

No. 09-35153

In the United States Court of Appeals for the Ninth Circuit

POWELL'S BOOKS, INC., et al.,
Plaintiffs-Appellants,
v.
JOHN KROGER, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman)
Case No. CV-0-8501-MO

PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

Plaintiffs Powell's Books, Inc.; Old Multnomah Book Store, Ltd.; Dark Horse Comics, Inc.; Colette's: Good Food + Hungry Minds, LLC; Bluejay, Inc.; St. John's Booksellers, LLC; American Booksellers Foundation for Free Expression ("ABFFE"); Association of American Publishers, Inc. ("AAP"); Freedom to Read Foundation, Inc. ("FTRF"); Comic Book Legal Defense Fund ("CBLDF") (collectively the "Bookseller/Media Plaintiffs") through their attorneys SNR Denton US LLP (known as Sonnenschein Nath & Rosenthal LLP when this case commenced), pursuant to Fed. R. Civ. P. 54(d)(2) and 42 U.S.C. § 1988 move for an award of attorneys' fees and expenses incurred through all levels of this

litigation, as detailed extensively below. In support of this motion, plaintiffs rely upon this application together with the attached declarations of Michael A. Bamberger, Rachel G. Balaban, Richard Zuckerman, Jonathan Bloom and Stephen E. Jenkins.

Despite a vigorous and persistent defense by the Office of the Attorney General of Oregon, this Court's Opinion of September 20, 2010, reversing the district court's Opinion and Order of December 12, 2008, found in favor of the plaintiffs in this action under 42 U.S.C. § 1983, gave plaintiffs total relief, and declared the challenged Oregon statutes unconstitutional. Accordingly, Bookseller/Media Plaintiffs hereby make this application for attorneys' fees and expenses.

The fee application is timely. Ninth Circuit Rule 39-1.6 states, in relevant part, that "the request for attorney fees shall be filed no later than 14 days after the court's disposition of the petition for rehearing." Defendants' petition for rehearing *en banc* was denied by this Court on December 14, 2010. The last day for this fee application is thus December 28, 2010.

In order to recover attorneys' fees pursuant to § 1988 a plaintiff must be a "prevailing party." This requirement is clearly met by the Ninth Circuit's September 20, 2010 Opinion declaring the challenged Oregon statutes unconstitutional. *Mendez v. County of San Bernadino*, 540 F.3d 1109, 1125 (9th Cir. 2008) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)). The

remaining issue to be addressed is the reasonableness of the fee. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996).

The starting point for any reasonableness determination under § 1988 is the “lodestar” method. *Id.* The lodestar method is computed by multiplying hours reasonably expended by the lawyer’s market rate. *McGrath v. County of Nevada*, 67. F.3d 248, 252 (9th Cir. 1995). While the fee may be further adjusted based upon the twelve-factor test, counsel in this case has decided to minimize controversy by requesting the basic lodestar amount. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (establishing the twelve factors); *Cunningham v. County of Los Angeles*, 879 F.2d 481, 487 (9th Cir. 1988). To the extent that defendants challenge the basic lodestar calculations, however, factors established by *Johnson*, such as the results obtained, the complexity of the case, the special skills of counsel, and the success realized provide strong additional justification and, indeed could warrant a substantial upward adjustment.

Although the relevant community for determining a reasonable hourly rate is usually the forum where the district court is located, “rates outside the forum may be used if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise or specialization required to handle properly the case.” *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (quoting *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)).

Under this test, Michael A. Bamberger clearly meets the standard and his higher requested rate should be used. Mr. Bamberger is one of the leading First Amendment attorneys in the nation. Even more relevant to this case, he is the nation's leading expert on laws, such as those in this case, regarding restrictions on juvenile access to sexually frank material ("harmful to minors" laws). For over 30 years, Mr. Bamberger has litigated such laws and related issues in the U.S. Supreme Court, seven of the Courts of Appeal, thirteen district courts and seven state supreme courts, often representing the institutional Bookseller/Media Plaintiffs. (See Exhibit E). There simply is no one in Oregon with such a depth of experience and knowledge on the federal constitutional issues in this case.

The \$690 rate that is being requested is below the range of \$775 to \$815 billed to Mr. Bamberger's other clients during the relevant time period. A rate of \$600 per hour for Mr. Bamberger has been approved by both the District of South Carolina (for services rendered eight years ago in 2002) and the Southern District of Indiana (for services rendered in 2008). See Orders annexed hereto as Exhibit F.^{1, 2}

¹ In support of this application, Mr. Bamberger has submitted a declaration which is attached hereto as Exhibit D. For further evidence of the reasonableness of Mr. Bamberger's requested rate, please see Exhibit G, Declaration of Jonathan Bloom in support of Mr. Bamberger's requested rate.

² Applying the Oregon State Bar 2007 Economic Survey ("Bar Survey"), using the 95th percentile to persons who have practiced over thirty years, the applicable hourly rate would be \$461.

Rachel Balaban (currently a litigation partner at Scarola Ellis LLP) was a partner at Sonnenschein Nath & Rosenthal LLP during this litigation. Due to her vast experience in First Amendment law -- outlined more fully in Ms. Balaban's declaration, Exhibit J -- plaintiff is requesting fees for her services at the hourly rate of \$500. Applying the Bar Survey using the 95th percentile to persons who have practiced in the range of seven to nine years, the applicable rate would be \$360. Ms. Balaban's legal services were valued at \$465 per hour by the United States District Court for the Southern District of Indiana in 2008. (See Exhibit F). Ms. Balaban played an integral role in plaintiffs' ultimate legal victory as she brought extensive experience to the table, having represented various media entities in First Amendment litigation.

Ms. Balaban worked closely with M. Bamberger on First Amendment litigation from 2004 until 2008. This application and Mr. Bamberger's declaration provide substantial evidence that he is one of the leading First Amendment lawyers in the nation. Due to his expertise, plaintiffs' counsel was able to handle this complex case in an efficient manner, drawing on experience and knowledge gained from previous cases. The same is true for Ms. Balaban. Her experience working along side Mr. Bamberger provided her with the necessary skills to handle the issues presented. Therefore, this Court should apply the higher rate requested for her services.

Richard M. Zuckerman has been a practicing litigator for almost thirty-five years. As a result of Mr. Zuckerman's experience litigating First Amendment cases and his extensive federal appellate knowledge, plaintiff is requesting fees for his services at the hourly rate of \$600, which is significantly less than his regular billing rates, which range from \$730 to \$810. Applying the Bar Survey using the 95th percentile to persons who have practiced for over thirty years, the applicable rate would be \$461.

Mr. Zuckerman began working on this case at the appellate level. He is the Co-Author of *Appeals to the Second Circuit* (7th Ed.), published by the Association of the Bar of the City of New York. His appellate experience, particularly at the federal level, is vast. In addition, Mr. Zuckerman has been working with Michael Bamberger on First Amendment issues, often representing members of the Media Coalition. Mr. Zuckerman has served as *pro bono* counsel to Human Rights Watch for over the past decade. In this capacity he counsels the organization on many complex First Amendment matters. This Court should apply the higher rate requested for Mr. Zuckerman's services due to his breadth of federal appellate and First Amendment experience.³

³ In support of this application, Mr. Zuckerman has submitted a declaration which is attached hereto as Exhibit H. For further evidence of the reasonableness of Mr. Zuckerman's requested rate, please see Exhibit I, Declaration of Stephen E. Jenkins in support of Mr. Zuckerman's requested rate.

Plaintiffs acknowledge that pursuant to the Practice Tip to District of Oregon Local Rule 54-3, the benchmark the district court would use for a reasonable hourly rate is the most recent Bar Survey.⁴ Through this Application, and supporting declarations, Bookseller/Media Plaintiffs request higher hourly rates for Mr. Bamberger, Ms. Balaban and Mr. Zuckerman based on specialized experience in the field of First Amendment litigation, including in the field of “harmful to minors” laws.

In addition to Mr. Bamberger, Mr. Zuckerman and Ms. Balaban, a number of other attorneys and paralegals contributed to this case. The table below indicates the individuals’ name, position and requested rate.

Name	Position	Billing
Zhubin Parang ⁵	Associate	\$216
Matthew Diament	Associate	\$216
Beatrice Ifshin	Legal Assistant (25 years experience)	\$150
Robert Adler	Summer Associate	\$100

⁴ The most recent version of the Oregon State Bar Economic Survey was published in December 2007. Available at http://www.osbar.org/_docs/resources/07EconSurvey.pdf.

⁵ Using the Bar Survey and applying the 95th percentile for attorneys with 0-3 years of experience, Mr. Parang’s and Mr. Diament’s requested rate is \$216 (substantially lower than the \$330 hourly rate the firm charged to other clients for Mr. Parang’s legal services and the \$315 hourly rate the firm charges to other clients for Mr. Diament’s legal services).

OVERVIEW OF ATTORNEYS' FEES SOUGHT

The following is a brief overview of the fees requested for SNR Denton US LLP (known as Sonnenschein Nath & Rosenthal LLP until Sept. 30, 2010). For convenience and organization the case been divided generally into several phases. The divisions between the phases are not sharp and the purpose is to give the Court an idea of the general development of the case. This section addresses all legal services provided, both at the district court level and in the Court of Appeals proceeding.

A detailed schedule of legal services provided by SNR Denton US LLP throughout this litigation is annexed hereto as Exhibit A. In compiling this Application plaintiffs' counsel exercised billing judgment in eliminating time entries that were not deemed appropriate, such as time expended by a first amendment litigation partner in preparation for oral argument. Calls and conferences with co-counsel, where not otherwise specifically designated, involved discussions of strategy and status.

I. DISTRICT COURT PROCEEDINGS

1. Preparing the Complaint and the Initial Motion for Preliminary Injunction

The first phase of the litigation involved preparing, drafting and filing the complaint in the United States District Court for the District of Oregon for Bookseller/Media Plaintiffs, as well as ACLU of Oregon, Candace Morgan,

Planned Parenthood of the Columbia/Willamette, Inc. and Cascade AIDS Project (“Other Plaintiffs”) represented by Stoel Rives LLP. Due to the complex nature of this action, considerable time was devoted to preparing the complaint. As the fee claims submitted show, this was a substantial task and involved focused legal and factual research related to the challenged Oregon statutes, working in conjunction with P.K. Runkles-Pearson of Stoel Rives LLP, counsel for Other Plaintiffs. Throughout the drafting and preparation of the complaint, plaintiffs’ counsel operated efficiently by making use of information from similar cases previously resolved in a number of other jurisdictions. The Complaint for Declaratory and Injunctive Relief was filed in the District Court on April 25, 2008.

Along with the complaint, an initial motion for a preliminary injunction was filed. The motion was accompanied by a fully briefed memorandum of law, and numerous factual declarations in support of a preliminary injunction. Drafting this motion and the supporting papers was a substantial undertaking, and SNR Denton worked in conjunction with counsel for Other Plaintiffs.

The fees claimed by SNR Denton for this portion of the case are as follows:

<u>SNR Denton Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Fees</u>
M. Bamberger	33.5	\$690	\$23,115.00
R. Balaban	118.9	\$500	\$59,450.00
Z. Parang	8.7	\$216	\$1,879.20
Subtotal	161.1		\$84,444.20

2. Preliminary Injunction: Briefing and Argument

The next phase in prosecuting this case was briefing and arguing the preliminary injunction motion in the district court. This phase required a thorough analysis of defendants' opposition papers and the preparation and drafting of plaintiffs' reply brief. In addition, oral argument was held to decide the preliminary injunction application, which required further substantial preparation. Michael Bamberger presented oral argument on June 23, 2008 for all plaintiffs, including those represented by Stoel Rives LLP.

The fees claimed by SNR Denton for this portion of the case are as follows:

<u>SNR Denton Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Fees</u>
M. Bamberger	41.3	\$690	\$28,497.00
R. Balaban	18.3	\$500	\$9,150.00
Subtotal	59.6		\$37,647.00

3. Request for Declaration of Unconstitutionality and Permanent Injunction: Briefing and Argument

After plaintiffs' application for a preliminary injunction was denied, it became necessary for plaintiffs to submit further papers requesting both a declaration of unconstitutionality and a permanent injunction. This phase required a full briefing of the legal issues, preparation of expert and witness declarations, analysis of defendants' brief opposing a permanent injunction and the drafting and filing of a reply brief. Ms. Runkles-Pearson presented oral argument at the hearing

on the merits held on October 3, 2008 for all plaintiffs, including those represented by SNR Denton.

The fees claimed by SNR Denton for this portion of the case are as follows:

<u>SNR Denton Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Fees</u>
M. Bamberger	40.8	\$690	\$28,152.00
R. Balaban	27.2	\$500	\$13,600.00
Subtotal	68.0		\$41,752.00
SUBTOTAL FOR FEES: DISTRICT COURT			\$163,843.20

II. NINTH CIRCUIT PROCEEDINGS

4. Appeal to the Ninth Circuit: Briefing and Argument

Following the District Court's order of December 12, 2008 denying plaintiffs' motion for a declaration of unconstitutionality and a permanent injunction, plaintiffs timely commenced an appellate proceeding in the Ninth Circuit.

The two sets of plaintiffs in this litigation -- the SNR Denton Bookstore/Media Plaintiffs and the ACLU/health educator Other Plaintiffs -- filed separate notices of appeal because the District Court decision dealt differently with them. However, at the onset of the appellate proceeding plaintiffs believed that in the interest of judicial efficiency the cases should be combined for appellate record and hearing purposes. This decision required the filing of a Motion for Leave to

File a Single Excerpt of Record and for Combined Oral Argument and later a Motion for Reconsideration on the same issue.

The preparation of SNR Denton's plaintiffs-appellants' opening brief involved legal research and a comprehensive briefing of the legal issues brought up on appeal. Further, this stage of the litigation required a thorough study and analysis of defendants' answering brief, researching and drafting the reply brief and preparation for oral argument. Oral argument was heard in the Ninth Circuit on June 8, 2010. Michael Bamberger presented oral argument as to the federal constitutional issues.

The fees claimed by SNR Denton for this portion of the case are as follows:

<u>SNR Denton Attorney/Paralegal</u>	<u>Hours</u>	<u>Rate</u>	<u>Fees</u>
M. Bamberger	61.5	\$690	\$42,435.00
R. Zuckerman	29.8	\$600	\$17,880.00
B. Ifshin	21.7	\$150	\$3,255.00
Subtotal	113.0		\$63,570.00

5. Post-Appeal Motions

After the conclusion of oral argument defendants filed a motion to certify a question to the Oregon Supreme Court. This filing prompted further legal work in this case including analysis of defendants' motion, legal research regarding the issues in question, preparation of a response to defendants' motion, and evaluation of defendants' reply papers. Despite the Ninth Circuit's opinion of September 20,

2010 finding the statutes unconstitutional, defendants filed a petition for rehearing *en banc* with a suggestion that the Court certify questions to the Oregon Supreme Court. This petition was denied on December 14, 2010.

The fees claimed by SNR Denton for this portion of the case are as follows:

<u>SNR Denton Attorney/Paralegal</u>	<u>Hours</u>	<u>Rate</u>	<u>Fees</u>
M. Bamberger	6.6	\$690	\$4,554.00
R. Zuckerman	2.6	\$600	\$1,560.00
R. Adler	8.1	\$100	\$810.00
Subtotal	17.3		\$6,924.00

Pursuant to Ninth Circuit Rule 39-1.6, Ninth Circuit Form 9 is annexed hereto as Exhibit C. Fees requested for work at the District Court level are *not* included in this form.

6. Initial Preparation of the Fee Application

This has been a complex case with a lengthy record of activity by counsel. Plaintiffs respectfully request that this Court award attorneys fees for preparing the current application. The principle attorney that worked on the fee application was Matthew R. Diament, an associate in SNR Denton's litigation department. He graduated from Binghamton University, cum laude, in 2003, and received his law degree from Benjamin N. Cardozo School of Law, cum laude, in 2009. He was admitted to New York bar in March 2010. Using the Bar Survey and applying the

95th percentile, Mr. Diament's rate is \$216 (substantially lower than the \$315 hourly rate the firm charges to other clients for Mr. Diament's legal services).

The fees claimed by SNR Denton for this portion of the case are as follows:

<u>SNR Denton Attorney/Paralegal</u>	<u>Hours</u>	<u>Rate</u>	<u>Fees</u>
M. Bamberger	5.3	\$690	\$3,657.00
R. Zuckerman	4.8	\$600	\$2,880.00
M. Diament	51.1	\$216	\$11,037.60
Subtotal	61.2		\$17,574.60
SUBTOTAL FOR FEES: NINTH CIRCUIT			\$88,068.60

TOTAL FEES

Plaintiff respectfully requests attorneys' fees in the **total amount of \$251,911.80** for services provided in the District Court and Court of Appeals proceedings.

EXPENSES

Duplicating, messenger and courier, travel, computer research and court expenses were incurred in connection with SNR Denton's work in this action. Full compensation of these reasonable and necessary expenses in the amount of **\$9,776.54** is requested. An itemized list of these expenses, broken down by District Court proceedings and Ninth Circuit proceedings, is attached hereto as Exhibit B.

All of these expenses are the sort that are normally billed to SNR Denton's clients as they are incurred, since these types of expenses are not included as overhead in our attorney fee billing structure.

EXHIBITS

Plaintiffs have attached the following documentation to the show the reasonableness of their efforts, and the reasonableness of the hourly rates requested, in both the district court and the Court of Appeals:

<u>Exhibit</u>	<u>Description</u>
A	Detailed log of services
B	List of expenses
C	Ninth Circuit Form 9
D	Declaration of Michael A. Bamberger
E	“Harmful to Minors” cases litigated by Michael A. Bamberger
F	Orders from District of South Carolina and Southern District of Indiana
G	Declaration of Jonathan Bloom
H	Declaration of Richard M. Zuckerman
I	Declaration of Stephen E. Jenkins
J	Declaration of Rachel G. Balaban

CONCLUSION

The time spent by plaintiffs' counsel, SNR Denton US LLP, was reasonable, their rates are reasonable and the expenses incurred are reasonable. Therefore, for the reasons set forth above, plaintiffs' application for attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 should be granted in the amounts set forth above.

