No. 05-3578

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, et al.,	)	Appeal from the United
	)	States District Court for the
Plaintiffs-Appellees,	)	Northern District of Illinois
	)	
vs.	)	No. 66 C 1459
	)	
CHICAGO HOUSING AUTHORITY and TERRY PETERSON,	)	Honorable Marvin E. Aspen
	)	
Defendants-Appellants,	)	
	)	
vs.	)	
	)	
DANIEL E. LEVIN and THE HABITAT COMPANY LLC,	)	
	)	
Receiver-Appellees.	)	

BRIEF OF DEFENDANTS-APPELLANTS

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JURISDICTIONAL STATEMENT

The district court has jurisdiction over this civil action under 28 U.S.C. §§ 1331 and 1343. The case alleges that the Chicago Housing Authority ("CHA") racially discriminated in the development of public housing, in violation of the Fourteenth Amendment to the Constitution and 42 U.S.C. §§ 1981 and 1983.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, which vests the courts of appeal with jurisdiction over "final decisions" of the district courts. Indeed, this Court previously considered the propriety of a fee award in this case in 1982. *Gautreaux v. CHA*, 690 F.2d 601 (7th Cir. 1982). In *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964), the Supreme Court noted that a "final decision" for purposes of section 1291 does not necessarily mean the last order possible in a case. The collateral order doctrine allows appeals from decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). An order is an immediately appealable collateral order if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The interim fee award here falls within the scope of the collateral order doctrine. The trial court conclusively ruled that plaintiffs were entitled to fees and costs totaling $728,438. This ruling is separate and distinct from the underlying merits of the *Gautreaux* litigation, which

concern allegations of discrimination in the development of public housing. Should CHA be prevented from appealing this award until the end of this litigation which has already lasted forty years, the prospects of CHA being able to retrieve any funds already paid to plaintiffs or their attorneys, as discussed below, is slight, if non-existent. Indeed, the namesake plaintiff, Dorothy Gautreaux, died more than ten years ago. The trial court's decision is, therefore, immediately appealable.

As this Court recently held, "An interim award of fees may be appealed if 'the party against whom the award is made will not be able to get his money back if he prevails at the end of the case and the award is vacated.'" *Dupuy v. Samuels*, 423 F.3d 714, 718 (7th Cir. 2005), quoting *Estate of Drayton v. Nelson*, 53 F.3d 165, 167 (7th Cir. 1994). In addition, the standard for appealability based on the collateral order doctrine is more than satisfied here, since "it is enough to show that there is a danger - there was no more than that in *Cohen* - that the fees would disappear into insolvent hands." *Palmer*, 806 F.2d at 1319.

Business and Professional People for the Public Interest ("BPI"), the organization representing the plaintiffs, is a not-for-profit advocacy entity. Appendix ("A") at 5; Supplemental Appendix ("SA") at 50. There is, consequently, a significant risk of non-repayment from BPI should there be any reversal of this fee award at the conclusion of this litigation. *See also People Who Care v. Rockford Bd. of Ed. Dist. No. 205*, 921 F.2d 132, 134 (7th Cir. 1991) (Interim fee awards satisfy the collateral order doctrine "when the defendant may have difficulty getting the money back."). Moreover, the plaintiff class here is composed of tenants of and applicants for public housing. *Gautreaux v. CHA*, 304 F.Supp. 736, 737 (N.D. IL 1969). These class members, by definition, have extremely limited financial assets and would not be

able to reimburse the fees awarded here, should CHA have to wait to some indefinite date in the future when this litigation is concluded to recover the fees it paid. In this case, the money once disbursed is beyond recall and so the award is subject to appeal. *Dupuy*, 423 F.3d at 718, citing *Palmer v. City of Chicago*, 806 F.2d 1316,1319 (7th Cir. 1986) (finding jurisdiction over appeal of interim fee order when members of class to whom fee was paid "might be insolvent" or "might have disappeared" by the end of litigation).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in awarding attorneys' fees and related expenses totaling $728,438 under 42 U.S.C. § 1988 for the two year period from August 2001 through July 2003 for monitoring activities in this forty year old civil rights case in light of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), and *Alliance to End Repression v. City of Chicago*, 356 F.3d 767 (7th Cir. 2004)?

2. Even if plaintiffs are considered "prevailing parties" entitled to attorneys' fees, did the District Court err in awarding $728,438 in interim fees and costs based on the documentation provided by plaintiffs-appellees?

