

**In The Unites States District Court
For The Northern District of Ohio
Eastern Division**

Project Vote, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 1:06-cv-1628
	:	
Jennifer Brunner,	:	Judge O'Malley
Secretary of State	:	
	:	
Defendant.	:	Magistrate Judge Perelman

**Defendant's Memorandum Contra
Plaintiffs' Motion For Costs And Attorneys Fees**

Defendant Jennifer Brunner, Ohio Secretary of State, respectfully asks this Court to deny the plaintiff's request for attorney fees and costs totaling \$452,705.59 in its entirety. Plaintiffs' counsel have over-lawyered the case, billed duplicatively, expended unnecessary amounts of time on simple assignments, included tasks that cannot conceivably be related to the litigation, requested hourly rates that cannot be justified, and asked for "costs" which are not reasonable. This fee application is an attempt to inflate bills, and it should shock the conscience of the Court. The Court should deny the Application *in toto*.

I. Introduction

In civil rights litigation, a court may award "a *reasonable* attorney's fee as part of the cost." 42 U.S.C. § 1988 (emphasis added). However, a petitioner should not recover fees when the district court, in its discretion, finds that "special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983). *Complete* denial of a fee request is appropriate if the request is grossly and intolerably exaggerated, manifestly filed in bad faith, or wholly undocumented. *Jordan v. U.S. Dept. of Justice*, 691 F.2d 514, 518 (D.C. Cir. 1982).

Where the request is “so exorbitant as to shock the conscience of the court,” it is not necessary to conduct an examination of the factors relevant to establishing reasonableness before denying the request outright. *The Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92, 96 (4th Cir. 1993), quoting *Sun Publishing Co., Inc. v. Mecklenberg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987); see also *Brown v. Stackler*, 612 F.2d 1057 (7th Cir. 1980).

This request in this case, a half-million dollar fee to pay for more than a dozen attorneys to prepare a case involving no witnesses or discovery, is so unreasonable, excessive, and improper, that the Court should deny the motion outright.

II. The Fee Application On Its Face Is Grossly Excessive

It is beyond question that this case was “over-lawyered.” The plaintiffs have submitted fee bills from **thirteen** attorneys.¹ The over-billing by Perkins Coie is especially egregious. In addition to Mr. Sandstrom, who is “of counsel” to the firm, Perkins Coie seeks reimbursement for three partners, three associates, three law clerks, and two librarians. In all, plaintiffs seek fees for **1,416.45 hours** of work by attorneys, interns, administrative assistants, and librarians.

The fee submission is especially shocking when one recalls how little work this case required. The parties exchanged no written discovery, they took no depositions, and there was no trial on the merits. Plaintiffs’ entire case consisted of five pleadings (a Complaint, a Motion for Preliminary Injunction, a Reply Brief, a Memorandum opposing the defense Motion to Dismiss, and a motion for Summary Judgment), a status conference or two, and one oral argument before the Court. On its face, 1,416.45 hours of work is absurd. And that conclusion is apparent even before one considers the extent to which plaintiffs’ counsel duplicated work, the

¹ The motion seeks to recover expenses, but not fees, relating to the services of a fourteenth attorney, Elliot Minberg.

excessive hourly rates they seek to collect, or the extent to which they billed for unrecoverable expenses.

III. The Fee Application Is Rife With Double Billings, Inflated Hours, and Improper Charges

The closer one looks at the billing records, the more examples one can find of double billings, inflated hours, and unrelated billings. Examples of duplicate, triplicate, even septuplet billing, padded hours, and improper billings include, but are not limited to, the following:

A. Conference Calls Among Plaintiffs' Counsel

Long before litigation was initiated, plaintiffs' counsel engaged in multiple conference calls. The Fee Application repeatedly seeks payment for five attorneys, and sometimes as many as seven, who participated in these chats.

The billing records show that on May 3, 2006, two months before the plaintiffs filed suit, attorneys Paradis, Weiser, Reese, Sandstrom, Nayak, and McTigue participated in a conference call that lasted more than an hour. (McTigue's records erroneously place the call on May 2). The Brennan Center triple-staffed the call (Weiser, Paradis, and Nayak) and Perkins Coie double-staffed (Sandstrom and Reese). All six attorneys have submitted their time for reimbursement.

