

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
WAYNE T. DONER, ET AL.,

Relators,

v.

JAMES ZEHRINGER, DIRECTOR
OHIO DEPARTMENT OF
NATURAL RESOURCES, ET AL.,

Respondents.

Case No.: 2009-1292

MOTION OF RELATORS FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

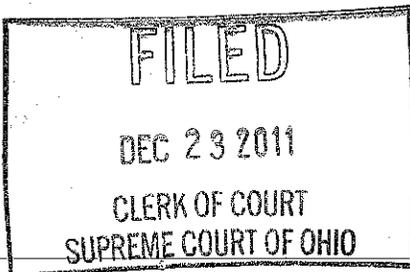
Bruce L. Ingram (0018008)
(Counsel of Record)
Joseph R. Miller (0068463)
Thomas H. Fusonie (0074201)
Martha C. Brewer (0083788)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel.: (614) 464-6480
Fax: (614) 719-4775
blingram@vorys.com
jrmiller@vorys.com
thfusonie@vorys.com
mcbrewer@vorys.com

Attorneys for Relators

William J. Cole (0067778)
(Counsel of Record)
Mindy Worly (0037395)
Jennifer S.M. Croskey (0072379)
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Tel: (614) 466-2980
Fax: (866) 354-4086
william.cole@ohioattorneygeneral.gov
mindy.worly@ohioattorneygeneral.gov
jennifer.croskey@ohioattorneygeneral.gov

Dale T. Vitale (0021754)
Daniel J. Martin (0065249)
Tara L. Paciorek (0082871)
Assistant Attorneys General
Environmental Enforcement Section
2045 Morse Road # D-2
Columbus, Ohio 43229
Tel.: (614) 265-6870; Fax: (614) 268-8871
dale.vitale@ohioattorneygeneral.gov
daniel.martin@ohioattorneygeneral.gov
tara.paciorek@ohioattorneygeneral.gov

Attorneys for Respondents



MEMORANDUM IN SUPPORT

Introduction

Pursuant to S. Ct. Prac. R. 14.4, Relators, by and through their counsel, respectfully move this Court for an award of attorneys' fees and costs under 42 U.S.C. 1988(b).

As this Court found, "uncontroverted firsthand testimonial and documentary evidence" established that Respondents cause Relators' properties to flood "more frequently, over a larger area, for longer duration, and with greater damage." 2011-Ohio-6117, ¶ 69. As a result, this Court vindicated Relators' constitutional right to just compensation and ordered Respondents to pay for taking a flood easement across Relators' land.

Relators filed this suit seeking to uphold their constitutional rights under Ohio and United States Constitution and specifically requested an award of attorneys' fees under 42 U.S.C. §§ 1983 and 1988(b). They were forced to do so because Respondents refused to accept their constitutional and statutory duty to initiate appropriation actions to compensate Relators for taking a flood easement across their land. R.C. 163.59(J) mandates "No head of an acquiring agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of the owner's real property." Respondents defied this law over and over again both before Relators filed their lawsuit and after.

Respondents vigorously opposed this lawsuit at every turn. They did so even after they caused Relators' land to flood in 2010. They did so even after they caused Relators' land to flood again in 2011 – claiming as to Relators' evidence of that massive flooding, "there is **nothing extraordinary** about Relators' latest proposed submissions. **They are merely evidence that, when there is a heavy rain in Mercer County, some of it falls on their properties.**" (Opp'n of 3/21/11 at 3) (emphasis added). Respondents' statements are appalling in light of

both Respondents' clear legal duty to Relators and Relators' uncontroverted evidence of widespread flooding caused by Respondents.

Respondents' bad faith opposition forced Relators to submit 98 affidavits (many with visual evidence) about Respondents' flooding. Relators likewise had to submit to 70 depositions demanded by Respondents and intrusive discovery into Relators' finances (and even at times, their marital history), in addition to the extensive motion practice, merit briefing and oral argument before this Court. All told, Relators' attorneys and their paralegal and litigation support staff spent 3,197.85 hours of legal time on behalf of Relators to vindicate their constitutional rights and over \$174,000 in litigation expenses – all of which could have been avoided had Respondents previously honored their clear legal duty to Relators. Affidavit of Bruce L. Ingram (“Ingram Aff.”), ¶¶ 2, 7.¹

As prevailing parties under 42 U.S.C. § 1988(b), Relators are presumptively entitled to an award of attorneys' fees and costs. Further, in recognition of the importance of upholding and protecting constitutional rights, 42 U.S.C. § 1988(b) compels awarding attorneys' fees to the fullest extent. Relators deserve such an award. Moreover, they deserve that award be enhanced by a lodestar multiplier. The logistical complexity of this mass inverse condemnation action, the risk to the Relators in challenging a state entity, the extensive discovery taken in the action by Respondents, and the complex issues related to expert testimony all warrant enhancing the award by a lodestar multiplier.

