Exhibit E

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

Southeast Booksellers Association, *et al.*, Plaintiffs, v. Henry D. McMaster, Attorney General of South Carolina, *et al.*, Defendants.	C.A. No. 2:02-3747-23 **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, Plaintiffs[1] 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 §

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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

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[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 miscalculations[3] 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.

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[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 Distribs. Ass'sn 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.

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[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 theWashington, 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

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[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% reduction[10] in fees and costs is

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[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.

641 F.2d 880, 903 (D.C. Cir. 1980) (citing *Lindy Bros. Builders, Inc. of Philadelphia v. Am. Radiator*

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,

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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