Dated: December 27, 2010

s/ Michael A. Bamberger

Michael A. Bamberger
SNR Denton US LLP
1221 Avenue of the Americas
New York, NY 10020-1089
(212)768-6700

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the
Appellate CM/ECF System

U.S. Court of Appeals Docket Number: 09-35153

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 27, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: s/Michael A. Bamberger

EXHIBIT A

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
11/28/2007	R. Balaban	1	Call with Oregon American Civil Liberties Union (ACLU); review summary of issues and analyze same.	\$500.00	\$500.00
11/28/2007	M. Bamberger	2.5	Conference call with Oregon ACLU; review ACLU memo.	\$690.00	\$1,725.00
11/30/2007	M. Bamberger	0.3	Call with client discussing prior conference call.	\$690.00	\$207.00
12/5/2007	M. Bamberger	0.7	Draft outline for Complaint.	\$690.00	\$483.00
12/13/2007	M. Bamberger	0.4	Conference call with Martha Walters (counsel for other plaintiffs) re: draft complaint.	\$690.00	\$276.00
12/24/2007	M. Bamberger	2.5	Work on complaint.	\$690.00	\$1,725.00
12/26/2007	M. Bamberger	2.3	Work on complaint.	\$690.00	\$1,587.00
12/27/2007	M. Bamberger	1.5	Work on complaint.	\$690.00	\$1,035.00
12/28/2007	M. Bamberger	1.2	Work on complaint.	\$690.00	\$828.00
1/2/2008	M. Bamberger	0.8	Draft memo requesting approval for suit.	\$690.00	\$552.00
1/4/2008	R. Balaban	2.5	Conference call with client and representatives for other plaintiffs re: draft complaint and other related issues; review relevant materials.	\$500.00	\$1,250.00
1/4/2008	M. Bamberger	1	Conference call with case team re: draft complaint.	\$690.00	\$690.00
1/9/2008	M. Bamberger	0.3	Collect forms of affidavits for Oregon.	\$690.00	\$207.00
1/9/2008	R. Balaban	1	Analyze and review case papers from other jurisdictions, including Arkansas and Ohio; review affidavits relating to preliminary injunction.	\$500.00	\$500.00
1/10/2008	R. Balaban	1.3	Read and analyze papers re: preliminary injunction.	\$500.00	\$650.00
1/11/2008	R. Balaban	1.8	Read and analyze affidavits from prior cases; outline key points for Oregon case.	\$500.00	\$900.00
1/14/2008	R. Balaban	0.8	Analyze issues for affidavits for preliminary injunction and follow-up re: same.	\$500.00	\$400.00
1/17/2008	R. Balaban	1.8	Review case documents related to affidavits; Outline issues re: same.	\$500.00	\$900.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
1/23/2008	R. Balaban	0.8	Draft affidavit of C. Finan (American Booksellers for Free Expression) for preliminary injunction.	\$500.00	\$400.00
1/24/2008	R. Balaban	4.5	Draft and edit C. Finan affidavit; analyze Oregon statute; draft complaint and other relevant papers.	\$500.00	\$2,250.00
1/24/2008	M. Bamberger	0.5	Review and comment on C. Finan affidavit.	\$690.00	\$345.00
1/25/2008	M. Bamberger	2.5	Call with R. Balaban in preparation for conference call; conference call with client and representatives of other plaintiffs re: complaint and preliminary injunction motion.	\$690.00	\$1,725.00
1/25/2008	R. Balaban	4	Draft and edit C. Finan affidavit; conference call with attorneys re: complaint and preliminary injunction; call with M. Bamberger re: same.	\$500.00	\$2,000.00
1/29/2008	M. Bamberger	1.3	Work on preliminary injunction brief; Research re: same.	\$690.00	\$897.00
2/4/2008	R. Balaban	3.8	Analyze issues and draft J. Krug (Freedom to Read Foundation) affidavit; analyze topics for other plaintiff affidavits.	\$500.00	\$1,900.00
2/4/2008	M. Bamberger	0.1	Emails with clients re: change of counsel for other plaintiffs.	\$690.00	\$69.00
2/5/2008	R. Balaban	4.8	Analyze Oregon statute; work on draft complaint and J. Krug affidavit of J. Krug; communicate with M. Bamberger re: case issues.	\$500.00	\$2,400.00
2/6/2008	R. Balaban	3.8	Edit J. Krug Affidavit; review complaint; follow-up with M. Bamberger re: complaint; draft A. Adler (Association of American Publishers) affidavit and follow up re: same.	\$500.00	\$1,900.00
2/7/2008	R. Balaban	0.8	Communicate with Client re: case documents.	\$500.00	\$400.00
2/11/2008	R. Balaban	3	Draft and edit A. Adler affidavit; Analyze affidavits for additional plaintiffs.	\$500.00	\$1,500.00
2/13/2008	M. Bamberger	0.5	Conference call with Katherine McDowell;	\$690.00	\$345.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
2/19/2008	R. Balaban	1.5	Analyze issues re: preliminary injunction papers; draft plaintiff affidavits and analyze issues re: same.	\$500.00	\$750.00
2/20/2008	R. Balaban	2.5	Review papers from Oregon counsel ; edit draft complaint; communicate with C. Brownstein (Comic Book Defense Legal Fund) re: same; analyze current draft affidavits.	\$500.00	\$1,250.00
2/26/2008	M. Bamberger	0.2	Emails with various plaintiffs.	\$690.00	\$138.00
2/29/2008	M. Bamberger	1.5	Work on preliminary injunction papers and complaint.	\$690.00	\$1,035.00
2/29/2008	R. Balaban	2.5	Work on case documents and various follow-up re: same.	\$500.00	\$1,250.00
3/3/2008	R. Balaban	1	Review and analyze plaintiff affidavits and follow-up with M. Bamberger re: same.	\$500.00	\$500.00
3/3/2008	M. Bamberger	3.3	Revise and edit complaint and preliminary injunction memorandum of law.	\$690.00	\$2,277.00
3/4/2008	R. Balaban	3.8	Draft A. Adler and M. Powell's affidavits, including AAP and Powell's; analyze relevant case papers re: same; review Powell's website for affidavit content.	\$500.00	\$1,900.00
3/5/2008	R. Balaban	5.8	Draft affidavits of Powell Bookstore and Charles Brownstein; review and edit all plaintiff affidavits; conference with M. Bamberger and Z. Parang re: plaintiff affidavits; telephone call with client and C. Brownstein re: complaint and case status; review latest complaint and preliminary injunction motion and edit same.	\$500.00	\$2,900.00
3/5/2008	M. Bamberger	0.5	Conference with R. Balaban and Z. Parang re: plaintiff affidavits.	\$690.00	\$345.00
3/5/2008	Z. Parang	1.5	Conference with M. Bamberger and R. Balaban re: plaintiff affidavits.	\$216.00	\$324.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
3/7/2008	M. Bamberger	1	Conference call with Oregon ACLU and local counsel for other plaintiffs; revise brief and case documents.	\$690.00	\$690.00
3/10/2008	M. Bamberger	0.3	Email to counsel for other plaintiffs.	\$690.00	\$207.00
3/11/2008	Z. Parang	3.4	Draft plaintiff affidavits.	\$216.00	\$734.40
3/12/2008	M. Bamberger	0.8	Memo on pros and cons of venue; calls to D. Horowitz.	\$690.00	\$552.00
3/12/2008	Z. Parang	3.8	Legal research re: standing of associations bringing suit under Oregon declaratory judgment statute on behalf of members; draft memorandum summarizing results of research.	\$216.00	\$820.80
3/14/2008	M. Bamberger	0.2	Emails with counsel for other plaintiffs.	\$690.00	\$138.00
3/17/2008	M. Bamberger	0.3	Call with Oregon counsel for other plaintiffs re: draft complaint and preliminary injunction papers.	\$690.00	\$207.00
3/17/2008	R. Balaban	2	Conference call with Oregon counsel; review and analyze case matters and correspondence; analyze next steps and draft litigation papers.	\$500.00	\$1,000.00
3/19/2008	R. Balaban	1.8	Conference call with counsel for Dark Horse Comics; Read and analyze latest draft complaint and preliminary injunction papers.	\$500.00	\$900.00
3/19/2008	M. Bamberger	0.7	Revise draft complaint and preliminary injunction motion.	\$690.00	\$483.00
3/20/2008	R. Balaban	2.5	Meet with M. Bamberger on various case issues; analyze case issues and communicate with client and counsel re: same; read current papers and edit same.	\$500.00	\$1,250.00
3/20/2008	M. Bamberger	0.2	Conference with R. Balaban.	\$690.00	\$138.00
3/21/2008	R. Balaban	4	Draft and edit K. Lizzi (Dark Horse Comics) declaration; edit preliminary injunction brief; communicate with M. Bamberger on various case issues.	\$500.00	\$2,000.00
3/26/2008	M. Bamberger	0.2	Call P.K. Runkles-Pearson (counsel for other plaintiffs) re: draft complaint.	\$690.00	\$138.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
3/27/2008	R. Balaban	2	Incorporate various client changes to declarations and follow-up re: same.	\$500.00	\$1,000.00
3/27/2008	M. Bamberger	0.2	Call Mike Powell of Powell's Books (lead plaintiff).	\$690.00	\$138.00
3/28/2008	M. Bamberger	1	Email re: fees; review and send out declarations.	\$690.00	\$690.00
3/28/2008	R. Balaban	2.5	Draft and edit plaintiff declarations; communicate with clients re: same; analyze filing issues	\$500.00	\$1,250.00
3/31/2008	R. Balaban	0.8	Communicate with client and representatives of other plaintiffs re: case status; communicate with D. Horowitz and Oregon ACLU re: complaint and filing.	\$500.00	\$400.00
4/1/2008	R. Balaban	0.8	Analyze current papers including draft complaint and preliminary injunction motion; follow-up re: same.	\$500.00	\$400.00
4/2/2008	R. Balaban	3	Communicate with various plaintiffs; edit and revise complaint and preliminary injunction papers.	\$500.00	\$1,500.00
4/3/2008	R. Balaban	3	Communicate with plaintiffs re: plaintiff declarations; edit plaintiff declarations; analyze open case issues.	\$500.00	\$1,500.00
4/4/2008	R. Balaban	5	Edit declarations and preliminary injunction papers; conference call with team; analyze open issues; various follow-up e-mail communications with team; various telephone calls and e-mails with client on declarations.	\$500.00	\$2,500.00
4/10/2008	R. Balaban	6	Edit and finalize multiple plaintiff declarations and engagement letters; communicate with local counsel re: same; analyze issues related to filing complaint; communicate with M. Bamberger re: filing status.	\$500.00	\$3,000.00
4/10/2008	M. Bamberger	0.5	Review case documents; conference with R. Balaban re: same.	\$690.00	\$345.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
4/11/2008	R. Balaban	6	Edit and finalize declarations and retainer letters for plaintiffs; analyze local counsel's changes and comments to draft complaint; analyze open case matters.	\$500.00	\$3,000.00
4/14/2008	R. Balaban	4.8	Revise and finalize plaintiff declarations and retainer agreements; review current draft of complaint and preliminary injunction papers; communicate with client re: same.	\$500.00	\$2,400.00
4/14/2008	M. Bamberger	1.5	Call Annie Bloom's (a client); send declaration to M. Powell (a client); work on complaint.	\$690.00	\$1,035.00
4/15/2008	M. Bamberger	0.4	Conference call with client and representatives of other plaintiffs re: filing issues.	\$690.00	\$276.00
4/15/2008	R. Balaban	1.5	Conference call with client and representatives of other plaintiffs on media and filing issues and follow-up re: same; communicate with various plaintiffs re: declarations.	\$500.00	\$750.00
4/16/2008	R. Balaban	4.3	Review case materials, including attorney agreement and communicate with M. Bamberger and local counsel re: same; edit complaint; edit declarations and follow-up with plaintiffs; read preliminary injunction brief; review local counsel changes to same; begin editing same.	\$500.00	\$2,150.00
4/17/2008	R. Balaban	3.8	Draft and edit J. L. Rogers (Good Food & Hungry Minds, LLC) declaration and other bookseller declarations; follow-up with M. Bamberger and local counsel re: filing; edit complaint and analyze open issues.	\$500.00	\$1,900.00
4/17/2008	M. Bamberger	0.8	Revise preliminary injunction memorandum of law.	\$690.00	\$552.00
4/18/2008	R. Balaban	3	Edit and finalize papers for filing; communicate with case team and various plaintiffs re: declarations.	\$500.00	\$1,500.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
4/21/2008	R. Balaban	3	Edit and finalize complaint and preliminary injunction papers and communicate with M. Bamberger re: same.	\$500.00	\$1,500.00
4/21/2008	M. Bamberger	1.5	Revise final versions of complaint and preliminary injunction papers; communicate with R. Balaban re: same.	\$690.00	\$1,035.00
4/22/2008	R. Balaban	2	Finalize complaint and preliminary injunction papers; circulate the same to plaintiffs; follow-up with plaintiffs on same; attention to filing issues; communicate with local counsel re: declarations.	\$500.00	\$1,000.00
4/23/2008	R. Balaban	1.5	Analyze plaintiff declarations; communicate with M. Bamberger re: same; communicate with Colette Bookstore re: same.	\$500.00	\$750.00
4/24/2008	R. Balaban	1.8	Communicate with plaintiff bookstores on various matters; analyze declarations and papers for filing.	\$500.00	\$900.00
4/25/2008	R. Balaban	1	Finalize and proofread papers for filing; communicate with client and representatives for other plaintiffs on phone; email re: filing.	\$500.00	\$500.00
4/28/2008	R. Balaban	1.5	Read and analyze final pleadings and response from state counsel; communicate with local counsel re: same; communicate with various plaintiffs re: case filing and analyze next steps.	\$500.00	\$750.00
5/5/2008	R. Balaban	0.5	Analyze next steps in litigation and draft emails re: same.	\$500.00	\$250.00
5/5/2008	M. Bamberger	0.5	Conference call with Attorney General; emails.	\$690.00	\$345.00
5/9/2008	M. Bamberger	0.3	Schedule court hearing re: preliminary injunction motion.	\$690.00	\$207.00
5/14/2008	M. Bamberger	0.3	Analyze issues re: amendment complaint.	\$690.00	\$207.00
5/20/2008	R. Balaban	0.8	Analyze case matters; communicate with P. K. Runkles-Pearson re: Williams case.	\$500.00	\$400.00
5/27/2008	R. Balaban	0.8	Analyze case matters including status of plaintiffs; review emails re: same.	\$500.00	\$400.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
6/2/2008	R. Balaban	0.3	Review and analyze case matters including status of plaintiffs; review emails re: same.	\$500.00	\$150.00
6/3/2008	M. Bamberger	1	Read and review State's papers re: preliminary injunction motion.	\$690.00	\$690.00
6/4/2008	M. Bamberger	1.8	Conference call with clients and counsel/representatives of other plaintiffs re: State's papers and strategy.	\$690.00	\$1,242.00
6/4/2008	R. Balaban	2.8	Read and analyze state's brief and outline arguments for reply; meet with M. Bamberger and conference call with team on same.	\$500.00	\$1,400.00
6/5/2008	M. Bamberger	2	Work on preliminary injunction reply brief.	\$690.00	\$1,380.00
6/6/2008	M. Bamberger	3	Work on brief; emails.	\$690.00	\$2,070.00
6/8/2008	M. Bamberger	1.5	Work on brief.	\$690.00	\$1,035.00
6/9/2008	R. Balaban	0.5	Analyze issues re: reply brief and related documents.	\$500.00	\$250.00
6/9/2008	M. Bamberger	2	Work on reply brief; emails re: same.	\$690.00	\$1,380.00
6/10/2008	M. Bamberger	4	Work on reply brief; send out rough draft of brief to clients and counsel/representatives for other plaintiffs.	\$690.00	\$2,760.00
6/10/2008	R. Balaban	2	Read and edit reply brief and analyze same.	\$500.00	\$1,000.00
6/11/2008	R. Balaban	1.5	Read and edit section of reply brief drafted by counsel.	\$500.00	\$750.00
6/11/2008	M. Bamberger	1.5	Work on revisions of draft; review P.K. Runkles-Pearson draft.	\$690.00	\$1,035.00
6/12/2008	M. Bamberger	3	Conference call with clients and counsel/representatives for other plaintiffs; work on reply on brief; consideration of relief; work on A. Meyer (ACLU) declaration.	\$690.00	\$2,070.00
6/12/2008	R. Balaban	0.8	Analyze scope of motion of preliminary injunction; emails clients and counsel/representatives for other plaintiffs re: same; review and revise A. Meyer declaration.	\$500.00	\$400.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
6/13/2008	R. Balaban	3.5	Read and edit reply brief; meet with M. Bamberger re: same; review A. Meyer declaration.	\$500.00	\$1,750.00
6/13/2008	M. Bamberger	3.8	Revise reply brief; conference with R. Balaban re: same.	\$690.00	\$2,622.00
6/16/2008	M. Bamberger	0.5	Proofread final version of reply brief in support of preliminary injunction; communicate with R. Balaban re: same.	\$690.00	\$345.00
6/16/2008	R. Balaban	1.8	Read, edit and finalize reply brief; communicate with M. Bamberger re: same.	\$500.00	\$900.00
6/19/2008	M. Bamberger	2.5	Prepare for oral argument.	\$690.00	\$1,725.00
6/20/2008	M. Bamberger	1.8	Prepare for oral argument.	\$690.00	\$1,242.00
6/20/2008	R. Balaban	1.5	Analyze issues for oral argument; review key documents, including declarations; communicate with M. Bamberger re: same; emails with case team.	\$500.00	\$750.00
6/22/2008	M. Bamberger	4.8	Prepare for oral argument; communicate with local counsel re: oral argument.	\$690.00	\$3,312.00
6/23/2008	M. Bamberger	7	Appearance at court hearing.	\$690.00	\$4,830.00
6/24/2008	R. Balaban	0.8	Analyze issues relating to hearing; determine next steps in case; communicate with case team re: same.	\$500.00	\$400.00
6/25/2008	R. Balaban	1.5	Analyze case issues and next steps for permanent injunction; re: same.	\$500.00	\$750.00
6/26/2008	R. Balaban	1.8	Analyze issues related to permanent injunction papers; analyze declarations for same; conference call with M. Bamberger and counsel for other plaintiffs re: same.	\$500.00	\$900.00
6/26/2008	M. Bamberger	1.2	Conference call with R. Balaban and counsel for other plaintiffs re: permanent injunction application.	\$690.00	\$828.00
7/1/2008	M. Bamberger	1	Work on brief.	\$690.00	\$690.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
7/1/2008	R. Balaban	0.8	Analyze issues related to permanent injunction motion; review additional information from booksellers; read and review Oregon counsel outline.	\$500.00	\$400.00
7/2/2008	R. Balaban	3	Read and analyze transcript, review outline from local counsel and relevant case law; communicate with M. Bamberger re: brief.	\$500.00	\$1,500.00
7/3/2008	R. Balaban	0.8	Read and analyze hearing transcript; analyze case law for permanent injunction brief.	\$500.00	\$400.00
7/10/2008	R. Balaban	0.5	Analyze legal issues for permanent injunction brief; communicate with M. Bamberger re: same.	\$500.00	\$250.00
7/10/2008	M. Bamberger	0.2	Conference with R. Balaban on legal issues.	\$690.00	\$138.00
7/11/2008	R. Balaban	2.8	Meet with case team re: arguments for brief; read and analyze Maynard case and hearing transcript; analyze legislative history issues and follow-up with case team re: same.	\$500.00	\$1,400.00
7/11/2008	M. Bamberger	3	Work on brief; conference call with counsel for other plaintiffs; email to P.K. Runkles-Pearson.	\$690.00	\$2,070.00
7/14/2008	M. Bamberger	1	Work on brief in support of motion for permanent injunction and declaration of unconstitutionality.	\$690.00	\$690.00
7/15/2008	M. Bamberger	1	Work on brief.	\$690.00	\$690.00
7/15/2008	R. Balaban	1.8	Analyze issues for brief; analyze and listen to legislative hearings.	\$500.00	\$900.00
7/16/2008	M. Bamberger	1	Work on brief.	\$690.00	\$690.00
7/17/2008	M. Bamberger	1.3	Call with P.K. Runkles-Pearson re: permanent injunction brief; work on brief.	\$690.00	\$897.00
7/17/2008	R. Balaban	0.8	Analyze issues for brief and legislative hearings.	\$500.00	\$400.00
7/18/2008	M. Bamberger	2	Work on brief.	\$690.00	\$1,380.00
7/21/2008	M. Bamberger	1.5	Work on brief.	\$690.00	\$1,035.00
7/21/2008	R. Balaban	0.8	Read and analyze portion of draft brief on permanent injunction and follow-up with M. Bamberger re: same.	\$500.00	\$400.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
7/22/2008	M. Bamberger	1	Work on brief.	\$690.00	\$690.00
7/23/2008	M. Bamberger	1	Work on brief.	\$690.00	\$690.00
7/24/2008	M. Bamberger	1	Work on brief.	\$690.00	\$690.00
7/25/2008	M. Bamberger	1	Work on brief.	\$690.00	\$690.00
7/28/2008	R. Balaban	1.8	Read, analyze and edit current draft brief; conference call with M. Bamberger and P.K. Runkles-Pearson on case issues.	\$500.00	\$900.00
7/28/2008	M. Bamberger	1	Work on brief; conference call with R. Balaban and P.K. Runkles-Pearson re: same.	\$690.00	\$690.00
7/29/2008	M. Bamberger	1.3	Work on brief and supplemental declaration for C. Finan.	\$690.00	\$897.00
7/29/2008	R. Balaban	3	Draft and edit summary of argument; read and analyze materials re: same; communicate with client and M. Bamberger on issues related to brief; communicate with local counsel re: brief.	\$500.00	\$1,500.00
7/30/2008	M. Bamberger	1	Work on brief.	\$690.00	\$690.00
7/30/2008	R. Balaban	1	Review changes to brief and follow-up re: same; review e-mails from client, local counsel and follow-up re: same.	\$500.00	\$500.00
7/31/2008	R. Balaban	1.5	Review and analyze permanent injunction motion papers in preparation of filing.	\$500.00	\$750.00
7/31/2008	M. Bamberger	0.2	Review and comment on motion papers.	\$690.00	\$138.00
8/13/2008	M. Bamberger	0.7	Conference call with clients.	\$690.00	\$483.00
8/20/2008	M. Bamberger	0.9	Conference call with clients and counsel for other plaintiffs; email re: outstanding order.	\$690.00	\$621.00
9/2/2008	R. Balaban	0.6	Read and analyze state's memorandum of law in opposition to permanent injunction.	\$500.00	\$300.00
9/3/2008	R. Balaban	2	Conference with M. Bamberger, counsel for other plaintiffs and client re: reply brief; analyze reply points and follow-up re: same.	\$500.00	\$1,000.00
9/3/2008	M. Bamberger	1	Conference with R. Balaban, counsel for other plaintiffs and client re: State's brief; draft bullet points and emails re: same.	\$690.00	\$690.00

