STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
A11-152

Sara Hippert, Dave Greer, Linda Markowitz, Dee Dee Larson, Ben Maas, Gregg Peppin, Randy Penrod and Charles Roulet, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

Kenneth Martin, Lynn Wilson, Timothy O'Brien, Irene Peralez, Josie Johnson, Jane Krentz, Mark Altenburg, and Debra Hasskamp, individually and on behalf of all citizens of Minnesota similarly situated,

Intervenors,

Audrey Britton, David Bly, Cary Coop, and John McIntosh, individually and on behalf of all citizens of Minnesota similarly situated,

Intervenors,

vs.

Mark Ritchie, Secretary of State of Minnesota; and Robert Hiivala, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.



**SECRETARY OF STATE MARK RITCHIE'S MEMORANDUM IN OPPOSITION TO MOTION FOR ATTORNEYS' FEES**

## INTRODUCTION

Plaintiffs and Intervenors together seek nearly three quarters of a million dollars in attorneys' fees and costs from nominal defendants in these redistricting proceedings, the payment of which would be borne by the taxpayers of Minnesota. The Plaintiff groups

claim success because the Panel found that the districts created by a prior redistricting panel a decade ago are unconstitutional and cannot be used for the 2012 regular elections. However, the need to reapportion in light of the 2010 Census was a foregone conclusion, as it is every ten years. This conclusion, which was undisputed by the nominal Defendants, hardly supports an attorney fee award, let alone one in the magnitude requested by all Plaintiffs' counsel.

Even if the Panel finds that the Plaintiff groups are prevailing parties, any fee award should be significantly reduced. The crux of this litigation, including the majority of the fees and costs expended, involved the proposed redistricting plans. Yet none of the Plaintiff groups can claim anything more than limited success with respect to the ultimate decision of the Panel. Indeed, the redistricting plans were created by the *Panel's* efforts, with as much input from the public as from the Plaintiff groups. Under these circumstances, the taxpayers should not be required to pay the fees and costs requested; at best, only a fraction of those amounts would be appropriate based on the alleged success of the parties.

Finally, the fee requests are not based upon reasonable hourly rates or hours reasonably expended, so they should be reduced for this reason as well.

## FACTS

### A. Federal Court Proceedings.

On January 12, 2011, the Britton Intervenors commenced an action in federal district court. They alleged that the congressional and legislative districts created by the Minnesota Special Redistricting Panel in *Zachman, et al. v. Kiffmeyer* (Minn. S. Ct. Case

No. C0-01-160) in March 2002 (the "*Zachman* districts"), were unconstitutionally malapportioned. The action sought a permanent injunction and judgment decreeing that the districts "may not hereafter be used" by the State in any future elections. (*See* Britton Fed. Compl. at 13-15, attached to Affidavit of Kristyn Anderson ("Anderson Aff.") as Ex. A.) A three-judge panel was appointed, but on February 7, 2011, pursuant to an agreement by the parties[1], the action was stayed.

On May 17, 2011, the Britton group moved the federal district court to dissolve the stay, and authorize them to make a partial summary judgment motion. The motion sought an order that the *Zachman* districts were "now unequally apportioned," that the *Zachman* districts "may [not] be used for any purpose," and that the parties submit redistricting criteria to the *federal* court. (*See* Britton Fed. Mot. to Lift Stay, Anderson Aff. Ex. B.) Defendant Ritchie opposed this motion, arguing that the stay should remain in place because the Minnesota Legislature and Governor still had an opportunity to adopt new legislative and congressional redistricting plans, and in any event, the federal court must defer to the Minnesota state court redistricting proceeding, citing *Growe v. Emison*, 507 U.S. 25 (1993). The federal district court agreed with Defendant Ritchie and denied the Britton group's motion to lift the stay, stating, "the stay should [ ] remain in effect, and the state legislative and judicial processes should be allowed to proceed without the interference of federal litigation." (*See* July 21, 2011 Fed. Ord. on Mot. Lift

[1] The Hippert Plaintiffs and a group represented by counsel for Martin Intervenors also intervened in the federal action.

Stay & For Intervention at 6, Anderson Aff. Ex. C.[2])

**B. The State Redistricting Proceedings.**

On January 21, 2011, the Hippert Plaintiffs commenced an action in Wright County. On January 25, 2011, the Hippert Plaintiffs moved Minnesota Supreme Court Chief Justice Lorie Gildea to appoint a Special Redistricting Panel. On February 14, 2011, Chief Justice Gildea granted the Hippert Plaintiffs' motion, but stayed the appointment of the redistricting panel and further proceedings in order to honor "the primacy of the legislative role in the redistricting process" and to ensure that "the judiciary not be drawn prematurely into that process." (*Hippert* Feb. 14, 2011 Order at 3-4.) On June 1, 2011, the stay was lifted and the Special Redistricting Panel was appointed. During the redistricting proceedings, the parties stipulated to several items, including that the *Zachman* districts were "unequally apportioned based on the 2010 Census" and therefore that the legislative and congressional districts "need[ed] to be changed to reflect the 2010 Census for purposes of Minnesota's 2012" elections. (*See* Stipulation.) Defendant Ritchie advocated that the Panel adopt the same redistricting criteria that were successfully used in *Zachman*. (*See* Mot. of Ritchie to Adopt Redistricting Criteria.) The Panel largely adopted these criteria. (*See* Nov. 4, 2011 Ord. Stating Redist. Principles.)

On September 28, 2011, the Britton Intervenors requested an Order granting them summary judgment that the *Zachman* districts "are now unconstitutional and may not be

[2] The federal court lifted the stay only for the limited purpose of allowing intervention by the group represented by counsel for Martin Intervenors.

used for any purpose without further order of this Panel." (Statement of Unresolved Issues of Plaintiff-Intervenors Britton, *et al.* at 2.) Thus, the Britton Intervenors sought an order precluding *any future use* of the *Zachman* districts, even for special elections occurring before the 2012 regular elections. Defendant Ritchie opposed this motion, explaining that "[a] finding of current unconstitutionality would create the potential for chaos regarding any special elections which occur prior to the 2012 regular State election." (Ritchie Statement Unresolved Issue Of Const. Of Current Dists. at 3.) The Panel denied the Britton Intervenors' motion. (Nov. 4, 2011 Ord. Stating Redist. Principles at 2-4.)

On January 4, 2012, the Plaintiffs and Intervenors presented their proposed redistricting plans. Other than requesting that the Panel minimize divisions of political subdivisions, Defendant Ritchie remained neutral concerning the merits of the proposed plans. (See Dec. 8, 2011 Resp. of Ritchie.) On February 21, 2012, the Panel stated that the *Zachman* districts were unconstitutional and enjoined their use "for purposes of the 2012 primary and general elections." Since the Legislature and Governor had not enacted new redistricting plans, the Panel issued its own redistricting plans. (Feb. 21, 2012 Legis. Ord. at 22; Feb. 21, 2012 Cong. Ord. at 22.) The Panel stated that it used a "least-change" strategy in both the legislative and congressional plans, where feasible. (Feb. 21, 2012 Legis. Ord. at 10; Feb. 21, 2012 Cong. Ord. at 9.) The Panel noted that "[a]lthough certain elements from each proposed redistricting plan are reflected in the panel's [redistricting] plan, no proposed plan was adopted in its entirety." (Feb. 21, 2012 Legis. Ord. at 8; Feb. 21, 2012 Cong. Ord. at 7.) Indeed, the Panel specifically stated that

it "decline[d] to follow the more sweeping reconfigurations of congressional districts in the plans proposed by the respective plaintiffs to this action." (Feb. 21, 2012 Cong. Ord. at 9.)

The Panel also noted that "[r]obust and diverse public input" informed the redistricting process, including the record of the Minnesota House of Representatives' Redistricting Committee, public testimony given at eight public hearings held by the Panel, and written submissions by the public. (Feb. 21, 2012 Legis. Ord. at 9; Feb. 21, 2012 Cong. Ord. at 8.) The Panel stated: "We are heartened by and grateful for the level of civic engagement reflected in the public's participation in the hearing-and-comment process, and we favorably acknowledge the assistance provided." (Feb. 21, 2012 Legis. Ord. at 10; Feb. 21, 2012 Cong. Ord. at 9.)

**C. Fee Applications.**

**1. Britton Intervenors.**

The Britton Intervenors seek attorneys' fees, pursuant to 42 U.S.C. § 1988, in the amount of $173,925 and costs in the amount of $6,838.98, for a total of $180,763.98. The Britton Intervenors were represented by three attorneys. The Britton Intervenors' fee request appears to include over $22,000 for time spent working on the federal court litigation[3]-- including resisting federal court deferral to this Panel-- and expenses related to the federal court matter, such as the $350 U.S. District Court filing fee. They argue that they are prevailing parties because the Panel declared the *Zachman* districts

[3] This figure does not include the 36 hours of time spent drafting the Federal Complaint, the substance of which was also filed in the State proceedings.

unconstitutional in its February 21, 2012 Orders. They also argue that they prevailed by the mere fact that new districts were drawn. They also argue that they prevailed because the Panel used "aspects and concepts of the plans" they submitted, such as "opposition to drawing east-west Seventh and Eighth Congressional Districts across the north half of the state; maintaining an east-west congressional district in Southern Minnesota." (Britton Mem. Fees at 3.) The Britton Intervenors request the Court to consider an upward adjustment of the lodestar award for their lead counsel, Alan Weinblatt.

**2. Hippert Plaintiffs.**

The Hippert Plaintiffs argue that they are prevailing parties because the Panel determined the *Zachman* districts to be unconstitutionally malapportioned for the 2012 elections, and enjoined their use in those elections, and the Panel held that certain elements of each proposed plan are reflected in the Panel's plans.

The Hippert Plaintiffs represented the interests of the Republican Party in this litigation. The Panel noted that the Hippert Plaintiffs' proposed plans "reflect[ ] in substantial part the Legislature's [ ] plan that the Governor vetoed. . . ." (Feb. 21, 2012 Legis. Ord. at 8; Feb. 21, 2012 Cong. Ord. at 7.)

The Hippert Plaintiffs seek $225,000 in fees and $20,985.66 in costs, for a total of $245,985.66. The Hippert Plaintiffs were represented in this litigation by two different law firms, and six attorneys. It appears that the Hippert Plaintiffs are not seeking fees for work conducted by the Trimble Law Firm, and they do not identify the Trimble firm's rate or hours expended. The Hippert Plaintiffs submit the billing statements of Briggs and Morgan, P.A., but they are almost completely redacted.

### 3. Martin Intervenors.

The Martin Intervenors represented the interests of the DFL party in this litigation. They request legal fees for 728.5 hours of work. The Martin Intervenors seek fees in the amount of $279,608.85, and costs in the amount of $12,522, for a total of $292,130.85. The Martin Intervenors were represented by two different law firms and five attorneys. They seek to be reimbursed at out-of-state rates for three out-of-state attorneys and four of their legal assistants.

The Martin Intervenors allege that they prevailed in this litigation because the Panel found the existing districts were unconstitutionally malapportioned for the 2012 elections, and enjoined their use accordingly. They also argue that they prevailed because the Panel adopted some of the criteria they proposed, adjusted some of the district boundaries as they proposed, and maintained some of the boundaries as they proposed. They also argue that they prevailed because "[a]s urged by the Martin Intervenors, the Panel relied heavily on the '[r]obust and diverse public input' through live hearings and written submissions." (Martin Mem. Fees at 6.)

## ARGUMENT

### I. ATTORNEYS' FEES SHOULD BE DENIED BECAUSE NONE OF THE PLAINTIFF GROUPS PREVAILED ON A SIGNIFICANT ISSUE.

Reasonable attorneys' fees are awardable to "prevailing parties" in section 1983 actions. 42 U.S.C. § 1988. A plaintiff is a "prevailing party," if he or she succeeds on any significant issue in the litigation which achieves "actual relief on the merits of his claim [which] materially alters the legal relationship between the parties by modifying

the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 110, 111-12 (1992).

Each of the Plaintiff groups assert that they are prevailing parties under 42 U.S.C. § 1988 principally because the Panel found the *Zachman* districts unconstitutionally malapportioned for the 2012 primary and general elections. The Panel's conclusion does not confer upon them prevailing party status. *See, e.g., Navajo Nation v. Arizona Indep. Redistricting Comm'n*, 286 F. Supp.2d 1087, 1093-1094 (D. Ariz. 2003).

The court in *Navajo Nation* rejected the precise argument made by the Plaintiff groups here. *Navajo Nation* involved a redistricting case in which the plaintiffs claimed they were prevailing parties because the court agreed that 1994 districts were unconstitutional and enjoined the Arizona Secretary of State from using the malapportioned districts in the 2002 elections. *Id.* at 1093-94. The court concluded, however, that since all parties, including the secretary of state, agreed that the old districts were unequally apportioned and had to be redrawn for use in the 2002 elections, the plaintiffs had not prevailed on a significant issue for the purpose of establishing prevailing party status. *Id.* at 1093-94. The court stated that "[w]here all parties from the outset of the litigation agreed on an issue, it is not a significant issue warranting an award of attorney's fees." *Id.* at 1094.

Likewise, the Plaintiff groups are not prevailing parties. Defendant Ritchie agreed from the outset that the *Zachman* districts were unequally apportioned in light of the 2010 Census, needed to be changed to reflect the Census, and would not be used for the 2012 primary and general elections. (*See* Stipulation at 2; Joint Statement of Unresolved

Issues at 2.) As a result, these were not significant issues in the litigation warranting a fee award. In addition, since Defendant Ritchie agreed that the *Zachman* districts would not be used for the 2012 primary and general elections, the Panel's injunction did not bring about a material alteration in the legal relationship between the parties. *See Buckhannon Bd. & Care Home, Inc., v. West. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (rejecting "catalyst theory" and finding plaintiff was not prevailing party where lawsuit brought about voluntary change in defendant's conduct). Moreover, the Britton Intervenors failed entirely in a critical piece of the relief they sought-- that the *Zachman* districts be voided for use *prior to* the 2012 regular elections. Under the circumstances, the Plaintiff groups have not established that they are prevailing parties based upon the Panel's declaration or injunction.

The Plaintiff groups also cannot establish that they are prevailing parties based upon the Panel's adoption of redistricting plans. "[I]n the redistricting context the touchstone for whether a party 'prevails' is simply whether that party's map (or the map the party ultimately embraces) is ultimately adopted." *Hastert v. Illinois State Bd. of Election Comm'rs*, 28 F.3d 1430, 1443 (7th Cir. 1993), *cert. denied*, 513 U.S. 964 (1994). *Accord Navajo Nation*, 286 F. Supp.2d at 1095 (finding plaintiff was prevailing party where court accepted its proposed map). *Cf. Balderas v. State*, 2002 WL 32113830, at *3-*4 (E.D. Tex. 2002) (denying attorneys' fees award where court did not adopt any party's proposed map). Since the Panel did not adopt any of the parties' maps (and indeed specifically rejected the sweeping congressional district changes advocated by the

Plaintiff groups), but crafted its own maps, none of the Plaintiff groups are prevailing parties, and their requests for fees should be denied.

## II. IF THE PANEL AWARDS FEES TO PLAINTIFFS AND INTERVENORS, THE FEE AWARDS SHOULD BE SEVERELY REDUCED BECAUSE OF THEIR LIMITED SUCCESS.

Even if the Panel finds that the Plaintiff groups are entitled to fees, they should receive a fraction of their requests because of their limited success. "The most important factor in determining what is a reasonable fee is the magnitude of the plaintiff's success in the case as a whole. . . . If the plaintiff's success is limited, he is entitled only to an amount of fees that is reasonable in relation to the results obtained." *Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997). *See also Milner v. Farmers Ins. Exchange*, 748 N.W.2d 608, 622-23 (Minn. 2008) (holding that reasonableness of fee award must be assessed in relation to degree of success obtained, in comparison to scope of litigation as a whole). The U.S. Supreme Court explained:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. . . . That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.

*Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). *See also Farrar*, 506 U.S. at 114-15 (concluding that where recovery of compensatory damages is the purpose of civil rights litigation, although a plaintiff who is awarded only nominal damages is "technical[ly]" a prevailing party, the only reasonable fee under the circumstances is no fee at all).

The court in *Balderas* equated a redistricting case to a case seeking money damages, and applied the rule in *Farrar*. 2002 WL 32113830, at *3. The court noted that the touchstone in a redistricting case is whether a party's map is adopted. *Id.* at *3 (*citing Hastert*, 28 F.3d at 1443). The court recognized that the plaintiffs were technically prevailing parties under fifth circuit precedent, because the state's liability was uncontested and the state was enjoined from using the old districts. *Id.* at * 2. Nevertheless, the court found, under *Farrar*, that this technical victory did not merit a fees award. *Id.* at *3. The court stated, "[w]here the sole purpose of redistricting litigation is to secure for a litigant a particular remedy, and the court refuses to adopt that remedy in favor of another that is markedly different, the litigant has obtained little, if any, more than the 'technical' victory described in *Farrar*." *Id.*

Since the court did not adopt any party's proposed map, but instead drew its own map based on neutral districting principles, the court found that no attorneys' fee award was reasonable. *Id.* The court concluded:

> There are fundamental differences among almost all of the parties' proposals and the one the court adopted. . . . .The task of distilling from our plan any specific element contributed by any of these particular litigants would border on the metaphysical. Although these applicants and the rest of the voters may now exercise that franchise in legal congressional districts, we are generally convinced that a reasonable attorney's fee for these applicants is no fee at all.

*Id.* at *4.

All of the Plaintiff groups achieved at most limited success in this litigation, and any fee award should be significantly reduced as a result. As discussed above, it was a foregone conclusion that the districts were malapportioned and redistricting must occur.

While the Panel adopted many of the redistricting criteria advocated by the Plaintiff groups, the Panel adopted the redistricting criteria that Defendant Ritchie advocated should be used. *See, e.g., Balderas*, at *4 (rejecting argument that court's adoption of some redistricting principles advocated by plaintiffs entitled them to fee award, stating "[t]hat a court applies a legal principle contained in a party's brief before it concludes that the court's remedy ought not resemble what the party proposed does not, in our minds, convert an otherwise technical victory into a substantive one."). The Panel should award little or no fee for these efforts.

In addition, even if the Panel determines that the Plaintiff groups were technically prevailing parties because of the above issues, none of the Plaintiff groups can claim anything more than very limited success with respect to the most important aspect of this case: the ultimate redistricting plans. The objective for each of the Plaintiff groups was to persuade the Panel to adopt their proposed redistricting plan. None of the Plaintiff groups succeeded in this effort. The Panel explained that while "certain elements" from each of the Plaintiff groups' proposed plans are reflected in the Panel's plans, "no proposed plan was adopted in its entirety." (Feb. 21, 2012 Legis. Ord. at 8; Feb. 21, 2012 Cong. Ord. at 7.) Instead, the Panel conducted public hearings across Minnesota, obtained "[r]obust and diverse public input" from those hearings and other sources, and prepared its own plans.[4] Since none of the Plaintiff groups received all of the relief they

[4] The Martin Intervenors assert as a measure of their own success the fact that they advocated that the Panel should obtain public input. To obtain fees, the success must be achieved by the efforts of the lawyers seeking the fees. The Martin Intervenors cannot claim the Panel's efforts, and the efforts of the public, to be their success.

requested, let alone even close to full relief regarding the final redistricting plans, their fees should be significantly reduced. *See Dillard v. City of Greensboro*, 213 F.3d 1347, 135-576 (11th Cir. 2000) (reducing attorneys' fee award in redistricting case by up to two-thirds where plaintiff's proposed plan was not adopted and instead the ultimate redistricting plan resulted from the special master's own investigation and work); *Balderas*, at *4 (awarding no fee where court did not adopt any party's redistricting plan).[5]

Under such circumstances, the court may conduct an itemized reduction, or may reduce the fee petition by a percentage to account for the plaintiff's lack of complete success. *See Hensley*, 461 U.S. at 436-37 ("The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment."); *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 852 (8th Cir. 2002) (finding that district court properly reduced calculation of fees by percentage to reflect lack of complete success).[6] Plaintiffs' and Intervenors' fee requests should be reduced by a

[5] *See also Jenkins*, 127 F.3d at 718 (citing *Ustrak v. Fairman*, 851 F.2d 983, 990 (7th Cir. 1988) ("Since the reasonableness of a fee is a function in part of the success achieved by the expenditure, lack of success . . . is certainly material in deciding how large the reimbursement should be.")). *See also Hensley*, 461 U.S. at 440 ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.").

[6] To account for limited success, courts have reduced the cost award by the same percentage as the fee award reduction. *See, e.g., Piekarski v. Home Owners Sav. Bank*, 755 F. Supp. 859, 866 (D. Minn. 1991), *rev. on other grounds*, 956 F.2d 1484 (8th Cir. 1992), *cert. denied*, 506 U.S. 872 (1992).

substantial percentage to reflect the fact that they achieved no more than a technical victory.[7]

## III. PLAINTIFFS' AND INTERVENORS' FEE REQUESTS ARE EXCESSIVE AND ANY AWARD SHOULD BE REDUCED ACCORDINGLY.

To determine any fee award, the starting point for the court is the "lodestar" figure, which is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended in the litigation. *Hanig v. Lee,* 415 F.3d 822, 825 (8th Cir. 2005) (citations omitted). Any fees must be "reasonably expended," so hours that were redundant, inefficient or "simply unnecessary" are not compensable. *Jenkins*, 127 F.3d at 716, 718 ("Assessing the reasonableness of a fee requires us to consider the plaintiff's overall success; the necessity and usefulness of the plaintiff's activity in the particular matter for which fees are requested; and the efficiency with which the plaintiff's attorneys conducted that activity."). The burden is on plaintiffs' counsel to provide an appropriate demand, not on a defendant to object to every example of unnecessary billing. *See Hensley*, 461 U.S. at 434 (stating fee applicant must make good faith effort to exclude excessive, redundant or unnecessary hours). "The district court should exclude hours that were not reasonably expended." *Wheeler v. Missouri Hwy. & Transp. Comm'n,* 348 F.3d 744, 754 (8th Cir. 2003), *cert. denied*, 541 U.S. 1043 (2004) (citations omitted).

---

[7] The *Balderas* court noted that, given the partisan nature of redistricting litigation, its failure to award attorneys' fees would not impair the future vigilant enforcement of civil rights laws in the redistricting context. 2002 WL 32113830, at *4. The same can be said in this case. *See also Daggett v. Kimmelman*, 811 F.2d 793, 801 (3d Cir. 1987) ("Appellees are not obligated to compensate counsel's efforts merely to maximize anyone's political leverage.").

### A. The Hippert Plaintiffs Have Failed To Adequately Support Their Fee Petition.

In an application for attorneys' fees, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley*, 461 U.S. at 437. *See also Philipp v. ANR Freight Sys., Inc.*, 61 F.3d 669, 675 (8th Cir. 1995) (stating, "the plaintiff bears the burden of establishing an accurate and reliable factual basis for an award of attorneys' fees"). Minnesota General Rule of Practice 119.02 requires that "any action or proceeding" for attorneys' fees must be accompanied by an affidavit establishing the following:[8]

> 1. A description of each item of work performed, the date upon which it was performed, the amount of time spent on each item of work, the identity of the lawyer or legal assistant performing the work, and the hourly rate sought for the work performed;
>
> 2. The normal hourly rate for each person for whom compensation is sought, with an explanation of the basis for any difference between the amount sought and the normal hourly billing rate, if any;
>
> 3. A detailed itemization of all amounts sought for disbursements or expenses, including the rate for which any disbursements are charged and the verification that the amounts sought represent the actual cost to the lawyer or firm for the disbursements sought; and
>
> 4. That the affiant has reviewed the work in progress or original time records, the work was actually performed for the benefit of the client and was necessary for the proper representation of the client, and that charges for any unnecessary or duplicative work has been eliminated from the application or motion.

---

[8] Counsel for the Hippert Plaintiffs appear to contest that Rule 119 applies to this proceeding. However, the Rule is clear that it applies "[i]n any action or proceeding in which an attorney seeks the award, or approval, of attorneys' fees in the amount of $1,000.00 for the action, or more . . . ." Minn. R. Gen. Prac. 119.01 (emphasis added). The Hippert Plaintiffs seek fees in an amount of more than $1,000.

The Hippert Plaintiffs do not adequately support their fee petition. The Briggs and Morgan billing submission is almost completely redacted so it is impossible to determine whether the work billed was necessary or duplicative. Indeed, in many instances even the unredacted portions of the bill are so vague as to prevent any meaningful review or analysis. (*See, e.g.,* entries for "office work.")

When the reasonableness of the hours expended is challenged, it is incumbent upon the court to "scrutinize" the claim for fees and expenses. *See Milner*, 748 N.W.2d at 622. The Hippert Plaintiffs have provided insufficient information to enable the Panel or Defendants to scrutinize their claim for fees, and accordingly have failed to satisfy their burden to prove entitlement to fees. *See, e.g.*, *Hensley*, 461 U.S. at 433 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Am. Broad. Co., Inc. v. Ritchie*, 2011 WL 665858 (D. Minn. Feb. 14, 2011) (reducing overall billed amount by percentage where billing entries were so vague that court could not accurately evaluate their reasonableness).[9]

---

[9] The Hippert Plaintiffs may claim that their redactions are necessary based on the attorney-client privilege or work-product doctrine. While it is conceivable that some of the information redacted is privileged or work-product, it is unlikely that all of the redactions are appropriate. *See, e.g.*, *Engelking v. Engelking*, 2004 WL 1102337, at *3 (Minn. Ct. App. May 18, 2004) (stating descriptive information in billing records is not *per se* privileged); *City Pages v. State*, 655 N.W.2d 839, 845-46 (Minn. Ct. App. 2003), *rev. denied* (Minn. Apr. 15, 2003) (finding billing records were privileged only if rendered legal advice, and work-product only if contained attorney opinions, conclusions, legal theories or mental impressions prepared for purpose of litigation, rather than in regular course of business). Indeed, the fact that the itemized statements of the Britton and Martin Intervenors are entirely unredacted undermines any such claim. Regardless, if the Hippert Plaintiffs wish to assert privilege or work-product, they must establish its applicability in an *in camera* review. *City Pages*, 655 N.W.2d at 847. *See also Engelking*, at *3 (stating court could not evaluate applicability of privilege without *in*

The Hippert Plaintiffs' suggestion that the Panel simply award them $225,000 because a survey (which they fail to provide)[10] indicates that the rates of "large firms" in the Twin Cities have increased by an average of 81% since the *Zachman* fee award, is not supported by law. Plaintiffs bear the burden of proving the reasonableness of their particular fee request regardless of the rate of inflation or an award in another case. Plaintiffs have failed to do so. *See Hensley*, 461 U.S. at 434 (stating fee request should exclude hours that are excessive, redundant or otherwise unnecessary, "just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission").

