IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:13-CV-00949

DAVID HARRIS and CHRISTINE BOWSER,

Plaintiffs,

v.

PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and A. GRANT WHITNEY, JR., in his capacity as Chairman of the North Carolina State Board of Elections,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES

I. INTRODUCTION

Plaintiffs challenged the constitutionality of two North Carolina congressional districts – District 1 and District 12 – as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. (ECF. No. 1, Complaint.) After a three-day bench trial, this Court determined Plaintiffs had shown that race predominated in both Districts and that Defendants had failed to establish that its redistricting plan satisfied strict scrutiny. (ECF No. 142, Mem. Op.) As a result, on February 6, 2016, the Court found that the 2011 versions of Congressional Districts 1 and 12 were unconstitutional, and the Court required the General Assembly to draw a new Congressional district plan for those two districts. (ECF No. 143, Final Judgment.)

On February 18, 2016, the General Assembly enacted the Contingent Congressional Plan ("Congressional Plan").[1] Plaintiffs, however, were not satisfied with the Congressional Plan. On March 3, 2016, they filed objections to the Congressional Plan, arguing that it was not an adequate remedy. (ECF No. 157, Pls.' Objections.) The Court denied Plaintiffs' objections. (ECF. No. 171, Mem. Op.)

On April 5, 2015, Plaintiffs filed a Motion for Award of Attorneys' Fees and Litigation Expenses and Memorandum in Support, asking this Court to award attorneys' fees in the amount of $1,104,307.80 and litigation expenses in the amount of $150,809.17. (ECF No. 165, Motion; ECF No. 166, Mem. In Supp.) Defendants have appealed this Court's judgment finding the 2011 version of District 1 and 12 unconstitutional. Until Defendants' appeal is resolved, Defendants believe that it is premature for this Court to award fees or costs to the plaintiffs. If Defendants' appeal is dismissed or this Court's judgment affirmed, Defendants will not contest that Plaintiffs are prevailing parties in this matter or that the Court has discretion to award a reasonable fee award in this case.

If the Court deems the fee motion ripe for consideration, Defendants do now contest the reasonableness of the rates and hours expended, as well as some of litigation expenses sought. For the reasons discussed in detail below, Defendants respectfully

[1] Prior to doing so, Defendants filed a notice of appeal and a motion to stay the Court's order, which was denied. (ECF Nos. 144, 145, 148.). Defendants then filed an emergency motion to stay the Court's order with the United States Supreme Court, which was denied. *McCrory v. Harris*, 136 S.Ct. 10001 (2016).

request that the Court significantly reduce the amounts sought by Plaintiffs and exclude certain fees and litigation expenses.

II. ARGUMENT

A. STANDARD OF PROOF

In determining what is a reasonable fee, the Court must first determine whether Plaintiffs' fee request incorporates hourly rates that 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, 895 n.11, 104 S.Ct. 1541 (1984). Applicants bear the burden of proving that their asserted hourly rates are reasonable and, as noted by the Fourth Circuit, "determination of the hourly rate will generally be the critical inquiry in setting the reasonable fee." *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990). To meet their burden, movants "must produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which [they] seek[ ] an award." *Grissom v. Mills Corp.*, 549 F.3d 313, 321 (4th Cir. 2008). The fee applicants may draw from "a range of sources," including "evidence of the fees [counsel] ha[ve] received in the past," *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010), or "affidavits of other local lawyers who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community." *Plyler*, 902 F.2d at 278; see also *Daly v. Hill*, 790 F.2d 1071, 1080 (4th Cir. 1986) (considering "affidavits from other area attorneys").

The court should also consider the twelve factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) in calculating the reasonable number of hours:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required 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) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results 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.

Morse v. Republican Party of Virginia, 972 F. Supp. 355, 365 (W.D. Va. 1997).

B. PLAINTIFFS' REQUESTED RATES ARE EXCESSIVE.

A strong presumption exists that the relevant legal services market is the area in which suit is filed. *Montcalm Publ'g v Commonwealth*, 199 F.3d 168, 173 (4th Cir. 1999). Thus, for purposes of this inquiry, the Court should look to the North Carolina legal market. Notably, Plaintiffs have not supplied the court with the kind of evidence called for in *Grissom* ("prevailing market rates in the relevant community for the type of work for which [they] seek[ ] an award."), 549 F.3d at 321; *Plyler* ("affidavits of other local lawyers who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community"), 902 F.2d at 278; or *Daly* ("affidavits from other area attorneys"), 790 F.2d at 1080.