DISTRICT COURT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
9/4/2008	M. Bamberger	1.6	Call with counsel for other plaintiffs; emails; revision of bullet points for reply brief; draft brief sections.	\$690.00	\$1,104.00
9/5/2008	M. Bamberger	2	Finalize draft sections of reply brief.	\$690.00	\$1,380.00
9/5/2008	R. Balaban	0.3	Analyze points for reply brief.	\$500.00	\$150.00
9/9/2008	R. Balaban	0.8	Read and edit reply brief.	\$500.00	\$400.00
9/9/2008	M. Bamberger	1.5	Conference call with counsel for other plaintiffs; review and revise draft reply brief.	\$690.00	\$1,035.00
9/10/2008	M. Bamberger	1.7	Get comments from Ming, counsel for other plaintiffs; follow up.	\$690.00	\$1,173.00
9/10/2008	R. Balaban	0.3	Review and analyze communications with counsel for other plaintiffs and proposed changes to brief.	\$500.00	\$150.00
9/11/2008	M. Bamberger	1.4	Work on resolving issues related to reply brief; communicate with P.K. Runkles-Pearson re: same.	\$690.00	\$966.00
9/12/2008	M. Bamberger	1	Finalize reply brief.	\$690.00	\$690.00
9/29/2008	R. Balaban	0.5	Review case papers in preparation for oral argument; communicate with local counsel re: same.	\$500.00	\$250.00
10/1/2008	M. Bamberger	0.1	Email to clients re: oral argument and case status.	\$690.00	\$69.00
10/2/2008	M. Bamberger	4	Meet with P.K. Runkles-Pearson re: preparation for oral argument.	\$690.00	\$2,760.00
10/3/2008	M. Bamberger	3	Appearance at court hearing; email to plaintiffs re: same.	\$690.00	\$2,070.00
10/7/2008	M. Bamberger	0.2	Email to clients re: case status and court hearing.	\$690.00	\$138.00
12/9/2008	M. Bamberger	0.2	Email to P.K. Runkles-Pearson re: case status.	\$690.00	\$138.00
12/12/2008	M. Bamberger	0.8	Review district court opinion and order.	\$690.00	\$552.00
SUBTOTAL FOR DISTRICT COURT PROCEEDINGS		288.7			\$163,843.20

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
12/15/2008	M. Bamberger	0.5	Further review of district court opinion and emails re: same.	\$690.00	\$345.00
12/17/2008	M. Bamberger	1	Draft memorandum to clients re: district court decision.	\$690.00	\$690.00
12/18/2008	R. Zuckerman	0.7	Review and comment on M. Bamberger memo to clients re: district court decision.	\$600.00	\$420.00
12/18/2008	M. Bamberger	0.5	Draft review of district court decision.	\$690.00	\$345.00
12/19/2008	M. Bamberger	0.3	Emails to local counsel re: district court judgment.	\$690.00	\$207.00
12/19/2008	R. Zuckerman	0.2	Emails re: order and judgment; edit proposed Order.	\$600.00	\$120.00
12/24/2008	M. Bamberger	0.5	Address timing issue on notice of appeal with P.K. Runkles-Pearson.	\$690.00	\$345.00
12/29/2008	R. Zuckerman	0.1	Emails re: notice of appeal.	\$600.00	\$60.00
1/9/2009	M. Bamberger	0.6	Calls with co-counsel re: appeal from Oregon decision.	\$690.00	\$414.00
1/9/2009	R. Zuckerman	0.8	Preparation for and conference call with M. Bamberger and counsel for other plaintiffs re: appeal from Oregon decision,	\$600.00	\$480.00
1/20/2009	M. Bamberger	0.3	Draft notice of appeal.	\$690.00	\$207.00
1/24/2009	M. Bamberger	0.2	Emails to counsel for other plaintiffs re: notice of appeal.	\$690.00	\$138.00
1/27/2009	R. Zuckerman	0.9	Review emails re: Ninth Circuit appeal; review issues for Ninth Circuit appeal.	\$600.00	\$540.00
1/31/2009	M. Bamberger	0.3	Draft proposed language for Ninth Circuit docketing statement.	\$690.00	\$207.00
1/31/2009	R. Zuckerman	1.6	Review memorandum on vagueness cases; prepare statement of issues for appeal.	\$600.00	\$960.00
2/1/2009	M. Bamberger	0.3	Email to P.K. Runkles-Pearson re: issues on appeal.	\$690.00	\$207.00

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
2/2/2009	R. Zuckerman	0.3	Revise Statement of Issues for Notice of Appeal; Email to M. Bamberger re: judgment entered below.	\$600.00	\$180.00
2/3/2009	M. Bamberger	1	Email to plaintiffs re: Ninth Circuit appeal; file Notice of Appeal and Ninth Circuit documents.	\$690.00	\$690.00
4/10/2009	M. Bamberger	0.2	Draft email to amicus.	\$690.00	\$138.00
4/16/2009	R. Zuckerman	0.3	Telephone conference with P.K. Runkles-Pearson and M. Bamberger re: issues to be raised on appeal.	\$600.00	\$180.00
4/20/2009	M. Bamberger	1	Work on appellate brief.	\$690.00	\$690.00
4/28/2009	M. Bamberger	0.5	Draft motion to consolidate agreement.	\$690.00	\$345.00
4/29/2009	M. Bamberger	0.6	Review and revise motion to consolidate agreement.	\$690.00	\$414.00
5/4/2009	M. Bamberger	0.1	Review P.K. Runkles-Pearson's comments on motion to consolidate.	\$690.00	\$69.00
5/5/2009	M. Bamberger	0.2	Revise motion to consolidate; communicate with R. Zuckerman and P.K. Runkles-Pearson re: same.	\$690.00	\$138.00
5/5/2009	R. Zuckerman	1	Edit motion to consolidate; conference with M. Bamberger and local counsel re: same.	\$600.00	\$600.00
5/8/2009	M. Bamberger	1	Work on appellate brief.	\$690.00	\$690.00
5/11/2009	M. Bamberger	4	Work on appellate brief.	\$690.00	\$2,760.00
5/12/2009	M. Bamberger	1.3	Address issues related to extension of filing brief; emails re: same; work on appellate brief.	\$690.00	\$897.00
5/13/2009	R. Zuckerman	0.2	Draft notice of appearance in Ninth Circuit.	\$600.00	\$120.00
5/13/2009	M. Bamberger	0.3	Call re: extension of time to file brief; email attorney general re: same.	\$690.00	\$207.00
5/14/2009	M. Bamberger	1	Work on appellate brief.	\$690.00	\$690.00
5/15/2009	M. Bamberger	0.8	Work on appellate brief.	\$690.00	\$552.00
5/18/2009	M. Bamberger	1	Work on appellate brief.	\$690.00	\$690.00
5/19/2009	M. Bamberger	1	Work on appellate brief.	\$690.00	\$690.00
5/19/2009	R. Zuckerman	1	Edit and revise Ninth Circuit brief.	\$600.00	\$600.00

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
5/20/2009	R. Zuckerman	1.3	Review draft Ninth Circuit brief	\$600.00	\$780.00
5/20/2009	M. Bamberger	1	Work on appellate brief; email to-counsel for other plaintiffs re: same.	\$690.00	\$690.00
5/26/2009	M. Bamberger	4	Work on appellate brief.	\$690.00	\$2,760.00
5/27/2009	B. Ifshin	4.7	Work on 9th Cir. brief and conference with copy center re: numbering pages for record.	\$150.00	\$705.00
5/28/2009	R. Zuckerman	4.6	Review and edit draft of Ninth Circuit brief.	\$600.00	\$2,760.00
5/28/2009	B. Ifshin	4.5	Continue work on 9th Cir. Appeal.	\$150.00	\$675.00
5/29/2009	B. Ifshin	7	Work on 9th Cir. brief and conferences with R Zuckerman re: same.	\$150.00	\$1,050.00
5/29/2009	R. Zuckerman	5.8	Draft and revise Ninth Circuit brief.	\$600.00	\$3,480.00
6/1/2009	R. Zuckerman	0.8	Proofread brief; read and review draft ACLU brief.	\$600.00	\$480.00
6/2/2009	B. Ifshin	1.5	Conference with M. Bamberger re: status and schedule of filing brief; determine additional pages of excerpts to the record and changes in pagination of excerpts; cite check additions to brief and edit re same; assemble additional pages to excerpts to the record and change page references in Table of Contents.	\$150.00	\$225.00
6/3/2009	R. Zuckerman	1.2	Review ACLU brief; receive and review Court Order re: consolidation; conference with Oregon counsel; review and edit motion for reconsideration.	\$600.00	\$720.00
6/3/2009	B. Ifshin	4	Work on Ninth Circuit Brief	\$150.00	\$600.00
6/3/2009	M. Bamberger	1	Motion for reconsideration discussions.	\$690.00	\$690.00
6/8/2009	R. Zuckerman	0.7	Prepare and file Notice of Filing of Motion for Reconsideration	\$600.00	\$420.00
6/16/2009	R. Zuckerman	0.1	Emails re: notifications from Court	\$600.00	\$60.00
7/20/2009	M. Bamberger	1	Work on appellate brief; conference with R. Zuckerman re: same.	\$690.00	\$690.00
7/20/2009	R. Zuckerman	0.4	Conference with M. Bamberger re: Ninth Circuit brief; prepare Venn diagram for appellate brief.	\$600.00	\$240.00
7/21/2009	M. Bamberger	1	Work on appellate brief.	\$690.00	\$690.00

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
7/22/2009	M. Bamberger	1	Finalize and file brief in the Ninth Circuit.	\$690.00	\$690.00
7/24/2009	M. Bamberger	0.5	Letter to plaintiffs re: Ninth Circuit brief.	\$690.00	\$345.00
7/27/2009	M. Bamberger	0.2	Call Attorney General re: request for extension;	\$690.00	\$138.00
9/24/2009	M. Bamberger	0.1	Email to M. Casper (Assistant Attorney General).	\$690.00	\$69.00
9/29/2009	R. Zuckerman	2.7	Review Opening Brief, ACLU/CAP Opening Brief, and State Answering Brief in Ninth Circuit; outline issues for Reply Brief.	\$600.00	\$1,620.00
9/29/2009	M. Bamberger	1.5	Review and analyze answering brief; communicate with P.K. Runkles-Pearson re: same.	\$690.00	\$1,035.00
10/2/2009	M. Bamberger	1.1	Email P.K. Runkles-Pearson re: State's brief and reply brief; work on reply brief.	\$690.00	\$759.00
10/3/2009	M. Bamberger	3.8	Work on reply brief.	\$690.00	\$2,622.00
10/4/2009	M. Bamberger	0.8	Work on reply brief.	\$690.00	\$552.00
10/5/2009	M. Bamberger	1.5	Work on reply brief.	\$690.00	\$1,035.00
10/7/2009	M. Bamberger	1	Work on reply brief.	\$690.00	\$690.00
10/8/2009	M. Bamberger	1.5	Review, finalize and file Ninth Circuit reply brief.	\$690.00	\$1,035.00
10/18/2009	R. Zuckerman	0.4	Emails re: filing of reply in Ninth Circuit.	\$600.00	\$240.00
10/19/2009	R. Zuckerman	0.3	Emails re: filing of reply in Ninth Circuit.	\$600.00	\$180.00
1/12/2010	M. Bamberger	0.4	Draft letter to court re: scheduling of hearing.	\$690.00	\$276.00
3/24/2010	M. Bamberger	1.8	Call Ninth Circuit re: postponement of oral argument; work on motion re: same; communicate with P.K. Runkles-Pearson re: postponement.	\$690.00	\$1,242.00
3/25/2010	M. Bamberger	0.8	Complete and file motion to postpone oral argument.	\$690.00	\$552.00
4/30/2010	M. Bamberger	0.3	Review notice of oral argument from Ninth Circuit.	\$690.00	\$207.00
5/20/2010	M. Bamberger	1.3	Draft rule 28(j) letter; draft motion for extended oral argument.	\$690.00	\$897.00
5/21/2010	M. Bamberger	0.3	Finalize and file motion for extended oral argument and rule 28(j) letter.	\$690.00	\$207.00

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
5/30/2010	R. Zuckerman	1.5	Review appeal briefs; prepare for moot court oral argument.	\$600.00	\$900.00
6/1/2010	R. Zuckerman	2.5	Preparation for and participate in moot court session re: oral argument.	\$600.00	\$1,500.00
6/1/2010	M. Bamberger	1.8	Prepare for oral argument; address panel issues; communicate with P.K. Runkles-Pearson re: oral argument.	\$690.00	\$1,242.00
6/3/2010	R. Zuckerman	0.2	Emails re: certification language.	\$600.00	\$120.00
6/3/2010	M. Bamberger	0.5	Address timing of oral argument issues.	\$690.00	\$345.00
6/4/2010	M. Bamberger	0.3	Address certification language issues; conference with R. Zuckerman re: same.	\$690.00	\$207.00
6/4/2010	R. Zuckerman	0.2	Review proposed Certified Question; conference with M. Bamberger re: same.	\$600.00	\$120.00
6/7/2010	M. Bamberger	5	Travel to Portland for Ninth Circuit oral argument; prepare for oral argument; conference with P.K. Runkles-Pearson re: same.	\$690.00	\$3,450.00
6/8/2010	M. Bamberger	4.5	Prepare for and appear at oral argument in the Ninth Circuit.	\$690.00	\$3,105.00
6/9/2010	M. Bamberger	5	Travel home from oral argument.	\$690.00	\$3,450.00
6/14/2010	M. Bamberger	0.6	Read and review Attorney General's motion to certify question to state supreme court.	\$690.00	\$414.00
6/16/2010	M. Bamberger	0.5	Search for cases on non-certification; emails re: same.	\$690.00	\$345.00
6/18/2010	R. Adler	6	Perform legal research re: certifying questions to the state supreme court and abstention doctrines in the Ninth Circuit.	\$100.00	\$600.00
6/18/2010	M. Bamberger	0.2	Email re: proposed brief in response to motion to certify question.	\$690.00	\$138.00
6/20/2010	M. Bamberger	2	Work on response to certification motion.	\$690.00	\$1,380.00
6/21/2010	R. Adler	0.2	Discuss abstention and certification of state questions with M. Bamberger.	\$100.00	\$20.00
6/21/2010	R. Adler	1.5	Edit and revise response to appellees' motion to certify questions to Oregon Supreme Court.	\$100.00	\$150.00

