

IN THE SUPREME COURT OF OHIO

STATE ex rel. WAYNE T. DONER, et al.,	:	Case No. 2009-1292
	:	
Relators,	:	Original Action in Mandamus
	:	
v.	:	
	:	
JAMES ZEHRINGER, Director,	:	
Ohio Department of Natural Resources, et al.,	:	
	:	
Respondents.	:	

MEMORANDUM OF RESPONDENTS IN OPPOSITION TO RELATORS' MOTION FOR ATTORNEY FEES AND COSTS

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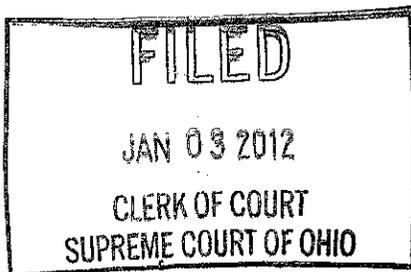
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## I. INTRODUCTION

The sole basis upon which Relators claim attorney fees and costs is their erroneous assertion that they are prevailing parties under 42 U.S.C. 1983 and 1988. Contrary to Relators' claim, well-established federal and state case law holds there is no taking claim under the federal Constitution where the state provides sufficient legal procedures by which to recover just compensation for property taken. Both the federal Sixth Circuit and this Court recognize that Ohio's mandamus/appropriation procedure for compensating owners is sufficient for Section 1983 purposes. Because Relators have not completed the applicable state procedures, they have not "prevailed" on their Section 1983 claim, and thus are not entitled to attorney fees and costs under Section 1988.

Alternatively, even if this Court finds that Relators satisfy Section 1988, they are not entitled to attorney fees and costs because they have failed to meet their burden of proving their claim with the requisite detail and reasonableness. Indeed, Relators do not even include the dates of service in their Motion.

Accordingly, Relators' motion for attorney fees and costs should be denied.

## II. ARGUMENT

- A. Federal and state case law uniformly establishes that Relators pursuing a takings action are not entitled to fees under 42 U.S.C. 1988 where state law provides them with appropriate legal procedures by which to recover just compensation for property taken by the state.**

Relators advance their motion for attorney fees solely under 42 U.S.C. 1988, claiming that they have "prevailed" on their claim under 42 U.S.C. 1983. See Motion of Relators for an Award of Attorneys' Fees and Costs ("Relators' Motion") at 2, 9. It is black-letter law that Relators cannot at this juncture recover fees under that federal statute. Federal and state authority uniformly establishes that there is no federal

constitutional takings-clause violation where the state-law process initiated by mandamus and resulting in appropriation/compensation proceedings affords Relators “just compensation” for property taken by action of the state. Absent any federal “just compensation” violation, there is no Section 1983 cause on which Relators can prevail, and without prevailing under Section 1983, Relators cannot claim fees under Section 1988. Indeed, Relators have pointed to no case – from any jurisdiction – in which any court at any level has awarded fees under Section 1988 where the property owner had available to him appropriate state law procedures entitling him to just compensation. (The federal Title VII cases they cite, for example, simply have nothing to do with this issue because they do not relate to whether the state will provide “just compensation” for a taking of property; they are totally inapposite.) Because Relators’ Motion is predicated entirely on Section 1988, and because that statute cannot be triggered unless the State denies proper payment after the completion of compensation proceedings, Relators’ Motion should be denied in its entirety.

- 1. As Ohio and federal courts uniformly have made clear, “no [federal Fifth and Fourteenth Amendment] violation occurs until just compensation has been denied” upon the exhaustion of appropriate state legal proceedings.**

The Fifth Amendment to the United States Constitution specifies that private property shall not be taken for public use “without just compensation.” Under the clear terms of the Constitution, that federal prohibition “does not proscribe the taking of property; it proscribes taking without just compensation.” *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Thus, it has been and remains binding and established law that “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just

Compensation Clause *until it has used the procedure and been denied just compensation.*” *Id.* at 195 (emphasis added); *see also, State ex rel. Hensley v. Columbus*, 10th Dist. No. 10AP-840, 2011-Ohio-3311, ¶ 27, appeal not allowed, \_\_ Ohio St. 3d \_\_, 2011-Ohio-5605 (no federal constitutional claim where state procedures afford just compensation).

Contrary to Relators’ unsupported representations, the state of the law on that score did not change in 2005 with the holding in *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323 (2005). Far from overruling the *Williamson* holding that a plaintiff cannot prevail on a federal takings clause claim unless he has exhausted the state procedures and been denied just compensation, as Relators suggest in their Motion at 7-8, *San Remo* in fact reaffirmed what it termed the *Williamson* “requirement that aggrieved property owners must seek ‘compensation through the procedures the State has provided for doing so’.” 545 U.S. at 346. That requirement, the Court observed, of course “does not preclude state courts from hearing simultaneously a plaintiff’s request for compensation under state law and the claim that, *in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.*” *Id.* (emphasis added).

In the instant case, this Court has ordered that appropriations proceedings commence, and to date there has been no denial of just compensation under such proceedings that could underpin an alternative argument that absent state law compensation there will be a federal Fifth Amendment violation. Relators’ selective quotation from *San Remo*, omitting the words “in the alternative, the denial,” cannot transmute the long-standing law that they do not prevail on their Section 1983 claim

unless and until they are denied just compensation under the appropriation proceedings now ordered. (Four Justices wrote separately in *San Remo* to signal some discomfort with the Court opinion's reaffirmation of *Williamson*; they noted, however, that "no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners." 545 U.S. at 352 [Rehnquist, C.J., concurring].) On the point to which *Williamson* is relevant here, the case remains good law followed by Ohio courts and the Sixth Circuit.