### B. The Martin Intervenors and Hippert Plaintiffs Seek An Unreasonable Hourly Rate.

#### 1. The Martin Intervenors are Not Entitled To Washington, D.C. Rates.

Generally, a reasonable hourly rate is the ordinary rate for similar work in the community in which the case was litigated. *Fish*, 295 F.3d at 851. A plaintiff may be entitled to charge out-of-state rates where he "can show he has been unable through diligent, good faith efforts to retain local counsel." *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140 (8th Cir. 1982). The Hippert Plaintiffs and Britton Intervenors are represented by competent Twin Cities attorneys. Indeed, the Martin Intervenors themselves managed to retain two competent Minneapolis attorneys who actively

---

*camera* disclosure of billing statements, and denying motion for attorneys' fees since party failed to provide court with sufficient information to demonstrate that privilege applied).

[10] It is the fee applicant's burden to establish the claimed market rate. *See Dillard*, 213 F.3d at 1354. The Hippert Plaintiffs do not satisfy this burden by referring to a survey which they do not supply to the Panel or to Defendants.

participated in the proceedings. Under the circumstances, the Martin Intervenors' out-of-state counsel cannot be awarded anything more than a reasonable rate prevailing in the Twin Cities for attorneys of comparable experience.[11] *See Avalon*, 689 F.2d at 141 (rejecting argument that out-of-town rates were justified because counsel was a "specialist" with a national practice in the area of law at issue).

### 2. The Martin Intervenors' and Hippert Plaintiffs' Hourly Rates Are Unreasonable In Light Of The Purpose Of Section 1988.

The purpose of attorney fee awards under Section 1988 is "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429. The hourly rate awarded should be no more than what is adequate to attract competent legal counsel:

> These [fee-shifting] statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws.

*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). *Cf. Schaub v. County of Olmsted*, 2011 WL 3664565, at *2-*3 (D. Minn. Aug. 19, 2011) (approving highest rate of $550 per hour although "on the higher end of

[11] The Martin Intervenors submit no information regarding the years of experience of the lawyers working on the case, and therefore fail to satisfy their burden to produce evidence of reasonable hourly rates. *See Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984) (holding fee applicant must "produce satisfactory evidence-- in addition to the attorney's own affidavits-- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."). At the very least, the Martin Intervenors' out-of-state counsel's rates should be no higher than those of their Minneapolis counsel.

the scale," because of "several unusual circumstances," and in particular that "it was extraordinarily difficult for Schaub [a convicted sex offender] to obtain representation").

Here, as evidenced by the hourly rate charged by Mr. Weinblatt ($300/hr.), the very high hourly rates charged by counsel for the Martin Intervenors and Hippert Plaintiffs were unnecessary to ensure effective access by their clients to the judicial process.[12] *Cf. Balderas*, 2002 WL 32113830, at *4 ("The parties, the office-holders, and the would-be-candidates use the courts, rather than the legislature, to leverage their political causes. This is fine with us because the law permits it. Nevertheless, we need not mislead ourselves into believing that the failure to award attorney's fees under these circumstances [ ] might somehow deter similar efforts in the future.").

While the parties were free to select the counsel of their choosing, it is unreasonable to charge the taxpayers exorbitant rates. *See, e.g., Daggett v. Kimmelman*, 811 F.2d 793, 799 (3rd Cir. 1987) ("[T]here nevertheless comes a point where a lawyer's historic rate, which private clients are willing to pay, cannot be imposed on his or her adversaries."); *Coulter v. Tennessee*, 805 F.2d 146, 149 (6th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987) ("The statutes use the words "reasonable" fees, not "liberal" fees. Such fees are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region. . . .We therefore apply the principle that hourly rates for

[12] The Hippert Plaintiffs suggest that they are entitled to a fee award 81% greater than that awarded ten years ago because large law firm rates have increased by that amount. Although large firms may charge high rates to private clients, such rates are not reasonable fees necessary to retain competent counsel in these proceedings.

fee awards should not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question.").

### C. None Of The Plaintiff Groups Should Recover Fees Expended In The Unnecessary Federal Court Matter.

In January 2011, the Britton Intervenors brought a precipitous and unnecessary action in federal court. Now they seek to charge State taxpayers for over $22,000 in fees, as well as expenses, for the work they unsuccessfully performed for the federal court proceeding, most of which was in an effort to deny primary jurisdiction to this Panel, despite the clear holding of *Growe*. Counsel for the Martin Intervenors and Hippert Plaintiffs also seek to charge Defendants for work conducted for the federal litigation.

The hours spent on the federal court matter were "simply unnecessary," *Jenkins*, 127 F.3d at 716, 718, not occasioned by Defendants, and not reasonably expended, and therefore should be subtracted from any fee award. Indeed, Defendant Ritchie advocated for a stay of the federal proceedings, in favor of State proceedings, and that stay was granted. The federal court granted no relief on behalf of Plaintiffs or Intervenors.[13] Moreover, with the exception of the Complaints, which were also filed in the State proceedings and are addressed more fully below, Plaintiffs and Intervenors cannot claim that the work they did in the federal court matter was also necessary for the State proceedings. Accordingly, the Panel should not award fees or expenses to any of the

[13] *See, e.g.*, *Jenkins*, 127 F.3d at 718 ("[S]uccess or failure on the particular matter in question (as opposed to overall success) is still a factor in deciding the reasonableness of the attorney's efforts.").

Plaintiff groups with respect to the work conducted for the unnecessary federal court matter.

**D. Any Award Should Be Reduced Because Of Over-Lawyering.**

Plaintiffs' and Intervenors' requests should be reduced for redundant and excessive hours. *See, e.g., Hensely*, 461 U.S. at 434.

For example, the Britton Intervenors appear to seek compensation for approximately 36 hours for drafting their Complaint.[14] However, a comparison of their Complaint with the Complaint that Mr. Weinblatt prepared and filed a decade ago in the *Zachman* case, shows that the Britton Complaint largely duplicates the *Zachman* Complaint. (*Compare* Anderson Aff. Ex. D *with* Britton Compl. in Intervention.) The Martin Intervenors' Complaint is also strikingly similar to Mr. Weinblatt's *Zachman* Complaint.[15] (*Compare* Anderson Aff. Ex. D *with* Martin Compl. in Intervention.) Any fee award should be reduced for these duplicative efforts.[16] *See Am. Civil Liberties Union of Ga. v. Barnes*, 168 F.3d 423, 430 (11th Cir. 1999) (concluding that district court abused discretion in failing to exclude fees for drafting complaint that was derived in large part from filings in another case, and stating that "[a]n attorney is not entitled to be paid in a case for the work he or another attorney did in some other case.").

---

[14] All of the Plaintiff groups' billing statements sometimes include entries with more than one task, and unclear descriptions of the tasks, so it is difficult to determine precisely how much time is being billed for each particular task.

[15] The Hippert Plaintiffs do not appear to be charging for their drafting of the Complaint.

[16] *Compare also, e.g.*, Anderson Aff. Ex. E *with* Britton Intervenors' Mem. Redist. Criteria.

Moreover, the Martin Intervenors' and Hippert Plaintiffs' fees should be reduced for the excessive number of hours billed by the highest paid attorneys. Although each of the teams included more junior attorneys, Mark Elias (with an hourly rate of $650) billed 103.5 hours, David Lillehaug (with hourly rates of $495 and $515) billed 210.8 hours, and Eric Magnuson (with an hourly rate of $620) billed 253.6 hours. *See Madison v. Willis*, 2011 WL 851479, at *1 & n.4 (D. Minn. Mar. 9, 2011) (approving $600 per hour rate, which was "on the very upper end of what is reasonable in the prevailing community," where senior attorney billed a total of just under twenty hours on the file, and other attorneys, who performed bulk of work, charged rates ranging from $180-$350).

The Martin Intervenors' and Hippert Plaintiffs' fees also should be reduced for overstaffing and redundant hours. *See Hensley*, 461 U.S. at 433-34 (stating that district court should exclude hours not reasonably expended due to overstaffing). Each chose to litigate the case with large litigation teams, which resulted in both groups charging large amounts of time for conferences and email exchanges among the team members. Indeed, the Martin Intervenors identify "lengthy telephone conference[s]" between Minnesota and out-of-state counsel, multiple emails and conferences among the out-of-state counsel group, and additionally charge for their "weekly legal strategy call" among the out-of-state and local team members, often charging for four lawyers' time on the same call. The overabundance of charges for such conferences warrants a reduction in fees. *See BP Group, Inc. v. Capital Wings Airlines, Inc.*, 2011 WL 4396938 (D. Minn. Sept. 21, 2011) (reducing fees for multiple attorneys' participation in excessive interoffice conferences).

Finally, the Martin Intervenors and Hippert Plaintiffs should not be permitted to charge Defendants for time spent drafting press releases and communicating with the media. These communications served the parties' non-litigation interests, and do not serve the purpose of Section 1988 to protect the constitutional rights of aggrieved parties. *See In re Kujawa*, 270 F.3d 578, 583 (8th Cir. 2001) (reducing fees award for time spent talking with press); *Ryther v. KARE 11*, 864 F. Supp. 1525, 1533 (D. Minn. 1994) (declining to award fees for time spent meeting with media).

### E. Counsel for Martin Intervenors and Hippert Plaintiffs Should Not Be Awarded Fees For Work They Conducted For The Legislative Process.

The Plaintiff groups are not entitled to fees for work conducted for the legislative process. The Panel noted that the Hippert Plaintiffs' proposed plans "reflect[ ] in substantial part the Legislature's [ ] plan that the Governor vetoed. . . ." (Feb. 21, 2012 Legis. Ord. at 8; Feb. 21, 2012 Cong. Ord. at 7.) Because of the redactions in the Hippert Plaintiffs' invoices, it is impossible to determine whether some of the charges are duplicative of work already done for the Legislature. To the extent they are duplicative, Hippert Plaintiffs' fees should be reduced. The Martin Intervenors charge for time spent during the legislative process reviewing correspondence between the Governor and legislators, communicating with House members "regarding legislative strategy," "view[ing] House Redistricting Committee proceedings," "[r]eview[ing] House proposed redistricting maps," communicating regarding the Senate floor debate, and emailing and reviewing "draft veto messages." These and other charges for work done for the legislative process, as opposed to the Panel's process, should not be awarded.

### F. Expert Fees Are Not Awardable In This Case.

The Britton Intervenors seek $14,040 in compensation for work performed by a "consultant" and describes his work as "plan presentation and analysis." It is unclear what the nature of the consultant's fees were. However, to the extent that these are expert fees, they are not awardable in this case. Section 1988 provides for expert fees only in cases brought under 42 U.S.C. §§ 1981 and 1981a. *See* 42 U.S.C. § 1988(c). This action was brought under Section 1983. Accordingly, any request for expert fees must be denied.

### G. The Requests For Costs Are Unreasonable.

The parties' costs should also be reduced considerably. Costs for legal research are not compensable. *See Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 325 n.7 (8th Cir. 1993); *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 695 (8th Cir. 1983). Moreover, the charges for copying, postage, overtime, internal printing, digital reproduction, delivery and telephone calls are too vague to support an award. *See Felder ex. rel. Felder v. King*, 2011 WL 2174538, at *4 (D. Minn. May 31, 2011) (reducing costs where "the bare receipts [for photocopies] . . . gave no basis to determine which, if any, of these photocopies were necessarily obtained for use in the case."). In addition, these costs are part of normal firm overhead and should not be awarded. *See Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983), *overruled on other grounds*, 483 U.S. 711 (1987) (refusing to award costs for photocopying, postage, telephone, books, and overtime secretarial work since district court found such costs were normally absorbed as part of firms' overhead). Finally, travel costs (and fees for travel time) for the Martin

Intervenors' out-of-state counsel are unwarranted since they had fully competent local counsel. *See* 713 F.2d at 559 (refusing to reimburse travel expenses where no need to employ out-of-state counsel).

## IV. NO UPWARD ADJUSTMENT SHOULD BE MADE.

The Britton Intervenors request an upward adjustment for Mr. Weinblatt's work. No upward adjustment of fees should be made in this case. Only rare cases of "exceptional success" justify an upward adjustment in the lodestar figure, and the applicant bears the burden of proving with "specific evidence in the record" that "an upward adjustment 'is *necessary* to the determination of a reasonable fee.'" *Milner*, 748 N.W.2d at 624 (citations omitted, emphasis in original).

The Britton Intervenors argue that they are entitled to an upward adjustment of the lodestar figure for Mr. Weinblatt's work because the legislature and governor did not redistrict, and they were successful in seeking relief and altering the relationship between them and the State. These are no more than alternative ways to argue that they are prevailing parties. Even if the Panel determines that the Britton Intervenors are prevailing parties, prevailing party status alone does not merit an upward adjustment. They also claim that the "issues presented were far beyond ordinary legal issues in redistricting cases and presented several issues of first impression." (Britton Mem. Fees at 16.) They do not, however, identify what these issues are, nor do they demonstrate that Mr. Weinblatt merits an upward adjustment for his work on these issues. Indeed, the quality of counsel and the complexity or novelty of a case are not justifications for an upward adjustment. *See Blum v. Stensen*, 465 U.S. 886, 899 (1984).

Since the Britton Intervenors have failed to satisfy their burden to show that this is one of those rare cases in which an upward adjustment is justified, this request should be denied.

## CONCLUSION

The Panel should deny attorneys' fees and expenses to the Plaintiffs and Intervenors for the reasons stated above. In the alternative, the Panel should exercise its discretion to greatly reduce the fees and expenses requested based on the limited success of each of the Plaintiff groups, and based on the excessiveness of the requests.

Dated: May 31, 2012

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678

KRISTYN ANDERSON
Assistant Attorney General
Atty. Reg. No. 0267752

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2127
(651) 757-1225 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR MARK RITCHIE,
SECRETARY OF STATE OF
MINNESOTA

AG: #3007517-v1

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
A11-152



Sara Hippert, Dave Greer, Linda Markowitz, Dee Dee Larson, Ben Maas, Gregg Peppin, Randy Penrod and Charles Roulet, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

Kenneth Martin, Lynn Wilson, Timothy O'Brien, Irene Peralez, Josie Johnson, Jane Krentz, Mark Altenburg, and Debra Hasskamp, individually and on behalf of all citizens of Minnesota similarly situated,

Intervenors,

Audrey Britton, David Bly, Cary Coop, and John McIntosh, individually and on behalf of all citizens of Minnesota similarly situated,

Intervenors,

vs.

Mark Ritchie, Secretary of State of Minnesota; and Robert Hiivala, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

**TRANSMITTAL AFFIDAVIT OF KRISTYN ANDERSON**

STATE OF MINNESOTA )
) ss.
COUNTY OF RAMSEY )

KRISTYN ANDERSON, Assistant Attorney General representing Secretary of State Mark Ritchie in the above-entitled matter, being first duly sworn on oath, deposes and states as follows:

1. Attached hereto as Exhibit A is a true and correct copy of the Complaint in *Britton, et al. v. Ritchie, et al.*, United States District Court Case No. 11-cv-00093(PJS/AJB).

2. Attached hereto as Exhibit B is a true and correct copy of Plaintiffs' Motion to Lift Stay in *Britton, et al. v. Ritchie, et al.*, United States District Court Case No. 11-cv-00093(PJS/AJB).

3. Attached hereto as Exhibit C is a true and correct copy of the Order on Motions to Lift Stay And Motion For Intervention in *Britton, et al. v. Ritchie, et al.*, United States District Court, Case No. 11-cv-00093(PJS/AJB).

4. Attached hereto as Exhibit D is a true and correct copy of the Complaint in Intervention of the Cotlow Intervenors in *Zachman, et al. v. Kiffmeyer*, Minnesota Supreme Court Case No. C0-01-160.

5. Attached hereto as Exhibit E is a true and correct copy of the Memorandum Regarding Redistricting Criteria of the Cotlow Intervenors in *Zachman, et al. v. Kiffmeyer*, Minnesota Supreme Court Case No. C0-01-160.

6. Attached hereto as Exhibit F is a true and correct copy of *Balderas v. State*, 2002 WL 32113830 (E.D. Tex. 2002).

7. Attached hereto as Exhibit G is a true and correct copy of *Am. Broad. Co., Inc. v. Ritchie*, 2011 WL 665858 (D. Minn. Feb. 14, 2011).

8. Attached hereto as Exhibit H is a true and correct copy of *Engelking v. Engelking*, 2004 WL 1102337 (Minn. Ct. App. May 18, 2004).

9. Attached hereto as Exhibit I is a true and correct copy of *Schaub v. County of Olmsted*, 2011 WL 3664565 (D. Minn. Aug. 19, 2011).

10. Attached hereto as Exhibit J is a true and correct copy of *Madison v. Willis*, 2011 WL 851479 (D. Minn. Mar. 9, 2011).

11. Attached hereto as Exhibit K is a true and correct copy of *BP Group, Inc. v. Capital Wings Airlines, Inc.*, 2011 WL 4396938 (D. Minn. Sept. 21, 2011).

12. Attached hereto as Exhibit L is a true and correct copy of *Felder v. King*, 2011 WL 2174538 (D. Minn. May 31, 2011).

Further affiant saith not.

KRISTYN ANDERSON

Subscribed and sworn to before me on
this 31st day of May, 2012.

NOTARY PUBLIC

AG: #3021598-v1

BARBARA J. FEHRMAN
NOTARY PUBLIC - MINNESOTA
MY COMMISSION
EXPIRES JAN. 31, 2015

**UNITED STATES DISTRICT COURT**

**FOR THE**

**DISTRICT OF MINNESOTA**

---

Audrey Britton, David Bly,
Cary Coop, and John McIntosh,
individually and on behalf of all
citizens of Minnesota similarly situated,

Plaintiffs,

vs.

**COMPLAINT**

Mark Ritchie, Secretary of
State of Minnesota, Rachel Smith,
Hennepin County Elections Manager,
Fran Windschitl, Rice County Auditor,
Cindy Geis, Scott County Auditor,
Robert Hiivala, Wright County
Auditor, individually and on behalf
of all Minnesota county chief
election officers,

Defendants.

---

Plaintiffs, for their cause of action against Defendants, state and allege as follows:

JURISDICTION:

1. This Court has subject matter jurisdiction over this action based upon the provisions of 42 U.S.C. §§ 1983 and 1988 as well as 28 U.S.C. § 1343(a)(3)(4) and 28 U.S.C. § 2201.

Anderson Aff.
Exhibit A

PARTIES:

2. Plaintiffs are citizens and qualified voters of the United States of America and of the State of Minnesota residing in various counties, legislative districts and congressional districts in the State of Minnesota as shown on Exhibit "A" which is attached hereto and incorporated herein by reference.

3. Plaintiffs bring this action individually and as representatives of all of the citizens of the State of Minnesota who are similarly situated, as being currently denied Equal Protection of the Laws and Due Process of Law, as further alleged herein.

4. Defendant Mark Ritchie is the duly elected and acting Secretary of State of the State of Minnesota whose duties under Minnesota Statutes Chapters 200 through 211B inclusive, charge him, in his official capacity, with the duties of keeping records of state elections, giving notice of such elections, receiving filings for office, preparing ballots and instructions to voters, distributing election laws of the State of Minnesota, receiving election returns, furnishing blank election ballots and forms, furnishing certificates of elections in multi-county legislative districts and Congressional Districts and statewide elections, membership on the Minnesota State Canvassing Board and various other election duties.

5. Defendant Rachel Smith is the Elections Manager for Hennepin County, Minnesota, whose duties under Minnesota Statutes Chapters 200 through 211B inclusive, charge her, in her official capacity, with the duties of keeping records of state elections, giving notice of such elections, receiving filings for office, preparing ballots and instructions to voters, distributing election laws, receiving election returns, furnishing blank election ballots and forms, furnishing certificates of elections in Hennepin County legislative districts and congressional districts.

6. Defendant Cindy Geis is the duly elected County Auditor and chief election officer for Scott County, Minnesota, whose duties under Minnesota Statutes Chapters 200 through 211B inclusive, charge her, in her official capacity, with the duties of keeping records of state elections, giving notice of such elections, receiving filings for office, preparing ballots and instructions to voters, distributing election laws, receiving election returns, furnishing blank election ballots and forms, furnishing certificates of elections in Scott County legislative districts and congressional districts.

7. Defendant Fran Windschitl is the duly elected County Auditor and chief election officer for Rice County, Minnesota, whose duties under Minnesota Statutes Chapters 200 through 211B inclusive, charge him, in his official capacity, with the duties of keeping records of state elections, giving notice of such elections, receiving filings for office, preparing ballots and instructions to voters, distributing election laws, receiving election returns, furnishing blank election ballots and forms, furnishing certificates of elections in Rice County legislative districts and congressional districts.

8. Defendant Robert Hiivala is the duly elected County Auditor and chief election officer for Wright County, Minnesota, whose duties under Minnesota Statutes Chapters 200 through 211B inclusive, charge him, in his official capacity, with the duties of keeping records of state elections, giving notice of such elections, receiving filings for office, preparing ballots and instructions to voters, distributing election laws, receiving election returns, furnishing blank election ballots and forms, furnishing certificates of elections in Wright County legislative districts and congressional districts.

COUNT I:

LEGISLATIVE MALAPPORTIONMENT

9. This case arises under the Fourteenth Amendment, Section 1, to the Constitution of the United States which provides in pertinent part:

> "[1]No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions thereof guaranty to the citizens of each state the right to vote in State and Federal elections and that the vote of each citizen shall be equally effective with any other vote cast in such election. A state statute and/or court order which enforces or effects an apportionment which invidiously discriminates against citizens in highly populous legislative districts and prefers other voters in the least populous legislative districts violates the above quoted constitutional provision.

10. This case also arises under the Fifth Amendment of the Constitution of the United States, which provides in pertinent part: "No person shall ... be deprived of life, liberty or property without due process of law."

11. The current Minnesota legislative apportionment system established by a five (5) member Special Redistricting Panel in Zachman v. Kiffmeyer, Civil File No. CO-01-160 (Final Order dated March 19, 2002) effects a legislative apportionment which invidiously discriminates against citizens in the most highly populous legislative districts, including

Plaintiffs, and prefers other citizens in the least populous legislative districts in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

12. This case also arises under Article IV, Section 2 of the Minnesota State Constitution, which provides:

> The number of members who compose the senate and house of representatives shall be prescribed by law. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

13. This case also arises under Article IV, Section 3 of the Minnesota Constitution provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series.

14. Plaintiffs are citizens of the United States and of the State of Minnesota and have the rights conferred by the above provisions of the United States Constitution and the Minnesota Constitution to have the entire membership of the Minnesota Legislature apportioned and elected on the basis of the 2010 Federal Census.

15. The intent and the purpose of the above referenced provisions of the Minnesota Constitution is to require that the members of the Minnesota Legislature be elected by the people of the State of Minnesota on a basis of equal representation of the individual

citizens of the state. Therefore, all Minnesota State Senators and Representatives must be equally apportioned throughout the state in districts which are arranged in population according to the number of inhabitants thereof as shown by the 2010 Federal Census.

16. On information and belief, the United States Federal Census taken as of April 2010 shows that the Minnesota state legislative districts as established by the Special Redistricting Panel in Zachman v. Kiffmeyer, Civil File No. CO-01-160 (Order dated March 19, 2002), are now unequally apportioned; that despite the compilation of said Census the State of Minnesota has failed and neglected, and unless otherwise ordered, will continue to fail and neglect to reapportion the legislative districts in the State of Minnesota; and that the present apportionment of the state legislative districts is no longer based upon any logical or reasonable formula but is arbitrary and capricious.

17. Based upon the April 2010 Federal Census, the ideal population for each Minnesota State House of Representatives district is 39,581.5. The ideal population for each Minnesota State Senate district is 79,163.

18. These Plaintiffs are residents, citizens and voters of certain legislative districts in the State of Minnesota, the population of which has increased since the last Federal Census at a rate greater than the state population as a whole.

19. The unequal population of the Minnesota House of Representatives districts and the Minnesota State Senate districts deprives Plaintiffs and all other citizens of the highly populated districts of the rights guaranteed to them by the Fourteenth Amendment to the

United States Constitution, including the rights of Due Process of Laws and the Equal Protection of the Laws. It further deprives them of the rights guaranteed to them by the above quoted provisions of the Minnesota State Constitution.

20. The plaintiffs are informed and believe and, therefore, allege that the Legislature of the State of Minnesota will not pass a law reapportioning itself in conformity with the United States Constitution and the Constitution of the State of Minnesota during the 2011 Legislative Session. The plaintiffs further allege on information and belief that the defendants intend to and will, unless sooner restrained by an order of this Court, conduct the election for the 2013 Minnesota State Legislature during the year 2012 on the basis of the senatorial and representative districts determined by the Special Redistricting Panel in the case of Zachman v. Kiffmeyer, Case File No. CO-01-160 (Order dated March 19, 2002) and that until there is a legislative reapportionment, defendants will continue to do so in subsequent elections for members of the Minnesota State Legislature.

21. Plaintiffs further allege that they intend to and will vote in the state primary and general elections to be held in 2012 and thereafter for candidates for Minnesota State Senate and Minnesota House of Representatives; and that said elections conducted in accordance with final order of the Special Redistricting Panel in the case of Zachman v. Kiffmeyer, Case File No. CO-01-160 (Order dated March 19, 2002) will continue to deprive plaintiffs of their rights guaranteed under the Constitution of the United States and the Constitution of the State of Minnesota.

22. In the absence of reapportionment of the legislative districts of the State of Minnesota in conformance with the Minnesota Constitution, any action of these defendants in conducting an election of the members of the Minnesota Legislature in accordance with the districts ordered by the Special Redistricting Panel in the case of Zachman v. Kiffmeyer, Case File No. CO-01-160 (Order dated March 19, 2002) will continue to deprive plaintiffs of their constitutional rights in that:

(a) They are and will be arbitrarily deprived of their liberty and property without Due Process of Law, and are and will be arbitrarily deprived of the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) They are and will be in substantial measure, disenfranchised and deprived of their rights and privileges, all in violation of Article I, Section 2 of the Minnesota Constitution.