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
6/23/2010	R. Adler	0.4	Shepardize cases for response to motion to certify questions to State Supreme Court of Oregon.	\$100.00	\$40.00
6/23/2010	R. Zuckerman	1.4	Draft and revise response to motion to certify questions to state supreme court; communicate with local counsel re: same.	\$600.00	\$840.00
6/23/2010	M. Bamberger	1.6	Work on response to motion; email with P.K. Runkles-Pearson re: same.	\$690.00	\$1,104.00
6/24/2010	M. Bamberger	1.3	Call P.K. Runkles-Pearson re: response to motion; revise, finalize and file response.	\$690.00	\$897.00
6/24/2010	R. Zuckerman	0.9	Revise response motion to certify questions; review reply filed by Planned Parenthood.	\$600.00	\$540.00
6/30/2010	R. Zuckerman	0.3	Review Attorney General's reply in support of motion to certify questions to Oregon Supreme Court.	\$600.00	\$180.00
7/1/2010	M. Bamberger	0.4	Review state's reply in support of motion to certify.	\$690.00	\$276.00
12/1/2010	M. Bamberger	0.5	Conference with M. Diament re: Ninth Circuit fee application.	\$690.00	\$345.00
12/1/2010	M. Diament	0.5	Conference with M. Bamberger re: Ninth Circuit fee application.	\$216.00	\$108.00
12/2/2010	M. Diament	4.3	Review Ninth Circuit opinion, district court opinion and other background documents in preparation of drafting fee application; Legal research re: fee applications in civil rights cases.	\$216.00	\$928.80
12/3/2010	M. Diament	3.8	Outline M. Bamberger declaration; Review and analyze case documents; outline and bullet point fee application; legal research re: treatise on fee applications.	\$216.00	\$820.80
12/4/2010	M. Diament	0.9	Draft fee application (district court portion).	\$216.00	\$194.40
12/6/2010	M. Diament	3.3	Draft fee application and M. Bamberger declaration; conference with M. Bamberger and R. Zuckerman re: same; prepare Exhibit B for fee application.	\$216.00	\$712.80

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
12/6/2010	R. Zuckerman	0.7	Prepare for and meet with M. Bamberger and M. Diament re: fee application.	\$600.00	\$420.00
12/6/2010	M. Bamberger	0.4	Conference with R. Zuckerman and M. Diament re: fee application.	\$690.00	\$276.00
12/7/2010	M. Diament	2.3	Prepare Exhibit A for fee application; begin drafting appellate court portion of fee application.	\$216.00	\$496.80
12/8/2010	M. Diament	2.4	Draft fee application; emails re: same; review fee applications submitted in other federal jurisdictions.	\$216.00	\$518.40
12/9/2010	M. Diament	2.3	Work on fee application and M. Bamberger declaration; gather exhibits for application.	\$216.00	\$496.80
12/10/2010	M. Diament	1.7	Legal research: fee applications and hourly rates in the Ninth Circuit; outline exhibits for application; work on M. Bamberger declaration.	\$216.00	\$367.20
12/11/2010	M. Diament	2.9	Work on and revise draft fee application to Ninth Circuit.	\$216.00	\$626.40
12/13/2010	M. Diament	0.6	Legal research re: local forum rule in the Ninth Circuit	\$216.00	\$129.60
12/14/2010	M. Diament	2.6	Gather facts and materials for fee application; draft portion of fee application; conference with M. Bamberger re: same; review exhibit A to application	\$216.00	\$561.60
12/14/2010	M. Bamberger	0.8	Review draft of fee application; conference with R. Zuckerman and M. Diament re: same.	\$690.00	\$552.00
12/14/2010	R. Zuckerman	0.2	Receive Order for Ninth Circuit denying rehearing; conference with M. Bamberger re: same; email M. Diament re: timing for fee application.	\$600.00	\$120.00
12/15/2010	M. Diament	1.8	Draft fee application; conference with M. Bamberger and P.K. Runkles-Pearson re: same.	\$216.00	\$388.80
12/15/2010	M. Bamberger	0.4	Call with P.K. Runkles-Pearson re: fee applications; Email with P.K. re: coordinating applications.	\$690.00	\$276.00
12/15/2010	R. Zuckerman	0.8	Conference with M. Bamberger re: review of issues for fee application including form of fee application, Ninth Circuit and Oregon requirements.	\$600.00	\$480.00

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
12/16/2010	M. Bamberger	0.5	Work with M. Diament on fee petition and send the same to P.K. Runkles-Pearson.	\$690.00	\$345.00
12/16/2010	M. Diament	0.4	Communicate with M. Bamberger re: status of fee application and declarations.	\$216.00	\$86.40
12/17/2010	M. Diament	1.2	Proofread and revise fee application, declaration of M. Bamberger; emails re: same.	\$216.00	\$259.20
12/17/2010	M. Bamberger	0.3	Review time log and strike inappropriate time entries.	\$690.00	\$207.00
12/20/2010	M. Diament	2.5	Work on R. Balaban declaration' review District of Oregon fee application rules and Oregon Bar economic survey; gather further exhibits for fee application; attention to filing issues; emails with local counsel re: fee application.	\$216.00	\$540.00
12/20/2010	M. Bamberger	1.5	Work on fee application, Bamberger declaration; review schedule of services.	\$690.00	\$1,035.00
12/21/2010	M. Bamberger	0.4	Conference with M. Diament and R. Zuckerman re: status of fee application; send time log to P.K. Runkles-Pearson.	\$690.00	\$276.00
12/21/2010	M. Diament	1.4	Revise and edit M. Bamberger declaration; conference with R. Zuckerman and M. Bamberger re: status of application; revise fee application.	\$216.00	\$302.40
12/21/2010	R. Zuckerman	0.2	Conference with M. Bamberger re: fee application.	\$600.00	\$120.00
12/22/2010	M. Bamberger	0.5	Review fee application papers.	\$690.00	\$345.00
12/22/2010	M. Diament	2.1	Revise and incorporate M. Bamberger's comments into fee application and M. Bamberger declaration; conference with M. Bamberger and R. Zuckerman re: same.	\$216.00	\$453.60
12/22/2010	M. Diament	0.6	Call to Ninth Circuit and District of Oregon re: filing procedure and motion requirements.	\$216.00	\$129.60
12/22/2010	M. Diament	1.1	Communicate with local counsel re: fee applications; email with R. Balaban re: declaration; revise and edit Balaban declaration.	\$216.00	\$237.60
12/22/2010	M. Diament	3.1	Prepare exhibits for fee application including list of M. Bamberger cases, prior Orders from other jurisdictions, supporting declarations; format exhibits for filing.	\$216.00	\$669.60

NINTH CIRCUIT PROCEEDINGS					
Date	Timekeeper	Hours	Description	Rate	Amount
12/22/2010	R. Zuckerman	0.8	Conference with M. Bamberger and M. Diament re: fee application; review declaration of J. Bloom; conference with S. Jenkins re: request for declaration; outline draft declaration for S. Jenkins.	\$600.00	\$480.00
12/23/2010	M. Diament	4.2	Review, revise and finalize Bamberger declaration, fee application and Exhibit A;	\$216.00	\$907.20
12/23/2010	M. Diament	0.8	Legal research re: lodestar method in the Ninth Circuit.	\$216.00	\$172.80
12/23/2010	M. Diament	2.9	Prepare and format exhibits for fee application in preparation of filing; review R. Zuckerman declaration	\$216.00	\$626.40
12/23/2010	R. Zuckerman	1.8	Review outline of S. Jenkins declaration; email to S. Jenkins re: same; review response for S. Jenkins; draft and execute R. Zuckerman declaration.	\$600.00	\$1,080.00
12/27/2010	R. Zuckerman	0.3	Review fee application; conference with M. Bamberger and M. Diament re: same.	\$600.00	\$180.00
12/27/2010	M. Diament	1.4	Review and finalize fee application and accompanying exhibits.	\$216.00	\$302.40
SUBTOTAL FOR NINTH CIRCUIT PROCEEDINGS		191.5			\$88,068.60

TOTAL FEES REQUESTED.....	\$251,911.80
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EXHIBIT B

EXPENSES

I. District Court Proceedings

Airfare

Roundtrip flight for M. Bamberger from New York to Portland, Oregon for oral argument at the District Court: June 2008	\$754.40
Roundtrip flight for M. Bamberger from New York to Portland, Oregon for merits hearing at the District Court: October 2008	\$730.62

Ground Transportation

M. Bamberger's appearance at oral argument: June 2008	\$191.15
M. Bamberger's appearance at merits hearing: October 2008	\$115.50

Lodging

M. Bamberger in Portland, June 2008	\$426.95
M. Bamberger in Portland, October 2008	\$477.92

Duplicating Charges

Court Fees and Filing Fees

Federal Express Delivery Charges

Subtotal for District Court Proceedings	\$3,271.87
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II. Ninth Circuit Proceedings

Airfare

Roundtrip flight for M. Bamberger from New York to Portland, Oregon for oral argument at the Ninth Circuit: June 2010	\$1,153.40
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Ground Transportation

Rental car for M. Bamberger, Ninth Circuit oral argument: June 2010	\$162.00
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Lodging

M. Bamberger in Portland, June 2010	\$390.82
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Computer Research Charges

Duplicating Charges

Court Fees and Filing Fees

United State Courts Pacer Service

Federal Express Delivery Charges

Subtotal for Ninth Circuit Proceedings	\$6,504.67
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TOTAL EXPENSES.....	\$9,776.54
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EXHIBIT C

Office of the Clerk
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
P.O. Box 193939
San Francisco, California 94119-3939

Molly C. Dwyer
Clerk of Court

(415) 355-8000

**Form 9: APPLICATION FOR ATTORNEYS FEES
Under Ninth Circuit Rule 39-1.6**

9th Cir. No. 09-35153

Case Name: Powell's Books, Inc., et al.,

v. John Kroger, et al.,

DESCRIPTION OF SERVICES

HOURS

Interviews & Conferences

3.7

Obtaining & Reviewing Records

8.7

Legal Research

9.7

Preparing Briefs

75.9

Preparing for & Attending Oral Argument

22.7

Other (specify below):

70.8

This form details the time spent on the appeal only. For time spent and fees requested for the district court proceedings please see the Application for Attorneys' Fees and Expenses. The time labeled as "other" represents time spent on: communications with the court and the client; filing necessary papers (apart from any briefs); other motions, including the motion to consolidate and the motion for reconsideration; attention to scheduling issues; and preparation of the Application for Attorneys' Fees and Expenses.

+

TOTAL Hours Claimed

191.5

TOTAL COMPENSATION REQUESTED: \$ 88,068.60

Signature /s/ Michael A. Bamberger

Date Dec 27, 2010

A request for an award of attorneys fees must be supported by a memorandum showing that the party seeking fees is legally entitled to them and must be accompanied by Form 9 or a document that contains substantially the same information, along with:

- (1) a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task;
- (2) a summary for each lawyer and paralegal of the total hours spent in the categories set forth above;
- (3) a showing that the hourly rates claimed are the prevailing rates in the relevant market; and
- (4) an affidavit attesting to the accuracy of the information submitted.

EXHIBIT D

In the United States Court of Appeals for the Ninth Circuit

POWELL'S BOOKS, INC., et al.,
Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman)
Case No. CV-0-8501-MO

DECLARATION OF MICHAEL A. BAMBERGER

Michael A. Bamberger declares as follows:

1. I am a member of the law firm of SNR Denton US LLP (known as Sonnenschein Nath & Rosenthal LLP when this case commenced) and was counsel to plaintiffs Powell's Books, Inc.; Old Multnomah Book Store, Ltd.; Dark Horse Comics, Inc.; Colette's: Good Food + Hungry Minds, LLC; Bluejay, Inc.; St. John's Booksellers, LLC; American Booksellers Foundation for Free Expression ("ABFFE"); Association of American Publishers, Inc. ("AAP"); Freedom to Read Foundation, Inc. ("FTRF"); Comic Book Legal Defense Fund ("CBLDF"), in the above-captioned action. For over twenty-five years I have represented members of the Media Coalition, a coalition of media-related entities organized to protect First Amendment rights, in First Amendment litigation. (Plaintiffs ABFFE, AAP, FTRF and CBLDF are members

of Media Coalition.) In connection therewith, I have litigated many of the major cases throughout the country involving the First Amendment and regulation of access by minors to sexually explicit material. I brought to this case extensive specific relevant experience. Not only am I a leading First Amendment attorney, but I am considered the nation's leading expert on laws concerning restrictions on juvenile access to sexually frank material ("harmful to minors" material), the subject of this lawsuit. For over 30 years I have litigated issues regarding "harmful to minors" materials in the U.S. Supreme Courts, in seven of the Courts of Appeal, in 13 district courts, and seven state supreme courts. (See list of cases, Exhibit E) I submit this affidavit in support of Plaintiffs' Application for Attorneys' Fees and Expenses, pursuant to 42 U.S.C. §1988 (the "Application").

2. Through the date of this declaration, plaintiffs seek an award of attorneys' fees in the amount of **\$251,911.80** on behalf of SNR Denton US LLP. Of this request, \$130,410.00 is allocated to my services and represents compensation for 189 hours reasonably expended by me times an actual billing rate of \$690 per hour, which is well below the standard rate charged by my firm for my services. A rate of \$600 per hour for my services has been approved by both the District of South Carolina (for services rendered in 2002) and the Southern District of Indiana (for services rendered in 2008).

3. The fees for time expended of \$251,911.80, plus \$9,776.54 in expenses, yields a total requested fee award for my firm at this time of **\$261,688.34**.

4. This affidavit is divided hereafter into three parts: (a) time expended; (b) hourly rate; and (c) expenses. Attached to the Application as Exhibit A is an itemized list of the time expended and services rendered in this action. Exhibit B is a list of the expenses my firm incurred in connection with litigating this action.

A. **TIME EXPENDED**

5. It is my practice and the practice of my firm, and it has been our practice throughout this litigation, to maintain contemporaneous daily time records on which all billable time is recorded.

6. Based on such contemporaneous daily time records through the date of this declaration, the firm expended **480.2** hours of time on this action for which we seek compensation. In compiling this Application, I used my billing judgment and eliminated time entries that I believed were not appropriate to be included in this request to the Court.

7. Below is a table indicating the attorney/paralegal, the total amount of hours spent, and the billing rate requested for the particular timekeeper. A description of each timekeeper's qualifications other than Mr. Zuckerman and Ms. Balaban is provided in this declaration.¹

Name	Position	Total Hours	Billing Rate Requested	Fees Requested
Michael Bamberger, Esq.	Partner	189	\$690	\$130,410.00
Rachel Balaban Esq.	Partner	164.4	\$500	\$82,200.00
Richard Zuckerman, Esq.	Partner	37.2	\$600	\$22,320.00
Zhubin Parang, Esq.	Associate	8.7	\$216	\$1,879.20
Beatrice Ifshin	Legal Assistant	21.7	\$150	\$3,255.00
Robert Adler	Summer Associate	8.1	\$100	\$810.00
Matthew Diament, Esq.	Associate	51.1	\$216	\$11,037.60

8. The 480.2 hours which my firm expended on this action and for which we are seeking compensation is time which was reasonably and necessarily expended for plaintiffs to prevail in this action.

¹ The qualifications for the other principal attorneys on this matter, Richard Zuckerman and Rachel Balaban, are found in their respective declarations, annexed to the Application as Exhibits H and J.

B. HOURLY RATES

9. The firm seeks compensation for my services at a billing rate of \$690 per hour which is within the range of billing rates charge by the firm for my services. My usual rate at this time ranges from \$775 to \$815, which is not being sought in this matter.

10. I graduated magna cum laude from Harvard Law School in 1960. For the period 1958 through 1960 I was an editor of the Harvard Law Review. I have been interested in First Amendment problems for many years. My honors thesis at Harvard College dealt with the legal and administrative problems posed by the U.S. Customs Bureau regulation of motion pictures imported into the United States. My honors thesis at Harvard Law School concerned the constitutional and administrative problems associated with FCC content regulation of radio and television shows. From 1967 through 1973, I was a member of the American Bar Association Subcommittee on Obscenity and Censorship. From 1979 to 1985, I was a member of the ABA Subcommittee on Freedom of the Press. I was Chairman of the Committee on Civil Rights of the Association of the Bar of the City of New York from July 1983 to June 1986.

11. I have represented various clients concerned with First Amendment issues for many years and, since 1978, have been General Counsel to The Media Coalition, Inc. I have participated in over sixty First Amendment cases in the last thirty years. As more fully described in paragraph 1 above and in Exhibit E to the fee application, I am considered the nation's leading expert on laws concerning restrictions on juvenile access to sexual frank ("harmful to minors") materials, having litigated most of the significant cases in the area.