Instead, they rely on three declarations which are directed to other evidence: one from J. Gerald Hebert, Adjunct Professor of Law at Georgetown University Law Center and New York Law School, one from William B. Stafford, partner with Perkins Coie

LLP, lead firm in the litigation, and Edwin Speas, partner with Poyner Spruill LLP, characterized in the fee motion as "Local Rule 83.1 Counsel for Plaintiffs." Hebert Declaration (ECF No. 165-3); Stafford Declaration (ECF 165-5); and Speas Declaration (ECF No. 165-4.) Only Mr. Speas practices in the relevant community. Absent from the fee petition is any evidence from other attorneys practicing in the relevant market and the Hebert and Stafford Declarations are silent on the *Grissom* and *Plyler* standards.

The thrust of the Hebert and Stafford Declarations is to demonstrate that Perkins Coie is one of the premier firms in the country in the field of voting rights litigation, and the lawyers identified therein as among the best voting rights attorneys in the nation. The Speas Declaration demonstrates his own credentials, likewise firmly establishing him as one of the most experienced, seasoned and accomplished voting rights attorneys in the country. The Speas Declaration also demonstrates that Mr. Speas' Poyner Spruill colleagues are worthy members of an excellent support team.

Defendants do not deny the credentials of Perkins Coie and its attorneys, but the Hebert and Stafford declarations fail to satisfy the standards of proof for a fee petition in a matter filed in the United States District Court for the Middle District of North Carolina, and tried in Greensboro, North Carolina. To the contrary, the Hebert and Stafford declarations state nothing about prevailing market rates in North Carolina or the absence of qualified counsel in that market.

Collectively, Plaintiffs' evidence demonstrates that Plaintiffs had ample opportunity to rely upon competent counsel in North Carolina to represent them - specifically, Mr. Speas (and his team). Mr. Speas has significant experience in the areas

of voting rights law and litigation. One might even argue that he is one of preeminent lawyers in the field in the State of North Carolina[2] if not the region. As noted in his biography on Poyner Spruill's website: "The focus of Mr. Speas' work over the years has been the application of legal principles in a courtroom setting to disputes concerning legislative and congressional redistricting . . . ." (emphasis added.)

The record establishes that the prevailing market rate for lead counsel in a matter such as this is $500 per hour, the rate Mr. Speas charged for his services.[3] This rate is considerably lower than the rates for the top end Perkins Coie lawyers (e.g., Marc Elias - $765, Kevin Hamilton - $655, and John Devaney - $575 (in 2014)).[4] The record likewise establishes that the prevailing market rate for lawyers in a support role is $300 per hour, the rate charged by Mr. Speas' Poyner Spruill colleagues who worked on this matter (Caroline Mackie and John O'Hale).[5] This rate is considerably lower than the latest rates for similarly skilled Perkins Coie lawyers (e.g., Abha Khanna - $525, and William Stafford - $495).

Plaintiffs have produced no evidence to rebut the presumption that they could have retained competent lead counsel from North Carolina rather than hire an out-of state law firm for this action whose attorneys are based in Seattle and Washington, D.C.[6] Rates for

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[2] *See, e.g.,* http://www.poynerspruill.com/people/Pages/EdwinMarionSpeas,Jr.aspx (last visited June 10, 2016); Speas Declaration (ECF No. 165-4.)

[3] Speas Decl. ¶ 5.

[4] Rates listed are for 2016 unless otherwise indicated.

[5] Speas Decl. ¶ 5.

[6] It was not necessary to bring in outside lawyers from across the country to try this case when there are capable attorneys located in North Carolina. (Stafford Decl. ¶¶ 6, 19.)

legal services in North Carolina are decidedly lower than those in the nation's capital, or in Seattle. Accordingly, if fees are awarded, they should be calculated at a lower rate than those requested by Plaintiffs. *See PLX v. Prosvstems*, 220 F.R.D. 291, 299 (N.D. W. Va. 2004) (rejecting plaintiff's request for $295.00 an hour charged by its New Jersey law firm and awarding "fees at the rate of $200.00 per hour, in accordance with the rate charged by intellectual property law firms practicing in Martinsburg, West Virginia."). Specifically, the rate for fees for the top end Perkins Coie lawyers should be no higher than the rate for Mr. Speas ($500), and the rate for fees for middle to lower level Perkins Coie lawyers should be no higher than the rate for Mackie and O'Hale ($300).[7] At a minimum, the rates for these Perkins Coie attorneys should be reduced by at least 25%, proportionate to the reduction for Hamilton, Mr. Speas' contemporary, from $655 to $500 per hour.

