UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT **PLAINTIFF**

v. **No. 4:82-cv-866 DPM**

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, et al. **DEFENDANTS**

MRS. LORENE JOSHUA, et al. **INTERVENORS**

KATHERINE KNIGHT, et al. **INTERVENORS**

ADE'S RESPONES TO JOSHUA INTERVENORS'
MOTION FOR AWARD OF ATTORNEY'S FEES FROM THE STATE OF ARKANSAS

ADE responds as follows to the Joshua Intervenors' *Motion for Award of Attorney's Fees From the State of Arkansas*:

I. INTRODUCTION

The Joshua Intervenors request $3.3 million in attorney's fees against ADE through a petition that relies upon inadequate and legally deficient documentation. They first calculated a lodestar at $1.9 million and then seek an enhancement of that award of by 75%. Counsel for the Joshua Intervenors claim they worked 8,381.97 hours, but they provide time and billing records for only 521.57 of those hours. In other words, the Joshua Intervenors can only document 6% of their requested hours. The remainder is based on impermissible estimates that federal courts have routinely refused to accept. Moreover, many of the requested hours occurred many years ago, and the Joshua Intervenors provide no explanation for waiting so long to request the fees. This large time gap between work performed and the petition for fees has prejudiced ADE's ability to respond to this large fee request, and the unreasonable delay bars such an untimely motion.

What is more, only 282.36 of the documented hours are actually tethered to opposing the ADE. These hours involve some excessive, unnecessary, and duplicative work that justifies a reduction of approximately 70 hours. This leaves 212.36 hours in documented, reasonably expended time. Hourly rates in central Arkansas are typically in the range of $250 to $300 per hour. This results in fees of approximately $63,708.

The State has offered to pay more in attorney's fees than what the Joshua Intervenors' documented time suggests. In the final settlement agreement, the State stipulated that:

> Joshua Intervenors . . . are prevailing parties as to the State with regard to certain motions filed subsequent to the 1989 Settlement Agreement that Joshua joined and which were successful against the State and are entitled to reasonable attorney's fees, in the amount of $500,000. . . unless contested, in which event the Court may award a reasonable fee unless otherwise agreed upon.

Final Settlement Agreement p. 3, ¶C.9. The Joshua Intervenors rejected that offer, preferring instead to request millions of dollars in fees based on vague comparisons to other lawyers and methodologies that courts have routinely rejected. This Court should deny the fee petition to the extent that it is based on inflated hourly rates and undocumented hours worked. A review of the documents submitted with the Joshua Intervenors' fee petition, as explained below, suggests that reasonable attorney's fees of $63,708 have been properly documented. Alternatively, if the Court decides to award a fee for the undocumented time, the total award should not exceed the $500,000 stated in the Final Settlement Agreement.

II. ARGUMENT

The Joshua Intervenors request attorney's fees[1] under 42 U.S.C. § 1988. Essentially, the Joshua Intervenors request fees for a) post 1989 Settlement Agreement monitoring efforts, and b) certain actions taken by the Joshua Intervenors with which, they contend, they prevailed against the State.

This fee request is different from a normal fee request. The Joshua Intervenors have not asked for fees following a successful trial; they have asked for fees for work done in the over twenty years following the entry of the 1989 Settlement Agreement. A claim for attorney's fees after judgment is analyzed differently than a similar request for obtaining the initial judgment. *Jenkins v. State of Mo.*, 127 F.3d 709 (8th Cir. 1997). Prevailing party status as a result of the 1989 Settlement Agreement only extends to post-judgment work that is a "necessary adjunct[] to the initial litigation." *Id.* at 716-717. To be compensable, that work must still produce some relief on the party's claims. *Buckhannon Bd. and Care Home Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 604-605 (2001). In particular, fee requests for post-judgment monitoring must spring from work that is "useful and of a type ordinarily necessary" to advance the remedy obtained. *Jenkins*, 127 F.3d at 718, *quoting Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 561 (1986).

Prevailing party status does not extend to other types of post-judgment work. "Work that is more like a new, separate lawsuit requires a fresh determination of entitlement to fees." *Cody*

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[1] *Haymond v. Lundy*, 205 F.Supp.2d 403, 406 n. 2 (E.D. Penn. 2002) (reviewing cases and authorities and settling on "attorney's fees" as the proper term).

v. Hilliard, 304 F.3d 767, 773 (2002). In other words, activity that is not directly related to the decree awarded must be treated as new litigation and fees determined accordingly. *Id.*

The overriding consideration in an award of fees is "the degree of a plaintiff's success in the case as a whole." *Cody*, 304 F.3d at 773. A party may attain prevailing party status based on limited relief, but the award of fees may only be based upon the portion of the case on which the party actually prevailed. *Hensley v. Eckerhard*, 461 U.S. 424, 434-435 (1983). Indeed, where results are limited, the lodestar formula "may be an excessive amount" even if the party's claims "were interrelated, nonfrivolous, and raised in good faith." *Id.* at 436.

Finally, each step of the analysis must be documented. The U.S. Supreme Court has instructed that "[i]t is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination." *Perdue v. Kenny A*, 559 U.S. 542, 558 (2010). The fee award must be based on objective factors and should not appear to be influenced "by a judge's subjective opinion regarding particular attorneys or the importance of the case." *Id.* (noting that Section 1988 fees are often not paid by a constitutional or statutory violator but, instead, by state and local taxpayers).

A. The Joshua Intervenors Have Unreasonably Delayed Much of Their Attorney's Fees Request to ADE's Prejudice

Federal Rule of Civil Procedure 54 governs applications for attorney's fees in civil cases. Fed. R. Civ. Pro. 54(d). The rule requires fee requests "to be filed no later than 14 days after the entry of judgment." Fed. R. Civ. P. 54(d)(2)(b)(i); *Robinson v City of Harvey*, 617 F.3d 915, 918-19 (7th Cir. 2010) (noting in § 1988 fee dispute that "[j]udges need good reasons for permitting litigants to exceed" Rule 54(d)'s deadline). The Advisory Committee notes that "prompt filing [of fee petitions] will permit the court to resolve fee disputes while the services performed still should be freshly in mind." *See also* 10 Charles Alan Wright, et al., *Federal*

Practice and Procedure: Civil § 2680, p. 493 (3rd Ed. 1998). The rule recognizes that unreasonable delay can lead to the loss of evidence and knowledge about the work claimed in the fee petition. Laches also recognizes that unreasonable delay by a party that results in prejudice to the opponent may bar the relief sought. *Summit Mall Co., LLC v. Lemond*, 355 Ark. 190, 206, 132 S.W.3d 725, 735 (2003); *Royal Oaks Vista, LLC v. Maddox*, 372 Ark. 119, 124, 271 S.W.3d 479, 483 (2008). Memories fade, documents can be lost, and those who worked on the case and who were familiar with the litigation move on; all of which prejudices the defense of a fee petition.

The Joshua Intervenors present a fee petition requesting fees for work done from 1993 to 2014, which is a twenty-year span. They provide no reason why they could not have sought fees, even for monitoring, at or near the time the services were rendered. In certain circumstances, the failure to comply with a filing deadline can be excused, but those circumstances are not present here. *Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 403 (8th Cir. 2000).

A number of lawyers have handled this case for ADE over the years. None of those lawyers, except the undersigned, still work for either ADE or the Attorney General's office. Even for the few lawyers who handled the case for ADE in the 1990s and who still work in state government, memories have faded. The only way to evaluate the Joshua Intervenors' request for fees prior to 2007 is to review the documents in the docket. But, the Joshua Intervenors provide little assistance for either the Court or defense counsel because they point to few docket entries that would assist in evaluating the claimed hours. Their unreasonable delay in seeking fees should result in a denial of fees.

