

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

CUMBERLAND BROADCASTING	}	
COMPANY. <i>et al.</i> ,	}	
	}	
Plaintiffs,	}	
	}	
v.	}	Case No: AMD 07-CV-2266
	}	
WILLIAM J. AUMILLER, <i>et al.</i> ,	}	
	}	
Defendant.	}	
	}	

**ORDER OF AWARD OF ATTORNEYS' FEES AND EXPENSES**

Pending and ripe for decision is Plaintiffs' motion for award of attorneys' fees regarding their civil rights action, filed pursuant to 42 U.S.C. § 1983 against, William J. AuMiller, in his official capacity as Superintendent of Schools for Allegany County, and the president and members of the Board of Education of Allegany County. Judge Davis referred the case to me for a binding determination of the attorney's fees and costs to be awarded to the Plaintiffs, who substantially prevailed in this litigation, pursuant to Paragraph 11 of the Consent Decree signed by the Court that resolved the merits of this case. Paper No. 29. The matter has been fully briefed and this order disposes of Paper Nos. 34, 35, 36, 37 and 38.

Plaintiffs, broadcasters and media outlets, brought this action in response to being denied access to press boxes at county school athletic fields, and for being denied information

for announcements related to public schools and information needed for a college scholarship program. It was alleged that the denial of access and information was the result of "unfavorable or critical reporting" of school related activities. The suit began on August 28, 2007 when Plaintiffs filed their complaint with a Motion for Preliminary Injunction, Paper Nos. 1 and 2.

Shortly thereafter, Plaintiffs, after seeking an expedited hearing on their motion due to the on-coming school year, requested to postpone the hearing so that the parties could enter into settlement negotiations. Paper Nos. 4 & 5. The hearing set for September 4, 2007 was postponed by Judge Davis and then, following a disagreement as to the terms of the settlement and the parties inability to agree on a mediator, Plaintiffs filed another motion requesting a preliminary injunction hearing, Paper Nos. 6, 12, and 13, while Defendants were coordinating who would serve as their counsel. See Notices of Appearances, Paper Nos. 10, 11, and 15. On September 7<sup>th</sup>, Judge Davis scheduled a preliminary injunction hearing for September 12, 2007. Paper No. 14.

The lengthy hearing included the testimony of four witnesses and concluded with Judge Davis, ruling from the bench, granting Plaintiffs' motion for a preliminary injunction and ordering the parties to submit a proposed order for the Court.

The parties could not agree on the wording and therefore each filed a proposed order for the Court's approval. Paper Nos. 19 and 20.

As the proposed orders were pending, the parties attempted, once again, to settle the case. Pls.' Mem. in Supp. of Mot for Attys' Fees, at 5-6. By September 27, 2007, it appears as if Plaintiffs' counsel was operating under the belief that a binding settlement agreement had been reached with Defendants through their counsel, Gary Hanna, Esquire. However, no written memorialization of the settlement was prepared and, despite additional correspondence on October 9, 2007, Defendants advised Plaintiffs that no settlement agreement existed. On October 10, 2007, Plaintiffs filed a Motion to Enforce Settlement, Paper No. 23, as Defendants were entering the appearance of new counsel, Thomas Althaus, Esquire. Paper No. 24. Briefing on Plaintiffs' motion then followed and concluded on November 6, 2007. Paper Nos. 26 and 27.

Plaintiffs state that, between November, 2007 and February, 2008, the parties continued to negotiate a settlement agreement while Plaintiffs also considered amending the original complaint and filing a motion for contempt due to the failure of an Allegany County school to include Plaintiffs' radio station in a letter to parents as a source for school closings and delays, in violation of the preliminary injunction. Pls.' Mem. in Supp. of

Mot for Attys' Fees, at 6-7. By the end of January, 2008, the parties had agreed upon a consent decree which was filed and signed by Judge Davis on February 5, 2008. Paper No. 29. Paragraph 11 of the decree expressly stated that Plaintiffs' legal fees and expenses would be submitted to a Magistrate Judge for determination of which fees and expenses should be paid by Defendants pursuant to 42 U.S.C. § 1988 and that the "determination of the Magistrate Judge shall be final and binding on the parties." Paper No. 29, at 5.

Under Section 1988, the Court is granted discretion to award a prevailing party a *reasonable* attorney's fee by determining the lodestar amount, meaning the number of hours reasonably expended on the litigation multiplied by an hourly rate that is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 890 n. 11 (1984). See also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (The lodestar amount is "the product of reasonable hours times a reasonable rate."); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *EEOC v. Service News Co.*, 898 F.2d 958, 965 (4<sup>th</sup> Cir.1990); *Thompson v. U.S. Dept. of Housing and Urban Development*, No. Civ. A. MJG-95-309, 2002 WL 31777631, at \*6 (D. Md. Nov. 21, 2002). The Court's discretion in determining the

lode star amount is facilitated by examining which of the twelve factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5<sup>th</sup> Cir.1974)<sup>1</sup>, and adopted by the Fourth Circuit in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4<sup>th</sup> Cir.1978), are relevant to the determination of reasonable attorneys' fees. *Daly v. Hill*, 790 F.2d 1071, 1075-76 (4<sup>th</sup> Cir.1986).