There is no disputing that highly competent counsel can be found in North Carolina.[8] The fact that the Ogletree Deakins' Raleigh office represented the Defendants in this matter further underscores the fact that there are lawyers in the market equipped to handle this type of litigation.[9] Moreover, Plaintiffs have failed to demonstrate that Mr. Speas and his team were not capable of handling this litigation on their own. The use of

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[7] The record establishes Ms. Mackie and Mr. O'Hale as eminently qualified and quite capable of supporting the litigation. (Speas Decl. ¶ 3.)

[8] Defendants note that in his Declaration, Gerald Hebert does not opine on whether Plaintiffs could have retained a local attorney to provide competent representation nor does he opine that the Poyner Spruill firm is not capable of representing the Plaintiffs.

[9] *See* Declaration of Thomas A. Farr (discussing the relevant experience and rates charged by the lawyers who worked on this case and the discounted rate charged to the State), attached hereto.

Perkins Coie in this matter was not a necessity, but a luxury. Because Plaintiffs chose to go outside the North Carolina market, they should have to bear the burden of the excessive fees, not the State of North Carolina.

C. PLAINTIFFS' FAILED TO EXERCISE PROPER BILLING JUDGMENT THROUGHOUT THE LIFE OF THIS CASE

Plaintiffs' seek compensation for a total of 2,678.12 hours of work on this case. Perkins Coie seeks payment for the work of 13 timekeepers in the three year life of this litigation, and Poyner Spruill seeks payment for the work of five timekeepers. (Stafford Decl. ¶ 19.) Perkins Coie also acknowledges that *twenty-two other* timekeepers worked on this case. So, in the course of three years, forty lawyers, including *thirty-five* Perkins Coie lawyers worked on this case. *Defendants by comparison, had ten Ogletree Deakins lawyers working on this case prior to entry of the Court's judgment.* (Farr Decl. ¶ 4.)[10] The sheer number of lawyers Plaintiffs' firms assigned to the case suggests considerable redundancy. *See e.g., Perdue v. City Univ. of New York*, 13 F. Supp. 2d 326, 346 (E.D.N.Y. 1998) (reducing plaintiff's fee request by 20% to account for the redundancy in hours billed by three partners and six associates that worked on the case).

Even more compelling than the number of lawyers assigned to the case, however, is the fact that Plaintiffs have admitted their attorneys billed too much. (*See* Mem. In Support at 7-8.) Due to admitted inefficiencies, Plaintiffs' counsel states that they are limiting their fee petition, excluding "the scores of hours" spent on this case that "arguably could have been more efficiently spent." (Stafford Decl. ¶¶ 17-18.) Thus,

[10] Alec McC. Peters, Senior Deputy Attorney General for the North Carolina Department of Justice, also served as co-counsel for Defendants in this case. (Peters Decl. ¶¶ 3-5)

Perkins Coie effectively admits that, in hindsight, they have billed too much. (*See* Mem. In Support at 8; Stafford Decl. ¶ 18.) Thus, the issue is not whether Plaintiffs' attorneys work on the case was excessive. It was. The only question is, how excessive was it? Defendants contend that the $1,104,307.80 in fees which Plaintiffs are seeking should be limited even further.

While Plaintiffs' counsel couch their inefficiencies and redundancies as "thoroughness," Mem. In Support at 8, the time entries submitted to the court support a finding of excessiveness. *See* Plaintiffs' Attorney Time Entries (ECF No. 165-1.) These numerous excesses include the following entries:

- Multiple attorneys participated in a number or conferences without apparent justification (*see* time entries 10, 15-16, 18-19, 26-30, 34, 35, 37, 45-47, 58, 59, 64-66, 71-72, 76-77, 86, 87, 95-96, 98, 111-112, 118, 119, 136, 138, 141-142, 321-324, 340-343, 366-370.)
- Excessive time was spent on a number of tasks, such as: (1) drafting the Complaint (*see* time entries 80, 85, 89-91, 97-99, 101-114[11]); (2) drafting a FOIA letter and/or "public records requests" (*see* time entries 39-40, 48, 50-51, 67-68, 70, 78, 144-145, 148, 150, 152); (3) drafting a motion for expedited discovery (*see* time entries 52, 55, 61, 67, 78); and doing work that appears to be clerical in nature[12] (*see* time entries 168, 170, 172, 174,

[11] Defendants note that in time entry 105, this individual had already billed six (6) hours for this task.