12. In addition, I was lead counsel in the District Court, Court of Appeals and U.S. Supreme Court in Hudnut v. American Booksellers, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

13. I have also filed many amicus briefs on related issues, including the following cases: Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (2002); U.S. v. X-Citement Video, 115 S.Ct. 464 (1994); FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990); Ft. Wayne Books v. Indiana, 489 U.S. 46 (1989); Pope v. Illinois, 481 U.S. 497 (1987); Renton v. Playtime Theatres, 89 L.Ed.2d 29 (1986); Maryland v. Macon, 472 U.S. 463 (1985); Brockett v. Spokane Arcades, 472 U.S. 491 (1985); New York v. Ferber, 458 U.S. 747 (1982); Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Jenkins v. Georgia, 418 U.S. 153 (1974); Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992); Upper Midwest Booksellers Ass'n v. Minneapolis, 780 F.2d 1389 (8th Cir. 1985); Penthouse International v. McAuliffe, 610 F.2d 1354 (5th Cir. 1980); United States v. The Progressive Inc., No. 79-1664 (7th Cir. 1979); Playboy Entertainment Group, Inc. v. U.S., No. 96-94/96-107-JJF (D.Ct. Del. 1996); Village Books v. Bellingham, C88-1470 (W.D. Wash. Feb. 9, 1989). I filed an amicus brief in Knox v. U.S., 114 S.Ct. 375 (1993), and on remand, at the request of the court argued orally before the Third Circuit in Knox v. U.S., 32 F.3d 733 (3d Cir. 1994). Without being immodest, I have thus been in the forefront of much of the major litigation in the United States over the last thirty years relating to the interplay of the First Amendment and sexually frank material.

14. Using the Oregon State Bar 2007 Economic Survey (“Bar Survey”), applying the 95th percentile to persons who have practiced over thirty years, the applicable rate would be \$461. However, the statutes at issue here were unusual and the argument of the State attempting to circumvent the application of the U.S. Supreme Court’s Miller/Ginsberg standard raised unique issues. Simply put, there was no one in Portland with such a depth of experience and knowledge as I brought to the case. Both the District of South Carolina and Southern District of

Indiana have recognized the reasonableness of a \$600 hourly rate for my services. These decisions were based on my experience and expertise in litigating first amendment cases. Orders from these courts granting this hourly rate are annexed to the Application as Exhibit F.

15. In further support of the reasonableness of my hourly rate, filed herewith is an affidavit of Jonathan Bloom, counsel to the firm of Weil, Gotshal & Manges LLP.

16. I have had principal responsibility for this matter. A number of other members of our firm's litigation department, Rachel Balaban, Richard Zuckerman, Zhubin Parang, Beatrice Ifshin, Robert Adler and Matthew Diament also worked on this matter.

17. **Zhubin Parang.** Mr. Parang was an associate in our firm's litigation department. He graduated from Vanderbilt University, magna cum laude, in 2003, and received his law degree from Georgetown University Law Center in 2006. He was admitted to the bar of New York in 2007. He is also a member of the Bar of this Court and the United States District Court for the Southern District of New York. Using the Bar Survey and applying the 95th percentile, Mr. Parang's rate is \$216 (again substantially lower than the \$330 hourly rate the firm charged to other clients for Mr. Parang's legal services).

18. **Beatrice Ifshin.** Ms. Ifshin is a senior legal assistant in our firm's litigation department. She has been employed by SNR Denton since 2002 and has over 25 years of paralegal experience. Ms. Ifshin has a Bachelor of the Arts from New York University. The application seeks an hourly rate of \$150 for Ms. Ifshin's time.

19. **Robert Adler.** Mr. Adler was a law intern at our firm during the summer of 2010. He graduated from the University of Buffalo, magna cum laude, in 2007, and is currently a law student at Georgetown University Law Center with an expected graduation date of February 2011. The application seeks an hourly rate of \$100 for Mr. Adler's time.

20. **Matthew Diament.** Mr. Diament is an associate in SNR Denton's litigation department. He graduated from Binghamton University, cum laude, in 2003, and received his law degree from Benjamin N. Cardozo School of Law, cum laude, in 2009. He was admitted to the bar of New York in March 2010. Using the Bar Survey and applying the 95th percentile, Mr. Diament's rate is \$216 (substantially lower than the \$315 hourly rate the firm charges to other clients for Mr. Diament's legal services).

C. EXPENSES

21. As detailed in the Application, specifically in Exhibit B, expenses were reasonably incurred in connection with my firm's role in this action. Full compensation of these expenses in the amount of \$9,776.54 is requested. All of these expenses are of the sort that are normally billed by my firm to clients, since they are not included as overhead in our attorney fee billing structure.

CONCLUSION

22. For the foregoing reasons, I submit that the hours billed in this matter were reasonably expended; and that the actual billing rates, as set forth above and in the other declarations attached to the Application, are per se reasonable. The \$9,776.54 in expenses for which reimbursement is sought was reasonably necessary for the plaintiffs to prevail in this matter. The total award sought for by attorney's fees and expenses based on services rendered by my firm through December 27, 2010 is **\$261,688.34**. I reserve the right to seek an additional fee award for time after that date, including time expended in negotiating and/or litigating this entitlement to fees, for expenses incurred but not yet posted, and for time expended on any other proceedings in this matter.

23. I declare under penalty of perjury under the laws of the United States that the information contained in this Declaration and in the Application for Attorneys' Fees and Expenses is true and correct.

Dated: December 27, 2010

s/ Michael A. Bamberger

Michael A. Bamberger

EXHIBIT E

MICHAEL A. BAMBERGER'S CASES INVOLVING "HARMFUL TO MINORS" MATERIALS

U. S. SUPREME COURT

Virginia v. American Booksellers Assn., Inc., 484 U. S. 383 (1988), vacated and remanded, 488 U. S. 905 (1988) (C¹)

U. S. COURTS OF APPEAL

Powell's Books, Inc. v. Kroger, 622 F.3d 1202 (9th Cir. 2010) (C)

American Booksellers Fdn. for Free Expression v. Strickland, 601 F.3d 622 6th (Cir. 2010); 560 F.3d 443 (6th Cir. 2009) (certified questions to Ohio Sup. Ct.) (C)

ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), cert. den. 129 Sup. Ct. 1032 (2009) (affirmed unconstitutionality of COPA) (A²)

PSINet v. Chapman, 362 F. 3d 227 (4th Cir. 2004) , rehearing den. 372 F.3d 671 (4th Cir. 2004) (C)

American Booksellers Foundation v. Dean, 342 F. 3d 96 (2d Cir. 2003) (C)

Cyberspace Communications, Inc. v. Engler, 238 F.3d 420 (6th Cir. 2000) (A)

ACLU v. Johnson, 194 F. 3d 1149 (10th Cir. 1999) (C)

American Booksellers v. Webb, 919 F. 2d 1493 (11th Cir. 1990) (C)

American Booksellers v. Virginia, 882 F. 2d 125 (4th Cir. 1989) (after remand from U. S. Supreme Court); 792 F. 2d 1261 (4th Cir. 1986) (C)

American Booksellers Assn., Inc. v. Schiff, 868 F. 2d 1199 (10th Cir. 1989) (C)

Upper Midwest Booksellers Ass'n v. Minneapolis, 780 F. 2d 1389 (8th Cir. 1985) (A)

American Booksellers Assn., Inc. v. Rendell, 673 F. 2d 1298 (3d Cir. 1981) (C)

¹ Counsel for party or parties to action.

² Counsel for amici.

U. S. DISTRICT COURTS

American Booksellers Fdn. for Free Expression v. Coakley, 2010 WL 4273802 (D. Mass. Oct. 26, 2010) (C)

American Booksellers Fdn. for Free Expression v. Sullivan, No. 3:10-CV-0193 (D. Alaska Oct. 20, 2010) (C)

Powell's Books, Inc. v. Myers, 599 F.Supp. 2d 1226 (D. Ore. 2008) (C)

King's English, Inc. v. Shurtleff, 2008 WL 3285898 (D. Utah Aug. 8, 2008) (C)

American Booksellers Fdn. for Free Expression v. Strickland, 512 F.Supp. 2d 1082 (S.D. Ohio 2007) (C)

Southeast Booksellers Ass'n v. McMaster, 282 F.Supp. 2d 389 (D.S.C. 2003); 371 F. Supp. 2d 773 (D.S.C. 2005); 233 F.R.D. 456 (D.S.C. 2006) (C)

Shipley, Inc. v. Long, 454 F.Supp. 2d 819 (E.D. Ark. 2004) (C)

Athenaco v. Cox, 335 F. Supp. 2d 773 (E. D. Mich. 2004) (C)

ACLU v. Goddard, 2004 WL 3770439 (D. Ariz. Aug. 11, 2004) (C)

Bookfriends, Inc. v. Taft, 223 F. Supp. 2d 932 (S. D. Ohio, W. Div. 2002) (C)

American Booksellers Fdn. For Free Expression v. Dean, 202 F. Supp. 2d 300 (D. Vt. 2002) (C)

ACLU v. Napolitano, No. CIV 00-0505 TUC-AM (D. Ariz. 2002) (C)

PsiNet v. Chapman, 108 F. Supp. 2d 611 (W. D. Va. 2000), 167 F. Supp. 2d 878 (W. D. Va. 2001) (C)

American Library Ass'n v. Pataki, 969 F. Supp.. 160 (S. D. N. Y. 1997) (C)

American Booksellers Ass'n v. Virginia, 617 F. Supp. 699 (E. D. Va. 1985) 617 F. Supp. 699 (E.D. Va. 1985), aff'd in part and rev'd in part, 792 F. 2d 1261 (4th Cir. 1986), question certified, 484 U. S. 383 (1988), vacated and remanded, 488 U. S. 905 (1988), on remand, 882 F. 2d 125 (4th Cir. 1989) (C)

American Booksellers Assn. Inc. v. McAuliffe, 533 F. Supp.. 50 (N. D. Ga 1981) (C)

STATE COURTS

American Booksellers Fdn. v. for Free Expression v. Cordray, 922 N.E.2d 192 (Ohio 2010) (C)

Shipley, Inc. v. Long, 359 Ark. 208 (Sup. Ct. 2004) (C)

Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W. 2d 520 (Tenn. Sup. Ct. 1993) (C)

Commonwealth v. American Booksellers Assoc., 236 Va. 168 (Sup. Ct. 1988) (C)

Tattered Cover, Inc. v. Tooley, 696 P. 2d 780 (Colo. 1985) (C)

American Booksellers Assn. Inc. v. Webb, 329 S.E. 2d 495 (Sup. Ct. Ga. 1985) (C)

American Booksellers Assn. Inc. v. Rendell, 481 A. 2d 919 (Pa. Super. Ct. 1984) (C)

American Booksellers Assn. Inc. v. Superior Court of Los Angeles Cty., 129 Cal. App. 3d 197 (Ct. of App; 2d Dist. 1982) (C)

American Booksellers Ass'n v. Superior Court, 181 Cal. Rptr. 33 (Ct. of App., 2d District 1982) (C)

Leech v. American Booksellers Assn. Inc., 582 S.W. 2d 738 (Tenn. Sup. Ct. 1979) (C)

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

)
Southeast Booksellers Association,)
et al.,)
)
Plaintiffs,)
) C.A. No. 2:02-3747-23
v.)
)
Henry D. McMaster, Attorney)
General of South Carolina, *et al.*,)
)
Defendants.)
)

ORDER

This matter is before the court on Plaintiffs' petition for attorney's fees pursuant to 42 U.S.C. § 1988. Defendants Henry McMaster, Attorney General, and Solicitors (hereinafter "Defendants") filed a memorandum in opposition to Plaintiffs' petition, claiming that no award of attorney's fees and costs should be made. In the alternative, if any award is made, Defendants ask the court to make such award against the state of South Carolina as an entity rather than against the Attorney General and the solicitors and/or to substantially reduce the award below the amount requested by Plaintiffs. For the reasons set forth below, the court grants Plaintiffs' petition for attorney's fees, but only in the amount of **\$405,485.61**.

BACKGROUND

In this case, Plaintiffs¹ initially brought a pre-enforcement constitutional challenge to

¹ With the exception of Families Against Internet Censorship ("FAIC"), which is an organization representing families with Internet access and at least one child, Plaintiffs are organizations that represent artists, writers, booksellers, and publishers who use the Internet to engage in expression, including graphic arts, literature, and health-related information. Most of these organizations maintain websites that contain resources on obstetrics, gynecology, and sexual health; visual art and poetry; and other speech which could be considered "harmful to minors" in some communities under the Act, despite the fact that their speech is constitutionally protected as

permanently enjoin the operation of S.C. Code § 16-15-385, which provides criminal sanctions for “disseminating harmful material to minors” as applied to “digital electronic files” that are sent or received via the Internet under S.C. Code Ann. § 16-15-375 (2). *See* S.C. Code Ann. § 16-15-375; S.C. Code Ann. § 16-15-385 (collectively hereinafter “the Act”). The Act defines “harmful to minors” as follows:

“Harmful to minors” means that quality of any material or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:

- (a) the average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and
- (b) the average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and
- (c) to a reasonable person, the material or performance taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

S.C. Code Ann. § 16-15-375. A violation of § 16-15-375 is a felony, punishable by up to five years in prison, a fine of \$5,000, or both. *See* S.C. Code Ann. § 16-15-385.

The controversy in this case centered primarily around an amendment to the Act, signed by former Governor Jim Hodges on July 20, 2001, which added the definition of “material” as follows: “‘Material’ means pictures, drawings, video recordings, films, *digital electronic files, or other visual depictions or representations* but not material consisting entirely of written words.” S.C. Code §

to adults.

16-15-375(2) (emphasis added). Pursuant to this amendment, the Act proscribes the dissemination to minors of obscene “digital electronic files.” Plaintiffs initially challenged this proscription as violative of the First Amendment and the Commerce Clause because it prohibits adults, and even older minors, from viewing and sending constitutionally-protected images over the Internet and has the effect of prohibiting constitutionally-protected communications nationwide. (Compl. ¶¶ 1; 78-81; 84-86.)

PROCEDURAL HISTORY

In this case, both parties filed cross motions for summary judgment. This court held those cross-motions in abeyance pending the United States Supreme Court’s decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), due to the similarities between the relevant provisions of the Child Online Protection Act (“COPA”), which were under review in *Ashcroft*, and those at issue in the present action.² Following the Supreme Court’s decision in *Ashcroft* on June 29, 2004, this court issued its ruling denying summary judgment to both sides in the present case on July 6, 2004.

In the July 6, 2004 ruling, the court denied Defendants’ motion for summary judgment because Defendants simply reasserted arguments previously addressed and rejected at the motion to dismiss stage. With respect to Plaintiffs’ motion, the court concluded that summary judgment was inappropriate under the reasoning in *Ashcroft*. Specifically, the court denied summary judgment

² In *Ashcroft*, the Supreme Court held that Internet content providers and civil liberties groups were entitled to a preliminary injunction against enforcement of COPA because the plaintiffs were likely to prevail on their claim that COPA violated the First Amendment by unduly burdening adults’ access to protected speech. 542 U.S. at 703. Notably, however, the Court stopped short of declaring COPA unconstitutional. *Id.* at 703-06. The Court held that, instead of considering the broader question of the constitutionality of COPA, the United States Court of Appeals for the Third Circuit should have remanded the case to the district court to conduct a “full trial on the merits.” *Id.* at 704.

pursuant to the admonition in *Ashcroft* that a full trial on the merits might be necessary before a court could rule on the constitutionality of a statute such as the one at issue in order to allow adequate development of the record with respect to the question of plausible, less restrictive alternatives. At the time of the court's July 6th Order, the record simply did not contain sufficient evidence regarding the effectiveness of less restrictive alternatives vis-a-vis the challenged statute.

On October 7, 2004, Plaintiffs filed an updated motion for summary judgment including the Supplemental Expert Declaration of Dr. Lorrie Faith Cranor ("Cranor Declaration"). On November 24, 2004, Defendants filed their updated motion for summary judgment, including a Declaration of Dr. Dan R. Olsen, Jr ("Olsen Declaration"), who, like Cranor, offered a factual account of pertinent Internet technology. Through these expert declarations, both parties attempted to answer the question of whether the restriction at issue was the least restrictive means of furthering the goals of the statute. Ultimately, the court granted Plaintiff's motion for summary judgment and permanently enjoined and prohibited Defendants from enforcing S.C. Code Ann. § 16-15-385 as applied to "digital electronic files" that are sent or received via the Internet under S.C. Code Ann. § 16-15-375(2). Defendants did not appeal the court's decision.

ANALYSIS

In their request for attorney's fees and costs under 42 U.S.C. § 1988, Plaintiffs seek a total amount of \$480,669.89, broken down as follows:

(1)	Derfner, Altman & Wilborn, LLC	\$32,658.02
(2)	Wilmer Cutler Pickering Hale and Dorr LLP	\$364,668.30
(3)	Sonnenschein Nath & Rosenthal LLP	\$83,343.57
TOTAL		\$480,669.89

Unfortunately, however, the court finds that Plaintiffs made some mathematical miscalculations³ in reaching their total of \$480,669.89, and in reality, according to Plaintiffs' requested rates and hours, the correct figure sought should be **\$490,699.89**. First, the court considers whether Plaintiffs are entitled to such an award under the standard for awarding fees under 42 U.S.C. § 1988 and then turns to the reasonableness of Plaintiffs' request.

³ The miscalculations appear to be with Attorney Kenneth Bamberger and Attorney Brian Murray's requested rates. For instance, Plaintiffs assert that Mr. Bamberger spent 293.7 hours working on this case at an hourly rate of \$420. However, according to the time records and the charts in Attorney Ogden's Declaration, Plaintiffs actually apply a rate of \$340 for work done before 2002, \$370 for work done in 2003, \$400 for work done in 2004, and \$420 for work done in 2005. Similarly, Attorney Brian Murray requests a rate of \$370 an hour. However, in the time sheets, Plaintiffs charge a rate of \$340 for work completed in 2004 and a rate of \$370 for work completed in 2005. The court understands that this reflects the change in these Attorneys' rates over the years. However, hourly rates for the other attorneys at Wilmer Cutler Pickering Hale and Dorr, LLP do not vary over the years, even though Mr. Ogden's Declaration notes each attorney's historic rates. For example, Attorney Ogden charges a rate of \$650 for work done in every year, from 2002-2005, even though his rate was \$540 in 2002, \$580 in 2003, and \$625 in 2004. Similarly, Attorney Kestenbaum charges a consistent rate of \$430 for work done even though her rate has increased over time, and Attorney Strayer charges a consistent rate of \$310 even though his rates also have increased. Moreover, in their Fee Petition, Plaintiffs request that the court calculate fees at the attorneys' current rates because the litigation spanned a number of years. The court finds that if Plaintiffs had applied a consistent hourly rate of \$420 for Attorney Bamberger and \$370 for Attorney Murray, the calculation of the fee award would be \$490,669.89.