It remains the case that "[t]he [federal] Takings Clause does not prohibit the government from taking private property; it prohibits the government from taking private property without just compensation," just as it remains true that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Coles v. Granville*, 448 F. 3d 853, 860, 861 (6th Cir. 2006), citing *Williamson*; see also *River City Capital, L.P. v. Bd. of Cty. Comm'rs, Clermont Cty.*, 491 F.3d 301, 306 (6th Cir. 2007) ("the Supreme Court has ruled that constitutional takings claims are not ripe for federal court review until state compensation procedures, assuming they exist and are adequate, have been exhausted"); *Crosby v. Pickaway Cty. Gen., Health Dist.*, 2006 U.S. Dist. Lexis 98087 at \*25 (S.D. Ohio 2006) (reiterating that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation"); *Home Builders Ass'n of Dayton & Miami Valley v. Lebanon*, 167 Ohio App. 3d 247, 258 (12th Dist. 2006) (plaintiff must "seek compensation through the procedures the State has provided"

before it can prevail on a Section 1983 takings clause claim); *Donna Boutin Real Estate, LLC v. Eping*, 2010 U.S. Dist. Lexis 22353, at \*3-5 (D.N.H. 2010).

Indeed, at least two Ohio courts of appeals have reconfirmed the established analysis within the last year. In *Hensley*, the court stated, “Thus, a just compensation claim under the Fifth and Fourteenth Amendments does not arise until the property has been taken *and* just compensation for that taking is denied.” 2011-Ohio-3311 at ¶ 27 (emphasis in original). Noting that *Williamson* was accepted by this Court in *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 15, the court again recited that “if a state provides a ‘reasonable, certain, and adequate provision for obtaining compensation’ for a taking of a private property, a property owner may not assert a claim under the Fifth and Fourteenth Amendments until he has ‘used the [state’s] procedure and been denied just compensation’.” *Id.* at ¶ 26 (quoting *Williamson*, 473 U.S. at 194-95). The court further observed that because Ohio law finds the taking to occur when the state substantially or unreasonably interferes with a property right, these principles do not affect a “state claim seeking to invoke the method of obtaining compensation under state law,” but rather relate only to the federal Just Compensation claim. *Id.* at ¶ 27. Similarly, in *State ex rel. Jeffers v. Athens Cty. Comm’rs*, the court held that “[u]nder Ohio law, a plaintiff must first exhaust the remedies available under mandamus before the plaintiff can pursue an action under Section 1983.” 4th Dist. No. 10CA3 & 10CA15, 2011-Ohio-675, ¶ 23, citing *Home Builders Ass’n*, 167 Ohio App. 3d at ¶ 42-43; and *River City Capital*, 491 F. 3d at 307.

**2. Because Ohio's mandamus and appropriation-action compensation procedure provides Relators with an appropriate avenue to achieve just compensation for takings, no federal Fifth Amendment violation has been established and Relators have not prevailed under 42 U.S.C. 1983.**

Ohio's process of mandamus leading to an appropriation proceeding without question provides the necessary "reasonable, certain, and adequate procedures" for plaintiffs to pursue compensation for an involuntary taking" and forestall a federal Just Compensation Clause violation. *Coles*, 448 F. 3d at 865 (noting the "frequency of mandamus actions as a means to force appropriation proceedings in Ohio today," *id.* at 864). As this Court well knows, as Relators averred in this action, and as the Sixth Circuit has recognized, a property owner "who believes that his property has been taken in the absence of ... an appropriation proceeding may initiate a mandamus action in Ohio court to force the government actor into the correct appropriation proceeding." *Id.* at 861. Because "Ohio now has a 'reasonable, certain, and adequate procedure' for takings claimants to pursue in Ohio state courts," plaintiffs cannot prevail on a federal Section 1983 Fifth/Fourteenth Amendment takings claim until such proceedings have been exhausted and "'just compensation has been denied'." *Id.* at 860-61. *Cf. Arnett v. Myers*, 281 F. 3d 552, 563 (6th Cir. 2002) (Tennessee now has enacted "reasonable, certain, and adequate procedures for obtaining just compensation" that will need to be exhausted with just compensation denied before a federal takings claim becomes cognizable); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F. 3d 87, 93-94 (1st Cir. 2003) ("Pascoag cannot show that Rhode Island's remedies were inadequate or unavailable.... Rhode Island state courts have long allowed recovery through suits for inverse condemnation;")

because it did not show that it had been denied just compensation under such procedures, “Pascoag did not satisfy the *Williamson County* prerequisites for a federal claim”).

As Judge Marbley explained in 2007, in cases in which the state fails initially to commence an appropriations proceeding, “the prospective [federal] plaintiff may bring a mandamus action in state court forcing the government to afford him a compensation hearing,” and only if the plaintiff is denied compensation may he prevail on a federal Just Compensation Clause claim. *Columbia Casualty Co. v. St. Clairsville*, 2007 U.S. Dist. Lexis 16797, at \*23 (S.D. Ohio 2007).