STATEMENT OF THE CASE

This civil rights case was filed on August 9, 1966. S.A. at 1. In 1969, the District Court held that CHA had discriminated against a class of African-American tenants and low income persons seeking public housing at CHA developments on the basis of race, in the location of its public housing developments and its tenant selection policies (by limiting African-American tenants to projects in African-American neighborhoods, and whites to projects in white

neighborhoods). *Gautreaux v. CHA*, 296 F.Supp. 907 (N.D. IL 1969). The court entered an injunction requiring that CHA adopt new development and tenant selection policies, to eliminate racial segregation in public housing in Chicago. *Gautreaux v. CHA*, 304 F.Supp. 736 (N.D. IL 1969). The injunction required CHA to locate any new public housing units for families in conformity with specific requirements, including the provision that three new units would have to be located in a "General Public Housing Area" ("General Area") for every new unit located in a "Limited Public Housing Area" ("Limited Area"). The 3:1 ratio was later modified to a 1:1 ratio. The General Areas are census tracts in Chicago where the population is less than 30 percent "non-white." Limited Areas are those census tracts where the "non-white" population is greater than 30 percent. *Id.*, at 737. The order also prohibited the development of public housing units above the third floor in new construction, 304 F.Supp. at 739, and required CHA to promulgate a tenant assignment plan that prevented race discrimination in tenant assignments. The District Court originally awarded plaintiffs attorneys' fees under section 1988 in *Gautreaux v. Landrieu*, 523 F.Supp. 684 (N.D. IL 1981), *aff'd sub nom., Gautreaux v. CHA,* 690 F.2d 601 (7th Cir. 1982).

Following the District Court's injunction in 1969, an extended period of post-judgment litigation ensued seeking to enforce compliance with the injunction. This litigation culminated in a 1987 order placing CHA's "scattered-site housing program" in receivership. The "scattered-site housing program" covers the development of all new CHA family public housing units. SA at 8-15. Daniel Levin and the Habitat Company were appointed as the Receiver of this program and charged with the responsibility for developing scattered site housing on the CHA's behalf from 1987 to the present. *Id.; Gautreaux v. CHA*, 178 F.3d 951, 953 (7th Cir. 1999). For many

years, the Receiver focused on building two, three, four, and six-flats in various General Areas around the city. A total of 1602 units were built between the 1987 receivership order and 2000. SA at 828, 838. The Receiver was not involved with CHA's existing family housing developments.

In 2000, however, the CHA and the City of Chicago embarked upon a new Plan for Transformation. Under the Plan, the CHA set about demolishing all of its family high-rise and mid-rise buildings, and rehabilitating its senior, scattered-site and low-rise units, so as to make available 25,000 new or rehabilitated public housing units----enough for all CHA families in residence as of October 1, 1999. The centerpiece of this Plan was the development of new, low-density, mixed-income developments, virtually all of which were to be built in Limited Areas, and, for the most part, on the site of the demolished CHA buildings. The new developments would be built and managed by various private firms. The Plan was not prompted by the plaintiffs or this lawsuit. Rather, it was a response by local government to the deplorable condition of CHA high-rises, which, in effect, warehoused the very poor, isolating these families economically and socially from the remainder of the city. SA at 319-20.

Since 2000, the plaintiffs have cooperated with CHA and the Receiver as CHA has implemented the Plan for Transformation. This has involved vacating the various provisions of the *Gautreaux* judgment order that prohibit CHA from building in Limited Areas and from locating public housing units above the third floor of a building. Indeed, for the two year period encompassed by the attorneys' fees award before this Court (August 2001 through July 2003), there were no contested matters between plaintiffs and CHA presented to the district court. SA

at 1-7. Plaintiffs' counsel billed only 4 hours of court time out of the 2,574 total hours of time billed by nine attorneys seeking fees during this period. SA at 629-805.

Excluding the present fee award, to date plaintiffs' counsel has been paid $3.37 million in attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988(b). *Gautreaux*, 690 F.2d at 614; SA at 21-25. During the first fifteen years of this litigation from 1965 to 1980, plaintiffs' counsel was awarded $375,375 for 3,003 hours of attorney time. *Gautreaux, id.*, at 612 n.28 and 614. This included litigating the action to judgment in 1969, and then engaging in prolonged post-judgment proceedings, including multiple appeals and litigation to the United States Supreme Court, seeking to effectuate the relief granted. *Gautreaux*, 690 F.2d at 603. In 1998, a further $1.15 million was awarded in attorneys' fees to the plaintiffs for thirteen years (1984 - 1997) of activity. SA at 21-22. Plaintiffs were awarded $1.8 million for the four year period from 1997 to 2001. SA at 23-25.