A. Standard for awarding attorney's fees under 42 U.S.C. § 1988

In civil rights actions, “the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs” *See* 42 U.S.C. § 1988(b). The provision allowing attorney’s fees in § 1988 helps ensure “‘effective access to the judicial process’ for persons with civil rights grievances.” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558 at 1 (1976)). Although the decision to award a fee is discretionary, “a prevailing plaintiff ‘should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.’” *Hensley*, 461 U.S. at 429 (quoting S. Rep. No. 94-1011 at 4 (1976)). In this case, Defendants claim both that Plaintiffs are not prevailing parties and that special circumstances render an award of fees unjust. The court addresses each of these issues in turn.

1. Prevailing Party Determination

As a threshold matter, the court first must determine whether Plaintiffs are in fact prevailing parties within the meaning of 42 U.S.C. § 1988. In their Memorandum in Opposition to Plaintiffs’ Petition for Attorney’s Fees, Defendants claim that no award should be made because Plaintiffs are not “prevailing parties” under § 1988. The court disagrees with Defendants’ contention that Plaintiffs merely won a “technical” victory and are not prevailing parties.

“[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim . . . a plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). “Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and

the defendant.” *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (citing *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987)); *see also* *Hewitt*, 482 U.S. at 760 (finding that the plaintiff was not a prevailing party because he did not receive a damages award, an injunction, a declaratory judgment, or a consent decree or settlement).

In the present case, the court granted Plaintiffs’ motion for summary judgement and permanently enjoined and prohibited Defendants from enforcing S.C. Code Ann. § 16-15-385 as applied to “digital electronic files” that are sent or received via the Internet under S.C. Code Ann. § 16-15-375(2). Defendants claim that because they had neither enforced nor threatened to enforce the statute, Plaintiffs have not prevailed in any legal victory, and the court’s declaratory relief and injunction is but a “technical” victory. The court disagrees entirely and finds that there is no question that Plaintiffs are prevailing parties.

Clearly, Plaintiffs can point to a resolution of the dispute which altered the relationship between the parties. Plaintiffs received all of the relief they sought under both their First Amendment and their Commerce Clause claims; the court granted summary judgment in Plaintiffs’ favor, declared the Act unconstitutional, and permanently enjoined Defendants from enforcing the Act, a statute that they previously had the ability to enforce had they so chosen. Therefore, Plaintiffs’ victory alters the relationship between the parties by modifying Defendants’ behavior in a way that benefits Plaintiffs. *See, e.g., Filtration Dev. Co., LLC v. U.S.*, 63 Fed. Cl. 612 (Fed. Cl. 2005) (“The permanent injunction in this case altered the legal relationship between the parties and is sufficient to confer prevailing party status.”); *Gerling Global Reinsurance Corp. of America v. Garamendi*, 400 F.3d 803, 806 (9th Cir. 2005) (finding that insurance companies prevailed in their challenge to California’s Holocaust Victim Insurance Relief Act when they obtained a permanent

injunction against enforcement of the act), *amended on other grounds on denial of reh 'g*, 410 F.3d 531 (9th Cir. 2005); *Abrahamson v. Bd. of Educ. of Wappingers Cent. Falls Sch. Dist.*, 374 F.3d 76 (2d Cir. 2004) (holding that plaintiff teachers who obtained an injunction requiring defendant school district to bring collective bargaining agreement in compliance with Age Discrimination in Employment Act were prevailing parties because the existence of the injunction and the ability to enforce it materially altered the relationship between the parties); *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001) (finding that plaintiff was entitled to an injunction against a statute found facially invalid under the First Amendment, and therefore, she was a prevailing party entitled to fees under § 1988); *Rhode Island Med. Soc. v. Whitehouse*, 323 F.Supp.2d 283, 298 (D.R.I. 2004) (finding that plaintiffs constitute prevailing parties because the district court granted a permanent injunction against defendants and as a result, the state could no longer enforce the statute at issue); *Yassky v. Kings County Democratic County Comm.*, 259 F.Supp.2d 210, 217-18 (E.D.N.Y. 2003) (finding that the legal relationship between the parties was permanently altered in plaintiffs' favor only because of the issuance of a permanent injunction against defendants and the judgment in favor of plaintiffs); *West Virginia for Life, Inc. v. Smith*, 952 F.Supp. 342, 344 (S.D.W.Va. 1996) ("Here, there is no question that plaintiffs are prevailing parties. They obtained a summary judgment order granting the precise relief prayed for in their complaint – a determination that the challenged statute was unconstitutional and a permanent injunction against its enforcement."); *Dairy Maid, Inc. v. U.S.*, 837 F.Supp. 1370 (E.D.Va. 1993) (noting that the Army did not dispute that plaintiff was a prevailing party when the court entered a permanent injunction). In the present case, Plaintiffs clearly qualify for prevailing party status. Therefore, having found Plaintiffs entitled to reasonable attorney's fees as prevailing parties, the court must next determine who is liable for those fees and

to what extent.

2. Defendants' Authority to Pay Attorney's Fees

"In general, losing Title VII defendants are held presumptively liable for attorney's fees." *Mallory v. Harkness*, 923 F.Supp. 1546, 1551 (S.D. Fla. 1996)(citing *Christiansburg Garment v. EEOC*, 434 U.S. 412, 418 (1978)). However, Defendants claim that "no attorneys award may be made against the Attorney General or solicitors because state law does not appropriate funds or authorize the use of public monies for that purpose by those defendants," and therefore, if an award is made, it should be against the State of South Carolina as an entity. (Def. Memo in Opposition 15.) In Plaintiffs' Reply Brief in Support of their Petition for Attorney's Fees, Plaintiffs do not oppose excusing the county solicitor and instead making the Attorney General and the State of South Carolina jointly and severally liable for the fee award. (Pl. Reply Br. 11.) In response, Defendants filed a Supplemental Memorandum claiming that *only* the State of South Carolina as an entity, and not the Attorney General, should be liable if the court grants an award. (Def. Supp. Memo in Opposition 1-3.) Accordingly, the court must determine against whom any award of attorney's fees should be made.

"As the case law of the circuits amply demonstrates, the allocation of liability for attorneys' fees remains an area in which there is no simple formula of universal applicability." *Herbst v. Ryan*, 90 F.3d 1300, 1304 (7th Cir. 1997) (citing *Council for Periodical Distrib. Ass'n v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987), and *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 959 (1st Cir. 1984)). Additionally, the legislative history of § 1988 provides "that the attorney's fees . . . will be collected either directly from the official, in his official capacity, from the funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named

party).” *Hutto v. Finney*, 437 U.S. 67, 694 (1978) (citations omitted).

Here, Defendants cite *Herbst* in support of their claim that only the State of South Carolina should be liable for an award of attorney’s fees. In *Herbst*, Plaintiffs, a group of physicians in Illinois, brought suit for declaratory and injunctive relief against the enforcement of various amendments to the Illinois abortion law against: (1) the State’s Attorney of Cook County, in his official capacity and as a representative of a class of the State’s Attorneys; (2) the Attorney General of Illinois in his official capacity; and (3) the Director of the Illinois Department of Public Health, in his official capacity. 90 F.3d at 1302. “The District Court noted that a state is liable for attorneys’ fees under section 1988 when a state official is sued in his official capacity.” *Id.* (citing *Hutto*, 437 U.S. at 693-94). Plaintiffs argued for joint and several liability, but the district court concluded that the fee award should be entered solely against the State of Illinois. The Seventh Circuit Court of Appeals affirmed the District Court’s decision, noting that in requiring the State of Illinois to bear full responsibility for the fee award, “[t]he district court certainly committed no abuse of discretion in determining that the ‘moving force’ behind the statute at issue here was the State of Illinois . . . [and] the district court certainly in no way impaired the purposes of § 1988 or the concerns of federalism.”⁴ *Id.* at 1306.

⁴ In *Herbst*, the court stated:

Because the officers were sued in their official capacities, the liability for attorney’s fees is not their personal liability but the liability of the governmental body of which they are officers. . . . Liability can be imposed on a governmental entity, and on its officer in his official capacity, only when that governmental entity is the “moving force” behind the constitutional wrong that forms the basis of the suit. Here, the Attorney General of the State and the State Director of Public Health clearly undertook the defense of the challenged amendments on behalf of the state. The State’s Attorneys also undertook the defense of the constitutionality of this *state* statute and the *state* policy that it embodied. It is clear that the State’s Attorneys,

In this case, Plaintiffs request that the court award fees against the Attorney General and the state of South Carolina jointly and severally. In support of their position, Plaintiffs also cite *Herbst* and claim that there is no basis to excuse Defendant McMaster from liability for the fee award. (Pls.' Reply Br. 13.) In *Herbst*, the court noted "that a number of courts have upheld the imposition of joint and several liability for a fee award where there existed a question as to whether the fee would be collectible from one of the defendants." 90 F.3d at 1306 (citations omitted). However, Plaintiffs only cite the "uncertainty and potential practical difficulties with awarding a fee award against a non party" in support of their request for joint and several liability. (Pls' Reply Br. 14.) Interestingly, Plaintiffs also state: "Nor is there any meaningful distinction between the state Attorney General and the entity called the 'State of South Carolina.' . . . And whether the Attorney General or 'the State of South Carolina' pays the attorney's fee award, the money will ultimately come from the same place – the South Carolina State Treasury." (Pls.' Reply Brief 13.)

Accordingly, because Plaintiffs sued Defendants in their official capacities and because a state is liable for attorney's fees when a state official is sued in his official capacity, the court believes that an award of attorney's fees against the State of South Carolina as an entity is proper.

when bringing an action under the criminal laws of the State of Illinois, also are operating as officers of the state. In short, the undertaking was a defense of a state policy by state officers on behalf of the state. The district court certainly committed no abuse of discretion in determining that the "moving force" behind the statute at issue here was the State of Illinois.

90 F.3d at 1306 (citations omitted).

B. Reasonableness of Plaintiffs' Request

1. Lodestar Calculation

After determining that Plaintiffs are in fact prevailing parties entitled to a fee award against the State of South Carolina, the court must evaluate the reasonableness of Plaintiffs' fee request. In so doing, the court begins by calculating the lodestar figure. The lodestar figure is calculated by multiplying the number of reasonable hours expended times a reasonable rate. To determine the reasonable rate and reasonable number of hours to use in calculating the lodestar, a district court's analysis must strictly follow the factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as modified by *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The *Johnson* factors are: (1) the time and labor required to litigate the suit; (2) the novelty and difficulty of the questions presented by the lawsuit; (3) the skill required to properly perform the legal services; (4) the attorney's opportunity costs in pursuing the litigation; (5) the customary fee for such services; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the attorney's professional relationship with the client; and (12) awards in similar cases. *See Daly v. Hill*, 790 F.2d 1071, 1075 n. 2 (4th Cir. 1986). The court will therefore consider these factors to determine the reasonable rate and the reasonable number of hours in this case. *See id.* at 1078.

a. Reasonable Rate

The first prong of the lodestar analysis involves determining the reasonable hourly rate of compensation to apply. *See Hensley*, 461 U.S. at 433. *See Wagner v. Dillard Dep't Stores, Inc.*, 2000 WL 33321252, at *2 (M.D.N.C. 2000). Defendants argue that local rates should control, not

the New York and Washington, D.C. rates proposed by Plaintiffs. In *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir.1988), the Fourth Circuit observed that the community in which the court sits is the first place to look to in evaluating the prevailing market rate. “Rates charged by attorneys in other cities, however, may be considered when ‘the complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally,’ and the party choosing the attorney from elsewhere acted reasonably in making the choice.” *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994) (quoting *National Wildlife*, 859 F.2d at 317).

In this case both criteria are satisfied. The litigated issues include complicated First Amendment questions, and because Plaintiffs’ counsel are specialists in these fields and regularly litigate cases involving the questions at issue, consideration of their customary rates is proper. *See Rum Creek*, 31 F.3d at 179 (reversing the district court’s downward adjustment of out-of-town counsel’s rates when the issues “included questions of preemption and constitutional law” and out-of-town counsel were “concededly well-experienced in the type of matters involved.”). Accordingly, the requirements of *National Wildlife* are satisfied, and this court declines to apply local rates to non-local attorneys.

The court’s inquiry does not end here. The court must now determine whether Plaintiffs’ counsels’ proposed hourly rates are reasonable - that is, “that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Here, at least three of the *Johnson* factors – the customary fee; the attorney’s experience, reputation, and ability; and awards in similar cases – are relevant to determining the prevailing market rate for the services rendered by all three of Plaintiffs’ counsel.

Defendants argue that the hourly rates requested by Plaintiffs are too high: From the Charleston, South Carolina firm of Derfner, Altman & Wilborn, LLC, Mr. Derfner requests a rate of \$400 an hour while both Mr. Altman and Mr. Wilborn request a rate of \$275 an hour. From the Washington, D.C. office of Wilmer Cutler Pickering Hale and Dorr LLP, Mr. Ogden, partner, requests \$650 an hour; Ms. Kestenbaum, counsel, requests \$430 an hour; Mr. Kenneth Bamberger, counsel, requests \$420 an hour; Brian Murray, associate, requests \$370 an hour, Robert Strayer, associate, requests \$310 an hour; and compensation for five law clerks and paralegals is requested at rates varying from \$160 to \$200 an hour. From the New York City office of Sonnenschein Nath & Rosenthal LLP, Mr. Michael Bamberger requests \$650 an hour. The court addresses each firm's situation in turn.

i. Derfner, Altman & Wilborn LLC (Charleston, SC)

1. Armand Derfner

Attorney Derfner documents that he spent 75.5 hours on this case at a rate of \$400 an hour. Plaintiffs have submitted Mr. Derfner's Declaration, in which he details the extent of his expertise and experience in civil rights litigation and affirms that the rate of \$400 is reasonable given his experience. (Derfner Decl.)

Mr. Derfner has extensive experience in first amendment and constitutional litigation. Consideration of the customary fees awarded in similar litigation and the awards in other cases support a rate of \$400 an hour for Mr. Derfner. Also, Mr. Derfner has received similar fees in this district. *See, e.g., United States v. Charleston County*, C.A. No. 2:01-00155-23 (D.S.C. Aug. 8, 2005) (awarding Mr. Derfner \$400 an hour); *IUE-CWA v. EnerSys, Inc.*, C.A. No. 3:01-4766-10 (D.S.C. Aug. 10, 2004) (approving a rate of \$450 an hour). Therefore, given Mr. Derfner's

experience and similar past awards, the court believes his requested rate of \$400 an hour is reasonable.

2. Jonathan Altman and Peter Wilborn, Jr.

Attorney Altman documents that he spent 1.4 hours on this case, and Attorney Wilborn documents that he spent 5.7 hours on this case. Both attorneys request a rate of \$275. In Mr. Derfner's Declaration, he notes that both Mr. Altman and Mr. Wilborn are experienced litigators with skill comparable to lawyers in this area who charge \$275 or more an hour. (Derf. Decl.) Additionally, Mr. Wilborn has been awarded a rate of \$267 an hour in *Maxey v. ALCOA*, C.A. No. 1:02-CV-0280 (N.D. Oh. Sept. 25, 2003), and a rate near that in *IUE-CWA*. Therefore, given the experience and similar awards, the court believes that Mr. Altman and Mr. Wilborn's requested rate of \$275 an hour is not unreasonable.

ii. Wilmer Cutler Pickering Hale and Dorr LLP (Washington, D.C.)

1. David W. Ogden, Partner

First, Attorney Ogden documents that he spent 43.3 hours working on this case at a rate of \$650 per hour. Plaintiffs have submitted Mr. Ogden's Declaration, in which he details the extent of his expertise and experience in First Amendment and Commerce Clause issues and affirms that the rate of \$650 an hour would be reasonable given his experience. (Ogden Decl. 7-10.)

Mr. Ogden graduated *magna cum laude* from Harvard Law School in 1981, where he served as an editor of the *Harvard Law Review*. Overall, he has a highly impressive background including vast experience in First Amendment litigation. Many of the cases in which he has participated have involved constitutional challenges to federal or state legislation that purported to restrict speech, and some of which have involved statutes directed at the protection of children from obscene or harmful

material, including, for example: *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000); *American Library Ass'n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994); and *American Library Ass'n v. Barr*, 794 F.Supp. 412 (D.D.C. 1992). In addition, Mr. Ogden has co-taught a course entitled, “Constitutional Law: Theories of Free Speech,” at Georgetown University Law Center.

Although the court recognizes that Mr. Ogden has vast expertise and experience, the court rejects Mr. Ogden’s request for payment at \$650 an hour in favor of a more reasonable figure. In his Declaration, Mr. Ogden claims that his requested hourly rate of \$650 an hour is in line with those in the Washington, D.C. community. In support of this claim, Mr. Ogden attached a copy of the National Law Journal’s December 6, 2004 survey of billing rates nationwide. *See Firm-By-Firm Sampling of Billing Rates Nationwide*, 12/6/04 NAT’L L.J. 20. This survey does not include a sampling of rates for Wilmer Cutler Pickering Hale and Dorr LLP, and therefore, Mr. Ogden directs the court’s attention to the comparable firms of Akin, Gump, Strauss, Hauer & Feld; Covington & Burling; and Hogan & Hartson. These three firms report billing rates for partners as follows: \$425-\$750; \$390-\$690; and \$230-\$725, respectively. Frankly, as these rates range anywhere from \$230 to \$750, they do not help the court in determining a reasonable hourly fee for Mr. Ogden. Furthermore, Mr. Ogden does not support his request for \$650 an hour with an affidavit or with reference to recent case law awarding either him or partners similarly situated with such a steep rate. Additionally, Plaintiffs include the Memorandum Opinion from *PSINet, Inc.* as Attachment A to their Reply Brief; in this Memorandum Opinion, the court capped counsels’ rates at \$300 an hour for partners and \$200 an hour for associates, finding that the higher rates that counsel had requested exceeded “the outer limits of the court’s ‘conscience cap.’” (Attachment A to Pls.’ Reply Br. 7.) Although this Opinion is dated March, 27, 2002, and almost three and one-half years have since

passed, the court likewise finds that Mr. Ogden's request for \$650 an hour, without any support other than the National Law Journal's survey, exceeds its conscience cap. Therefore, the court limits Mr. Ogden's rate to \$500 an hour, \$10 more than the average of the \$230 to \$750 range provided in the National Law Journal survey for partners at comparable firms.