A mere two days later, on May 5, 2006, the billing records show that the same six attorneys conducted another telephone conference for more than an hour. Again, all six attorneys have submitted their time to the Court. On May 22, 2006, another conference occurred, involving attorneys McTigue, Mellor, Paradis, Sandstrom, and Weiser which lasted, according to the billing records of Paradis, Mellor, and Weiser, about an hour. Again, the fee petition seeks payment for all participants. And one week later, on May 30, 2006, **seven** attorneys billed for the same conference call (McTigue, Mellor, Nayak, Paradis, Reese, Sandstrom, and Weiser).

This practice persisted after the Complaint was filed. On July 7, 2006, the Brennan Center double-staffed (Weiser and Paradis) a conference call with McTigue, Mellor, and Sandstrom for an hour or more. All five lawyers have asked to be paid. The Brennan Center's Weiser and Paradis also tag teamed a conference call on September 11, 2006, after the court issued its Preliminary Injunction Order, with Sandstrom and McTigue.²

Incredibly, of the 50.45 total hours Mr. Mellor claims to have devoted to this case, nearly one-third – 16 hours – consisted of nothing but conference calls among counsel.

B. Drafting The Complaint

The Complaint apparently took eight lawyers and one intern 80.9 hours to draft. Defense Counsel cannot claim with confidence to have found all the billing entries that refer specifically to drafting the Complaint, but it appears that the following attorneys claimed fees “drafting,” “editing,” or “reviewing” the Complaint: Elias (1 hour); McGinnis (3 hours); McTigue (1.8 hours); Mellor (6.5 hours); Paradis (12.1 hours); Reese (24.5 hours); Sandstrom (13 hours); and Weiser (15.7), plus 2.3 hours by Legal Intern McGhee. What makes these numbers so startling is that that do not include time billed for researching federal election law, which consumed more than 100 hours of attorney time at Perkins Coie alone. 80.9 hours are just for word-smithing.

C. Drafting The Motion For Preliminary Injunction

The first 12 plus pages of the Motion for Preliminary Injunction were literally cut and pasted from the Complaint, with almost no change to the content, though some to the order of the paragraphs. Despite the fact that nearly one-third of the motion contained no new content, plaintiffs' counsel claim substantial hours for drafting that motion.

² Mr. McTigue's records incorrectly identify this call as having taken place on September 12, 2006.

Perkins Coie, unsurprisingly, led the pack. A conservative estimate of the hours devoted strictly to drafting³ shows that attorney Sandstrom spent 38.25 hours, attorney Reese 34.8 hours, attorney Gringold 20.4 hours, attorney Alexander 3.3 hours, and attorney Elias 1.5 hours, on top of the **58 hours** billed by Legal Clerk Anderson (which, despite apparently yielding no satisfactory product, Perkins Coie asks to have compensated at a rate of \$155 an hour, more than many experienced attorneys bill). But even after approximately 100 hours of attorney time and 58 hours of intern time, the motion was not ready for filing. First, attorney Paradis had to spend 4.6 hours revising the motion, attorney Mellor was forced to bill 2 hours for doing the same, attorney McGinnis worked for 5 hours, and attorney McTigue devoted 3.2 hours to the task (including 1.5 hours spent reviewing the motion on July 16, 2006, three days *after* it had already been filed).

D. Attendance At The September 1, 2006 Preliminary Injunction Hearing

On September 1, 2006, the Court heard oral argument from counsel (without testimony) on the Motion for Preliminary Injunction. By that date, the legal issues had been fully researched and briefed. Nevertheless, between August 29 and September 1, 2006, Mr. Sandstrom, plaintiffs' lead counsel, billed 29.25 hours to prepare for and appear at the hearing. But that is not the curious part.