This appeal involves the District Court's Memorandum Opinion and Order of August 9, 2005, which granted plaintiffs' motion for award of attorneys' fees in the amount of $724,732 and related expenses of $3,706. The order awarded plaintiffs all the fees they requested for the period from August 2001 to July 2003. A at 1. CHA timely appealed this order on August 30, 2005.

STATEMENT OF FACTS

A. The Nature of the Litigation Between the Parties During the 2001 - 2003 Fees Period

During the period at issue, the plaintiffs did not file any contempt petitions or seek to litigate any other type of enforcement action against the CHA (or its Receiver). SA at 1-7. Indeed, there were no contested issues between the parties in court during this two-year period.

As such, there is no dispute that CHA honored the terms of the 1969 judgment order throughout the 2001-2003 period.

1. CHA adopts the Plan for Transformation

The Mayor of Chicago and senior officials at the CHA, in conjunction with the Receiver, devised the Plan for Transformation, which was formally adopted by the CHA Board in 2000, to remedy longstanding issues that have plagued public housing residents and the City of Chicago. SA at 319-20. No court proceeding or order required the CHA to adopt the Plan for Transformation. *Id.* Nor did the plaintiffs play any role in devising the Plan. *Id.* It was purely an initiative developed by those responsible for public housing in the city. *Id.*

The Plan for Transformation is unprecedented in the history of public housing. No other city is undertaking the kind of sweeping change the CHA is pursuing. SA at 320. The Plan for Transformation is a ten-year, $1.6 billion dollar effort to demolish all of the CHA's family high-rises, as well as some of its low-rise buildings, and then redevelop or rehabilitate a total of 25,000 units of public housing across the city----enough units for every family and senior living at CHA on October 1, 1999, provided they remain lease-compliant. *Id.* While the CHA is rehabilitating some of its existing housing stock, including 9500 senior units (now almost complete) and nearly 2700 scattered site units (also largely done), the centerpiece of the Plan for Transformation is the creation of new, low-density, mixed-income communities on the sites and in the neighborhoods where the CHA has demolished the old high-rises. *Id.*, at 320-21. These new mixed-income communities are being developed by some of the leading real estate firms in the nation. *Id.*, at 321. All of the new housing is managed by real estate professionals, rather than by the CHA. These new communities consist of a combination of market units, affordable

units for working families and public housing units. *Id.* They will allow public housing families to live in the same kind of housing and the same kind of neighborhoods as other Chicagoans. *Id.*

Mixed-income developments now stand where decrepit CHA high-rises once loomed. *Id.* These include: North Town Village, Old Town Square, Domain Lofts, and River Village at the old Cabrini site; Roosevelt Square on the site of the ancient ABLA development at Roosevelt Road west of Blue Island Avenue; Lake Park Crescent and Jazz on the Boulevard at 40th and Drexel on the site of the old Lakefront high-rises that were imploded; Legends South, on the site of the Robert Taylor Homes; Oakwood Shores, near 35th and King Drive, where the Madden-Wells development used to sit; Park Boulevard, on the site of the Stateway Gardens development, near U.S. Cellular field; Westhaven Park, on the site of the old Horner development, just west of Ashland and near the United Center; and the Archer, West End and South Leavitt developments near the old Rockwell project on the west side. *Id.*; SA at 321, 334-57.

In addition to bricks and mortar, the Plan for Transformation includes substantial programs to increase the self-sufficiency of CHA residents. SA at 321. The service-connector program, for example, is an initiative that assists residents in resolving a wide variety of social issues, including drug dependency, child custody and protection matters, day-care problems, poor credit, and deficient housekeeping, so that residents will succeed in the mixed-income housing. SA at 322. In addition, CHA has created innovative job training programs and has partnered with both the private and public sector to maximize employment opportunities for its residents. Further, each of the developers involved with the CHA's mixed-income communities

is required to offer social services, designed to assist residents to become self-sufficient and participate meaningfully in these new communities. *Id.*

2. The 1969 *Gautreaux* Injunction and the Plan for Transformation

The *Gautreaux* case presented a major obstacle to the Plan for Transformation. *Id.* The 1969 *Gautreaux* judgment order prohibits CHA from building in census tracts denoted as Limited Areas, (i.e. where the non-white population exceeds 30% of the total), unless CHA also builds in General Areas, (i.e. where the non-white population is less than 30% of the total). *Id.* Virtually every one of the sites where CHA intended to demolish its high-rises and replace them with new, mixed-income communities is in a Limited Area. *Id.* Thus, unless this provision of the 1969 judgment order were modified, CHA could not proceed with the Plan for Transformation. In addition, the 1969 judgment order precludes CHA from building family housing taller than three stories. Many of the new developments, however, include condominium buildings taller than three stories. Because the public housing units are interspersed with the other units the developers are building, some of the public housing units are above the third story. *Id.*

