

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

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

Plaintiffs,

*- against -*

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

Defendant.

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Cause No. 1:04CV750  
District Judge Michael Watson

**SECOND MOTION OF PLAINTIFFS FOR AN AWARD OF  
ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 1988**

Pursuant to 42 U.S.C. § 1988, Plaintiffs American Broadcasting Companies, Inc., The Associated Press, Cable News Network LP, LLLP, CBS Broadcasting Inc., Fox News Network LLC and NBC Universal, Inc. respectfully file this second motion and move this Court for an award of attorneys' fees in this action. The grounds supporting this second motion for attorneys' fees are set forth in the Memorandum of Law in Support of Plaintiffs' Second Motion for an Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988; Affidavit of Susan Buckley in Support of Plaintiffs' Second Motion for an Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988; and the Affidavit of Richard M. Goehler in Support of Plaintiffs' Second Motion for an Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988, each filed separately herein.

Plaintiffs' first motion for attorneys' fees, the Motion of Plaintiffs for an Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988 filed herein on October 11, 2006, remains pending before the Court.

Dated: July 20, 2007

Respectfully submitted,

FROST BROWN TODD LLC

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

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion of Plaintiffs 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 20<sup>th</sup> day of July, 2007.

/s/Richard M. Goehler

**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,  
LLP, 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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SECOND MOTION  
FOR AN AWARD OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988**

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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 support of their second motion for an award of attorneys’ fees.

On September 26, 2006, this Court declared that the Secretary of State’s<sup>1</sup> directive to state election officials prohibiting exit polling within 100 feet of polling places violated the First Amendment and that Ohio Revised Code §§ 3501.30, 3501.35 and 3599.24 (the “Loitering Statutes”) cannot be interpreted to prohibit exit polls within the 100-foot designated area around polling places without violating the First Amendment. This Court also entered permanent injunctions against the enforcement of the Secretary of State’s Oral Directive and against the issuance or enforcement of any rule, directive, advisory, policy or communication that would prohibit exit polls within the 100-foot designated area around polling places, and ordered the Secretary of State to issue a written directive stating that it would be unlawful and unconstitutional to interpret, apply, or enforce the Loitering Statutes to prohibit exit polls within 100 feet of polling places. On October 26, 2006, Defendant appealed this Court’s ruling to the Sixth Circuit. (Doc. # 67) *See* Affidavit of Susan Buckley in Support of Plaintiffs’ Second Motion for an Award of Attorneys’ Fees Pursuant to 42 U.S.C. § 1988 (“Second Buckley Aff’t”) at ¶ 2.

As required by Federal Rule of Civil Procedure 54(d)(2)(B), on October 11, 2006

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<sup>1</sup> Secretary Blackwell was succeeded as Secretary of State by Jennifer Brunner on January 8, 2007. As a result, she is automatically substituted as the party defendant. Fed. R. Civ. P. 25(d).

Plaintiffs, as prevailing parties in the action, filed their motion for an award of attorneys' fees incurred in connection with the proceedings before this Court. (Doc. # 65, "First Fee Motion")) Rather than respond to the motion (and without seeking an extension of time to do so), on October 31, 2006, Defendant filed a "motion to defer" any ruling on Plaintiffs' motion for attorneys' fees in light of the pendency of the appeal. (Doc. # 74) Plaintiffs' First Fee Motion remains pending. *See* Second Buckley Aff't, ¶ 3.

On November 9, 2007, the Court of Appeals entered a scheduling order for the submission of appellate briefs. Proof briefs were submitted by Defendant on January 9, 2007 and by Plaintiffs on February 12, 2007. The Joint Appendix was prepared and was filed on March 27, 2007. Final briefs were submitted by the parties on April 16, 2007. Oral argument was definitively scheduled for July 18, 2007. *See* Second Buckley Aff't, ¶ 5.

On June 28, 2007, more than seven months after filing their notice of appeal, and after all briefing in connection with the appeal had been completed, Defendant filed a notice of voluntary dismissal of the appeal with no prior notice to Plaintiffs. *See* Second Buckley Aff't, ¶ 6. Treating the notice as a motion to dismiss the appeal, on July 9, 2007, the Court of Appeals granted the motion thus ending the appellate phase of this case and leaving this Court's declaratory judgment and permanent injunction entirely intact. *Id.*

Accordingly, as prevailing parties on the appeal, Plaintiffs now file their motion for an award of attorneys' fees in connection with the appeal and respectfully request that this Court consider this motion, together with Plaintiffs' First Fee Motion, at this time.