Further, Respondents' bad faith shirking of their clear legal duty also compels both awarding Relators attorneys' fees to the fullest extent and enhancing that award by a lodestar multiplier. Respondents' conduct exemplifies why attorneys' fees are awarded to prevailing

¹ The Affidavit of Bruce L. Ingram has been included in a contemporaneously filed Appendix at Appx. A.

parties under 42 U.S.C. § 1988(b). No citizen of the United States should have to fight a governmental entity for years simply because that entity openly shirks its clear legal duty and refuses to honor a citizen's constitutional rights. When those unfortunate circumstances happen, 42 U.S.C. § 1988(b) compels awarding attorneys' fees to the fullest extent, including an enhancement by a lodestar multiplier. Victims of such governmental abuse should not have to expend over 3,000 hours in legal time and over \$174,000 in legal expenses to vindicate constitutional rights that Respondents were and are charged with protecting in the first place.

Finally, for the same reasons they are entitled to an award of fees under 42 U.S.C. §1988(b), Relators are entitled to an award of their expenses and costs under 42 U.S.C. §§1988(b) and (c).

Procedural Background

To protect their constitutional rights under both the Ohio and United States Constitutions, more than 80 landowners filed this action on July 17, 2009, seeking a writ of mandamus to compel Respondents to initiate appropriation actions. They also requested an award of attorneys' fees under 42 U.S.C. §§ 1983 and 1988(b). Rels. Compl., ¶ 159. Respondents filed a 14-page motion to dismiss. Relators opposed that motion. In response, this Court granted Relators an alternative writ and set a schedule for briefing and presentation of evidence. To prepare for the typical expedited mandamus action schedule, Relators' counsel and Relators prepared and obtained 98 Affidavits from Relators and other fact witnesses.

After additional motion practice by Respondents, the Court appointed a master commissioner to receive evidence and make evidentiary rulings. After the master commissioner set a discovery schedule, extensive discovery and discovery motion practice occurred, including the following:

- 74 depositions of fact witnesses, which included Respondents asking intrusive questions into Relators' finances (e.g., Joint Exhibits Vol. 8, Dep. of Mark Siefring, at pgs. 118-134 & Exs. F-L) and marital history (e.g., Joint Exhibits Vol. 8, Dep of Mark Siefring, at pgs. 14, 17-18);
- 6 depositions of experts;
- discovery requests, including Respondents serving requests that required each Relator to gather documents and provide written responses;
- production of over 2,500 pages of documents by Relators in response to discovery requests;
- production of over 13,000 pages of documents by Respondents in response to discovery requests;
- preparation of additional affidavits of Relators and fact witnesses based on March, 2010 flooding; and
- a motion by Relators to extend case management deadlines related to additional flooding and to address delays by Respondents in delivering expert witness testimony in a readily readable format.

The master commissioner ultimately set June 1, 2010 as the deadline for the presentation of evidence. Relators submitted 11 volumes. Relators and Respondents submitted an additional 18 volumes of joint evidence. Respondents filed an additional volume of evidence. The parties then each filed a motion to exclude certain evidence to which the opposing side responded. The master commissioner made certain evidentiary rulings, including denying Respondents' multiple attempts to exclude evidence of the flooding they caused in 2010.

In the fall of 2010, the parties submitted their merit briefs. Respondents challenged some of Relators' appendices to their merit briefing, which led to more briefing. This Court denied Respondents' challenge.

In February and March of 2011, Relators suffered additional massive flooding of their properties. Relators gathered considerable visual evidence of the flooding. They sought leave to supplement their presentation of evidence with this new evidence. Respondents opposed

claiming that as to Relators' evidence of massive flooding: "[t]here is nothing extraordinary about Relators' latest proposed submissions. They are merely evidence that, when there is a heavy rain in Mercer County, some of it falls on their properties." (Opp'n of 3/21/11 at 3) (emphasis added). On July 6, 2011, this Court granted Relators leave to submit the new evidence. That same day, the Court set the case for oral argument on September 20, 2011. This leave resulted in Respondents filing yet another motion, this time to delay the oral argument so they could conduct additional discovery. Relators were forced to oppose this motion. On August 24, 2011, the Court denied Respondents' motion.

