

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

AMERICAN BROADCASTING COMPANIES, INC., THE
ASSOCIATED PRESS, CABLE NEWS NETWORK LP,
LLLP, CBS BROADCASTING INC., FOX NEWS
NETWORK, L.L.C. and NBC UNIVERSAL, INC.,

Plaintiffs,

- against -

JENNIFER BRUNNER, in her official capacity as the
SECRETARY OF STATE OF OHIO,

Defendant.

Cause No. 1:04CV750
District Judge Michael Watson

**REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR
AN AWARD OF ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 1988**

Richard Goehler
FROST BROWN TODD LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202-4182
Telephone: (513) 651-6711
E-Mail: rgoehler@fbtlaw.com

Of Counsel:

Susan Buckley
Kayvan Sadeghi
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
ARGUMENT	1
A. Plaintiffs’ Original Motion for Attorneys’ Fees Was Timely.....	1
B. Plaintiffs’ Retention of Cahill Gordon Was Reasonable.....	2
C. The Secretary’s Complaints About Staffing Decisions Are Baseless.....	6
D. The Firms’ Rates Are Reasonable and Comparable	6
E. Plaintiffs Were Awarded Complete Relief.....	8
F. The Secretary’s Litigation Conduct Weighs In Favor of a Full Award	10
G. The Time Spent on the Fee Applications Was Reasonable.....	10
H. Plaintiffs’ Out-of-Pocket Expenses Are Fully Recoverable.....	12
CONCLUSION	13

This memorandum is respectfully submitted on behalf of plaintiffs American Broadcasting Companies, Inc. (“ABC”), The Associated Press (“AP”), Cable News Network LP, LLLP (“CNN”), CBS Broadcasting Inc. (“CBS”), Fox News Network, L.L.C. (“Fox News”) and NBC Universal, Inc. (“NBC”) (collectively “Plaintiffs”) in further support of their motion for an award of attorneys’ fees.

The Secretary of State grasps at straws in her effort to oppose what should be a straight-forward award of attorneys’ fees following a definitive victory for Plaintiffs. The Secretary first asserts — either out of careless error or a deliberate attempt to mislead this Court — that Plaintiffs’ fee application is untimely. As we demonstrate below, it is not. The Secretary then attempts to argue that Plaintiffs lost half the issues presented to this Court and that their attorneys’ fees should be reduced by half. That is nonsense. The Secretary’s remaining arguments lack support, contradict each other, and rely on out-dated law. The Secretary ignores the unique circumstances created by the Secretary’s eleventh-hour oral directive, her ever-changing written directives, and the entirely wasteful appeal. The resulting litigation costs are of the Secretary’s own making. The Court should grant Plaintiffs’ attorneys’ fees motion in its entirety.

ARGUMENT

A. Plaintiffs’ Original Motion for Attorneys’ Fees Was Timely

The Secretary begins her assault on Plaintiffs’ request for an award of attorneys’ fees with the claim that Plaintiffs’ original motion was untimely. The argument is frivolous, at best.

As required by Federal Rule of Civil Procedure 54(d)(2)(B), Plaintiffs filed their motion for an award of attorneys’ fees incurred in connection with the proceedings before this

Court on October 11, 2006. The Secretary correctly recites that Rule 54(d)(2)(B) requires motions for attorneys' fees to be filed within fourteen days *after entry of judgment*. (Opposition at 2, emphasis added) The Secretary then attempts a bait-and-switch, claiming that the motion was untimely because it was filed fifteen days *after the Court "issued its initial decision"* on September 26, 2006. (*Id.*) The judgment, however, was entered the following day, September 27, 2006. (Docket # 64) Plaintiffs' motion for attorneys' fees was timely filed fourteen days *after entry of judgment*. Having correctly recited that the operable date is the date of the entry of judgment, it is simply mind boggling, to say the least, for the Secretary to have urged this Court to deny Plaintiffs' motion on timeliness grounds in the face of these irrefutable facts.

