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 JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,** **Defendants.**	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES**

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I. INTRODUCTION

Defendants do not dispute that Plaintiffs, as the prevailing parties, are entitled to an award of fees and reasonable litigation expenses. Rather, Defendants lodge two primary objections to Plaintiffs' motion. As described below, neither has merit.[1]

II. ARGUMENT

A. Plaintiffs' Requested Fees Are Reasonable

Defendants challenge Plaintiffs' counsels' hourly rates and contend further that Plaintiffs' counsel billed "excessive" time to this case to the extent they billed more time than Defendants' counsel. *See* ECF No. 172 at 16. This claim fails.

1. Plaintiffs' Requested Hourly Rates Are Reasonable

Defendants do not dispute that Plaintiffs' counsels' rates are reasonable in the markets in which they practice. They offer no objection to the rates requested for Poyner Spruill timekeepers. Rather, Defendants argue that Perkins Coie timekeepers should be held to "North Carolina" rates. *See* ECF No. 172 at 4.

To be sure, "the community in which the court sits is the *first* place to look to in evaluating the prevailing market rate." *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994) (emphasis added). But a court "of course" can award out-of-state rates where a given matter is particularly "complex or specialized." *Montcalm Pub. Corp. v. Commonwealth of Virginia*, 199 F.3d 168, 173 (4th Cir. 1999).[2] Voting rights cases are

[1] Plaintiffs file this reply to complete briefing on their pending motion, pending this Court's determination as to whether it will resolve the motion now or defer consideration of it pending appeal.

[2] *See also Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 2008 WL 906031, at *9 (W.D. Mich. Mar. 31, 2008) (recognizing that where foreign counsel are specialists "just because . . . out-of-town counsel were not necessary, this does not necessarily mean the rates charged by said counsel are unreasonable") (citation omitted); *Howes v.*

among the most complex and time-consuming cases handled by the federal judiciary. *See* ECF No. 165-5 Ex. A. Perkins Coie counsel have litigated such cases around the country, *see, e.g. id.* ¶¶ 3-10, and are recognized as preeminent practitioners in this highly specialized and complex area of law, ECF No. 165-3 ¶¶ 12-29.

To be sure, Plaintiffs relied on the work done by their skilled local counsel, Poyner Spruill. Mr. Speas is an experienced voting rights litigator. Mr. O'Hale and Ms. Mackie provided him with able assistance, although they do not have the deep voting rights experience that Perkins Coie counsel collectively brought to bear. But the availability of some skilled North Carolina practitioners does not mean Plaintiffs should be penalized for securing national experts as lead counsel in this complex and nationally significant case.[3] The Court should award Plaintiffs' fees at the rates set out in their motion papers.

2. The Time Counsel Spent Prosecuting This Case Is Reasonable

Plaintiffs' counsel exercised billing judgment before submitting this motion and discounted their fees by $88,848.80—roughly 7.5%. ECF No. 165-5, ¶ 18. Defendants

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Med. Components, Inc., 761 F. Supp. 1193, 1196 (E.D. Pa. 1990) (awarding New York rates for Philadelphia case: "[A] party should be entitled to retain the most competent counsel available, particularly in [a] highly specialized area of complex . . . litigation"); *Berry v. Sch. Dist. of the City of Benton Harbor*, 703 F. Supp. 1277, 1282-83 (W.D. Mich. 1986) ("[I]n cases involving particularly complex issues . . . [a] national market or a market for a particular legal specialization may provide the appropriate market.") (citations omitted).

[3] *See, e.g.*, *Bone Shirt v. Hazeltine*, 2006 WL 1788307, at *3 (D.S.D. June 22, 2006) (awarding home rates to out of state counsel given their "familiarity and specialization with voting rights law"); *Jeffers v. Clinton*, 776 F. Supp. 465, 469 (E.D. Ark. 1991) (awarding out-of-state rates in voting rights case, notwithstanding participation of local counsel, because "mammoth case could not have been undertaken without [out-of-state counsels'] lawyers and resources."), *vacated on other grounds*, 503 U.S. 930 (1992), and amended sub nom. *Jeffers v. Tucker*, 835 F. Supp. 1101 (E.D. Ark. 1993)); *see also Am. Booksellers Ass'n, Inc. v. Hudnut*, 650 F. Supp. 324, 328 (S.D. Ind. 1986) (awarding New York City rates in Indiana in First Amendment case: "Although this court certainly recognizes and acknowledges that there are Indiana attorneys who could have competently handled this case on behalf of plaintiffs, it must also acknowledge that based on the breadth of experience that Finley Kumble possesses in litigating first amendment questions, it is unlikely that services of like quality [were] truly available" (citation omitted)); *Planned Parenthood v. Miller*, 70 F.3d 517, 519 (8th Cir. 1995) (awarding Chicago rates in South Dakota, reproductive rights case, in light of plaintiff's attorneys' experience and specialization in a complex area of law, despite believing that local attorneys were available and sufficiently competent to handle the case).

