

**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 and SERVICE	:	
EMPLOYEES INTERNATIONAL UNION,	:	Judge Algenon L. Marbley
LOCAL 1199,	:	
	:	Magistrate Judge Terence P. Kemp
Plaintiffs,	:	
	:	
vs.	:	<b>PLAINTIFFS' MEMORANDUM IN</b>
	:	<b>OPPOSITION TO DEFENDANTS'</b>
JENNIFER BRUNNER, in her official	:	<b>MOTION TO DISMISS (DOC NO. 99) AND</b>
capacity as Secretary of State of Ohio,	:	<b>REPLY MEMORANDUM IN SUPPORT OF</b>
	:	<b>THEIR MOTION FOR ATTORNEYS'</b>
Defendant.	:	<b><u>FEES AND COSTS (DOC. NO. 96)</u></b>
	:	
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THE NORTHEAST OHIO COALITION	:	
FOR THE HOMELESS and SERVICE	:	
EMPLOYEES INTERNATIONAL UNION,	:	
LOCAL 1199,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
THE STATE OF OHIO,	:	
	:	
Intervenor-Defendant.	:	

**I. PRELIMINARY STATEMENT**

On January 4, 2008, Plaintiffs The Northeast Ohio Coalition For The Homeless (“NEOCH”) and Service Employees International Union, Local 1199 (“SEIU”) (collectively, “Plaintiffs”) moved this Court under 42 U.S.C. § 1988 and 28 U.S.C. §§ 1821 and 1920 for an award of attorneys’ fees and costs expended for the procurement and enforcement of the November 1, 2006 Consent Order and the November 15, 2006 Agreed Enforcement Order in this matter. (See Doc. No. 96.) In response, on February 27, 2008, Defendant Ohio Secretary of

State Jennifer Brunner and Intervenor-Defendant the State of Ohio (collectively, “Defendants”) both opposed Plaintiffs’ motion and moved to dismiss this case in its entirety for lack of subject matter jurisdiction on the ground that the Plaintiffs allegedly lack standing. (See Doc. No. 99.)

For the reasons stated below, and based on the evidence discussed below and attached to this brief, Plaintiffs do have standing to litigate the issues before this Court. Furthermore, Plaintiffs are entitled to attorneys’ fees and costs expended for the procurement and enforcement of the November 1, 2006 Consent Order and the November 15, 2006 Agreed Enforcement Order in this matter. Accordingly, this Court should deny Defendants’ Motion to Dismiss, grant Plaintiffs’ Motion for Attorneys’ Fees, and set a hearing date to determine the appropriate amount of those fees and costs.

## **II. LAW AND ARGUMENT**

### **A. Defendants’ Motion To Dismiss Should Be Denied.**

Defendants have moved to dismiss this case for lack of subject matter jurisdiction on the ground that Plaintiffs do not have standing to pursue their claims. Defendants argue that Plaintiffs have not shown an injury in fact, that the Sixth Circuit found a weak showing of standing, and that nothing has changed in this case since the Sixth Circuit’s review that would confer standing on Plaintiffs. (Defendants’ Motion at 2-6). These arguments are not well-taken. As explained below, Plaintiffs do have standing and this Court should deny Defendants’ Motion.

#### *1. The Sixth Circuit’s review of this case was based on only a partial record.*

Throughout this litigation, Defendants have made much of the Sixth Circuit’s statements regarding standing in its October 31, 2006 decision. It is very significant, however, that when the Sixth Circuit reviewed this Court’s October 26, 2006 grant of a temporary restraining order (“TRO”) enjoining the enforcement of certain provisions of Ohio’s election laws, it did so on a

partial record consisting of nothing more than the Plaintiffs’ unverified complaint, motion for TRO, and TRO hearing transcript. Because of the expedited nature of the TRO hearing, Plaintiffs had not yet fully developed the record at the time of the hearing and appeal to the Sixth Circuit. Viewed in context, it is clear that the Sixth Circuit’s statements, quoted here, were preliminary and based in large part on the limited evidentiary record before it:

The record on the standing issue consists only of the unverified complaint. In the complaint plaintiff Northeast Ohio Coalition for the Homeless avers that it is a non-profit charitable organization providing services to the homeless. It says that it has helped homeless people register to vote and obtain birth certificates. Plaintiff Service Employees International Union, Local 1199, alleges that it is a labor union that engages in voter registration and other election activities on behalf of its members. ***These allegations fall far short of asserting that any of plaintiffs’ members have suffered or will imminently suffer a concrete, actual injury traceable to enforcement of the voter identification requirements. In fact, the complaint contains no reference at all to injury to the plaintiffs’ members.... The scanty information about the plaintiff organizations in the complaint*** also raises substantial questions about whether the interests at stake here are germane to the organizations’ purposes, which clearly are not primarily related to election or voters’ right issues. The weakness of plaintiffs’ showing of standing leads us to conclude that their likelihood of success on the merits is not strong.

*NEOCH v. Blackwell*, 467 F.3d 999, 1010 (6<sup>th</sup> Cir. 2006) (emphasis added). The concurring opinion expressly acknowledged that Plaintiffs “may yet be able to further develop the record in the district court hearing on the motion for preliminary injunction set for Wednesday, November 1, 2006.” *Id.* at 1013 (McKeague, J., concurring).

As shown below, there is ample evidence that Plaintiff NEOCH has standing,<sup>1</sup> including evidence that was submitted in support of Plaintiffs’ Motion for Preliminary Injunction—a

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<sup>1</sup> For purposes of this brief only, Plaintiffs will limit their arguments regarding standing to Plaintiff NEOCH. Because Plaintiff NEOCH has standing in this matter, it is not necessary to also consider whether Plaintiff SEIU also has standing. *Sch. Dist. of Pontiac v. Sec’y of the United States Dep’t of Educ.*, 512 F.3d 252, 259 (6<sup>th</sup> Cir. 2008) (“Since at least one Plaintiff in this action has standing, there is no need to consider whether the education association Plaintiffs also have standing.”). Therefore, Plaintiffs’ discussion of standing is limited to evidence pertaining to Plaintiff NEOCH.

motion that was never ruled upon because the Defendants entered into a Consent Order on the day of the preliminary injunction hearing.<sup>2</sup> Therefore, Defendants' Motion should be denied.

2. *The legal standard for organizational standing.*

Defendants argue, wrongly, that Plaintiff NEOCH must establish “third party standing” to bring this action. (Defendants' Motion at 5). Instead, it is well-settled that an organization has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Svcs., Inc.*, 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L. Ed. 2d 383 (1977).

For Plaintiff NEOCH's members to have standing to sue in their own right, they must show that they have “(1) suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury has to be fairly traceable to the challenged action of the defendant, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *NEOCH v. Blackwell*, 467 F.3d 999, 1010 (6<sup>th</sup> Cir. 2006) (internal quotations and citation omitted). Here, Defendants challenge only the first prong of this test by arguing that Plaintiff NEOCH has not shown that its members have suffered an injury in fact.<sup>3</sup>

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<sup>2</sup> In fact, Plaintiffs were prepared to go forward with the November 1, 2006 preliminary injunction hearing at which time they would have put on evidence of standing and the merits of their claims—indeed, their witnesses waited all day to testify—but instead, the Defendants chose to enter into a Consent Order.

<sup>3</sup> Although the heading of Defendants' argument suggests that they also are challenging redressability, their brief does not argue that issue. To the extent that this element is being challenged, it is evident that an injunction of the challenged election laws would redress the various harms claimed in the Complaint.

In election cases, plaintiff organizations are not required to identify, in advance, which of their members will be harmed with respect to their ability to vote. For example, in *Sandusky Cty.*, the Sixth Circuit found that the Sandusky County Democratic Party had standing to assert the rights of their members who would vote in the November 2004 election without identifying which specific voters would be harmed. The court held that it was understandable that the Party had not identified which voters would seek to vote at a polling place that would be deemed wrong by election workers, or would have his or her name dropped from the rolls, because, by their nature, mistakes cannot be identified in advance. *See also Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (“The exact identity of the group of qualified voters who will cast provisional ballots from incorrect polling places, by definition, cannot be known.”); *Miller v. Blackwell*, 348 F. Supp. 2d 916, 920 (S.D. Ohio 2004).