**3. Without having prevailed under 42 U.S.C. 1983, Relators cannot recover their attorney fees under 42 U.S.C. 1988, and their fees motion should be denied.**

The plaintiffs in *Home Builders* made a similar claim for attorney fees when they had failed to exhaust mandamus-compelled appropriation proceedings for compensation under state law. The Twelfth District Court of Appeals noted that a party may not prevail on a 42 U.S.C. 1983 takings-clause claim without first being denied appropriate compensation under Ohio’s appropriations procedures. The court then spelled out the inexorable logic that governs the attorney fees sought here:

With respect to the homebuilders’ argument that they are nevertheless entitled to attorney fees pursuant to [42 U.S.C. 1983] because they are the “prevailing party,” we find *National Private Truck Council, Inc. v. Oklahoma Tax Comm.* (1995), 515 U.S. 582 ... to be controlling. In that case, the Supreme Court held that “when no relief can be awarded pursuant to Section 1983, no attorney’s fees can be awarded under Section 1988.” *Id.* at 592 ... See, also, *Bonner v. Guccione* (C.A.2, 1999), 178 F. 3d 581, 596; *Gerling Global Reinsurance Corp. of Am. v. Garamendi* (C.A.9, 2005), 410 F.3d 531, 532 (“If a plaintiff does not have a substantial, properly cognizable Section 1983 claim, then Section 1988 attorney’s fees may not be awarded”). Because the homebuilders pleaded a Section 1983 claim that the common pleas court properly found not to be cognizable, the court did not err in failing to award the homebuilders attorney fees under Section 1988.

167 Ohio App. 3d at 258-59.

Relators cannot prevail on their Section 1983 claims unless and until the State denies them appropriate compensation upon the conclusion of the appropriations proceedings that this Court has ordered the state to commence. Their claim for attorney fees under Section 1988 is contingent on their prevailing under Section 1983. Because Relators have not prevailed under Section 1983, their Motion cannot be granted.

**B. Alternatively, the fees and expenses submitted in the application are unreasonable, and Relators have not met their burden to document and justify their fees.**

While this Court does not need to proceed further as Relators are not entitled to recover fees and costs for their work, Respondents offer some additional observations as to why the specific fee application submitted here would be inappropriate even if the law on Section 1988 were other than it is. If the Court finds it must review the fee application in substance, the fees and costs sought in this matter are unreasonable, and should be rejected *in toto* or significantly reduced.

Consideration of a motion for an attorney fee award is guided by the principle that the fee must be “reasonable.” *Reed v. Rhodes*, 179 F. 3d 453, 471 (6th Cir. 1999). A reasonable fee is one that is “adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers.” *Geier v. Sundquist*, 372 F. 3d 784, 789 (6th Cir. 2004), citing *Perotti v. Seiter*, 935 F. 2d 761, 763 (6th Cir. 1991). The party seeking attorney fees carries the burden of documenting the work for which it seeks compensation. *Webb v. Cty. Bd. of Edn. of Dyer Cty., Tenn.* 471 U.S. 234, 242 (1985).

The starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.

*Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This amount is referred to as the “lodestar.” The party requesting fees has an obligation to document the hours worked and the rates claimed. “Where the documentation of hours is inadequate, the district court may reduce the award accordingly.” *Id.* Further, the court should exclude from the initial amount “hours that were not ‘reasonably expended.’” *Id.* at 434. Counsel must “make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.” *Id.* As discussed *infra*, Relators’ documentation of hours is inadequate because all billing entries lack dates of service, and in many instances, it is difficult, if not impossible, to tell how many hours were expended on each particular claim that Relators raised in their mandamus complaint. For this reason alone, Relators’ submitted documentation for attorney fees is improper and must be disregarded.

The Sixth Circuit explored the “reasonableness” aspect of attorney fee awards in *Coulter v. Tenn.*, 805 F. 2d 146 (6th Cir. 1986). The court identified three kinds of issues that can arise regarding excessive hours: 1) factual questions about whether the lawyer actually worked the hours claimed or is padding the account; 2) legal questions about whether the work performed is sufficiently related to the points on which the client prevailed as to be compensable; and 3) mixed questions about whether the lawyer used poor judgment in spending too many hours on some part of the case or by unnecessarily duplicating the work of co-counsel. *Id.* at 150-152. In *Coulter*, the Sixth Circuit examined the fee request in that case, and reduced the award based on compensability and billing judgment.

In this case, the hourly rate billed by Relators' counsel is at the highest end of the spectrum for "real property law matters." *The Economics of Law Practice in Ohio, Desktop Reference for 2010* (Ohio State Bar Ass'n, 2010), at 24 ("OSBA Study") (attached in Respondents' Appendix as Tab A). Further, the number of hours claimed is unreasonable and incapable of analysis because no dates are assigned to billed tasks, and the repeated use of block-billing practices renders analysis of discrete tasks undecipherable. In addition, some of the hours claimed are not related to issues on which Relators prevailed, are not relevant to the litigation, or are duplicative. Therefore, were fees theoretically available under Section 1988 at this time, they would still have to be denied under the specifics of Relators' Motion.