What *is* untimely is the Secretary's effort to oppose the motion now. The Secretary was served with Plaintiffs' first motion on October 11, 2006, more than ten months ago. She chose not to respond to the motion at that time. She chose not to seek an extension of time to do so and no extension of her time to do so was ever granted. On this basis alone, the Court may properly reject all of the arguments now belatedly proffered by the Secretary in response to the motion.

B. Plaintiffs' Retention of Cahill Gordon Was Reasonable

The Secretary concedes that the applicable standard for determining reasonable attorneys' fees for non-local counsel is "(1) whether hiring the out-of-town specialist was reasonable in the first instance, and (2) whether the rates sought by the out-of-town specialist are reasonable for an attorney of his or her degree of skill, experience, and reputation." (*Id.*, quoting *Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995)). Although the Secretary mocks (and misquotes) our observation that Cahill Gordon's experience *in exit polling litigation* is unmatched by any firm in the country (*see* Opposition at 4), the Secretary does not contest that this is so because she can't. Nor does the Secretary contest that the rates charged by Cahill

Gordon are the firm's normal billing rates for paying clients and are thus presumed to be reasonable for attorneys of their degree of skill, experience, and reputation. (*See id.*)

Instead, the Secretary argues that hiring an out-of-town specialist was unnecessary and that Cahill Gordon's fees should be recalculated according to rates prevailing in Ohio. (*See* Opposition at 4) In doing so, the Secretary ignores the unique circumstances created by the eleventh-hour oral directive and the significant efficiency gains resulting from the retention of counsel who was involved in every prior litigation involving restrictions on exit polling.¹

Plaintiffs were not only reasonable in retaining Cahill Gordon as out-of-town specialists in the first instance, they were left with no viable alternative as a result of the Secretary's last-minute oral directive issued on the eve of the 2004 election. As the Court is well aware, despite a history of exit polling without incident in Ohio, and repeated assurances that exit polling would be allowed in 2004, this case arose after the Secretary advised Plaintiffs on Friday, October 29, 2006 — less than two business days before the election — that exit polling would not be allowed within 100 feet of Ohio polling places on November 2, 2004. (Opinion at 6-7) Plaintiffs had less than 72 hours, over a weekend, to prepare their entire case for presentation to this Court on the following Monday.

Now, the Secretary advances the untenable position that, on the weekend before the election, Plaintiffs should have retained Ohio counsel to investigate the facts, conduct appropriate legal research, identify witnesses, draft all papers initiating the action, finalize all mate-

¹ The Secretary also ignores the fact that Plaintiffs have provided the Court with calculations of their fees at local rates, notwithstanding the fact that, as demonstrated below and in Plaintiffs' prior papers, hiring an out-of-town specialist was reasonable given the nature of the suit and extreme time constraints created by the Secretary's actions.

rials to be filed in support of a request for a temporary restraining order and prepare for a hearing on Monday morning. The argument defies logic. Cahill Gordon's prior experience litigating precisely this type of challenge was indispensable under the extreme circumstances created by the Secretary's last-minute oral directive. It was entirely reasonable for Plaintiffs to retain Cahill Gordon, the only attorneys intimately familiar with the facts and law at issue, to handle this matter. *See Hadix*, 65 F.3d at 535 (adopting a reasonableness standard).