On September 20, 2011, the Court held the oral argument. On December 1, 2011, this Court granted Relators' writ by a 7-0 decision. The Court found that Respondents were "liable for the damage to downstream landowners caused by the intermittent, but inevitably recurring, flooding that resulted from the new western spillway." 2011-Ohio-6117, ¶ 85.

Argument

I. Relators Are Entitled To An Award Of Fees Under 42 U.S.C. § 1988(b).

A. Relators' Petition Asserted Claims Under 42 U.S.C. § 1983.

42 U.S.C. §1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

A litigant can bring an action under 42 U.S.C. § 1983 in state court. *Howlett v. Rose*, 496 U.S. 356, 358 (1990) ("State courts as well as federal courts have jurisdiction over § 1983 cases."); *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980) (holding that Section 1983 case can be

brought in state court and fees under 42 U.S.C. § 1988 can be awarded to the prevailing plaintiff in such state court actions); *Schwarz v. Bd. of Trs.*, 31 Ohio St. 3d 267, 273 (1987) (holding that Ohio state trial courts have jurisdiction over Section 1983 claims); *Thomas v. City of Cleveland* (2008), 176 Ohio App.3d 401, 892 N.E. 2d 454, ¶¶ 20, 22; *see also Cleary v. City of Cincinnati* (2007), Hamilton App. No. C-060410, 2007-Ohio-2797, at ¶ 19, appeal not accepted for review, 115 Ohio St.3d 1473 (2007) (“The availability of attorney fees is an ‘integral’ part of the Section 1983 remedy, and fees may be awarded in state-court litigation based upon Section 1983 claims.”); *Gibney v. Toledo Bd. of Educ.* (1991), 73 Ohio App.3d 99, 596 N.E.2d 591 (upholding trial court’s award of attorney’s fees in 42 U.S.C. Section 1983 case brought in state court).

With their Complaint, Relators sought to protect their civil rights, specifically those rights secured by the Fifth and Fourteenth Amendments to the United States Constitution. Rels. Compl., ¶ 1. Protecting the constitutional right to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution falls within “any rights, privileges, or immunities secured by the Constitution....”

In *San Remo Hotel, L.P. v. City and County of San Francisco, Ca.*, 545 U.S. 323, 342-46 (2005), the United States Supreme Court specifically held that a property owner can bring a claim in state court that the denial of just compensation for a taking would violate the Fifth and Fourteenth Amendment of the United States Constitution. 42 U.S.C. § 1983 is the method by which such a claim can be asserted against state actors acting under the color of state law. *Baker v. McCollan* (1979), 443 U.S. 137, 145 (holding that 42 U.S.C. § 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes”). Further, the property owner’s federal claim of denial of just compensation can be heard by state court

“simultaneously” with a request for “compensation under state law”; otherwise, property owners would have to “resort to piecemeal litigation or otherwise unfair procedures.” *San Remo, supra*.

Here, Relators specifically invoked 42 U.S.C. §1983. Rels. Compl., ¶ 159. They also specifically invoked 42 U.S.C. § 1988(b) in their Complaint, asking that they be awarded attorneys’ fees. *Id.* Relators’ assertions in their Complaint satisfy the pleading standard for asserting a claim under 42 U.S.C. § 1983 and for fees under 42 U.S.C. § 1988(b). Indeed, courts have held that a plaintiff does not even need to plead or argue reliance on 42 U.S.C. §1983 to obtain fees under 42 U.S.C. § 1988(b). “The mere failure to plead or argue reliance on 42 U.S.C. § 1983 is not fatal to a claim of attorney’s fees if the pleadings and evidence do present a substantial Fourteenth Amendment claim for which 42 U.S.C. § 1983 provides a remedy, and this claim is related to the plaintiffs’ ultimate success.” *Thomas*, 176 Ohio App.3d 401, 892 N.E.2d 454, at ¶ 20 (quoting *Berger v. City of Mayfield Heights*, 265 F.3d 399, 404 (6th Cir. 2001)). “The plaintiff does not even have to reference 42 U.S.C. 1983 in an argument before the court.” *Id.* (citing *Goss v. City of Little Rock, Ark.* (8th Cir. 1998), 151 F.3d 861, 864-67).

