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

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

In their memorandum in opposition ("MIO"), Defendants argue that they are shocked—shocked!—that Plaintiffs filed their Third Motion for Attorneys' Fees.

For their part, Plaintiffs are not only surprised at Defendants' claim of surprise, but are themselves shocked by Defendants' claim that by entering into the Consent Decree, Plaintiffs waived their ability to seek such fees. Twice before in this case, Plaintiffs have sought and been awarded attorneys' fees after they had obtained interim consent decrees. Although none of those consent decrees addressed the issue of attorneys' fees, Defendants never before argued (as they now do) that the issue was impliedly waived. Moreover, Defendants never disclosed their intention to argue waiver during the confidential negotiations leading up to the Consent Decree. In fact, the only point that the parties appear to agree upon is that the issue was never raised or discussed (or apparently germane) in the context of those particular discussions.

The threshold issue before the Court is a legal one, namely, when both parties are silent on the issue of attorneys' fees, does it amount to a waiver? The Sixth Circuit has declined to hold that silence creates a waiver and instead directs the Court to determine the parties' intent.

Jennings v. Metro. Govt. of Nashville, 715 F.2d 1111, 1114 (6th Cir. 1983); *McCuiston v. Hoffa*, Case No. 05-2057, 202 Fed. Appx. 858, 2006 WL 2930107 (6th Cir. Oct. 12, 2006).

The second issue before the Court is a factual one, namely, did the parties intend the Consent Decree "to be a final disposition of all claims"? *Jennings*, 715 F.2d at 1114. Contrary to Defendants' belated protest, the evidence shows that the parties did *not* have such an intent.

The third issue before the Court is a legal one, namely, if the Court cannot decide the question of what the parties intended, then did Plaintiffs waive their right to seek fees? Other courts have answered that question in the negative, and this Court should do the same.

Finally, Defendants raise a handful of issues relating to the reasonableness and calculation of Plaintiffs' claimed fees and costs. Those arguments will be briefly addressed below.

I. STATEMENT OF FACTS.

This Court is well-acquainted with the long history of this litigation, the relevant portions of which will only be briefly summarized here.

On November 1, 2006, shortly after Plaintiffs filed their Complaint, the parties negotiated and this Court entered a Consent Order (Doc. No. 51) that set forth uniform voter-identification procedures for Boards of Elections to follow in the upcoming election. Two weeks later, the parties negotiated and this Court entered an Agreed Enforcement Order (Doc. No. 57) that addressed poll-worker errors made during the election with respect to voter-identification rules.

Neither Order addressed the issue of attorneys' fees. Plaintiffs subsequently filed a motion for attorneys' fees related to these Orders (Doc. No. 96) and it was granted. At no time did Defendants argue that Plaintiffs had waived their right to seek such fees. Then, as now, Defendants offered hollow protests that the relief obtained merely restated existing Ohio law,

accomplished nothing, kept Plaintiffs from being considered a prevailing party, etc.—which this Court squarely rejected.

On October 24, 2008, the parties negotiated and this Court entered an agreed Order that adopted and annexed Secretary of State Directive 2008-101 (Doc. No. 142). That Directive, which was "issued as a means to settle ongoing litigation" in this case, set forth uniform provisional-ballot procedures for Boards of Elections to follow in the upcoming election. Three days later, the parties negotiated and this Court entered an agreed Order that prohibited Boards of Elections from rejecting provisional ballots because of poll-worker error or because the voter did not have a permanent address. (Doc. No. 143.)

Again, neither Order addressed the issue of attorneys' fees. Plaintiffs subsequently filed a second motion for attorneys' fees related to these Orders (Doc. No. 179) and it was granted. Again, at no time did Defendants argue that Plaintiffs waived their right to seek such fees, although they did (as now) repeat their standard argument that Plaintiffs were not prevailing parties.

