit. Doc. 207.

During the pendency of the appeal, the parties began negotiations to globally settle this litigation, which eventually resulted in the Consent Decree entered by this Court. *See* Ex. 1, Affidavit of Brian Shinn ("Shinn Aff.") ¶ 3; Ex. 2, Affidavit of Susan Ashbrook ("Ashbrook Aff.") ¶ 3; Ex. 3, Affidavit of Richard Coglianesi ("Coglianesi Aff.") ¶ 4. With the assistance of the Sixth Circuit mediation office, State Defendants agreed to drop their Sixth Circuit appeal and to pay a fixed amount of attorneys' fees in exchange for a final resolution of this four year litigation. Ashbrook Aff. ¶ 7.

The plain language of the Consent Decree reflects the parties' intent to globally settle this litigation. The Preamble states that the parties entered into negotiations "desiring that this action be settled . . . without the burden of protracted litigation." Consent Decree, Doc. 210 at 2. Further, the Consent Decree is "final and binding" as to the "issues raised in the Plaintiffs' Complaint and Supplemental Complaint," which includes Plaintiffs request for attorneys' fees. *Id.*; Doc. 2, Prayer for Relief; Doc. 120, Prayer for Relief. Finally, the substantive terms of the Consent Decree are set forth with the following introduction: "*In resolution of this action*, the parties hereby AGREE to, and the Court expressly APPROVES, ENTERS and ORDERS, the following . . ." Doc. 210 at 2 (emphasis added). One of the terms *expressly* negotiated in the final Consent Decree is the amount of attorneys' fees that State Defendants must pay, set forth in Section V. *Id.* at 6.

Over six weeks after this Court signed and entered the final and comprehensive Consent Decree, Plaintiffs filed their Third Motion, attempting to re-open this case, re-litigate whether they are deserving of attorneys' fees, and circumvent the document that they initially drafted. To be clear: State Defendants entered into settlement negotiations to finalize this litigation; State Defendants were never willing to concede the legal validity of any of Plaintiffs' claims. Shinn Aff. ¶ 5; Ashbrook Aff. ¶ 8. Because State Defendants interpret the Consent Decree as requiring them to do no more than what Ohio election law already requires or allows, State Defendants viewed the issue of attorneys' fees as the single most significant liability in this case. Shinn Aff. ¶ 6; Ashbrook Aff. ¶ 9. Accordingly, inclusion of a final and certain amount of attorneys' fees was a material term of the complete settlement, and State Defendants would not have agreed to settle this case if the parties had intended to leave the issue of *additional* attorneys' fees open or unsettled. Shinn Aff. ¶¶ 7-8; Ashbrook Aff. ¶¶ 10-11. Plaintiffs' Third Motion for attorneys' fees was a "total shock" to State Defendants. Shinn Aff. ¶ 9; Ashbrook Aff. ¶ 12. To the extent that Plaintiffs' counsel harbored an intention to seek additional fees – after the parties endured six months of negotiations and mediation, after the State Defendants agreed to withdraw their Sixth Circuit appeal, and after the Consent Decree had been entered – this intention was concealed from the State Defendants. Shinn Aff. ¶ 10; Coglianese Aff. ¶ 9; Ashbrook Aff. ¶ 13.

For the following reasons, Plaintiffs' Third Motion should be denied outright. First, Plaintiffs waived the opportunity to request additional fees because the Consent Decree resolved all claims brought in Plaintiffs' Complaint. If this Court could somehow interpret the Consent Decree as awarding Plaintiffs additional fees beyond those already distributed, State Defendants will move to vacate the Consent Decree as there was obviously no meeting of the minds between the parties on the meaning of the settlement. Second, and in the alternative, even if the Court

determines that Plaintiffs have not waived a request for additional fees, the Court should nonetheless deny Plaintiffs' Third Motion because unusual circumstances exist here that would render any award unjust; Plaintiffs' Third Motion requests "fees for fees" beyond the Sixth Circuit's "three percent rule"; and Plaintiffs' Third Motion requests fees that are excessive, redundant, and unnecessary.