(c) They are and will be deprived of equally apportioned congressional districts of the Minnesota Legislature as guaranteed by Article IV, Section 2 and Article IV, Section 23 of the Minnesota Constitution.

(d) Their right to vote, as guaranteed by Article VII, Section 1 of the Minnesota Constitution, is and will continue to be abridged, diluted and infringed.

23. By reason of the failure of the Legislature of the State of Minnesota to reapportion the legislative districts of the state in conformity with the Minnesota Constitution, thus violating the above cited constitutional rights of these plaintiffs and of all other members of the class of citizens and voters whom they represent, a justiciable controversy exists.

COUNT II:

CONGRESSIONAL REDISTRICTING

24. Plaintiffs reallege paragraphs 1 through 8 hereof.

25. This case arises under the Fourteenth Amendment, Section 1 of the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.

The provisions thereof guaranty to the citizens of each state the right to vote in State and Federal elections and that the vote of each citizen shall be equally effective with any other vote cast in such elections. A state statute and/or court order which enforces or effects an apportionment, which invidiously discriminates against citizens in highly populous congressional districts and prefers other citizens in the least populous congressional districts violates the above quoted constitutional provision.

26. Article 4, Section 3 of the Minnesota State Constitution provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts.

27. Plaintiffs are citizens of the United States and of the State of Minnesota, and have the rights conferred by the above provisions of the United States Constitution and the Minnesota Constitution to have all Representatives in Congress from the State of Minnesota apportioned and elected on the basis of the 2010 Federal Census. The intent and purpose of the aforesaid provision of the Minnesota Constitution is to require that Representatives in Congress be elected by the people of the State of Minnesota on a basis of equal representation of the individual electors in the state and that the Minnesota Representatives in Congress from the State of Minnesota must be equally apportioned throughout the state in districts which are arranged in proportion to the number of inhabitants therein.

28. On information and belief, the United States Federal Census taken as of April 2010 shows that the congressional districts as established by the Court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and Minnesota Statutes Sections 2.742 through 2.812 are now unequally apportioned; that despite the compilation of said Census, the Minnesota Legislature has failed and neglected to reapportion lawfully the congressional districts in the State of Minnesota; and the present apportionment of the congressional districts is not based upon any logical or reasonable formula whatsoever, but is arbitrary and capricious.

29. Based upon the April, 2010 Federal Census, the ideal population for each congressional district in Minnesota is 662,990.

30. The unequal representation effected by the congressional districts created and ordered by the Court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), deprives plaintiffs and all other citizens of the highly populated congressional districts of the rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States including their rights of Due Process of Law and the Equal Protection of the laws. It further deprives them of their rights as guaranteed by the above quoted provisions of the Minnesota State Constitution.

31. The plaintiffs are informed and believe and, therefore allege, that the Legislature of the State of Minnesota will adjourn without reapportioning the state's congressional districts in conformity with the United States Constitution and the Constitution of the State of Minnesota during the 2011 legislative session. The plaintiffs further allege on the information and belief that all of the Defendants intend to and will, unless sooner restrained by an order of this Court, conduct the next election for Representatives in Congress during the year 2012, on the basis of the current congressional districts and that until there is a congressional reapportionment, Defendants will continue to do so in subsequent elections of Representatives in Congress.

32. Plaintiffs further allege that they intend to and will vote in the state primary and general election in 2012 and thereafter for candidates for Representatives in Congress; and that said elections conducted in accordance with the present congressional districts will continue to deprive Plaintiffs and the class that they represent of their rights guaranteed under the above cited provisions of the Constitution of the United States and of the Constitution of the State of Minnesota.

33. In the absence of reapportionment of the congressional districts of the State of Minnesota in conformity with the United States Constitution, any action of these Defendants in conducting an election for Representatives in Congress in accordance with the present districts has deprived and will continue to deprive Plaintiffs of their constitutional rights in that:

(a) They are and will be arbitrarily deprived of liberty and property without Due Process of Law, and are and will be arbitrarily deprived of the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) They are and will be in substantial measure disenfranchised and deprived of their rights and privileges, all in violation of Article 1, Section 2 of the Minnesota Constitution.

(c) They are and will be deprived of equally apportioned congressional districts as guaranteed by Article 4, Section 3 of the Minnesota Constitution.

(d) Their right to vote, as guaranteed by Article 7, Section 1of the Minnesota Constitution, is and will continue to be abridged, diluted and infringed.

34. By reason of the failure of the Legislature of the State of Minnesota to reapportion the congressional districts of the state in conformity with the United States and Minnesota Constitutions, thus violating the constitutional rights of these plaintiffs and of all other members of the class of citizens and voters whom they represent, a justiciable controversy exists.

WHEREFORE, Plaintiffs respectfully pray that:

1. This Court declare the rights of these Plaintiffs pursuant to 28 U.S.C. § 2201, to wit:

(a) That the present legislative apportionment of the State of Minnesota as ordered by the court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002) and in Minnesota Statutes §2.043 through 2.703 has deprived and continues to deprive plaintiffs and all citizens of the State of Minnesota similarly situated in underrepresented districts of their liberty and property without Due Process of law and has denied and continues to deny plaintiffs and all citizens of the State of Minnesota similarly situated in underrepresented districts of the Equal Protection of the law all in violation of the Fourteenth Amendment to the Constitution of the United States; and

(b) That the present plan of congressional apportionment as ordered by the court Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002) Minnesota Statute §§ 2.742 through 2.812 deprives plaintiffs and the class they represent of Due Process of Law and Equal Protection of the Law all in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) That the present plan of Congressional districts, as ordered by the court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and §§2.742 through 2.812, unlawfully impairs the rights of the plaintiffs and the class they represent as guaranteed by Article 4, Section 3, and Article 1, Section 2 of the Minnesota Constitution.

(d) That the decision of the Special Redistricting Panel in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and Minnesota Statute §§2.043 through 2.703 unlawfully impairs the rights of the plaintiffs and the class they represent as guaranteed by Article I, Section 2 and Article 4, Sections 2 and 3 of the Minnesota Constitution.

2. The Court issue a permanent injunction and judgment decreeing that the plan of the legislative apportionment set forth in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and Minnesota Statute §§2.043 through 2.703 may not hereafter be used as a valid plan of legislative apportionment.

3. The Court permanently restrain defendants and the class of persons they represent from receiving nominations and petitions for legislative office, from issuing certificates of nominations and elections, and from all further acts necessary to the holding of elections for members of the Minnesota Legislature in the districts set out and described in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and Minnesota Statutes §§2.043 through 2.703 until such time as the legislature passes and the governor approves legislation reapportioning the state legislative districts in accordance with the Constitution of Minnesota and the Due Process and Equal Protection clauses of the United States Constitution.

4. The Court issue its permanent injunction and judgment decreeing that the plan of congressional apportionment set forth in Minnesota Statutes §§2.043 through 2.703 and §§2.742 through 2.812 and as set forth in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), may not hereafter be used by Defendants as a valid plan and scheme of congressional apportionment.

5. The Court permanently restrain the defendants and the class of persons they represent from receiving nominations and petitions for Congressional office, from issuing certificates of nomination and elections, and from all further acts necessary to the holding of elections for members of Congress in the districts to the decree of the Court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order

dated March 19, 2002) until such time as the legislature passes and the Governor approves legislation reapportioning the eight (8) Minnesota Congressional districts in accordance with the Constitution of Minnesota and the Due Process and Equal Protection clauses of the United States Constitution.

6. That this Court notify the Governor and Legislature of the State of Minnesota that it will retain jurisdiction of this action and, upon the failure of the State of Minnesota to adopt constitutionally valid plans of congressional redistricting and legislative reapportionment, prior to the end of the current legislative session, the Court will issue an Order requesting the parties hereto to submit proposed plans of congressional redistricting and legislative reapportionment for the Court's consideration.

7. The Court order defendants to pay to plaintiffs, pursuant to 42 U.S.C. §1988 and Minn. Stat. §555.08, their reasonable attorneys fees and expenses, expert fees, costs and other expenses incurred in prosecuting this action.

8. For such other and future relief as is just in the circumstances.

WEINBLATT & GAYLORD, PLC

Dated: January 11, 2011

s/Alan W. Weinblatt

Alan W. Weinblatt (#115332)
Jay Benanav (#0006518)
Jane L. Prince (#0388669)
Attorneys for Plaintiffs
111 East Kellogg Boulevard, Suite 300
St. Paul, MN 55101
Telephone: (651) 292-8770
Facsimile: (651) 223-8282
alan@weglaw.com

**Exhibit A**

| | Congressional District | Legislative District |
|---|---|---|
| Audrey Britton | 3 | 43A (Hennepin County) |
| David Bly | 2 | 25B (Rice County) |
| Cary Coop | 2 | 25B (Scott County) |
| John McIntosh | 6 | 19B (Wright County) |

**UNITED STATES DISTRICT COURT**
**FOR THE**
**DISTRICT OF MINNESOTA**

---

Audrey Britton, David Bly, Cary Coop, and John McIntosh, individually and on behalf of all citizens of Minnesota similarly situated,
Plaintiffs,

vs.

Mark Ritchie, Secretary of State of Minnesota, Rachel Smith, Hennepin County Elections Manager, Fran Windschitl, Rice County Auditor, Cindy Geis, Scott County Auditor, Robert Hiivala, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,
Defendants.

Sara Hippert, Dave Greer, Linda Markowitz, Dee Dee Larson, Ben Maas, Gregg Peppin, Randy Penrod and Charles Roulet, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,
Plaintiffs in Intervention,
Intervenors.

Civil Action No. 11cv93 PJS/AJB

**PLAINTIFFS' MOTION TO LIFT STAY**

---

Pursuant to the Joint Letter of Counsel dated February 2, 2001 and the Order of this Court, Honorable Arthur J. Boylan, Chief U.S. Magistrate Judge, dated February 7, 2011, Plaintiffs Audrey Britton, David Bly, Cary Coop and John McIntosh, hereby move the Court for an Order:

1. Dissolving the Stay ordered February 7, 2011.

Anderson Aff.
Exhibit B

2. Authorizing Plaintiffs to seek by Motion to the previously appointed three judge court a partial summary judgment determining that:

a. This Court has subject matter jurisdiction over this case based upon the provisions of 42 U.S.C. §§ 1983 and 1988 as well as 28 U.S.C. § 1343(a)(3),(4) and 28 U.S.C. § 2201.

b. The Minnesota legislative districts as established by the Special Redistricting Panel in Zachman v. Kiffmeyer, Civil File No. CO-01-160 (Final Order dated March 19, 2002), are now unequally apportioned and therefore violate the provisions of the Fourteenth Amendment, Section 1, of the United States Constitution.

c. The Minnesota Congressional Districts established by the Special Redistricting Panel in Zachman v. Kiffmeyer, Civil File No. CO-01-160 (Final Order dated March 19, 2002), are now unequally apportioned and therefore violate the provisions of the Fourteenth Amendment, Section 1, of the United States Constitution.

d. Neither the legislative districts nor the congressional districts established by the Special Redistricting Panel in Zachman v. Kiffmeyer, Civil File No. CO-01-160 (Final Order dated March 19, 2002) may be used for any purpose.

3. Ordering the parties hereto to submit to this Court any proposed criteria for judicial redistricting of the Minnesota legislative and congressional districts within 60 days following the grant of this motion.

4. For such other and further relief as may be appropriate.

WEINBLATT & GAYLORD, PLC

Dated: May 17, 2011

s/Alan W. Weinblatt
Alan W. Weinblatt (#115332)
Jay Benanav (#0006518)
Jane L. Prince (#0388669)
Attorneys for Plaintiffs
111 East Kellogg Boulevard, Suite 300
St. Paul, MN 55101
Telephone: (651) 292-8770
Facsimile: (651) 223-8282
alan@weglaw.com

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Audrey Britton, et al.,

Plaintiffs,

v.

Mark Ritchie, et al.,

Defendants.

Civil No. 11-93 PJS-MJD-DM

**ORDER ON MOTIONS TO TO LIFT STAY AND MOTION FOR INTERVENTION**

This matter is before the Court, Chief Magistrate Judge Arthur J. Boylan, on Plaintiffs' Motion to Lift Stay [Docket No. 32] and Motion to Lift Stay of Proceedings and Intervene by Lori Sellner, et al. [Docket No. 41]. The case concerns legislative and congressional redistricting in Minnesota following the 2010 census. Hearing was held on June 6, 2011, at the U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415. Alan W. Weinblatt, Esq., Jay Benanav, Esq., and Jane L. Prince, Esq. appeared on behalf of the plaintiffs. Tony P. Trimble, Esq., and Matthew W. Haapoja, Esq. appeared on behalf of previous intervener plaintiffs. Allan I. Gilbert, Esq., and Mark T. Berhow, Esq., appeared on behalf of the defendant Minnesota Secretary of State. David L. Lillehaug, Esq., and Marc E. Elias, Esq. appeared on behalf of the applicant plaintiff interveners. A three-judge panel consisting of the Honorable Diana E. Murphy, United States Circuit Judge for the Eighth Circuit; the Honorable Michael J. Davis, Chief Judge, United States District Court, District of Minnesota; and the Honorable Patrick J. Schiltz, United States District Court Judge, District of Minnesota, has been designated to hear this case.[1] The present motions have been referred to the magistrate judge for

[1] Order of Designation [Docket No. 7].

Anderson Aff.
Exhibit C

determination. The applicant interveners' motion to lift the stay is made for the limited purpose of permitting their intervention. The only opposition to the motion for intervention is made by previous interveners who contend that the motion is untimely and intervention applicants' interests are adequately represented by existing plaintiffs. Initial plaintiffs do not oppose the intervention but contend that the scope of intervention should be limited to remedies. Defendant Secretary of State states no position on the intervention motion, but opposes lifting the stay on the grounds the federal court should defer to the Minnesota state court redistricting process and it has not been shown that redistricting plans cannot be adopted in accordance with established government processes.

Based upon the file, declarations, memorandums and arguments of counsel, **IT IS HEREBY ORDERED** that:

1. The Motion to Lift Stay of Proceedings and Intervene by Lori Sellner, et al. is **granted** [Docket No. 41]. It is the court's determination that intervention is not untimely and is properly permitted as a matter of permissive intervention under Fed. R. Civ. P. 24(b)(1), and that such intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Timeliness of a motion to intervene is a matter within the district court's discretion, subject to considerations which include: (1) the extent to which the case has progressed; (2) the applicants' knowledge of the litigation; (3) the reason for delay in seeking intervention; (4) and whether the intervention will prejudice existing parties. See American Civil Liberties Union v. Tarek Ibn Ziyad Acad., _ F.3d. _, 2011 WL 2637701 at *3 (8th Cir., July 7, 2011). The case is presently subject to an indefinite stay of proceedings and a pretrial scheduling order has yet to be issued. Under these circumstances the court concludes that the motion to intervene is not

untimely and the intervention will not prejudice existing parties. The scope of the intervention will not be limited to particular issues or remedies. An appropriate alignment of parties for purposes of conducting motion and trial practice can be established upon lifting the stay and implementation of a litigation scheduling and case management order.

2. The Motion to Lift Stay by plaintiffs Audrey Britton, et al. is **denied** [Docket No. 32].

Dated: July 21, 2011

s/ Arthur J. Boylan
Arthur J. Boylan
United States Chief Magistrate Judge

**MEMORANDUM**

This redistricting matter was stayed by court Order issued on February 7, 2011, and pursuant to agreement of parties. Plaintiffs now move to have the stay lifted, asserting that census data necessary for legislative and congressional redistricting has become available since the stay was imposed; it is not readily apparent that the matter will be addressed in the near future through Minnesota governmental processes; and lifting the stay and commencement of the judicial process, including possible appeals, is necessary to allow timely consideration and determination of redistricting issues prior to the scheduled dates for political candidate endorsements for elections to be held in November 2012. Defendants and initial intervener plaintiffs oppose the motion to lift the stay, arguing that federal courts must give deference to state courts on redistricting matters, and plaintiffs have not presented evidence to establish that a

state redistricting panel will be unable to adopt a plan in a timely fashion.

The stay that is currently in effect in the matter does not preclude parties from collecting public data, preparing legal arguments, conferring with experts, and otherwise readying themselves for anticipated legal proceedings. Indeed, there is no contention that the stay is delaying discovery, and the primary purpose of lifting the stay at this point is to ensure ample time is allowed for court decisions and expected appeals. Plaintiffs assert that the final determination on redistricting must be made before February 21, 2012, the statutory deadline for adopting constitutional redistricting plans. Plaintiffs further contend that the federal litigation appropriately provides a standby plan in the event that state redistricting processes fail, and there is no cause for further delay in this action. The defendant argues that the federal court should defer to parallel state court redistricting proceedings pursuant to the direction of Growe v. Emison, 507 U.S. 25, 32-37 (1993), and that a three-member redistricting panel has been established by Order by Supreme Court Justice Gildea, though actual appointments have not been made in deference to the legislature's role.

Although state and federal courts have concurrent jurisdiction over issues in the reapportionment and redistricting context, principles of comity and federalism typically favor giving deference to either or both legislative and judicial consideration of disputes at the state level. Emison, 507 U.S. at 32-33, 34 (citing Scott v. Germano, 381 U.S. 407 (1965)). "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal and state legislative districts." Emison, 507 U.S. at 34 (citing U.S. Const., Art. I, § 2). Without showing that the state's legislative or judicial branches will be unwilling or unable to perform its duties in regards to redistricting, the federal court must not obstruct the state's performance or

allow such performance to be impeded by way of federal litigation. Id. With respect to the timely progression of state efforts, including the pace and time required for orderly appeals, it is recognized that redistricting can be successfully accomplished by the state under highly exigent circumstances and the prospect of appeals is not particularly relevant to the discussion. Id. at 35. Nonetheless, the federal courts are only required to defer to the states, not to abstain from any action, and the federal court is justified in setting deadlines for state legislative and state court action, and establishing its own redistricting plan, in the event that the state branches are unable to timely develop a redistricting plan in time for elections. Id. at 36-37.

In this instance the plaintiffs have simply not shown that proceedings which have been commenced at the state level will be ineffective or will fail to provide timely results. Allowing federal court proceedings to go forward on a parallel track with state litigation and redistricting processes would not necessarily burden the political parties to a great extent because respective arguments and proposed remedies would presumably overlap significantly. The Minnesota legislature did send a redistricting plan to the legislature which was vetoed by the governor.[2] The bill and the veto manifest the highly political nature of the redistricting task, a reality which was acknowledged in Emison, 507 U.S. at 33. However, the actions also indicate that the legislature and the governor are cognizant of redistricting duties in general, and it is premature to conclude that those duties will not be timely performed. Likewise, the judicial branch has taken the initial step of establishing a three-member redistricting panel. Finally, the federal three-judge panel has been designated to hear the present case. It is apparent that each of the institutions that may be called upon to consider reapportionment and redistricting in

[2] Declaration of Tony P. Trimble, Ex. B.

Minnesota is currently poised for the challenge and plaintiffs' request to lift the stay is based substantially upon a largely speculative time line rather than concrete evidence of the state's inability or unwillingness to act on the matter. Of course, the passage of time itself may alter the analysis, but for the present, it has simply not been shown that a complete breakdown of the state reapportionment and redistricting process has occurred or is imminent and the stay should therefore remain in effect, and the state legislative and judicial processes should be allowed to proceed without the interference of federal litigation. The court does not conclude that the stay in this case can never be lifted so long as some nominal state level activity is occurring, but the necessity for federal court intervention in Minnesota redistricting has not yet come to fruition.

STATE OF MINNESOTA
IN SUPREME COURT
C0-01-160

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diane V. Bratlie, Brian J. LeClair and Gregory Ravenhorst, individually and on Behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

**COMPLAINT IN INTERVENTION**

and

Patricia Cotlow, Thomas L. Weisbecker, Theresa Silka, Geri Boice, William English, Benjamin Gross, Thomas R. Dietz, John Raplinger, individually and on Behalf of all citizens and voting residents of Minnesota similarly situated,

Intervening Plaintiffs,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota; and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Respondents.

Anderson Aff.
Exhibit D

Intervening Plaintiffs, for their cause of action, state and allege as follows:

PARTIES

1. Intervening Plaintiffs are citizens and qualified voters of the United States of America and of the State of Minnesota residing in various counties, legislative districts and congressional districts in the State of Minnesota, as appears with greater particularity in Exhibit "A" which is attached hereto and made a part hereof by reference.

2. Intervening Plaintiffs bring this action individually and on behalf of themselves and all other citizens and voters of the United States of America who reside in the State of Minnesota and who are similarly situated as having been denied Equal Protection of the laws as further stated herein. This class is so numerous as to make joinder impossible and impractical; there are common questions of law and fact which predominate over individual questions of law and fact; the claims of the named individuals are typical of the claims of the members of this class; and these Intervening Plaintiffs will fully and adequately represent and protect the interests of the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of inconsistency or varying adjudications which would establish incompatible standards of conduct for the named Defendants. The common questions of law which predominate are (1) the

constitutionality of the scheme of legislative apportionment set forth in Minnesota Statutes §§2.043 through 2.703 and (2) the constitutionality of the current plan of congressional redistricting set forth in Minnesota Statutes §§2.742 through 2.812, both of which are being enforced by the Defendants.

3. The Defendants are each citizens of the United States and of the State of Minnesota, residing in the State of Minnesota. Defendant Mary Kiffmeyer is the duly elected, qualified and acting Secretary of State of Minnesota. On information and belief, she resides in Hennepin County, Minnesota. Under the provisions of Minnesota Statutes 2000 Chapters 200 through 211 inclusive, she is charged, in her official capacity, with the duty of keeping records of state elections, giving notice of state elections, receiving the filings of candidates for state elective offices, preparing ballots and instructions to voters, distributing copies of the election laws of the State of Minnesota, receiving election returns, furnishing blank election ballots and forms to the several county auditors, furnishing certificates of election to successful legislative candidates in multi-county districts and to successful candidates for election to the United States Congress, serving on the State Canvassing Board, and various other election duties.

4. Defendant Doug Gruber is the duly qualified and acting Auditor of Wright County, State of Minnesota. As such he is the Wright County Chief election officer.

5. This action is brought against Defendant Doug Gruber as Wright County Auditor, individually and as representative of all other county auditors and/or chief county election officers similarly situated in the State of Minnesota; such persons being so numerous as to make it impracticable to bring them all before the Court by way of joinder; there are predominantly common questions of law, to wit, the constitutionality under the United States and Minnesota constitutions of (a) the legislative apportionment system set forth in Minnesota Statutes §§2.043 through 2.703 and (b) the current plan of congressional redistricting as set forth in Minnesota Statutes §§2.742 through 2.812; the defenses of the named Defendants will fairly and adequately protect the interests of the class; and the prosecutions of separate actions against individual members of the class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for Intervening Plaintiffs.

6. Said county auditors and chief county election officials, however designated or titled, are charged with various election duties in their respective counties, including but not limited to preparation of ballots, furnishing of ballots, canvassing of returns of legislative and congressional elections; providing certificates of election to successful legislative and congressional candidates in single county legislative districts; certifying to the Secretary of State the

results of the canvass in their respective counties and various other miscellaneous duties with respect to primary, general and special elections.

7. The Plaintiffs represent the interests of supporters of the Independent Republican Party of Minnesota and not of Intervening Plaintiffs who are supports of the Minnesota Democratic-Farmer-Labor Party nor the interests of the citizens of Minnesota as a whole.

## COUNT I

## LEGISLATIVE MALAPPORTIONMENT

8. This case arises under the Fourteenth Amendment, Section 1 to the Constitution of the United States which provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions thereof guaranty to the citizens of each state the right to vote in State and Federal elections and that the vote of each shall be equally effective with any other vote cast in such elections. A state statute which effects a legislative apportionment which invidiously discriminates against

voters in highly populous districts and prefers other voters in the least populous districts violates the above quoted constitutional provision.

This case also arises under the Fifth Amendment to the Constitution of the United States which provides in pertinent part:

"No person shall . . . be deprived of life, liberty or property without due process of law."

Minnesota Statutes §§2.043 through 2.703 effect an apportionment which invidiously discriminates against voters in the more highly populous districts including Intervening Plaintiffs and prefers other voters in the least populous districts in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

9. This case also arises under Article IV, Section 2 of the Minnesota State Constitution which provides:

"The number of members who compose the senate and house of representatives shall be prescribed by law. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof."

10. Article IV, Section 3 of the Minnesota State Constitution provides:

"The legislature shall have the power to provide by law for an enumeration of the inhabitants of this state and also have the power at their first session after each enumeration of the inhabitants of this state made by the authority of the United States, to prescribe the bounds of congressional, senatorial and representative districts, and to apportion the new senators and

representatives among the several districts according to the provisions of section Second this Article."

11. Intervening Plaintiffs as citizens of the United States and of the State of Minnesota have the right conferred by the above provisions of the Minnesota Constitution to have the entire membership of the Minnesota Legislature apportioned and elected on the basis of the 2000 Federal Census. The intent and the purpose of the aforesaid provisions of the Minnesota Constitution is to require that the members of the Legislature be elected by the people of Minnesota on a basis of equal representation of the individual electors in the state and that the Minnesota State Senators and Representatives must be equally apportioned throughout the state in districts which are arranged in proportion to the number of inhabitants therein.

12. On information and belief, the United States Census for the 2000 shows that the state legislative districts as established and set forth in Minn. Stat. 2000, §§2.043 through 2.703 are unequally apportioned; the legislature of the State of Minnesota has adopted no legislative apportionment system since 1994; that despite the compilation of the 2000 census, the legislature has failed and neglected to reapportion the legislative districts in the State of Minnesota and will unless otherwise ordered, continue to fail and neglect to reapportion those districts; and the present apportionment of the state legislative

districts is not based on any logical or reasonable formula whatsoever, but is arbitrary and capricious.

13. The unequal representation reflected in the statutes cited above, deprives Intervening Plaintiffs and all other voters of the highly populated districts of the rights guaranteed to them by the Fourteenth Amendment to the United States Constitution including their rights of Due Process of Law and Equal Protection of the laws. It also deprives them of their rights as guaranteed by the above quoted provisions of the Minnesota State Constitution.