2. Janis C. Kestenbaum, Counsel

Attorney Kestenbaum documents that she spent 348.9 hours on this case at a rate of \$430 an hour. Mr. Ogden's Declaration details the extent of her expertise and experience in First Amendment litigation and litigation involving other constitutional issues. (Ogden Decl. 10.)

Ms. Kestenbaum graduated *magna cum laude* from Harvard Law School, where she served as an editor of the *Harvard Law Review*, in which she published three pieces on constitutional issues, including one involving the First Amendment. (Ogden Decl. 10.) As with Mr. Ogden, Ms. Kestenbaum has extensive experience with the subject matter at issue. Furthermore, from a review of the time records, it appears that Ms. Kestenbaum, along with Attorney Kenneth Bamberger, put in the brunt of the work in this case. Although Plaintiffs again do not include a supporting affidavit or a reference to case law providing for a fee of \$430 an hour for Ms. Kestenbaum, after a review of the record and consideration of awards in similar litigation, the court believes that Ms. Kestenbaum's requested rate of \$430 an hour is reasonable.

3. Kenneth A. Bamberger, Counsel

Attorney Kenneth Bamberger documents that he spent 293.7 hours working on this case at a rate of \$420 an hour. Mr. Ogden's Declaration outlines Mr. Bamberger's historical rates and details the extent of his expertise and experience. (Ogden Decl. 11.)

Like Ms. Kestenbaum, Mr. Bamberger graduated from Harvard Law School, where he served

as President of the *Harvard Law Review*. (Ogden Decl. 11.) Mr. Bamberger's practice has primarily involved constitutional and statutory litigation – including First Amendment issues raised by the regulation of telecommunications – in proceedings raised against government and private parties at the trial and appellate court levels, and in administrative proceedings. (Ogden Decl. 11.) As previously mentioned, a review of the record indicates that Mr. Bamberger, along with Ms. Kestenbaum, performed a great portion of the work involved in this case. Accordingly, the court finds Mr. Bamberger's requested rate of \$420 an hour reasonable in light of the circumstances.

4. Brian Murray, Associate

Attorney Murray documents that he spent 44.2 hours on this case at a billing rate of \$370 per hour. Mr. Ogden's Declaration outlines Mr. Murray's background and experience. (Ogden Decl. 11-12.)

Mr. Ogden graduated from the University of Virginia School of Law in 2000, where he was an Executive Editor of the *Virginia Law Review*. Mr. Murray clerked both at the U.S. District Court for the District of Columbia and at the U.S. Court of Appeals for the Eleventh Circuit before joining Wilmer Cutler Pickering Hale and Dorr LLP, where he works with the firm's Communications and E-Commerce Department. (Ogden Decl. 12.) Again, Plaintiffs provide no support for this requested rate other than Mr. Ogden's Declaration and the National Law Journal survey. Accordingly, and in light of a mathematical error in Mr. Ogden's Declaration that concerns Mr. Murray's hourly rate, the court finds a rate of \$350 an hour to be more reasonable than the requested rate of \$370 an hour.

5. Robert Strayer, Associate

Attorney Strayer documents that he spent 19.9 hours on this case at a rate of \$310 an hour. Mr. Ogden's Declaration describes Mr. Strayer's background and experience in this area. (Ogden

Decl. 12.)

Mr. Strayer graduated from Vanderbilt Law School in 2000, *Order of the Coif*. Prior to joining the firm, he clerked at the U.S. Court of Appeals for the Eleventh Circuit and also served a one-year fellowship with the State Solicitor in the Ohio Attorney General's Office, where his practice focused on federal constitutional litigation, including litigation before the U.S. Supreme Court. (Ogden Decl. 12.) Mr. Strayer was a third-year associate in 2004, and ultimately, the court finds a billing rate of \$300 to be more reasonable than Mr. Strayer's requested billing rate of \$310 an hour.

6. Law Clerks and Paralegals

Defendants advance no serious challenge to the rates assessed for law clerk and paralegal assistance given to litigation counsel.⁵ Notwithstanding, the court finds the rates charged by such support staff are not unreasonable or unconscionable under the circumstances of this case.

iii. Sonnenschein Nath & Rosenthal LLP (New York, NY)

1. Michael A. Bamberger, Partner

Attorney Bamberger documents that he spent 121.6 hours working on this case at a billing rate of \$650 an hour. Plaintiffs have submitted Mr. Bamberger's Declaration, in which he details his extensive experience and expertise in First Amendment litigation. (Bamberger's Decl.) Additionally, Plaintiffs have submitted Mr. Bruce Rich's Declaration in support of Mr. Bamberger's request for a billing rate of \$650 an hour. (Rich Decl.)

Mr. Bamberger graduated *magna cum laude* from Harvard Law School, where he was an

⁵ As the court more fully addresses below, Defendants do challenge the number of hours assessed for law clerk and paralegal assistance in this litigation.

editor of the *Harvard Law Review*. Mr. Bamberger has participated in over 60 First Amendment cases, many of which have involved the regulation of access by minors to sexually explicit material, namely *PSINet, Inc. v. Chapman*, 342 F.3d 227 (4th Cir. 2004), *reh'g. den.* 372 F.3d 671 (4 th Cir. 2004), *aff'g* 167 F.Supp.2d 878 (D. Va. 2001). Additionally, he has represented members of the Media Coalition for over twenty years. (Bamberger Decl.)

In the Declaration of Bruce Rich, a member of the firm of Weil Gotshal & Manges LLP in New York, Mr. Rich states that Mr. Bamberger is one of the leading First Amendment attorneys in the nation. (Rich Decl.) Additionally, Mr. Rich states that he is familiar with the billing rates of leading New York attorneys and that “the billing rate of \$650 per hour is within the range of what one would reasonably expect for an attorney of his stature and experience.” (Rich Decl.) Although the court recognizes the extent of Mr. Bamberger’s expertise and experience in this field, the court declines to accept Mr. Bamberger’s requested rate of \$650 an hour and instead believes that a rate of \$600 an hour is more reasonable.

2. Reasonable Number of Hours

Defendants argue that the requested amount of compensation, \$480,669.89, is unreasonable because it shocks the conscience and the hours claimed by Plaintiffs are grossly excessive due to overstaffing and unnecessary work which created duplication of effort.⁶ Additionally, Defendants claim that the amount of time needed to present this case should have been minimized because of previous experience and participation by some Plaintiffs in these types of cases. In return, Plaintiffs argue both that Defendants’ actions prolonged and complicated the case and that Defendants grossly

⁶ Using the hourly rates and the numbers of hours actually requested by Plaintiffs, the court finds that Plaintiffs actually seek a fee award of \$490,669.89.

underestimate the complexity of the case and amount of work necessary to prosecute this case.

To establish the reasonable number of hours expended, Plaintiffs must submit evidence supporting the number of hours worked. *See Hensley*, 461 U.S. at 433. The number of hours should be reduced to exclude “hours that are excessive, redundant, or otherwise unnecessary” in order to reflect the number of hours that would be properly billed to the client. *Id.* at 434. Plaintiffs request compensation for 954.2 attorney hours and 114.1 law clerk and paralegal hours, for a total of 1068.3 hours.

The party seeking reimbursement of attorney’s fees has the burden of presenting adequate documentation of the hours reasonably expended. *See League of United Latin Am. Citizens #4552 v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1233 (5th Cir. 1997). Accordingly, the fee applicant must document the hours expended in a manner sufficient for the court to verify that the applicant has met his burden. *See La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995) (per curiam). The court may reduce fee requests that are based on inadequate documentation. *See LULAC*, 199 F.3d at 1233; *La. Power & Light Co.*, 50 F.3d at 326. Here, the court finds that attorneys provided sufficiently detailed billing records that adequately describe the date, hours, and work performed, and as such, the court will not discount the hours for inadequate documentation.

Defendants argue that the hours Plaintiffs claim are grossly excessive due to overstaffing and unnecessary work. For example, in their Memo in Opposition to Plaintiffs’ Fee Petition, Defendants note that Plaintiffs submitted time records for nine attorneys and five paralegals, and at any one time, at least six lawyers were working on the case. (Defs.’ Memo in Opp. 21.) Also, three lawyers attended each hearing although only one made oral arguments, and two attended the deposition of Defendants’ expert in Utah although only one asked questions of the deponent. (Defs.’ Memo in

Opp. 21, 24, 26.) The involvement of this number of attorneys necessarily involves some degree of duplication and overlap, and accordingly, the court must take this into account in determining the reasonable number of hours to compensate Plaintiffs. *See, e.g., Alexander S. By and Through Bowers v. Boyd*, 929 F.Supp. 925, 946 (D.S.C.,1995) (“Courts will substantially reduce bills when unnecessary duplication is brought about by having an excessive number of attorneys involved in a case. Duplicative work, such as several attorneys attending the same hearing, should generally not be part of a fee award.”) (citations omitted).

Additionally, Defendants argue that the time is particularly unconscionable in light of a recent similar case, *PSINet v. Chapman*, 372 F.3d 671 (4th Cir. 2004), which involved one of the same attorneys and two of the same experts.⁷ After reviewing counsels’ declarations and billing records, the court does not find that the hours requested by Plaintiffs “shock the conscience,” as Defendants assert. However, the court does find some unnecessary duplication of effort and excessive billing and therefore reduces the award accordingly.

For example, as previously mentioned, three attorneys attended the Motion to Dismiss hearing, but only one attorney argued the matter. Anywhere from three to six attorneys worked on most documents at any given time. In addition, three attorneys attended and prepared for oral argument for Plaintiffs on the updated Motion for Summary Judgment, although only one attorney actually argued it. Also, Plaintiffs’ records include more than 44 hours in connection with a moot

⁷ In *PSINet*, the district court awarded fees for more than 1,429.75 hours through the summary judgment stage and 15 additional hours spent on litigation of the fee petition itself. Plaintiffs note that they seek roughly 500 fewer attorney hours than the district court awarded in *PSINet*. However, in addition to the 954.2 attorney hours Plaintiffs request in this case, Plaintiffs also request 114.1 hours for the work of law clerks and paralegals.

court held in advance of the argument.⁸ *See Planned Parenthood of Cent. New Jersey v. Attorney Gen. of New Jersey*, 297 F.3d 253 (3d Cir. 2003) (holding that moot court time of 25.5 hours was excessive for purposes of attorney fee award under § 1988). In preparing the fee petition alone, Plaintiffs claim almost 70 hours. *See Spell v. McDaniel*, 852 F.2d 762, 770 (4th Cir. 1988) (finding counsel's 64.6 hours spent preparing the fee petition "simply incredible" and noting that 19 attorney hours were sufficient to accomplish the task). Lastly, Plaintiffs' records indicate that one paralegal spent 12.6 hours cite checking Plaintiffs' Motion for Summary Judgment, a document of less than 2 pages. Overall, and in light of the foregoing examples, the court believes that Plaintiffs' hours are somewhat excessive due to duplication and/or waste of effort of the nine attorneys and five law clerks and paralegals.⁹ Therefore, the court believes that a 15% reduction¹⁰ in fees and costs is

⁸ Plaintiffs' records from April of 2005 include the following entries in connection with moot court: (1) for Kenneth Bamberger, entries for 3.6 and 4.2 hours for a total of 7.8 hours; (2) for Janis Kestenbaum, entries for 5, 4.5, 5, and 7 hours for a total of 21.5 hours; (3) for Brian Murray, entries for 4 and 4 hours for a total of 8 hours; (4) for David Ogden, entries for 1.5 and 2 hours for a total of 3.5 hours, and; (5) for Michael Bamberger, entries for .75 and 2.6 hours. Entries for these five attorneys in connection with the moot court total 44.15 hours.

⁹ Plaintiffs claim that Defendants' actions prolonged the litigation and complicated the case. For example, Plaintiffs note that Defendants refused to enter into certain stipulations, and Defendants filed numerous motions that were without merit. Although the court finds Plaintiffs' hours to be somewhat excessive and/or redundant, the court also considers the extent to which Defendants prolonged this litigation in addressing the reasonableness of the fee award.

¹⁰ In *Copeland v. Marshall*, the U.S. Court of Appeals for the D.C. Circuit stated:

Once the district court determines the reasonable hourly rates to be applied, for example, it need not conduct a minute evaluation of each phase or category of counsel's work. . . . We think that the District Court Judge in this case – recognizing, as he did, that some duplication or waste of effort had occurred – did not err in simply reducing the proposed "lodestar" fee by a reasonable amount without performing an item-by-item accounting.

appropriate, to be applied after application of the court-approved hourly billing rates.¹¹

Total Reasonable Attorney's Fees

Accordingly, based on the discussion above, the court finds that Plaintiffs are entitled to attorney's fees in the amount of **\$405,485.61**.

& Standard Sanitary Corp., 540 F.2d 102, 116 (3d Cir. 1976)) (citation omitted).

¹¹ Using the hourly rates and the numbers of hours actually requested by Plaintiffs, the court finds that Plaintiffs actually seek a fee award of \$490,669.89.00. Using the court's approved hourly rates, the new amount is calculated as follows:

Attorney Derfner: 75.5 hours at \$400/hour = \$30,200

Attorney Altman: 1.4 hours at \$275/hour = \$385

Attorney Wilborn: 5.7 hours at \$275/hour = \$1,567.50

Attorney Ogden: 43.3 hours at \$500/hour = \$21,650

Attorney Kestenbaum: 348.9 hours at \$430/hour = \$150,027

Attorney Bamberger: 293.7 hours at \$420/hour = \$123,354

Attorney Murray: 44.2 hours at \$350/hour = \$15,470

Attorney Strayer: 19.9 hours at \$300/hour = 5,970

Attorney Bamberger: 121.6 hours at \$600/hour = \$72,960

Law Clerks and Paralegals: 114.1 hours at rates between \$160 to \$200/hour = \$20,378

Costs and fees:

(1) for Derfner, Altman & Wilborn, LLC: \$505.52.

(2) for Wilmer Cutler Pickering Hale and Dorr LLP: \$30,271.30;

(3) for Sonnenschein Nath & Rosenthal LLP: \$4,303.57.

The sum of these amounts is: \$477,041.89. This is \$13,628 less than the actual amount sought by Plaintiffs. After calculating this amount, the court believes that a 15% reduction for excessive and duplicative work is necessary. Fifteen percent of \$477,041.89 amounts to \$71,556.28. Subtracting this amount from \$477,041.89 leaves \$405,485.61.

CONCLUSION

It is therefore **ORDERED**, for the foregoing reasons, that Plaintiffs' petition for attorney's fees and costs in the aggregate amount of **\$405,485.61** is **GRANTED**.

AND IT IS SO ORDERED.



PATRICK MICHAEL DUFFY
United States District Judge

Charleston, SC
September 8, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BIG HAT BOOKS, *et al.*,)
Plaintiffs,)
v.) CASE NUMBER: 1:08-cv-0596-SEB-TAB
PROSECUTORS: ADAMS, *et al.*,)
Defendants.)

NOTICE OF SETTLEMENT OF ATTORNEY FEES

Come now all parties, by their respective counsel, and report to the Court that the matter of attorney fees and costs has been settled pursuant to the attached listing of rates, costs and totals. Accordingly, all fee and cost claims in this case have been resolved.

Respectfully submitted,

/s/ Kenneth J. Falk (with permission)
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Respectfully submitted,

/s/ Jon B. Laramore (with permission)
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/s/ Matthew T. Albaugh (with permission)
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Attorneys for Indianapolis Museum of Art, Indianapolis Downtown Artists and Dealers Association

Respectfully submitted,

/s/ Michael A. Bamberger (with permission)
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Admitted Pro Hac Vice
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Attorney for American Booksellers
Foundation for Free Expression,
Association of American Publishers,
Freedom to Read Foundation,
Entertainment Merchants Association,
National Association of Recording
Merchandisers, and Great Lakes
Booksellers Association

Respectfully submitted,

/s/ David A. Arthur
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E-Mail: David.Arthur@atg.in.gov
Attorney for Defendant Prosecutors

Total Hours Expended by Counsel - 199.8 hours

Total Hours Expended by Non-lawyers - 20.5 hours

Rates:

ACLU

Kenneth J. Falk	-	\$350/hr
Jaquelyn Bowie Suess	-	\$275/hr

Sonnenschein

M. Bamberger	-	\$600/hr
R. Balaban	-	\$465/hr

Baker and Daniels

Jon Laramore	-	\$430/hr
Matthew Albaugh	-	\$290/hr

Total Fees: \$74,544.00

Total Costs: \$7031.79

TOTAL PAID- \$81,575.79

EXHIBIT G

In the United States Court of Appeals for the Ninth Circuit

POWELL'S BOOKS, INC., et al.,
Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman)
Case No. CV-0-8501-MO

DECLARATION OF JONATHAN BLOOM

Jonathan Bloom declares as follows:

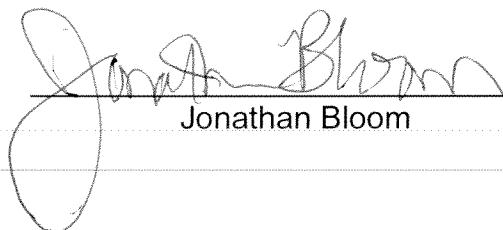
1. I am counsel to the law firm Weil Gotshal & Manges LLP. I have practiced in the firm's New York office in the area of Media/ First Amendment law for more than 17 years.
2. I have known and worked with Michael A. Bamberger of SNR Denton US LLP (formerly known as Sonnenschein Nath & Rosenthal LLP), one of the country's leading First Amendment attorneys, for many years. Specifically, I have participated in the preparation of numerous briefs with Mr. Bamberger in First Amendment cases over the years and know that he is held in the highest regard in the world of communications and constitutional law. In particular, he is the nation's leading expert on laws

concerning restrictions on juvenile access to sexually frank material ("harmful to minors" laws), having successfully litigated most of the significant cases in that area.