### **III. LEGAL ARGUMENT**

#### **A. Plaintiffs Waived Any Claim For Additional Attorneys' Fees.**

The U.S. Supreme Court has long-recognized that parties in civil rights actions may waive statutory attorneys' fees awards in a settlement or consent decree. *Evans v. Jeff*, 475 U.S. 717, 732 (1986) (fee awards are simply one negotiation tool in the "arsenal of remedies available to combat violations of civil rights"). In the Sixth Circuit, the test to determine whether a plaintiff has waived a claim for attorneys' fees under § 1988 through the operation of a consent decree or settlement agreement is "whether the parties intended the settlement to be a final disposition of all claims." *Jennings v. Metropolitan Gov. of Nashville*, 715 F.2d 1111, 1114 (6th Cir. 1983). The recent case of *McCuiston v. Hoffa*, No. 04-2057, 2006 U.S. App. LEXIS 25608 (6th Cir. Oct. 12, 2006), best illustrates the Sixth Circuit's rule.

In *McCuiston*, the parties agreed to a stipulated consent judgment, which provided: "This is a final order of the court, disposing of all remaining claims in this action." *Id.* at \*3. The issue of attorneys' fees was neither discussed in settlement conference nor mentioned in the final stipulated consent judgment; in fact, plaintiffs' attorney had "intentionally refrained" from mentioning the issue. *Id.* (internal quotations omitted). Two weeks after the parties stipulated to the entry, the plaintiffs sought fees totaling nearly \$160,000.<sup>1</sup> The district court denied the fee

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<sup>1</sup> *McCuiston* did not involve § 1988; however, the Sixth Circuit nonetheless analyzed the case as a § 1988 statutory fee-shifting issue. *McCuiston*, 2006 U.S. App. LEXIS 25608, \*9-13.

request, holding that the “comprehensive language in the stipulated consent judgment demonstrates that the parties intended to reach a settlement in full.” *Id.* at \*18-19.

The Sixth Circuit affirmed, explaining that the “question is simply whether the parties intended their settlement, however formalized, to leave the claim for attorneys fees unresolved or to constitute settlement in full.” *Id.* at \*13. The appellate court recognized that the attorneys’ fee issue was not mentioned during settlement negotiations. Nonetheless, “[w]hile this meant that no separate agreement was reached on the claim for attorney fees, it did not prevent the parties from agreeing to a settlement in full.” *Id.* at \*19. Because the language of the stipulated consent judgment disposed of “all remaining claims,” a “comprehensive settlement was reached” and attorney fees were denied. *Id.* at \*20.

*Jennings* and *McCuiston* control here. The Consent Decree is clear and unambiguous and leads to only one conclusion: the parties intended the agreement to constitute a settlement in full of all the claims raised in Plaintiffs’ complaint. For the following reasons, Plaintiffs have waived any additional request for attorneys’ fees.

**First**, the plain language Consent Decree demonstrates the parties’ intent to resolve all claims relating to Plaintiffs’ Complaint and to reach a comprehensive settlement. The parties entered the agreement “desiring that this action be settled . . . without the burden of protracted litigation.” Doc. 210, at 2. The Consent Decree is “final and binding . . . as to the issues raised in the Plaintiff’s Complaint and Supplemental Complaint,” and the parties agreed to its terms in “resolution of this action.” *Id.* Most important, unlike *McCuiston*, where the consent judgment was silent as to attorneys’ fees, the Consent Decree **expressly** awards Plaintiffs’ attorneys’ fees as part of the “final and binding” entry. *Id.* at 2, 6. Under the standard set in *McCuiston* and *Jennings*, the language of the Consent Decree demonstrates that Plaintiffs’ waived any claim for

additional attorneys' fees. *See also In re: Leonard Lybarger*, 793 F.2d 136, 138 (6th Cir. 1986) (holding that language such as "the parties, being desirous of settling these matters without further litigation" expresses a "clear intent to end all litigation" and a waiver of the plaintiff's right to appeal any decision regarding attorney's fees).<sup>2</sup>

*Second*, Ohio's principles of contract interpretation dictate the conclusion that the Consent Decree forecloses any request for additional fees. *See McCuiston*, 2006 U.S. App. LEXIS at \*8 (consent decrees must be interpreted as contractual agreements). Under Ohio law, "the primary and paramount objective" in construing any written instrument is to ascertain and give effect to the intent of the parties. *S.R.L. v. PCC Airfoils, L.L.C.*, 371 F. Supp. 2d 933, 939 (N.D. Ohio 2005) (citations omitted). However, "[t]he Court presumes that the parties' intent resides in the words utilized in the agreement." *Id.* Here, the Consent Decree is "final and binding" on all claims raised in the Complaint, and nothing in the Consent Decree leaves open the possibility of additional claims for attorneys' fees.<sup>3</sup> Thus, the language of the Consent Decree demonstrates the parties' objective to resolve this litigation.