Relators anticipate that Respondents may argue that under *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985), Relators’ relief under 42 U.S.C. §§ 1983 and 1988(b) is not ripe and therefore they cannot be awarded fees under 42 U.S.C. § 1988(b). Respondents misinterpret the law. *Williamson* only held that a landowner must first exhaust state court proceedings to establish a taking before pursuing a federal takings claim **in federal court**. As *San Remo* confirmed, *Williamson* does not preclude landowners from bringing a federal takings claim in state court. 545 U.S. at 342. Likewise, given the holding in *San Remo* that a state court can hear both a claim for compensation under state law and a claim of denial of compensation under the Fifth and Fourteenth Amendments, the United States

Supreme Court has necessarily ruled that a property owner can bring the denial of compensation claim pursuant to 42 U.S.C. § 1983 - the vehicle for bringing federal constitutional claims against state actors acting under the color of state law.

Further, even if somehow *Williamson* applies, Relators are still entitled to award of fees under 42 U.S.C. § 1988(b). *Williamson's* ripeness requirement is akin to the mandatory exhaustion of administrative remedies requirement under Title VII of the Civil Rights Act of 1964. Attorney's fees incurred in mandatory state administrative proceedings to satisfy Title VII's exhaustion requirement are recoverable. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980); *Webb v. Bd. of Educ. of Dyer County*, 471 U.S. 234, 240-41 (1985); cf. *Eggers v. Bullitt Cnty. Sch. Dist.*, 854 F.2d 892, 895 (6th Cir. 1988). Equally, attorney's fees incurred in mandatory state court proceedings to satisfy *Williamson's* standard for having a takings claim ripe for federal court review should be recoverable under 42 U.S.C. § 1988(b).

B. Relators Are A Prevailing Party Under 42 U.S.C. §§ 1983 And 1988(b).

42 U.S.C. § 1988(b) provides that a "prevailing party" under 42 U.S.C. § 1983 may recover reasonable attorneys' fees. Although the statute provides a plaintiff "may" recover reasonable attorneys' fees, the United States Supreme Court has read it as mandatory when the plaintiff prevails and the losing party cannot prove special circumstances. *Déjà vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson Cty., Tenn.*, 421 F.3d 417, 420 (6th Cir. 2005) (citing *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989)); *Northeast Ohio Coalition for the Homeless v. Brunner*, 652 F.Supp.2d 871, 881-82 (S.D. Ohio 2009) ("Unless 'special circumstances' exist, a district court *must* award attorney's fees to a prevailing party.").

A plaintiff is a "prevailing party" under § 1988 if it has obtained "an enforceable judgment on the merits that 'materially alters the legal relationship between the parties by

modifying the defendant's behavior in a way that directly benefits the plaintiffs.'" *Déjà vu of Nashville, Inc.*, 421 F.3d at 420 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)); *Northeast Ohio Coalition for the Homeless*, 652 F.Supp.2d at 881. Even where a party prevails on a claim resolved "exclusively under state law", the party "may still be awarded attorney fees if the state claim was joined in an action with a claim based on a federal right created under Section 1983, the state claim arose out of a common nucleus of operative fact with the federal claim, and the federal claim, although unaddressed, was otherwise substantial." *Cleary*, 2007-Ohio-2797, ¶ 19; *see also Maher v. Gagne*, 448 U.S. 122, 132-33 n.15 (1980) ("The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the [other] claim on which the plaintiff prevailed is one for which fees cannot be awarded....If the claim for which fees may be awarded meets the 'substantiality test...attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'"); *Fenton v. Query*, 78 Ohio App.3d 731, 738 (1st Dist. 1992); *Doe v. Cuddy*, 21 Ohio App.3d 270, 273 (1st Dist. 1985); *Knutty v. Wallace*, 100 Ohio App.3d 555, 559-560 (10th Dist. 1995). For a claim to be "held plainly insubstantial under the test" it must be "obviously without merit" or "its unsoundness so clearly results from previous judicial decisions that it must be said that the subject is foreclosed and that there is no room for the inference that the question sought to be raised can be a matter of legitimate controversy." *Doe, supra*.

Here, the Relators have been granted a writ of mandamus to compel Respondents to commence appropriation proceedings to determine just compensation for the taking of Relators' property. This Court's reliance on both Ohio and federal law in its opinion confirms protection

of Relators' constitutional rights under both the Ohio and U.S. Constitution. Further, Relators have materially altered the legal relationship between the parties by obtaining a writ modifying the Respondents' behavior in a way that benefits the Relators. Respondents refused to initiate appropriation actions to compensate Relators for the taking of their property. Respondents now must do so. Thus, there can be no reasonable dispute that Relators are "prevailing parties" under Section 1983.

In addition, whether the Relators prevailed per se on their Section 1983 claim or exclusively under state law is immaterial for two reasons. First, both their state and federal claims arise from the same common nucleus of operative facts - Respondents' intermittent and inevitably recurring flooding of Relators' land. Second, Relators' federal claim is necessarily substantial as the right to just compensation is within the Bill of Rights and inviolable. For these reasons, Relators are a prevailing party.