ARGUMENT

I. AS THE PREVAILING PARTIES IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983, PLAINTIFFS ARE ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976

As prevailing parties in an action brought pursuant to 42 U.S.C. § 1983 (2000) (“section 1983”), Plaintiffs are entitled to an award of reasonable attorneys’ fees and expenses incurred in this action pursuant to the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000) (“section 1988”). It cannot be disputed that Plaintiffs’ claims in the present case arose under section 1983 and that the provisions of section 1988 apply to this action. *See* Complaint, ¶ 1; First Fee Motion.

The legislative history of section 1988 and the case law both make clear that prevailing plaintiffs are entitled to such an award “‘unless special circumstances would render such an award unjust.’” *Kentucky v. Graham*, 473 U.S. 159, 164 (1985) (quoting S. Rep. No. 94-1011, p. 4 (1976)); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). As fully set forth in our memorandum submitted in support of the First Fee Motion (Doc. # 65), there can be no question that Plaintiffs are the prevailing parties within the meaning of section 1988. Plaintiffs obtained all of the relief they requested, including: (i) a declaration that the Secretary of State’s directive was unconstitutional and that the Ohio Loitering Statutes could not be interpreted to prohibit exit polls within the 100-foot designated area around polling places without violating the First Amendment to the Constitution; (ii) a permanent injunction against the enforcement of the Secretary of State’s Oral Directive and against the issuance or enforcement of any rule, directive, advisory, policy or communication that would prohibit exit polls within the 100-foot designated area around polling places; and (iii) an order that the Secretary of State issue a written directive stating that it would be unlawful and unconstitutional to interpret, apply, or en-

force the Loitering Statutes to prohibit exit polls within 100 feet of polling places. *American Broadcasting Co. v. Blackwell*, No. 1:04cv750 (S.D. Ohio Sept. 26, 2006). Accordingly, an award of attorneys' fees and expenses pursuant to section 1988 should be made as a matter of course.

The law is equally clear that Plaintiffs are entitled to seek attorneys' fees from this Court for services rendered on appeal. "[T]he relevant inquiry is simply whether the party seeking compensation substantially prevailed at the appellate level. Consideration and disposition of this critical issue is pragmatically left to the forum of the trial court." *Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 682 (6<sup>th</sup> Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986) (internal citation omitted). Here, because Defendant voluntarily dismissed her appeal, there can be no dispute that Plaintiffs were the prevailing parties on appeal. *Glover v. Johnson*, 138 F.3d 229, 252 (6<sup>th</sup> Cir. 1998) ("The plaintiffs should be compensated for their work in connection with the appeal . . . because the defendants' voluntary dismissal of the appeal in effect made the plaintiffs prevailing parties."). The voluntary dismissal of Defendant's appeal leaves in place the relief granted to Plaintiffs by this Court, precisely the result sought by Plaintiffs in opposing Defendant's appeal. Accordingly, for all the reasons set forth in Plaintiffs' First Fee Motion, Plaintiffs should be compensated for their work on appeal as well. Finally, Plaintiffs should be compensated for their work in preparing this submission. *Coulter v. Tennessee*, 805 F.2d 146, 151 (6<sup>th</sup> Cir. 1986) ("[t]ime spent in preparing, presenting, and trying attorney fee applications is compensable"), *cert. denied*, 482 U.S. 914 (1987).

II. THE ATTORNEYS' FEES FOR WHICH PLAINTIFFS SEEK REIMBURSEMENT ARE REASONABLE AND SHOULD BE AWARDED IN THEIR ENTIRETY

“The most useful starting point for [determination of] the amount of a reasonable fee [payable to a prevailing party] is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002) (quoting *Hensley*, 461 U.S. at 433); accord *Paschal v. Flagstar Bank, FSB*, 297 F.3d 431, 434 (6th Cir. 2002), *cert. denied*, 537 U.S. 1227 (2003). Plaintiffs’ First Fee Motion, and the affidavits submitted in support thereof, set forth in detail the qualifications and experience of Plaintiffs’ counsel, the basis for determining their reasonable hourly rate, and the specific nature of the work performed in connection with the proceedings before this Court. In the interests of brevity and to avoid duplication, Plaintiffs incorporate by reference their submissions on the First Fee Motion in support of this motion, and submit the following affidavits detailing the work performed since the submission of the First Fee Motion:

- The Affidavit of Susan Buckley (“Second Buckley Affidavit”). Ms. Buckley describes in detail the specific responsibilities of each Cahill Gordon attorney who assisted on this litigation since the filing of the First Fee Motion. She describes the tasks performed by each such attorney and attaches, as Exhibit A to her affidavit, the actual line-item contemporaneous daily time reports for each attorney involved in the appeal and in preparing this submission. Ms. Buckley also sets forth the sum of fees requested for work performed by each Cahill Gordon attorney, as well as the total of recoverable expenses incurred by that firm since the First Fee Motion was filed.