Plaintiffs' position as the prevailing parties is not in dispute. Defendants do not raise such a contention and the consent decree is clear that Plaintiffs are entitled to a reasonable award. Moreover, the Supreme Court and Fourth Circuit have often held that a consent decree is one example of the type of relief that satisfies the prevailing party test. *See, e.g., Buckhannon Board and Care Home v. WVA Dep't of Health and Human Resources*, 121 S.Ct. 1835, 1840 (2001); *Brinn v. Tidewater Transp. District Comm'n*, 242 F.3d 227, 234 (4<sup>th</sup> Cir.2001). Accordingly, this Court is left to examine which of the *Johnson* factors are relevant in this case to a determination

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

of what fees and expenses are reasonable. Due, in part, to the necessarily expedited nature of these proceedings, repeated attempts to settle the matter absent court intervention, and the final consent decree entered into, I conclude that the most relevant *Johnson* factors are: (1) the time and labor required; (3) the skill requisite to properly perform the legal service; (5) the customary fee; (7) 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; and (12) awards in similar cases.

With these factors in mind, I have carefully examined the briefing submitted by the parties. Of the factors identified as relevant to this matter, Defendants generally contest factor (8): "the amount involved and the results obtained." Aside from complaints that some time is duplicative, Defendants argue more broadly that they should not be required to pay for Plaintiffs' preparation to file an amended complaint that was never filed, and Plaintiffs' Motion to Enforce the Settlement Agreement and subsequent briefing. On these two broad areas, I agree with Defendants.

Plaintiffs' amended complaint was never filed and the draft copy provided to Defendants, Mem. in Supp. of Pls.' Mot. for Award of Attys.' Fees, Ex. 10, simply added wording that reflected that Dr. AuMiller would be sued in his individual and

personal capacity, that the board of education would be sued (Para. 12), and one new allegation claiming a violation of the injunction (para. 43). But these additions do not justify the 24.4 hours of work claimed by Plaintiffs - more than half a week's work - nor is there a showing that the draft amended complaint provided to Defendants played any significant part in their eventual decision to sign the consent decree. Therefore, the time claimed for its preparation will not be awarded.

Similarly, I do not find that the time spent by Plaintiffs on their Motion to Enforce the Settlement Agreement, Paper Nos. 23, 26 and 27, was sufficiently fruitful to warrant the counsels' fees sought for it. While I need not now decide whether or not a settlement agreement was in effect in October, 2007, it is clear in the papers before me, and in the briefing filed in support of the motion to enforce, that although counsel for Defendants may have been willing to recommend that Defendants enter into a settlement, his clients were of a different mind. This is evidenced, in part, by defense counsel's implied rejection of the written terms by not responding to Plaintiffs' counsel's e-mail, his express rejection of the alleged settlement agreement two days prior to Plaintiffs' filing their motion, and the appearance of new defense counsel on or around the same period who also rejected Plaintiffs' contention that any settlement had been reached.

Mem. in Supp. of Pls.' Mot. for Award of Attys.' Fees, at 5-6. Accordingly, I find that the time spent by Plaintiffs on their Motion to Enforce a Settlement Agreement was not productive nor did it "substantially advance their clients' interests by obtaining a significant concession from defendants as a result of their motion" so as to warrant the award of attorney fees. *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983) (internal quotations omitted).

Additionally, I deducted the hours of Plaintiffs' counsel that neither entered their appearance nor, upon the record before me, provided significant service to their client in light of the services provided by their partners and associates. Accordingly, 10.6 hours of Mr. Gunst's 16.4 hours have been eliminated and Ms. Rubin's hourly fee of \$300 has been reduced to \$195 per hour for the twelve hours of time she spent on the fee petition reply. Plaintiffs provide no explanation as to why Ms. Rubin, an attorney formerly unassociated with this case and with an hourly rate \$100 more than Ms. Carrollan, was brought in to assist in the fee petition reply when, according to Plaintiffs, Ms. Carrollan had spent over 85 hours on the matter, including 10 hours on the original fee petition. Prior to Plaintiffs' reply, Ms. Rubin had not been mentioned in any brief or time entry. Since Ms. Carrollan was apparently still associated with the case, since her name appears as part of the

filing to this Court attempting to justify Ms. Rubin's rate, Paper No. 38, and the Defendants did not have the ability to respond to the use of a more expensive associate in this final matter, Ms. Rubin's hourly rate will be adjusted to equal that of Ms. Carrollan.