Similarly, the principle *expressio unius est exclusio alterius* means that the expression in a contract of one or more things of a class implies the exclusion of all others not expressed. *State ex rel. Paluf v. Feneli*, 69 Ohio St. 3d 138, 143 (Ohio 1994). Accordingly, the express inclusion of an attorneys' fees award in the Consent Decree implies the exclusion of any other fee award. Finally, a contract must be construed against the party who drafted it or selected its language. *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 764 (6th Cir. 2008). Here, it is undisputed that

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<sup>2</sup> State Defendants' response here is limited to the fees requested in Plaintiffs' Third Motion – all of which were incurred before entry of the Consent Decree. State Defendants acknowledge that Plaintiffs may have a future claim for attorneys' fees if they are successful on a future cause of action that one of the State Defendants has somehow violated the Consent Decree.

<sup>3</sup> Plaintiffs do not appear to deny that the Consent Decree resolved all claims in this litigation; their Third Motion requests fees relating to the negotiation of the Consent Decree, which they admit "*terminat[ed] this litigation.*" Doc. 212 at 1 (emphasis added).

Plaintiffs initially crafted the first version of the Consent Decree. *Coglianesse Aff.* ¶ 7. The Court, therefore, should construe the Consent Decree against Plaintiffs' apparent interpretation that it somehow leaves the issue of attorneys' fees open for a later date.

**Third**, Plaintiffs have no legal support for the position that the language of the Consent Decree somehow leaves open the possibility of additional fees. Almost every court that has analyzed settlement agreements with similar language has held that if the settlement resolves all claims in the complaint, the party waives any request for future fees. *See e.g., Fulford v. Forest Hills Eagle Supermarket*, No. 86-3407, 1987 U.S. App. LEXIS 9516, at \*1-2 (6th Cir. 1987) (plaintiffs not entitled to attorneys' fees where settlement agreement, which settled "all claims . . . of whatever kind," was "complete and plenary"); *Y.B. v. Williamson Cty. Bd. of Educ.*, No. 3:08-0999, 2009 U.S. Dist. LEXIS 108701, at \*17-18 (M.D. Tenn. Nov. 20, 2009) (settlement agreement language stating that it would be the "full and final agreement of all issues raised in the due process complaint in this matter" would raise "significant challenges" to the plaintiff in recovering attorneys' fees); *Aburime v. Northwest Airlines, Inc.*, No. 97-4383MN, 1998 U.S. App. LEXIS 38744, at \*2 (8th Cir. July 7, 1998) (denying fees incurred during litigation of fee petition because consent decree set forth when fees were to be awarded and if the parties intended to award "fees for fees," "they would have stated so"); *Young v. Powell*, 729 F.2d 563, 566 (8th Cir. 1984) ("Attorney's fees were prayed for in the original complaint and were one of the issues involved in this case. As such they were clearly within the scope of the settlement agreement of the parties.").

**Fourth**, Plaintiffs' counsel's secret intent to request additional fees cannot alter the language of the Consent Decree. Plaintiffs' counsel may argue they always intended to request fees incurred in negotiating the settlement and/or they are entitled to fees because the Consent

Decree does not explicitly extinguish a claim for fees incurred in litigating their previous fee requests. Parties cannot harbor a secret intent to request fees while simultaneously attempting to fully settle a case. This specious argument has already been rejected by several courts, including the Sixth Circuit. In *McCuiston*, the defendants had asked plaintiffs' counsel if the settlement would be "it" – meaning the end of litigation – and defense counsel were led to believe that it would. 2006 U.S. App. LEXIS 25608, at \*8. The Sixth Circuit subsequently held that the plaintiffs' "purposeful silence" on the attorneys' fees issue during settlement negotiations cannot demonstrate that the consent judgment did not resolve all claims. *Id.* at \*20.