The circumstances here are thus markedly different from those where courts have applied local rates to out-of-town counsel. The central question is whether the legal work was of a type that local counsel regularly performs, rendering an out-of-town specialist unnecessary. In *Hadix*, for example, the court found it unreasonable to compensate counsel at non-local rates for routine monitoring of compliance with a court order — a task regularly and routinely handled by local counsel. *See id.* In approving non-local rates, the court in *Crosby v. Bowater Inc. Retirement Plan For Salaried Employees of Great Northern Paper, Inc.*, 262 F. Supp. 2d 804 (W.D. Mich. 2003) explained why the logic of *Hadix* is not applicable to the circumstances here. *Crosby* distinguished precedent applying the same standard as *Hadix*, noting that it was appropriate to award out-of-town counsel at non-local rates, because local rates should only be applied when the work being performed was “typical of many other cases filed by local attorneys [such that there was no] need to employ either high priced local counsel or an out-of-town specialist to perform the duties of the plaintiff counsel.” *Id.* at 813. This case was hardly a typical case regularly or routinely filed. The case involved a last-minute affront to the press' core First Amendment right to report on local and national elections in one of the most influential and hotly contested states in the country. The legal issues were matters of first impression in the Sixth Circuit, both with respect to the construction of the specific statutes at issue and the constitutional concerns raised thereby. In short, this is precisely the type of case

where a specialist is deemed necessary. *See Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983) (relevant factors include the novelty and difficulty of the questions and the time limits imposed by the circumstances).

Plaintiffs were also reasonable in continuing to use Cahill Gordon after the temporary restraining order was issued if for no other reason than to gain the substantial increase in efficiency available from Cahill Gordon's prior litigation experience with regard to exit polling matters generally, as well as their research and preparation for the temporary restraining order in this case.² While it is true that the Frost Brown firm is experienced and well-qualified, they did not have the benefit of Cahill Gordon's prior litigation and general familiarity with the facts and law specifically related to exit polling. Moreover, as the attorney time records (and time spent before this Court) demonstrate, Plaintiffs' counsel did seek to efficiently distribute tasks between Cahill Gordon and Frost Brown. At the preliminary injunction hearing, for example, cross examination of Defendant's testifying witness was handled by Mr. Goehler, while the legal argument, informed by Cahill Gordon's prior exit polling litigation experience, was handled by Ms. Buckley. This division allowed for the most efficient use of Cahill Gordon's prior experience while simultaneously allocating distinct and/or local tasks to Frost Brown. Plaintiffs should not be penalized for retaining a New York firm as counsel in this action when the very reason for doing so was to minimize the time necessary to prepare and present their case. *See, e.g., Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 770 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983); *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983).

² Indeed, it is worth noting that the standard as set forth in *Hadix* considers whether it was reasonable to hire out-of-town counsel "in the first instance", as it is rarely reasonable or more efficient to change counsel mid-stream.

C. The Secretary's Complaints About Staffing Decisions Are Baseless

The Secretary advances two contradictory and unsupported arguments in support of her claim that counsel's staffing decisions were unreasonable. On the one hand, the Secretary argues that Plaintiffs' counsel failed to delegate work that "could have reasonably been done by lower level associates." (Opposition at 7) Tellingly, not a single example is offered. (*See id.*) On the other hand, the Secretary also contests the fact that Plaintiffs' counsel *did* delegate tasks to more junior associates, objecting to the fact that the fee application does not "justify any possible unique and special skills" of a first-year associate to whom tasks were delegated. (Opposition at 5-6) The Secretary can't have it both ways, arguing that tasks should have been delegated to someone less experienced, then objecting to the lack of experience of those to whom work is delegated.

The Secretary's only specific example of purported improper staffing is an assertion that it was unnecessarily duplicative to have both Ms. Buckley and Mr. Goehler at the TRO hearing. (*See* Opposition at 8) It was not only proper (as demonstrated above), it was required. Local Rule 83.4(a) specifically requires that counsel appearing *pro hac vice* be accompanied by local counsel.