Also, because the Joshua Intervenors could have sought fees at the time they were rendered, if the Court decides to award fees, then the hourly rates applied should be those that

would have applied at the time the Joshua Intervenors could have filed their fee request. For example, the Joshua Intervenors apply for attorney's fees for joining the school districts claims regarding worker's compensation funds and loss funding. The Court set a deadline (August 26, 1996) for the Joshua Intervenors to apply for fees, but they did not do so until now, eighteen years later. On September 23, 1996, the Court found that a reasonable hourly rate for Rep. Walker was $200 per hour. DE # 2821, Memorandum Opinion and Order, p. 9 n. 6. If the Court decides to award fees after this eighteen year delay (and it should not), it should apply the rate that was found to be reasonable when the fee petition should have been filed.

B. The Hourly Rate Claimed Is Far Above the Prevailing Market Rates in Central Arkansas

The lodestar method requires first a determination of "the prevailing market rates in the relevant community." *Perdue*, 559 U.S. at 551 *quoting Blum v. Stenson*, 465 U.S. 886, 895 (1984). That is because this method is designed to "produce[] an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Id.*(emphasis in original). District courts may rely on their own knowledge and experience of the prevailing market rates in the locality. *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005).

The Joshua Intervenors claim hourly rates for work allegedly extending from 1993 to 2013 as follows: John Walker - $400 per hour; Robert Pressman - $325 per hour;[2] Austin Porter -

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[2] Hourly rates from other areas (e.g. Boston) may only be awarded when a fee applicant demonstrates that the client was "unable to find local counsel able and willing to take the case" after "diligent, good faith efforts." *Emery v. Hunt*, 272 F.3d 1042, 1048 (8th Cir. 2001). The Joshua Intervenors do not appear to make any claim for enhancement of the hourly rates on this basis.

$300 per hour. They request an hourly paralegal rate for Joy Springer of $125 per hour, and an hourly legal assistant rate from Evelyn Jackson for $75 per hour. These fees are out of step with current rates, and are vastly out of step with rates charged at the times most of the fees were incurred.

In the last few years, the Attorney General's office has received fee requests in other civil rights litigation from other lawyers in central Arkansas. The rates requested in those cases range from $295 per hour for Pat James (Ex. 1) and Jack Wagoner III (Ex. 2) to $275 for Dan Harrington (Ex. 3) to $210 for John Davis (Ex. 4). The maximum hourly rate under the Eastern District's Criminal Justice Act plan for capital cases is $180 per hour. Judicial awards in recent years have been in the range of $200-300 per hour. *Sexton v. Ellison*, 2009 WL 1940523 (E.D. Ark. July 2, 2009) (Harrill & Sutter); *Gay v. Saline County*, 2006 WL 3392443 (E.D. Ark. Oct. 20, 2006) (John Holleman & Q. Byrum Hurst); *Pressler v. FTS USA, LLC*, 2011 WL 2182023 (June 2, 2011) (holding that $225 was reasonable hourly rate "[t]hough still a bit on the high side"). The Joshua Intervenors' requested rates are well above what courts in the Eastern District of Arkansas have found should be awarded in the recent past.

The Joshua Intervenors point to the Eighth Circuit's recent decision awarding fees on appeal. *LRSD v. Arkansas*, 674 F.3d 990 (8th Cir. 2012). However, the Court of Appeals did not analyze the rates requested by Rep. Walker or Mr. Pressman. Its primary concern seems to have been the rates and fees of the other lawyers. The hourly rate determination may also have been because the number of hours requested for Rep. Walker were not high, and the resulting award for Rep. Walker and Mr. Pressman were not significant in the overall award; $6,700 for Rep. Walker (4% of total) and $29,347.5 for Mr. Pressman (20% of total) in a total award of $149,417.50.

Moreover, the rates awarded Rep. Walker and Mr. Pressman were not justified in light of other awards in the Eastern District of Arkansas. The Eighth Circuit cited an unpublished opinion of Judge Susan Webber Wright as the basis for its rate determination. *B & B Hardware, Inc. v. Fastenal Co.*, No. 4:10–cv–00317, 2011 WL 6829625, at *9 (E.D.Ark. Dec. 16, 2011). That order noted that an hourly rate of $400 per hour had been specifically rejected in the Eastern District of Arkansas. *Id*. at *9. The highest rate that Judge Wright noted had been allowed was $300 per hour. See *All-Ways Logistics, Inc. v. USA Truck, Inc.*, No. 3:06cv0087 SWW, 2007 WL 4285410, at *10 (E.D. Ark. Dec. 4, 2007) (noting that "this Court is not aware of any similar case in the Jonesboro area, much less the Little Rock area, in which hourly attorney rates of $400 and paralegal rates of $150 were charged" . . . "it simply cannot be said such rates are the ordinary rates for similar work in the community where the case has been litigated."); *see also Scroggin v. Credit Bureau of Jonesboro, Inc.*, 973 F.Supp.2d 961 (E.D. Ark. 2013) (reaffirming *All-Ways* order on hourly rates; holding $250 per hour reasonable rate for senior partner with over 35 years' experience (i.e. Donn Mixon)). The Eighth Circuit affirmed Judge Wright's ruling on attorney's fees and reasonable rates in that case. *All-Ways Logistics, Inc. v. USA Truck, Inc.*, 583 F.3d 511, 521 (8th Cir. 2009). However, the panel in the *LRSD v. PCSSD* opinion did not provide any explanation for departing from this prior panel opinion.

ADE cannot locate any other case finding that $400 per hour is a reasonable rate for attorneys from central Arkansas. All of the cases say it is not. *Edwards v. Beck*, 4:13cv00224, 2014 WL 2574522 (E.D. Ark. June 9, 2014) ($300 per hour); *Beauford v. ActionLink, LLC*, 4:12cv00139, 2014 WL 183904, at *4 (rejecting $475 per hour, granting $275 per hour). Accordingly, the hourly rates claimed by the Joshua Intervenors appear to be a significant

departure from the reasonable hourly rates found by the courts in the Eastern District of Arkansas and should be reduced accordingly.

The inflated hourly rates are even more skewed by the fact that the hours pertain to work allegedly performed a long time ago. There was no impediment to the Joshua Intervenors' filing for attorney's fees at the time the services were rendered. Their unreasonable delay should not result in a windfall to counsel. The Court, if it decides to award fees for these long ago time periods, should apply the rates that counsel could have charged at the time they should have applied for fees. Rep. Walker was awarded hourly rates in the past as follows: 1989: $165 per hour; 1991: $175 per hour; 2007: $250 per hour. *Hollowell v. Gravett*, 723 F.Supp. 107, 110 (E.D. Ark. 1989); *Sanders v. Stewart*, 776 F.Supp. 458 (E.D. Ark. 1991); *Smith v. City of Jacksonville*, 4:05cv001930, 2007 WL 4240860 (E.D. Ark. Nov. 28, 2007) (awarding hourly rate of $250 for Messrs. Walker and Pressman and $85 for Ms. Springer). The rates in 1989 and 1991 appear high for the time period. On September 23, 1996, this Court in this case held that a reasonable hourly rate for Rep. Walker was $200 per hour, although it denied fees at the time. DE # 2821, Memorandum Opinion and Order p. 9 n. 6.

Courts in the Eastern District of Arkansas have also approved rates for legal assistants of $100 per hour. *Beauford*, 2014 WL 183904, at *4 (rejecting $125 per hour for legal assistants); Paralegal time has been billed at rates of $110 per hour (Ex. __, John Davis). The claim for Ms. Springer's rate at $150 per hour approaches that paid to counsel in death-penalty cases. "[A]n hourly rate for paralegals that rivals the rate charged for attorney's work is excessive." *Ladd v. Pickering*, 783 F.Supp.2d 1079, 1093 (E.D. Mo. 2011).