[12] "Purely clerical tasks are ordinarily a part of a law office's overhead and should not be compensated for at all." *Porter v. Colvin*, 2014 U.S. Dist. LEXIS 73384, at *4

175, 178, 180, 182-183, 186, 188, 190-191, 193, 195, 197-200, 202, 204, 206-207, 211, 213, 215-216, 224, 240-242, 248, 391.)

- Excessive time and a duplication of efforts were spent on numerous motions papers as well[13] (*see* time entries 176, 183, 196, 201, 203, 208, 214, 217-219, 232, 235-236, 243, 245, 252-254, 257, 261-271, 273-274, 277, 279, 287-293, 295-299, 301-303, 306-310 and 366, 375, 380, 381, 385-386, 390, 394-396, 399-402, 407-421, and 646, 648, 650-654, 656-658.)

A comparison to the total hours expended by counsel for Defendants from the inception of this case through the date final judgment was entered (February 6, 2016) further supports Plaintiffs failed to exercise proper billing judgment. During this time frame, the Ogletree Deakins lawyers logged 1,780.90 hours. Senior Deputy Attorney General Alec Peters, co-counsel for defendants, estimates that he worked no more than

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(W.D.Va. 2014) (*quoting Chapman v. Astrue*, 2009 U.S. Dist. LEXIS 104428, at *3-4, 2009 WL 3764009 (W.D.Va. 2009)). *See also Green Party of Tennessee v. Hargett*, No. 3:13-1128, 2014 WL 1404900 at *1 (M.D. Tenn. 2014) (noting that "[f]ees cannot be awarded for purely clerical or secretarial tasks"); *Stewart v. CUS Nashville*, No. 3:11-cv-342, 2014 WL 116593 at *9 (M.D. Tenn. Jan. 10, 2014) (denying 13.4 hours of clerical duties performed by attorneys); *Hyland v. Indicator Lites, Inc.*, 160 F. Supp. 2d 981, 985-86 (N.D. Ill. 2001) ("We also disallow several entries which detail clerical tasks that need not be performed by attorneys, such as time spent filing motions or photocopying."). Moreover, "hours not properly billed to one's client are not properly billed to one's adversary." *Harry v. Balden Cnty. North Carolina*, No. 87-72-CIV-7, 1989 WL 253428, at *6 (E.D. N.C. Dec. 11, 1989) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

[13] *See also United States v. Univ. Physician Assocs.*, No. 04-3530, 2012 WL 10033888, *10 (D. N.J. 2012) (noting that "[flees should be reduced when the efforts of attorneys with a high level of skill are duplicative in that "the attorneys are unreasonably doing the same work" such as the same research or working on the same pleadings) (citation omitted).

140 hours on the case. (Peters Decl. ¶¶ 4-5) Thus, in total, defense counsel in this case logged no more than 1,920.9 hours working on this litigation. In contrast, Perkins Coie and Poyner Spruill lawyers logged 2,365 hours – *or 444 more hours than defense counsel*. (Farr Decl. ¶ 7.); Plaintiffs' Attorney Time Entries (ECF No. 165-1.) Whether due to redundancy or inefficiency (or even excessive "thoroughness"), this disparity points to unnecessary work on the case.

More recently, following the enactment of the Congressional Plan on February 18, 2016, there are 54 billing entries among four (4) Perkins Coie lawyers and three (3) Poyner Spruill lawyers.[14] These attorneys and their staff members expended 133.7 hours and ran up $68,828 in fees for activities related to an ultimately unsuccessful attempt to object to the Plan. This component of the fee claim is excessive on its face.

Hours billed that are duplicative and excessive should be excluded (or reduced). *See* cases cited *supra* note 11; *McGee v. Cole*, 115 F. Supp. 3d 765, 771 (S.D. W. Va. 2015) ("'[H]ours that are excessive, redundant, or otherwise unnecessary' should be excluded." (citing *Hensley*, 461 U.S. at 434)). *See also Neves v. Neves*, 637 F. Supp. 2d 322, 343 (W.D. N.C. 2009) (holding that "'[i]n complicated cases, involving many lawyers, deducting a small percentage of the total hours may be used to eliminate duplication of services,'" citing *Freier v. Freier*, 985 F. Supp. 710, 712 (E.D. Mich. 1997), and therefore "reduc[ing] the overall attorney's fee award by twenty percent (20%) to account for [] redundant and duplicative billing."); *Perdue*, 13 F. Supp.2d at 346.