After this Court awarded Plaintiffs their attorneys' fees for work performed up through the time of the last agreed order (see Doc. No. 203), Defendants filed with the Sixth Circuit an interlocutory appeal of that particular fee order—not the underlying relief obtained. (In the meantime, of course, as Defendants surely would have understood by virtue of filing the appeal and every time they engaged Plaintiffs' counsel in discussion, fees and costs had continued to accumulate.) The parties then entered into settlement discussions under the auspices of the Sixth Circuit mediator, which are required to be kept confidential. 6th Cir. L.R. 33(c)(4). Those discussions led to the April 19, 2010 Consent Decree (Doc. No. 210).

Defendants now claim that they intended to include, and did include, a waiver in the Consent Decree of Plaintiffs' ability to seek their fees for work performed between January 21, 2009 and April 19, 2010. (Defendants acknowledge that Plaintiffs may have a future claim for fees for work performed after the entry of the Consent Decree—see MIO at 6 n.2). Defendants claim that this alleged waiver was a material term of the settlement and that they would not have agreed to the Consent Decree unless Plaintiffs had agreed to include such a waiver.

Statements made during the mediation process are required to be kept confidential, and Plaintiffs will not violate that rule here. At no time before Plaintiffs filed their Third Motion for Fees, however, did Defendants communicate their alleged intention to them. Specifically:

- At no time was there any discussion about Plaintiffs' entitlement to seek fees for work performed between January 21, 2009 and the date that the Consent Decree was entered. (Supplemental Declarations of Caroline Gentry ("Gentry Decl."), Subodh Chandra ("Chandra Decl.") and H. Ritchey Hollenbaugh ("Hollenbaugh Decl."), ¶ 12) (filed concurrently with this Reply).

- Plaintiffs' counsel were unaware that Defendants would later claim that the Secretary of State's office would not have agreed to settle this case if the parties had intended to leave the issue of additional attorneys' fees open or unsettled. (Gentry Decl. ¶ 14, Chandra Decl. ¶ 14, Hollenbaugh Decl., ¶ 13).

- Plaintiffs' counsel were unaware that Defendants would later claim that paragraph 12 of the Consent Decree was intended to constitute a "final and certain amount of attorneys' fees as a material term of the complete settlement." (Gentry Decl. ¶ 15, Chandra Decl. ¶ 15, Hollenbaugh Decl., ¶ 14). Instead, Plaintiffs' counsel believed that the intent of paragraph 12 was to require Defendants to pay the attorneys' fees that were previously awarded by the Court by a fixed deadline. (Gentry Decl. ¶ 16, Chandra Decl. ¶ 16, Hollenbaugh Decl., ¶ 15). The amount agreed to be paid is consistent with what the Court previously awarded and it would have been illogical for anyone to assume that Plaintiffs were "gifting" the additional work.

- Plaintiffs' counsel were unaware that Defendants would later claim that it was their position that they intended to include, as a material term of the settlement, any provision that would bar Plaintiffs from seeking fees for work performed from January 21, 2009 through April 19, 2010. (Gentry Decl. ¶ 17, Chandra Decl. ¶ 17, Hollenbaugh Decl., ¶ 16).

- Plaintiffs' counsel were unaware that Defendants would try to argue that the Consent Decree waived Plaintiffs' ability to seek attorneys' fees for work performed from January

21, 2009 to April 19, 2010. (Gentry Decl. ¶ 18, Chandra Decl. ¶ 18, Hollenbaugh Decl., ¶ 17).

In sum, Plaintiffs were completely unaware that Defendants would claim waiver. Plaintiffs did not either intend to agree to such a waiver (Gentry Decl. ¶ 19, Chandra Decl. ¶ 19, Hollenbaugh Decl., ¶ 18) or actually agree to a waiver—which is unsurprising, since it was never discussed or raised by Defendants.