Finally, the Court will also grant Plaintiffs' request for expenses and expert fees, as both appear reasonable for the present matter. As to Defendants argument that the testimony provided by Plaintiffs' expert, C. Christopher Brown, was irrelevant, I disagree. Mem. in Supp. of Pls.' Mot. for Award of Attys.' Fees, Es. 17. If Mr. Brown's testimony had been provided solely in support of the reasonableness of Plaintiffs' billing rates, when Plaintiffs' billing rates were presumptively reasonable under Appendix B-3 of the Local Rules of this Court, then Plaintiffs' request would be reduced -- the Court does not want to encourage parties to seek out expert witnesses to justify presumptively reasonable hourly rates. But Mr. Brown's testimony went beyond simply gauging reasonableness of the fees charged and included an examination of the quality and reasonableness of the Plaintiffs' counsels' work. In fact, of the affidavit's sixteen paragraphs, only four discussed the reasonableness of the fees.

For the foregoing reasons, and as outlined in the appended chart, Plaintiffs' counsel is awarded \$109,085.50 in Attorneys'

Fees; \$3,697.36 in Expenses; and \$3,240 in Expert Fees, for a total of \$112,782.86. This amounts to a reduction of \$23,495.50 from the amount originally sought.

August 14, 2008  
Date

\_\_\_\_\_/S/\_\_\_\_\_  
Paul W. Grimm  
United States Magistrate Judge

	<u>Attorney</u>	<u>Hours Sought</u>	<u>Hours Deducted</u>	<u>Total Hours</u>	<u>Fee</u>	<u>Fees Reported</u>	<u>Section Total Requested</u>	<u>Total Awarded</u>
<b>A. Case Dev.</b>								
<b>Section Award</b>	Astrachan	29.8	3.5	26.3	\$ 415.00	\$ 12,367.00		\$10,914.50
\$12,641.50	Morgan	5.8	0.8	5	\$ 315.00	\$ 1,827.00		\$1,575.00
	Carolan	0.4	0	0.4	\$ 180.00	\$ 72.00		\$72.00
	Gunst	0.2	0	0.2	\$ 400.00	\$ 80.00		\$80.00
							\$ 14,346.00	

<b>B. Pleadings</b>								
<b>Section Award</b>	Astrachan	15.2	2.5	12.7	\$ 415.00	\$ 6,308.00		\$5,270.50
\$14,998.50	Morgan	19.8	8.2	11.6	\$ 315.00	\$ 6,237.00		\$3,654.00
	Carolan	42	8.7	33.3	\$ 180.00	\$ 7,560.00		\$5,994.00
	Gunst	0.7	0.5	0.2	\$ 400.00	\$ 280.00		\$80.00
							\$ 20,385.00	

<b>C. Motions</b>								
<b>Section Award</b>	Astrachan	21.3	5.1	16.2	\$ 415.00	\$ 8,839.50		\$6,723.00
\$21,729.00	Morgan	39.8	16.6	23.2	\$ 315.00	\$ 12,537.00		\$7,308.00
	Carolan	32.5	0.4	32.1	\$ 180.00	\$ 5,850.00		\$5,778.00
	Gunst	10.3	5.5	4.8	\$ 400.00	\$ 4,120.00		\$1,920.00
	Martin	1	1	0	\$ 195.00	\$ 195.00		\$0.00
							\$ 31,541.50	

<b>D. Hearing</b>								
<b>Section Award</b>	Astrachan	10	0	10	\$ 415.00	\$ 4,150.00		\$4,150.00
\$6,512.50	Morgan	7.5	0	7.5	\$ 315.00	\$ 2,362.50		\$2,362.50
							\$ 6,512.50	

<b>E. Settlement</b>								
<b>Section Award</b>	Astrachan	30.1		30.1	\$ 415.00	\$ 12,491.50		\$12,491.50
\$20,018.50	Morgan	19	0.8	18.2	\$ 315.00	\$ 5,985.00		\$5,733.00
	Gunst	0.6		0.6	\$ 400.00	\$ 240.00		\$240.00
	Martin	7.4		7.4	\$ 210.00	\$ 1,554.00		\$1,554.00
							\$ 20,270.50	

<b>F. Fee Petition</b>								
<b>Section Award</b>	Astrachan	12.3		12.3	\$ 415.00	\$ 5,104.50		\$5,104.50
\$22,693.50	Morgan	49.4		49.4	\$ 315.00	\$ 15,561.00		\$15,561.00
	Carolan	10.4		10.4	\$ 195.00	\$ 2,028.00		\$2,028.00
	Gunst	4.6	4.6	0	\$ 400.00	\$ 1,840.00		\$0.00
							\$ 24,533.50	

<b>Reply</b>								
<b>Section Award</b>	Astrachan	3.4		3.4	\$ 415.00	\$ 1,411.00		\$1,411.00
\$10,492.00	Morgan	21.4		21.4	\$ 315.00	\$ 6,741.00		\$6,741.00
	Rubin	12		12	1 7/13	\$ 3,600.00	\$ 11,752.00	\$2,340.00
							\$ 129,341.00	\$109,085.50

	<u>Requested</u>	<u>Awarded</u>
<b>Expenses</b>	\$ 3,697.36	\$ 3,697.36
Expert Fees	\$ 3,240.00	\$ 3,240.00

**Total to be Paid By Defendants: \$112,782.86**