Consequently, since the inception of the Plan for Transformation, CHA has sought modifications of the 1969 *Gautreaux* judgment order from the plaintiffs in this case. *Id.* The plaintiffs have agreed to these modifications or waivers of the judgment order, allowing the CHA's Plan for Transformation to proceed. *Id.* These waivers have permitted CHA to build public housing in the Limited Areas, on the very sites of the old public housing developments, and public housing on the fourth floor or higher in the condominium buildings. *Id.*

3. Orders Entered by the District Court During the 2001 - 2003 Fees Period

The only substantive orders entered by the district court during the 2001 - 2003 fees period were five agreed orders, jointly offered by CHA and the plaintiffs. SA at 1-7; 322. These orders are:

a. *September 7, 2001 Order.* The developer at Cabrini, and CHA, as well as the Receiver, felt strongly that mid-rise buildings should be part of the initial redevelopment effort. The developer and the Receiver designed buildings that contained a certain number of public housing units interspersed throughout the buildings, including above the third floor. This order lifted the blanket prohibition on public housing units above the third floor for certain buildings at North Town Village, a Cabrini redevelopment site. SA at 323; 368-71.

b. *August 29, 2002 Order.* This agreed order modified the 1969 judgment order's Tenant Assignment Plan, so that CHA families who were forced to relocate, as a result of the Plan for Transformation, would have top priority for CHA's share of the new units available throughout the City. Previously, one-half of CHA's units went to existing CHA families and one-half went to eligible families on the CHA waiting list. SA at 324; 372-77.

c. *September 11, 2002 Order.* This agreed order expanded the North Kenwood-Oakland revitalizing area, thereby permitting CHA and the Receiver to build new public housing units on the site of the old Ida B. Wells, Clarence Darrow, and Madden Park developments, all of which are in Limited Areas. Without this order, building new mixed-income units at Oakwood Shores and the other mixed-income units planned for the area would be squarely prohibited by the 1969 judgment order. SA at 324; 378-82.

d. *December 12, 2002 Order.* This agreed order was entered so that the CHA could build units in Limited Areas at Horner in Phase II (otherwise expressly prohibited by the 1969 judgment order), and so that some of those buildings at Horner could exceed three stories. SA at 26-28; 323. The Horner development, including Phase II (to which this order relates) is the subject of separate federal litigation, entitled *Henry Horner Mothers Guild v CHA*, 91 C 3316, pending before Judge Zagel. SA at 323. The details of Horner Phase II were negotiated with plaintiffs' counsel in the *Mothers' Guild* case (along with many other interested parties). SA at 323. The 2002 *Gautreaux* order was entered only because the agreement with the *Mothers' Guild* plaintiffs, and the other stakeholders at Horner, would have violated the *Gautreaux* judgment order, unless that order was vacated or modified, so as to let Horner Phase II proceed. *Id.* As a direct result of this order, CHA won permission to build in a Limited Area, and to build mid-rise buildings. *Id.*

e. *March 18, 2003 Order.* This agreed order addressed an exhibit to the 1969 judgment which listed each of the Limited Area census tracts in Cook County by number. The 2003 order updated that list to account for the results of the 2000 census, a ministerial act. SA at 324; 383-89.

B. Nature of the Activities for which the Plaintiffs Seek Fees during 2001 - 2003

1. Plaintiffs Have Filed Two Sets of Attorney Time Affidavits

Plaintiffs have filed two sets of attorney time affidavits in this case. SA at 48-239 and 629-805. Plaintiffs provided the original set of affidavits to CHA in connection with the Federal Rule of Civil Procedure 54 discussions. SA at 3–39; 617. Plaintiffs filed these same affidavits with their fees motion on May 6, 2005. SA at 48-239. CHA set forth its objections to the time

affidavits in its Rule 54 objections and then again in its June 9, 2005 brief opposing an award of attorneys' fees and related expenses. SA at 282-305. This brief identified the excessive and duplicative time billed. SA at 294-302. The brief also detailed inadequacies in the fee affidavits and plaintiffs' counsel Alexander Polikoff's summary affidavit. 294-302. On account of these deficiencies, CHA asked the District Court to strike the fee petition or drastically reduce the fees awarded. SA at 295-96.