- 1. The requested hourly rate(s) exceed those which would encourage competent representation in the Columbus, Ohio market and would result in a windfall.**

A reasonable hourly rate cannot be determined solely by accepting whatever hourly rate counsel seeks in their motion, but must include consideration of actual market rate in the venue sufficient to encourage representation. *Lamar Adv. Co. v. Charter Twp. of Van Buren*, 178 Fed. App'x 498 (6th Cir. 2006) (awarding \$200 per hour when \$370 per hour was demanded); *see also Auto Alliance Internat'l, Inc. v. United States Customs Serv.*, 155 Fed. App'x 226, 228 (6th Cir.2005) (awarding a \$200 per hour flat rate where lead attorney's rate was \$400 per hour). "[H]ourly rates for fee awards should not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question." *Coulter*, 805 F. 2d at 149 (6th Cir. 1986). *See also Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004), citing *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000). Courts have recognized and approved the use of state

bar association surveys and studies to help guide it in reviewing the reasonableness of hourly rates. See *Gonter v. Hunt Valve Co., Inc.*, 510 F. 3d 610, 618, fn. 6 (6th Cir 2007) (approving district court's use of a 2004 OSBA Ohio State Bar survey); *Auto Alliance*, 155 Fed. App'x at 228.

Relators seek compensation for their attorneys at the following hourly rates:

Bruce L. Ingram	\$410-\$440 per hour
Joseph R. Miller	\$320-\$375 per hour
Thomas H. Fusonie	\$265-\$280 per hour
Michael J. Hendershot	\$260 per hour
Kristi Wilhelmy	\$220-\$230 per hour
Martha C. Brewer	\$180-\$190 per hour

Relators' Motion, Affidavit of Bruce Ingram. According to the OSBA Study, the 2010 median hourly billing rate for Ohio attorneys is \$200 per hour, and the mean billing rate is \$211 per hour. Respondents' App'x, Tab A at 23. The study also weighed the size of firm, geographic location, and years of practice for practitioner. For example, a practitioner with more than twenty-five years' experience earning \$395 or more per hour would be in the 95th percentile for compensation among Ohio attorneys. The median hourly rate for those most experienced counsel is \$205 per hour for all Ohio attorneys.

Firms located in downtown Columbus have a median hourly rate of \$250 per hour, while an hourly rate of \$425 or higher is representative of the 95th percentile of attorney compensation for "Downtown Columbus" counsel. The study does not contain a category of practice specifically for involuntary takings-constitutional claims, but the

median rate for real-property law practice among all Ohio attorneys is at \$218, and general civil trial practice the median is at \$220 per hour. *Id.* at 24.

Associate attorney hourly rates are also explored in the OSBA Study on pages 25, 26, and 28. Mr. Ingram's affidavit attests that he has over thirty years' experience, but he provides no specifics with regard to years of experience of his various co-counsel, or their status as partners or experienced associates versus junior associates. Counsel's affidavit asserts a "range" of hourly attorney fees from \$170 to \$440 per hour. As the OSBA Study indicates, Respondents' App'x, Tab A at 25-26, associate billing rates can vary widely based on experience and geographic location. By way of example, the largest percentage of associates in greater Columbus with at least five years' experience (20.9%) are billed at \$200-\$224 per hour. The hourly rates claimed in Relators' Exhibit A-1 appear to be at the highest percentiles of rates as represented in the OSBA Study.

Relators also seek compensation for paralegal and support-staff hourly rates with the following rates:

Jane Gaines	\$180-\$185 per hour
Colleen Brandt	\$160 per hour
Bridget Klingbeil	\$160 per hour
Julie Carmona	\$155-\$160 per hour
Courtney Weiss	\$150-\$165 per hour
Lindsay Whetstone	\$150 per hour
Rosa Waller	\$120 per hour
Andrew Ward	\$95 per hour
Richard Webner	\$80 per hour

Steven Hager

\$75 per hour

Counsel's affidavit does not clearly identify which individuals served in which capacities, or describe the years of experience of the staff. Such failures are further examples of the lack of particularity which merits this Court's denial of the claimed fees and costs. However, from the attached billing statements it may be surmised that Ms. Weiss served as a paralegal/litigation support staff member, and Ms. Gaines performed property research and other research, and several individuals appear to have provided technical services or clerical assistance. However, the affidavit provides no specific information with respect to individual experience levels other than the affiant's. It cannot be determined whether the hourly rate billed is commensurate with the experience of the individuals for whom compensation is sought. Paralegals with five years' experience in greater Columbus, for example, are billed at anywhere between \$40 or less to over \$140 per hour. Paralegals billing at \$140 per hour or more represent 13.3% of individuals in the survey. The largest percentage of paralegals with five years' experience in the Columbus market (16.7%) are billed at \$121-\$130 per hour. Legal assistants are not differentiated by geographic location in the OSBA Study, but an experience parameter was considered. OSBA Study, Respondents' App'x, Tab A at 25. The largest percentage of legal assistants with five years of experience (17.7%) are billed at \$81-\$91 per hour.

In this case, the hourly rates billed, when compared to the OSBA Study results, are at the highest percentiles reflected in the survey. Certainly Mr. Ingram's rate, while appropriately the highest as a seasoned attorney, exceeds the state and Columbus median, and are at or near the 95th percentile. His rate of \$410-\$440 per hour also exceeds the \$340 per hour billed for attorneys in the 95th percentile that handle real-property cases.