C. *Relators Are Entitled To Recover The Fees They Have Incurred In Seeking An Award Of Attorneys' Fees.*

In addition to recovering the fees they incurred in prosecuting their action, Relators are also entitled to recover the fees they have incurred in seeking to recover an award of attorneys' fees under Section 1988. *Lamar Advertising Co. v. Chapter Twp. of Van Buren*, 178 F. App'x 498, 502 (6th Cir. 2006) (holding "[f]ees for fees," including fees incurred in litigating the fee request at the trial court and appellate level, are recoverable under Section 1988); *Weisenberger v. Huecker*, 593 F.2d 49, 54 (6th Cir. 1979) ("implementation of Congressional policy requires the awarding of attorney's fees for time spent pursuing attorney's fees"); *White v. Morris*, 863 F.Supp. 607, 611 (S.D. Ohio 1994) (finding plaintiffs were entitled to recover the attorney's fees they incurred in filing their motion for attorney's fees). Thus, the fees Relators have incurred in

preparing this motion and seeking the recovery of their attorneys' fees should be included in Relators' award.

D. Relators' Attorneys' Fees Are Reasonable.

"The starting point for determining the amount of a reasonable attorney fee is the 'lodestar' amount which is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Northeast Ohio Coalition for the Homeless*, 652 F.Supp.2d 871, 883 (S.D. Ohio 2009) (quoting *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 551 (6th Cir. 2008)) (internal quotation marks omitted). In the present case, the rate of Relators' attorneys and the time spent on this lengthy and complex litigation are reasonable. As a result, Relators are entitled to recover the fees incurred in full.

1. Relators' Attorneys' Rates Are Reasonable.

The rates of Relators' attorneys in this matter are reasonable because they reflect the normal, fair market billing rates of Relators' attorneys and courts have previously held that similar billing rates are reasonable billing rates in Columbus, Ohio.

"To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Id.* at 885 (quoting *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004)) (internal quotation marks omitted). "[T]he actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate." *Morrison v. Davis*, 88 F.Supp.2d 799, 802 (S.D. Ohio 2000) (quoting *Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982)) (internal quotation marks omitted). Applying these principles, the federal courts in Ohio have previously found that billing rates from \$280 to \$395 per hour in civil rights cases are reasonable

and comparable to the rates of other attorneys of similar skill and experience in Columbus, Ohio. *Northeast Ohio Coalition for the Homeless*, 652 F.Supp.2d at 885. *See also Ray v. Franklin Cty. Bd. of Elections*, No. 2:08-cv-1086, 2009 U.S. Dist. LEXIS 49778, at * 11-12 (S.D. Ohio June 2, 2009) (approving \$350 hourly rate for lead counsel in civil rights case).

In this case, the billing rates for Relators' attorneys that have worked on this matter ranged from \$170 to \$ 440 an hour. *Ingram Aff.*, ¶ 3. These billing rates are based on the usual billing rates that Relators' attorneys charge other clients, (*id.*), and reflect the fair market value of the services rendered by each attorney. These rates are reasonable and consistent with the rates charged by other attorneys in this area for similar services. *Id.* These rates are also comparable to what the United States District Court for the Southern District of Ohio found to be reasonable rates for attorneys in Columbus, Ohio in civil rights cases. *See, e.g., Northeast Ohio Coalition for the Homeless*, 652 F.Supp.2d at 885; *Ray*, 2009 U.S. Dist. LEXIS 49778, at * 11-12. Accordingly, the rates charged by Relators' attorneys are reasonable and Relators are entitled to recover the full billing rate for each of their attorneys who have worked on the matter.

2. The Time Relators' Attorneys Expended In Prosecuting Relators' Claims Is Reasonable.

In addition to charging a reasonable rate, the 3,197.85 hours in time Relators' attorneys expended in prosecuting Relators' claims and protecting Relators' interests is reasonable.

The Southern District of Ohio has explained that:

In determining the hours reasonably expended by a prevailing party's counsel, "[t]he question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief requested. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed."

Bank One, N.A. v. Echo Acceptance Corp., 595 F.Supp.2d 798, 801 (S.D. Ohio 2009) (quoting *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1173 (6th Cir. 1990)).