Moreover, Plaintiffs would likely have rejected such a waiver if it had been proposed. Two of Plaintiffs' counsel, who were focused on the appeal's merits, considered Defendants' interlocutory appeal of this Court's order awarding them attorneys' fees to be both jurisdictionally defective[1] and substantively meritless. (Gentry Decl. ¶ 20, Chandra Decl. ¶ 20). They would not have recommended that their clients forfeit sixteen months worth of fees—thereby requiring their counsel to work for free, in derogation of the fee-shifting provisions and policy encouraging counsel to handle such matters that underlies 42 U.S.C. § 1988—merely to settle an appeal that counsel viewed as a frivolous delaying tactic. (*Id.*)

II. PLAINTIFFS DID NOT WAIVE THEIR ABILITY TO SEEK ATTORNEYS' FEES BY ENTERING INTO THE CONSENT DECREE.

In the Sixth Circuit, it is well-established that the parties' silence on the issue of fees does not create a waiver. Unlike some other Circuits, the Sixth Circuit neither requires the defendant to obtain an express waiver of fees, nor requires the plaintiff to expressly reserve its right to seek fees. *McCuiston v. Hoffa*, Case No. 05-2057, 202 Fed. Appx. 858, 2006 WL 2930107 (6th Cir.

[1] The Sixth Circuit has observed that "ordinarily orders awarding interim fees in the course of litigation are not appealable." *Webster v. Sowders*, 846 F.2d 1032, 1035 (6th Cir. 1988). Although there are limited exceptions to this general rule, those exceptions did not apply here. *E.g., Nat'l Ass'n of Criminal Defense Lawyers, Inc. v. United States DOJ*, 182 F.3d 981 (D.C. Cir. 1999) (dismissing interlocutory appeal of interim fee award for lack of jurisdiction and stating that "the irreparable harm necessary to bring a case within the 'tight collateral order doctrine' … must entail some prospect that the party [receiving the award] is or will become judgment proof."). As this Court knows, Defendants certainly adduced no evidence in the record that would make any such an exception apply. *See* Chandra Decl. at ¶ 20.

Oct. 12, 2006). Indeed, when the issue is "whether the parties intended the settlement to dispose of all claims, *the silence of the parties regarding attorneys' fees is not controlling*." *Jennings v. Metro. Govt. of Nashville*, 715 F.2d 1111, 1114 (6th Cir. 1983) (emphasis added).

The Sixth Circuit has further held that the issue of whether the parties intended to include a waiver in their settlement agreement is not even the proper question before the Court. Instead, the question that this Court must decide is "whether the parties intended the settlement to be a final disposition of all claims, rather than whether the parties intended to include attorneys' fees in the settlement." *Jennings*, 715 F.2d at 1114. Although "intent is an issue of fact," in some cases the record may permit only one inference to be drawn. *Id*. This is just such a case.

1. The fact that the Consent Decree does not terminate until 2013—and that Plaintiffs can seek fees for violations of the Decree—shows that the parties did not intend to fully dispose of all claims between them.

The primary flaw with Defendants' contention that the Consent Decree effectuated a full and final resolution of all claims between the parties (MIO at 5) is the obvious fact that it did *not* fully and finally resolve all of the claims between the parties. By its terms, the Consent Decree remains in effect until June 30, 2013. (Doc. No. 219, ¶ 9.) During that time, "[a]ny of the parties may file a motion with the Court to modify, extend or terminate this Decree for good cause shown." (*Id.*, ¶ 11.) Moreover, the parties' agreement that the Decree is "final and binding" is "subject to the continuing validity of this Decree if it or its terms are challenged in any other Court." (*Id.*, preamble). And finally, Defendants admit (as they must) that Plaintiffs *may assert a claim for future fees* if there is a violation of the Consent Decree. (MIO at 6 n.2.)

In light of these facts, the cases that Defendants cite for the proposition that "if the settlement resolves all claims in the complaint, the party waives any request for future fees" (MIO at 6 & 7) are wholly distinguishable. Three of Defendants' cited cases were employment-

discrimination cases[2] and one was brought under the Individuals with Disabilities Education Act.[3] All four cases fully resolved the plaintiffs' claims without a consent decree.[4] Indeed, the *Young* court expressly observed that "[t]he case before us *does not* involve a situation wherein a settlement was finalized by a consent decree …. Rather, the parties agreed (1) that the disputed issues had been resolved; and (2) that the case … would be dismissed upon the payment to the plaintiff of a specific sum of money." 729 F.3d at 566. No such resolution was reached here.