For the same time-period, plaintiffs double-billed "preparation time" for five other lawyers, totaling 42.1 hours: McGinnis (13.6 hours); McTigue (10 hours); Mellor (2.5 hours); Paradis (8 hours); and Weiser (8 hours). McGinnis and Weiser did not even attend the hearing, so it is unclear what they prepared for. In addition, plaintiffs claim 11.5 hours for Ms. Paradis to

³ Perkins Coie attorneys "block bill" their time, which makes it impossible to apportion time among the multiple tasks listed. Rather than arbitrarily divvy up a block of hours, defense counsel has assigned all of it either to research or to drafting, as seemed most appropriate, but has been careful never to double-count an entry, and has erred on the side of not counting hours at all where it was unclear what the employee was doing.

travel to and attend the hearing, where she sat quietly at counsel table without once speaking. The billing statements also list 8 hours for Mr. McTigue to travel and attend, even though he only informed the Court on the record that the Greek Festival is held in Columbus.⁴

E. Drafting The Summary Judgment Motion

The plaintiffs' motion for summary judgment consisted of two paragraphs (summarizing the Counts in the Complaint and the procedural posture of the case), plus one final sentence incorporating by reference the evidence from the preliminary injunction hearing. The seven sentences of this motion took Attorney Paradis an astonishing **5.5 hours** to draft (at \$235 per hour), according to her timesheets for October 23 and 24, 2006, including 1.5 hours to "outline" this motion.

F. The Motion For Attorney Fees

Just as Perkins Coie overinflated their time on the preliminary injunction motion, the Motion for Attorney Fees became the Brennan Center's method to exaggerate hours as well. According to their timesheets, drafting the motion and affidavits alone consumed just under 40 hours: 11.8 hours by attorney Paradis, 5.1 hours by attorney Weiser, and 22 hours by Intern Infranca. If the work product from the intern was such that the attorneys needed sixteen hours to rewrite it, there is no excuse for the Brennan Center trying to bill the intern's time. Once again, these hours are just for the research and drafting; they do not include the approximately 8.8 hours (double) billed by Paradis, Weiser, Infranca, and Administrative Assistant Chen for internal meetings.

Even more troubling is the separate billing for preparing the billing records themselves. In an age of computer software programs that automatically track and generate billing records, it

⁴ Just to complete the picture, plaintiffs' counsel also claim 3 hours for Mr. Mellor to attend the hearing, and another 5.5 hours for Ms. Chen, an administrative assistant, to prepare exhibits.

is not even slightly plausible that Ms. Chen needed 13.6 hours just to “make/prepare/compile” time records. Nor is it conceivable why attorney Paradis needed **7 hours** just to “compile” time records. (See Paradis bills for February 16, 2007, June 6-7 and 14, 2007, and March 14, 2008).⁵

G. Many Of The Billing Entries Are Unrelated To The Litigation

Counsel cannot recover fees for services unrelated to the litigation. By that standard, plaintiffs’ counsel cannot justify fee requests such as the following:

- (1) Attorney Weiser lists 5 hours for preparing “press release, talking points, and press strategy” on August 31 and September 1, 2006;
- (2) Attorney Bauer lists 3 hours (at \$500 per hour) to “review soliciting and fundraising questions” on May 19, 2006 (two months before suit was filed);
- (3) Attorney Nayak claims 2.7 hours, and attorney McTigue 3 hours, for testifying at a Public Hearing on June 5, 2006. (The nature of the Hearing is not described). Mr. Nayak’s timesheet also includes 3 hours for testimony at an earlier Public Hearing on June 1, 2006.
- (4) Attorney James claims 4.3 hours spent attending a hearing of JCARR (the Joint Commission on Administrative Rules and Regulations) on June 26, 2006.

The Supreme Court has instructed that the attorney seeking payment of fees bears the burden of demonstrating the hours were “reasonably necessary” to the litigation. *Webb v. Bd. of Ed of Dyer County*, 471 U.S. 234, 242-243 (1985). The Fee Application does not even attempt to explain why retaining Mr. Bauer at \$500 an hour to look at “fundraising” questions is a reasonable litigation expense. Nor is there any discussion of how preparing a “press release, talking points, and press strategy” is a reasonable litigation expense.

⁵ 6 of those 7 hours were billed **before** attorney Sandstrom reviewed the Perkins Coie timesheets on February 15, 2008, which suggests Paradis was only “compiling” Brennan Center timesheets.