C. A Reasonable Determination of Hours Spent in this Case Requires a Substantial Reduction in the Requested Fees

Fee requests cannot be based on "excessive, redundant, or otherwise unnecessary" work. *Hensley*, 461 U.S. at 434. These hours "are not compensable." *Cody*, 304 F.3d at 773, *quoting Jenkins*, 127 F.3d at 716. In other words, a party is not entitled to a fee for any and all post-decree work. *Binta B. ex rel. SA v. Gordon*, 710 F.3d 608, 625 (6th Cir. 2013). That type of fee award would directly conflict with the Supreme Court's instruction that § 1988 does not exist to improve the lot of attorneys. *Hensley*, 461 U.S. 424, 434 (noting that "[h]ours not properly billed to one's client are also not properly billed to one's adversary"). Entry of a consent decree does not grant an attorney "a guaranteed life income by bringing and losing a series of actions to enforce the decree and charging the expense to the [state] and thus to the taxpayers." *Alliance to End Repression v. City of Chicago*, 356 F.3d 767, 773 (7th Cir. 2004). Moreover, the Supreme Court has rejected the "catalyst" theory for § 1988 fee awards. *Buckhannon Board*, 532 U.S. 598. Claimed hours that resulted in not change in the parties' legal relationship violate *Buckhannon* and are demonstrably "unnecessary." *Binta B*, 710 F.3d at 625.

To be compensable, the fee applicant's claimed hours "must be useful and of a type ordinarily necessary to secure the final result obtained from the litigation." *Delaware Valley*, 478 U.S. 546, 561, *quoting Webb v. Board of Ed. of Dyer County*, 471 U.S. 234, 243 (1985). To qualify in the post-decree context under this standard the hours must be necessary to enforce the consent decree and obtain a result that "secures plaintiffs' initial success in obtaining the consent decree." *Binta B*, 710 F.3d at 625 *quoting Delaware Valley*, 478 U.S. at 558-559.

For both categories of fees, the Joshua Intervenors must present evidence demonstrating the hours worked and the rates claimed in their request. *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983) ("The party seeking an award of fees should submit evidence supporting the hours

worked and the rates claimed. Where the determination of hours is inadequate, the [trial] court may reduce the award accordingly."). Failure to produce evidence to support the fee request can result in an outright denial of fees. *See*, *e.g.*, *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988) ("[C]ourts may reduce or eliminate attorneys' fees awards where the absence of such records leaves the court without a reliable basis on which to award fees.") (citing *Hensley*, 461 U.S. at 433). A district court has broad discretion to strike "vague or unjustified billing entries." *Montanex v. Simon*, __ F.3d ___, 2014 WL 2757472*6 (7th Cir. June 18, 2014) citing *Harper v. City of Chicago Heights*, 223 F.3d 593, 605 (7th Cir. 2000). Federal courts require a fee applicant, "absent unusual circumstances . . . to submit contemporaneous records with their fee applications." *Scott v. City of New York*, 626 F.3d 130, 133 (2nd Cir. 2010); *see also Reed v. Rhodes*, 179 F.3d 453, 471-472 (6th Cir. 1999) (denying fees where counsel had failed to produce billing records that complied with generally accepted billing practices). A court reviewing a fee application must "provide a concise but clear explanation of its reasons for the fee award that is sufficient to permit appellate review." *Harper*, 223 F.3d 593, 605.

Many of the hours and rates requested by the Joshua Intervenors are completely undocumented and based solely on an estimate that has little, if any, connection to the record in this case. "The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433. Reconstructed records (as opposed to the preferred contemporaneous time records) may work (albeit rarely), but they must actually document the time spent so that the Court and defense counsel can analyze the reasonableness of the hours claimed. *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054 (8th

Cir. 1988).[3] This Court has previously rejected a fee request by the Joshua Intervenors for having "failed to establish with specificity those activities that were directly related to [the fee request] or what activities were necessary for reasonable monitoring of the plans." DE # 2821, Memorandum Opinion and Order p. 8-9. The same principle applies here. Most of the hours requested are not documented; they are block billed and provide either a baseless estimate or records of counsel (such as Ms. Springer's calendar entries) that have not been provided. These failures do not satisfy the Joshua Intervenors' burden on their fee application and justify a denial of all undocumented hours.

Most of Rep. Walker's estimates of his time spent on the matters claimed are based on a comparison to time spent by other lawyers in the case. The Eighth Circuit has held, however, that this exact type of comparison fails to satisfy a fee applicant's burden to prove the reasonableness of a fee request. *Burks v. Siemens Energy & Automation, Inc.*, 215 F.3d 880 (8th Cir. 2000). In *Burks*, counsel for a Title VII plaintiff (the fee applicant) sought to justify his request for fees by comparing his request to the fees charged by defense counsel. *Id.* at 884. The Eighth Circuit rejected this approach:

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[3] Many circuit courts now require contemporaneous time and billing records and reject fee requests based on anything less. *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2nd Cir. 1983); *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); *National Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (stating that "[c]asual after-the-fact estimates of time expended are insufficient to support an award of attorneys' fees"); Even those that accept reconstructed records require specificity in those records. *Keenan v. City of Philadelphia*, 983 F.2d 459, 475 (3rd Cir. 1992); *Bode v. U.S.*, 919 F.2d 1044, 1047 (5th Cir. 1990); *Jean v. Nelson*, 863 F.2d 759, 772 (11th Cir. 1988). The logic behind these cases is sound: it is not difficult for counsel to keep contemporaneous records and avoid the problems the failure to do so creates.

> Such an apples-to-oranges comparison is not required by law and would not be advisable. The most obvious flaw with this proposed requirement is that making such a comparison – where the benchmark for the award of plaintiff's attorney fees is "reasonableness" – would require the trial court to first determine whether the defendant's counsel billed a reasonable amount. Such a scheme does not make sense.

Id. The approach makes no more sense here than it did in *Burks*. A fee applicant's burden of proof is to demonstrate the reasonableness of his counsel's fee request. Comparing Rep. Walker's undocumented time to that of other counsel in the case fails to carry that burden. This fee request should be denied.

Joshua submits estimates of time spent on five discrete matters upon which it claims to have prevailed against the State within the meaning of § 1988. This brief will address each area but in a different order from the Joshua Intervenors' arrangement.

1. Litigation over proposed Jacksonville School District.

The Joshua Intervenors claim an estimated 225 hours on this matter. This estimate is solely based on the number of hours claimed by counsel for PCSSD in its petition for attorney's fees from ADE for the same matter. PCSSD's petition for attorney's fees can be found at Docket Entry # 3804. PCSSD's counsel's time and billing records for this event can be found as an exhibit to ADE's Response to PCSSD's Petition. DE # 3814. These time and billing records by PCSSD show that no time was spent conferring with counsel for the Joshua Intervenors on the matter. Rep. Walker asserts that he "spent a considerable amount of time meeting with" four PCSSD officials related to this matter. Joshua Ex. 1, Walker Affidavit ¶ 21. PCSSD's contemporaneous time and billing records reflect meetings with these same officials, but never once reflect Rep. Walker's (or any other Joshua representative's) presence at any of these meetings. DE # 3814.

Rep. Walker asserts in his affidavit that this matter was "marked by several motions to intervene and additional briefing by the would-be intervenors, which took up more time." Joshua Ex. 1, Walker Affidavit ¶ 21. The docket in this case, however, reveals that Joshua never filed any response to any of these motions or briefs. In fact, the only document that the Joshua Intervenors filed in this matter was a three-line "joinder" in PCSSD's briefing on the matter. DE # 3782. PCSSD's time and billing records show that PCSSD counsel actually drafted this joinder for the Joshua Intervenors in less than half an hour. Ex. 3814, 8/6/03 time entry. The record clearly does not support Rep. Walker's assertion in his affidavit that his "contribution to this aspect of the litigation was at least equivalent to PCSSD's" and that the Joshua Intervenors' "opposition was absolutely necessary" when counsel for Joshua never drafted any documents in connection with the issue; not even the three-line joinder. Those conclusory assertions are belied by the hard, tangible evidence.