Respondents' App'x, Tab A at 24. Junior attorneys and support staff performed a significant amount of work on the case as reflected in Relators' Exhibit A-1, yet because the affidavit lacks clarity regarding their years of experience for each of the individuals billed, it is difficult to determine if the billable rates for those individuals are commensurate with their skill and experience levels. Assuming (because adequate detail is not provided) that Mr. Miller is a senior attorney and Mr. Fusonie, Ms. Brewer, and Ms. Wilhelmy are associate attorneys of varying experience, it is fair to say their respective hourly rates are at or near the highest percentiles identified by the OSBA Study data for associate attorneys. Respondents' App'x, Tab A at 25-26. The same can be said for the paralegal(s) and support staff. *Id.* at 25, 27, 29. Here again, the roles of the multiple staff members are not clearly identified. For example, numerous submissions are made for time for Ms. Gaines for what appears to be research.

The hourly rates charged in this matter exceed that amount which is appropriate to encourage competent representation, and go beyond that to produce a windfall. Relators' attorneys seek the very highest levels of hourly compensation for themselves and their staff. As other courts have opined, reasonableness is not driven simply by what the moving party thinks it can bill short of an excessive fee. Rather, a windfall is to be avoided so long as competent counsel would perform the same representation and further the goal of the statute. To the extent this Court orders any payment of fees, a more appropriate hourly rate calculation would be the median hourly rate for Columbus attorneys, paralegals and support staff, according to respective years of experience as portrayed in the OSBA Study data.

**2. No dates of service are reflected in the submitted billing documentation.**

Relators' failure to provide the dates of their legal work renders their billing documentation fatally defective. As the parties that carry the burden of proving their claim to attorney fees, the documentation provided "must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation." *United Slate, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F. 2d 495, 502, fn.2 (6th Cir. 1984). Documentation has been found sufficient where the submission included "itemized billing records that specify, for each entry, the date that the time was billed, the individual who billed the time, the fractional hours billed (in tenths of an hour), and the specific task completed." *Imwalle v. Reliance Medical Prods.*, No. 06-4619, 2008 U.S. App. Lexis 12157, at \*15 (6th Cir. 2008). However, omitting dates of service renders Relators' billing documentation wholly defective, as the moving party has the burden to sufficiently document the work performed.

Mr. Ingram's affidavit does not attempt to explain why the billing entries attached as Relators' Exhibit A-1 fail to provide dates of service for services rendered. The entries appear to be roughly chronological as the case progressed, but it is impossible to determine the dates that various tasks were completed. This omission also impairs the ability of this Court or Respondents to verify the reasonableness of the tasks performed and effort to perform them. The lack of date references impairs the ability of a reviewer to determine if multiple attorneys or staff performed the same task or were present for the same conference or phone call. This in turn frustrates the ability to detect double billing

or billing for services that may not have been completed or performed. Since all of the entries contain undocumented dates of services, no fees should be awarded, or alternatively, a significant reduction factor should be applied were any fees authorized by law (and they are not).

**3. Relators' claim for fees also unjustifiably relies upon inappropriate "block billing" practices.**

Courts disfavor the practice known as "block billing," and frequently slash attorney fee requests significantly to discourage the scheme. "Block billing" involves lumping multiple tasks into one billing entry and assigning an amount of time to the collective tasks grouped in the entry, rather than itemizing the specific task and the specific amount of time allocated to complete the task. *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir 2007). Block billing prevents the defending party from scrutinizing and challenging time allocations that are inordinate for the task(s) for which compensation is sought. *Id.*

In *Kearney v. Auto-Owners Ins. Co.* 713 F. Supp. 2d 1369 (M.D. Fla. 2010), the district court found that the moving party's block billing prevented the court from determining the amount of time spent on particular tasks. The court evaluated each entry and significantly reduced fees or eliminated the entire block-billed entry from the fee request. Some courts have applied an across the board reduction in fees. In *L.A. Printex Indus. Inc. v. William Carter Co.*, 2010 WL 4916634, at \*13-15 (C.D. Cal. 2010), the reviewing court found repeated occasions where multiple tasks were contained in one billing entry. The court could not determine whether the time spent on each task was excessive, duplicative or unreasonable. The court implemented a 20% across-the-board reduction in the fee request. *Id.* at \*15.

Here, the entries in Relators' Exhibit A-1 reflect frequent instances of multiple tasks that are grouped without time accounting for individual takes. In particular, billings from Mr. Fusonie, Ms. Wilhelmy, Ms. Weiss, and Ms. Gaines lump multiple tasks in a manner that prevents identification of time spent on each discrete task. This makes it impossible to evaluate the reasonableness of the time spent on tasks or to determine if a task was unnecessary to the litigation or duplicative of other services reflected in the entries.

Accordingly, even if any fees were to be awarded, these entries would not justify Relators' claim.

**4. Relators' unexplained redactions prevent identification and evaluation of services claimed.**

Mr. Ingram's affidavit concedes that some billing entries on Relators' Exhibit A-1 were redacted entirely and the amount of fees for those entries is not sought. Affidavit of Bruce Ingram at ¶ 5). While Respondents do not quarrel with those entries for which no compensation is sought, it does take exception to repeated redactions within the description block of services rendered for which compensation is sought. Mr. Ingram does not explain or account for the redactions, and he does not assert a privilege or otherwise justify the missing information. It is especially important that fee requests be transparent and verifiable as reasonable tasks directly related to this case and not some other matter. With multiple unexplained redactions, this requirement cannot be fairly met. Just by way of only one example, in Exhibit A-1,<sup>1</sup> Mr. Fusonie logged 1.50 hours for which \$397.50 is sought for an entry stating:

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<sup>1</sup> Because this memorandum refers to Relators' un-paginated billing records, Respondents have Bates-stamped and attached those records in their Appendix as Tab B.