D. The Firms' Rates Are Reasonable and Comparable

The Secretary does not argue that Plaintiffs' counsel's rates are unreasonable for firms of their skill, experience, and reputation in their respective legal markets. Instead, Defendant claims that Plaintiffs have offered no evidence of what the prevailing rates in the Southern District of Ohio are and asserts that the affidavits of Ms. Buckley and Mr. Goehler simply set forth that the rates charged to Plaintiffs here are the rates normally charged by their respective firms. (Opposition at 6-7) Defendant is simply mistaken. Both Ms. Buckley and Mr. Goehler testified to the fact that their firm's rates are comparable to those prevailing in

their firm's respective markets. (First Buckley Affidavit ¶ 48; First Goehler Affidavit ¶ 14) Defendant cannot simply will that testimony away. Ms. Buckley also attached to her first affidavit (*see* First Buckley Affidavit, Ex. C), a detailed published report of firm billing rates nationwide, a report that includes firms in both New York and Ohio. That Defendant chooses to ignore that evidence does not defeat it.

A lawyer's ordinary billing rates for paying clients are presumed to be reasonable, *see Adcock-Ladd v. Secretary of Treasury*, 277 F.3d 343, 351 (6th Cir. 2000), and the Secretary does not suggest otherwise. Nonetheless, as the Secretary is apparently dissatisfied with the present evidentiary record (including that which she chooses to ignore), we are submitting herewith additional information concerning the rates prevailing at comparable firms in New York and Ohio, information that should put an end to the Secretary's baseless arguments. *See* Affidavit of Maria Boboris, sworn to August 23, 2007 and Ex. A; Affidavit of Julie Pfeifer, sworn to August 24, 2007, and Ex. A.³ As these affidavits confirm, there can be no question that the rates charged by Cahill Gordon and Frost Todd are comparable to those of their peers notwithstanding Defendant's insulting — and wholly unsupported — assertions to the contrary.⁴

³ Ms. Boboris attaches a chart, prepared in connection with another litigation, detailing rates for comparable New York firms derived from an analysis of fee applications in bankruptcy proceedings for the period February 1, 2005 through September 30, 2006, a period substantially similar to the period at issue here. Ms. Pfeifer attaches a similar chart detailing comparable Ohio rates for the years 2004 through 2006. The underlying bankruptcy filings will separately be provided to Defendant's counsel and to the Court should the Court wish to examine them.

⁴ The Secretary claims that she will proffer relevant evidence on this point at the hearing on Plaintiffs' motions for attorneys' fees scheduled for September 13, 2007. (Opposition at 7 n.4) The Secretary's offer is too little and too late. Defendant is not permitted to oppose a motion on the ground that she is dissatisfied with the evidentiary record (a record she chooses in any event to ignore) and then insist that she will present her own evidence after briefing is closed.

E. Plaintiffs Were Awarded Complete Relief

In another effort to avoid the consequences of her own litigation conduct, the Secretary insists that any award of attorneys' fees should be discounted on the ground that Plaintiffs did not prevail on all of the arguments they presented to this Court. (Opposition at 10-11) Plaintiffs achieved the very relief they sought in this litigation and are therefore entitled to a full award of attorneys' fees. The Secretary's argument that the victory was only partial, and that attorneys' fees should be reduced by half, is nonsense.

The relief sought by Plaintiffs was simple: (i) a declaration that Ohio Law did not prevent exit polling within 100 feet of the polls, and could not constitutionally be interpreted to do so; (ii) an order enjoining the Secretary or those acting at his direction from issuing or enforcing any rule or directive prohibiting exit polling within 100-feet; and (iii) an Order directing the Secretary to issue a new written directive that complied with the Court's findings. That is precisely the relief granted by this Court. (Opinion at 44-45)