nonetheless seek a dramatic further reduction of 444 hours—a number Defendants apparently derived not by reasoned analysis, but in an effort to hold Plaintiffs to the number of hours they "estimate" that *their* counsel spent on the case. ECF No. 172 at 10-11. There is no support for such a nonsensical approach.

As an initial matter, Defendants' intransigence contributed significantly to the size of Plaintiffs' lodestar. Defendants repeatedly sought to delay the Court's consideration of the merits of this case, filing multiple motions to stay or defer. They defended against Plaintiffs' claims vigorously through trial. And after the Court ruled against Defendants on the merits, they sought to delay implementation of a remedy, an effort roundly rejected by both this Court and the United States Supreme Court. There are ramifications to the City's decision to "mount[] a Stalingrad defense of" its unlawful districting plan. *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 298 (1st Cir. 2001). Driving up Plaintiffs' fees is one obvious consequence. The suggestion that Plaintiffs' fee award should be reduced as a result of Defendants' tactics is, to put it mildly, inappropriate.

a. The Time Defendants Spent Losing the Case Does Not Establish That Plaintiffs Spent an Excessive Amount of Time Winning It

Plaintiffs address Defendants' specific arguments about the "excessiveness" of Plaintiffs' hours below. At the outset, however, Defendants' specific arguments just dress up their basic contention—unsupported by any case law—that the Court must take a *defendant's* billed hours as the appropriate lodestar for a *plaintiff's* fees. Defendants estimate that they spent 1920.9 hours through judgment whereas Plaintiffs spent 2,365 hours (444 more than Defendants), ECF No. 172 at 10-11, and then argue that the Court

should reduce Plaintiffs' fee request by 444 hours to "remedy the billing disparity" between Plaintiffs' documented hours and Defendants' represented hours. *Id.* at 16.

The argument fails at almost every level. First, and perhaps most glaringly, Defendants submit no documentation regarding the hours their counsel billed. Indeed, the Attorney General's Office does not even maintain such records. *See* ECF No. 172-2 ¶ 4. Mr. Peters instead "estimates" that he spent "approximately 125-140 hours" on this matter from October 24, 2013, when it was filed, to February 5, 2016. *Id.* ¶ 5. This suggests Mr. Peters spent scant time on this case (between 4.6 and 5.2 hours a month). Even assuming the accuracy of his post hoc recollection (a doubtful proposition, which is precisely why contemporaneous time records are required to support fee applications), Mr. Peters provides no estimate regarding the time *other attorneys* in his office spent on the matter, including Katherine Murphy. *See, e.g.*, ECF No. 79 (Notice of Appearance). Defendants' effort to hold Plaintiffs to their unsupported, back-of-the-envelope estimates necessarily fails. Defendants, moreover, utterly fail to defend, much less support, the implicit suggestion that would hold those *opposing* a fee petition to a different evidentiary standard than those *supporting* a fee application (where contemporaneous billing records are most assuredly required as a matter of undisputed law).

Moreover, Defendants' reliance on their own hours is fundamentally misguided. The question is the reasonableness of the time *Plaintiffs'* counsel spent. That Defendants' counsel spent less time losing the case is irrelevant if Plaintiffs' "compensated work was necessary and performed in an expeditious manner." *Harkless v. Sweeny Indep. Sch.*

Dist., 608 F.2d 594, 598 (5th Cir. 1979). Defendants' "flawed premise" is that their "counsel's practices [serve] as a benchmark for evaluating the conduct of plaintiff's attorneys." *Chabner v. Utd. Omaha Life Ins. Co.*, 1999 WL 33227443, at *3 (N.D. Cal. Oct. 12, 1999). It is no surprise that Plaintiffs' lodestar is higher the "crucial differences between prosecuting and defending a case," including the burden of proof. *Id.* For example, pre-litigation Plaintiffs needed to research their claim and prepare a factually-detailed Complaint. In response, Defendants simply filed an Answer denying Plaintiffs' claims. In short, it is unsurprising when plaintiffs' counsel's work "required substantially more time than did the unsuccessful opposition." *Harkless*, 608 F.2d at 598; *CBS Broad., Inc. v. Browning*, 2007 WL 2850527, at *8 (S.D. Fla. Sept. 21, 2007) ("[T]he amount of time and effort that [defense] counsel spent . . . is generally irrelevant to determining the reasonable amount of time which Plaintiffs' counsel spent" as "[u]sually a plaintiff, who has to carry the burden of proof, spends a great deal more time on litigation").[4]