Telephone conference with Mr. Duane Sheets regarding REDACTED  
Same with Ms. Doner regarding REDACTED Emails to and from Ms.  
Croskey regarding third-party document production and privilege log.  
Same with Messrs. Ingram and Miller.

Respondents' App'x, Tab B at 87, third entry from bottom. The redactions, coupled with another example of multiple tasks lumped into a single entry, further prevent a fair opportunity for the Court or Respondents to evaluate whether the tasks are appropriately assessed. Accordingly, the entries with redactions for which compensation is sought should either be removed from the lodestar calculation entirely, or significantly reduced.

**5. Relators seek fees for research and outreach to identify potential clients.**

While reasonable pre-filing research and due diligence should be expected, it appears in multiple entries in Relators' Exhibit A-1 that counsel is seeking compensation for efforts to identify and contact what were at the time potential clients before an attorney-client relationship ensued. Because much of the billing is bulked for all Relators as a group, it is difficult to determine at what point individual Relators and counsel began an attorney-client relationship, especially where no dates are used to identify the date that services were performed. But in this case, the portions of the billing statements pre-dating the filing of the mandamus complaint contain numerous entries for a Ms. Gaines and others that seem to revolve around identifying an expanded client base, rather than substantive legal work on behalf of the clients. The following are illustrative examples from Tab B of Respondents' Appendix:

- Page 11, second, third, and fourth entries from the top for Jane Gaines, billing at \$180 per hour, continuation to research Mercer County Auditor's records to identify property ownership for 30 potential clients of ODNR litigation
- Page 12, first entry for Jane Gaines includes a notation to commence identification of all owners along Beaver Creek

- Page 12 entries 4-5, reference preparation of a chart of property owners adjacent to Beaver Creek
- Page 14, top entry, Ms. Gaines bills 2.50 hours and includes with her entry among other tasks, preparation of revised charts as to potential clients' owned properties and identification of properties contiguous to Beaver Creek
- Page 30, bottom entry from Ms. Wilhelmy includes this reference among other tasks, conference Ms. Wilhelmy and Mr. Johnson regarding affidavit and inclusion of properties owned by Shelly Company (which was never a Relator in this suit).

Multiple entries are repeated, roughly from pages 10 to 30 of Tab B, which describe efforts to identify property owners along the Beaver Creek and/or identify potential or prospective clients. The fees associated with these entries should not be considered because they reflect business development activities on the part of counsel, and not necessary substantive legal representation.

**6. Relators improperly claim fees for work on issues which they did not prevail.**

Relators filed pleadings alleging discovery disputes which the Court soundly rejected. First, they sought a motion to compel discovery from Tony Logan, the former ODNR chief in-house counsel. The State raised and successfully asserted its privilege with respect to Mr. Logan. Further, the Relator's counsel also prepared and filed contempt motions against Respondents' experts, claiming they had not complied with a subpoena. The Court also denied these motions. Relators also expended considerable effort and generated billing entries for supplemental evidence including a substantial affidavit from attorney Martha Brewer, which was *stricken* by the Court.

The entries reflecting this work in Relators' Exhibit A-1 should be removed from the calculation of the lodestar amount as Relators did not prevail on these issues.

**7. Relators seek fees for work not related to this litigation.**

Relators' counsel seeks fees for matters that appear to be unrelated to this litigation. On Relators' Exhibit A-1 (Bates-stamped copy attached to Respondents' Appendix as Tab B), pages 169-171 from Martha Brewer, Tom Fusonie, and Kristi Wilhelmy refer to research and at least one conference regarding the outbreak of algae blooms in Grand Lake St. Marys. There is also an entry on page 170 noting, "Consideration by Mr. Ingram of news article and sent email to report with the Dispatch," costing \$205.00. On the same page, Ms. Brewer seeks \$54.00 for review of toxic algae news coverage and "review of facebook.com message boards." Relators' counsel should not be compensated for billing entries for research into a matter that is completely unrelated to the claims made in this case. Also, at page 18, top entry for Ms. Gaines seeks three hours of work totaling \$540.00 for work that includes finding parcel numbers for owners of land in another case (Minch, Post Family Trust, Linn, Baucher and Zumberge Trust cases); research Medina County Auditor database and attention to same and acquisition of tax sheets, and preparation of location maps for the Minch, Post, Linn, Baucher, Zumberge properties. This entry appears to be related to separate litigation in Mercer County Common Pleas Court, but there is no rationale for why a search in the Medina county data base is relevant to this pending matter.

**8. Relators claim fees for inordinate and unreasonable time spent on drafting and editing Relators' affidavits.**

Relators' counsel chose to support the mandamus complaint with individual affidavits and in many cases, supplemental affidavits. The amount of hours billed to draft and continually edit and revise the affidavits is unreasonable. This is especially so considering that when one reviews the affidavits, they are clearly similar in most

respects. Generally, the affidavits appear to have been drafted as a “form” document and later revised with respect to individual Relators. In fact, the billing entries reflect that an initial “sample” affidavit was drafted by Ms. Wilhelmy. The topmost entry on page 23 of Tab B to Respondents’ Appendix includes (among other blocked tasks) the notation “Preparation by Ms. Wilhelmy of draft of sample landowner affidavit.”