This action involved more than 80 landowners and 90 parcels covering thousands of acres of land. It involved the preparation of or for nearly 200 affidavits and depositions. It involved several expert witnesses on hydrology and hydraulics. The parties submitted dozens of volumes of evidence plus supplemental evidence. Successful prosecution of Relators' claims thus involved extensive fact investigation, document review, and witness interviews; preparation of the petition; research and full briefing on Respondents' motion to dismiss; propounding and responding to requests for production of documents, interrogatories, and requests for admission; research and full briefing on motions to compel discovery, as well as other discovery related motions; preparation for, attendance at, and review of testimony from approximately 80 depositions; extensive analysis of expert documents; briefing several case management motions; the submission of 29 volumes of evidence and then supplemental evidence; research and full briefing of the merit brief and reply merit brief; responding to Respondents' motion for an extension of time to supplement evidence, and preparation for and attendance at oral argument. *Ingram Aff.*, ¶ 2. Thus, successful prosecution of Relators' claims in this action required substantial attorney time and costs. *Id.*

As evident from the foregoing and the procedural history set forth above, Relators have been forced to pursue and protect their constitutional rights for over two years and through contentious litigation. During this time, Respondents have done everything in their power to delay and prevent Relators from prosecuting and vindicating their rights. The time expended by Relators' attorneys therefore was both reasonable and necessary to secure the result that was obtained.

In this case, the 3,197.85 hours in time expended amounts to \$756,584.50 in fees as of December 20, 2011, exclusive of interest. *Id.* at ¶ 4 & Ex. 1. These fees were reasonable and necessary in the prosecution of Relators' interests and claims asserted in this action. *Id.* Moreover, the total amount of fees for the services rendered by Relators' attorneys was and is both reasonable and necessary in order to adequately and properly protect Relators' interest and to achieve Relators' successful prosecution of their claims in this matter. *Id.* at ¶¶ 2-4.² Accordingly, Relators are entitled to the full amount of the fee amount for the time their counsel billed: \$756,584.50.

E. Relators Are Entitled To Recover Interest On The Fees They Have Incurred.

Relators are also entitled to receive interest on its attorneys' fees because they used their attorneys' historical billing rates, rather than the attorneys' current rates, when calculating the lodestar.

When litigation has been protracted and there has been a delay in the recovery of attorneys' fees, a prevailing party is entitled to an appropriate adjustment to its fee award to account for the delay in payment. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). The reasoning behind this rule is that "compensation received several years after the services were rendered ... is not equivalent to the same dollar amount received reasonably promptly as the legal

² Whether Relators ultimately pay all of the amount of fees for the time expended is not relevant to determining the amount of a fee award under 42 U.S.C. § 1988. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (holding a plaintiff is not precluded from an award of attorney fees under § 1988 simply because she contracted with a nonprofit legal services organization and that organization agreed not to charge any fees); *McDaniel v. Princeton Sch. Dist. Bd. of Educ.*, 114 F.Supp.2d 658, 662-63 (S.D. Ohio 2000), *aff'd* by 45 F.App'x 354, 359 (rejecting the argument that the district court erred in awarding attorney fees because plaintiff's attorneys were paid by her labor organization).

services are performed, as would normally be the case with private billings.” *Bank One, N.A.*, 595 F.Supp.2d at 801-02 (citing *Jenkins*, 491 U.S. at 283).

There are two different ways a prevailing party can account for delay in payment. One method is for the prevailing party to use its attorneys’ current rates, as opposed to its historical rates, when calculating the lodestar amount. *Id.* (citing *Jenkins*, 491 U.S. 274 at 282-84). *See also Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 617 (6th Cir. 2007) (awarding 2004 rates for work done in 2001-2003 to compensate the firm for waiting several years for payment); *Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005) (using the current market rate in calculating plaintiff’s attorney fees “because the litigation had been ongoing for nearly six years”). Another method is to use the attorney’s historic rates when calculating the lodestar amount and then add interest to that amount. *Bank One, N.A.*, 595 F.Supp.2d at 802 (citing *Jenkins*, 491 U.S. 274 at 282-84); *Dean v. Veterans Admin.*, Case No. 1:89cv2357, 1995 U.S. Dist. LEXIS 8777, at *6 (N.D. Ohio Mar. 29, 1995) (calculating fees monthly and then applying a post-judgment interest rate of 6.57 percent to the fee award).

Here, Relators calculated the lodestar by using their attorneys’ rates that were in effect at the time the attorneys performed the work. Ingram Aff. ¶ 4 & Ex. 1. Because Relators calculated the lodestar using their attorneys’ historic rates, it is entitled to recover interest at the Ohio statutory interest rate on those fees to account for the delay in payment. Applying the statutory rate on a monthly basis to the amount of the attorneys’ fees for the time Relators’ attorneys have expended, Relators are entitled to recover \$50,979.38 in interest on the attorneys’ fees through December 23, 2011. Ingram Aff. at ¶ 6 & Ex. 2.