Of course, another crucial difference is the parties' widely-divergent success. Respectfully, given that Defendants "lost this case" their "approach does not recommend a model for conducting litigation[.]" *Chabner*, 1999 WL 33227443, at *3.

b. Defendants' Other Arguments Fail

Even if Defendants' efforts to limit Plaintiffs' recoverable hours based on their own billing are not rejected at the outset, they are meritless.

[4] *See also Dease v. City of Anaheim*, 838 F. Supp. 1381, 1383 (C.D. Cal. 1993) (time spent by defendant's counsel was "irrelevant" to the plaintiff's fee request); *LaBarge Pipe & Steel Co. v. First Bank*, 2011 WL 3841605, at *4 (M.D. La. Aug. 29, 2011) (same); *cf. Zhang v. GC Servs., LP*, 537 F. Supp. 2d 805, 809 (E.D. Va. 2008) (refusing discovery into opposing party's billing records because they were irrelevant to the plaintiff's fee request).

First, Defendants' vague complaints about the number of timekeepers Plaintiffs used fail to withstand scrutiny. Setting aside the work by document review attorneys who performed a discrete project after the case was first filed (and at significantly reduced rates), Plaintiffs' counsel seek recovery of fees for a total of 12 lawyers. *See* ECF No. 165-5 at 8. *Defendants used at least 12 lawyers too*. *See* ECF Nos. 79; 172-1 ¶ 4; 172-2.[5]

As this Court has recognized, "[t]here is nothing inherently unreasonable about a client having multiple attorneys." *Stuart v. Walker-McGill*, 2016 WL 320154, at *7 (M.D.N.C. Jan. 25, 2016) (citations omitted). "While there were a number of attorneys working on this case over time, the various attorneys divided up responsibilities for the work required during the various phases of the case in a reasonable way." *Id.* For example, of the six Perkins Coie timekeepers who billed more than 50 hours, Mr. Devaney served as the supervising partner and Mr. Christensen provided briefing support during the early part of the case, Mr. Hamilton served as lead trial counsel, Mr. Wenzinger provided pretrial and trial support to Mr. Hamilton, and Mr. Stafford and Ms. Khanna took the lead in drafting most briefing. The fact that Plaintiffs used multiple attorneys with different primary roles provides no reason to reduce their fees. *Id.* at *7.[6]

[5] Defendants also argue that Plaintiffs' decision *not* to seek recovery for 22 timekeepers' time shows that the time as to which they *do* seek recovery is excessive. That logic is, with all due respect, at best opaque. Further, Defendants' supposition that Plaintiffs used 40 lawyers on this case is wrong. Of the 22 timekeepers for whom Plaintiffs do *not* seek fees, only seven are lawyers. *See* Second Stafford Decl. ¶ 2. The remainder are paralegals and other support staff. *Id.* As to the lawyers, Plaintiffs chose to write off—rather than seek recovery for—time spent by attorneys who provided discrete support over the three-year life of this case, such as assisting with research for a single motion. *Id.*

[6] *See also Gay Officers*, 247 F.3d at 297 ("Given the complexity of modern litigation, the deployment of multiple attorneys is sometimes an eminently reasonable tactic."); *Johnson v. Univ. Coll. of Univ. of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) ("The retaining of multiple attorneys in a significant, lengthy . . . case . . . is understandable and not a ground for reducing the hours claimed. The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work.").

Second, Defendants' claim that Plaintiffs' counsel spent excessive or duplicative time is unconvincing. As this Court has recognized, "[l]awyers who take the time necessary to develop an adequate factual record and provide quality briefs to the court should not be penalized when it comes time to award attorneys' fees." *Stuart*, 2016 WL 320154 at *9.[7] Defendants object mostly to conference calls about case strategy and joint contributions to important briefing. *See* ECF No. 172 at 9. But complex cases require the participation of several attorneys (and Plaintiffs already wrote off the time of some attorneys who joined these calls and reviewed key briefs). *See Stuart*, 2016 WL 320154, at *8 ("Time spent coordinating, editing, and conferring was reasonable").[8] It is notable that Defendants do not represent that the (at least) 12 attorneys who worked on their behalf worked in isolation, never joining conference calls or co-authoring briefs. No team of lawyers working on a major piece of litigation can be effective without significant coordination and without securing the contributions of various team members.[9]

[7] *See also Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[T]he court should defer to the winning lawyer's professional judgment as to how much time he was required to spend . . . ; after all, he won, and might not have, had he been more of a slacker."); *BCS Servs., Inc. v. BG Investments, Inc.*, 728 F.3d 633, 642 (7th Cir. 2013) (courts should award "fees reasonably incurred ex ante even if excessive-seeming ex post").