In light of the record in this case and counsel for PCSSD's contemporaneous time and billing records, counsel for the Joshua Intervenors appears to have severely overstated the amount of time spent on this matter. These claimed hours should be denied in their entirety.

2. 1994 action to enforce 1989 Agreement against State

The Joshua Intervenors claim an estimated 170 hours spent on this matter. Joshua Ex. 1, Walker Affidavit ¶ 20. No contemporaneous time and billing records are submitted with this request. It appears, like the Jacksonville detachment issue, to be derived solely from an impermissible comparison with work done by the school districts' attorneys. *Burks*, 215 F.3d 880, 884. Without contemporaneous time and billing records (or even reconstructed records) it is not possible to determine what hours were actually spent by counsel for Joshua on this matter and which, if any, of those hours were reasonable, were connected with some level of success, or

were unnecessary. *Gilbert v. Des Moines Area Com. Coll.*, 495 F.3d 906, 915 (8th Cir. 2007) (noting that district courts are not "obligated to wade through and search the entire record for some specific facts that might support" a party's claim).

Counsel for the school districts filed for, and were awarded, attorney's fees and costs from the ADE on this matter. DE # 2757-58, 8/16/96 PCSSD Motion and Brief; DE # 2797-98, 8/30/96 LRSD Motion and Affidavit; DE # 2819-20, 9/20/96 PCSSD Supplemental Motion and Brief. Comparing counsel for the Joshua Intervenors' claimed hours to that of other counsel does not form a basis for the attorney's fees request. *Burks*, 215 F.3d 880, 884. Reviewing the relevant docket entries and the time and billing records submitted by counsel for the school districts, however, it appears that counsel for Joshua Intervenors' work was not similar to that of the school districts. The Joshua Intervenors appear to have done little more than allow its name to be lent to the motion papers on this issue. Thus, the Joshua Intervenors' work on this matter was duplicative of that of the school districts' counsel.

As is noted above, the primary consideration in awarding attorney's fees is the degree of the fee applicant's success. *Cody*, 304 F.3d at 773. The motions referred to in this section resulted in only partial success. *LRSD v. PCSSD*, 83 F.3d 1013 (8th Cir. 1996). This Court has previously recognized as much. DE # 2880, 2883 (Orders on LRSD and PCSSD Fee Petitions). The only success the parties enjoyed in this matter was a one-time disbursement of "seed money" for workers' compensation benefits for district employees and a change to "loss funding" to include M to M students. *LRSD 1996*, 83 F.3d 1013. The benefit to the Joshua Intervenors from this limited success seems indirect at best. The seed money was provided to "soften the blow brought about by" the shift from the State to the Districts of the responsibility to pay for workers' compensation insurance. *Id.* at 1016. The payments were not related to

anything directly connected to the Joshua Intervenors class. Loss funding was based on M to M students, but the actual payment was not limited for use on M to M students. *Id.* In fact, it resulted in a payment to districts based on students that had left the district. *Id.* at 1018-19. It is unlikely that this provided any benefit to any members of the Joshua Intervenors class. Thus, success on this issue appears to be only technical for the Joshua Intervenors. Based on this lack of success and failure to document the time spent on the matter, the Court should deny attorney's fees to the Joshua Intervenors for this matter. Alternatively, if the Court decides to award fees, the Court should apply a substantial downward departure from the requested amounts.

In addition the doctrines of laches and waiver, bar the Joshua Intervenors' request for fees on this issue as discussed above. It bears emphasizing that the Court allowed the Joshua Intervenors to apply for attorney's fees and costs at the time these issues became final. LRSD, PCSSD, and the Joshua Intervenors filed a number of motions for extensions of time to file a petition for attorney's fees and costs regarding this matter. DE # 2341, 2357, 2674, 2699. The Court extended the time. DE # 2683, 2703. In the final time order, the Joshua Intervenors were given until thirty days after the Eighth Circuit issued its mandate within which to apply for fees and costs from the State. DE # 2703. The mandate issued on July 24, 1996. DE # 2719. As noted above, LRSD and PCSSD filed petitions for attorney's fees. The Joshua Intervenors, however, did not. Presumably if they had 170 hours invested in the matter (or $34,000 at 170 hours times $200 per hour) then they would have applied for those fees. Their failure to request fees also suggests that the current time estimate is overstated. This failure waived any entitlement to request those fees now eighteen years later.

An eighteen-year delay to apply for these fees is patently unreasonable. Fed. R. Civ. P. 54(d) (requiring attorney fee applications "be filed no later than 14 days after the entry of

judgment"); *Summit Mall Co., LLC v. Lemond*, 355 Ark. 190, 206, 132 S.W.3d 725, 735 (2003) (laches elements). And, the Joshua Intervenors provide no explanation in their current petition for their eighteen-year delay. Thus, the fee request on this matter was waived by the Joshua Intervenors' unreasonable delay to ADE's prejudice.

Accordingly, ADE requests that the Court deny the Joshua Intervenors' request for attorney's fees and costs related to the workers' compensation seed money and loss funding issues. Alternatively, if the Court decides to award fees it should do so according to the reasonable hourly rate found by the Court for counsel for Joshua Intervenors in 1996, and provide a substantial downward departure in claimed hours for the undocumented, unnecessary, duplicative, and largely unsuccessful work claimed.

3. Compelling the State to conduct required monitoring

The Joshua Intervenors claim an estimated 220 hours for efforts from November 19, 1993 to May 12, 2000, regarding the ADE's monitoring. The Joshua Intervenors note that the only order commanding action by the ADE on monitoring was issued December 10, 1993.[4] Joshua Ex. 1, Walker Affidavit ¶ 8, 12. Counsel for the Joshua Intervenors concedes that he was paid appropriate fees for this work. DE # 5031, Brief in Support p. 4. The Joshua Intervenors, however, point to no order since 1993 compelling a change in the ADE's legal relationship to case monitoring. Indeed, a fair reading of the record is that the monitoring secured by the Joshua Intervenors in 1993 was of limited benefit to their class and was abandoned (with one exception) by all parties, including the Joshua Intervenors, in 2000. The one exception to this abandonment

[4] ADE's monitoring efforts were extensively briefed with the Motion for Release from 1989 Settlement Agreement. See DE # 4724, Brief in Support of Motion for Release from 1989 Settlement Agreement p. 28-33.

was the monthly Project Management Tool ("PMT"), which documents only ADE's efforts to comply with the 1989 Settlement Agreement.

The Joshua Intervenors mention a few discrete events relative to ADE's monitoring obligations that bear discussion. The Joshua Intervenors point to an April 27, 1994, motion asking the Court to reinstate the State as a party. DE # 2170; Joshua Ex. 1, Walker Affidavit ¶ 13. They candidly admit that this motion was denied. In other words, they were unsuccessful in obtaining a ruling from the Court. In fact, the Joshua Intervenors orally requested in court that this motion be held in abeyance. DE # 2309. On January 13, 1995, this motion was denied as moot. DE # 2337. Nothing ever came of this motion.

The Joshua Intervenors point to a November 23, 1998, motion in which they objected to not being included in negotiations over a revised monitoring plan for the State. DE # 3221. The PMT, however, documents a meeting on February 18, 1998, regarding revising ADE's monitoring plan and reports, which "representatives of all parties" attended. DE # 3231 p. 11-12. The PMT also documented progress in September and October of 1998 on "revisions to the monitoring process by committee representatives of all the Parties." *Id., see also* DE # 3231 p. 20-21. It is not clear what meetings that the Joshua Intervenors claim that they were "excluded" from, but this current representation is in conflict with the Joshua Intervenors' representation at the time. In the Joshua Intervenors Response to the Motion to Relieve ADE of filing its semi-annual monitoring report, counsel stated that "Joshua has not been involved in the regular meetings between the parties." DE # 3221. There is no suggestion of exclusion, only a failure to attend meetings to which the Joshua Intervenors were invited. Time spent *not* attending a meeting is not compensable "meeting time." Moreover, no order issued from the Court on this non-issue.