3. I am generally familiar with the billing rates of leading New York-based attorneys in this field. To my knowledge, the billing rate of \$650 per hour for Mr. Bamberger (the rate requested in this application) is well within the range of what one would reasonably expect for an attorney of his stature and experience. Indeed, I believe most New York-based litigators with comparable expertise and experience command a billing rate at least that high and in many cases higher.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: December 17, 2010



Jonathan Bloom

EXHIBIT H

In the United States Court of Appeals for the Ninth Circuit

POWELL'S BOOKS, INC., et al.,
Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman)
Case No. CV-0-8501-MO

DECLARATION OF RICHARD M. ZUCKERMAN

Richard M. Zuckerman declares as follows:

1. I am a member of the law firm of SNR Denton US LLP (known as Sonnenschein Nath & Rosenthal LLP when this case commenced) ("SNR Denton"), counsel to plaintiffs-appellants Powell's Books, Inc.; Old Multnomah Book Store, Ltd.; Dark Horse Comics, Inc.; Colette's: Good Food + Hungry Minds, LLC; Bluejay, Inc.; St. John's Booksellers, LLC; American Booksellers Foundation for Free Expression ("ABFFE"); Association of American Publishers, Inc. ("AAP"); Freedom to Read Foundation, Inc. ("FTRF"); Comic Book Legal Defense Fund ("CBLDF"), in the above-captioned action.

2. I have personal knowledge of the facts set forth in this Declaration, which I make in support of SNR Denton's application for an award of attorneys' fees.

3. SNR Denton seeks compensation for my services at the rate of \$600 per hour.

My regular billing rates range from \$730 to \$810 per hour.

4. I have been a member of the Bar of the State of New York for nearly 35 years, since January 1976. I have been a member of the Bar of the United States Court of Appeals for the Ninth Circuit for 15 years. I am also a member of the Bar of the United States Supreme Court, the United States Courts of Appeals for the District of Columbia, Federal, Second, Third, Fifth, and Tenth Circuits, and the United States District Courts for the Southern and Eastern Districts of New York and the District of Connecticut. I have also appeared *pro hac vice* in additional federal and state courts. I am a member in good standing of each of the Courts to which I have been admitted.

5. I graduated from Dartmouth College, *summa cum laude*, in 1972, and from Yale Law School, in 1975. In law school, I was an editor of the Yale Law Journal, a director of Moot Court, an Assistant-in-Instruction, and the recipient of the Harlan Fiske Stone Prize for appellate advocacy.

6. Since my admission to the Bar, the overwhelming majority of my practice has been devoted to civil litigation, including both trials and appeals. I am a Co-Author of Appeals to the Second Circuit (7th Ed.), published by the Association of the Bar of the City of New York.

7. Since 2002, I have worked with my law partner, Michael Bamberger, on a broad range of matters which, since 2008, have included representing members of the Media Coalition, a coalition of media-related entities organized to protect First Amendment rights, in First Amendment litigation. (Plaintiffs ABFFE, AAP, FTRF and CBLDF are members of Media Coalition.) In addition to my work on this case, my work for Media Coalition and/or its members has included:

(a) *Schwarzenegger v. Entertainment Merchants Ass'n*, No. 08-1448 (United States Supreme Court, argued Nov. 2, 2010) (whether California law restricting violent video games violates First Amendment), counsel for ABFFE, AAP, FTRF, and others, as *amicus curiae*;

(b) *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. 2010) (enjoining, as violative of First Amendment, the extension of Massachusetts "harmful to minors" law to electronic communications); and

(c) *American Booksellers Foundation for Free Expression v. Cordray*, 124 Ohio St.3d 329, 922 N.E.2d 192, 2010 Ohio 149 (Ohio 2010) (limiting construction of Ohio "harmful to minors" statute to comply with First Amendment).

8. In addition, I have been honored to serve as counsel for the American Bar Association and several other *amici curiae* before the United States Supreme Court in these, among other, cases:

(a) *Fitzgerald v. Barnstable School Committee*, 555 U.S. ---, 129 S.Ct. 788 (2009) (whether gender discrimination claims under 42 U.S.C. § 1983 are preempted by Title IX of the Education Amendment Acts of 1972), counsel for American Bar Association, as *amicus curiae*;

(b) *Horne v. Flores*, 557 U.S. ---, 129 S.Ct. 2579 (2009) (equal access to education for students for whom English is a second language), counsel for Asian American Justice Center and other civil rights organizations, as *amici curiae*;

(c) *Al-Marri v. Spagone*, --- U.S. ---, 129 S.Ct. 1545 (2009) (criminal due process rights during times of threat to national security), counsel for American Bar Association, as *amicus curiae*; and

(d) *Samantar v. Yousuf*, --- U.S. ---, 130 S.Ct. 2278 (2010) (whether foreign sovereign immunity may be asserted as a defense to civil rights claims under 42 U.S.C. § 1983), counsel for professors of international litigation and foreign relations law, as *amici curiae*.

9. I have served as *pro bono* counsel to Human Rights Watch, one of the world's leading human rights organizations, for over 15 years. I regularly counsel Human Rights Watch on First Amendment matters, including pre-publication vetting of reports, and responses to subpoenas seeking the production of research notes containing confidential source materials.

10. My regular litigation practice includes a broad range of commercial litigation and civil rights litigation, including First Amendment litigation. My cases include:

(a) *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010) (Article III standing under the Real Estate Settlement Procedures Act);

(b) *In re WestPoint Stevens, Inc.*, 600 F.3d 231 (2d Cir. 2010) (scope of appellate review of bankruptcy court's sale order);

(c) *Eastern Paralyzed Veterans Ass'n, Inc. v. Secretary of Veterans Affairs*, 257 F.3d 1352 (Fed. Cir. 2001) (constitutionality of regulations permitting Secretary of Veterans Affairs to discontinue medical care to veterans);

(d) *DeGirolamo v. Alitalia-Linee Aeree Italiane, S.p.A.*, 159 F.Supp.2d 764 (D. N.J. 2001) (liability of airline for discrimination against wheelchair user);

(e) *In re Letters of Request From Supreme Court of Hong Kong*, 821 F.Supp. 204 (S.D.N.Y. 1993) (due process rights of defendant relating to discovery taken in United States for use in Hong Kong criminal proceeding);

(f) *Eastern Paralyzed Veterans Ass'n, Inc. v. Veterans' Admin.*, 762 F.Supp.

539 (S.D.N.Y. 1991) (equal protection claim on behalf of spinal cord injured veterans relating to care provided at Veterans Administration Medical Center);

(g) *Americans Disabled for Accessible Public Transp. (ADAPT) v. Skinner*, 881 F.2d 1184 (3d Cir. 1989) (civil rights claim related to accessibility of mass transit system);

(h) *Kelly v. Schmidberger*, 806 F. 2d 44 (2d Cir. 1986) (defense of defamation claim against priest);

(i) *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223 (2d Cir. 1984) (whether academic researcher may assert “scholar’s privilege,” under First Amendment, in response to grand jury subpoena);

(j) *Recording Industry Ass’n of America v. Copyright Royalty Tribunal*, 662 F.2d 1 (D.C.Cir. 1981) (appeal from proceeding of Copyright Royalty Tribunal establishing royalty rates for recorded music);

(k) *New York Charter School Ass’n v. Smith*, 15 N.Y.3d 403, --- N.E.2d ---- (2010) (whether charter schools are subject to prevailing wage laws);

(l) *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 368 N.E.2d 1230, 398 N.Y.S.2d 864 (1977) (speech protected by First Amendment could not subject speaker to liability for *prima facie* tort); and

(m) *Quirk v. Municipal Assistance Corp. for City of New York*, 41 N.Y.2d 644, 363 N.E.2d 549, 394 N.Y.S.2d 842 (1977) (constitutionality of Municipal Assistance Corporation of the City of New York).

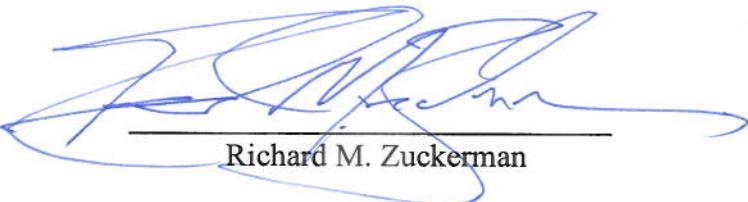
11. SNR Denton’s application requests fees for the time of my law partner, Michael Bamberger at \$690 per hour, and for my time at \$600 per hour. As noted above, my regular

billing rates range from \$730 to \$810 per hour. SNR Denton requests an award at \$600 an hour—rather than a rate within my regular billing range—for my time because while I have substantial First Amendment and civil rights litigation experience, I do not claim to have the depth of experience in this particular field—the constitutionality of “harmful to minors” statutes—that Mr. Bamberger has. Nevertheless, I respectfully suggest that an award at \$600 per hour is appropriate¹ both because of the nature of my First Amendment, civil rights, and appellate experience, and because, since I regularly work with Mr. Bamberger (whose office adjoins mine) on First Amendment matters, the aggregate time is less than it would be if he were to work with counsel with whom he did not regularly work.

12. In further support of the reasonableness of my hourly rate, filed herewith is an declaration of Stephen E. Jenkins of the law firm of Ashby & Geddes in Wilmington, Delaware.

I declare under penalty of perjury under the laws of the United States that the information contained in this Declaration is true and correct.

Dated: December 23, 2010



Richard M. Zuckerman

¹ Using the Oregon State Bar 2007 Economic Survey (“Bar Survey”), applying the 95% percentile to persons who have practiced over thirty years, the applicable rate would be \$461.

EXHIBIT I

In the United States Court of Appeals for the Ninth Circuit

POWELL'S BOOKS, INC., et al.,
Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman)
Case No. CV-0-8501-MO

DECLARATION OF STEPHEN E. JENKINS

Stephen E. Jenkins declares as follows:

1. I am the president of Ashby & Geddes, P.A., a law firm in Wilmington, Delaware. I was admitted to the bar of the Supreme Court of the State of Delaware in 1982, and am also a member of the bars of the United States District Court for the District of Delaware, and the United States Courts of Appeals for the Third Circuit and District of Columbia Circuit as well as the United States Supreme Court.

2. My regular practice includes a broad range of complex corporate litigation in the Delaware State Courts and a variety of federal courts. In *pro bono* representations, I have concentrated on First Amendment matters, including the free speech rights of professors and the free exercise rights of religious organizations.

3. For many years, I have known and worked with Richard M. Zuckerman, Esq., of the firm of SNR Denton US LLP (formerly known as Sonnenschein Nath & Rosenthal LLP), in complex litigation, in the United States Court of Appeals for the Second Circuit, the United States District Court for the Southern District of New York (on an appeal from the United States Bankruptcy Court for the Southern District of New York), and the Court of Chancery of the State of Delaware.

4. Mr. Zuckerman is a seasoned, and in my view, an excellent, appellate lawyer. On the matters where I have had an opportunity to observe his work first-hand, I have found Mr. Zuckerman to have a penetrating analytical mind and excellent writing skills. Among other things, Mr. Zuckerman is one of the best lawyers I have ever met at being able to untangle complex legal problems and present them to a court in a logical, lucid and orderly way.

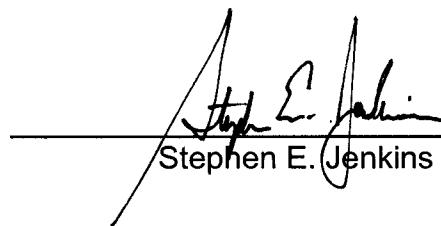
5. Because many corporations select Delaware as their state of incorporation, I have had the pleasure of working with (and against) highly skilled counsel from across the United States throughout my career. I am generally familiar with the billing rates of law firms engaged in complex trial and appellate litigation, both in the Delaware courts, and in the federal appeals courts. In addition, I have been appointed as a Special Master to assess the reasonableness of legal fees in three different cases in the Delaware Court of Chancery and by the Chancery Division in Chicago, Illinois in a fourth. All involved legal fees that former directors were receiving pursuant to their statutory rights to advancement and indemnification; I was charged by the various courts with reviewing those fees for reasonableness. In that connection, I have reviewed probably hundreds of contested bill submitted by lawyers in Los Angeles,

San Francisco, Chicago, New York, Washington D.C. and London as well as many other cities. As a result, I believe that I am generally familiar with the hourly rates charged by lawyers in those cities.

6. Based upon that experience, the billing rate of \$600 per hour for Mr. Zuckerman (the requested rate in this application, which I understand is less than Mr. Zuckerman's regular billing rate) is *greatly below* what one would reasonably expect for an attorney of his status, capabilities and experience in New York (where I would expect a billing rate of over \$800 per hour for him), and still quite a bit below what one would expect in most other large cities. Most litigation attorneys with comparable expertise and experience and with national practices, command a billing rate significantly higher than that being charged by Mr. Zuckerman here.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: December 23, 2010



Stephen E. Jenkins

EXHIBIT J

No. 09-35153

In the United States Court of Appeals for the Ninth Circuit

POWELL'S BOOKS, INC., et al.,
Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman)
Case No. CV-0-8501-MO

DECLARATION OF RACHEL G. BALABAN

Rachel G. Balaban declares as follows:

1. I am currently a partner in the law firm of Scarola Ellis LLP located in New York, New York and was a partner with the law firm of Sonnenschein Nath & Rosenthal LLP (now known as SNR Denton US LLP) throughout the time period referenced in the application.
2. I graduated from New York University School of Law in 1999. I am an attorney admitted to the practice of law before the Courts of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, the United States Courts of Appeals for the Third, Sixth, Ninth and Federal Circuits, and the United States Supreme Court.

3. I joined Sonnenschein Nath & Rosenthal LLP in the fall of 1999 as a litigation associate and became a litigation partner in 2006.

4. During my time at Sonnenschein Nath & Rosenthal LLP I worked closely with Michael Bamberger on many First Amendment cases from 2004 until I left the firm in November 2008. This work was related to Sonnenschein's continued representation of Media Coalition, Inc., a coalition of media-related entities organized to protect First Amendment rights through litigation.

5. In representing Media Coalition Inc., I worked on a number of cases involving similarly complex constitutional issues, namely Shipley, Inc. v. Long, 454 F.Supp. 2d 819 (E.D. Ark 2004) (successful challenge to Arkansas minors' access law) United States v. Williams, 128 S.Ct. 1830 (2008) (drafted amicus brief); Big Hat Books v. Prosecutors, 565 F.Supp. 2d 981 (S.D. Ind. 2008) (successful challenge to Indiana registration law); Entertainment Software Ass'n v. Blagojevich, 469 F.3d 641 (7th Cir. 2006) (affirming injunction of Sexual Explicit Video Games Law); Beard v. Banks, 581 U.S. 521 (2006) (amicus brief); American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001) (amicus brief for case challenging arcade "violent" game ordinance); VSDA v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009) (amicus brief); American Booksellers Fdn. For Free Expression v. Strickland, 601 F.3d 622 (6th Cir. 2010) (harmful to minors law). The Shipley, Big Hat and Strickland cases all involved, like this case, restrictions on "harmful to minors" material.

6. In addition, I took depositions and ran discovery matters in a high-profile First Amendment defamation case, Gary Condit v. Dominick Dunne, 225 F.R.D. 113 (S.D.N.Y 2004).

7. Along with Michael Bamberger, I was counsel to plaintiffs Powell's Books, Inc.; Old Multnomah Book Store, Ltd.; Dark Horse Comics, Inc.; Colette's: Good Food + Hungry

Minds, LLC; Bluejay, Inc.; St. John's Booksellers, LLC; American Booksellers Foundation for Free Expression ("ABFFE"); Association of American Publishers, Inc. ("AAP"); Freedom to Read Foundation, Inc. ("FTRF"); Comic Book Legal Defense Fund ("CBLDF"), in the above-captioned action.

8. As described above, at the time this litigation commenced in 2008, I had gained extensive First Amendment experience including as a result of working directly with Michael Bamberger, one of the nations leading First Amendment lawyers, for over three years.

9. I submit this declaration in support of plaintiff's Application for Attorneys' Fees, specifically plaintiffs' request for compensation for my services at a billing rate of \$500 per hour. This rate was within the range of billing rates Sonnenschein Nath & Rosenthal LLP charged for my services during the relevant period of this litigation. My standard rate at the time of this litigation was \$565 per hour, which is not being sought in this matter.

10. From the onset of the litigation I worked closely with Michael Bamberger in our representation of the Bookseller/Media Plaintiffs involved in this case, ultimately filing the case in the United States District Court for the District of Oregon.

11. I continued to work on this matter from the time the case was commenced through oral argument was heard at the District Court in relation to plaintiffs' request for a declaration of unconstitutionality and permanent injunction. As detailed further in the Application and the detailed time log, I worked on this matter from November 2007 until September 2008.

12. Prior to this case being filed in the District Court of Oregon I worked with M. Bamberger and Stoel Rives LLP (counsel for the Other Plaintiffs) in preparing the initial papers, consisting of the complaint, the motion for a preliminary injunction, and a number of factual declarations in support of the preliminary injunction.

13. After the initial complaint was filed the defendants submitted opposition papers to the preliminary injunction motion. I reviewed and analyzed the opposition papers and worked extensively on researching, outlining, and drafting plaintiffs' reply brief. In addition, having worked on the initial preliminary injunction and the reply brief, I assisted in Michael Bamberger's preparation for oral argument on the preliminary injunction motion.

14. Plaintiffs' application for the preliminary injunction was denied and I began researching and drafting the motion papers requesting a declaration of unconstitutionality and a permanent injunction. Following the filing of this motion I reviewed the state's memorandum of law in opposition to the permanent injunction and began analyzing the issues necessary for drafting the reply brief. I also took part in preparing for the hearing on the merits held in the District Court.

15. During the relevant time period it was my practice and the practice of the firm to maintain contemporaneous daily time records for all billable time. The descriptions of the hours I expended on this litigation are accurate.

16. The hours which I expended in this action and for which plaintiffs are now seeking compensation is time which was reasonably and necessarily expended in order for plaintiffs to ultimately prevail in this action.

17. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: December 23, 2010


Rachel G. Balaban