[8] *See also 34 Hudson v. Pittsylvania Cty.*, 2013 WL 4520023, at *7 (W.D. Va. Aug. 26, 2013) ("Relying on co-counsel to review and edit pleadings is the type of division of responsibility that reflects each counsel's distinct contribution to the case, and is not impermissible 'duplication' that must be avoided"), *aff'd*, 774 F.3d 231 (4th Cir. 2014). *Moreno*, 534 F.3d at 1112 ("[S]ome degree of duplication [is] an inherent part of the process," and "[t]here is no reason why the lawyer should perform this necessary work for free."); *Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1125 (C.D. Cal. 2012) (refusing to reduce hours because counsel "kept each other informed about the case and double-checked each other's work; indeed, many motions this Court denies would have benefitted from a second read and more strategizing"); *Chabner v. United of Omaha Life Ins. Co.*, 1999 WL 33227443, at *4 (N.D. Cal. Oct. 12, 1999) ("Common sense dictates that . . . a number of people might contribute to one end product.").

[9] Plaintiffs have not "admitted their lawyers billed too much." ECF No. 172-1 at 8. Plaintiffs explained that "all billing attorneys efficiently discharged their duties in litigating this case, notwithstanding its complexity." ECF No. 166 at 7. Plaintiffs would have been fully justified in seeking recovery for all fees charged, but exercised billing judgment prior to filing this motion. That is par for the course. Defendants *also* eliminated "time entries that were arguably redundant or not essential to the litigation." ECF No. 172-1 ¶ 4. Plaintiffs' good faith efforts to present the Court with a targeted and limited fee petition scarcely provides a reason to discount Plaintiffs' requested lodestar.

Third, Defendants ask the Court to deny (or reduce) Plaintiffs' fees related to Plaintiffs' request that the Court review the remedial plan adopted by the General Assembly before it went into effect. The basis of Defendants' request is unclear. Plaintiffs brought a single claim before the Court on which they prevailed. The remedy they sought was injunction of further elections under the enacted plan and adoption of a plan that did not use race as the predominant factor (or which was narrowly tailored to serve a compelling government interest). The Court enjoined use of the enacted plan and a new plan was adopted at the Court's direction. There was no claim presented in this case as to which Plaintiffs were "unsuccessful," and Plaintiffs' work to obtain judicial review of the remedy adopted by the General Assembly is closely and inextricably connected with their victory on the merits. *See Hensley*, 461 U.S. at 438. To be sure, Plaintiffs have serious concerns regarding the specific "remedy" adopted by the General Assembly. So does the Court. *See* ECF No. 171 at 6 ("The Court is very troubled by" the auspices of the new plan). The Court may have ultimately concluded that Plaintiffs' objections to the new plan were best raised in another forum, but it was reasonable for Plaintiffs to ask the Court to evaluate the new plan before it was used in an election.[10]

B. Defendants' Objections to Plaintiffs' Requests for Litigation Expenses Fail

Defendants also argue that the Court should reduce Plaintiffs' requested litigation expenses by 50%. ECF No. 172 at 13. The number appears pulled out of a hat, as it is untethered to any actual objections lodged. Defendants offer no specific objection to six

[10] Indeed, even the single case Defendants cite, the district court *awarded* fees related to ancillary, unsuccessful post-trial motion practice. *E.E.O.C. v. Freeman*, 126 F. Supp. 3d 560, 580 (D. Md. 2015).

of the ten categories of requested expenses, which constitute well more than 50% of the total requested expenses. In any event, Defendants' specific objections lack merit.