14. The common relief sought against the defendants in their official capacities relates to their respective jurisdictions in carrying out the election laws of the State of Minnesota with respect to the election of senators and representatives of said State Legislature calling for elections therefor; and the taking of all steps necessary to hold all elections both nominating and general, and all matters relating to the election of state representatives and senators to the Minnesota State Legislature.

15. The Legislature of the State of Minnesota did not pass a law reapportioning itself in conformity with the United States Constitution and the Constitution of the State of Minnesota which law will be signed by the governor of the State of Minnesota, during the 2001 Legislative Session. The Intervening Plaintiffs allege on information and belief that all of the Defendants intend to and will, unless sooner restrained by an Order of this Court, conduct the

election for the next legislature, namely the 2003 legislature, during the year 2002, on the basis of the senatorial and representative districts set forth in Minn. Stat. §§2.043 through 2.703, and that until there is legislative reapportionment, Defendants will continue to do so in subsequent elections of members of the Minnesota state legislature.

16. Intervening Plaintiffs further allege that they intend to and will vote in the state primary and general elections in 2002 and thereafter for candidates for state legislative offices; and that said elections conducted in accordance with Minn. Stat. §§2.043 through 2.703 will continue to deprive Intervening Plaintiffs of their rights guaranteed under the Constitution of the United States and the Constitution of the State of Minnesota.

17. In the absence of reapportionment of the legislative districts of the State of Minnesota in conformity with the Minnesota Constitution, any action of these Defendants in conducting an election for members of the Minnesota Legislature in accordance with the districts prescribed by Minn. Stat. §§2.043 through 2.703, has deprived and will continue to deprive Intervening Plaintiffs of their constitutional rights in that:

(a) They are and will be arbitrarily deprived of liberty and property without Due Process of law, and are and will be arbitrarily deprived of the Equal Protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) They are and will be deprived of liberty and property contrary to Article I, Section 7 of the Minnesota Constitution.

(c) They are and will be, to substantial measure, disenfranchised and deprived of their rights and privileges, all in violation of Article I, Section 2 of the Minnesota Constitution.

(d) They are and will be deprived of an equally apportioned state legislature as guaranteed by Article 4, Sections 2 and 3 of the Minnesota Constitution.

(e) Their right to vote, as guaranteed by Article 7, Section 1 of the Minnesota Constitution, is and will continue to be abridged, diluted and infringed.

18. By reason of the failure of the Legislature and Governor of the State of Minnesota to reapportion the legislative districts of the state in conformity with the Minnesota Constitution, thus violating the constitutional rights of these Intervening Plaintiffs and of all other members of the class of citizens and voters whom they represent, a justiciable controversy exists.

## COUNT II

## CONGRESSIONAL REDISTRICTING

19. Intervening Plaintiffs reallege Paragraphs 1 through 6 hereof.

20. This case arises under the Fourteenth Amendment, Section 1 of the Constitution of the United States which provided in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions thereof guaranty to the citizens of each state the right to vote in State and Federal elections and that the vote of each shall be equally effective with any other vote cast in such elections. State action which enforces or effects an apportionment which invidiously discriminates against voters in highly populous districts and prefers other voters in the least populous districts violates the above quoted constitutional provision.

21. Article IV, Section 3 of the Minnesota State Constitution provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts.

22. Intervening Plaintiffs as citizens of the United States and of the State of Minnesota have the right conferred by the above provision of the Minnesota Constitution to have all Representatives in Congress from the State of Minnesota apportioned and elected on the basis of the 2000 Federal Census. The intent and purpose of the aforesaid provision of the Minnesota Constitution is to require that Representatives in Congress be elected by the

people of the State of Minnesota on a basis of equal representation of the individual electors in the state and that the Minnesota Representatives in Congress from the State of Minnesota must be equally apportioned throughout the state in districts which are arranged in proportion to the number of inhabitants therein.

23. On information and belief, the United States Census for 2000 shows that the congressional districts as established in Minnesota Statutes §§2.742 through 2.812 are now unequally apportioned; that despite the compilation of said Census, the Legislature has failed and neglected to reapportion lawfully the congressional districts in the State of Minnesota; and the present apportionment of the congressional districts is not based upon any logical or reasonable formula whatsoever, but is arbitrary and capricious. The estimated present population of each congressional district as now set forth in Minnesota Statutes §§2.742 through 2.812, appear more fully in Exhibit "B" which is attached hereto and made a part hereof by reference.

24. The unequal representation reflected in Exhibit "B" deprives Intervening Plaintiffs and all other voters of the highly populated districts of the rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States including their rights of Due Process of Law and the Equal Protection of the laws. It further deprives them of their rights as guaranteed by the above quoted provisions of the Minnesota State Constitution.

25. The common relief sought against all defendants in their official capacities related to their respective jurisdictions in carrying out the election laws of the State of Minnesota with respect to the election of Representatives in Congress calling for elections therefor; the appointment of election judges therefor; the registration of qualified voters therefor; the holding of elections therefor; the certifying of the result of said elections; the preparation of ballots therefor, and the taking of all steps necessary to hold all elections both nominating and general, and all matters relating to the election of Representatives in Congress.

26. The Legislature of the State of Minnesota did not pass a law reapportioning the congressional districts in conformity with the United States Constitution and the Constitution of the State of Minnesota during the 2001 Legislative Session. The Intervening Plaintiffs further allege on information and belief that all of the defendants intend to and will, unless sooner restrained by an order of this Court, conduct the next election for Representatives in Congress during the year 2002, on the basis of the current congressional districts and that until there is congressional reapportionment, defendants will continue to do so in subsequent elections of Representatives in Congress.

Intervening Plaintiffs further alleges that they intend to and will vote in the state primary and general election in 2002 and thereafter for candidates for

Representatives in Congress; and that said elections conducted in accordance with the present districts will continue to deprive Intervening Plaintiffs and the class that they represent of their rights guaranteed under the Constitution of the United States and of the State of Minnesota.

27. In the absence of reapportionment of the congressional districts of the State of Minnesota in conformity with the United States Constitution and the Minnesota Constitution, any action of these defendants in conducting an election for Representatives in Congress in accordance with the present districts has deprived and will continue to deprive Intervening Plaintiffs of their constitutional rights in that:

(a) They are and will be arbitrarily deprived of liberty and property without due process of law, and are and will be arbitrarily deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) They are and will be deprived of liberty and property contrary to Article I, Section 7 of the Minnesota Constitution.

(c) They are and will be, in substantial measure, disenfranchised and deprived of their rights and privileges, all in violation of Article I, Section 2 of the Minnesota Constitution.

(d) They are and will be deprived of equally apportioned congressional districts as guaranteed by Article 4, Section 3 of the Minnesota Constitution.

(e) Their right to vote, as guaranteed by Article 7, Section 1 of the Minnesota Constitution, is and will continue to be abridged, diluted and infringed.

28. By reason of the failure of the Legislature of the State of Minnesota to reapportion the congressional districts of the state in conformity with the Federal and Minnesota Constitutions, thus violating the constitutional rights of these Intervening Plaintiffs and of all other members of the class of citizens and voters whom they represent, a justiciable controversy exists.

## JURISDICTION

29. This Court has authority under and by virtue of 42 U.S.C. § 1983 et. seq. to enforce the Intervening Plaintiffs' United States Constitutional rights set forth above and has general jurisdiction to enforce the Intervening Plaintiffs' Minnesota constitutional rights set forth in Counts I and II above.

30. This Court also has jurisdiction under the provisions of M.S.A. §555.01 and §555.08 through 555.12 to grant the relief requested herein.

WHEREFORE, Intervening Plaintiffs pray for relief as follows:

1. That this Court declare the rights of the Intervening Plaintiffs and the class they represent in the premises, to wit:

   (a) that the present legislative apportionment of the State of Minnesota as set forth in Minnesota Statutes §2.043 through 2.703 has deprived and continues to deprive Intervening Plaintiffs and their class of their liberty and property without Due Process of law and has denied and continues to deny the Intervening Plaintiffs Equal Protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States; and

   (b) the present scheme of congressional apportionment deprives Intervening Plaintiffs and the class they represent of Due Process of Law and Equal Protection of the law all in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The Court declare that Minnesota Statute §§2.043 through 2.073 unlawfully impairs the rights of the Intervening Plaintiffs and the class they represent as guaranteed by Article 1, Section 2 and Article 4, Sections 2 and 3 of the Minnesota Constitution.

3. The Court issue its permanent injunction and judgment decreeing that the plan of legislative apportionment set forth in Minnesota Statute

§§2.043 through 2.703 may not hereafter be used as a valid plan and scheme of legislative apportionment.

4. The Court permanently restrain the defendants and the class of persons they represent from receiving nominations and petitions for legislative office, from issuing certificates of nominations and elections, and from all further acts necessary to the holding of elections for members of the Minnesota Legislature in the districts set out and described in Minnesota Statutes §§2.043 through 2.703 until such time as the legislature passes and the governor approves legislation reapportioning the state legislative districts in accordance with the Constitution of Minnesota and the Due Process and Equal Protection clauses of the United States Constitution.

5. The Court notify the Legislature of the State of Minnesota presently in session, that it shall retain jurisdiction of this cause during the terms of such legislature to determine at the end thereof whether any new legislative apportionment system has been devised to meet the requirements of the Fourteenth Amendment to the Constitution of the United States and the provisions of the Constitution of the State of Minnesota and for further hearings herein to determine the validity of any new legislative apportionment law as may be enacted; and in the absence of the enactment of a constitutionally valid method of

legislative apportionment by said Legislature that this Court will make a determination of a proper legislative apportionment system for the State of Minnesota.

6. The Court declare that the present plan of Congressional districts unlawfully impairs the rights of the Intervening Plaintiffs and the class they represent as guaranteed by Article 4, Section 3 and Article 1, Section 2 of the Minnesota Constitution.

7. The Court issue its permanent injunction and judgment decreeing that the plan of congressional apportionment set forth in the present plan of Congressional districts as set forth in Minnesota Statutes §§2.742 through 2.812 may not hereafter be used by Defendants as a valid plan and scheme of congressional apportionment.

8. The Court permanently restrain the Defendants and the class of persons they represent from receiving nominations and petitions for Congressional office, from issuing certificates of nomination and election and from all further acts necessary to the holding of elections for members of Congress in the districts set out and described in Appendix A to the decree of the Court in Minnesota Statutes §§2.742 through 2.812 until such time as the legislature passes and the governor approves legislation apportioning the eight (8) Minnesota Congressional districts in accordance with the Constitution of

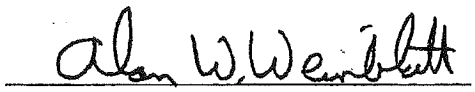
Minnesota and the Due Process and Equal Protection clauses of the United States Constitution.

9. The Court notify the Legislature of the State of Minnesota presently in session, that it Court shall retain jurisdiction of this cause during the terms of such legislature to determine at the end thereof whether any new congressional apportionment system has been devised to meet the requirements of the Fourteenth Amendment to the Constitution of the United States and the provisions of the Constitution of the State of Minnesota and for further hearings herein to determine the validity of any new congressional apportionment law as may be enacted; and in the absence of the enactment of a constitutionally valid method of congressional apportionment by said Legislature that this Court will make a determination of a proper congressional apportionment system for the State of Minnesota.

10. The Court order defendants to pay to Intervening Plaintiffs, pursuant to 42 U.S.C. §1988 and Minn. Stat. §555.08, their reasonable attorneys fees and expenses, expert fees, costs and other expenses incurred in prosecuting this action.

11. For such other and future relief as is just in the circumstances.

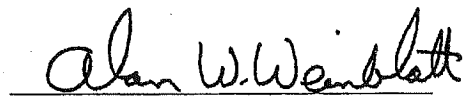
Dated: August 17, 2001



Alan W. Weinblatt, 155332
Kathleen A. Gaylord, #0033856
*Attorneys for Plaintiff-Intervenors*
336 N. Robert Street, Suite 1616
St. Paul, MN 55101
651-292-8770 (Phone)
651-223-8282 (fax)
weglaw@usinternet.com

## ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.21, subd. 2, to the party against whom the allegations in this pleading are asserted.



ALAN W. WEINBLATT

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
C0-01-160

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diane V. Bratlie, Brian J. LeClair and Gregory Ravenhorst, individually and on Behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

and

Patricia Cotlow, Thomas L. Weisbecker, Theresa Silka, Geri Boice, William English, Benjamin Gross, Thomas R. Dietz, John Raplinger, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs-Intervenors,

And

Jesse Ventura,

Plaintiff-Intervenor,

and

Roger D. Moe, Thomas W. Pugh, Betty McCollum, Martin Olav Sabo, Bill Luther, Collin C. Peterson and James L. Oberstar,

Plaintiffs-Intervenors,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota; and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

**MEMORANDUM REGARDING REDISTRICTING CRITERIA**

Anderson Aff.
Exhibit E

## INTRODUCTION

Pursuant to this Court's Order dated October 29, 2001, counsel for the parties exchanged drafts of proposed redistricting criteria and conferred by telephone on November 9, 2001, and thereafter through this date. The result of that conference was a joint stipulation of agreed criteria which has now been executed by counsel and is being filed. The *Cotlow* Plaintiffs concur with that stipulation. This Memorandum is submitted regarding certain unagreed principles suggested by one or more parties but which did not receive unanimous support.

## I. PERMITTED DEVIATIONS IN LEGISLATIVE PLANS

The Minnesota Federal District Court in the cases of *Beens v. Erdahl*, (349 F. Supp. 97), and *LaComb v. Growe* (541 F. Supp. 145 and 160 D. Minn. 198), adopted a maximum permitted deviation of two percent (+or-) from absolute equality as the maximum tolerable deviation in the 1971 and 1981 legislative redistricting cases respectively. The Minnesota Special Redistricting Panel adhered to that same standard. *Cotlow v. Growe*, (Order dated August 16, 1991) (File MX 91-001562). The *Cotlow* Plaintiffs see no constitutional reason to change that criteria. If any party wishes to submit a legislative plan with a smaller deviation, they are certainly free to

do so. Unless constitutionally required, the *Beens, LaComb, Cotlow* standard should not be overruled.

## II. COMPACTNESS

For the following reasons, the Cotlow Plaintiffs strongly argue that "compactness" should not be a principle required for legislative or congressional districts except in those situations where it is also alleged that districts have been drawn for a prohibited racial reason.[1]

A. "Compactness" is not a constitutionally mandated criteria. *Shaw v. Reno* 517 U.S. 899, 935 116 S. Ct. 1894, 1915 (1996). As the Supreme Court there noted,

> "Neither the State nor federal constitution requires districts to be compact. Critics often refer to the lack of compactness of a particular district or group of districts as a sign of gerrymandering, but no court has ever struck down a plan merely on the basis that it did not appear to be compact. Although there are geometric methods for measuring the compactness of an area, these methods have not been recognized as judicial standards for evaluating the compactness of districts." *Id at fn 12.*

No matter how bizarre or convoluted a district appears, that fact standing alone does not implicate the U.S. Constitution. *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 2826-27 (1993). Nor does the Minnesota constitution require compact districts.

[1] Even in such cases compactness as an aesthetic norm may be unrelated to the evil sought to be cured. *Dillard v. Baldwin County Board of Education*, 686 F.Supp. 1459, 1465-66 (MD Ala. 1988).

Article 4, Sec. 3 requires only that state Senate districts be comprised of convenient and contiguous territory.

B. Beyond the constitutional issue, it is generally recognized that "compactness" is a weak consideration at best. *Diaz v. Silver* 932 F. Supp. 462, 464 (E.D. NY 1996). Irregular district shapes may be justified because the district line follows a significant geographic feature or political subdivision boundary or promotes population equality. *Smith v. Beasley, 946 F. Supp. 1174, 1179 (D.So.Car. 1996).* Further, a district may lack compactness due to geographic or demographic reasons but still serve the traditional goal of joining communities of interest. *Hunt v. Cromartic, 526 U.S. 541, 555 fn.1, 119 S.Ct. 1545, 1554 (1999) (Stevens J., concurring).* Finally, municipal boundaries, towns, census districts and precincts are not necessarily compact. This criteria is artificial, signifying nothing.

C. Compactness is not a useful or operational criteria for judging whether a districting plan is fair. *Young,* Measuring The Compactness of Legislative Districts, XIII Legislative Studies Quarterly 105, 106 (Feb 1988). Compactness is such a hazy and ill-defined concept that it is impossible to apply, in any rigorous sense, to matters of law*Young*, op cit at 113. Indeed, reliance on any one or more of the 36 potential measures of compactness opens the door to subtle types of gerrymandering (the result sought to be avoided) "in which high speed computers manipulate data bases in order to create plans that meet superficial mathematical

criteria of equality and compactness while being grossly gerrymandered in the political sense. *Id.* See *Dillard v. Baldwin County Board of Education, 686 F. Supp.* 1459, *1465-66 (MD Ala. 1988).*

It has been recognized that there are 36 different measures of "compactness". Each of them is flawed in one or more ways. See *Altman, The Consistency and Effectiveness of Mandatory District Compactness Rules,* page 9 (unpublished paper found at http://data.fas.harvard.edu/micah_altman/papers/cpt_cst2_3.pdf.), and *Niemi, Grofman, et al, "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering,"* 53 Journal of Politics 1155 at 1179 (1991); see also *Young,* supra. Indeed, it is not unfair to describe them as "junk science."

D. Because there are so many measures of compactness, because they are so vague and because they are nearly all outcome determinative (choose the "test" that gets you the desired result) courts generally have been reluctant to enforce them. *Pildes and Niemi, Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno,* 92 Mich. L. Rev. 483, 529-533 (1993). This court should not adopt a measure or principle without evidence of its consequences intentional or unintentional.

E. While population equality is a principle that favors neither the Republicans nor the Democrats, "compactness" is not similarly neutral. It has been recognized that:

> "On the whole, the adoption of compactness as a criterion for drafting or evaluating districting plans will systematically advance the interests of the Republican Party and correspondingly disadvantage the Democratic Party." Lowenstein and Steinberg *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory* 33 UCLA L. Rev. 1, 23-27 (1985).

F. At least of equal importance is the conclusion "...that the presence or absence of compact districts does not assure either the presence or absence of ... gerrymandering." *id.* Reaching the same conclusion, see *Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders,* 17 Political Geography 989 (1988). It seems clear that the reason for the worthlessness of compactness as a criterion is that compactness has none of the characteristics that make population equality and contiguousness desirable districting criteria. Lowenstein and Steinberg, op cit at pages 25 et seq. For example, applying a subjective measure of compactness will further embroil the court in the substantive political controversies inherent in districting. Id.

If compactness is not a reasonable measure of anything and is unfair to the Cotlow plaintiffs by reason of its political favoritism of Republican interests then why has it been often stated as a criteria but not generally applied? One author suggests an answer:

> "When physical geography is stretched too thin, when it is twisted, turned, and tortured - all in the apparent pursuit of fair and effective minority representation - at some point, too much becomes too much. That appears to be the judicial impulse that accounts for Shaw: in the conflict of territory and interest, the Constitution requires policymakers somehow to hold the line and accommodate both.
>
> But judicial impulses are one thing, legal doctrine another. That most people, judges included, recoil instinctively from willfully misshapen districts is understandable enough. Yet defining the values and purposes that might translate this impulse into an articulate, justifiable set of legal principles is no easy task. Leading academic experts in redistricting have long argued that this impulse reflects untutored intuition, an instinctive response that careful analysis reveals to be unwarranted."

Pildes and Niemi, op cit at p. 484. The Cotlow plaintiffs argue that unless alleged racial discrimination is shown in a plan, the use of compactness as a measure offers only an opportunity for mischief and should be rejected.

## III. COMMUNITIES OF INTEREST

The parties have agreed by stipulation that in adopting any districting plan, the court should include recognition and maintenance of communities of interest as a principle. They differ over what types of communities shall be included. The Cotlow Plaintiffs urge the court to adopt the definition contained in the stipulation and to add (a) neighborhoods, (b) economic interests, and (c) transportation as additional elements of the definition.

Neighborhoods by definition are communities of interest. While some neighborhoods may have to be divided between districts in order to achieve population equality or because use of census tracts or blocks requires such division, this category is a reasonable addition to the list of factors that should at least be considered. There should be no reason to totally ignore neighborhoods as a community of interest without some basis in law or fact.

Economic factors also bear upon the definition of a community of interest. Factors such as median income, median housing prices, or school lunch participation, in adjoining geographic areas give strong weight in deciding what is a "community of interest."

Transportation is a factor that clearly impacts communities of interest. The ability to easily get from one geographic area to another ties people together and helps create a sense of community. While it is not a factor that should be controlling, it certainly merits consideration. Data from the Minnesota Planning Department and the Metropolitan Council make this an easy factor to consider.

## IV. PREVIOUS OR PROJECTED VOTING BEHAVIOR BY PARTY AND POLITICAL COMPETITIVENESS

The Cotlow Plaintiffs submit that where a plan is to be drawn by a court, these factors should have no bearing. The Cotlow Plaintiffs are DFL orientated. Their

plan will most likely be oriented in that direction. Likewise, the Moe Plaintiffs and the Zachmann Plaintiffs will submit plans drawn to favor their respective interests. So, too, does the Governor's plan. He will try to seek political advantage using the vague and unenforceable concept of "political competitiveness". The drawing of district lines is inherently a "political" action. That is precisely the reason that such line drawing belongs in the political branch unless constitutional rights are being violated.

While there is nothing legally, constitutionally or ethically wrong in the use of political data by a legislative body or by any party to this litigation, the Court itself should not become engaged in the practice of drawing district lines for partisan advantage. To do so would enmesh the judiciary in precisely the "political thicket" horrible predicted by *Colgrove v. Green*. [2]

Furthermore, there are no measurable judicial standards for a court adopted partisan political plan whether Republican, DFL, Jesse or "competitive". Instead, the court should adopt the very best plan that it can fashion, giving the greatest weight to population equality and communities of interest principles. Above all, do no harm. *Davis v. Bandemere*, 478 U.S. 109, 106 S. Ct. 2797 (1986), does not require or authorize a court to become a political body when drawing a districting plan.

---

[2] 328 U.S. 549, 66 S. Ct. 1198 (1946). See Grofman, Criteria for Redistricting, A Social Science Perspective, 33 UCLA L. Rev. 77, 123-4 (1985).

## V. USE OF CURRENT DISTRICTS AND PRESERVATION OF THEIR CORE

One or more parties may ask the court to adopt a plan using the cores of the old, unconstitutional districts with "minimal tinkering" necessary to achieve population equality as the basis for a plan. The Cotlow Plaintiffs submit that there is great merit to that concept, but that it should not be adopted as a separate districting principle because it should not become a talisman for disregarding the concept of communities of interest. In certain parts of the state, strict adherence to the old districts may be desirable, i.e., to the extent that they reflect a community of interest. Per contra, in areas, using the current "core" may be detrimental to the recognition of these communities as they now exist or reasonably may be expected to develop over the current decade. In these districts, maintaining the present core would be both illogical and unfair. For example, in certain parts of the state the present or future community of interest may be more accurately reflected by the districts that existed after 1971 litigation (Beens districts) or after 1981 case (LaComb districts) than they are by the 1991 plan (Cotlow districts).

Finally, there are certain areas of Minnesota (e.g. Eden Prairie, Woodbury, Inver Grove Heights) where demographic changes since 1991 have been gigantic. In those areas, maintaining current "cores" (however that may be defined) is counter productive and measures no value that the court's plan need preserve.

## VI. OTHER MATTERS

A. Minority Representation.

The Cotlow Plaintiffs believe that a criteria pertaining to minority representation should be adopted by the Court. They agree to either of the proposals attached to this Memorandum.

B. Preserving Political Subdivisions.

The goal of recognition of existing political subdivisions has merit. The rhubric of blind adherence to them does not. The Cotlow Plaintiffs request that the proposed compromise attached to this Memorandum be adopted. Legislators represent people, not trees, acres, counties, towns or cities.

C. Political Competitiveness.

For the reasons set forth above, the Cotlow plaintiffs do not support the proposal to add an unspecified (or even specified) political litmus test to any plan adopted by the Court.

Dated: November 13, 2001

Alan W. Weinblatt, #115332
Weinblatt & Gaylord, PLC
Suite 1616, Pioneer Building
336 North Robert Street
St. Paul, MN 55101
Telephone: (651) 292-8770
Attorney for Plaintiffs-Intervenors
Cotlow, et al

COTLOW VERSION 1

MINORITY REPRESENTATION. No district shall be drawn that dilutes the voting strength of racial or language minority populations. Where a sizeable concentration of a racial or language minority makes it possible, and where it can be done in compliance with the other principles in this resolution, the districts must increase the probability that members of the minority will be elected.

COTLOW VERSION 2

MINORITY REPRESENTATION. No district shall be drawn to dilute racial or ethnic minority strength in violation of the Voting Rights Act of 1965, as amended.

COTLOW VERSION

PRESERVING POLITICAL SUBDIVISIONS. The integrity of existing boundaries of political subdivisions of the State (counties, cities and towns) will be respected to the extent practicable to minimize their division in the formation of a district.

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
C0-01-160

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diane V. Bratlie, Brian J. LeClair and Gregory Ravenhorst, individually and on Behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

and

Patricia Cotlow, Thomas L. Weisbecker, Theresa Silka, Geri Boice, William English, Benjamin Gross, Thomas R. Dietz, John Raplinger, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs-Intervenors,

And

Jesse Ventura,

Plaintiff-Intervenor,

and

Roger D. Moe, Thomas W. Pugh, Betty McCollum, Martin Olav Sabo, Bill Luther, Collin C. Peterson and James L. Oberstar,

Plaintiffs-Intervenors,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota; and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

**AFFIDAVIT OF SERVICE**

Alan W. Weinblatt, being first duly sworn, deposes and says that on November 13, 2001, I served upon each of the persons listed in Exhibit A attached hereto by United States Mail and by facsimile a true and correct copy of the Memorandum Regarding Redistricting for Patricia Cotlow, et al.

Alan W. Weinblatt

Alan W. Weinblatt

Subscribed and sworn to before me
this 13th day of November, 2001.