- The Affidavit of Richard M. Goehler (“Second Goehler Affidavit”). Mr. Goehler describes the role of co-counsel Frost Brown Todd LLC (“Frost Brown”) since the filing of the

First Fee Motion, and provides similar detail for fees requested and the recoverable expenses incurred by the Frost Brown firm.

Plaintiffs respectfully submit that the affidavits of Ms. Buckley and Mr. Goehler more than satisfy the requirements articulated by the Supreme Court and the Sixth Circuit and demonstrate that the hours expended by counsel for Plaintiffs are reasonable. Ms. Buckley's affidavit makes clear that the vast majority of the hours spent by Cahill Gordon attorneys since the filing of the First Fee Motion were spent preparing Plaintiffs' appellate brief, with limited time spent thereafter to follow up with the Court of Appeals, to monitor the status of the appeal, and to prepare this submission. (Second Buckley Affidavit ¶¶ 11-16.) This work was obviously necessary in light of the Secretary of State's decision to appeal this Court's ruling. That these costs could easily have been avoided had Defendant chosen not to pursue an appeal is unfortunate. It is even more so given Defendant's decision to pursue the appeal through full briefing only to abandon it weeks before oral argument. The fees incurred are fully reimbursable under section 1988.

The affidavit of Ms. Buckley also shows that care was taken to allocate responsibility for various tasks required during the course of the appeal, where possible, to an associate assisting on the case. While Ms. Buckley was heavily involved in and responsible for the strategy, client conferences, and review and consolidation of the work product of the associates on the case, duplication of effort and unnecessary staffing were avoided by a careful delineation of responsibility among the members of the small litigation team.

As demonstrated by the affidavits of Ms. Buckley and Mr. Goehler submitted in support of the First Fee Motion, the rates charged Plaintiffs by both Cahill Gordon and Frost Brown in this case are the rates normally charged by those firms to their clients. The rates re-

flect the experience level of counsel and the quality of their work, consistent with the prevailing market rates for similar competent counsel in New York and Cincinnati, respectively.

The Sixth Circuit has held that “[w]hen fees are sought for an out-of-town specialist, courts must determine (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.” *Hadix*, 65 F.3d at 535; *see also* First Fee Motion at 9. It cannot be disputed that Cahill Gordon’s experience in cases concerning the constitutionality of state restrictions on exit polling activities is unmatched by any firm in the country (*see, e.g.*, First Fee Motion at 9), and that Cahill Gordon’s familiarity with this case based on the work performed before this Court made the firm’s attorneys uniquely qualified to handle the appeal in the most efficient manner possible. Plaintiffs should not be penalized for retaining a New York firm as counsel in the appeal 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).

Having demonstrated the reasonableness of the time spent and the reasonableness of the rates charged, the lodestar amount — the product of the two — is established. “There is a ‘strong presumption’ that this lodestar figure represents a reasonable fee.” *Building Service Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995) (citing *Delaware Valley*, 478 U.S. at 565).

III. PLAINTIFFS' EXPENSES INCURRED IN PURSUING THE APPEAL ARE ALSO RECOVERABLE UNDER SECTION 1988

Plaintiffs are entitled to an award of reasonable expenses as a matter of course, and any reductions should occur only where the expenses sought are deemed unreasonable. *See* First Fee Motion at 13-14; *Northcross*, 611 F.2d at 639-40 (incidental costs are included in the concept of attorneys' fees, such as photocopying, paralegal expenses, travel and telephone costs, and are recoverable pursuant to the statutory authority of [section] 1988); *Dowdell*, 698 F.2d at 1191 (expenses are "liberally" dispensed as appropriate to the specific litigation and "even relatively large and unusual costs may be taxed when they are reasonably incurred").<sup>2</sup>

The expenses incurred by Cahill Gordon and Frost Brown are described in detail in the affidavits of Ms. Buckley and Mr. Goehler. All of these expenses were of the type "normally charged to a fee-paying client" and all are recoverable under section 1988. *See Northcross*, 611 F.2d at 639. Thus, Plaintiffs should be fully compensated for printing and photocopying expenses, facsimile and long distance telephone charges, postage, courier and air freight, computer-assisted research, overtime, and word processing expenses. *See id.*

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<sup>2</sup> The traditional authority for recovering costs is Federal Rule of Civil Procedure 54(d) and 28 U.S.C. §§ 1920 and 1923(a). Under these provisions, recovery is limited in scope to necessary costs incurred by the prevailing party that were paid to a third party — *i.e.*, docket fees, marshal fees, deposition expenses, and witness expenses. All such costs incurred by Plaintiffs that would have been recoverable through the filing of a bill of costs in this court or the Court of Appeals have been excluded from this application.

CONCLUSION

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

Dated: July 20, 2007

Respectfully submitted,

FROST BROWN TODD LLC

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