Finally, the appropriate time for determining the existence of standing is the date that the complaint is filed. Therefore, Plaintiff NEOCH must establish that standing existed when this lawsuit was filed on October 24, 2006. *NAACP v. City of Parma*, 263 F.3d 513 (6<sup>th</sup> Cir. 2001).

3. *Plaintiff NEOCH has standing to litigate this matter.*

Plaintiff NEOCH has standing to bring this lawsuit on behalf of its members because its members have standing to bring suit in their own right, the interests at stake in this suit are germane to NEOCH’s purpose, and neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit.

In addition, Plaintiff NEOCH has standing to bring this lawsuit on its own behalf because the voter identification laws threatened to cause injury to its own organizational interests.

For both of these reasons, Plaintiff NEOCH has standing to litigate this matter and Defendants’ Motion should be denied.

*a. NEOCH's members have standing to sue*

The attached declarations—some of which were previously filed in this case—establish that NEOCH's members had standing to bring suit when this lawsuit was filed in October 2006. These members fall into two categories.

The first category consists of homeless members who did not have any of the forms of identification required by the voter-identification laws and whose ability to vote was adversely impacted as a result. Specifically:

- (1) In October 2006, Anthony Willis was homeless and was a member of NEOCH. He is a United States citizen and was registered to vote. If able to do so, he intended to vote in the November 2006 general election and the elections that follow. He did not have any of the forms of identification required by the voter identification laws. He does have a Social Security number.
- (2) In October 2006, James Caldwell was homeless and was a member of NEOCH. He is a United States citizen and was registered to vote. If able to do so, he intended to vote in the November 2006 general election and the elections that follow. He did not have any of the forms of identification required by the voter identification laws. He does have a Social Security number.
- (3) In October 2006, Edward Rinn was homeless and was a member of NEOCH. He is a United States citizen and was registered to vote. If able to do so, he intended to vote in the November 2006 general election and the elections that follow. He did not have any of the forms of identification required by the voter identification laws. He does have a Social Security number.
- (4) In October 2006, Micky Trammell was homeless and was a member of NEOCH. He is a United States citizen and was registered to vote. If able to do so, he intended to vote in the November 2006 general election and the elections that follow. He did not have any of the forms of identification required by the voter identification laws. He does have a Social Security number.

All four of these NEOCH members executed declarations in this matter on October 18, 2006.

Those declarations, which are attached as Exhibit A to this brief, were also attached to Plaintiffs' Motion for Preliminary Injunction which was filed on October 27, 2006.

It is beyond dispute that when this lawsuit was filed shortly before the November 2006 election, Messrs. Willis, Caldwell, Rinn and Trammell were “suffer[ing] an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *NEOCH*, 467 F.3d at 1010. These NEOCH members did not possess the required identification and, as described in detail in the Complaint, that fact prevented them from being able to cast regular or provisional ballots on Election Day. Moreover, even if they would have been permitted to cast provisional ballots, the vagaries of the provisional ballot laws created a real possibility of unequal and nonuniform application of the laws. Unfortunately, that possibility became a reality, according to an academic study of the treatment of provisional ballots by Ohio Boards of Elections in the November 2006 election (excerpts attached as Exhibit B).<sup>4</sup> For these reasons, when this lawsuit was filed in October 2006, Messrs. Willis, Caldwell, Rinn and Trammell, along with other similarly-situated NEOCH members, were imminently suffering a concrete and particularized injury in fact, and therefore had standing to bring the claims in this lawsuit.

The second category of NEOCH members with standing consists of homeless members who did have at least one of the forms of identification required by the voter-identification laws, but whose voting rights were threatened by both the ongoing and imminent unequal application of the challenged laws by different county Boards of Elections, as described in the Complaint. Specifically:

(1) Margaret Burzas, who is homeless, has been a member of NEOCH since in or before October 2006. She is a United States citizen and is registered to vote. She voted in the November 2006 general election and intends to vote in the November 2008 election and the elections that follow. She does have at least one of the

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<sup>4</sup> Steven F. Huefner, Daniel P. Tokaji & Edward B. Foley, *From Registration to Recounts: The Election Ecosystems of Five Midwestern States*, pp. 32-33 & 49-53 (2007), at <http://moritzlaw.osu.edu/electionlaw/joyce/index.php> (excerpts attached as Exhibit B).

forms of identification required by the voter identification laws. She also has a Social Security number.