In response to the criticisms in CHA's brief, on July 7, 2005, plaintiffs attached a new set of "annotated" time records to their reply brief, requesting a slightly reduced total amount of attorneys' fees. SA at 618; 629-805. The District Court considered the plaintiffs' reply and the materials attached. A at 5. It granted the full amount of $728,438 requested by plaintiffs in their reply memorandum on August 9, 2005. SA at 618; A at 1. These new "annotated" time sheets purported to eliminate all billings for meetings and conferences attended by more than two plaintiffs' attorneys. However, a review of the new time sheets demonstrates that this was not consistently the case. SA at 617-18. Moreover, a comparison of the original and "annotated" time sheets for plaintiffs' attorney Alexander Polikoff reveals numerous contradictory time entries. *See, infra*, at 29-30. The District Court ignored all of these inconsistencies and contradictions and awarded the plaintiffs every dime they sought.

2. Hours Billed

A review of plaintiffs' annotated time sheets attached to their reply brief in the District Court shows that they billed only 4 hours of court time out of the 2,574 total hours claimed by plaintiffs' nine attorneys. SA at 629-805. The 2,570 hours of out-of-court time billed included 489 hours (amounting to $148,532) of intra-office communication solely among plaintiffs'

attorneys; 105 hours (amounting to $33,525) of time where more than one, and sometimes three or four attorneys for plaintiffs interacted with third parties in meetings or phone conferences; and 1,116 hours (amounting to $299,755) of time for activities and meetings that are not properly compensable as legal work or work related to the *Gautreaux* judgment. SA at 629 -805; compare with summary analysis (SA at 391-402) of original time records. SA at 403-557.

By comparison, CHA's outside counsel spent only 584.72 hours during the same time period. SA at 363. Moreover, CHA's outside counsel's time included not only the time spent on this case, but also on *Henry Horner Mother's Guild v CHA* and *Cabrini-Green LAC v CHA*, neither of which involve plaintiffs' counsel here. *Id.* Plaintiffs concede that they have staffed this case with an *average* of 5.75 attorneys. SA at 595. This, in turn, has led to 200 hours of internal "*Gautreaux* team meetings", where plaintiffs' various attorneys conferred among themselves during the two-year period. SA at 626.

3. Rates Charged

The plaintiffs' hourly rates were supported only by a single affidavit. It came from a member of the BPI Board of Directors, offering his opinion on how BPI's proposed rates compare with area litigation rates. A at 5-6. BPI (Business People for the Public Interest) is the not-for-profit that employs all of the plaintiffs' lawyers. The District Court found this affidavit sufficient to justify hourly rates from $200 to $400 per hour for plaintiffs' attorneys. The Court below completely ignored the CHA General Counsel's affidavit setting forth what attorneys in Chicago, ranging from some of the largest and most prestigious firms to some of the smallest, bid to provide legal services to CHA as a result of a regular competitive Request for Proposals (RFP) published by CHA and responded to by 75 law firms. SA at 362-66. These rates varied

from a high of $325 per hour for senior partners at the biggest firms to $105 per hour at other firms. SA at 363. CHA's counsel in this case, with thirty years experience, was paid $170 per hour for representing CHA, a rate below that allowed for plaintiffs' most junior attorney, a freshly minted law school graduate. SA at 364.

SUMMARY OF THE ARGUMENT

The District Court erred in awarding plaintiffs attorneys' fees and related expenses totaling $728,438 under 42 U.S.C. § 1988 for the two year period from August 1, 2001 through July 31, 2003 in this forty year old civil rights action because plaintiffs do not qualify as "prevailing parties" under the post-decree litigation criteria set forth in *Buckhannon Board and Care Home, Inc. v West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) and *Alliance to End Repression v City of Chicago*, 356 F.3d 767 (7th Cir. 2004). During the two year period at issue here, the only "litigation" occurring in this case was the entry of a series of agreed orders that limited the scope of the 1969 injunction so that CHA could proceed with its Plan for Transformation. The District Court granted each of these modifications to the 1969 injunction to eliminate outdated prohibitions that interfered with providing new mixed-income housing to public housing residents.

Though the District Court never entered an order in the plaintiffs' favor during this two year period, the Court nonetheless granted plaintiffs fees for all of the time they claimed, at the rates they sought. The Court did so because it determined that plaintiffs' success in winning the 1969 judgment order made them "prevailing parties" for all purposes, even forty years after the case was filed. Judge Aspen relied on this Court's decision in *Gautreaux v CHA*, 690 F2d 601 (7th Cir. 1982), which long predated the *Buckhannon* and *Alliance* decisions, and is inconsistent

with those decisions. The District Court also based its decision on the fact that it had awarded subsequent attorneys' fees to plaintiffs, particularly in 2000 and 2002, to which CHA had agreed. These orders, and CHA's agreement, however, predated the new rule, requiring the plaintiffs to show litigation success, established in *Buckhannon* and *Alliance*. The District Court's August 9, 2005 decision awarding further fees brings the grand total of attorneys' fees and costs awarded to plaintiffs in this case to $4,079,618, with no end to fees in sight.