Defendants argue that the "final and binding" language in the preamble constitutes a full release of all claims between the parties. Their cited case does not support that proposition, however. In *McCuiston*, both the district court and the Sixth Circuit held that the following one-paragraph consent decree fully and finally resolved all claims between the parties:

> Upon stipulation of all parties, the Plaintiffs in this case, Donna McCuiston, Rick Miazga, and Ava Miller, shall have the right to observe the counting of ballots on any future referenda approving a contract in which Plaintiffs are eligible to vote. This is a final order of the court, disposing of all remaining claims in this action.

McCuiston v. Conder, 385 F. Supp. 2d 617 (E.D. Mich. 2005), *aff'd by McCuiston v. Hoffa*, 2006 WL 2930107 (6th Cir. Oct. 12, 2006). Unlike the Consent Decree in this case, the abbreviated

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[2] *Fulford v. Forest Hills Eagle Supermarket*, Case No. 86-3407, 1987 U.S. App. LEXIS 9516 (6th Cir. July 14, 1987) (terminated employee signed broad release in Title VII action); *In re Leonard Lybarger*, 793 F.2d 136 (6th Cir. June 18, 1986) (employee alleging age discrimination settled Title VII action); *Young v. Powell*, 729 F.2d 563 (8th Cir. 1984) (employee alleging racial discrimination settled Title VII action).

[3] *Y.B. v. Williamson Cty. Bd. of Educ.*, Case No. 3:08-0999, 2009 WL 4061311 (M.D. Tenn. Nov. 20, 2009) (stating in dicta that offers of settlement that were not accepted "would have presented significant challenges to the plaintiff in terms of recovering attorneys' fees" because of the inclusion of "full and final agreement") (citing *Tompkins v. Troy Sch. Dist.*, Case No. 05-2314, 199 Fed. Appx. 463, 2006 WL 2819849 (6th Cir. Oct. 2, 2006) (parents of disabled student accepted settlement offer that *expressly disclaimed* any liability for fees)).

[4] Although there was a consent decree in the fifth cited case of *Aburime v. Northwest Airlines, Inc.*, No. 97-4383, 1998 U.S. App. LEXIS 38755 (8th Cir. July 7, 1998), the court in that case denied fees because the decree "set[] out in painstaking detail the circumstances when fees are to be awarded." The Consent Decree has no such provisions.

McCuiston consent order did not remain in effect until a future date, did not allow the parties to seek to modify or extend its terms, and did not allow the plaintiffs to seek fees for monitoring and enforcing the order. In addition, the Sixth Circuit relied on the fact that the district court (which construed the consent decree) "participated in the settlement discussions and drafted the consent judgment"—a circumstance that is not present here. 2006 WL 2930107, at *6. Finally, there were no other circumstances "to suggest that anything less than a comprehensive settlement was reached" in *McCuiston*. *Id*. Here, by contrast, the above-cited provisions of the Consent Decree and the Plaintiffs' prior fee requests following other consent orders both strongly suggest that the Decree did not fully and finally resolve all claims between the parties.

Defendants further argue that the preamble's statement that the Decree is "final and binding … as to the issues raised in the Plaintiffs' Complaint and Supplemental Complaint" shows an intention to fully resolve Plaintiffs' claim for attorneys' fees because Plaintiffs requested attorneys' fees in their Complaints. This argument is inconsistent with Defendants' admission that Plaintiffs can still seek fees for future violations of the Decree. Moreover, if accepted, this argument "would effectively reinstate the 'waiver by silence' rule" that the Sixth Circuit has declined to adopt since most civil rights complaints expressly request attorneys' fees. *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695, 698-99 (9th Cir. 1989).

Finally, Defendants argue that paragraph 12 of the Consent Decree was intended to be a full and complete settlement of all of Plaintiffs' claims for attorneys' fees. That paragraph reads:

> Within sixty (60) days after entry of this Decree, Defendant Secretary of State shall pay to counsel for Plaintiffs the attorneys' fees that were previously awarded by this Court, as follows: $321,942.15.51 [sic] to Porter Wright Morris & Arthur LLP, $99,722.58 to Carlile Patchen & Murphy LLP, and $82,749.38 to The Chandra Law Firm, LLC. (Doc. No. 210, ¶ 12).