The Motion for Fees cites *Chandler v. Vill. Of Chagrin Falls* as authority for the claim that counsel's time spent at pre-litigation administrative proceedings should be included as litigation expenses. That case is easily distinguishable. The plaintiff in *Chandler* alleged the Village violated her civil rights by denying her a building permit and failing to abide by required procedures when voting to deny the permit. The proceedings at the village level, according to the Court, "became adversary, and to protect Chandler's rights, it was necessary for counsel to prepare for and appear at village meetings and hearings in a manner comparable to litigation activity." In fact, had Chandler not pursued the administrative process, she likely would have been barred from filing suit. Plaintiffs' counsel cannot (and do not) make the same claim here. Plaintiffs did not have to exhaust any administrative remedies, and there was nothing about the Public Hearings that related specifically to plaintiffs more so than to other interested parties, pro and con. If one adopts plaintiffs' counsel's argument, then *everything* becomes a litigation expense and the rule that the expense be "reasonably necessary" to the litigation merely an empty admonition.⁶

IV. Legal Argument

A. The Proper Response To A Grossly Exaggerated Bill Is To Deny Fees Altogether

A petitioning attorney has an obligation to weed out hours that are excessive, redundant or otherwise unnecessary from his fee request. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). The standard for excluding unreasonable hours is "whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed. *Woolridge v. Marlene Industrices Cor.*, 898 F.2d 1169, 1177 (6th

⁶ The pre-hearing lobbying is a significant part of the alleged fees. For example, out of the 26.4 hours billed by attorney Nayak, only four entries, totaling a mere 5.5 hours, even arguably refer to litigation, rather than lobbying activities. (March 27, 2006, March 28, 2006, May 3, 2006, and May 5, 2006).

Cir.)(overruled on other grounds). As shown above, plaintiffs' counsel failed to weed out redundant, inflated, and unrelated billings.

In *Brown v. Stackler*, 612 F.2d 1057 (1980), the Seventh Circuit Court of Appeals directly addressed the question of how the court should respond when a party who is otherwise entitled to an award of fees submits a billing statement that is inflated. The counsel who submitted the inflated time records argued (as plaintiffs' counsel likely will in this case) that if the Court disagrees with the time billed, it should award whatever it considers to be reasonable. The Seventh Circuit understood that to do so would mean "claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place." *Id.* at 1059. To "discourage such greed," the Court affirmed the District Court's decision to deny fees altogether. Numerous courts have recognized the sense of imposing such a rule. *Scham v. District Courts Trying Crim. Cases*, 148 F.3d 554 (5th Cir. 1998); *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991); *Sun Publishing Co., Inc. v. Mecklenberg News, Inc.*, 823 F.2d 818 (4th Cir. 1987).

The massive over-billing in this case not only dwarfs what courts have rejected as outrageous in other cases, it contains an example of every tactic those courts decried. For example, in *Sun Publishing*, the Fourth Circuit rejected a \$41,000 tab for preparing a simple pleading, in part because "as many as six lawyers from different lawyers from different firms billed significant amounts of time in preparing for a short hearing on a simple issue." 823 F.2d at 820. In this case, plaintiffs billed for thirteen attorneys from four different firms/advocacy groups, eight attorneys billed for drafting the complaint, and six attorneys billed time for

preparing for the preliminary injunction hearing, even though only four of them attended and only two argued.

The abuses in this case also parallel the tactics the Seventh Circuit condemned in *Brown*. In that case, as here, the plaintiffs sought to enjoin enforcement of a statute on the grounds of unconstitutionality. The Court concluded that it was “manifestly unreasonable” to expend over 800 billable hours on the case. Project VOTE and its cohorts have nearly doubled that figure.

In *Scham*, the plaintiffs submitted bills totaling \$624,000 for 936 hours, in a case where discovery was limited, the parties did not meet, and there was no mediation, no court appearances, and no trial. Here, as noted, there was no trial, no discovery, and one limited appearance in court.

This case also resembles *Budget Rent-A-Car System, Inc. v. Consolidated Equity LLC*, 428 F.3d 717 (7th Cir. 2005). Budget submitted a bill for 3.3 partner hours and 10.4 associate hours for preparing a four-page memorandum. The Court of Appeals concluded that 13.7 hours of professional time were too many “for so modest a product.” *Id.* at 718. It is not hard to guess what Judge Posner and his colleagues would say to a bill for 5.5 hours from one attorney for preparing a seven sentence motion whose sole argument is “see our earlier pleadings.”