F. Relators Are Entitled To An Enhancement Of Its Lodestar.

A party may be entitled to a multiplier to the lodestar calculation in a case of exceptional success. *Barnes*, 401 F.3d at 745; *Bank One, N.A.*, 595 F.Supp.2d at 801. The United States Supreme Court recently recognized that an enhancement to the lodestar may be appropriate in certain cases and identified factors that could warrant an upward adjustment of the lodestar fee amount. *Perdue v. Kenny*, 130 S.Ct. 1662 (2010). Those factors include: (1) the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation; (2) the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; and (3) the attorney's performance involves exceptional delay in the payment of fees. *Id.* at 1674-75.

In addition to the factors identified in *Perdue*, courts in the Sixth Circuit have applied the twelve factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (the "*Johnson* factors") to determine whether a multiplier to the lodestar is appropriate. *Jordan v. City of Cleveland*, 464 F.3d 584, 604 (6th Cir. 2006). The *Johnson* factors are: (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. *Johnson*, 488 F.2d at 717-19. Applying these factors, numerous courts in the Sixth Circuit have upheld grants of a multiplier to the lodestar fee amount. *Barnes*, 401 F.3d at 745-46 (finding that the district court did not err in granting a

multiplier of 1.75 to the total fee award, given the “novelty and difficulty” of the case the “immense skill requisite to conducting this case properly,” the “extraordinary” result achieved, and the fact that the case was “highly controversial ... [as] few lawyers locally or nationally would take such a case”); *Paschal v. Flagstar Bank*, 297 F.3d 431, 436 (6th Cir. 2002) (holding that district court did not abuse its discretion in granting a multiplier of 1.5 to the total fee award because, “(1) the attorneys did an excellent job at trial, (2) this case involved claims of discriminatory treatment in an area (residential mortgage lending) where discriminatory treatment is often difficult to prove, (3) the marshaling of evidence was an arduous and time consuming task, and (4) the hourly rates used to calculate the lodestar are relatively modest”); *James v. Frank*, 772 F.Supp. 984, 1003 (S.D. Ohio 1991) (granting a multiplier of 2 to the total fee award, primarily because it was shown that the plaintiff “would have encountered substantial difficulties in obtaining counsel”).

In the present case, a number of these factors support an enhancement to Relators’ lodestar amount. First, pursuant to *Perdue*, an enhancement is warranted because this litigation required marshaling nearly 100 affidavits and volumes of visual evidence of flooding. Relators’ counsel also had to engage several expert witnesses at considerable expense. As such, Relators’ attorneys have an extraordinary outlay of expenses, and there has been exceptional delay in the payment of fees. This case has been pending for over two years and during that time Relators’ attorneys have expended time equaling approximately \$756,584.50 in fees and incurred \$174,588.54 in litigation expenses. Ingram Aff., ¶¶ 4-5, 9 & Exs. 1 and 3.

Likewise, application of the *Johnson* factors also confirms that an enhancement to Relators’ lodestar fee award is appropriate. First, this litigation has been contentious and Relators’ attorneys have had to fight vigorously on nearly every issue in order to obtain a

successful result. Doing so has resulted in over 3,197.85 hours for Relators' counsel. Moreover, the steps Relators' attorneys have had to take to effectively present Relators' case have been arduous and extremely time consuming. Examples include not only gathering all of the affidavits and visual evidence of flooding, but defending more than 70 depositions in Mercer County, Ohio while working with hydrological experts in Louisiana and Canada. Few law firms have the staffing capabilities to handle the logistical complexities of such evidence gathering and other aspects of a mass inverse condemnation action. As demonstrated by the results, Relators' counsel had the staff to do so. *See Paschal*, 297 F.3d at 436; *James*, 772 F.Supp. at 1003.

Second, Relators' attorneys took on difficult issues of first-impression and obtained a successful result that will have a great impact on the jurisprudence. Indeed, Relators have obtained a decision from this Court on the applicable statute of limitations on physical takings claims that will provide needed guidance on that issue. The fact that Relators' attorneys were able to obtain an extraordinary writ in the face of Respondents' aggressive defense provides further support for an enhancement of Relators' attorney fee award. *See Barnes*, 401 F.3d at 745-46.