Ms. Wilhelmy claims time revising the sample affidavit. Respondents’ App’x, Tab B, p. 24, second entry from the bottom. Affidavit work is billed extensively as reflected on entries on page 25. Later, Ms. Wilhelmy includes a notation in that entry (among other tasks) “Preparation of draft landowner affidavit to use in conjunction with client interviews.” *Id.* at 52, top entry. Throughout the billing entries there are repeated references to either drafting or revising landowner affidavits, and later, drafting of supplemental affidavits. While it is certainly reasonable to expect significant time to be spent processing affidavits for 80 plus landowners, the billing here appears to have made a cottage industry among multiple counsel reviewing, drafting and revising what were largely standardized form documents prepared with minimal complexity. The hours billed are inordinate, and in cases where simple editing or revising is cited could have been performed by clerical staff rather than associate or senior attorneys.

**9. Relators claim fees for inordinate time billed for research locating maps from public sources.**

Ms. Gaines performed various research tasks as billed throughout Relators’ Exhibit A-1. This included a protracted effort to acquire aerial maps from Mercer County, generally beginning at page 41 of the exhibit to page 45 in Respondents’ Appendix, Tab B. On page 43, there are four identical entries billed at \$180 per hour stating “Continuation by Ms. Gaines of research regarding Mercer County data base

relating to acquisition of aerial maps as exhibits to clients affidavits for identification of actual flood areas for each tax parcel affected.” Similar entries carry over into pages 44-45. The entries claim an inordinate and unnecessary amount of time for locating aerial maps from a public reference source.

**10. Relators unnecessarily billed for time spent on routine logistical arrangements.**

Relators inappropriately seek fees for fairly routine logistical matters that are properly considered overhead. Individuals who appear to be support or administrative staff are billed at high rates for tasks that are seemingly unnecessary or could be resolved through a phone call or two. Ms. Brandt, billing at \$160 per hour, bills for a conference regarding “case and case file; assist with preparation of individual plaintiff files electronically and in hard copy. Respondents’ App’x, Tab B at 32. Ms. Brandt bills for apparently routine clerical tasks such editing documents, attention to filing, and conferences regarding same. *Id.* at 38, top entry. Ms. Klingbeil also billed at \$160 per hour, claiming 1.25 hours conducting research for potential locations for clients’ meetings, communications regarding options, facilitating reservations of guest and meeting rooms in Celina, and search case file for materials for Ms. Wilhelmy. *Id.* at 42. She also bills for logistics for meetings in Celina. *Id.* at 52-53. Technical logistics and room preparation are also billed by her. *Id.* at 54-55. Mr. Hager billed \$75.00 for a *full hour* to coordinate conference room set up. *Id.* at 49. He later noted it took 1.25 hours to coordinate a conference room set up. *Id.* at 50. On another occasion, he billed 1.5 hours to set up a conference room has increased, on that occasion, taking 1.50 hours. *Id.* at 53. On another entry, the room set-up time for Mr. Hager is down to .50 hours. *Id.* at 56. On another entry, Ms. Whetstone bills for her time to visit the Supreme Court in advance of

argument, and then bills for her time guiding clients who came to view the arguments and for attending the argument. *Id.* at 201-02.

These examples are not exclusive or exhaustive, but illustrative of billing, and indeed over-billing for matters related to logistic, technical, and file and document management that in fairness should be absorbed by Relators as overhead.

**11. Relators claim fees for duplicative deposition staffing.**

On multiple occasions two attorneys were seated to defend Relator depositions or appear at other witness depositions. *See* Respondents' App'x, Tab C, which is based upon Respondents' review of the appearances noted in deposition transcripts. There are also multiple entries appearing in the billing documentation for Relator deposition defense. *Id.*, Tab B at 108-116, 120. As depicted in Tab C, on multiple occasions Mr. Fusonie and Ms. Brewer appeared together for depositions. Because dates of service are not identified and in many instances their time spent on individual tasks are not discernable, it is hard to verify whether or not both billed for time spent in the same deposition. In reviewing the entries on Relators' Exhibit A-1, it appears in some instances both billed for essentially a full business day of depositions. It is reasonable to conclude that the block-billing entries may very well include time billed for both to appear at the same deposition. Also, Ms. Kreis billed her paralegal time to travel to Celina and support the defense of Relators' depositions. Respondents' App'x, Tab B at 108-09. This Court should not award fees for both attorneys and/or a paralegal to attend depositions.

**12. Relators fail to itemize and reasonably identify expert fee expenses for outside professional services.**

While Relators are not entitled to expenses on the same basis as argued above regarding the inapplicability of 42 U.S.C. 1988, for other reasons as well, their submitted documentation is inadequate. Counsel simply provides a single sheet summary of costs and expenses in Relators' Exhibit A-3, along with a general monthly expense statement. A claim is made for \$103,369.29 for Conestoga Rovers for professional services. However, no itemized billing is provided, and there is no way this Court or Respondents can determine if this expense is reasonable, the exact hourly rate (if any), or if the work can be verified and attributed to this case. The same is true for the \$1,664.00 bill from Hydrosphere and \$1,517.50 bill from Aerial Columbus. Relators provide no documentation to adequately identify the dates or types of services rendered. Without specific documentation, it is impossible to tell what work the lump sums requested truly represent. Therefore these expenses should not be recoverable since they cannot be effectively reviewed for reasonableness. At a minimum, the billing sheets or invoices from the vendors must be made available for inspection.