The Secretary's argument that Plaintiffs' victory was only partial because the Court did not find the New Directive unconstitutionally vague, does not detract from Plaintiffs' success. In fact, the Secretary was ordered to issue a written directive to replace the New Directive with language expressly mandated by the Court. (*Id.* at 45) That Plaintiffs filed a cautionary notice of appeal as they waited to see if the Secretary would comply with this Court's injunction on Election Day 2006, is entirely irrelevant. Indeed, Plaintiffs withdrew their notice of appeal before any briefing on the issue precisely because the requested relief — a court-ordered written directive — had already been granted and had been complied with. There was

no further relief the Court of Appeals could have granted.⁵

The law is clear that “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” *Hensley*, 461 U.S. at 435. This is true even where the plaintiff has “succeeded on only some of his claims for relief.” *Id.* at 434. Here, Plaintiffs’ claims revolved around a common legal question and set of facts — *i.e.* whether the Secretary’s attempts to prevent exit polling within 100 feet of the polls violated the constitution. In these circumstances, *Hensley* makes clear that for attorneys’ fees purposes, “the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.” *Id.* at 435. “[T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit The result is what matters.” *Id.* (citation omitted). Moreover, any reduction in attorneys’ fees may not be made lightly. “This Court has stated that a reduction in attorney fees is to be applied only in rare and exceptional cases where specific evidence in the record requires it.” *Isabel v. City of Memphis*, 404 F.3d 404, 416 (6th Cir. 2005) (granting the full fee request where plaintiff succeeded on one of its four claims, because the results were excellent and there were no exceptional circumstances). No exceptional circumstances are present here that would justify a reduction of fees.

⁵ Moreover, the presentation of argument in support of Plaintiffs’ vagueness claim relating to the New Directive (Count II), as to which Plaintiffs’ motion for summary judgment was denied, required minimal attorney time. The issue did not even arise until the last round of motion practice, and only then was set forth in three pages of argument at the end of a twenty page brief. Any reduction in fees based on time spent on Count II would accordingly be negligible in the context of the case as a whole.

F. The Secretary's Litigation Conduct Weighs In Favor of a Full Award

To the extent Plaintiffs' attorneys' fees are higher than the Secretary would prefer, it is, in a very real sense, the result of the Secretary's own wasteful litigation strategy. At every turn, the Secretary has sought to extend this litigation unnecessarily. The frivolous argument that Plaintiffs' original motion for attorneys' fees was untimely is just the latest example and is reminiscent of the Secretary's equally frivolous argument advanced before this Court that the oral directive that triggered this litigation was never issued. (Opinion at 7-9) The Secretary's decision to issue new written directives regarding exit polling during the pendency of the suit, even after this Court's initial ruling, was the sole cause of further amendments to the Complaint and unnecessarily protracted the litigation. Compounding the problem, the Secretary filed an appeal and waited until all briefing on the matter had been completed before voluntarily dismissing the appeal shortly before argument. This Court's decision granting the temporary restraining order nearly three years ago should have given the Secretary pause that the outcome of the core legal issues was clear. The decision to continue challenging Plaintiffs' constitutionally protected activities through multiple motions for summary judgment and full appellate briefing was wasteful, and the attorneys' fees incurred over years of resulting litigation are directly attributable to the actions of the Secretary, not Plaintiffs.

G. The Time Spent on the Fee Applications Was Reasonable

The Court should not restrict Plaintiffs' attorneys' fees on this motion to three percent of fees on the main litigation as the Secretary urges, (*see* Opposition at 9-10, citing *Coulter v. Tennessee*, 805 F.2d 146 (6th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987)), because the guideline would not lead to a sensible result in this case. While the 3% guideline may be appropriate in certain contexts, it is not appropriate here because the policy underlying the limitation is not implicated, and application of the guideline would lead to an unreasonable result.

For example, the Secretary urges the Court to restrict the hours for preparing the appellate fee motion to one hour for Frost Brown, and five hours for Cahill Gordon. (Opposition at 10) As a practical matter, it is simply not possible to calculate fees appropriate for reimbursement and fully prepare and submit a motion in five hours, much less one hour. Plaintiffs' should not be penalized for having conducted their work so efficiently that the 3% guideline no longer comports with any practical understanding of reasonable hours expended.