This paragraph was intended to require Defendants to pay the attorneys' fees that had previously been awarded and to set a deadline for making such payment. (Suppl. Decl., ¶¶ 15 & 16). That is exactly what this paragraph accomplishes, no more and no less. Nowhere in this paragraph is there any waiver of Plaintiffs' future fees, or any statement relating to such fees. Defendants' reliance on the maxim of *expressio unius* fails both because this paragraph is not an attorneys' fees award and because silence is not controlling. *Jennings*, 715 F.2d at 1114.

It bears repeating that the proper issue before the Court is whether the parties intended the Decree to be a final disposition of all claims, not whether they intended to include a waiver of fees. Taken separately and together, the above-cited provisions of the Consent Decree show that it was *not* intended to be a final disposition of all claims and that it did not, in fact, fully and finally resolve all of the claims between the parties. There therefore was no waiver.

2. The fees and costs agreed upon in the Consent Decree corresponded to the previous court fee order, so it would have been illogical for anyone to "assume" that additional fees would not be required to eliminate all fee issues.

The second flaw in Defendants' insistence that the parties intended to dispose of all fee-related claims with the Consent Decree is the fact that the fee-and-cost amounts listed for Plaintiffs' counsel exactly corresponded with the Court's previous order. If Defendants had genuinely believed that Plaintiffs were "gifting" the balance of their time and disbursements after the last fee petition had been submitted, they surely would have shared their appreciation with Plaintiffs for their generosity to the State of Ohio. But the parties apparently agree that they did not do so. The fact that the fee-and-cost amounts in the Consent Decree are the same amounts that were awarded when the parties were last before this Court speaks volumes about the parties' true intent—whatever Defendants' supposed claims about their intent are now.

To claim to this Court, as Defendants apparently do, that Defendants exhibited not the least bit of curiosity as to why Plaintiffs' fee demand was not greater than the prior award not only strains credulity but also answers the question before the Court: the parties did not intend to resolve all fee issues with the Consent Decree—just the fee issues that were the subject of the Sixth Circuit appeal.

3. Defendants did not inform the Court or Plaintiffs of their intent.

Defendants now assert that they intended the claimed waiver to be a material provision of the Consent Decree and that they would never have settled the case without such a waiver. They never shared that intention with Plaintiffs or this Court, however.

Indeed, when asked by this Court to summarize the terms of the Decree, Defendants' trial counsel, Richard Coglianese, failed to mention their intention or the alleged waiver. (Transcript of April 19, 2010 Status Conference Proceedings, attached as Exhibit 1.) Defendants' failure to inform the Court or Plaintiffs of their now-claimed intention to bar Plaintiffs from seeking attorneys' fees for the period from January 21, 2009 to April 19, 2010 further shows that the parties did not intend to fully and finally resolve such a claim.

Without considering the ramifications of their own silence, Defendants argue that Plaintiffs' silence on the fee issue was deceitful and misleading (MIO at 7-9) (quoting *Bell v. Schexnayder*, 36 F. 3d 447, 450 (5th Cir. 1994) and *Conrad v. Bergen Comm. College*, No. 95-553, 1996 U.S. Dist. LEXIS 22383 (D.N.J. Dec. 12, 1996)). Putting aside the fact that the Third Circuit expressly abrogated the *Conrad* decision because that Circuit requires waivers to be express and does not allow them to arise from an "impression" that plaintiffs will not request fees,[5] these accusations are both outrageous and not well taken.

[5] *Torres v. Metropolitan Life Ins. Co.*, 189 F.3d 331, 334 (3rd Cir. 1999).

As an initial matter, even if Defendants are to be believed, it was unreasonable for Defendants to "assume" that Plaintiffs' silence on the issue was equivalent to a waiver. On two previous occasions, Plaintiffs sought fees after negotiating consent decrees in this case. Defendants should have fully expected them to do the same here. At most, Defendants have alleged a misunderstanding on their part, not a misrepresentation.