Even if, *arguendo*, plaintiffs were entitled to fees for this period in which they won no relief, the District Court erred in awarding the full amount that plaintiffs requested because the work billed by plaintiffs was predominantly for monitoring activities, consisting of attending meetings and intra-office conferences between the nine plaintiffs' attorneys who submitted fee affidavits. The hours billed were excessive and duplicative. Plaintiffs did not show that they exercised the kind of billing judgment that would be the case with a private client. The hourly rates charged exceed those charged in the market for equally experienced lawyers working on comparable litigation. The District Court never addressed these objections. The result is a sizable fee award that places a real and unwarranted financial burden on the CHA.

Moreover, in the face of CHA's objections below, plaintiffs submitted new affidavits and "annotated" attorney time records with their reply. It was improper for the District Court to consider these materials. The new materials contain at least one time affidavit that contradicts the original time affidavit submitted with the motion, despite plaintiffs' representation that the time affidavits were the same except for "annotations." Moreover, the "annotated" time affidavits do not delete all of the duplicate time which plaintiffs concede is not compensable.

Plaintiffs have the burden to support their fee application with adequate evidence and documentation at the outset. If they do not, their petition should be stricken with leave to amend.

ARGUMENT

I.

STANDARD OF REVIEW

While this Court generally reviews a district court's award of attorneys' fees for an abuse of discretion, where the district court's decision "is based on the application of a legal principle, we conduct *de novo* review of any alleged legal errors.'" *King v. Illinois State Board of Elections*, 410 Fed.3d 404, 411 (7th Cir. 2005), quoting *Jaffee v. Redmond*, 142 F.3d 409, 412-13 (7th Cir. 1998). Here, the appeal challenges the legal standard the District Court used to determine if plaintiffs were prevailing parties. Defendants maintain that the District Court erred as a legal matter, in holding that the Seventh Circuit's prior 1982 *Gautreaux* fee order trumped the standard established in *Buckhannon* and *Alliance*. Thus *de novo* review is appropriate here on the "prevailing party" issue.

Should this Court determine that plaintiffs are entitled to fees, the Court must examine whether the District Court erred in awarding the full amount of fees sought by plaintiffs and determining that plaintiffs' attorneys' billed activities and hourly rates were reasonable. *King*, 410 F.3d at 411-12.

II.

PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS' FEES UNDER § 1988

A. The Standard for Post-Decree Fee Recovery in *Buckhannon* and *Alliance*

In *Buckhannon*, the Supreme Court changed the standard used to determine the prevailing party status in fee-shifting cases. *Buckhannon* held that a plaintiff could no longer recover fees because his or her lawsuit served as a "catalyst" prompting the defendant to change its policies or practices. 532 U.S. at 610. Rather, to be a prevailing party, the plaintiff had to obtain a judgment on the merits or a consent decree causing a judicially sanctioned change in the material relationship of the parties. *Id.*, at 604-05. In essence, a party had to win something in court and directly alter the defendant's behavior. Under the *Buckhannon* test, the legal work has to force the defendant to change its ways.

In *Alliance*, this Court considered the *Buckhannon* standard in the context of a plaintiff who, like the *Gautreaux* plaintiffs, sought fees for post-decree work. In the *Alliance* case, the plaintiffs had won a consent decree against the Chicago Police Department to curtail improper surveillance activities and recovered fees for their work in securing the decree. Later, the plaintiffs sought an additional fee award for work following entry of the decree. They claimed fees for time spent monitoring the defendant's compliance with the decree, for opposing the city's successful motion to modify the decree and for two unsuccessful contempt petitions. The district court awarded fees, but this Court reversed, holding that the plaintiffs were not entitled to any fees.

Had the consent decree expressly provided the plaintiffs with the right to charge for monitoring the decree, the Court conceded they could recover. 356 F.3d at 770. The decree,

however, did not, just as the *Gautreaux* judgment order does not permit plaintiffs to charge for monitoring the order.