Notary Public

KATHLEEN A. GAYLORD
NOTARY PUBLIC - MINNESOTA
My Commission Expires 1/31/2005

EXHIBIT A

Timothy D. Kelly
Kelly & Berens, P.A.
Suite 3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55403

Marianne D. Short
Dorsey & Whitney
220 South Sixth Street, Suite 1300
Minneapolis, MN 55402

Brian J. Asleson
Deputy Wright County Attorney
Wright County Courthouse
Wright County Attorney's Office
10 Second St. NW
Buffalo, MN 55313

John French, Esq.
Brian Melendez, Esq.
2200 Wells Fargo Center
Faegre & Benson, LLP
90 South 7th Street
Minneapolis, MN 55402

Alan I. Gilbert
Chief Deputy & Solicitor General
Mark B. Levinger
Assistant Attorney General
Mike Hatch
Attorney General, State of Minnesota
445 Minnesota Street, Suite 1100
St. Paul, MN 55101

Not Reported in F.Supp.2d, 2002 WL 32113830 (E.D.Tex.)
**(Cite as: 2002 WL 32113830 (E.D.Tex.))**

**H**
Only the Westlaw citation is currently available.

United States District Court,
E.D. Texas, Tyler Division.
Simon BALDERAS, et al.
v.
STATE of Texas, et al.

No. 6:01CV158.
Feb. 20, 2002.

*ORDER*
HIGGINBOTHAM, HANNAH and WARD, JJ.
***1** This Filing Applies to: All Actions

The road to democracy is complete. All that is left is the bill. The sponsors of various fee applications assert prevailing party status under the Voting Rights Act and the Civil Rights Act. The state challenges the applications on two grounds: timeliness and whether the applicants are prevailing parties. We will address each argument.

1. Timeliness.

The state argues that several of the applications were not timely made and, therefore, should not be considered by the court. Specifically, the state challenges the applications submitted by the Mayfield plaintiffs (# 475), the Delay intervenors (# 482) and the Associated Republicans of Texas (# 486). We assume for purposes of this discussion that the state would make like challenges to applications recently filed, including the one filed by Congresswomen Eddie Bernice Johnson and Sheila Jackson Lee (# 495). The state argues that these parties seek fees solely for work performed during the congressional redistricting phase of this case, but they did not make application for those fees within the time period set forth in the rules.

To be entitled to attorney's fees under the federal rules, a party must (1) request attorney's fees in its pleadings and (2) file a timely application under Rule 54. *Romaguera v. Gegenheimer,* 162 F.3d 893, 895 (5th Cir.1998). To be timely, a motion for attorney's fees must be filed and served no later than 14 days after the entry of judgment. FED. R. CIV. P. 54(d)(2)(B). The failure to file a timely application under this rule serves as a waiver of the claim for attorney's fees, *United Industries, Inc. v. Simon-Hartley, Ltd.,* 91 F.3d 762, 766 (5th Cir.1996), absent circumstances that justify a departure from the rule. *E.g., Romaguera,* 162 F.3d at 896 (holding that district court's statement that fee application would be determined in "separate hearing" led applicant to believe a hearing would be scheduled by court and relaxed necessity to file application within 14 days after judgment).

The Mayfield plaintiffs, the Delay intervenors and Congresswomen Lee and Johnson recently have requested an extension of the deadline for filing attorney's fees applications. We grant the request for an extension of time and will treat all of the motions for attorney's fees filed as of the date of this order to have been timely made. We do so primarily because we perceive no prejudice to the state. The parties made mention of attorney's fees in their complaints, and, in addition, we recognize that our handling of the judgments in the various phases of this unorthodox case was not ordinary. We will judge the fee applications on their ultimate merit. We now turn to that task.

2. Prevailing Party Status.

A. Congressional Redistricting Efforts.

In the congressional case, several parties stake claim to prevailing party status under 42 U.S.C. § 1988 and 42 U.S.C. § 19731(e). *See* # 463 (Diaz/LULAC Intervenors), # 464 (Balderas Plaintiffs), # 465 (Valdez-Cox Intervenors), # 475 (Mayfield/Democratic Congressional Intervenors), # 482 (Republican Congressional Intervenors), # 486 (Associated Republicans of Texas), and # 495 (Congresswomen Lee and Johnson). These statutes provide that "prevailing parties" in actions to en-



Anderson Aff.
Exhibit F

force constitutional voting guarantees and certain provisions of the civil right statutes are entitled to a reasonable attorney's fee as part of the costs.

***2** A plaintiff prevails when he or she obtains an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. *Farrar v.. Hobby,* 506 U.S. 103, 111 (1992). "[A]t a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792 (1989). Recovery of nominal damages by a civil rights plaintiff confers prevailing party status, though the amount of a reasonable fee may be reduced if the nominal damages awarded represent only a technical victory. *Farrar,* 506 U.S. at 114-15.[FN1]

> FN1. Not all civil rights plaintiffs are prevailing parties, even if the lawsuit leads the defendant to alter its course of conduct in a manner that furthers the plaintiff's agenda. Last term, the Supreme Court held that a lawsuit's catalytic effects were not sufficient, standing alone, to support a prevailing party finding. *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Services,* 532 U.S. 598, 121 S.Ct. 1835, 1840 (2001). A voluntary change in the defendant's conduct, even though it accomplishes what the plaintiff sought to achieve in the lawsuit, lacks the necessary judicial *imprimatur* on the change. *Id.*

The state argues that the fee applicants are not prevailing parties because the state's liability in the congressional phase of the case was uncontested, and the court's focus was on a remedy. The state continues that since the court drew its own plan, rather than adopting one of the party's, no party prevailed in the sense of the fee statutes. Moreover, the state argues that the Balderas plaintiffs and the Martinez intervenors did not win on their claims requesting the creation of additional Hispanic congressional districts; therefore, they cannot be prevailing parties. These facts, according to the state, justify denial of the fee applications.

In assessing the merits of the applications, the first question is whether any of the applicants is a prevailing party. Were we writing on a clean slate, we might hold that none prevailed. Adherence to *Ramos v. Koebig,* 638 F.2d 838, 845 (5th Cir.1981), however, compels the conclusion that these applicants meet the statutory definition of prevailing parties. In *Ramos,* the City of Seguin, Texas had refused to redistrict its city council districts. The minority population, though comprising more than 54% of the total population of the municipality, had never been able to elect more than one fourth of the representatives on the council at any given time. The city council capitulated in response to the plaintiffs' suit, admitted the unconstitutionality of the districts, and offered up new districts. The district court chose to adopt the city council's plan over the plaintiffs' proposal and denied any fee award.

The Fifth Circuit held the district court erred when it concluded the plaintiffs were not prevailing parties. The primary purpose of the suit was to obtain an injunction against future elections being held under a plan that unlawfully diluted minority voting strength. *Ramos,* 638 F.2d at 845 (noting "[i]n the present case, the principal relief prayed for in plaintiffs' complaint was for an injunction against any future elections under the unconstitutional 1962 plan-precisely the relief ordered by the district court"). The court stated "that the district court rejected plaintiffs' plan and adopted the Council's plan likewise is irrelevant." *Ramos* counsels us to conclude that the present applicants meet the statutory definition of prevailing parties under the fee statutes.

***3** Prevailing party status, however, is not the end of the inquiry into the merits of these applications. Just because a litigant is a "prevailing party"

does not mean he is entitled to recover all of his fee request. "Although the 'technical' nature of a nominal damages award *or any other judgment* does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988." *Farrar,* 506 U.S. at 114 (emphasis added) . [FN2] We see no reason to distinguish between a case seeking money damages and one seeking a new congressional plan as a remedy. *See Daggett v. Kimmelman,* 811 F.2d 793, 800 (3d Cir.1987).

> FN2. "Where recovery of private damages is the purpose of ... civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.* (*quoting Riverside v. Rivera,* 477 U.S. 561, 585 (1986)(Powell, J. concurring)).

Redistricting litigation is not ordinary civil rights litigation. We appreciate the court's observation in *Hastert v. Illinois State Bd. of Elections,* 28 F.3d 1430, 1339 (7th Cir.1994):

> Each had a plan to offer and *the winner, at least from a lay person's perspective, is the litigant whose plan and objectives (usually incorporated in its map) the district court adopted.* Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of "prevailing party." (emphasis added).

*Hastert* announced a rule that "in the redistricting context the touchstone for whether a party 'prevails' is whether that party's map (or the map the party ultimately embraces) is ultimately adopted." *Id.* at 1443. *Ramos* aside, the Supreme Court's more recent pronouncement in *Farrar* compels us to discharge our additional duty to assess whether *any* fee is a reasonable fee in light of the overall result obtained by the applicant. *Farrar,* 506 U.S. at 114. We think that the *Hastert* court's approach is particularly appropriate here. Where the sole purpose of redistricting litigation is to secure for a litigant a particular remedy, and the court refuses to adopt that remedy in favor of another that is markedly different, the litigant has obtained little, if any, more than the "technical" victory described in *Farrar.* Bearing these standards in mind, we now turn to the question of whether any fee is reasonable in the context of the congressional redistricting case.

We observe that none of these applicants would even be prevailing parties in the Seventh Circuit, because the court failed to adopt a map any of them sponsored. Although we are persuaded that the judgment in the congressional phase of this case altered the legal relationship between these parties in the sense required by the fee-shifting laws, we nevertheless exercise our discretion and hold, for the reasons that follow, that most of the applicants' "victories" warrant an award of no attorney's fees.

The central and, in our minds, the *only* issue in the congressional portion of this case was the creation of an appropriate congressional plan. Liability under the one-person, one-vote decisions was not disputed. We liberally permitted intervention in these redistricting cases not because we favor exacerbating already complex litigation but because we thought fairness dictated we hear the competing voices. The trial consisted of various parties touting the fairness of their proposed plans. The court did not, however, adopt any party's proposed redistricting map. Instead, in the end, the court drew its own map based on the neutral districting principles and the approach elicited by the court from the state's expert, Dr. John Alford.

***4** There are fundamental differences among almost all of the parties' proposals and the one the court adopted. To illustrate, the Latino interests advocated for the creation of additional Latino congressional districts. The court failed to find that was appropriate. The Valdez-Cox intervenors failed to avoid a split of Hidalgo County. Most aligned with the Democratic interests, *at a minimum,* eschewed Congressman Bonilla's district, a position inconsistent with the final map. Most of the Republican in-

terests unraveled *all* of the non-minority Democratic districts, a result which, at least if one believes the published reports, they did not obtain. The task of distilling from our plan any specific element contributed by any of these particular litigants would border on the metaphysical. Although these applicants and the rest of the voters may now exercise that franchise in legal congressional districts, we are generally convinced that a reasonable attorney's fee for these applicants is no fee at all.

The sole exception, in our minds, is the application presented by Intervenors Sheila Jackson Lee and Eddie Bernice Johnson. These Congresswomen pursued a discreet agenda: the preservation of the minority nature of their districts. We respected these districts when we drew our congressional plan, and our plan is not markedly different from the ones these parties proposed. In particular, we preserved the core communities and the overall minority voting strength in each of their districts. We grant their application for attorney's fees, hold that they prevailed on the substantive merits of their claims and, in doing so, permit these parties a period of fifteen (15) days from the date of this order to attempt to reach agreement with the state on the appropriate amount of a reasonable fee.

We do not believe that our holding will impair the vigilant enforcement of any civil rights laws. There are enormous political pressures brought to bear in judicial redistricting efforts, despite the fact that the cases are brought under the rubric of one-person, one-vote claims. The politicians were "certainly not interested in statutory revision simply because of their inane attachment to mathematical exactitude." *Daggett,* 811 F.2d at 801 (reducing fees incurred in advancing partisan interests). The parties, the office-holders, and the would-be-candidates use the courts, rather than the legislature, to leverage their political causes. This is fine with us because the law permits it. Nevertheless, we need not mislead ourselves into believing that the failure to award attorney's fees under these circumstances status might somehow deter similar efforts in the future.

We also reject the argument that the court's adoption of some, but not all, of the legal principles advocated by a particular group entitles that group to a fee award. The law is what it is. That a court applies a legal principle contained in a party's brief before it concludes that the court's remedy ought not resemble what the party proposed does not, in our minds, convert an otherwise technical victory into a substantive one. The fee applications submitted in connection with the congressional case (463, 464, 465, 475, 482, and 486), other than the one submitted by Congresswomen Johnson and Lee, are denied. The application submitted by Congresswomen Johnson and Lee (# 495) is granted.

B. State House of Representatives Phase.

***5** The Mexican-American Legislative Caucus ("MALC") and the Balderas plaintiffs assert prevailing party status in the state House of Representatives phase of this case. This phase differed from the congressional part of the case because the state had enacted a plan, but it had not been precleared by the Department of Justice ("DOJ"). The DOJ objected to portions of the plan as causing a retrogression in the rights of Hispanics to exercise their voting rights. We drew a new plan that cured the DOJ's objections. MALC seeks fees for its efforts in the litigation as well as its contemporaneous work in the administrative proceedings before the DOJ.

We agree with MALC that its fees expended before this court and the DOJ are recoverable. Counsel's participation in administrative activities must be tied both "qualitatively and timely" to the lawsuit to establish that such work was performed on the litigation. *Leroy v. City of Houston,* 831 F.2d 576, 582 (5th Cir.1987). Although pre-clearance proceedings under § 5 and dilution claims under § 2 are different, MALC's work before the DOJ subsumed nearly identical issues as those presented in the litigation. Likewise, from a temporal standpoint, MALC performed its work before the DOJ concurrently with this suit. We believe this case falls within the rule endorsed by *Leroy,* that fees are

recoverable as "compensation for services rendered in a pre-clearance submission that bear directly on the issues in an independent lawsuit" where "the work is required and necessary to resolve the issues of the independent lawsuit." *Id.* at 583. That a portion of MALC's attorney's fees were incurred before the DOJ does not bar to their recovery under the procedural posture of this case.

As it turned out, MALC was correct in its position before the DOJ. The DOJ accepted MALC's arguments that the state House of Representatives plan worked a retrogression, a predicate for our judgment adopting a new plan. That said, MALC is a prevailing party and is entitled to recover its reasonable attorney's fees expended in the litigation during the House of Representatives phase of this case. The state cannot now be heard to complain that the hasty efforts of the Legislative Redistricting Board would have been corrected in any event by the DOJ, particularly when the proof demonstrates such a high level of involvement by MALC in forcing the administrative issue. We are aware, moreover, that the court's structuring of the trial in this case required the record from the congressional phase of the case to support the record developed in the subsequent state Senate and House of Representatives phases. Our determination that MALC is a prevailing party in the House of Representatives phase is not intended to prejudice MALC from seeking fees it may have incurred during earlier phases of the case, to the extent those efforts supported the record developed in the House of Representatives portion of this litigation.

***6** For similar reasons, we also believe that the Balderas plaintiffs are prevailing parties entitled to recover their attorney's fees incurred in the state House of Representatives litigation. We note, however, that the fee application submitted on their behalf includes time expended in the state court litigation and the congressional litigation. We have previously discussed the Balderas plaintiffs' entitlement to fees in connection with the congressional litigation. It is unclear to us whether and to what extent efforts taken in the state court proceedings and the congressional proceedings were directly supportive of and reasonably necessary to the federal litigation related to the state House of Representatives plan, though we understand the federal case was somewhat streamlined due to the work performed in the state court. Accordingly, our decision is to award fees incurred during the state House of Representatives phase of the case, including fees incurred in earlier phases of the federal proceeding that supported the record in the House of Representatives phase. Our award should also be read to include fees incurred during those undertakings in state court, such as witness preparation and the like, that were directly supportive of and preparatory to the Balderas plaintiffs' federal claims related to the state House of Representatives. We therefore grant MALC's and the Balderas plaintiffs' fee applications (470 and 471) under the terms set forth in this order. The Balderas plaintiffs, MALC and the state are granted fifteen (15) days to endeavor to reach an agreement on the amount of recoverable fees and costs in light of the guidance set forth in this order.

E.D.Tex.,2002.
Balderas v. State
Not Reported in F.Supp.2d, 2002 WL 32113830 (E.D.Tex.)

END OF DOCUMENT

Slip Copy, 2011 WL 665858 (D.Minn.)
**(Cite as: 2011 WL 665858 (D.Minn.))**

**H**
Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
AMERICAN BROADCASTING COMPANIES, INC., The Associated Press, Cable News Network, Inc., CBS Broadcasting Inc., Fox News Network, L.L.C., and NBC Universal, Inc., Plaintiffs,
v.
Mark RITCHIE, in his official capacity as the Secretary of State of the State of Minnesota, and Lori Swanson, in her official capacity as the Attorney General of the State of Minnesota, Defendants.

Civil No. 08-5285 (MJD/AJB).
Feb. 14, 2011.

Susan Buckley, Brian T. Markley, Kayvan B. Sadeghi, Cahill Gordon & Reindel LLP, and John P. Borger, Faegre & Benson LLP, for Plaintiffs.

Kenneth E. Raschke, Jr. and Nathan J. Hartshorn, Minnesota Attorney General's Office, for Defendants.

**MEMORANDUM OF LAW & ORDER**
MICHAEL J. DAVIS, Chief Judge.

## I. INTRODUCTION

***1** This matter is before the Court on Plaintiffs' Motion for an Award of Attorney's Fees and Expenses Pursuant to 42 U.S.C. § 1988. [Docket No. 52] The Court heard oral argument on January 21, 2011.

## II. SUMMARY OF THE COURT'S OPINION

The Court grants Plaintiffs' motion for attorney's fees because Plaintiffs were the prevailing party. Plaintiffs achieved an important and complete First Amendment victory. Defendants are not protected from judgment by Eleventh Amendment immunity. However, the Court reduces the amount of attorney's fees and expenses awarded because the remarkably high hourly billing rates charged by Plaintiffs' New York law firm were unreasonable, and excellent and cost-effective local counsel were readily available. Additionally, Plaintiffs' counsel's billing records were overly vague, and excessive hours were expended in litigating this matter.

## III. BACKGROUND

### A. Factual Background

Plaintiffs are American Broadcasting Companies, Inc., The Associated Press, Cable News Network, Inc., CBS Broadcasting Inc., Fox News Network, L.L.C., and NBC Universal, Inc. Plaintiffs all have conducted exit polling in the past and intended to conduct exit polling in Minnesota on Election Day, November 4, 2008.

### B. The Complaint and Motion for Preliminary Injunction

On September 29, 2008, Plaintiffs filed a Complaint against Minnesota Secretary of State Mark Ritchie and Minnesota Attorney General Lori Swanson, in their official capacities. The Complaint contained one count alleging that, as applied to Plaintiffs, Minnesota Statute § 204C.06, subdivision 1 ("the Statute") was a violation of Plaintiffs' rights under the First Amendment of the United States Constitution.

On September 30, 2008, Plaintiffs filed a motion for a preliminary injunction barring enforcement of the second sentence of the Statute as applied to their exit polling activities. At the time, the Statute provided:

> **Lingering near polling place.** An individual shall be allowed to go to and from the polling place for the purpose of voting without unlawful interference. No one except an election official or an individual who is waiting to register or to vote shall stand within 100 feet of the building in which a polling place is located.

Violation of the Statute was a misdemeanor.

Minn.Stat. § 645.241.

**C. Evolution of Minnesota Exit Polling Law**

In 1988, this Court issued an order enjoining enforcement of predecessor statute Minnesota Statute § 204C.06, subdivision 1 (1986), which provided: "No one, either inside a polling place or within 100 feet of the entrance to it, shall ask a voter how the voter intends to vote or has voted on any office of question on the ballot." *CBS Inc. v. Growe,* 15 Media L. Rep. (BNA) 2275 (D.Minn.1988). The Court held that the restriction was a content-based place restriction because it restricted inquiry within a 100-foot radius, an area constituting a traditional public forum. *Id.* at 2277. The Court then concluded that the restriction was not narrowly tailored because, although Minnesota had a legitimate interest in maintaining order at the polls, the statute was over-inclusive because it banned nondisruptive exit polling. *Id.* at 2278. The Court held that there was a strong likelihood that the plaintiffs would succeed on the merits of demonstrating that the statute violated the First Amendment. *Id.* at 2279.

***2** After entry of the *Growe* injunction, in 1989, the Minnesota Legislature amended the statute to, in effect, prohibit any person from standing within 100 feet of any polling place in Minnesota. However, the Secretary of State advised the *Growe* plaintiffs that she would interpret the term "polling place" to mean the room where the polling takes place, rather than the building.

In 1993, the legislature amended § 204C.06, subd. 1, to clarify that the 100-foot distance prohibiting standing near the entrance to a polling place was measured from the room where the polling occurs.

Plaintiffs claim that during the 2004 and 2006 general elections, their exit pollsters encountered difficulties in conducting their exit polling in Minnesota. They claim that some Minnesota election officials mistakenly required their pollsters to stand 100 feet from the buildings where polling occurred, rather than 100 feet from the rooms where the polling occurred.

Plaintiffs' representatives contacted the Secretary of State's Office early in September 2008 to attempt to resolve the exit polling issues before the November 4, 2008 general election. The Secretary of State's Office advised Plaintiffs that § 204C.06, subd. 1, had been amended, effective June 1, 2008, providing that no one could stand "within 100 feet of the building in which a polling place is located." The Deputy Secretary of State stated that the Secretary of State's Office had no opinion on the constitutionality of the law, but that the Statute would be enforced against exit pollers unless a court were to rule otherwise or the Minnesota legislature were to repeal the Statute.

**D. Entry of the Preliminary Injunction**

On October 15, 2008, the Court granted Plaintiffs' motion and issued a Preliminary Injunction. [Docket No. 29] *Am. Broad. Cos., Inc. v. Ritchie,* Civil File No. 08-5285 (MJD/AJB), 2008 WL 4635377 (D.Minn. Oct. 15, 2008). The Court rejected Defendants' argument that Eleventh Amendment immunity barred suit against them, holding, "that, at this preliminary injunction stage of the proceedings, Plaintiffs have shown a sufficient connection with the enforcement of the Statute to demonstrate that Defendants are proper parties for injunctive relief." 2008 WL 4635377, at *4. The Court held that "Plaintiffs are likely to succeed on the merits of their claim that, as applied to Plaintiffs' exit polling activities, the Statute violates the First Amendment." *Id.* at *7.

The Court enjoined Defendants:

> from enforcing the second sentence of Minn.Stat. § 204C.06, subd. 1, as against Plaintiffs' exit polling activities or from prohibiting Plaintiffs or their agents, under the authority of Minn.Stat. § 204C.06, subd. 1, from conducting exit polls within 100 feet of Minnesota polling places on November 4, 2008, the day of the general election, and pending the entry of a final judgment in

this action.

*Id.* at *8. The Court further ordered:

> The Secretary of State shall forthwith advise all County Auditors that Plaintiffs and their agents are permitted to engage in exit polling activities within 100 feet of polling places on November 4, 2008, provided that their activities do not otherwise violate Minnesota or federal law or unlawfully interfere with individuals going to and from the polling place for the purpose of voting. The Secretary of State shall forthwith notify all County Auditors of the entry and terms of this Preliminary Injunction.

***3** *Id.*

On December 4, 2008, the parties filed a joint motion to stay the matter until July 1, 2009, in light of possible amendments to the statute. [Docket No. 34] The Court granted the stay. [Docket No. 35] Based on Defendants' unopposed motion, the stay was extended until July 1, 2010. [Docket No. 43]

**E. Action by the Minnesota Legislature**

During the 2010 legislative session, the Minnesota Legislature amended the Statute to provide an exit-polling exception to the 100-foot limit. Upon the parties' stipulation, the Preliminary Injunction expired, the case was dismissed as moot on August 1, 2010, and judgment was entered.

Plaintiffs have now submitted their motion for approximately $250,000 in attorney fees and $7,000 in expenses.

## IV. DISCUSSION

### A. Standard for Award of Attorney Fees under 42 U.S.C. § 1988

Under 42 U.S.C. § 1988(b), "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983) (citation omitted).

### B. Eleventh Amendment Immunity

The Court rejects Defendants' claim that Plaintiffs' claim for attorney's fees is barred by Eleventh Amendment immunity.

#### 1. Standard for Exception to Eleventh Amendment Immunity

Under the Eleventh Amendment of the United States Constitution, a state is immune from suit in federal court by citizens of another state or its own citizens. *Skelton v. Henry,* 390 F.3d 614, 617 (8th Cir.2004). However, "the Eleventh Amendment does not bar a suit against a state official to enjoin enforcement of an allegedly unconstitutional statute, provided that 'such officer [has] some connection with the enforcement of the act.' " *Reproductive Health Servs. of Planned Parenthood of St. Louis Region v. Nixon,* 428 F.3d 1139, 1145 (8th Cir.2005) (quoting *Ex Parte Young,* 209 U.S. 123, 157 (1908)).

#### 2. Discussion

The Secretary of State is the proper party because he is "the chief election official in the state," and because he has the duty to implement an injunction regarding state election law because "if a provision of state election law cannot be implemented as a result of a court order, the Secretary of State has the authority and responsibility to 'adopt alternative election procedures.' " *Clark v. Pawlenty,* 755 N.W.2d 293, 299 (Minn.2008) (citation omitted). *See also Missouri Prot. & Advocacy Servs., Inc. v. Carnahan,* 499 F.3d 803, 807 (8th Cir.2007) (holding that, while the local election authorities administered voting, elections and registered voters, "the Secretary of State is 'the chief state election official responsible for overseeing of the voter registration process," so Eleventh Amendment immunity did not bar the voting rights lawsuit against the Secretary of State) (citations omitted). In this case, Plaintiffs challenged the application of a statute that the Secretary of State specifically instructed county and local officials to apply. (*See* 2008 Election Judge Guide at 13, 51.)

***4** In *Missouri Protection,* the Eighth Circuit

further held that the Eleventh Amendment did not bar a voting rights lawsuit against the Attorney General because he "has statutory authority to represent the state in both criminal and civil cases," and violation of the election statute at issue could result in a criminal prosecution. 499 F.3d at 807. In this case, violation of the Statute is a criminal misdemeanor. Minn.Stat. § 645.241.