(2) Trina Morgan, who is homeless, has been a member of NEOCH since in or before October 2006. She is a United States citizen and is registered to vote. She voted in the November 2006 general election and intends to vote in the November 2008 election and the elections that follow. She does have at least one of the forms of identification required by the voter identification laws. She also has a Social Security number.

Attached as Exhibit C are declarations executed by these two NEOCH members.

When this lawsuit was filed shortly before the November 2006 election, Ms. Burzas and Ms. Morgan were also “suffer[ing] an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *NEOCH*, 467 F.3d at 1010. As described in the Plaintiffs’ Complaint, and as shown by the evidence filed in support of Plaintiffs’ Motion for TRO and Motion for Preliminary Injunction, there was abundant evidence that different Boards of Elections were treating similarly-situated absentee voters differently—and would inevitably treat similarly-situated Election Day voters differently—when interpreting and applying the challenged voter identification laws. In addition, if any of these NEOCH members would have been required to cast provisional ballots, they faced the very real possibility of an unequal and nonuniform application of those laws. *See* Exhibit B. Accordingly, when this lawsuit was filed in October 2006, Ms. Burzas and Ms. Morgan, along with other similarly-situated NEOCH members, were imminently suffering a concrete and particularized injury in fact, and therefore had standing to bring the claims in this lawsuit.

*b. The interests at stake are germane to NEOCH’s purpose*

Brian Davis is the Executive Director of NEOCH. As described in his Declarations executed on October 18, 2006 (“2006 Davis Decl.”) (attached as Exhibit D and previously

attached to Plaintiffs' Motion for Preliminary Injunction) and April 3, 2008 ("2008 Davis Decl.") (attached as Exhibit E), the interests at stake in this lawsuit are germane to NEOCH's purpose.

NEOCH is a non-profit charitable organization operating in the City of Cleveland that provides services to approximately 25,000 homeless people each year. (2006 Davis Decl., ¶¶2, 6.) Approximately ten percent of NEOCH's members are homeless. (Id., ¶2.) The mission of NEOCH is to organize and empower homeless and at-risk men, women and children. (2008 Davis Decl., ¶3.)

Between twenty and thirty percent of the 25,000 homeless people whom NEOCH assists each year do not have any form of identification. (2008 Davis Decl., ¶7.) To obtain the identification required to vote, these people must first obtain a birth certificate, which is an expensive and time-consuming process. (Id., ¶8.) It is sometimes easier to travel to the place of one's birth to obtain a birth certificate, but that can be impossible for those who are homeless. (Id.) Moreover, once identification papers are obtained, it can be difficult for homeless people to maintain and keep track of those documents. (Id., ¶9.)

NEOCH provides advocacy services for homeless people, including homeless members, in the areas of housing, health care, economic justice and civil rights. (2008 Davis Decl., ¶4.) These services are described in NEOCH's Homeless Advocacy Initiatives for 2005-2010. (Id., attachment). One of NEOCH's stated Civil Rights Initiatives is to "[w]ork to assure that all homeless people are registered to vote, and reduce barriers to registering and homeless people actually voting. This includes assistance with obtaining identification in order to vote." (Id., ¶5.) NEOCH has helped hundreds of homeless people, including its homeless members, register to vote and obtain the identification necessary to register to vote. (Id., ¶6.)

The challenged voter identification laws harm NEOCH's members who do not possess the required identification. (Id., ¶13.) Those laws also harm NEOCH's ability to carry out its goal of working to "reduce barriers to ... homeless people actually voting." (Id., ¶14.)

For all of these reasons, the interests at stake in this lawsuit are germane to NEOCH's stated purposes.

*c. Individual participation of NEOCH's members is not required*

Neither the claims asserted in this lawsuit nor the relief requested requires the active participation of NEOCH's members. The Sixth Circuit has recognized that "[t]he individual participation of an organization's members is 'not normally necessary when an association seeks prospective or injunctive relief for its members.'" *Sandusky Cty.*, 387 F.3d at 574 (quoting *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546, 116 S.Ct. 1529, 134 L. Ed. 2d 758 (1996)). That principle applies here.