On February 1, 2000, after two years of negotiations with the parties to this case, the ADE filed a motion requesting approval of a revised monitoring plan known as the DMAP (Desegregation Monitoring and Assistance Program). DE # 3327 (motion), 3350 (reply). LRSD and the Joshua Intervenors opposed that motion (DE # 3340 (LRSD), 3334 (Joshua)) to ADE's surprise. The Joshua Intervenors objected, essentially, that the DMAP was not specific enough. LRSD argued that "ODM provid[ed] sufficient, independent monitoring, rendering the ADE's monitoring and reporting activities superfluous." DE # 3306, p. 4. The Court declined to approve the DMAP, it "strongly encouraged" (but did not order) the parties to continue negotiating a revised plan, and it invited the parties to apply to the Court for judicial intervention in the matter if an agreement could not be reached. DE # 3360. Ultimately, negotiations ceased and ADE did not monitor any of the districts again until a few years ago, and that was on ADE's own initiative.

The Joshua Intervenors do not explain how, based on this record, they claim success for their class in relation to ADE's monitoring. The Joshua Intervenors have always been highly critical of the monitoring that ADE did conduct in the 1990s. *See* DE # 3334. While, technically speaking, the Joshua Intervenors succeeded in opposing ADE's motion for a revised monitoring plan, their opposition resulted in no monitoring at all. In other words, their opposition lost what the Allen Letter had given them ten years before. Tellingly, the Joshua Intervenors make no argument in their petition for attorney's fees that their efforts vis-à-vis ADE monitoring provided any tangible benefit to their class. This is probably because the Joshua Intervenors have always stated that ADE monitoring has been of no benefit to the class. *See* DE # 4784, Joshua Intervenors [sic] Response to the ADE's Motion for Its Release From the 1989 Settlement Agreement ¶ 8 ("the ADE has not provided material assistance of substantive value to any of the

districts in meeting their obligations as set forth in the Allen letter"); DE # 4749 Brief in Support p. 3-4 ("State failed to monitor"). These admissions of lack of success, coupled with the lack of any court order altering the ADE's monitoring responsibilities in the last twenty years, should result in a denial of fees for this matter.

ADE notes also that the Petition contains nothing that would allow ADE to evaluate the 220 hours claimed for monitoring enforcement. This failure alone should result in a denial of fees for this claimed work. *Hensley*, 461 U.S. at 433.

4. Litigation over PCSSD's motion for unitary status

The Joshua Intervenors ask the Court to charge ADE for a significant amount of hours for their work in opposing PCSSD's motion for unitary status. They made a similar claim at the Eighth Circuit on PCSSD's appeal of its denial of unitary status. *LRSD v. PCSSD*, 674 F.3d 990, 996-997 (8th Cir. 2012). The Court of Appeals rejected this anomalous claim as this Court should. The ADE did encourage PCSSD to file for unitary status. ADE, however, did not join that motion and did not present argument in favor of PCSSD at the unitary status hearing. ADE offered two expert witnesses to assist PCSSD: Dr. David Armor and Dr. Christine Rossell. PCSSD accepted that offer and chose to use those two experts, but their testimony was for PCSSD's benefit. No depositions were taken of those experts, and their testimony comprised less than two days of a three week trial.[5]

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[5] The Joshua Intervenors assert that Drs. Armor and Rossell were paid $75,000 for this testimony. This is not true. Drs. Armor and Rossell signed contracts that allowed payment up to this amount. They both assisted with several aspects of this case in addition to their testimony at PCSSD's unitary status hearing. Their total work on this case, on all issues, did not reach $75,000. For their testimony at the PCSSD unitary status hearing they each charged approximately $2,000.

ADE notes that PCSSD was declared unitary on the issue of most interest to the State: student assignments to schools. Dr. Armor's testimony primarily concerned student assignments in PCSSD. Moreover, the portions of the order that dealt with issues of direct concern to the State were overturned by the Eighth Circuit because those issues were not litigated during the trial. *LRSD v. PCSSD*, 664 F.3d 738, 757-58 (8th Cir. 2011).

> The State has long made known its view that such funding will become unnecessary after all three districts are declared fully unitary. However, the State has not yet moved for relief from its funding obligations, and the scheduling order for the 2010 hearings on NLRSD's and PCSSD's petitions for declaration of unitary status did not provide for the presentation of any evidence regarding such relief. In addition, although the State participated in the hearings, it objected frequently that the State's own duties and obligations were not the subject of the hearings. . . . Nevertheless, the district court *sua sponte* released the State from the funding obligations listed above.

Id. at 757. In other words, the Eighth Circuit found that these issues were not litigated at trial.

The Eighth Circuit later denied the Joshua Intervenors fee petition on appeal based on essentially the same argument. *LRSD 2012*, 674 F.3d 990, 996-97. As the Eighth Circuit recognized, this Court should also deny the Joshua Intervenors' fee request for time spent opposing PCSSD.

The Joshua Intervenors compare this request to the fees awarded in *Jenkins* for the class counsel's opposition to unitary status of the Kansas City Municipal School District ("KCMSD"). But there is a critical distinction here. The State of Missouri was the moving party in *Jenkins*. *Jenkins v. Missouri*, 515 U.S. 70, 80-81 (1995). KCMSD opposed Missouri's motion. *Id. see also Jenkins v. Missouri*, 11 F.3d 755, 765 (1993) ("KCMSD argues that the State's evidence is insufficient . . . to grant unitary status"). It appears from the opinions that KCMSD agreed with the relief sought by the *Jenkins* class because KCMSD could pass those costs on to the State of Missouri which was jointly and severally liable for the costs. *Id.* 11 F.3d at 760. Officials from KCMSD testified in opposition to Missouri's motion for a declaration that KCMSD was unitary.

Id. at 765 (noting that KCMSD's Superintendent and assistant superintendent testified that "much remains to be done" under the plan). As such, the Eighth Circuit ordered the State of Missouri to pay attorney's fees to the *Jenkins* class, not KCMSD. *Jenkins*, 127 F.3d 709, 719-20.

In contrast, here, PCSSD voluntarily moved for full unitary status and prosecuted its motion to judgment on its own. The ADE provided some assistance and the General Assembly provided some incentives (namely attorney's fees), but it was PCSSD that argued that it was unitary and the PCSSD was free to develop its case as it saw fit. Accordingly, the Joshua Intervenors victory, such as it was, was against PCSSD not the ADE.

The Joshua Intervenors suggest that a downward adjustment to one-third of the requested fees in opposing PCSSD's unitary status is appropriate. DE # 5031, Brief in Support p. 7. But they provide no basis on which to support the one-third request. It bears no relationship to the limited participation that counsel for ADE took in the unitary status trial. The Joshua Intervenors' time and billing records make no effort to separate out the hours they attribute to opposing the ADE instead of PCSSD in the unitary status proceeding.

The only time and billing records with any detail are those of Mr. Pressman and Mr. Porter. Out of 494.03 hours that Mr. Pressman attributes to his work on PCSSD's Motion for Unitary Status less than an hour was spent dealing with work generated by ADE. Joshua Ex. 3, Pressman Affidavit p. 12 (entry on 9/15/09). The remainder was focused on opposing PCSSD's Motion for Unitary Status. That time is not chargeable to the ADE. It appears that the Joshua Intervenors are requesting attorney's fees for 164.67 hours (494.03 divided by 3) when Mr. Pressman spent less than an hour dealing with anything even arguably related to the ADE. Mr. Porter's time records appear to relate solely to preparation for and participation in the PCSSD's

unitary status hearing. Joshua Ex. 4. The entries contain no indication of any work performed on any issues involving the ADE. These hours should not be credited because they deal solely with work against PCSSD.