Minnesota's election statutes provide that it is the duty of the Secretary of State, assisted by the Attorney General, to instruct election officials on election procedures and that local election officials act at the direction of the Secretary of State and the Attorney General:

> The secretary of state shall prepare and publish a volume containing all state general laws relating to elections. The attorney general shall provide annotations to the secretary of state for this volume.... The secretary of state may prepare and transmit to the county auditors and municipal clerks detailed written instructions for complying with election laws relating to the conduct of elections, conduct of voter registration and voting procedures.

Minn.Stat. § 204B.27, subd. 2. *See also* Minn.Stat. § 204B.25, subd. 4 ("At least once every two years, the county auditor shall conduct training sessions for the municipal and school district clerks in the county. **The training sessions must be conducted in the manner provided by the secretary of state.**") (emphasis added).

Here, the record shows that the Secretary of State specifically instructed local election officials to enforce the Statute on election day and specifically advised Plaintiffs' representatives that the law would be enforced to prohibit Plaintiffs' exit polling activities on November 4, 2008.

Under Minnesota law, if a provision of state election law cannot be implemented as a result of a court order, the Secretary of State has the duty to "adopt alternative election procedures to permit the administration of any election affected by the order." Minn.Stat. § 204B.47. This is exactly what the Secretary of State did after this Court issued the Preliminary Injunction in this case.

This Court's Preliminary Injunction did not merely enjoin local officials. It explicitly enjoined the Secretary of State and the Attorney General from enforcing the Statute against Plaintiffs. It further ordered the Secretary of State to advise all County Auditors that Plaintiffs are permitted to engage in exit polling within 100 feet of the polling places and to notify them of the terms of the Preliminary Injunction.

Eleventh Amendment immunity does not apply simply because local election officials implemented the Secretary of State's exit-polling instructions throughout the state. *See Clark,* 755 N.W.2d at 299 ("Although the Secretary of State correctly points out that he is not directly responsible for the printing and preparation of ballots, when, as here, a ballot challenge under Minn.Stat. § 204B.44 concerns an office for which voting is conducted statewide and for which the Secretary of State has provided the challenged ballot information to all 87 county auditors, we conclude that the Secretary of State is a proper party"). Nor are the differences in procedures and personnel used by local election officials relevant in this case, because Plaintiffs do not challenge those differences. Here, Plaintiffs challenged the uniform instructions Defendants provided to all local officials barring Plaintiffs from exercising their constitutional right to conduct exit polling. *Cf. In re Contest of General Election Held on Nov. 4, 2008,* 767 N.W.2d 453, 464-66 (Minn.2009) (analyzing equal protection challenge based upon allegation of unequal application of election statutes or regulations by local officials).

***5** The Court further notes that, in *CBS v. Growe,* the Attorney General's office conceded that the Secretary of State represented the proper party to effectuate relief with regard to an injunction permitting exit polling.

The Court rejects Defendants' claim of Eleventh Amendment immunity.

**C. Whether Plaintiffs Are Prevailing Parties**

The Court holds that Plaintiffs are prevailing parties.

**1. Standard for "Prevailing Party"**

A "plaintiff must be a 'prevailing party' to recover an attorney's fee under § 1988." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby,* 506 U.S. 103, 111-12 (1992).

> The Supreme Court refined this standard in *Buckhannon* when it rejected the "catalyst" theory, ... which permitted a plaintiff to recover fees if its lawsuit achieved the desired result through a voluntary change in the defendant's conduct. The Court held instead that a party must obtain a *judicially sanctioned* material alteration of the legal relationship between the parties to the lawsuit to achieve prevailing party status. Surveying its past cases the Court determined that enforceable judgments on the merits and consent decrees create the requisite material alteration in the parties' legal relationship to achieve prevailing party status.

*Advantage Media, L.L.C. v. City of Hopkins, Minn.,* 511 F.3d 833, 836-37 (8th Cir.2008) (citing *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.,* 532 U.S. 598, 602-05 (2001)).

"[A] preliminary injunction can in some instances carry the judicial imprimatur required by *Buckhannon* to convey prevailing party status." *Advantage Media, L.L.C.,* 511 F.3d at 837 (citations omitted).

> For example, the grant of a preliminary injunction should confer prevailing party status if it alters the course of a pending administrative proceeding and the party's claim [ ] for [a] permanent injunction is rendered moot by the impact of the preliminary injunction. That type of preliminary injunction functions much like the grant of an irreversible partial summary judgment on the merits.

*N. Cheyenne Tribe v. Jackson,* 433 F.3d 1083, 1086 (8th Cir.2006) (citations omitted).

**2. Existence of a Judicially Sanctioned Material Alteration**

The Court's Preliminary Injunction materially altered the legal relationship between Plaintiffs and Defendants by modifying Defendants' behavior in a way that directly benefitted Plaintiffs. This Court found that exit polling is protected by the First Amendment; that Plaintiffs had established a substantial likelihood of success on the merits of their First Amendment claim; and that irreparable harm would result from the enforcement of the Statute. The Court barred Defendants from using the Statute to prevent Plaintiffs from conducting exit polling on Election Day 2008, and ordered Defendants to advise local election officials that Plaintiffs were permitted to conduct their exit polling. Because of the Preliminary Injunction, Plaintiffs were able to conduct exit polls statewide on Election Day 2008.

***6** In direct response to the Preliminary Injunction, the Minnesota Legislature amended the Statute to incorporate the terms of the Preliminary Injunction, effective August 1, 2010, providing Plaintiffs complete relief in the future. This matter was dismissed as moot only because Defendants took action to comply with the Preliminary Injunction. Plaintiffs obtained all the relief that they sought from the Preliminary Injunction:

> A "preliminary injunction issued by a judge carries all of the 'judicial imprimatur' necessary to satisfy *Buckhannon,* " and this preliminary injunction placed a judicial imprimatur on plaintiffs' entitlement to substantially all the relief they sought in the complaint. This was not a

> case where the filing of the lawsuit resulted in voluntary change on the part of the [defendant]. It was precisely because the Court believed voluntary change was not to be expected that it ordered the [defendant] not to engage in the practices of which plaintiffs complained. There was nothing voluntary about the [defendant's] giving up those practices. And the preliminary injunction was not "dissolved for lack of entitlement." Rather, it was terminated only when the new statute was enacted "after the preliminary injunction had done its job." The ultimate mooting of plaintiffs' claims resulted not solely from the filing of the lawsuit but from the results of the legal process.

*People Against Police Violence v. City of Pittsburgh,* 520 F.3d 226, 233-34 (3d Cir.2008) (citations and footnote omitted). *See also Dearmore v. City of Garland,* 519 F.3d 517, 525 (5th Cir.2008) ("[T]he district court's grant of the preliminary injunction directly caused the City to amend the offending portion of the Ordinance, thereby mooting the case and preventing [the plaintiff] from obtaining final relief on the merits. We note that this is not a case in which the City voluntarily changed its position *before* judicial action was taken. Indeed, if the City had mooted the case through amending the Ordinance before the court granted the preliminary injunction, then [the plaintiff] could not qualify as a prevailing party under *Buckhannon* because it would have improperly invoked the 'catalyst theory.' The City, however, mooted the case *after* and *in direct* response to the district court's preliminary injunction order.").

**D. Whether Special Circumstances Exist**

The Court holds that no special circumstances exist that would justify denial of attorney's fees.

"Although prevailing parties should ordinarily recover an attorney's fee, a district court has discretion to deny an award where special circumstances would render such an award unjust." *Peter v. Jax,* 187 F.3d 829, 837 (8th Cir.1999) (citation omitted). The special circumstances exception is "narrowly construed." *Id.* "[A] defendant's good faith alone is not a special circumstance sufficient to justify a denial of fees." *Id* . (citation omitted). Nor is a plaintiff's ability to pay his own attorney's fees. *See, e.g., Jones v. Wilkinson,* 800 F.2d 989, 991-92 (10th Cir.1986). "[I]f attorney's fees under § 1988 are to be denied to the prevailing party a strong showing is necessary of special circumstances rendering the award unjust." *Hatfield v. Hayes,* 877 F.2d 717, 721 (8th Cir.1989).

***7** Defendants rely on a district court opinion from the Western District of Washington for the proposition that special circumstances exist in this case. *See Thorsted v. Gregoire,* 841 F.Supp. 1068, 1084 (W.D.Wash.1994), *aff'd,* 75 F.3d 454 (9th Cir .1996). The viability of *Thorsted* is doubtful, in light of the Ninth Circuit's recent exit-polling opinion, reversing the district court's denial of § 1988 attorney fees to the media plaintiffs and warning district courts not to rely on Thorsted, stating that it was a decision that "we have already confined as based on factors largely unique to that case." *Am. Broad. Cos. v. Miller,* 550 F .3d 786, 788 (9th Cir.2008) (citation omitted).

In any event, even under the *Thorsted* factors, denial of attorney's fees is not justified in this case. This case did not involve a voter-approved statute. Defendants did, indeed, precipitate this litigation. The Secretary of State urged the Legislature to adopt the unconstitutional language in the Statute, and the Secretary of State's Office advised Plaintiffs that the statute would be enforced against them. This case did not involve a novel legal issue: the Secretary of State took these actions despite the previous *Growe* decision and numerous other federal decisions regarding exit polling. In any case, as Defendants admit, their good faith does not constitute a special circumstance. Nor does Plaintiffs' ability to pay their own attorney's fees.

Given that an award of attorney's fees is appropriate, the Court now turns to the question of the proper amount of such an award.

**E. Whether the Claim for Attorney Fees Is Ex-**

**cessive**

**1. Lodestar Method**

"The starting point in determining attorney fees is the lodestar, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates. When determining reasonable hourly rates, district courts may rely on their own experience and knowledge of prevailing market rates." *Hanig v. Lee,* 415 F.3d 822, 825 (8th Cir.2005) (citations omitted). "The district court should exclude hours that were not reasonably expended. The onus is on the party seeking the award to provide evidence of the hours worked and the rate claimed." *Wheeler v. Missouri Highway & Transp. Comm'n,* 348 F.3d 744, 754 (8th Cir.2003) (citations omitted). Additionally, "[t]he court may reduce the award if the documentation of the hours is inadequate." *DeGidio v. Pung,* 920 F.2d 525, 533 (8th Cir.1990).

**2. Cahill's Billing Rates**

The Court agrees with Defendants that the high New York billable hour rates billed by the attorneys at Cahill Gordon & Reindel LLP, are inappropriate for this Minnesota-venued case.

"The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community...." *Blum v. Stenson,* 465 U.S. 886, 895 (1984). "The 'relevant community' for determining hourly rates is the place where the case was tried." *Farmers Co-op Co. v. Senske & Son Transfer Co.,* 572 F.3d 492, 500 (8th Cir.2009). "In a case where the plaintiff does not use local counsel, the court is not limited to the local hourly rate, if the plaintiff has shown that, in spite of his diligent, good faith efforts, he was unable to find local counsel able and willing to take the case." *Emery v. Hunt,* 272 F.3d 1042, 1048 (8th Cir.2001) (citation omitted).

***8** Highly competent First Amendment counsel was available locally. For example, John Borger and the Faegre & Benson law firm, who, in fact, took a role in litigating this case, have repeatedly demonstrated their expertise in First Amendment law in numerous cases litigated in this Court. The billable hour rates used in the lodestar calculation should be comparable to those submitted by Faegre & Benson. *See, e.g., Am. Broad. Co., Inc. v. Brunner,* slip op. at 27-31 (S.D.Ohio Sept. 30, 2008) (holding that, while Susan Buckley was excellent, competent First Amendment counsel was available in Cincinnati, Ohio, and the exit polling case was not so complicated as requiring an out-of-town specialist, so using Cincinnati, Ohio billing rate for Cahill).

Moreover, while this case presented an important issue and Plaintiffs achieved a complete victory, there were multiple federal opinions to guide litigation of exit-polling statutes, including the *Growe* opinion dealing with a Minnesota exit-polling statute. This was not a particularly difficult First Amendment case. Based on other exit-polling decisions submitted by Plaintiffs, Cahill and its clients were aware that, in some cases, district courts have refused to allow Cahill's New York rates and have applied the local rates. Therefore, Cahill and its clients were aware of the possibility that this Court, too, might reduce Cahill's reimbursement rate.

Plaintiffs have provided an alternative calculation of Cahill's fees at Faegre-type rates, resulting in an attorney's fee request of $144,246.50 for Cahill for 317 hours of attorney time.

**3. Number of Hours Billed**

"[T]he plaintiff bears the burden of establishing an accurate and reliable factual basis for an award of attorneys' fees, and ... the district court has wide discretion in making a fee award determination." *Philipp v. ANR Freight System, Inc.,* 61 F.3d 669, 675 (8th Cir.1995) (citations omitted).

The Court has carefully reviewed the billing records submitted by Plaintiffs and determines that it is appropriate to cut the overall billed amount

(under Minnesota rates) by 25%. There are multiple facts which have contributed to this conclusion.

First, Plaintiffs have overbilled for Phase I, the portion of the case consisting of preparation and filing of the Complaint and Motion for Preliminary Injunction. Plaintiffs have submitted fees for 154.4 hours of work by 7 attorneys. Five months before the commencement of this case, the same Plaintiffs, also represented by Cahill, filed a similar lawsuit in the District of South Dakota seeking to enjoin a South Dakota statute to the extent that it barred Plaintiffs from conducting exit polls within 100 feet of polling places. *Am. Broad. Cos., Inc. v. Nelson,* Civil File No. 08-4068(LLP) (D.S.D.). Like Minnesota, South Dakota resides within the Eighth Circuit. Therefore, the governing case law was substantially similar. The Complaint, Motion for Preliminary Injunction, and supporting documents filed in the South Dakota case bear marked similarities to the corresponding documents filed in this case. While there were, in fact, unique issues in this case, such as the differing language and legislative history of the statutes at issue, more than 150 hours of attorney time for what was largely repetition of work from the South Dakota case is unreasonable. *See Am. Civil Liberties Union of Ga. v. Barnes,* 168 F.3d 423, 430 (11th Cir.1999) ("An attorney is not entitled to be paid in a case for the work he or another attorney did in some other case").

***9** Additionally, many of the billing entries submitted by Cahill attorneys were overly vague, so that the Court cannot accurately evaluate the reasonableness of much of the legal research, conferences, and correspondence billed. *See Maule v. Nicholson,* Civil No. 04-1369, 2006 WL 3758390, at *2 (D.Minn. Dec. 20, 2006) ("The Court also finds the billing to be vague to the extent that it is not possible to discern whether hours expended were reasonable or duplicative").

While time spent preparing a fee application is compensable, the more than 60 hours claimed for that task here, which does not even include time spent preparing for and performing oral argument is excessive. There are no particularly complex issues presented with regard to the attorney's fees motion.

Although the Court concludes that a reduction of the fee award is warranted, it does not agree with the rest of the objections raised by Defendants. The Court does not find the time billed by Faegre for reviewing the legislative history of the Statute to be unreasonable. This research was necessary to argue, successfully, that the Statute was not content-neutral. Reviewing the legislative history was critical and time-consuming. The Court further finds that Plaintiffs' counsel is entitled to compensation for time spent monitoring compliance with the Preliminary Injunction. *See Ass'n for Retarded Citizens of N.D. v. Schafer,* 83 F.3d 1008, 1010-11 (8th Cir.1996) ("The injunction must be implemented, that process must be monitored, and lingering or new disputes over interpretation of the decree must often be presented to the court for resolution. These functions take time and effort by the prevailing party's attorney. Therefore, it is generally accepted that prevailing plaintiffs are entitled to post-judgment fee awards for legal services necessary for reasonable monitoring of the decree.") (citation and footnote omitted).

The Court has carefully reviewed the billing records submitted by both Faegre and Cahill. It is intimately familiar with this case. Based on its analysis, as recounted above, the Court concludes that a 25% reduction in the amount billed under Minnesota rates is a just and reasonable estimation of reasonable fees incurred. Therefore, the Court awards attorney's fees in the amount of $141,510.75.

**F. Whether the Costs Claimed Are Excessive**

"Reasonable expenses of litigation incurred by counsel on the prevailing side can be awarded as part of the fees due under Section 1988. Such awards are not for court costs proper, but for reasonable expenses of representation." *SapaNajin v. Gunter,* 857 F.2d 463, 465 (8th Cir.1988) (citations omitted).

Faegre requests disbursements of $1,137.97 and Cahill requests disbursements of $5,726.55. Plaintiffs assert that all of the listed expenses are of the type normally charged to a fee-paying client. Based on the Court's knowledge of Minnesota billing practices, the Court concludes that the expenses requested by Plaintiffs are reasonable. The Court awards the full $6,864.52 in requested disbursements.

***10** Accordingly, based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

Plaintiffs' Motion for an Award of Attorney's Fees and Expenses

Pursuant to 42 U.S.C. § 1988 [Docket No. 52] is **GRANTED** as follows: Plaintiffs are awarded $148,375.27 in attorney's fees and expenses.

D.Minn.,2011.
American Broadcasting Companies, Inc. v. Ritchie
Slip Copy, 2011 WL 665858 (D.Minn.)

END OF DOCUMENT

Not Reported in N.W.2d, 2004 WL 1102337 (Minn.App.)
**(Cite as: 2004 WL 1102337 (Minn.App.))**

C
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.
In re the Marriage of Jon H. ENGELKING, petitioner, Appellant,
v.
Susan Katherine ENGELKING, Respondent.

No. A03-1290.
May 18, 2004.

Washington County District Court, File No. F9-00-4502.
Kathleen M. Picotte Newman, Larkin, Hoffman, Daly & Lindgren, Ltd. , Minneapolis, MN, for appellant.

D. Patrick McCullough, Lisa Watson Cyr, McCullough, Smith & Klempe, P.A., St. Paul, MN, for respondent.

Considered and decided by WRIGHT, Presiding Judge; SCHUMACHER, Judge; and WILLIS, Judge.

**UNPUBLISHED OPINION**

WRIGHT, Judge.

***1** In this maintenance-modification dispute, appellant-husband argues that the district court erred in ruling that the parties' stipulated dissolution judgment precluded him from moving to reduce his maintenance obligation until he received a W-2 form showing that his income had decreased by at least $50,000. Respondent-wife argues that husband's appeal is untimely and seeks attorney fees on appeal. We affirm, and we decline to award wife attorney fees in the absence of any billing explanation as to the legal services performed.

FACTS

The November 2001 stipulated judgment dissolving the marriage of appellant-husband Jon Engelking and respondent-wife Susan Engelking set forth husband's income, awarded wife spousal maintenance, and stated that husband could not seek an income-based reduction of his spousal-maintenance obligation unless his "W-2 income" showed a decrease of at least $50,000. Husband became unemployed in January 2003. In February, husband moved to decrease his maintenance obligation. By order dated May 23, 2003, the district court denied husband's motion, concluding that the motion is procedurally barred because husband had not received a W-2 form showing that his income had decreased by at least $50,000. The district court also ruled that if husband's motion were properly before the district court, husband had failed to show a substantial change in circumstances rendering the existing spousal-maintenance award unreasonable and unfair. After the denial of husband's posthearing motion for amended findings, husband appeals. Wife argues that the appeal is untimely and seeks attorney fees.

DECISION

**I.**

As an initial matter, we consider wife's claim that we lack jurisdiction over this appeal because it is untimely. Generally, an appeal of an order must be taken within 60 days after service of the notice of filing of the order. Minn. R. Civ.App. P. 104.01, subd. 1. Although a timely and proper motion for amended findings suspends the time to appeal the underlying ruling until resolution of that motion, a motion for reconsideration does not suspend the time to appeal. *Id.,* subd. 2(b) (regarding motions for amended findings); *Limongelli v. GAN Nat. Ins. Co.,* 590 N.W.2d 167, 168 (Minn.App.1999) (regarding motions for reconsideration). Wife was served with notice of filing of the May 23 order on

May 28, husband moved for amended findings, and the district court denied that motion, stating that it "constitutes a motion for reconsideration." Husband then appealed on September 8. Wife argues that the district court's ruling that husband's motion for amended findings constituted a motion for reconsideration establishes that the appeal time was not suspended. Because husband's September 8 appeal was not taken within 60 days of the May 28 service of notice of filing of the May 23 order, wife contends that the appeal is untimely. *See* Minn. R. Civ.App. P. 126.02 (stating that this court cannot extend time to appeal); *Bongard v. Bongard,* 342 N.W.2d 156, 158 (Minn.App.1983) (stating that "[t]ime limits on appeals are jurisdictional").

***2** A posthearing motion suspends the time to appeal if the "face" of the motion shows it to be "a motion that is expressly allowed under [Minn. R. Civ.App. P. 104.01, subd. 2]." *Madson v. Minn. Mining & Mfg. Co.,* 612 N.W.2d 168, 172 (Minn.2000) (holding that whether a motion has tolled the time for appeal is determined by the face of the motion, not its substance or merits). It is undisputed that the face of husband's motion sought amended findings. Rule 104 .01, subd. 2, lists a motion for amended findings among the motions that suspend the time to appeal. Minn. R. Civ.App. P. 104.01, subd. 2(b). Because husband's motion suspended the time to appeal, this appeal is timely.

**II.**

The dissolution judgment states that "[husband] will not be allowed to bring a motion to decrease spousal maintenance based on a decrease in his W-2 income unless his W-2 income for the year preceding the motion to modify support has decreased by at least $50,000.00." The district court denied husband's February 2003 motion to reduce maintenance, stating that "under the clear and unambiguous terms of the stipulation, [husband] may not move the Court to modify his maintenance obligation until after he has compiled his total earned income for the preceding calendar year." Accordingly, the district court ruled that husband is precluded from seeking to reduce his spousal-maintenance obligation until he receives a W-2 form showing that his income has decreased by at least $50,000. Husband argues that the judgment should be interpreted to refer to his W-2 income for the 12 months preceding the motion. He contests the district court's reading of the provision, claiming that it improperly substitutes "calendar year" for "year."

A document is ambiguous if it could reasonably have more than one meaning. *Landwehr v. Landwehr,* 380 N.W.2d 136, 138 (Minn.App.1985). Whether a document is clear or ambiguous is a legal question, which we review de novo. *Anderson v. Archer,* 510 N.W.2d 1, 3 (Minn.App.1993) (existence of clarity of stipulated judgment is legal question); *Halverson v. Halverson,* 381 N.W.2d 69, 71 (Minn.App.1986) (existence of ambiguity of stipulated judgment is a legal question). We conclude that "W-2 income" cannot reasonably be interpreted to mean anything other than the income shown on a W 2 form. When husband moved to modify his spousal-maintenance obligation, he had not received a W-2 form establishing that his income had decreased by at least $50,000. Accordingly, we affirm the district court's reading of the unambiguous provision to preclude husband's current motion.

Because the provision is not ambiguous, we need not address the parties' disputes as to the proper construction of the provision if it were ambiguous. Similarly, because husband's motion was premature, we do not address the parties' disputes as to whether husband established changed circumstances and whether the district court abused its discretion by receiving certain documents into evidence.

**III.**

***3** Wife seeks $10,151 in need-based and conduct-based attorney fees on appeal under Minn.Stat. § 518.14, subd. 1 (2002). She also argues that attorney fees are appropriate under Minn.Stat. § 549.211 (2002). Seeking attorney fees on appeal generally

requires that the party seeking fees submit

> specific descriptions of the work performed, the number of hours spent on each item of work, the hourly rate charged for that work, and evidence concerning the usual and customary charges for such work, or if the basis for the fees is other than hourly, information by which the court can judge the propriety of the request. Where appropriate, copies of bills submitted to the client, redacted if necessary to preserve privileged information and work-product, may be submitted with the motion.

Minn. R. Civ.App. P. 139.06 advisory comm. cmt. (1998). Husband argues that wife failed to submit sufficient information to permit us to determine the appropriate amount of fees because the billing records submitted lack any explanation of why the particular amounts were billed.[FN1] Wife's attorney contends that all of the billing explanations are subject to the attorney-client privilege.

> FN1. Husband also claims that wife's attorney-fee submissions are defective because they omit support for certain fee-related assertions made by wife. Any initial lack of support for those assertions, however, was addressed by the affidavit wife submitted as a reply to husband's response to the attorney-fee motion.

The burden of showing the applicability of the attorney-client privilege is on the party asserting it. *See Leininger v. Swadner,* 279 Minn. 251, 256, 156 N.W.2d 254, 258 (Minn.1968) (stating "whether a communication is privileged is a question of fact and that '[w]hen upon a discovery motion a party litigant claims privilege, the burden rests on him to present facts establishing the privilege' " (quoting *Brown v. St. Paul City Ry. Co.,* 241 Minn. 15, 34, 62 N.W.2d 688, 701 (1954))). Wife makes a single, conclusory assertion that the privilege applies to all of the descriptive information on all of the billing sheets. But descriptive information in billing statements is not per se privileged. *City Pages v. State,* 655 N.W.2d 839, 844-45 (Minn.App.2003), *review denied* (Minn. Apr. 15, 2003). We cannot evaluate the applicability of the attorney-client privilege without wife's in camera disclosure of the descriptive information that was redacted from the billing statements. Wife has not provided this court with sufficient information to demonstrate that the privilege applies. We, therefore, deny her motion for attorney fees.

**Affirmed; motion denied.**

Minn.App.,2004.
Engelking v. Engelking
Not Reported in N.W.2d, 2004 WL 1102337 (Minn.App.)

END OF DOCUMENT

Slip Copy, 2011 WL 3664565 (D.Minn.)
**(Cite as: 2011 WL 3664565 (D.Minn.))**

H
Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
Phillip David SCHAUB, Plaintiff,
v.
COUNTY OF OLMSTED, The, Olmsted County Adult Detention Center, Steven Vonwald, Bernie Seizer, and John Does 1–6, Defendants.

Civil No. 06–2725 (JRT/FLN).
Aug. 19, 2011.

Anthony J. Colleluori and Diane C. Petillo, Law Office Of Anthony J. Colleluori, Woodbury, NY; and Steven M. Corson, Corson Law Offices, LLC, Preston, MN, for plaintiff.

Gregory J. Griffiths, Dunlap & Seeger, Rochester, MN, for defendants.

**MEMORANDUM OPINION AND ORDER ON ATTORNEY FEES AND COSTS**

JOHN R. TUNHEIM, District Judge.