Last, Relators are also entitled to an enhancement of their fee award given the controversial nature of this case. Relators have faced stiff opposition from Respondents and endured attacks on their credibility and intelligence by Respondents. As embodied in their March 21, 2011 Opposition, Respondents arrogantly viewed the Relators as lacking the capability to understand or accurately describe the flooding they experienced. Relators' pursuit of their constitutional rights despite such adversity is yet another reason why they should receive an enhancement of their fee award. *See Barnes*, 401 F.3d at 745-46; *Brotherton v. Cleveland*, 141 F.Supp.2d 907, 913 (S.D. Ohio 2001).

II. Relators Are Entitled To Recover The Costs They Have Incurred.

In addition to incurring significant attorneys' fees, Relators and their counsel have also incurred considerable costs as of December 20, 2011 of \$174,588.54 in this matter. Ingram Aff., ¶¶7-8 & Ex. 3. Relators are entitled to recover these costs under 42 U.S.C. § 1988.

Section 1988 authorizes the recovery of “incidental and necessary expenses incurred in furnishing effective and competent representation,” including “those reasonable out-of-pocket expenses incurred by the attorney, which are normally charged to a fee-paying client in the course of providing legal services.” *Sigley v. Kuhn*, No. 98-3977, 2000 U.S. App. LEXIS 1465, at *23-24 (6th Cir. Jan. 31, 2000) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 439 (1983)). Reasonable photocopying, paralegal expenses, and travel and telephone costs are all recoverable pursuant to the statutory authority of § 1988. *Id.*; see also *Northcross v. Board of Educ.*, 611 F.2d 624, 639 (6th Cir. 1979) (“photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of § 1988.”) In addition, expert witness fees are recoverable pursuant to § 1988(c).

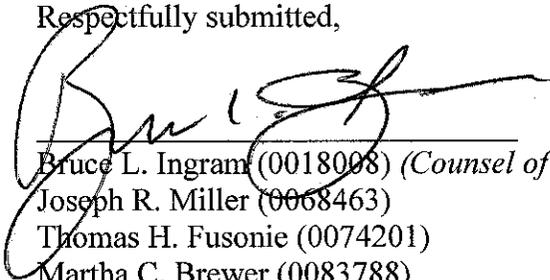
In the present case, Relators' costs consist of photocopying and scanning charges, courier and messenger services, telephone costs, court reporter and deposition expenses, legal research, filing fees, travel expenses, witness expenses, and expert expenses. Ingram Aff., ¶ 7 & Ex. 3. Relators are entitled to recover these costs pursuant to Section 1988.

In addition, Relators are also entitled to recover interest on these costs pursuant to the statutory interest rate. Applying this interest rate, Relators are entitled to recover \$7,937.49 in interest on the costs they have incurred in this matter. *Id.* at ¶ 9 & Ex. 4.

Conclusion

Since the start of this lawsuit, Relators have sought to vindicate their constitutional rights and an award of attorneys' fees and expenses under 42 U.S.C. § 1988. Respondents' stiff opposition at every turn resulted in Relators' counsel expending in 3,197.85 hours of legal time on behalf Relators and \$174,598.97 in expenses. This Court upheld Relators' constitutional right to just compensation and thus Relators are prevailing parties under 42 U.S.C. § 1983. As such, Relators are entitled to (1) an award of attorneys' fees in the amount of \$756,584.50, plus interest in the amount of \$50,979.38, plus an enhancement as the Court deems appropriate and (2) costs in the amount of \$174,588.54, plus interest in the amount of \$7,937.49.

Respectfully submitted,



Bruce L. Ingram (0018008) (*Counsel of Record*)

Joseph R. Miller (0068463)

Thomas H. Fusonie (0074201)

Martha C. Brewer (0083788)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street, P.O. Box 1008

Columbus, Ohio 43216-1008

Tel.: (614) 464-6480

Fax: (614) 719-4775

blingram@vorys.com

jrmiller@vorys.com

thfusonie@vorys.com

mcbrewer@vorys.com

Attorneys for Relators

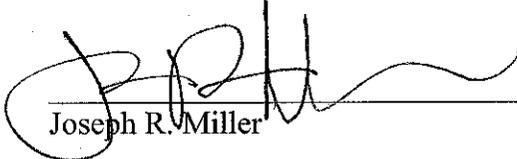
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via U.S. Mail postage prepaid, this 23rd day of December, 2011:

William J. Cole
Mindy Worly
Jennifer S.M. Croskey
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

Dale T. Vitale
Daniel J. Martin
Tara L. Paciorek
Assistant Attorneys General
Environmental Enforcement Section
2045 Morse Road # D-2
Columbus, Ohio 43229

Attorneys for Respondents



Joseph R. Miller