The Fifth Circuit succinctly made this point in a similar suit, and the relevant portion of the opinion deserves to be quoted in full:

Evidence was presented that, by all outward appearances, the settlement negotiations were intended to resolve all claims and release the defendants from all liability relating to the subject matter of the suit. To the extent that plaintiffs' counsel harbored a secret intent to seek attorney's fees – after the parties had agreed on a settlement amount, after the case had been removed from the docket, and after the district court had entered a dismissal order – that intent was concealed from defendants. On this record, the district court could conclude that plaintiffs' counsel knew that his request for attorney's fees in an amount nearly twice the amount of the settlement was totally unanticipated by defendants, and came as a complete shock to them. The district court acted properly in denying the fee request. Holding otherwise would run counter to three important goals encouraged by our judicial system: voluntary settlements of disputes, the enforcement of agreements according to the objective intent of the parties, and an end to litigation.

*Bell v. Schexnayder*, 36 F.3d 447, 450 (5th Cir. 1994).

The District Court of New Jersey has also rejected this argument:

I do not think the Third Circuit would approve a rule of law that would enable a plaintiff to mislead a defendant, even innocently, during the course of settlement negotiations into a justifiable belief that all counsel fees were encompassed within the agreement and thereafter rely on the absence of an expressed waiver in the written agreement to support an application for such fees

*Conrad v. Bergen Comm. College*, No. 95-553, 1996 U.S. Dist. LEXIS 22383, at \*16-17 (D. N.J. Dec. 12, 1996). *See also Lawson v. Sumter Cty. Sheriff's Office*, 528 S.E. 2d 86, 90 (S.C. 2000) (“We agree with the trial Judge that the order putting into effect the Settlement Agreement between the parties completely disposed of the issue of attorney’s fees and, had [plaintiff] intended to seek additional attorney’s fees under § 1988, she should have disclosed this intention at the hearing on the petition to approve the settlement.”).

*Fifth*, Plaintiffs’ interpretation of the Consent Decree is absurd, which further demonstrates that the parties could not have intended the Consent Decree to award additional fees. Under Plaintiffs’ interpretation, State Defendants are required to pay the fees already awarded (\$504,413), pay an uncertain amount of “additional” fees, and give up their Sixth Circuit appeal of the original award – all on a case in which State Defendants strongly believed that Plaintiffs’ claims lacked legal merit. It simply defies logic that State Defendants would strongly oppose any fee award in this case and appeal the Court’s order awarding fees to the Sixth Circuit, but then shortly thereafter withdraw that appeal and agree to be liable for an unknown – but certainly substantial – amount of additional attorneys’ fees. *See, e.g., Reed v. Wehrmann*, 159 F. Supp. 2d 700, 706 (S.D. Ohio 2001) (in a contract case, finding no agreement between the parties where it “defies logic” for a defendant to reject an offer to pay an excessive amount of attorneys fees – \$8,000 – but then agree to subsequent settlement offer for an unknown but certainly much more substantial amount of attorneys’ fees).

The Consent Decree is “final and binding” as to all claims raised in the Plaintiffs’ Complaint and explicitly awards Plaintiffs attorneys’ fees for this litigation. The language of the Consent Decree permits only one conclusion: Plaintiffs waived any opportunity to request additional fees.

**B. If the Court Grants Additional Attorneys' Fees, State Defendants Reserve the Right to Move to Vacate the Consent Decree.**

If the Court determines that the Consent Decree allows additional attorneys' fees – beyond those already awarded – State Defendants reserve the right to file a motion to vacate the Consent Decree under Rule of Civil Procedure 60(B).

Under Ohio law, to constitute a valid contract, there must be a “meeting of the minds” of the parties with respect to the essential terms of the contract. *See, e.g. Zelina v. Hillyer*, 846 N.E.2d 68, 70 (Ohio Ct. App. 2005). Any intervening decision by this Court awarding more fees would not only sweep away the legal and factual premise of the Consent Decree but would also interpret the Consent Decree in a way that demonstrates that there was no meeting of the minds about the settlement or there was a mutual mistake in forming the agreement. As explained above, State Defendants considered the Consent Decree's award of a final and total amount of attorneys' fees as a material term of the settlement. *Shinn Aff.* ¶ 7; *Ashbrook Aff.* ¶ 10. If the Consent Decree is interpreted as allowing additional fees, then State Defendants never assented to a material and essential term of the agreement, and there was no subjective or objective meeting of the minds.