Moreover, the Joshua Intervenors and the PCSSD negotiated a reasonable fee for this work. At the time of that fee application, there was no suggestion that the fees awarded were insufficient. In fact, they were significant. An award against the ADE, for essentially the same work, would constitute a double recovery, which is not allowed under Section 1988. ADE objects to the fee request for the Joshua Intervenors' opposition to PCSSD's motion for unitary status. The Court, as did the Eighth Circuit, should reject this claim.

5. Proceedings leading to the current Settlement Agreement.

Counsel's efforts in pursuing a settlement that results in a consent decree is compensable under 42 U.S.C. § 1988. *Buckhannon Board*, 532 U.S. 598, 600. Also, counsel's efforts to defend the 1989 Settlement Agreement from ADE's Motion for Release of 1989 Settlement Agreement are compensable under § 1988 as well. *Jenkins*, 127 F.3d 709, 717 (noting that fees are allowed "for *successfully* defending the remedy against attacks") (emphasis in original). That said, the rules noted above still apply. The fees claimed must be documented with specificity so the Court can perform its function of providing "a reasonably specific explanation for all aspects of a fee determination." *Perdue v. Kenny A*, 559 U.S. 542, 558 (2010). The claimed hours must represent work that is "useful and of a type ordinarily necessary to secure the final result obtained from the litigation." *Delaware Valley*, 478 U.S. 546, 561. "[E]xcessive, redundant, or otherwise unnecessary" work is not compensable. *Hensley*, 461 U.S. 424, 434; *Cody*, 304 F.3d 767, 773.

Rep. John Walker's Time Request: As with the other areas of the fee request, Rep. Walker has not provided any contemporaneous or reconstructed time and billing records for his work leading to the final settlement agreement. Accordingly, the Joshua Intervenors have failed to carry their burden to support this fee request. *Burks v. Siemens Energy & Automation, Inc.*, 215 F.3d 880 (8th Cir. 2000). Even taking Rep. Walker's estimate of his time as compared to Mr. Pressman (40% of Pressman's claimed time, Joshua Ex. 1, Walker Affidavit ¶ 33), based on an analysis of Mr. Pressman's records they are overstated and should be adjusted to fewer billable hours. Applying Rep. Walker's methodology results in 80 hours for his efforts in the case. These numbers, however, are speculative. There is no logic or evidence that supports this approach to estimating hours expended.

Rep. Walker estimates that he "spent 180 hours negotiating the current Settlement Agreement." Joshua Ex. 1, Walker Affidavit ¶ 34. He appears to count hours negotiating settlement from 2008-2012. It is not clear how he has made this determination. The Attorney General's office initiated negotiations on a settlement agreement beginning in 2008 after the District Court declined to conduct hearings on the unitary status petitions of NLRSD and PCSSD. DE # 4196. Those negotiations failed, however, in April of 2010. Afterwards, meetings on settlement occurred but they were few in number and sporadic. Moreover, they produced no tangible result. The Attorney General's office was not involved in substantive negotiations regarding settlement until October 2013. ADE notes also that the final settlement agreement reached in this case ended all of ADE's obligations other than payment of money for a limited time period for the sole purpose of allowing the school districts to adjust to operating without these funds. Any portions of the 1989 Settlement Agreement that existed for the benefit of the Joshua Intervenors were released with the final settlement agreement.

Bob Pressman Time Request: Mr. Pressman has provided fairly detailed, reconstructed time records. These reconstructed records, however, contain excessive, duplicative, and unnecessary work that is not compensable. For example, Mr. Pressman claims he spent a total of 29.97 hours working on responses to ADE's discovery requests to the Joshua Intervenors. Given Mr. Pressman's experience and history in the case, this time is excessive. Mr. Pressman records approximately 88.6 hours spent on the Joshua Intervenors' thirty-two page trial brief (excluding style, signature block, and certificate of service). This time is excessive.

Mr. Pressman claims 13.48 hours preparing for Dr. Armor's deposition regarding achievement gaps. Considering Mr. Pressman's experience and history in the case, his previous familiarity with Dr. Armor, Dr. Armor's prior testimony in this case, and the Court's previous acceptance of much of Dr. Armor's testimony regarding the causes of the achievement gap, this time is excessive. The time Mr. Pressman spent researching NAEP (National Assessment of Educational Progress) data and Arkansas ACT test results was unnecessary because he had three school districts working on the same issue that could have answered his questions in less time and with greater expertise.

Mr. Pressman has requested time for attending (by telephone) depositions that Rep. Walker also attended, some of which Mr. Pressman asked no questions. (9/13/13 LRSD Dir. of Testing, 2 hours; 9/19/13 Joy Springer deposition, 1.85 hours; 9/25/15 Stein deposition, 3.33 hours;). He also claims time for depositions that he attended but asked only a few questions. (9/11/13 Glasgow deposition 2.75 hours, four questions asked; 9/16/13 John Kirk depo. 1.5 hours, five questions).

The affidavit of Rep. Walker waives any time that he and his co-counsel spent working on the fee petition, but Mr. Pressman includes billing entries for time worked on the fee petition.

Joshua Ex. 1, Walker Affidavit ¶ 36. In particular, Mr. Pressman includes over 10 hours (or $6,500) for reconstructing his time records. This time should be excluded or, at least, discounted because counsel should have been keeping contemporaneous time records which would have significantly reduced the required hours.

Mr. Pressman has also included 1.66 hours that were devoted to work related to PCSSD and not the ADE's Motion for Release. He also includes an unstated amount of time for reading the Court's January 17, 2013, order on the charter school issue. These hours should be deducted from his overall time.

Mr. Pressman claims "total ADE time 2013-14" of 282.36 hours. Joshua Ex. 3, Pressman Affidavit p. 12. 11.66 of those hours should be deducted as dealing with non-ADE or waived issues. This leaves 270.7 hours. For excessive, unnecessary, and duplicative work, ADE suggests a reduction of 70 hours, leaving Mr. Pressman with 200 hours chargeable to work on ADE's Motion for Release from 1989 Settlement Agreement.

6. Monitoring by the Joshua Intervenors

Monitoring for compliance with the 1989 Settlement Agreement is not compensable under § 1988 after *Buckhannon Board,* 532 U.S. 598. The Joshua Intervenors may argue that Eighth Circuit precedent has allowed § 1988 awards for simple monitoring, but that is not so. In each of the cases where a fee applicant has requested fees based on monitoring, the applicant has been able to demonstrate some action it took based on the monitoring that resulted in a legal change in the relationship of their client with the defendant. *See Jenkins*, 127 F.3d 709.

Also, an award for post-judgment fees must take into account "the relationship the post-judgment litigation bears to the case as a whole." *Id.* at 718. In this case, the original judgment is not the product of the Joshua Intervenors work because they were not a party to the case at that

time. *LRSD v. PCSSD*, 584 F.Supp. 328 (E.D. Ark. 1984). The case was brought by LRSD against the State and the other two Pulaski County school districts. *Id.* At the liability trial, the PCSSD and NLRSD joined LRSD in its claims against the State. The Joshua Intervenors entered the case only after liability had been determined. *LRSD v. PCSSD*, 778 F.2d 404, 409 (8th Cir. 1985). The school districts submitted remedial plans, but the Eighth Circuit described the Joshua Intervenors participation in the remedy phase as follows:

> The Joshua intervenors did not advance a particular plan but presented a position statement in favor of consolidation but which was critical of several aspects of LRSD's consolidation plan. Their expert witness, Dr. Paul Masem, testified about three plans for remedying the inter- and intradistrict violations short of consolidation. These plans were primarily concerned with alterations in the present boundaries of the three districts. The district court rejected the options on the ground they would not "adequately remedy the constitutional violations found by the Court."

Id. at 432, *quoting LRSD 1984*, 597 F.Supp. at 1224.