*d. NEOCH has standing to sue on its own behalf*

Plaintiff NEOCH also has standing to bring this lawsuit on its own behalf. As stated above, the challenged voter identification laws have harmed, and will continue to harm, NEOCH's ability to carry out its stated goal of working to "reduce barriers to homeless people actually voting." NEOCH's organizational interest is negatively affected by Defendants' enforcement of the challenged laws. NEOCH therefore has suffered and will imminently suffer a concrete and particularized injury-in-fact that is fairly traceable to the Defendants' actions and is likely to be redressed by the relief requested in this lawsuit.

For all of these reasons, Plaintiff NEOCH has standing to bring this lawsuit on behalf of itself and its members, and Defendants' Motion should be denied.

**B. Plaintiffs' Motion for Attorneys' Fees And Costs Is Factually And Legally Supported And Should Be Granted.**

In their Motion for Attorneys' Fees, Plaintiffs set forth the legal and factual basis for their claim by pointing out the specific ways in which the Consent Order enjoined the challenged laws (for absentee voters), clarified the laws where their interpretation was open to uncertainty, and required equal and uniform enforcement of the laws where such enforcement had been lacking. In their opposition brief, Defendants argue that (1) Plaintiffs' lack of standing precludes this Court from awarding them attorneys' fees, (2) Plaintiffs' TRO victory does not warrant an award of attorneys' fees, and (3) the Consent Order and Agreed Enforcement Order that form the basis for Plaintiffs' Motion did not materially alter the relationship between the parties so as to render Plaintiffs prevailing parties under 42 U.S.C. § 1988. None of these arguments is well-taken.

1. *Plaintiffs Are Entitled To An Award Of Fees And Costs Regardless Of The Determination On Standing.*

Defendants argue that because Plaintiffs lacked standing to bring this matter, the Consent Order was void *ab initio* and cannot form the basis of any award of fees. For the reasons stated above, this argument fails because Plaintiffs did have standing to file this action. But even if they did not, they would still be entitled to fees and costs for the work performed in connection with the Consent Order and Agreed Enforcement Order.

The Seventh Circuit considered this precise issue in *Balark v. City of Chicago*, 81 F.3d 658 (7<sup>th</sup> Cir. 1996). In that case, the plaintiffs obtained a consent order which later was vacated under Rule 60(b)(5) because the court subsequently "either applied a new legal standard ... [or] clarified an earlier misunderstanding of the applicable law." *Id.* at 664. The Seventh Circuit held that the plaintiffs were nevertheless entitled to fees for their work relating to the consent order because, among other reasons, that decree was "valid while it lasted." *Id.* at 663. The

court rejected the Defendant's argument that a subsequent modification or termination of a consent decree must result in the denial of fees:

Far from losing on all their claims, plaintiffs worked for and won a consent decree that remained in force for a decade. The City invites us to take an *ex post* view of all consent decrees (and injunctions, we suppose), and to deny attorney's fees whenever subsequent events cause a court to set the decree aside in whole or in part under Rule 60(b). Such a rule would seriously undermine Section 1988 in consent decree cases, however, and we decline to take such a step.

*Balark*, 81 F.3d at 665. This Court should follow the Seventh Circuit's decision in *Balark* and hold that regardless of its determination on standing, Plaintiffs are entitled to their fees and costs that relate to the Consent Order and Agreed Enforcement Order in this case.

2. *Plaintiffs Have Not Sought An Award Based Upon The TRO.*

Defendants' argument that this Court's grant of a TRO does not warrant an award of attorneys' fees is somewhat puzzling because Plaintiffs did not rely on the TRO as a basis for their Motion. Therefore, this argument is irrelevant and does not provide a rationale for denying Plaintiffs' Motion.