Courts disallow all fees in civil rights cases where plaintiffs’ counsel submits enormous bills in what is otherwise a non-complex piece of litigation, especially where the fees claimed vastly exceed the amount of the damages award. In *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991), the Appellate Court reversed a fee award where the plaintiff’s counsel sought \$132,000 in fees for winning a judgment of \$5,000 in a simple false arrest case. *Kendrick* is particularly revealing because the Court was unswayed by the fact that counsel had to try the case for ten days in order to win the judgment. And in a recent decision from California, the District Court

held that it was unconscionable to bill over 2,500 hours to prepare for and try a case that only took a few days to try. *Mendez v. County of San Bernardino*, 2007 U.S. Dist. LEXIS 75495 (C.D. Cal. 2007) (attached as Defendant's Exhibit 1). *Mendez* features some of the same misconduct that exists here: 42.25 hours billed by multiple attorneys for preparing a simple pleading, followed by 19 hours of preparation for a hearing on the very same issues; 92.25 hours spent preparing a pleading that was a cut-and-paste reproduction of an earlier pleading.

The legislative intent behind attorney-fee shifting statutes was not to produce windfalls to lawyers. *Keener v. Department of Army*, 136 F.R.D. 140, 150 (M.D.Tenn. 1991), quoting *Coulter v. Tennessee*, 805 F.2d 146, 148-49 (6th Cir. 1986). Nor was it Congress' intent to allow counsel to submit exorbitant "opening bids" or force the District Court's to parse through all the thousands of inflated time entries to try to construct a more reasonable billing amount. A complete denial of fees case would be a fair result with far-reaching positive consequences.

B. The Proposed Hourly Rates Are Exorbitant and Unsubstantiated

Not only is the fee request unreasonable in terms of the work performed, it also seeks unreasonable fees for the personnel doing the work. The Supreme Court has recognized that one method for calculating fees is to take the number of hours reasonably expended by the attorney and multiply that by the attorney's reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). However, "hourly rates for fee awards should not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question." *Coulter v. State of Tennessee*, 805 F.2d 146, 149 (6th Cir. 1986), cert. denied, 482 U.S. 914 (1987). Section 1988 "does not guarantee civil rights plaintiffs the best counsel in the country; it guarantees them competent counsel." *Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995). It also does not guarantee them as many attorneys as they can hire to sign the pleadings.

Before considering the question of market rates in detail, the Secretary first asks the Court to consider the fundamental problem underlying the fee request: why was it necessary to employ more than a dozen attorneys, including partners and associates billing at large-firm rates in Boston, New York City, and Washington, D.C., to litigate an issue of Ohio election law? Mr. McTigue and Mr. McGinnis, both Ohio attorneys, concentrate their practices on federal and state election and campaign finance law. It would seem, therefore, that they possessed the expertise to brief this case without reaching outside the state.

With Mr. McTigue and Mr. McGinnis available, it seems unnecessary to employ the army of attorneys and support staff at Perkins Coie. Many of the attorney “Bios” purport to show that Perkins Coie attorneys are experts in federal elections law, but that claim is difficult to square with the fact that Perkins Coie attorneys billed hundreds of hours just on *researching* basic topics such as standing, notice, and the National Voter Registration Act of 1993. In alphabetical order, attorney Alexander billed approximately 64.3 hours to research standing, notice, and “Ohio cases;” attorney Gingold logged at least 30 hours on standing, ripeness, and vagueness; attorney Reese added around 4.5 hours of NVRA research, and lead counsel and \$500 an hour expert Sandstrom devoted nearly 20 hours just to research, on top of nearly 40 hours spent just on researching the NVRA by Law Clerk’s Anderson and Lowe. These hours, according to the timesheets, were separate from the hours billed for drafting the pleadings.

And speaking of duplication of effort, if Perkins Coie was handling the research chores, why did attorney Paradis bill almost 15 hours of additional research time just on the topics of the NVRA and federal jurisdiction? In addition to that time, Ms. Paradis also billed **22 hours** (between March 28, 2006 and April 7, 2006) to “Prepare memo.” Presumably this was a research memo on some topic, but the billing records are silent as to what the topic was, what its

relationship to the litigation was, or why this memo was not duplicative of work done by other attorneys assigned to the case. Those hours should be disallowed on vagueness alone.