Ultimately, all of the proffered remedial plans were rejected by both the District Court and the Eighth Circuit. *Id.* at 409, 432, 433-36. The Eighth Circuit rejected the district court's ordered remedy and issued its own required remedy. *Id.* Judge Richard Arnold described the required remedy as "spring[ing] full-grown from the brow of this Court, a decree that will, I dare say, startle all the parties to this case, including even those (if there are any) who like what they see." *Id.* at 437. Indeed, many did not like it. The remedies ordered were quickly criticized from many quarters. *See* Joseph Henry Bates, *Out of Focus: The Misapplication of Traditional Equitable Principles in the Nontraditional Arena of School Desegregation*, 44 Vand. L. Rev. 1315, 1317 (noting the "tragedy of the Little Rock case" as "succeed[ing] only in formulating half-remedies"). Litigation in the case turned, then, to implementing the Eighth Circuit's required remedy. The 1989 Settlement Agreement was, essentially, an agreement memorializing the parties' agreement on how to implement what the Eighth Circuit had ordered.

In light of this history, it is difficult to determine what portion of the 1989 Settlement Agreement that the Joshua Intervenors can lay claim to as "prevailing party" as against the State. Much of the efforts of the Joshua Intervenors over the years have been directed at the school districts, primarily LRSD. This makes sense because it was the school districts that were non-unitary before 1982 in cases brought by the NAACP. It was also the school districts that were primarily responsible for implementation of programs paid for with State funding for the benefit of the Joshua class. And, it was the school districts that adopted desegregation plans for the purpose of remedying past segregation in the districts.

Mr. Pressman claims 21.57 hours for "monitoring litigation, 2000-01." Joshua Ex. 3, Pressman Affidavit p. 26-27. Most of these hours center on a memo "dealing with possible motion to return ADE as a defendant." *Id.* No such motion appears to have been filed. So, it is not clear why Joshua Intervenors believe this time, that apparently made no difference whatsoever to the litigation, could be charged to the ADE. This time should be eliminated because it was wholly unnecessary.

Ms. Joy Springer: The Joshua Intervenors claim 4,753.13 hours at $125 per hour for various duties over the years. These hours are broken down into _ groupings. (1) Ms. Springer claims to have spent 2,438.8 hours on "meetings and physical visits magnet and M-to-M schools . . . meetings of the Desegregation Oversight Subcommittee[6] . . . meetings with State officials . . .

[6] It is not clear to what committee is being referred. ADE assumes that Joshua means meetings of the General Assembly's Desegregation Litigation Oversight Subcommittee. Ark. Code Ann. § 10-3-1501. This committee has met intermittently over the years. Ms. Springer's declaration gives no indication what meetings of this committee she is referring to, if it is in fact this committee.

and, since 2007, meetings of the Magnet Review Committee." Joshua Ex. 2, Springer Declaration ¶ 2. (2) She claims 220 hours "for reviewing the State's monitoring reports and discussing [them] with Mr. Walker." Id at ¶ 3. (3) She claims 880 hours "responding to class members' concerns about assignments to magnet and interdistrict schools." Id. at ¶ 4. (4) She claims "416 hours on State related litigation from July 2012 to January 2014." Id. at ¶ 5. (5) She claims 798.33 hours on litigation over the State's monitoring, the 1994 workers compensation and loss funding issue, the Jacksonville splinter district issue in 2003, and litigation over PCSSD's unitary status petition in 2009 and 2010. Id. at ¶ 6.

None of these claims are backed up with any evidence that provides the Court or counsel any way to analyze the claimed number of hours. Accordingly, the Court should deny this request for fees. For example, Ms. Springer's largest claim (2,438.8 hours) has to do with "school visits and meetings." Joshua Ex. 2, Springer Declaration ¶ 7. LRSD was responsible for operating the stipulation magnet schools and the interdistrict schools[7] in LRSD, not the ADE. *LRSD v. PCSSD*, 659 F.Supp. 363, 372, 384 ¶ 11 (E.D. Ark. 1987)("The host district shall respond to the educational needs of students. . ."). Similarly, NLRSD and PCSSD were responsible for operating their respective interdistrict schools. *Id.* The Joshua Intervenors have provided no explanation for why they seek to charge ADE for monitoring the school district's operation of their schools.

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[7] Ms. Springer's declaration references "M-to-M schools." Under the M-to-M program, however, students were eligible to attend any school in the host district. *LRSD v. PCSSD*, 659 F.Supp. 363, 383-385 (E.D. Ark. 1987). Some of the district's schools were listed at "interdistrict" schools

In the same way, the Magnet Review Committee's ("MRC") main responsibility has been to oversee the operation of the stipulation magnet schools, including recruiting students. At best, the Joshua Intervenors may claim that this was a collaborative task of the parties. Moreover, the case has included specific guidelines for the financial responsibility of the parties in relation to the MRC. *LRSD 1987*, 659 F.Supp. at 374; 1989 Settlement Agreement § II. A-E. In fact, the 1989 Settlement Agreement specifically states the expenses that the State was responsible for including "[t]he State's share of Magnet Review Committee expenses as currently allocated." 1989 Settlement Agreement § II.E.(3). By signing the 1989 Settlement Agreement the Joshua Intervenors agreed that the State's financial liability would be limited to that set forth in the Agreement. 1989 Settlement Agreement § II.N., V. Payment of MRC expenses to the Joshua Intervenors would be inconsistent with the agreement made in 1989.

With regard to Ms. Springer's review of monitoring reports produced by the ADE, the semi-annual monitoring reports produced a host of information about the School Districts. So, review of those monitoring reports would have been in whole or in part for reviewing the Districts' compliance with their desegregation plans. Ms. Springer's declaration, however, provides no method for determining what portion of her review was for monitoring of the Districts or ADE. Similarly, the declaration never identifies any use that was made by the Joshua Intervenors of these document reviews. It is as if the Joshua Intervenors are requesting payment for 220 hours of reading and then discarding these documents. Section 1988 requires proof of some use of these documents for enforcement purposes; i.e. some alteration in the legal relationship of ADE and the Joshua Intervenors. *Buckhannon Board*, 532 U.S. 598.

Ms. Springer's claim about "time responding to class members' concerns about assignments to magnet and inter district schools" does not give rise to payment by ADE. The

Districts, again, operated the magnet and inter district schools, not ADE. To the extent that class members' had concerns about the assignment or operation of these schools, those would have been directed to the Districts. ADE may assist, but changes to be made were for the Districts to perform. Thus, there appears to be little, if any, reason to charge the ADE with these fees.

Ms. Springer claims 416 hours for work from July 2012 to January 2014. Ms. Springer uses an exceptionally vague method of dividing her time to create an estimate of her time assisting with litigation matters. There seems to be little reason behind the numbers she uses. For example, she claims to work 50 hours per week every week of 2012 and 2013. She makes no allowance for vacation time, sick time, holiday time, etc. Mr. Pressman, on the other hand, makes no claim for time from July 2012 to June of 2013, except for a one hour entry in January of 2013. So, it is not clear what work Ms. Springer was handling during this time period where Mr. Pressman was apparently performing no work on the case.

Ms. Springer's claim regarding "the four other discrete litigation matters" bears little discussion. *Burks v. Siemens Energy & Automation, Inc.*, 215 F.3d 880 (8th Cir. 2000). Simply comparing her time to someone else's vague estimate of time spent fails to carry the Joshua Intervenors burden. Moreover, throughout her declaration, Ms. Springer does not provide a basis for differentiated between legal work or secretarial or clerical tasks. Legal work is compensable, secretary or clerical work is not. *Missouri v. Jenkins*, 491 U.S. 274, 288 n. 10 (1989)

Ms. Springer has failed to support her claimed time with any documentary evidence that would allow any meaningful review of her claims. Thus, the claim for paralegal fees based on Ms. Springer's declaration should be denied.