***1** Plaintiff Phillip David Schaub filed suit against the Olmsted County Adult Detention Center ("ADC"), where he was imprisoned in 2003, as well as Olmsted County and various ADC employees. A paraplegic, Schaub alleged that the facility was deliberately indifferent to his serious medical needs. Schaub asserted constitutional violations under the Eighth Amendment and *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658 (1978), as well as claims under the Americans with Disabilities Act ("ADA"). After a bench trial, the Court [FN1] granted judgment in favor of Schaub on his Eighth Amendment claims against defendant Steven VonWald, the director of the ADC during Schaub's incarceration. The Court awarded Schaub damages in the amount of $964,000, including $750,000 in punitive damages. (Docket No. 102.) The Court entered judgment for the defendants on the *Monell* and A DA claims, however.[FN2] Before the Court are two motions for attorney fees and costs submitted by Schaub's counsel, the Law Office of Anthony J. Colleluori ("Colleluori") and the Corson Law Offices ("Corson"), arising out of their representation of Schaub through trial and the instant motions.

FN1. The Honorable James M. Rosenbaum presided over this matter until his retirement following the bench trial. (Docket No. 157.)

FN2. The Eighth Circuit subsequently affirmed both the judgment and the punitive damages award. *See Schaub v. VonWald,* No., No. 10–1280, 2011 WL 1545455 (Apr. 26, 2011).

**ANALYSIS**

**I. REASONABLE ATTORNEY FEES**

Pursuant to 42 U.S.C. § 1988, "[i]n any action or proceeding to enforce a provision of [section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs...." The Court's analysis of what constitutes a reasonable attorney fee begins with what is called the "lodestar" amount: the reasonable number of hours worked by the prevailing party's attorney multiplied by a reasonable hourly rate for that attorney's services. *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). The party seeking an award of attorney fees must submit adequate evidence to demonstrate the hours worked and rates claimed. *Id.* at 437. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Id.* at 433. In addition, the Court must exclude claimed hours that were not "reasonably expended[,]" such as hours that are "excessive, redundant, or otherwise unnecessary...." *Id.* at 434.

The Court may consider numerous other factors in calculating a reasonable fee, however, including:

(1) the time and labor required; (2) the novelty or difficulty of the issues; (3) the skill required of the attorney to properly perform legal services; (4) preclusion of other employment due to acceptance of the case; (5) the attorney's customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the experience, reputation, and ability of the attorney; (9) the undesirability of the case; (10) the nature and length of the professional relationship with the client; and (11) awards in similar cases.

*Westendorp v. Ind. Sch. Dist. No. 273 (Edina, MN),* 131 F.Supp.2d 1121, 1125 (D.Minn.2000) (citing *Zoll v. E. Allamakee Cmty. Sch. Dist.,* 588 F.2d 246, 252 n. 11 (8th Cir.1978)). "[T]he most critical factor [in determining an attorney fees award] is the degree of success obtained." *Hensley,* 461 U.S. at 436; *see also Jenkins v. Missouri,* 127 F.3d 709, 716 (8th Cir.1997). Where, as here, a plaintiff prevails on only some of his claims for relief,

> ***2** two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?
>
> ....
>
> [In some civil rights actions,] the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead 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.

*Hensley,* 461 U.S. at 434–35. "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436–37.

Schaub has requested attorney fees in the amount of $352,200 for Colleluori, a New York-based firm, representing a total of 824.45 hours by three attorneys: Anthony Colleluori, Diane Peti llo, and Noel M unier. The hourly rates proposed are, respectively, $550, $450, and $225. These are the rates charged by these attorneys as of December 2009, although Anthony Colleluori's rate is generally $600 per hour. *See Missouri v. Jenkins,* 491 U.S. 274, 283 (1989) (finding it appropriate to apply current rates rather than retrospective rates to account for delay in payment). Schaub has requested attorney fees in the amount of $112,585 for attorney Steven Corson, reflecting an hourly rate of $500 per hour.

Schaub's submissions include an affidavit of Anthony Colleluori detailing each Colleluori attorney's background, education level, and expertise, and an affidavit of Steven Corson describing his status as the only law firm in Stewartville and his extensive litigation experience. (Aff. of Anthony J. Colleluori, Docket No. 120; Attorney Corson's Reply Aff., Docket No. 153.) However, a fee applicant must "produce satisfactory evidence— **in addition to the attorney's own affidavits** —that the requested rates are in line with those **prevailing in the community** for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson,* 465 U.S. 886, 896 n. 11 (1984) (emphasis added). Schaub has submitted no evidence regarding the prevailing rate for similar services by comparable lawyers in either Rochester, Minnesota, where Schaub's injuries occurred, or Minneapolis, Minnesota, where the case was tried. Accordingly, defendants [FN3] argue that the claimed hourly rates are unreasonable.[FN4] They cite the affidavit of Mark Stephenson, an attorney in Rochester whose practice includes a focus on civil rights issues and who estimated a rate of

$150 to $250 per hour for local civil rights trial attorneys; according to Stephenson, moreover, Corson's normal hourly rate is $150 per hour. (Aff. of Mark G. Stephenson, Jan. 28, 2010, Docket No. 115.)

> FN3. While judgment was entered against only one defendant, VonWald, defendants collectively object to the attorney fees.
>
> FN4. In addition, defendants have challenged as untimely Schaub's request for attorney fees incurred by his lead counsel Col lel uori. Schaub's motion was submitted beyond the deadline established by the Court, but in accordance with Local Rule 54.3. While the Court does not condone failures to comply with judicial orders, the Court will excuse the untimeliness of this submission; to do otherwise would unjustly deprive Schaub of an attorney fee award for his lead counsel's years of labor on this challenging case.

***3** Schaub's proposed rates, however, are similar to those recently deemed reasonable in civil rights enforcement actions and related cases in this district, although Anthony Colleluori and Steven Corson's rates are on the higher end of the scale. *See, e.g., Madison v. Willis,* No. 09–930, 2011 WL 851479, at * 1 & n. 4 (D.Minn. Mar. 9, 2011) (approving rates ranging from $180–$600 per hour but noting that "$600 per hour is on the very upper end of what is reasonable in the prevailing community" and that it was ascribed to the managing partner who runs the civil rights group at his firm); *Phenow v. Johnson, Rodenberg & Lauinger, PLLP,* No. 10–2113, 2011 WL 710490, at * 2 (D.Minn. Mar. 1, 2011) (approving rate of $350 per hour); *Hixon v. City of Golden Valley,* No. 06–1548, 2007 WL 4373111, at * 2 (D.Minn. Dec. 13, 2007) (approving rate of $400 per hour); *King v. Turner,* 05–CV–0388, 2007 WL 1219308, at *2 (D.Minn. Apr. 24, 2007) (approving rate of $500 per hour).

Moreover, while the Court might otherwise be inclined to reduce the hourly rates requested because of the dearth of evidence proffered to support the rates, the Court concludes that these rates are justified by several unusual circumstances of this case. In particular, it was extraordinarily difficult for Schaub to obtain representation, as evidenced by his affidavit in which he states that he sent over 1000 inquiries to attorneys and received over 200 written denials. (Aff. of Phillip Schaub, Ex. A, Docket No. 103.) Schaub had no money to advance towards litigation expenses, and all attorney fees in this case were contingent on the successful prosecution of Schaub's claims. Taking as true the assertions in the affidavits filed by Schaub, after Col lel uori agreed to represent Schaub despite being based in New York, he struggled to find local counsel. The first local counsel backed out shortly before Schaub's deposition and Corson was therefore retained on short notice. Counsel was required to expend additional resources in accommodating Schaub's disabilities, including but not limited to the extensive costs of special transportation arrangements from Rochester to Minneapolis.

Additionally, Schaub was a convicted sex offender accusing a local jail of violating his civil and constitutional rights, a very difficult set of claims for a plaintiff to prove. *See King,* 2007 WL 1219308, at * 1 ("[T]he Supreme Court has compared the complexity of civil rights litigation to antitrust litigation." (citing *Hensley,* 461 U.S. at 430 n. 4.)). The judgment ultimately obtained by Schaub greatly exceeded defendants' Rule 68 offer of $40,000 six weeks before trial. While devoting substantial resources to this challenging, high-risk litigation, counsel was required to turn down other, noncontingent work. There is little doubt but that Schaub's injuries would have gone uncompensated but for counsels' efforts over a period of several years. In sum, the Court concludes that the proposed hourly rates for attorney fees charged by Colleluori, Schaub's lead counsel, are reasonable in these unique circumstances. Because the only evidence on record suggests that Corson's typical rate is $150 per hour and because he was not the lead

counsel on this case, however, the Court finds that a slightly reduced rate of $400 per hour is reasonable for the work conducted by Corson. *See Alexander v. City of Minneapolis,* 545 F.Supp. 586, 589–90 (D.Minn.1982) (reducing attorney's hourly rate to reflect his limited role as second chair at trial).

***4** Defendants have also challenged the reasonableness of counsels' claimed hours. Some of defendants' specific objections to Colleluori's fees include the thirty-five hours Colleluori expended in preliminary research and other activities prior to filing the complaint, two hours devoted to interoffice communications regarding medical records, and time spent revising Colleluori's retainer agreement. After a careful review of the submitted charges, the Court concludes that they are reasonable and sufficiently detailed. To the extent that a few charges—such as 14.4 hours spent relating to a motion seeking to enlarge the time to complete discovery—may be somewhat unreasonable or excessive, the Court concludes that any minor reduction in the lodestar would be compensated for by an appropriate enhancement of the attorney fee award based on the case-specific factors discussed above. Likewise, while defendants' challenge to Corson's submission on the ground of incompleteness is not without merit, the Court concludes that whatever minor degree of unreasonableness may exist in Corson's billing should not serve to reduce the fee for his work given the circumstances of litigating this case.

The Court recognizes that Schaub did not prevail on all of his claims. However, the Court concludes that the claims on which Schaub failed to prevail were intricately related to the claim on which he succeeded, arising as they did out of the same factual circumstances and related legal theories. Further, the level of success he achieved—a nearly million dollar award—makes the hours reasonably expended a satisfactory basis for a fee award. *See Jenkins,* 127 F.3d at 716 ("If the plaintiff has won excellent results, he is entitled to a fully compensatory fee award, which will normally include time spent on related matters on which he did not win."). Defendants offer no argument or evidence to the contrary.

Accordingly, taking into account all of the factors discussed above and after a careful review of the record, the Court concludes that Schaub is entitled to $352,220 in attorney fees for Colleluori's work. The Court concludes that Schaub is entitled to $90,068 in attorney fees for Corson's work, representing a reduction in the requested amount of $112,585.

**II. REASONABLE COSTS**

A prevailing party is entitled to his costs as a matter of course under Federal Rule of Civil Procedure 54(d)(1). Defendants have not objected to any costs submitted by Colleluori, and the Court finds them reasonable. However, defendants argue that the Court should disallow $2,338.28 in costs submitted by Corson as they are supported only by a letter from another law firm that previously represented Schaub. There is no invoice or other documentation to justify those costs, and the Court will therefore disallow them. Accordingly, the Court concludes that Schaub is entitled to $8,828.50 in costs submitted by Col leluori. The Court concludes that Schaub is entitled to $2,703.18 in costs submitted by Corson, representing a reduction in the requested amount of $5,041.46.

**ORDER**

***5** Based on the foregoing, and the records, files, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for an Award of Costs, including Reasonable Attorneys' Fees [Docket No. 118] is **GRANTED.** The Law Office of Anthony J. Col lel uori is awarded attorney fees in the amount of $352,220 and costs in the amount of $8,828.50.

2. The Motion for Award of Steven Corson's Attorney Fees and Costs [Docket No. 103] is **GRANTED in part** and **DENIED in part.** The Corson Law Offices is awarded attorney fees in the

amount of $90,068 and costs in the amount of $2,703.18.

3. Within thirty days defendant Steven Von-Wald shall remit to plaintiff a total amount of $453,819.68 for reasonable attorney fees and costs.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

D.Minn.,2011.
Schaub v. County of Olmsted
Slip Copy, 2011 WL 3664565 (D.Minn.)

END OF DOCUMENT

C
Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
Nicole MADISON, Plaintiff,
v.
Daniel WILLIS, in his individual capacity as a Minneapolis police officer, Defendant.

Civil No. 09-930 (DWF/AJB).
March 9, 2011.

Jeffrey S. Storms, Esq., Ryan O. Vettleson, Esq., and Robert Bennett, Esq., Gaskins, Bennett, Birrell, Schupp, LLP, for Plaintiff.

C. Lynne Fundingsland, and Darla J. Boggs, Assistant City Attorneys, Minneapolis City Attorney's Office, for Defendant.

**ORDER**

DONOVAN W. FRANK, District Judge.

***1** This matter is before the Court on a Motion for an Award of Costs, including Reasonable Attorneys' Fees under 42 U.S.C. § 1988 brought by Plaintiff Nicole Madison. For the reasons set forth below, the Court grants the request in part.

Plaintiff brought this action against Defendant, alleging that Defendant used excessive force against her on December 8, 2008. The matter went to trial, and on December 9, 2010, the jury found that Defendant used excessive force and awarded Plaintiff compensatory damages in the amount of $21,000. Plaintiff sought, but was not awarded, punitive damages. Plaintiff now seeks an award of costs, including reasonable attorney fees, in the amount of $281,188.57. [FN1] This amount reflects fees and costs for services rendered by Plaintiff's attorneys through the preparation of her reply brief on the present motion. Defendant opposes Plaintiff's present request, asserting that the amount should be reduced to $155,452.29. Defendant asserts that the request is unreasonable and contains unsupportable or improper fees.[FN2]

FN1. Plaintiff originally sought $270,280.58 (reflecting $258,280.58 for services rendered by Plaintiff's attorneys through the verdict and an additional $12,000 for the preparation of the present motion). In her reply, Plaintiff indicated that she voluntarily withdraws $792.01 in fees and costs and conceded a $2,295 reduction based on the actual fee in presenting this motion. However, Plaintiff also requested an additional $13,995 in fees for the preparation of her reply brief.

FN2. Plaintiff has agreed to withdraw $792.01 in fees and costs which Defendant opposed. These fees and costs include $203.72 for a celebratory event on December 8, 2010; $40.00 in erroneously charged paralegal fees; $19.29 in mileage reimbursement; and $529.00 in fees associated with three time entries for administrative tasks that were performed by attorneys.

In any action brought to enforce 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby,* 506 U.S. 103, 111-12 (1992). To be a prevailing party, a plaintiff "must 'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Forest Park II v. Hadley,* 408 F.3d 1052, 1059 (8th Cir.2005) (quoting Farrar, 506 U.S. at 109). "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the



Anderson Aff.
Exhibit J

defendant to pay an amount of money he otherwise would not pay." *Farrar,* 506 U.S. at 113. While the amount of the award does not alter the prevailing party inquiry, it will bear on the propriety of fees awarded under § 1988. *Id.* at 114.

In calculating reasonable attorney fees, the Court begins by calculating the "lodestar"-the product of the number of hours reasonably expended on the litigation and the reasonable hourly rate at which those hours should be billed. *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). The reasonableness of a fee depends upon a number of factors, including "the plaintiff's overall success; the necessity and usefulness of the plaintiff's activity in the particular matter for which fees are requested; and the efficiency with which the plaintiff's attorneys conducted that activity." *Jenkins v. Missouri,* 127 F.3d 709, 718 (8th Cir.1997).

The Court has reviewed Plaintiff's submission. Defendant challenges both the hourly rates requested and many of the claimed fees and costs. With respect to hourly rates, the fee applicant must "produce satisfactory evidence-in addition to the attorney's own affidavits-that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson,* 465 U.S. 886, 896 n. 11 (1984). "A rate determined this way is normally deemed to be reasonable." *Id.* Plaintiff's counsel seeks to be reimbursed in this case at rates ranging from $180-$600 per hour for the attorneys on the file and $100-$125 per hour for paralegals.[FN3] Rates similar to these have been deemed reasonable in this district. *See King v. Turner,* 05-CV-0388, 2007 WL 1219308, at *2 (D. Minn. April 24, 2007) (approving rate of $500 per hour in April 2007). Moreover, the reasonableness of the hourly rates is supported by the affidavits of Brian O'Neill and Eric Hageman. The Court finds that the hourly rates requested are reasonable.[FN4]

FN3. These are the current rates for Plaintiff's attorneys, which are appropriately applied. *See Missouri v. Jenkins,* 491 U.S. 274, 283 (1989).

FN4. The Court notes that $600 per hour is on the very upper end of what is reasonable in the prevailing community. That rate was charged for work performed by Robert Bennett, a managing partner at Plaintiff's counsel's firm who runs the civil rights group. Robert Bennett billed a total of just under twenty hours on the file. The other attorneys, who performed the bulk of the legal work on Plaintiff's case, charged rates ranging from $180 to $350 per hour.

***2** Defendants also challenge the number of hours expended on Plaintiff's case. Specifically, Defendants assert that Plaintiff did not indicate that any hours billed were reduced or written off, but that they reflect charges for which no private client would expect to be billed. In addition, Defendants argue that a substantial portion of fees is the product of overstaffing, which resulted in multiple conferences and the same work being performed by multiple attorneys. Defendants also argue that the fee award should be reduced due to vague time entries and to eliminate time spent on claims upon which Plaintiff did not prevail. Some of these issues have been resolved by the concessions noted in Plaintiff's reply brief.

As to Defendant's remaining challenges regarding the reasonableness of the hours submitted, the Court respectfully finds such challenges are largely without merit. For example, the Court declines to reduce the request based on allegations of overstaffing, excessive conferencing, or duplicative work by Plaintiff's legal team. Plaintiff was successful in her civil rights claim, and it is likely that her success was due at least in part on the composition of the legal staff and their consultation with each other.

In addition, Defendant asserts that the $21,000 jury award bears on the extent of Plaintiff's success at trial and that Plaintiff's fee request includes over

$12,000 related to issues upon which Plaintiff did not prevail. Given the facts of this case, the Court concludes that Plaintiff achieved significant success. Accordingly, the Court declines to reduce the award because Plaintiff failed to obtain a larger compensatory award, punitive damages, or a positive ruling on every pre-trial motion or issue at trial.

The Court does find, however, that several portions of Plaintiff's request should be reduced. In particular, Defendant challenges Plaintiff's request for reimbursement for $500 in consultation fees and $1,000 for a deposition of Dr. Van Beek. Defendant argues that these fees are not recoverable because they are expert fees. Plaintiff claims that these fees are not expert fees, but that they represent costs that a treating doctor charged for time spent in writing a narrative report and testifying. The Court disagrees and concludes that even though Dr. Van Beek appeared at trial as a consulting physician and was not properly designated as an expert, Plaintiff intended Dr. Van Beek to appear as an expert. Section 1988 does not provide for such fees, except for cases brought pursuant to 42 U.S.C. §§ 1981 and 1981a. 42 U.S.C. § 1988(b) and (c). Accordingly, Plaintiff's cost request will be reduced by $1,500.

Finally, the Court finds that Plaintiff's request for an additional $13,995 for fees and costs associated with the preparation of her reply brief is unreasonably high. The Court reduces this amount by 30% ($4,198.50), allowing reimbursement in the amount of $9,796.50.

**ORDER**

Thus, based on the files, records, and proceedings herein, and for the reasons stated above, **IT IS HEREBY ORDERED** that:

*3 1. Plaintiff's Motion for an Award of Costs, including Reasonable Attorneys' Fees under 42 U.S.C. § 1988 (Doc. No. [113] ) is **GRANTED IN PART** in the amount of $275,490.07.

2. Defendants are hereby **ORDERED** to remit to Plaintiff a total amount of $275,490.07 for attorney fees and costs.

D.Minn.,2011.
Madison v. Willis
Slip Copy, 2011 WL 851479 (D.Minn.)

END OF DOCUMENT

Slip Copy, 2011 WL 4396938 (D.Minn.)
**(Cite as: 2011 WL 4396938 (D.Minn.))**

**H**
Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
BP GROUP, INC., Plaintiff,
v.
CAPITAL WINGS AIRLINES, INC., and David N. Kloeber, Jr., Defendants.
and
David N. Kloeber, Jr., Cross–Claimant,
v.
Gerald L. Trooien, Cross–Defendant.

Civil No. 09–2040 (JRT/JSM).
Sept. 21, 2011.

Aaron Mills Scott and Gary M. Hansen, Oppenheimer Wolff & Donnelly LLP, Minneapolis, MN, for plaintiff.

Michael H. Streater and Christianne A.R. Whiting, Briggs & Morgan, PA, Minneapolis, MN, for defendant/cross-claimant David N. Kloeber, Jr.

George G. Eck, Dorsey & Whitney LLP, Minneapolis, MN, for cross-defendant Gerald L. Trooien.

**MEMORANDUM OPINION AND ORDER**

JOHN R. TUNHEIM, District Judge.

***1** BP Group, Inc. ("BP Group") filed suit against David N. Kloeber, Jr. as the guarantor of certain contractual obligations it argued had been breached. The contract at issue is an Aircraft Management Agreement executed by BP Group and Capitol Wings Airlines, Inc. ("CWA"). Kloeber signed the agreement on behalf of CWA, and also signed a personal guaranty to secure CWA's performance. By Order of March 14, 2011 ("the Summary Judgment Order"), the Court denied Kloeber's Motion for Summary Judgment, granted BP Group's Motion for Summary Judgment as to its claims against Kloeber, and denied as moot BP Group's Motion to Strike. *BP Group ., Inc. v. Capital Wings Airlines, Inc.*, No. 09–2040, 2011 WL 884135, at *11 (D.Minn. Mar. 14, 2011). The Court directed that judgment be entered in favor of BP Group against Kloeber in the amount of $1,518,221.67. *Id.* at * 12.

The Aircraft Management Agreement provides that any payments unpaid under the agreement shall bear interest at a rate of 12% per annum, and that in the event of a dispute, the prevailing party is entitled to reasonable attorney fees and costs. *Id.* at * 11. Accordingly, pursuant to the Court's direction in the Summary Judgment Order, BP Group has filed a Motion to Add Attorney Fees and Costs to Judgment Without Hearing as well as a Motion to Add Interest to Judgment Without Hearing. (Docket Nos. 87, 90.) The Court grants the motions in part, reducing the amounts for the reasons stated below.

**ANALYSIS**

**I. ATTORNEY FEES AND COSTS**

The Aircraft Management Agreement provides that "[i]n the event of a dispute under this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, and costs." (Aff. of Aaron Mills Scott, Ex. A at 8, ¶ 22, Mar. 18, 2011, Docket No. 93.) BP Group requests attorney fees in the amount of $236,109.00 and costs and legal expenses in the amount of $34,919.29, for a total request of $271,028.29.

The Aircraft Management Agreement is governed by Florida law. (*Id.* at 8, ¶ 23.) While the issue of whether BP Group is entitled to recover attorney fees and costs pursuant to the Aircraft Management Agreement is a substantive matter controlled by Florida law, "the method of quantifying a reasonable fee is a procedural issue governed by federal law in a diversity suit." *Oldenburg Grp. Inc. v. Frontier–Kemper Constructors, Inc.*, 597 F.Supp.2d 842, 847 (E.D.Wis.2009) (emphasis omitted) (citing *Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1076 (7th Cir.2004)); *see also War-*

*ranty Corp., Inc. v. Hans,* No. CIV. A. 98–0889–MJ–S, 2000 WL 284261, at *6 (S.D.Ala. Mar. 9, 2000) ("The plaintiffs in this diversity action seek attorneys' fees pursuant to contract. Accordingly, entitlement to such fees, and the amount thereof, is a question of state law, while the procedures for proving up such fees is governed by federal law."). Kloeber does not challenge BP Group's entitlement to reasonable attorney fees and costs in the context of this motion; rather, he objects to the reasonableness of BP Group's claim for $271,028.29 in fees and costs.[FN1]

FN1. Even under Florida law, the Court would apply the federal approach to calculating reasonable attorney fees and costs. *Fla. Patient's Comp. Fund v. Rowe,* 472 So.2d 1145, 1146 (Fla.1985).

***2** In determining a reasonable award of attorney fees, the Court begins with the "lodestar" amount, obtained by calculating "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) (interpreting 42 U.S.C. § 1988); *see also Fair Isaac Corp. v. Experian Info. Solutions Inc.,* 711 F.Supp.2d 991, 1009 (D.Minn.2010) (using the *Hensley* lodestar method to assess a fee request submitted pursuant to contractual language). The party seeking an award of attorney fees must submit adequate evidence to demonstrate the hours worked and rates claimed. *Hensley,* 461 U.S. at 437. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Id.* at 433. In addition, the Court must exclude claimed hours that were not "reasonably expended[,]" such as hours that are "excessive, redundant, or otherwise unnecessary...." *Id.* at 434. In determining a reasonable fee, the Court may also account for numerous other factors, including "the [party's] overall success; the necessity and usefulness of the [party's] activity in the particular matter for which fees are requested; and the efficiency with which the [party's] attorneys conducted that activity." *Jenkins v. Missouri,* 127 F.3d 709, 718 (8th Cir.1997).

BP Group submitted fees for three attorneys with a range of rates increasing from 2009 to 2011: partner Gary Hansen (hourly billing rate of $535–$565), associate Aaron Scott (hourly billing rate of $290–$330), and associate Tara Iversen (hourly billing rate of $250–$270). The Court may not "automatically accept the lawyer's rate as reasonable; [instead, the Court] look[s] also to the ordinary fee for similar work in the community." *Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, Minn.,* 771 F.2d 1153, 1160 (8th Cir.1985) (internal quotation marks omitted). While BP Group did not submit affidavits or other evidence indicating the prevailing market rate for similar legal services in the Minneapolis area, the Court may rely on its own knowledge of prevailing market rates in determining a reasonable hourly rate. *See Warnock v. Archer,* 397 F.3d 1024, 1027 (8th Cir.2005). Nonetheless, without any information about the level of experience or expertise of the three attorneys whose work forms the basis for BP Group's attorney fee request, other than their typical hourly billable rates and designation as either partner or associate, it is difficult for the Court to determine whether the submitted rates are reasonable.[FN2]

FN2. The record includes evidence of **Kloeber's** counsel's billable rates, and BP Group argues that its rates are reasonable because its attorneys billed at a combined rate lower than Kloeber's attorneys. BP Group has offered no precedent in support of the proposition that a combined hourly lower than the combined hourly rate of opposing counsel demonstrates the reasonableness of each attorney's charged rate.