Moreover, Defendants are equally culpable of remaining silent. While Defendants insist that Plaintiffs should not be rewarded for remaining silent, it is equally true that this Court should not sanction "similarly deceptive conduct on the part of defendants" by "allowing them to deliberately rest on plaintiff's silence and thereafter ascribe an intent to waive thereto." *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128, 139 n.20 (3rd Cir. 1986). Indeed, since silence does not result in a waiver, "it was incumbent upon Defendant[s] to seek a waiver of fees" and "[i]t was Defendants' failure to address this issue at the time of settlement that should be criticized." *Fauntleroy v. Staszak*, 3 F. Supp. 2d 234, 237 n.1 (N.D.N.Y. 1998).

Had Defendants asked for a full and final settlement of all fee issues, Plaintiffs may well have been prepared to give them one—with a higher fee-and-cost demand to take into account all the additional work into this case. Defendants did not ask and so Plaintiffs brought the issue to this Court as is their right under 42 U.S.C. § 1988—the underlying purpose of which is to ensure that Plaintiffs benefit from the tireless advocacy of counsel in these civil-rights matters.

4. It is Defendants' position, not Plaintiffs' position, that is absurd and defies logic.

Defendants finally argue that it is absurd and illogical to believe that there was no waiver because they never would have settled the case without one. (MIO at 9).

While the evidentiary value of such self-serving statements is dubious at best, they can readily be matched or exceeded by Plaintiffs' own statements. Namely, two of Plaintiffs'

counsel believed—for reasons grounded in case law—that Defendants' interlocutory appeal was both jurisdictionally defective and substantively meritless, and would never have recommended to their clients that they waive all additional attorneys' fees simply to resolve that appeal. (Gentry Decl., ¶ 20; Chandra Decl., ¶ 20; n.1, above.) Nor, as explained in point 2 above, is it reasonable to expect that Plaintiffs would have agreed to give up sixteen months worth of fees in exchange for receiving payment of fees *that had already been awarded* and, if Defendants are to be believed, obtaining a settlement that accomplished very little (a point that Plaintiffs dispute).

Instead, if the Defendants had raised the issue of a waiver (which they did not), Plaintiffs would likely have attempted to negotiate an amount that accounted for their work performed on and after January 21, 2009. Because Defendants did not raise the issue, however, no such compromise was ever discussed or included in the Consent Decree.

B. If The Court Cannot Resolve The Question Of The Parties' Intent, Then The Court Should Hold That There Was No Waiver.

For the reasons stated above, the Court should find that the parties did not intend the Consent Decree to fully and finally resolve all claims between them, and that Plaintiffs did not waive their right to seek fees for work performed between January 21, 2009 and April 19, 2010.

If, however, the Court concludes that it is unable to determine the parties' intent, then the Court should hold that there was no waiver.

Such a result is inherently logical. If the evidence shows that "the parties did not intend the settlement to resolve the disputed issue of fees one way or the other," then that reasonably "would still permit the [plaintiffs] to seek fees." *Cody v. Hillard*, 304 F.3d 767 (8th Cir. 2002).

This result also furthers the policies underlying Section 1988. When faced with similar facts, the Tenth Circuit concluded that it is the defendant who should bear the risk of loss:

> Ellis asserts in her brief that the parties never discussed the Section 1988 claim …. The record also indicates that Ellis' counsel never

> revealed an intention to waive the fees …. Defendants, on the other hand, vigorously argue that they would have never agreed to settle the case had the settlement not released them of all liabilities, including attorneys' fees and costs.
>
> Thus, we must decide who must bear the loss where a settlement agreement of civil rights claims is silent on the issue of attorneys' fees and costs and the parties claim conflicting intentions. We believe that the "losing" party must shoulder the burden of showing that the parties mutually intended a settlement agreement to include a release of a Section 1988 claim. This rule best furthers the policy behind Section 1988, which not only allows a civil rights claimant to pursue meritorious constitutional claims without having to pay an attorney out-of-pocket, but also encourages 'competent attorneys to prosecute those claims.' Moreover, our result does not conflict with, but instead furthers the presumption in favor of awarding attorneys' fees.

Ellis v. Univ. of Kansas Med. Ctr., 163 F.3d 1186, 1201 (10th Cir. 1998). If this Court is unable to decide the issue of intent, then it should follow *Ellis* and hold that there was no waiver here.