[14] *See* Plaintiffs' Attorney Time Entries 1298 – 1352.

D. FEES AND EXPENSES SPENT ON PLAINTIFF'S OBJECTIONS TO THE CONTINGENT CONGRESSIONAL PLAN SHOULD BE EXCLUDED OR, ALTERNATIVELY, REDUCED BY 50 % BECAUSE THE OBJECTIONS LACKED FACTUAL AND LEGAL BASIS.

As noted above, Plaintiffs' lawyers expended 133.7 hours drafting and presenting to the Court objections to the Congressional Plan that were denied. (ECF No. 171.) In addition to being excessive, these fees should be completely excluded from any fee award because Plaintiffs' objections lacked factual and legal basis.

While the Court's Order was clear that it was not endorsing or foreclosing other challenges to the Congressional Plan, it also was clear that Plaintiffs' objections lacked merit. As to Plaintiff's first objection, the Court found it "remarkably vague" and concluded that Plaintiffs "failed to state with specificity the factual and legal basis" for it. (*Id.* at 5.) With regard to the second objection, the Court determined precedent tied its hands. (*Id.* at 6-7.) Given that Plaintiffs had no valid basis upon which to object, it seems apparent that the objections should never have been brought. The equities weigh in favor of denying fees for this phase of the representation for the further reason that Plaintiffs' pursuit of vague and unmeritorious objections came with a cost to the Defendants, who were obligated to authorize their attorneys to oppose the objections.

Therefore, Plaintiffs' counsel should not be permitted to recover the nearly $69,000 in fees they claim for pursuing objections that were "remarkably vague" and without legal authority, respectively. *See also E.E.O.C. v. Freeman*, 126 F. Supp.3d 560, 580 (D. Md. 2015) (reducing fees spent on unsuccessful motions after final judgment was

entered by 50%). Similarly, Plaintiff's counsel should not be permitted to recover any associated expenses with drafting and filing their objections.

E. THE EXPENSES SOUGHT BY PLAINTIFFS SHOULD BE REDUCED.

Plaintiffs seek expenses for the following categories: (A) photocopies and printing; (B) Electronic Discovery Database Hosting; (C) Filing Fees; (D) Depositions and Transcripts; (E) Document Collection, Processing, Production; (F) Administrative Expenses (charges, photocopying, postage, facsimile, and other non-extraordinary charges); (G) Expert Costs; (H) Research; (I) Shipping; and (J) Travel and Meals, for a total of $150,641.37. Defendants ask the Court to cut these expenses by 50% due to the absence of narratives for many of the line items, and otherwise vague descriptions, which prevents the Court from determining if the expenses are recoverable. To the extent the Court is unwilling to take a wholesale approach to the exorbitant amount of expenses sought by Plaintiffs, Defendants addresses these categories in more detail.

As initial matter, Defendants take issue with the vagueness of the description provided in support of the expenses listed in Category (E). This is a high priced amount, and yet it is not clear exactly what service or services were provided and whether they were necessary. *See Kabore v. Anchor Staffing, Inc.*, No. L-10-3204, 2012 WL 5077636, at *10 (D. Md. Oct. 17, 2012) (noting that expenses normally charged to a fee-paying client are recoverable, but "Plaintiffs' counsel must have provided sufficiently detailed records"). As a result, it is unclear what types of expenses associated with "document

collection, processing and production" fall within this Category, and whether these expenses are the type normally charged to a fee-paying client.

It would appear the processing and production of documents would likely also be covered by the "Administrative Expenses" sought within Category (F). It is even more difficult to make this determination, however, because Plaintiffs did not provide any narrative in support of the expenses listed in Category (F). Rather, Stafford states that Category (F) is further described in Speas Declaration, which states that these expenses "encompass photocopying, postage, facsimile, and other similar expenses typically charged to clients . . . calculated based on hours billed: $10.25 per billed hour." (Stafford Decl. ¶ 10 n.2; Speas Decl. ¶ 7.)