Ms. Evelyn Jackson: The Joshua Intervenors claim 336 hours at $75 per hour for work by Ms. Jackson that ended in 2007. Joshua Ex. 1, Walker Affidavit ¶ 45. First, there is no basis

stated for waiting seven years to request fees for Ms. Jackson's work. Second, there are no time and billing records supporting the requested time. There is not even an indication of which meetings that Ms. Jackson actually attended. The request is based simply on an estimate of the time spent preparing for the meetings; the basis for this estimate is unexplained. Third, there is no indication of what fruit came from Ms. Jackson's work. According to the request, she may have simply attended meetings without ever saying a word in the hearings. A fee request must be based on more. *Buckhannon Board*, 532 U.S. 598. Finally, it is not clear what Ms. Jackson's position was at Mr. Walker's law office. But, it appears that she was a legal assistant. If, despite the fatal errors already noted, the Court is inclined to award fees for Ms. Jackson's work, the hourly rate is too high for the time periods in which the work was performed. A substantial downward adjustment is, therefore, warranted, if not a denial of this request.

7. Conclusion

The Joshua Intervenors have failed to provide any meaningful documentation of their hours spent in this litigation with the exception of Mr. Pressman. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (noting that counsel's failure to disclose its time records made lodestar calculation "impossible"); *Jadwin v. County of Kern*, 767 F.Supp.2d 1069, 1101 (E.D. Cal. 2011)(denying attorney's fees for counsel's failure "to provide a properly documented fee motion [containing] adequate descriptions of hours expended for specific services provided on identifiable subject matter"). This failure justifies a denial of the majority of the attorney's fees requested. The other deficiencies noted above further support a denial of the majority of the hours requested by the Joshua Intervenors. If the Court decides that it will award fees despite the absence of time records, then a substantial downward departure is warranted.

D. No Multiplier is Warranted for this Fee Petition

The Joshua Intervenors invoke the so-called "Johnson factors" in support of their fee request. These factors do not directly apply to requests under § 1988. *Hensley*, 461 U.S. at 433-434. Federal Courts follow the lodestar approach because it "provides an objective basis on which" to evaluate the claim for fees. *Id.* Many of the Johnson factors "are subsumed within" the lodestar approach. *Delaware Valley*, 478 U.S. 546, 564 (1986). There is a "strong presumption" that the lodestar approach represents a reasonable fee. *Id*, at 565. Upward departures from the results of a lodestar calculation are disfavored. *Id.* The fee applicant requesting an enhancement of the lodestar bears the burden of proving that the enhancement is "necessary." *Perdue*, 559 U.S. at 553. To carry that burden the fee applicant "must produce specific evidence that supports the award." *Id.* Even so, the Supreme Court has emphasized time and again that fee enhancements are to be "rare;" reserved for only "exceptional circumstances." *Id.* at 552. For example, in *Perdue* the Court noted that a fee enhancement based on an attorney's performance or results obtained must be shown to be the result of the attorney's superior performance and not attributable to other potential factors that may arise in litigation. *Id.* at 554.

The factors from which the Joshua Intervenors argue are subsumed within the lodestar calculation. A few claims merit some discussion, however. From the record in this case, it does not appear that this case has caused counsel for Joshua Intervenors to forego a significant amount of other work. Counsel has represented to the Court that he has a "very busy law practice" and that "given [Rep. Walker's] experience and expertise in the civil rights field" he has a "very substantial personal docket." See DE # 2534, 9/29/95 Motion for Extension of Time.

The only case specifically named by the Joshua Intervenors that they claim was associated with a loss of revenue is *Nelson v. Wal-Mart Stores Inc*., 2:04-cv-0171 (E.D. Ark. filed Sept. 22, 2004). Rep. Walker, joined by Mr. Pressman, Mr. David Bowden, Mr. Shawn Childs, Mr. Jim Jackson, and Mr. Ted Boswell filed this case as a class action against Wal-Mart Stores Inc. During the case, Wal-Mart associated thirteen lawyers to defend the case. On May 11, 2005, Attorneys Chip Welch and Tre Kitchens entered their appearance in the case on behalf of the plaintiffs. DE # 31. A month later, on June 17, 2005, Messrs. Boswell and Jackson withdrew from the case. Mr. Bowden also withdrew from representing the plaintiffs. DE # 35. On March 14, 2006, Mr. Hank Bates entered his appearance on behalf of the plaintiffs. DE # 55. Thus, the case began with six lawyers and ended with six lawyers.

At the time Messrs. Bates, Welch, and Kitchens joined the *Nelson* case, nothing was happening in the desegregation case with regard to the State. On June 14 and 15, 2004, the court held status hearings on LRSD's compliance with its remaining obligations under its Revised Desegregation and Education Plan. Prior to the hearing, the Joshua Intervenors submitted proposed findings of fact and conclusions of law. DE # 3870. The court ruled for Joshua Intervenors in the hearing. DE # 3875. LRSD appealed the decision on July 23, 2004. DE # 3888. Counsel for the Joshua Intervenors participated in a skirmish between LRSD and the court that arose in September to November of 2005. The majority of the case activity in 2005 and 2006 centered on LRSD compliance (or lack thereof) with the final portion of its Revised Plan. None of the casework at the time focused on ADE.

On July 8, 2009, the court approved final settlement of the *Nelson* case. DE # 226. On June 23, 2009, counsel for *Nelson* plaintiffs filed their application for fees. DE # 214, 215. It was unopposed. Rep. Walker submitted an affidavit in support of his fee request. DE # 214-3. In

it, he stated that he "participated in all aspects of the litigation except for making in-court oral arguments." DE # 214-3, ¶ 4. He represented that he had spent 1,118.27 hours in the case.[8]

The primary factors federal courts examine in the exceptional cases that justify an enhancement of the lodestar fee are the degree of success and the extraordinary performance of the fee applicant's counsel. *Perdue*, 559 U.S. 542. The Joshua Intervenors claim "multiple successes in holding the State to its commitments." DE # 5031, Brief in Support of Joshua Intervenors' Motion for Award of Attorney's Fees from the State of Arkansas p. 15. What these successes are cannot be determined in the record. Ex. 5. There are no orders entered against the ADE in the last twenty years that the Joshua Intervenors applied for that expand or enforce any remedies imposed on the State which were adopted for the benefit of the class.

Despite the Eighth Circuit's precedent on attorney's fees for post decree work, the Joshua Intervenors have not pointed to the judicial awards that justify a multiplier in this case. Hours expended in "day-to-day monitoring activities to ensure compliance with a decade-old desegregation order constitute[] routine services which do not warrant enhanced hourly rates." *Reed*, 179 F.3d 453, 472. With regard to the five areas of litigation that the Joshua Intervenors rely on in support of their fees request, as explained above their success on these matters was either limited or not a success as to ADE. Accordingly, the Joshua Intervenors have not established that their fee request represents an extraordinary case justifying an enhancement to the lodestar.

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[8] The fee application against Wal-Mart requested $300 per hour for Mr. Pressman, $100 per hour for Ms. Springer, and $75 to $50 per hour for four other paralegals at Rep. Walker's law firm.

III. CONCLUSION

WHEREFORE, ADE requests that the Court award the Joshua Intervenors attorney's fees only for the prevailing market rates and their reasonable, properly documented hours worked; alternatively, if the Court decides to award a fee for the undocumented time, the total award should not exceed the $500,000 stated in the Final Settlement Agreement; and that ADE be granted all other relief to which it is entitled.

Respectfully submitted,

DUSTIN McDANIEL
Attorney General

BY: /s/ Scott P. Richardson
SCOTT P. RICHARDSON, Bar No. 01208
Sr. Assistant Attorneys General
323 Center Street, Suite 1100
Little Rock, AR 72201-2610
(501) 682-1019 direct
(501) 682-2591 facsimile
Email: scott.richardson@arkansasag.gov

ATTORNEYS FOR STATE OF ARKANSAS AND
ARKANSAS DEPARTMENT OF EDUCATION

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to all counsel of record.

/s/ Scott P. Richardson
SCOTT P. RICHARDSON