State Defendants will also move to vacate the Consent Decree because this Court did not have jurisdiction to enter the Decree. The Sixth Circuit has already held in this case that the allegations in Plaintiffs' Complaint fall short of asserting that any of Plaintiffs' members have suffered an actual injury traceable to enforcement of Ohio voter ID laws. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1010 (6th Cir. 2006). As Judge McKeague noted in his concurring opinion – which remains true to today – Plaintiffs cannot identify a single member of any of Plaintiffs' organizations that was affected by any alleged deficiency in Ohio's voter ID law. *Id.* at 1012 (J. McKeague, concurring). “The mere possibility

of garden variety irregularities does not portend the sort of fundamental unfairness resulting in significant disenfranchisement that would warrant judicial intervention.” *Id.* at 1013. If Plaintiffs are permitted to ignore the finality of the Consent Decree and request additional attorneys’ fees, then certainly State Defendants should be able to renew their first defense in this case: Plaintiffs lack standing to bring this case.

Accordingly, if Plaintiffs are awarded additional fees, State Defendants reserve the right to file a motion to vacate the Consent Decree under Rule 60(B)(1), (3), (4), (5) or (6).

**C. Any Award Of Attorneys’ Fees Would Be Unjust And Counter to 42 U.S.C. § 1988.**

If the Court determines that Plaintiffs did not waive their opportunity to request additional attorneys’ fees, the Court should nonetheless deny Plaintiffs’ Third Motion because it is unjust and contrary to the purposes of § 1988. Section 1988 authorizes the award of attorneys’ fees “in the discretion” of the court. The Supreme Court has long held that “this discretion will support a denial of fees in cases which a post judgment motion unfairly surprises or prejudices the affected party.” *White v. New Hampshire*, 455 U.S. 445, 454 (1982). Thus, even a prevailing party may not be entitled to attorney fees if “special circumstances would render such an award unjust.” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

For all the reasons explained above, the Court should find that “special circumstances” exist here and deny Plaintiffs’ Third Motion for fees as unjust. Plaintiffs and their counsel clearly concealed their intent to request additional fees throughout the sixth month negotiation period. While the State Defendants were attempting in good faith to finally resolve this four-year lawsuit, Plaintiffs’ counsel were purposely keeping their intent to request additional fees secret from opposing counsel – all the while adding up additional hours and appropriating to

themselves additional income. Such conduct does not deserve compensation from the State of Ohio and its taxpayers.

More importantly, allowing additional fees here beyond those already agreed to in the Consent Decree would be contrary to the purposes of § 1988. If Plaintiffs succeed, it effectively becomes impossible for defendants – especially state or public defendants – to devise a complete settlement of all claims in a civil rights case. Even if a settlement agreement is “final and binding” and *expressly* awards attorneys’ fees – as in this case – liability for additional fees still remains open, regardless of the terminology used in the settlement agreement. Such as result “would certainly deter the compromise of claims.” *Fulford*, 1987 U.S. App. LEXIS at \*5. Accordingly, defendants in civil rights cases will refuse to settle, which would force more cases to trial, unnecessarily burden the judicial system, and, ultimately, disserve civil rights litigants. *Evans*, 475 U.S. at 736-37. A fee-shifting statute should not be interpreted to encourage the conduct of Plaintiffs’ counsel in this case, or to deter the potential settlement of civil rights cases. Plaintiffs’ Third Motion should be denied as unjust and against public policy.

**D. The Requested Fees In The Petition Are Excessive and Unreasonable.**

In the alternative, if the Court determines that Plaintiffs did not waive their opportunity to request additional attorneys’ fees, the Court may also deny Plaintiffs’ Third Motion in its entirety – or drastically reduce any award – because the fees requested in the Third Motion are unreasonable. Specifically, the Third Motion violates the Sixth Circuit’s “three percent rule” when requesting “fees for fees” and requests fees that are excessive, redundant, and unnecessary for the work involved.