In the absence of such a provision, the *Alliance* plaintiffs argued that the original consent decree made them prevailing parties and their effort to police the decree deterred the defendant from violating the decree. The *Gautreaux* plaintiffs have made the same argument. In *Alliance*, this Court rejected this argument for two reasons: *First*, "the rationale is attenuated in a case such as this in which someone else----not the plaintiff----is the appointed monitor." 356 F.3d at 771. In *Alliance,* the Chicago Police Board (composed of civilians appointed by the Mayor) was charged with monitoring police surveillance conduct. Similarly, in the *Gautreaux* case, the Court has appointed a Receiver to not only monitor but to actually conduct the development activity governed by the original judgment order. *Second,* in the Court's words, "More fundamentally, the cases [the court had cited] ... are inconsistent with the Supreme Court's rejection in *Buckhannon* of the "catalyst" theory of fee-shifting ... Monitoring may reduce the incidence of violations of a decree, but if it does not produce a judgment or order, then under the rule of *Buckhannon*, it is not compensable." *Id.*

After *Alliance*, the bottom line is that post-decree work is not compensable under §1988, absent authority for post-decree fees in the consent decree or order causing real change in the defendant's conduct *Accord Petersen v Gibson*, 372 F.3d 862, 865 (7th Cir. 2004)(orders that do not force a material change in the defendant's conduct, e.g. declaratory judgments, orders for nominal damages, or situations where the defendant changes its conduct in the face of a related order do not qualify the plaintiffs for an award of fees). *See also, Cody v Hillard*, 304 F.3d 767, 773 (8th Cir. 2002) (fact that plaintiff "has once established prevailing party status does not make

all later work compensable"); and *Blackman v District of Columbia*, 328 F.Supp.2d 36, 43 (D.D.C., 2004) (rejecting plaintiffs' argument that because the court had granted their motion for summary judgment on liability "the plaintiffs have *de facto* 'prevailing party' status for the duration of these actions with respect to any issues that arise for which attorneys' fees are incurred").

B. Plaintiffs Do Not Have Perpetual Prevailing Party Status Due to the 1969 Injunction

The District Court granted plaintiffs' motion for attorneys' fees here because the Court had "previously determined that Plaintiffs are 'prevailing parties,' who are entitled to recover attorneys' fees, under 42 U.S.C. § 1988," citing *Gautreaux v. CHA* [sic], 523 F.Supp. 684, 690 (N.D.IL 1981) (*affirmed by Gautreaux v. CHA*, 690 F.2d 601, 614 (7th Cir. 1982). A at 2. It further noted that the Court had awarded plaintiffs attorneys' fees and costs on "several additional occasions" and most recently by orders dated April 2, 2002 and June 27, 2000. *Id.*

The District Court's analysis, however, overlooks the fact that the *Buckhannon* and *Alliance* decisions radically reshaped the legal landscape of post-decree attorneys' fees. To the extent that the District Court deemed the 1969 judgment in this case to have conferred perpetual "prevailing party" status on the *Gautreaux* plaintiffs, the District Court erred. This Court noted in *Alliance* that "the postjudgment proceedings here, coming as they did so many years after the consent decree went into effect, are clearly separable from the proceeding that led up to the entry of the decree." *Id.*, 356 F.3d at 771. The *Gautreaux* injunction was already fifteen years old in 1981 when the *Alliance* consent decree first went into effect. Thus, the postjudgment proceedings at issue here (2001 - 2003) are substantially more removed from the initial judgment order than in *Alliance*. Yet, the District Court, relying on this Court's comment in 1982, that the postjudgment

proceedings from 1969 through 1981 were a "continuous active equitable case" rather than separate smaller matters (A at 4), has determined that the *Gautreaux* plaintiffs are "prevailing parties" thirty-seven years after the judgment order and apparently forever into the future.

No one disputes that forty years ago, plaintiffs brought an historic civil rights case against the CHA. Nor could anyone doubt that the 1969 judgment order was a watershed in the history of our city. Following entry of the judgment order, there was lots of litigation between the plaintiffs and the CHA, up and down the court system and all the way to the Supreme Court. The plaintiffs deserved to be paid for winning the judgment order, and for enforcing it in the face of CHA opposition.

When this Court affirmed the award of attorneys fees in 1982 (for the 1965-1980 period), there was no question that CHA was not complying with the judgment order. The Court's opinion outlines in detail the battles plaintiffs fought and won against the CHA prior to 1980, *Gautreaux v CHA*, 690 F2d 601, 605-607 (7th Cir. 1982).[1] In the Court's words: "CHA's response to orders by the court and magistrate ranged from lethargic to obdurate." 690 F.2d at 606. Given this record, it was proper for the District Court to award fees for the 1965-1980 period. The same is true for those fee orders entered later to cover the post-1980 period. Both periods involved real litigation between the parties, including the litigation that led to the 1987 Receivership order and the

[1] Among other fights, CHA refused to submit public housing sites to the City Council because of aldermanic opposition until the District Court ordered CHA to do so. CHA refused to bypass the City Council and eliminate the Council's race-based "pre-approval" process until the Court ordered it to do so. CHA fought the plaintiffs' effort to freeze all Model Cities' funds and CHA assisted HUD in opposing metropolitan-wide relief.

dispute over whether HOPE VI funds were covered by the judgment order. *(See* the orders that were the subject of *Gautreaux v CHA* ,178 F.3d 951 (7th Cir. 1999)).