III. DEFENDANTS' REMAINING ARGUMENTS TO AVOID PAYING FEES AND COSTS FAIL.

Defendants briefly raise additional challenges to the merits of Plaintiffs' request for fees, and Plaintiffs will briefly respond to those challenges here.

A. No Special Circumstances Require The Denial Of Plaintiffs' Motion.

Defendants argue that Plaintiffs' Motion should be denied due to "special circumstances" presented here, namely, Plaintiffs' alleged concealment of their intention to seek attorneys' fees and Defendants' supposed attempt to include a waiver provision in the Decree. As stated above, the parties' mutual silence on the issue of fees is not controlling and does not bar Plaintiffs from seeking fees, particularly since Plaintiffs had filed such motions twice before. Moreover, Defendants' slippery-slope argument that no waiver could ever be effective fails both because there was no express waiver in this case and because the Third and Ninth Circuits both require and enforce such express waivers—which shows that they can be drafted.

B. Plaintiffs' Fee Request Complies With The Three Percent Rule.

Defendants argue that Plaintiffs' request for fees for the sixteen-month period between January 21, 2009 and April 19, 2010 must be limited to 3% of the prior fee award, or $14,232.56, because of the Sixth Circuit's "three percent" rule. This argument mischaracterizes the rule, Plaintiffs' Third Motion, or both.

This Court has recognized the well-established rule that a supplemental fee petition "*which seeks fees for the preparation of an original fee petition* … should be limited to three percent of the award for the main case when it is decided on the papers without a trial." *Bank One v. Echo Acceptance Corp.*, Case No. 04-CV-318 (S.D. Ohio Apr. 10, 2009). In that case, this Court awarded total fees of $965,533.28 after a trial, and thereafter approved the request for $30,542.23 in additional fees for the time spent litigating the fee petition.

Defendants' argument wrongly assumes that all of the fees sought in Plaintiffs' Third Motion for Fees were incurred in connection with litigating the two prior motions for attorneys' fees. That is clearly not true. The bulk of those fees were instead incurred during the parties' lengthy negotiations of the Consent Decree—which, ironically enough, did not even settle the Defendants' appeal; the Sixth Circuit was forced to dismiss the appeal for lack of prosecution. (*See* Doc. No. 211.) By Defendants' twisted logic, when Defendants run up costs and fees by taking Plaintiffs through a frivolous appeal that is later dismissed for want of prosecution, Plaintiffs should bear the burden of that frivolity.

In any case, when the time spent mediating the appeal is carved out from the three-percent rule (which is entirely appropriate, since that time was devoted to negotiating the Decree), this argument is clearly misplaced. For example, Porter Wright Morris & Arthur LLP received a fee award of $321,942 and its counsel, trial attorney Caroline Gentry, has requested only $8,560 in fees for her work relating to the prosecution of those fee petitions—which amount

is *less* than 3% of the fee award. (Doc. No. 213-1, entries dated 3/10/09, 7/13/09, 7/14/09, 7/21/09, 7/22/09, 7/28/09, 9/1/09, 9/8/09, 9/24/09 & 5/28/10). Most of the fees requested by Ms. Gentry were incurred while negotiating the Decree, and those fees are *not* subject to the three-percent rule.

C. There Was No Unreasonable Duplication Of Effort.

Defendants argue that it was unnecessary for Plaintiffs to employ three attorneys to litigate their prior fee petitions. But as stated above, most of the time spent by Plaintiffs' counsel was spent on negotiating the Consent Decree. Those negotiations included not only an all-day session with the mediator but, in addition, numerous phone calls with and without the mediator, including calls that sometimes involved only one or two of the parties' counsel. Each of the Plaintiffs' counsel made unique contributions to the Herculean efforts to settle this case and they should be compensated for those efforts, which were not duplicative.