3. *Plaintiffs Are Prevailing Parties With Respect To The Consent Order and Agreed Enforcement Order And Are Entitled To Their Fees.*

Finally, Defendants argue that the Consent Order and Agreed Enforcement Order did not materially alter the relationship between the parties so as to render Plaintiffs prevailing parties under 42 U.S.C. § 1988. This is wrong. The Consent Order and Agreed Enforcement Order materially altered the relationship between the parties in at least two significant respects. First, it defined terms that the legislature, in drafting and passing the voter identification provisions, had neglected to define. Second, amid a complex and confusing statutory scheme, it provided to the

88 Boards of Elections clear guidance—where none had existed before—on the interpretation and application of the challenged election laws.

For example, in the absence of statutory definitions or any guidance from then-Secretary of State Blackwell, it was unclear (1) which of the two numbers that appear on an Ohio driver’s license qualify as appropriate identification, (2) how “current” a utility bill, bank statement, government check, paycheck or other government document had to be in order to qualify as valid identification, (3) and what constituted an “other government document” that qualified as valid identification. In the absence of such guidance, the various county Boards of Elections were applying different standards on these and other issues. The pertinent deposition testimony of various Board of Elections officials is summarized in the chart attached as Exhibit F.

Some Boards of Elections were also failing to apply the express terms of the law, for example, by requiring absentee voters to present one of the required forms of identification instead of accepting the last four digits of the voter’s Social Security number. (*See* Exhibit F.) This erroneous interpretation of the law became more prevalent when the Secretary of State issued Directive 2006-08 on October 26, 2006, which ***wrongfully required in-person absentee voters to provide one of the listed forms of identification instead of the last four digits of their Social Security numbers.*** (Doc. No. 15-2 and Exhibit F.) In the weeks before the November 2006 election, these circumstances were resulting in voter confusion and unequal treatment of similarly-situated voters across the State of Ohio.

The Consent Order alleviated this confusion and ensured the fair and equal application of the laws by (1) providing a uniform set of rules for Boards of Elections to apply, (2) suspending the application of the challenged laws to absentee voters, many of whom had already cast their ballots, (3) reversing a portion of Directive 2006-78 by requiring Boards of Election to accept the

last four digits of an in-person absentee voter’s Social Security number, and (4) requiring all Boards of Elections to enforce all provisions of the law as written given the evidence that some Boards of Elections were not in compliance with the law.

This outcome achieved a significant portion of the relief that Plaintiffs sought with respect to the November 2006 election, and Defendants cannot seriously contend otherwise. The Consent Order corrected erroneous interpretations of the voter identification laws—by Boards of Election and the Secretary of State—and laid out a uniform set of rules which had previously been lacking, thereby depriving Ohio voters of the equal protection of the laws. It also ensured that absentee voters would not be treated unequally by suspending the voter identification laws for their ballots, which erased the application of unequal and shifting standards to those voters. Plaintiffs “vindicated important rights,” namely, the right to vote, in the Consent Order and therefore prevailed in this matter. *Putnam v. Davies*, 960 F. Supp. 1268, 1273 (S.D. Ohio 1997).

Accordingly, Plaintiffs are prevailing parties with respect to the Consent Order and Agreed Enforcement Order. Because Defendants have not identified any special circumstances that would preclude an award of fees, Plaintiffs are entitled to an award of their fees and costs incurred in connection with procuring and enforcing these Orders. *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 272 (6<sup>th</sup> Cir. 1991) (“[I]n the absence of special circumstances a district court not merely ‘may’ but *must* award fees to the prevailing plaintiff”) (quoting *Independent Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754, 761, 109 S. Ct. 2732 (1989)).

**C. This Court Should Hold A Hearing On The Amount Of Fees.**

Defendants assert that the amount of fees requested is unreasonable and attach an affidavit from their proffered expert on the issue. Defendants offer little to no argument to which Plaintiffs can respond. Plaintiffs request that, if the Court finds that it should award Plaintiffs

their fees and costs, it set this issue for a hearing and permit Plaintiffs to identify their witnesses, including expert witnesses, in advance of such a hearing, and also submit briefs.

### III. CONCLUSION

For all of the foregoing reasons, Plaintiffs request that this Court deny Defendants' Motion to Dismiss and award Plaintiffs their attorneys' fees and costs incurred in procuring and enforcing the November 1, 2006 Consent Order and the November 15, 2006 Agreed Enforcement Order in this matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2008, 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.

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