Moreover, as the Court noted in *Coulter*, the purpose of the 3% guideline is to discourage "protracted litigation" on fees. *Id.* at 151. However, here it is the Secretary, *not Plaintiffs*, who are seeking protracted litigation on fees. Indeed, the Secretary has not only argued that Plaintiffs need submit far more documentation than they submit to their fee-paying clients (*see* Opposition at 9 (seeking detail of the number and types of copies made, reasons for fax transmissions and telephone charges, etc.)), but the Secretary has recently served 8 burdensome interrogatories and 7 overly broad document requests related exclusively to Plaintiffs' fee application. In light of the Secretary's ongoing litigiousness in this case, Plaintiffs have expended the time to present detailed records in support of their fee application beyond the requirements of Rule 54.⁶ It is ironic at best that the Secretary claims on the one hand that too much time was expended on the motions and then demands on the other hand that more detail is necessary. Indeed, Plaintiffs are now forced to incur additional expenses on this fee application as a result of the Secretary's discovery demands, so that the fees requested in the fee motion already represent less than all of the total fees incurred.

⁶ The comments regarding the 1993 Amendments to Rule 54 note that the 14-day filing time was intended to quickly give notice of the amount of fees requested, and "does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees," which may be submitted later.

H. Plaintiffs' Out-of-Pocket Expenses Are Fully Recoverable

The Secretary acknowledges that courts allow recovery for out-of-pocket expenses that are normally charged to fee paying clients (Opposition at 9), and offers no support for the request that the Court reject such charges outright in this case. Instead, the Secretary challenges a few requested expenses specifically. The Secretary challenges out-of-pocket expenses for copying, transportation, and other related expenses, solely on the basis that the documentation provided in connection with the fee application is purportedly insufficient. (*Id.*) On the contrary, Plaintiffs attached detailed categorized break-downs of their out-of-pocket expenses, in exactly the form provided to fee paying clients, and presented testimony that those charges were actually and necessarily incurred. (First Buckley Affidavit ¶ 52 and Ex. D; First Goehler Affidavit ¶ 16 and Ex. B; Second Buckley Affidavit ¶ 21 and Ex. A)

Relying on out-dated law from other circuits, the Secretary also argues that computer research is “not a separately taxable cost.” (*Id.*) On the contrary, computerized legal research is standard procedure and is routinely awarded as an out-of-pocket expense. *See, e.g., Citizens Against Pollution v. Ohio Power Co.*, 484 F. Supp. 2d 800, 816 (S.D. Ohio 2007) (awarding costs of computerized legal research); *see also Bench Billboard Co., Inc. v. Louisville-Jefferson County Metro Government*, 2007 WL 2229536, at *6 (W.D. Ky. Aug. 1, 2007) (noting the “growing circuit consensus that reasonable charges for computerized research may be recovered”). All of the expenses sought here are typically billed to clients in Plaintiffs’ counsel’s respective legal markets, and have been billed to Plaintiffs in this case. The Secretary has not pointed to anything to indicate that the charges are unreasonable, and Plaintiffs’ counsel have submitted ample documentation of the basis for the charges. Accordingly, Plaintiffs’ request for reimbursement for their out-of-pocket expenses should be granted.

CONCLUSION

Plaintiffs' motion for an award of reasonable attorneys' fees, including appropriate expenses, should be granted in its entirety.

Dated: August 24, 2007

Respectfully submitted,

FROST BROWN TODD LLC

By: /s/ Richard M. Goehler
Richard M. Goehler

Of Counsel:

Susan Buckley
Kayvan Sadeghi
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005

2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202-4182
Telephone: (513) 651-6711
E-Mail: rgoehler@fbtlaw.com

Counsel for Plaintiffs American Broadcasting Companies, Inc., The Associated Press, Cable News Network LP, LLLP, CBS Broadcasting Inc., Fox News Network, L.L.C., and NBC Universal, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum in Further Support of Plaintiffs Motion for an Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988 was served upon Defendant electronically via the court's electronic filing system this 24th day of August, 2007.

/s/Richard M. Goehler