D. Plaintiffs Obtained Significant Relief.

Finally, Defendants repeat their by-now-familiar mantra that Plaintiffs did not obtain any significant relief and so should not receive any award. But, as before, they are wrong to suggest that the Decree merely recited existing law. Perhaps the most significant provisions of the Decree appear in paragraphs 5(b)(v) through (vii). Those provisions require Boards of Election to count provisional ballots that might otherwise be rejected, including circumstances where the poll worker (1) erroneously allowed the voter to cast a vote in the wrong precinct (but right polling place), (2) erroneously allowed the voter not to complete or sign the provisional-ballot application, or (3) himself erred by failing to complete or sign the provisional-ballot application. Existing Ohio law does not provide for this relief; it is necessary to achieve the Decree's purposes.

The Decree also achieves significant relief by clearly identifying the circumstances under which provisional ballots cast by voters who lack identification must be counted. As shown by Plaintiffs in the evidence obtained prior to the November 2008 election, Boards of Elections intended to apply widely varying rules to provisional ballots. For example, Boards were split on the issue of whether to accept or reject a ballot that did not include the voter's date of birth. The Decree resolves that confusion and lack of uniformity by clearly providing that such ballots must be counted. (Doc. No. 210, paragraph 5(b)(ii)).

For these reasons, among others, the Decree achieves significant relief for the Plaintiffs and their counsel should be awarded a fully compensatory fee. Defendants should not be permitted to undermine every policy consideration underlying 42 U.S.C. § 1988 by claiming that Plaintiffs are entitled to nominal (if any) fees. And this Court certainly should not entertain or be swayed by Defendants' threat to seek to vacate the Decree if fees are awarded (*see* MIO at 10-11).

IV. DEFENDANTS' PARTICULAR QUIBBLES WITH FEE-AND-COST LINE ITEMS FAIL.

Defendants nitpick at certain line-items submitted to the Court for recovery. Each argument fails:

- For example, the work and coordination required in locating a homeless client was vital for all other clients to ensure that entering into the Consent Decree was authorized, and to satisfy this Court (and Defendants) that reasonable efforts had been made to locate a named plaintiff whom Defendants presumably ideally would want to be a bound signatory to the very Decree that Defendants claim resolved all claims. The investigator who was hired was a retired FBI agent and

supervisor who spent time working with Mr. Chandra on the client's last known whereabouts and leads.

- Defendants are fully aware that travel time is compensable as a fee at an attorney's hourly rate, as the Court has previously awarded fees for travel time in this case. The Court has also awarded Plaintiffs' counsel their costs of travel. (*See* Doc. 203 at 22). The mileage reimbusement is a cost—it reflects the expense of gasoline and wear-and-tear on an automobile, not the fee associated with the lawyer's time. The case that Defendants cite to claim otherwise relies on a Fourth Circuit case, which merely observes that the question of whether such a practice constitutes a double recovery turns on the law firm's own customary practice and whether the fees were intended to cover the expenses.[6] Here, the Chandra Law Firm, LLC customarily bills for attorneys' time and fees incurred by travel time and the out-of-pocket expenses such as mileage reimbursement associated with such travel.[7] Much of Mr. Chandra's involvement in this case was telephonic, but there were times—such as attending the Sixth Circuit mediation in person—that travel consuming substantial amounts of Mr. Chandra's otherwise compensable time was required.

- Similarly, why should a NEOCH client representative *not* be reimbursed through his client's submission for a mileage reimbursement, when that client's presence

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[6] *Daly v. Hill*, 790 F.2d 1071, 1084 n.18 (4th Cir. 1986) ("An attorney's practices in billing clients for expenses may be relevant to the question of whether compensation for litigation expenses is proper in addition to attorney's fees in a particular case. It is customary for attorneys to bill clients for duplicating expenses, attorney travel and other necessary litigation expenses in addition to a regular hourly rate. However, there may be circumstances in which an attorney's customary hourly rate is intended to cover litigation expenses. *In such a case*, reimbursement for expenses in addition to a reasonable fee would constitute improper double compensation.")

[7] Chandra Decl. at ¶ 21.

is required at a court-ordered mediation? Defendants should be grateful that other compensable litigation expenses were not incurred and submitted, such as travel reimbursements for Plaintiff SEIU or other clients.

The trivial nature of Defendants' nitpicking highlights how reasonable and sparing the billing is.

V. CONCLUSION.

For the foregoing reasons, Plaintiffs' Third Motion for Attorneys' Fees should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9th, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

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