Moreover, Kloeber has cited examples of charges for legal fees that the Court agrees are excessive. Specifically, Kloeber identified over eighty-five billing entries in which BP Group's attorneys billed for conferencing with each other. On a complex case such as this one, it is reasonable to

expect some amount of billing for discussions between attorneys. *See, e.g., Baughman v. U.S. Liab. Ins. Co.,* 723 F.Supp.2d 741, 750–51 (D.N.J.2010) ("The Court finds it entirely appropriate, and probably necessary, that the partner assigned to this case met periodically with the associate who performed most of the work. Moreover, paying both attorneys for their reasonable expenditure of time at these meetings is not 'double-billing'—both [the partner's] and [the associate's] time is to be valued." (footnote omitted)). However, the Court concludes that the amount of full billing for multiple attorneys' participation in dozens of interoffice conferences warrants a reduction in the requested fee in this case. *See Signature Combs, Inc. v. United States,* No. Civ. 98–2777, 2003 WL 22071165, at *1–2 (W.D. Tenn. June 18, 2003) (finding "[i]nteroffice conferences ... excessive" and concluding that when multiple attorneys have billed for overlapping calls or conferences, it is appropriate to permit full remuneration for the attorney billing at the highest rate and one half of the claimed remuneration for one other attorney billing at an equal or next lower rate).

***3** Additionally, many of the billing entries submitted by BP Group's counsel relate to claims brought against and settlement discussions with Kloeber's former co-defendant and fellow guarantor Gerald Trooien. BP Group also seeks reimbursement for legal fees related to filing a proof of claim in Trooien's subsequent bankruptcy proceeding, and reviewing pleadings and observing proceedings in a state court lawsuit between Trooien and Kloeber, to which BP Group is not a named party. The Aircraft Management Agreement provides that "[i]n the event of a dispute under this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, and costs." While this language is arguably broad enough to cover expenses related to the claims in this lawsuit against Kloeber's co-defendants, the Court concludes that expenses related to Trooien's bankruptcy proceeding and the separate lawsuit between Trooien and Kloeber are too attenuated from the dispute in which BP Group prevailed to sustain the imposition of attorney fees related to those separate proceedings.

The Court does not find merit in all of Kloeber's challenges to the reasonableness of BP Group's attorney fee request. For example, contrary to Kloeber's assertion, BP Group's counsel reasonably expended 31.3 hours in preparing for and attending the summary judgment hearing. Kloeber objects that a partner billed for reviewing the transcripts of depositions taken by an associate, but in the Court's view it is reasonable and presumably necessary for a partner working on a case to review the deposition transcripts; the firm achieved efficiency in avoiding billing for both attorneys to attend the depositions. Similarly, the Court is untroubled by what Kloeber characterizes as duplicative billing but what in fact reflects the reasonableness of more than one attorney working together on a case. Kloeber challenges, for example, billing for a partner to edit a Rule 26 disclosure statement and for an associate's time spent revising it. Moreover, Kloeber has cited no legal authority for the proposition that a disparity between the hours expended by BP Group's counsel on this case (710 hours) as compared to the hours expended by Kloeber's counsel (293.35 hours) reflects the unreasonableness of the former. BP Group's counsel obtained a decisively favorable judgment in a complex contract dispute. According to BP Group, Kloeber's attorney fees are deceptively low because they reflect efficiencies its law firm was able to achieve in fact investigation arising in part from two facts: (a) other attorneys represented Kloeber's interests prior to BP Group's filing suit, and (b) Kloeber's counsel achieved efficiencies in fact investigation by representing Kloeber in multiple other related suits.

Nonetheless, the Court concludes that some reduction in BP Group's fee request is necessary given the absence of evidence supporting the claimed rates as well as some excessive billing, as described above. In these circumstances, and after a careful review of the parties' submissions, the Court finds it appropriate to reduce BP Group's request for attor-

ney fees by 15%, or $35,416.35. Instead of the $236,109.00 in attorney fees requested by BP Group, the Court concludes that $200,692.65 represents a reasonable amount of attorney fees in this matter.

***4** BP Group also requests $34,919.29 in costs and legal expenses. Kloeber objects to $24,487.20 in computerized research charges, arguing that such costs are not reimbursable under Eighth Circuit precedent. *See Standley v. Chilhowee R–IV Sch. Dist.,* 5 F.3d 319, 325 n. 7 (8th Cir.1993) ("Counsels' time spent doing the computer-based legal research is compensable as part of counsels' billable hours. It is the actual cost to the attorneys for their on-line computer time that ... is a component of attorney fees and cannot be recovered in addition to the fee award."); *Leftwich v. Harris–Stowe State Coll.,* 702 F.2d 686, 695 (8th Cir.1983) ("[C]omputer-aided research, like any other form of legal research, is a component of attorneys' fees and cannot be independently taxed as an item of cost in addition to the attorneys' fee award."). Kloeber observes that BP Group appears to charge for both its attorneys' time conducting online research as well as the cost of the online research itself.

However, the Eighth Circuit recently upheld a district court's award of such costs in a case in which the fees were sought pursuant to a negotiated settlement agreement, distinguishing *Leftwich* and *Standley* on the ground that they addressed the reimbursement of costs under fee-shifting statutes. *See In re UnitedHealth Grp. Inc. S'holder Derivative Litig.,* 631 F.3d 913, 918 (8th Cir.2011); *see also Trs. of Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.,* 460 F.3d 1253,1258 (9th Cir.2006) ("No other circuit has endorsed [the Eighth Circuit's] view [as expressed in *Leftwich* and *Standley* ], and many have expressly held that computerized research costs can, in appropriate circumstances, be recovered in addition to the hourly rates of attorneys." (citations omitted)); *Yarrington v. Solvay Pharm., Inc.,* 697 F.Supp.2d 1057, 1068 n. 4 (D.Minn.2010) ("[I]t is unclear whether *Standley* and *Leftwich* represent a hard-and-fast rule in the Eighth Circuit."). In the Court's view, the parties' pre-conflict contractual agreement to award reasonable attorney fees and costs to the prevailing party in any dispute under the agreement more closely resembles a settlement agreement than a fee-shifting statute; under the reasoning of *In re UnitedHealth Group Inc., Leftwich* and *Standley* are not controlling precedent with regard to the excludability of online research costs from an award of reasonable attorney fees and costs.

The Aircraft Management Agreement, however, provides only for those costs that are reasonably incurred, and the Court may reduce an award on the basis of inadequate documentation. *See Hensley,* 461 U.S. at 433. Many, and perhaps most, of BP Group's submitted charges for online research contain vague descriptions such as "computer research" or "document retrieval." The Court cannot determine the relevance or necessity of such charges, let alone their possible relation to this dispute, from such ambiguous descriptions. *See Felder ex rel. Felder v. King,* No. 07–4929, 2011 WL 2174538, at * 4 (D.Minn. May 31, 2011) (reducing an award of costs where "the bare receipts [for photocopies] ... gave no basis to determine which, if any, of these photocopies were necessarily obtained for use in the case" (internal quotation marks omitted)). Accordingly, the Court finds it appropriate to reduce by 60% BP Group's request for reimbursement of online research fees, from $24,487.20 to $9,794.88. Another basis for the Court's reduction is BP Group's failure to provide adequate supporting documentation for additional charges for costs such as "held hard costs" and unidentified costs ($8,662.94 by Kloeber's count). Most of these costs are likely appropriate and attributable to deposition transcripts and travel expenses, but the Court is unable to readily account for them based on the evidence submitted. The Court therefore concludes that $25,124.41 is an appropriate award for reasonable fees incurred as a result of this dispute.

**II. INTEREST**

***5** The Aircraft Management Agreement provides that any payments "due to either party under this Agreement, if not paid on or before the due date, shall bear interest at the lesser of 12% per annum, or the maximum rate allowed by law." (Scott Aff., Ex. A at 9, ¶ 24.) In the Summary Judgment Order, the Court directed that judgment shall be entered in favor of BP Group and against Kloeber in the amount of $1,518,221.67, encompassing (1) BP Group's payment to West Star Aviation ($647,887.03), (2) monthly payments due under the Aircraft Management Agreement less charter revenue earned from alternate sources and BP Group's use of the Aircraft ($860,632.01), and (3) the costs of returning the Aircraft to Florida ($9,702.63). *BP Group, Inc.,* 2011 WL 884135 at *12. The Court also directed Kloeber to pay interest on these amounts listed at the rate of 12% per annum commencing the day after each amount was due. *Id.* BP Group has moved the Court to assess interest in the amount of 12% per annum on these three amounts.

Kloeber challenges only the assessment of interest relating to the West Star payment, on two grounds. First, he argues that since the West Star bill was owed **to West Star** by CWA, the provision of the Aircraft Management Agreement requiring 12% annual interest on payments "due to either party under this Agreement" does not apply. However, under the Aircraft Management Agreement it was the obligation of CWA or its assignee to pay for paint and interior refurbishment work performed by West Star, and Kloeber guaranteed the performance of CWA or its assignee. When CWA or its assignee, and subsequently Kloeber as guarantor, failed to pay the West Star bill as mandated by the Aircraft Management Agreement, BP Group was compelled to do so and then sue for breach of contract. The West Star bill is therefore a financial obligation owed by Kloeber to BP Group under the terms of the Aircraft Management Agreement and guaranty. The agreement's provision mandating 12% interest per annum applies to the West Star bill.

Kloeber also argues that BP Group is entitled to interest on the West Star bill beginning May 1, 2009, the date BP Group paid the bill, rather than BP Group's requested date of January 1, 2009, the day after West Star's work was completed and the aircraft became available. The Court agrees. The West Star bill could not have been owed **to BP Group** by Kloeber under the Aircraft Management Agreement until BP Group actually paid the bill. Rather, from the time the aircraft was ready until the time BP Group paid the bill, the bill was owed **to West Star** by CWA or its assignee, and/or their guarantors. Because the Aircraft Management Agreement provides for interest only if owed sums are not paid "on or before the due date[,]" the Court concludes that interest on the West Star bill must be applied from **May 2, 2009,** the day after BP Group paid the bill, through March 14, 2011, the date judgment was entered. *See id.* ("Kloeber shall also pay interest on the amounts listed in paragraph 4 at the rate of 12% per annum commencing **the day after** each amount was due." (emphasis added)). Likewise, while not a reduction requested by Kloeber, the Court concludes that interest on the cost of returning the plane to Florida, following BP Group's payment of the West Star bill, applies from May 2, 2009 through March 14, 2011.

***6** The period between May 2, 2009 and March 14, 2011 constitutes 681 days, or 1.866 years. Applying a 12% per annum rate of interest, Kloeber owes BP Group $145,074.86 on the West Star bill ($647,887.03), and $2,172.61 on the cost of transporting the aircraft ($9,702.63). Adding these quantities to the unchallenged amount of interest on the unpaid monthly payments, $161,441.49, BP Group is entitled to a total amount of interest of $308,688.96.

**ORDER**

Based on the foregoing, and the records, files, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. BP Group's Motion to Add Attorney Fees and Costs to Judgment Without Hearing [Docket

No. 87] is **GRANTED in part** and **DENIED in part.** BP Group is awarded attorney fees in the amount of $200,692.65 and costs in the amount of $25,124.41.

2. BP Group's Motion to Add Interest to Judgment Without Hearing [Docket No. 90] is **GRANTED in part** and **DENIED in part.** BP Group is awarded prejudgment interest in the amount of $308,688.96.

D.Minn.,2011.
BP Group, Inc. v. Capital Wings Airlines, Inc.
Slip Copy, 2011 WL 4396938 (D.Minn.)

END OF DOCUMENT

Slip Copy, 2011 WL 2174538 (D.Minn.)
**(Cite as: 2011 WL 2174538 (D.Minn.))**

**H**
Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
Katie J. FELDER, as trustee for the next of kin of Dominic Aries FELDER, Plaintiff,
v.
Jason KING, individually and in his official capacity as a City of Minneapolis Police Officer, Lawrence Loonsfoot, individually and in his official capacity as a City of Minneapolis Police Officer, and City of Minneapolis, Defendants.

Civil No. 07–4929(DSD/JJK).
May 31, 2011.

James R. Behrenbrinker, Esq., Minneapolis, MN and Douglas L. Micko, Esq., Beth A. Erickson, Esq., and Lawrence P. Schaefer, Esq. and Schaefer Law Firm, Minneapolis, MN, for plaintiff.

Timothy S. Skarda, Esq., Sara J. Lathrop, Esq., Minneapolis City Attorney's Office, Minneapolis, MN, for defendants.

## ORDER

DAVID S. DOTY, District Judge.

***1** This matter is before the court upon the motions for attorneys' fees and for review of taxation of costs by plaintiff Katie J. Felder. Based on a review of the file, record and proceedings herein, and for the following reasons, the court grants the motions in part.

## BACKGROUND

On October 25, 2010, a jury found defendants Jason King and Lawrence Loonsfoot liable under 42 U.S.C. § 1983 and common law assault and battery for use of excessive force against Dominic Felder (decedent). The jury awarded Felder $1,010,000 in compensatory damages and $800,000 in punitive damages. Thereafter, Felder moved for award of attorneys' fees and costs under Federal Rule of Civil Procedure 54(d), 42 U.S.C. § 1988(b) and 28 U.S.C. § 1920. On March 9, 2011, the Clerk of Court taxed $6,503.90 in costs in favor of Felder. Felder moved for review of the cost judgment. The court now considers the motions.

## DISCUSSION

### I. Attorneys' Fees

In an action under § 1983, "the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "To be a prevailing party, a plaintiff must succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Gill v. Maciejewski,* 546 F.3d 557, 565 (8th Cir.2008) (citation and internal quotation marks omitted). The extensive contact with the parties and familiarity with the issues make determination of the reasonable amount of attorney fees peculiarly within the discretion of the district court. *See Greater Kansas City Laborers Pension Fund v. Thummel,* 738 F.2d 926, 931 (8th Cir.1984). In the present case, defendants do not dispute that Felder is a prevailing party, and as a result only the reasonable amount of fees is at issue.

As an initial matter, Felder agrees that several of her fee requests are improper. Specifically, she does not dispute removal of $572.50 spent to publicize her position in the media and $211.50 spent in another matter. Therefore, Felder requests a total fee award of $392,079.75.

In assessing the reasonableness of fees, the court considers:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the res-

ults obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Hensley v. Eckerhart,* 461 U.S. 424, 430 n. 3 (1983). The court need not "examine exhaustively and explicitly, in every case, all of the factors that are relevant to the amount of a fee award." *Griffin v. Jim Jamison, Inc.,* 188 F.3d 996, 998 (8th Cir.1999). "The starting point in determining attorney fees is the lodestar, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates." *Hanig v. Lee,* 415 F.3d 822, 825 (8th Cir.2005) (citation omitted).

***2** In calculating the reasonable number of hours expended, the court excludes "excessive, redundant or otherwise unnecessary" hours. *Hensley,* 461 U.S. at 434. The present excessive-force matter was not unusually complex or difficult. Regardless, plaintiff seeks compensation for the work of numerous different lawyers and paralegals. While some change in staffing is inevitable over the course of four years, such diffusion of work inevitably results in inefficiency and redundancy of effort. The billing records show many hours recorded and billed for updates and communication between various lawyers. Felder explains fifty-seven entries as "office conference with co-counsel," email correspondence with counsel, or another form of update.

Defendants argue that the fee award should be reduced by $57,071 to account for the redundant, excessive and unnecessary hours. The court disagrees; such a reduction overstates the amount of redundant and unnecessary time spent. Felder discounted some of the hours that resulted from the additional work in 14 of the 57 entries. However, most entries are unchanged, and Felder does not explain the need for such over-staffing. As a result, the court finds that a modest reduction of the fee award is warranted.

A reduction is also warranted based on Felder's overall degree of success in this action. When, as here, "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley,* 461 U.S. at 436. "This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Id.* To be certain, Felder was highly successful in her excessive-force claims, and the jury awarded a large sum. That award does not, however, negate Felder's failure in the other central claim of municipal liability against Minneapolis. As Felder states, this fact affects the reasonable amount of fees. *See* Pl.'s Mem. Supp. 6, ECF No. 111.

Felder argues, however, that she has already discounted time spent on the failed claim. The billing records show over 140 hours of work on the summary judgment motion that disposed this claim. Although Felder discounted 5.75 hours for "research on *Monell* claim," it is evident that more than 5.75 hours of work went into the municipal-liability claim at summary judgment. As a result, a modest reduction is also warranted based on degree of success.

Therefore, based on a careful consideration of the *Hensley* factors, a slight reduction is warranted. The court finds that an award of fees in the amount of $372,475.76 is reasonable in this case. This award is made jointly and severally against King and Loonsfoot.

**II. Costs**

In her original motion, Felder urged the court to approve taxation of $26,839.58 in expert witness fees as costs. The Clerk of Court denied those costs, as well as costs for photocopying. Felder also moves for review of that cost judgment.

***3** The court has "substantial discretion" in awarding costs to a prevailing party under 28 U.S.C. § 1920 and Federal Rule of Civil Procedure 54(d). *Zotos v. Lindbergh Sch. Dist.,* 121 F.3d 356, 363 (8th Cir.1997) (citation and quotation omitted).

Unless a federal statute, rules or court order provides otherwise, "costs—other than attorney's fees—should be allowed to the prevailing party." Fed.R.Civ.P. 54(d)(1). In addition to other costs, the Clerk of Court may tax "[f]ees and disbursements for printing and witnesses" and "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." 28 U.S.C. § 1920(3)-(4). Defendants have the burden to show that the cost judgment "is inequitable under the circumstances." *Concord Boat Corp. v. Brunswick Corp.,* 309 F.3d 494, 498 (8th Cir.2002) (internal quotation and citation omitted).

**A. Expert Fees**

Witnesses attending "any court of the United States ... shall be paid an attendance fee of $40 per day for each day's attendance" plus documented travel costs. 28 U.S.C. § 1821(a)-(d). Those fees and travel costs are taxable as costs under 28 U.S.C. § 1920. *Id.* § 1821(c)(4). "[A]bsent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 445 (1987). Minnesota law differs. The Minnesota Legislature vests discretion in the court to award expert witness fees. See Minn.Stat. § 357.25 ("The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, *may allow such fees or compensation as may be just and reasonable.* " (emphasis added)).

Felder argues that Minnesota law should govern expert-witness costs under *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), because the case involves a mixture of federal and state law. In support, Felder first cites *Henning v. Lake Charles Harbor & Terminal Dist.,* 387 F.2d 264, 267 (5th Cir.1968), for the proposition that expert witness fees are controlled by state substantive law. Felder fails to tell the court, however, that the Fifth Circuit expressly confined *Henning* to "the special case of Louisiana eminent domain proceedings" and noted that "no violence is done to the twin aims of the *Erie* doctrine of preventing forum shopping and avoidance of inequitable administration of the laws by the application of federal procedural provisions to the taxing of costs, including expert witness fees." *Chevalier v. Reliance Ins. Co. of Ill.,* 953 F.2d 877, 886 (5th Cir.1992) (citing *Cates v. Sears, Roebuck & Co.,* 928 F.2d 679, 689 (5th Cir.1991)). Felder further cites *Simeone v. First Bank Nat'l Ass'n,* 971 F.2d 103 (8th Cir.1992). Felder misrepresents the holding of *Simeone.* The Eighth Circuit allowed expert fees under state law in *Simeone* for "a prior *state* court proceeding, not a federal court proceeding wherein expert witness costs might be limited by Sections 1821 and 1920." *Id.* at 108 (applying Rule 41(d)).

***4** In addition to citing inapposite cases, Felder fails to show that expert witness fees are appropriate in this case. This action included substantially identical claims of excessive use of force under both state and federal law. The mere presence of state-law claims under supplemental jurisdiction does not make application of § 1820 a subversion of a state-law right. *See Humann v. KEM Elec. Co-op., Inc.,* 497 F.3d 810, 813 (8th Cir.2007) (holding that "[t]he award of costs in federal court is governed by Rule 54(d), rather than by state law that conflicts with Rule 54 " in case involving mixed federal and state law).

Moreover, even in a pure diversity action, the suggestion that state law controls "ordinary items of costs" under *Erie* "clearly is unsound." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2669 (3d ed. 1998 & 2011 Supp.) (collecting cases). This is especially true where, as here, neither the state legislature nor the state courts give express indication of a special state interest in providing litigants recovery of expert witness fees. Instead, the Minnesota Legislature made award of such fees discretionary. Therefore, Rule 54(d) and §§ 1821 and

1920 control witness fees in the present action, and the court overrules the objection.[FN1]

> FN1. Other recent decisions of district and appellate courts have reached the same conclusion. *See, e.g., First Nat. Mortg. Co. v. Fed. Realty Inv. Trust,* 631 F.3d 1058, 1070–71 (9th Cir.2011) ("[F]ederal law should control the reimbursement of expert witnesses in federal courts sitting in diversity jurisdiction." (citation and internal quotation marks omitted); *Kearney v. Auto–Owners Ins. Co.,* No. 8:06–00595, 2010 WL 1856060, at *1 (M.D.Fla., May 10, 2010) ("A district court, however, may only award those costs specifically permitted by federal law, even where the court, as in this case, sits under diversity jurisdiction to adjudicate state law claims."); *Grabau v. Target Corp.,* No. 06–01308, 2009 WL 723340, at *1 (D.Colo.) Mar. 18, 2009) ("[F]ederal law controls the assessment of costs in a diversity case.").

**B. Printing Fees**

Felder also argues that the Clerk improperly disallowed printing costs for 874 copies, including 325 color photocopies. Felder introduced copies of photographs and other documents into evidence at trial, but the bare receipts provided to the Clerk gave no basis to determine which, if any, of these photocopies were "necessarily obtained for use in the case." Defendants suggest that $149.00, which reflects the fees for printing 100 color copies, labor and a CD, is proper. Based on evidence introduced at trial, the court agrees, and awards Felder $149.00 in fees for printing, to be taxed against defendants.

**CONCLUSION**

Accordingly, based on the above, **IT IS HEREBY ORDERED** that:

1. The motion for attorney fees [ECF No. 109] is granted;

2. Plaintiff is awarded $372,475.76 for her attorneys' fees jointly and severally against defendants King and Loonsfoot;

3. The motion for review of taxation of costs [ECF No. 147] is granted in part:

a. Plaintiff is awarded an additional $149.00 in costs for fees for printing; and

b. The Clerk of Court shall amend the Cost Judgment [ECF No. 146] to reflect an additional $149.00 in fees for printing, to result in a total allowance of $6,652.90.

D.Minn.,2011.
Felder ex rel. Felder v. King
Slip Copy, 2011 WL 2174538 (D.Minn.)

END OF DOCUMENT

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

May 31, 2012

SUITE 1100
445 MINNESOTA STREET
ST. PAUL, MN 55101-2128
TELEPHONE: (651) 282-5700

*Via E-mail and Messenger*

Bridget Gernander
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155-6102

OFFICE OF APPELLATE COURTS

MAY 31 2012

FILED

Re: *Sara Hippert, et al. v. Mark Ritchie, et al.*
Case Number A11-152

Dear Ms. Gernander:

Enclosed for filing in the above-captioned matter, please find an original and nine copies of the following documents:

1. Secretary of State Mark Ritchie's Memorandum in Opposition to Motion For Attorneys' Fees;
2. Transmittal Affidavit of Kristyn Anderson with Exhibits A-L; and
3. Affidavit of Service.

By copy of this letter, service by electronic mail and United States Mail is made on counsel of record.

Sincerely,

KRISTYN ANDERSON
Assistant Attorney General

(651) 757-1225 (Voice)
(651) 282-5832 (Fax)

Enclosures

cc: Alan W. Weinblatt, Jay Benanav (w/encs. via e-mail and U.S. Mail)
David L. Lillehaug, Christopher A. Stafford (w/encs. via e-mail and U.S. Mail)
Marc Elias, William Stafford, Kevin J. Hamilton (w/encs. via e-mail and U.S. Mail)
Eric Magnuson, Elizabeth Brama, Michael Wilhelm (w/encs. via e-mail and U.S. Mail)
Thomas N. Kelly, Greg T. Kryzer (w/encs. via e-mail and U.S. Mail)
Tony P. Trimble, Matthew W. Haapoja (w/encs. via e-mail and U.S. Mail)

AG: #3022059-v1

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL AND U.S. MAIL

**Re:** *Sara Hippert, et al. v. Mark Ritchie, et al.*
Case Number A11-152

STATE OF MINNESOTA )
) ss.
COUNTY OF RAMSEY )

Barbara J. Fehrman, being first duly sworn, deposes and says:

That at the City of St. Paul, County of Ramsey and State of Minnesota, on May 31, 2012, she caused to be served and filed true and correct copies of:

1. Secretary of State Mark Ritchie's Memorandum in Opposition to Motion For Attorneys' Fees; and

2. Transmittal Affidavit of Kristyn Anderson with Exhibits A-L.

upon the following parties via United States Mail and also by electronic mail at the addresses show below:

David Lillehaug
Christopher A. Stafford
Fredrikson & Byron, P.A.
200 South 6th Street, Suite 4000
Mpls., MN 55402-1425
*dlillehaug@fredlaw.com*
*cstafford@fredlaw.com*

Marc Elias
Kevin J. Hamilton
William Stafford
Perkins Coie LLP
700 13th Street NW, Suite 600
Washington, DC 20005-3960
*melias@perkinscoie.com*
*khamilton@perkinscoie.com*
*wstafford@perkinscoie.com*

Thomas N. Kelly
Greg T. Kryzer
Wright County Attorney's Office
Wright County Government Center
10 2nd Street NW, Room 400
Buffalo, MN 55313
*Greg.kryzer@co.wright.mn.us*
*tom.kelly@co.wright.mn.us*

Tony P. Trimble
Matthew W. Haapoja
Trimble & Associates, Ltd.
10201 Wayzata Boulevard, Suite 130
Mpls., MN 55305
*trimblelegals@earthlink.ne*
*MWHaapoja@aol.com*

Eric J. Magnuson
Elizabeth M. Brama
Michael C. Wilhelm
Briggs and Morgan
2200 IDS Center
80 South 8th Street
Mpls., MN 55402-2157
*emagnuson@briggs.com;*
*mwilhelm@briggs.com;*
*ebrama@briggs.com*

BARBARA J. FEHRMAN

Subscribed and sworn to before me on this 31st day of May, 2012.

NOTARY PUBLIC

JULIE L. TINKHAM
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2015