As an initial matter, Defendants contend that a calculation of cost based on hours billed, at $10.25 per billed hour, fails to capture the actual expenses incurred. Rather, Plaintiff should provide an accounting of the actual costs incurred for photocopying, postage, facsimile, and other unknown expenses. The approach utilized by Plaintiffs is less exacting and could result in more expenses being billed to the client than those actually incurred in carrying out these types of administrative tasks. Moreover, processing and producing documents could certainly include photocopying, postage, and facsimile.

In a similar vein, Defendants are hard-pressed to see how the expenses sought in Category (F), which include photocopying, are not duplicitous of the expenses sought in Category (A), which are costs for photocopying, and printing. Based on the foregoing, Defendants ask the Court to reduce the expenses sought in Category (F) by $5,134.30

(the amount sought in Category (A)), and reduce the expenses sought in Category (E) by 50%.

Plaintiffs also seek $37,572.08 in Electronic Discovery Database Hosting. While the costs of converting data into readable format may be compensable, "not all electronic discovery consultant charges are taxable." *See, e.g., Johnson v. Allstate Ins. Co.*, No. 07-cv-0781-SCW, 2012 WL 4936598, at *5 (S.D. Ill. Oct. 16, 2012)[15] (holding that "[*n]on-compensable costs include* collecting and *preserving* ESI, processing and indexing ESI, and keyword searching of ESI for responsive and privileged documents") (emphasis added.)

Should the Court find this type of expense recoverable in the instant case, Defendants respectfully request that, prior to any award being made, the Court order Plaintiffs' counsel to submit documentation that they are in fact entitled to recover their ESI hosting costs under the parties' contract/legal fee arrangement. *See Tampa Bay Water v. HDR Engineering, Inc.*, No. 8:08-CV-2446-T-27TBM, 2012 WL 5387830, at *21 (M.D. Florida Nov. 2, 2012) (finding the scope of the relevant statute immaterial because "HDR is entitled to recover its reasonable ESI costs under the parties' contract."); *Bladen Cnty. North Carolina*, 1989 WL 253428, at *6 ("[H]ours not properly

[15] While this case dealt with costs under 28 U.S.C. § 1920, the term "costs" used in Rule 54(d) is congruent with 28 U.S.C. § 1920, and Plaintiffs have provided no case law to support that ESI Hosting costs are "reasonable litigation expenses" recoverable under 52 U.S.C. § 10310(e) or 28 U.S.C. § 1988. *Johnson*, 2012 WL 4936598, at * 5; 52 U.S.C. § 10310(e). *See also Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S.Ct. 1997, 2001 (2011) (the Supreme Court has "rejected the view that 'the discretion granted by Rule 54(d) is a separate source of power to tax as costs expenses not enumerated in § 1920.'" (quoting *Crawford Fittings Co. v J.T. Gibbons, Inc.*, 482 U.S. 437 , 107 S.Ct. 2494, (1987))).

billed to one's client are not properly billed to one's adversary." (citing *Hensley*, 461 U.S. at 434)).

To the extent the Court orders Plaintiff to provide such documentation and it supports Plaintiffs are entitled to recover ESI hosting costs, Defendants also contend that the amount sought is not "reasonable" and should be reduced by fifty percent.

III. CONCLUSION

After Defendants' appeal is resolved, should the Court determine an award of attorneys' fees and expenses is warranted in this case, Defendants respectfully request, as shown herein, that the Court: (1) reduce the standard hourly rates of Perkins Coie attorneys to the rates charged by attorneys for Poyner Spruill, a comparably qualified North Carolina law firm ($500.00 (lead attorney) and $300.00 (associate attorney)); (2) reduce Plaintiffs' counsel's billed hour total (2,365 hours) by 444 hours to remedy the billing disparity caused by Plaintiffs' counsel's redundancies; (3) calculate any fees believed to be owed Plaintiffs' counsel by using the reduced billed hour total and the Poyner Spruill rates for all Plaintiffs' attorneys; (4) find that Plaintiffs' counsel is not entitled to the $68,828.00 in fees charged for Plaintiffs' unsuccessful, and meritless, attempt to object to Defendants' remedial Congressional plan; and (5) order Plaintiffs to produce supplemental documentation concerning their actual costs so that the Court can make a more accurate determination of the reasonable costs that should be awarded.

Respectfully submitted, this the 22nd day of June, 2016.

NORTH CAROLINA DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that on this date I caused a copy of the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS" MOTION FOR AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

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This the 22nd day of June, 2016.

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