The calculation of reasonable attorneys’ fees involves a two step process. First, the trial court must calculate the fee applicant’s “lodestar,” which is “the *proven* number of hours *reasonably* expended on the case by an attorney, multiplied by his court-ascertained reasonably

hourly rate.” *Adcock-Ladd v. Secretary of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000) (emphasis added). Second, the court may adjust the lodestar figure to reflect relevant considerations peculiar to the subject litigation, including the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The party seeking fees bears the burden of proving that the number of hours expended was reasonable. *Granzeier v. Middleton*, 173 F.3d 568, 577 (6th Cir. 1999). When considering improper fee requests, courts often apply an across-the-board fee reduction (25%, 50% or more), rather than wade through the time records line by line. In this case, however, due to the number of overlapping offenses, a simple percentage reduction would be inadequate. Plaintiffs’ Third Motion should be denied outright.

**1. Plaintiffs have not calculated their potential award under the Sixth Circuit’s “three percent rule.”**

Plaintiffs’ Third Motion is essentially a “fees for fees” request, which is capped at three percent of the compensable hours in the main case. As the Sixth Circuit has long held, the intent behind attorney fee statutes is to “encourage lawyers to bring successful civil rights cases, not successful attorney fee cases.” *Coulter v. Tennessee*, 805 F.2d 146, 151 (6th Cir. 1986). Accordingly, the Sixth Circuit has held that “the hours allowed for preparing and litigating the attorney fee case should not exceed 3% of the hours in the main case when the issue is submitted on the papers without a trial.” *Id.* This limitation is “necessary to insure that the compensation from the attorney fee case will not be out of proportion to the main case and encourage protracted litigation.” *Id.*; see also *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 621 (6th Cir. 2007) (applying “three percent rule”); *Auto Alliance Int’l, Inc. v. United States Customs Serv.*, No. 05a0929n.06, 2005 U.S. App. LEXIS 26092, at \*8 (6th Cir. Nov. 23, 2005) (capping plaintiffs recovery of “fees for fees” under the three percent rule); *Bank One, N.A. v. Echo*

*Acceptance Corp.*, No. 04-CV-318, 2009 U.S. Dist. LEXIS 35633, at \*5 (S.D. Ohio Apr. 10, 2009) (J. Marbley) (acknowledging “rule” that “any supplemental award should be limited to three percent of the award for the main case”); *Disabled Patriots of America, Inc. v. Reserve Hotel, Ltd.*, 659 F. Supp. 2d 877, 891 (N.D. Ohio 2010) (J. O’Malley) (“[T]he Sixth Circuit follows the ‘three percent rule’ in determining whether the requested hours associated with litigating the amount of attorney’s fees are reasonable.”).

Plaintiffs apparently believe they are entitled to “fees for fees” because of the “experience, reputation and abilities” of their counsel. Third Motion at 9, Doc. 212. Plaintiffs’ counsel Subodh Chandra repeatedly refers to his “heavy civil-rights related and constitutional law practice” in his Declaration. Subodh Decl. at ¶¶ 5, 5, 6, 6, 7, Doc. 215-1.<sup>4</sup> Notwithstanding this proclaimed expertise, however, Plaintiffs’ counsel has not explained how they are exempt from application of the three percent rule. Regardless, their Third Motion is a “fees for fees” motion and must be capped at 3%.

Plaintiffs’ Third Motion covers fees and costs in three areas: (1) “work related to the briefing and argument of Plaintiffs’ prior motions for fees and costs”; (2) “opposition to and settlement of the State of Ohio’s appeal of this Court’s award of fees”; and (3) “negotiation of the Consent Decree that terminated this litigation.” Third Motion at 11, Doc. 212. The first two areas are clearly related to their fee petitions. The third area is also directly related to the attorneys’ fee issue in this case because the Consent Decree involved the settlement of the ultimate attorneys’ fees award. Moreover, the Consent Decree was negotiated through the Sixth Circuit mediation office, and State Defendants’ appeal of this Court’s interim fee award was the *only* reason that the Sixth Circuit mediation office was involved in this case. That is, but for the

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<sup>4</sup> There are two paragraphs labeled “5” and two paragraphs labeled “6” in Mr. Chandra’s Declaration; all four paragraphs mention his “civil rights” experience.

State Defendants' appeal of the original fee award, the Sixth Circuit mediation office would not have been utilized by the parties. Accordingly, because the Consent Decree was also the settlement and negotiation of the attorneys' fees issue, all of the hours allegedly expended by Plaintiffs' counsel in this Third Motion relate to their fee requests.