Given the enormous duplication of effort, there is no justification for paying thirteen lawyers from four separate firms. Given the vast amount of basic research counsel needed to get started (which belies any claim of great expertise), there is no reason to award these attorneys a premium for their services. The hourly rates sought by the motion are clearly excessive.

In her “Declaration,” attorney Teresa James states she received a J.D. from Case Western Reserve University School of Law in 1981; she is election counsel with Project Vote; and her expertise on election law issues has been sought by Congress. Based on her 28 years of experience and expertise in election law, Ms. James asks for a rate of \$200 per hour, which she believes is “reasonable and within the prevailing fee for an attorney of comparable education and experience.” The Secretary of State agrees with Ms. James’ assessment.

Eight attorneys seek reimbursement at higher rates than Ms. James even though they have dramatically less experience than she.

Attorney	Year of Law School Graduation	Hourly Rate Requested
Weiser	1996	\$350
Paradis	2003	\$235
Nayak	2003	\$235
McGinnis	2003	\$250
Mellor	1983	\$300
Elias	1993	\$375
Gingold	1998	\$250
Reese	2002	\$240

Particularly striking are Paradis, Nayak, and McGinnis, all of whom have less than five years of practice experience. Ms. James would certainly have to agree their rate requests are too high.

Plaintiffs' counsel bear the burden of proving these rates are reasonable, and they have not done so. In support of the motion, they offer a vague and conclusory affidavit from attorney Ritchey Hollenbaugh which says he reviewed the records and believes the fees are reasonable. With all due respect to Mr. Hollenbaugh, his affidavit does not meet the burden of proof. For one thing, he never identifies which records he saw. The motion implicitly asks the Court to assume he saw all the billing records, but there is no reason to make such a generous assumption. Mr. Hollenbaugh's affidavit certainly does not explain why it is reasonable to pay \$500 an hour to attorney Bauer, for example, for essentially adding his name to the case without doing any substantive work. Nor does Mr. Hollenbaugh explain why the rates claimed by Perkins Coie for its summer clerks (\$155 to \$175 an hour) are reasonable, especially when it appears from the records that the attorneys were unable or unwilling to use any of their work product. And finally, Mr. Hollenbaugh's affidavit does not explain the contradiction cited above between the rate claimed by Ms. James and the higher rates claimed by more junior practitioners.

The hourly rates (\$500 for partners, \$325 for associates, and \$150 or more for clerks, librarians, and staff) are simply not what the market would bear in Ohio. It appears counsel are billing their Boston/New York/Washington rates, but curiously, their declarations claim these are appropriate rates *in Ohio*. How an associate in a firm in Washington D.C. would know what the market rates are for attorneys in Cleveland or Columbus is never explained.

These inflated hourly rates are further evidence of counsel's intent to milk the fee shifting statute for every penny from the public fisc they can. The primary concern in attorneys fee litigation is that the fee awarded be reasonable. *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999) citing *Blum v. Stenson*, 465 U.S. 886, 893 (1984). Because plaintiffs have submitted such

an unreasonably high fee request, as exemplified by the proposed hourly rates, defendant asks this Court to deny the award of fees altogether.

C. If Fees Are Awarded, The Deductions Should Be Commensurately Large

Should the Court choose to award some amount of fees, it should impose serious deductions. In *Libertarian Party of Ohio v. Brunner*, 2007 U.S. Dist. Lexis 88623 (N.D. Ohio 2007), the court (rejecting an affidavit from Mr. Hollenbaugh) reduced Mr. McTigue's rate from \$450 down to \$300. This Court should at least do the same. And the Court should discount entirely the bills from Perkins Coie and the Brennan Center. There is no question those attorneys were not necessary to the case, and they abused the system by repeatedly double and triple staffing.

D. The Proposed Expenses Are Not Recoverable and/or Unsubstantiated

Thus far, the discussion has focused solely on the bills for attorney time. But plaintiffs' counsel has also asked this Court for an award of thousands of dollars in "expenses." The Supreme Court in *Hensley* noted that the same responsibility that pertains to time billed (not to seek a windfall) applies to expenses. The expense request is, if anything, even more improper than the fee requests.