First, Defendants take issue with the purported "vagueness" of entries in Category E (Document Collection, Production, and Processing). The first three entries state clearly that they relate to costs paid to a vendor to convert documents from their "native" format to "TIFF" images, *see* ECF No. 165-2 at 3, which was necessary to facilitate the review of legislative and other materials relevant to Plaintiffs' claims to be reviewed to support Plaintiffs' motion for preliminary injunction and subsequent arguments on the merits. *See* Second Stafford Decl. ¶¶ 3-6. The last three entries reflect payments to a vendor that prepared for Plaintiffs copies of the parties' trial exhibits. *See id.* ¶ 7 & Ex. A. As the Court knows, the parties identified thousands of pages of exhibits. These expenses were reasonably incurred by Plaintiffs and would not be absorbed by Plaintiffs' counsel. *Id.*

Second, Defendants object to the "Administrative Expenses" category. As Plaintiffs have explained, this category of expenses consists *solely* of expenses incurred directly by Poyner Spruill and of the type Mr. Speas described. ECF No. 165-4 ¶ 7. There is no duplication between such expenses and Category E, which reflect amounts charged by third party vendors. Second Stafford Decl. ¶ 8. Nor is there duplication between Categories A and F. The photocopying and printing expenses set out in Category A were

either (a) incurred by Perkins Coie (rows 1-14, 17) or (b) reflect large printing jobs that Poyner Spruill outsourced to a third party vendor (rows 15-16, 18-22). *Id.*[11]

Third, Defendants argue that electronic database hosting costs are not recoverable. In support of that claim, Defendants rely solely on a Southern District of Illinois case interpreting the *cost* statute (28 U.S.C. § 1920). But Plaintiffs are *not* limited to recovery of "costs," but rather to *all* "reasonable litigation expenses," 52 U.S.C. § 10310(e), which in this case—given the voluminous record—include electronic data hosting expenses.[12]

C. Plaintiffs' Counsel Are Entitled to Their "Fees on Fees"

Defendants do not contest that Plaintiffs' counsel are entitled to recover their "fees on fees." Plaintiffs have incurred an additional $76,919 in fees since they prepared their initial fee petition, as detailed in the Second Stafford Declaration at paragraphs 10-11. Second Stafford Decl. ¶ 10.

III. CONCLUSION

Plaintiffs prevailed in this complex and vigorously-defended action and obtained excellent results. This Court should grant Plaintiffs fees in the amount of $1,104,307.80, as requested in their original motion, additional fees in the amount of $76,919 that Plaintiffs incurred since preparing their initial fee petition, and reasonable litigation expenses in the amount of $149,527.94. *Hensley*, 461 U.S. at 435.

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[11] Plaintiffs have identified one duplicative entry (an $1,113.43 invoice from a third-party vendor that was inadvertently listed twice, on rows 20 and 75 of Appendix B). Plaintiffs exclude this sum from their request.

[12] *See, e.g.*, ECF No. 166 at 18 (citing *D.G. ex rel. Strickland v. Yarbrough*, 2013 WL 1343151, at *8-9 (N.D. Okla. Mar. 31, 2013)); *see also U.S. ex rel. Becker v. Tools & Metals, Inc.*, 2013 WL 1293818, at *12 (N.D. Tex. Mar. 31, 2013) (awarding electronic database hosting expenses in action where "reasonable expenses" were recoverable); *Hernandez v. Merrill Lynch & Co.*, 2013 WL 1209563, at *10 (S.D.N.Y. Mar. 21, 2013) (awarding "document hosting and retrieval" expenses to class counsel as part of recovery for "reasonable out-of-pocket expenses").

Respectfully submitted, this the 11th day of July, 2016.

PERKINS COIE LLP

/s/ John M. Devaney
John M. Devaney
D.C. Bar No. 375465
JDevaney@perkinscoie.com
/s/ Marc E. Elias
Marc E. Elias
D.C. Bar No. 442007
MElias@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

/s/ Kevin J. Hamilton
Kevin J. Hamilton
Washington Bar No. 15648
KHamilton@perkinscoie.com
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8741
Facsimile: (206) 359-9741

Attorneys for Plaintiffs

POYNER SPRUILL LLP

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
John W. O'Hale
N.C. State Bar No. 35895
johale@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

Local Rule 83.1
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016 I filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Alexander McC. Peters
Senior Deputy Attorney General
apeters@ncdoj.gov
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919)716-6900
Facsimile: (919)716-6763

Counsel for Defendants

Thomas A. Farr
Phillip J. Strach
Michael D. McKnight
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
michael.mcknight@ogletreedeakins.com
OGLETREE, DEAKINS, NASH, SMOAK & STEWART. P.C.
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919)787-9700
Facsimile: (919)783-9412

Co-counsel for Defendants North Carolina State Board of Elections and Joshua Howard, in his capacity as Chairman of the North Carolina State Board of Elections

/s/ Edwin M. Speas, Jr.