Therefore, under Sixth Circuit precedent, if the Court grants any fees, the maximum allowable amount is \$14,232.56 (3% of the Court's previous lodestar award of \$474,418.50. *See* Doc. 25. Anything more would be completely out of proportion to the main case and, as the Sixth Circuit predicted, "discourage early settlement of cases by rewarding protracted litigation of both the civil rights case and the attorney fee case." *Coulter*, 805 F.2d at 151.<sup>5</sup>

**2. Plaintiffs' fee request should be denied as unreasonable.**

Plaintiffs' fee requests should also be denied – or drastically reduced – because they have submitted bills that are completely unreasonable for the work required.

*First*, Plaintiffs' counsel "overlawyered" the issues involved in the Third Motion. The law is clear that plaintiffs' counsel must make a good faith effort to exclude hours that are "excessive, redundant, or otherwise unnecessary" from a fee application, just as an attorney in private practice uses "billing judgment" to trim the fat from a bill before submitting it to a client. *Disabled Patriots*, 659 F. Supp. 2d at 884-85 (J. O'Malley) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). While Plaintiffs claim that "there was no unreasonable duplication, as each lawyer often performed different tasks.," a review of their billing records demonstrates that Plaintiffs failed to exercise any billing judgment. Third Motion at 8, Doc. 212.

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<sup>5</sup>Even if the Court decides that some of Plaintiffs requested fees negotiating the Consent Decree are not technically "fees for fees," the Court should still reduce those hours by an across the board percentage to reflect the fact that the Consent Decree's negotiation included settlement of the ultimate attorneys' fee award and withdrawal of State Defendants' appeal of the interim fee award.

Plaintiffs' Third Motion does not explain why the relatively straightforward preparation and litigation of Plaintiffs' motions for attorneys' fees required the participation of *three* separate litigation firms. For nearly every task listed in Plaintiffs' Third Motion, all three law firms appear to perform the same work. Every issue required that the three law firms "communicate," "conference" or "follow up" with co-counsel. A reduction for redundant hours is warranted if the attorneys are unreasonably doing the same work. *American Civil Liberties Union of GA v. Barnes*, 168 F.3d 423, 432 (11th Cir. 1999). "An award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation." *Id.* Nothing in Plaintiffs' Third Motion meets this burden. The Declarations from Ms. Gentry, Mr. Hollenbaugh, and Mr. Chandra offer no insight into whether they each represent different clients with separate interests or whether the contribution made by one of the law firms (*e.g.*, Porter Wright) was distinct from what Carlile Patchen & Murphy or The Chandra Law Firm was capable of doing or was in fact already doing.

**Second**, the relevant issues were not complex enough to warrant three law firms. In addition to redundancy, courts will reduce excessive fee requests depending on the novelty or difficulty of the legal issues and the skill required to perform the legal services properly. Plaintiffs assert that multiple representation was warranted here because of the "complex" and "expedited" nature of the case. Third Motion at 9, Doc. 212. However, most of the legal issues involved in their Third Motion were for attorneys' fees under § 1988. If Plaintiffs' counsel are experienced litigators in civil rights cases as they claim (*see, e.g.* Chandra Decl. at ¶¶ 5, 5, 6, 6, 7, Doc. 215-1), then they should not be required to "triple-lawyer" a relatively straightforward § 1988 attorneys' fees issue. The "complex" issues of this litigation – *i.e.*, whether Ohio's provisional ballot and voter ID laws are unconstitutional – were not at issue for a majority of the

fees submitted in Plaintiffs' Third Motion. Accordingly, the hours submitted in Plaintiffs' Third Motion were not reasonably expended as the issues were not difficult questions requiring the work of three separate law firms.

**Third**, Plaintiffs' fee applications have been inflated by the addition of non-compensable tasks that did not contribute in any meaningful way to the litigation. For example, Mr. Chandra and Mr. Hollenbaugh both billed for their efforts to "locate" or "track down" their client. Doc. 215-1 at 6; Doc. 214 at 4. Mr. Chandra even billed for time "work[ing] with investigator," apparently to locate his client, and he is charging \$742.50 for the amount he paid a private investigator to locate his client. Doc. 215-1 at 6, 20. Also, Mr. Hollenbaugh charged 1.5 hours for "review revised Complaint, Motion for Summary Judgment and replies; review motion and Amended Complaint" on March 11, 2010 – even though no motions of summary judgment were filed in this case and the Consent Decree was in final draft form at that time. Doc. 214 at 3. None of these hours should be reimbursable in any way.