**13. Relators do not itemize claims for travel, mileage and meal expenses.**

The expenses claimed for travel, mileage and meals are not sufficiently identified. A lumps sum for each is provided in Relators' Exhibit A-3. Again, the approximate time period of the incurred expenses are only vaguely provided by a monthly statement. The Court and Respondents should be able to review the claimed expenses and determine the dates incurred and the reasonableness of the expenditure. The expenses should not be

recoverable because there is no way of confirm whether they are reasonable or appropriate.

**C. Even if Relators' Motion could be approved by the Court, their request for an enhancement of the lodestar amount would fail.**

In addition to seeking top-of-the-scale hourly rates, an excessive number of hours, and interest on that calculation, Relators seek a lodestar multiplier. Even were Relators entitled to some fees (which they are not at this juncture), they certainly are not due an enhancement of their inflated request.

Relators mention the *Johnson* factors, but do little to explain how they meet many of the twelve factors. They briefly discuss only three of those factors – time and labor required, novelty and difficulty of the questions, and the undesirability of the case. Moreover, the United States Supreme Court favors the lodestar method over the *Johnson* approach, stating that the lodestar calculation is objective. *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010). In *Perdue*, the Court acknowledged that a lodestar may be increased, but only in extraordinary circumstances: it underscored the “strong presumption that the lodestar is sufficient.” *Id.* at 1669. The Court explained that the “party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified.” *Id.*

Relators' request for an enhancement based on time and labor required is not appropriate. Regarding time and labor, if fees were appropriate and properly documented, the lodestar would be sufficient because both are a factor subsumed in the lodestar calculation. *Id.*

Relators are also wrong to request enhancement based on novelty and difficulty of the questions. This case does not establish a new cause of action and Relators' counsel

have not endured public criticism. *See Bank One, N.A. v. Echo Acceptance Corp.*, 595 F. Supp. 2d 798, 803 (S.D. Ohio 2009). Indeed, before touting the novelty, difficulty, and legal significance of the issues involved in this case, Relators' counsel castigate Respondents for having even defended the case. Relators' Motion at 3. Further, Relators' counsel, a law firm with the "staffing capabilities to handle the logistical complexities of such evidence gathering and other aspects of a mass inverse condemnation action," would be adequately compensated by a lodestar calculated with top of the scale hourly rates – again, if Relators were entitled to fees at all (which they are not).

Relators' request for enhancement based on the undesirability of the case is also misplaced. There is no evidence that this case was particularly undesirable or exceptional other than the vague assertions by Relators' counsel. *See Guam Soc. of Obstetricians & Gynecologists v. Ada*, 100 F. 3d 691, 697 (9th Cir. 1996). Likewise, there is no evidence that other attorneys turned the case down. *See Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913 (S.D. Ohio 2001). Indeed, as Relators frequently mentioned throughout the litigation, other attorneys have brought similar cases. *See State ex rel. Post v. Speck*, 3d Dist. No. 10-2006-001, 2006-Ohio-6339; *Case Leasing & Rental, Inc. v. Ohio Dept. of Natural Resources*, 10th Dist. No. 09AP-498, 2009-Ohio-6573.

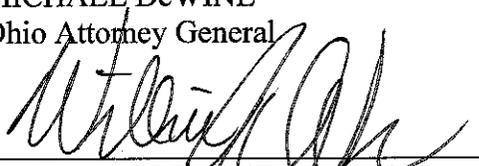
Finally, this litigation has not been unusually lengthy. Other cases, in which fee enhancements have been awarded, were pending for six and fifteen years. *See Philecia Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *McKenzie v. Kennickell*, 277 U.S. App. D.C. 297, 875 F. 2d 330, 338-39 (D.C. Cir. 1989). Even if Relators were entitled to fees, a very substantially scaled back lodestar calculation would be sufficient.

### **III. CONCLUSION**

All authority, including United States Supreme Court case law and decisions across the Ohio and federal courts, makes plain that Relators' claim for attorney fees and costs under 42 U.S.C. 1988 is not appropriate or authorized by law unless and until Relators are denied just compensation in the appropriation proceedings this Court has ordered. Their fee claim is simply not ripe, and, even were it to be considered, as presented lacks sufficient detail and billing justification. Accordingly, Relators' Motion should be denied.

Respectfully submitted:

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Ohio Attorney General

  
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*\*Counsel of Record*

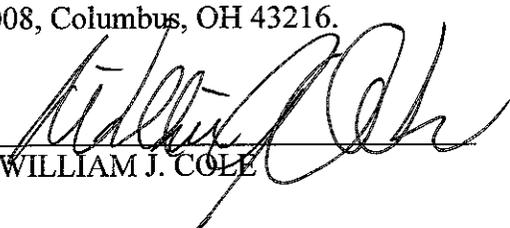
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Counsel for Respondents

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent by regular mail on January 3, 2012,  
to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, and Martha C. Brewer, Vorys,  
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