The motion asks for an award of "statutory costs" under 28 U.S.C. §§1821 and 1920. Section 1821 is plainly inapplicable.⁷ As for Section 1920, plaintiffs are correct to say there is authority for the proposition that an award of attorney fees may include some out-of-pocket expenses, but only if those expenses are reasonable. *Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir. 1994). The party seeking to recover expenses bears the burden of showing the costs were

⁷ Section 1821 pertains *only* to payment of expenses relating to *witnesses*, and there were no witnesses in this case. Section 1821 is so narrow that it does not even allow an award of costs for a witness who is also a party. *Evanow v. M/V Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998); *Haroco, Inc. v. American National Bank & Trust Co.*, 38 F.3d 14289, 1442 (7th Cir. 1994). There is no authority for the proposition that attorney costs are recoverable under Section 1821.

reasonable and necessary. *Hall v. Ohio Education Assoc.*, 984 F.Supp. 1144, 1146 (S.D. Ohio 1997). Plaintiffs' counsel have failed to meet their burden of proof.

According to plaintiffs' Exhibit B, Mr. Sandstrom, on behalf Perkins Coie, is seeking to recover \$6,495.87 in alleged expenses. However, there is nothing in Mr. Sandstrom's "Declaration"⁸ or the exhibits submitted by Perkins Coie that identifies what this money was spent on. All we have is Mr. Sandstrom's declaration that "[t]he costs for which Perkins Coie seeks reimbursement are to the best of my knowledge the costs actually incurred." Since Perkins Coie has not even told us what the expenses are, it has failed to show the expenditures were reasonable or necessary.

The same is true of the \$1,062.12 which Plaintiffs' Exhibit B attributes to Mr. Minberg at People for the American Way. Mr. Minberg did not submit a "Declaration" or any supporting documentation. In fact, there is nothing to indicate that People for the American Way is even a party to this motion, which raises a serious question of propriety.

Even the expenses for which we do have documentation are unreasonable or unnecessary. For example, Raj Nayak seeks \$634.92 relating to his trip to Ohio to testify at a rules hearing in May, 2006, two months before the case was filed. How was this trip by Mr. Nayak necessary to the litigation which as yet did not exist, and with which Mr. Nayak had little involvement once it did commence? The Motion does not explain. Ms. Paradis asks for \$372.10 for her travel to attend the preliminary injunction hearing. As noted before, she did not participate in the hearing. Counsel need to explain why it was reasonable and necessary for her to come to Ohio in person, and they have not done so. This request is particularly hard to swallow when set beside Mr. McTigue's request for \$190 spent on the Pro Hac Vice filing fee for Ms. Weiser, who works alongside Ms. Paradis. Why have Ms. Weiser admitted *pro hac vice*, but then send Ms. Paradis,

⁸ None of the "Declarations" is a properly executed affidavit.

who was not admitted and could not appear? Why pay to have Ms. Weiser admitted, when local counsel would sign all pleadings and Ms. Weiser never came to Ohio?

Mr. McTigue seeks payment for mileage and parking costs incurred on May 17, 2007. How is one to evaluate whether that travel was reasonably related to the litigation, when he has offered no explanation of where he was traveling or why? A review of the time sheets for Mr. McTigue and his colleague, Mr. McGinnis, show no activity by either person on that date, which strongly suggests the travel was **not** related.

There are plenty more questions one could ask about these expenses: Why is Mr. McTigue's parking and mileage expenses to attend the rules hearing on June 5, 2006 a "litigation" expense? Why was it reasonable or necessary for plaintiffs to purchase a hearing transcript which was never cited or used in any subsequent brief or proceeding? Nothing about the staffing and expenditures on this case is reasonable. Rather than try to sift through these expenses line by undocumented line, the Court should deny the motion entirely.

V. **Conclusion**

The Plaintiffs' billing records are unreasonable and highly inflated. Defendant, Jennifer Brunner, asks the Court to deny the fee request entirely as outrageous and unsubstantiated.

Respectfully submitted,

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Certificate of Service

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 28th day of April, 2008.

/s Richard N. Coglianese