**Fourth**, the Plaintiffs did not obtain the "excellent" results as they allege in their Third Motion. Third Motion at 9, Doc. 212. The degree of any plaintiff's success is a critical factor in determining the amount of reasonable attorneys' fees. *Farrar v. Hobby*, 506 U.S. 103 (1992). Obtaining minimal relief is not sufficient to justify an award of even nominal attorneys' fees. *D.L.S., Inc. v. Chatanooga*, No 97-6028, 1998 U.S. App. LEXIS 11647, at \*10 (6th Cir. May 28, 1998). In reviewing a fee application, district courts must "base the fee award in principal part on the degree to which the moving party obtained the relief sought." *Id.* at \*11.

Plaintiffs claim they 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 the elections in Ohio while the Consent Decree is in effect." Third

Motion at 8, Doc. 212. In reality, other than the award of attorneys' fees, Plaintiffs received a nominal – at best – “victory” with entry of the Consent Decree. A cursory comparison of Plaintiffs' sixteen count Complaint (Docs. 2 and 120) with the Consent Decree demonstrates that the settlement did not award them the relief sought in their Complaint. No law was permanently enjoined or held unconstitutional for any of the reasons alleged in their Complaint. The “General Injunctive Relief” section of the Consent Decree simply restates Ohio law in Ohio Rev. Code sections 3505.18, 3505.181, and 3505.182. The “Implementation” section of the Consent Decree requires the Secretary of State to issue certain directives reminding boards of election to comply with the injunctive relief awarded in the Consent Decree. One could hardly argue that reminding boards of election to follow the law is anything more than a nominal or symbolic victory. Similarly, the Consent Decree incorporates Directive 2008-80, which clarifies certain provisional ballot laws (*e.g.*, it provides a definition of “current”). But again, such clarification cannot be said to equal any of the relief that Plaintiffs originally sought in this case.

Similarly, the Consent Decree does not give Plaintiffs any rights they did already possess. Because the Consent Decree merely parrots the existing requirements of state law, Plaintiffs were already able to seek judicial review of any questionable provisional ballot handling (assuming they met Article III standing requirements). In light of the minimal degree of success, the Court should reduce Plaintiffs' fee requests to reflect the *de minimis* victory – if any – achieved in this case.

***Fifth***, Plaintiffs have improperly sought reimbursement for costs. The costs and expenses awarded to a prevailing party must be reasonable. *Disabled Patriots*, 659 F Supp. 2d at 886. Mr. Chandra's proposed costs are improper for two reasons. First, he has requested double compensation by seeking reimbursement for both the time he spent traveling (at his full hourly

rate, which is \$400 an hour) and his mileage. Chandra Decl. at 4, 10, Doc. 215-1 (billing 15.5 hours for traveling to Cincinnati for Sixth Circuit mediation and also submitting mileage costs for the same trip). Such double compensation is improper. *Keener v. Department of Army*, 136 F.R.D. 140, 149 (M.D. Tenn. 1991). Second, without any explanation, Mr. Chandra has submitted reimbursement for his client NEOCH's employee travel expenses. Chandra Decl. at 10-11, 19, 22-27; Doc. 215-1.

*Sixth*, Plaintiffs counsels' requested hourly rates are unreasonable for the legal issues involved here. Mr. Chandra has requested reimbursement for a rate of \$400 an hour, and Mr. Hollenbaugh has requested reimbursement for \$325 an hour, while Ms. Gentry has requested reimbursement for \$290 an hour. Mr. Chandra's and Mr. Hollenbaugh's fees should be reduced appropriately to reflect the fact that the legal matters involved in the Third Motion – especially the first two attorneys' fees motions – were not complex and did not require the involvement of three litigation firms.

#### **IV. CONCLUSION**

As this brief has demonstrated, the Consent Decree entered in this case was “final and binding” and “resol[ved]” all the issues brought in Plaintiffs' Complaint. Plaintiffs cannot resurrect this case by requesting additional fees. Plaintiffs had that opportunity, but waived it when they agreed to resolve all of their claims in the final and comprehensive Consent Decree. For all of the foregoing reasons, Plaintiffs' Third Motion should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed electronically on this 9th day of August, 2010. 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/ Erick D. Gale*

ERICK D. GALE

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