Times, however, have changed. In 2000, CHA adopted its ambitious and nationally significant Plan for Transformation, under which all of its crime-ridden and dysfunctional high-rises would be torn down, and 25,000 public housing units would be developed or rehabilitated, with the centerpiece being the development of new and exciting mixed-income developments. Neither the plaintiffs nor the District Court prompted the adoption of the Plan for Transformation. Indeed, virtually all of these units are to be built in Limited Areas, and thus would be proscribed by the 1969 judgment order in this case. Rather than block the Plan, the plaintiffs have cooperated with it, as they recognize that the judgment order's insistence on building in General Areas is no longer practicable. Since 2000, the goal in the *Gautreaux* court has been to vacate those portions of the 1969 judgment order that block the Plan for Transformation. As a result, the prohibition on building in Limited Areas repeatedly has been lifted; the prohibition on building public housing over three stories has been set aside; and the Tenant Assignment Plan has been modified to benefit the CHA relocation process.

During the period covered by this fee petition (2001-2003), CHA scrupulously honored the terms of the judgment order and diligently sought modification of the judgment order so it could properly proceed with the Plan for Tranformation. The plaintiffs have not held CHA in contempt or initiated any kind of enforcement action against CHA. Nor has the District Court admonished CHA for being unfaithful to any aspect of the judgment order---as was the case in the past. On the contrary, the Court repeatedly has praised CHA for working hard with all of the interested parties (virtually all of whom are not parties in *Gautreaux*) to make the Plan for

Transformation a reality. Certainly, if CHA were to reverse course and re-join its battle with the plaintiffs, CHA would be on the hook for fees where the plaintiffs litigated and prevailed. That, however, has not occurred. Where, as here, plaintiffs are not winning orders against the CHA but agreeing to vacate or modify their decree, *Buckhannon* and *Alliance* make it clear they are not entitled to fees.

C. *Gautreaux* Is Not Factually Distinguishable from *Alliance*

The District Court attempted to distinguish *Alliance* by noting that plaintiffs there had brought a series of failed contempt motions and unsuccessfully opposed modification of the consent decree. A at 3. This purported distinction does not withstand analysis. The *Gautreaux* plaintiffs, during the 2001 to 2003 period, have never alleged that CHA was in violation of any provisions in the 1969 judgment (thus, like the police department in *Alliance*, CHA was in compliance with the court's orders), and when CHA sought modifications limiting the 1969 judgment to allow CHA's Plan for Transformation to proceed, plaintiffs agreed jointly to bring each motion which CHA sought. As in *Alliance*, CHA obtained the modifications it needed. In neither *Alliance* nor *Gautreaux* did the plaintiffs prevail on a single motion.

Plaintiffs seek compensation for classic monitoring activities-----meetings with CHA and third parties, meetings among plaintiffs' lawyers, and review of documents generated by the CHA and the Receiver. As noted by the *Alliance* court, "Monitoring may reduce the incidence of violations of a decree, but if it does not produce a judgment or order, then under the rule of *Buckhannon* it is not compensable." 356 F.3d at 771. Here, there was no judgment or order that changed CHA's course of action.

The District Court acknowledged *Alliance's* holding that "modification proceedings were 'clearly separable' from the entry of the consent decree," A at 3. Nonetheless, the District Court found that 1982 *dicta* in *Gautreaux v CHA*, 690 F.2d 601, 605 (7th Cir. 1982), required a different result. Twenty-four years ago, this Court said, "It is more consistent with the history of this particular lawsuit ... and with the nature of equitable proceedings in general not to divide a continuously active equitable case into a host of separate smaller matters." *Id. Alliance,* however, was also an active equitable case which this Court proceeded to divide into separate smaller matters, including for purposes of an attorneys' fees analysis. The *Gautreaux* plaintiffs are in the same posture as the plaintiffs in *Alliance* because they have no victories or matters on which they prevailed in the postjudgment period for which fees are sought but, rather, have only a record of monitoring.[2]

Nor can plaintiffs argue that they are prevailing parties by virtue of having agreed to orders that modify the 1969 judgment, as these orders implemented voluntary changes sought by CHA and not relief sought by plaintiffs. *Petersen*, 372 F.3d at 865 ("relief must be real in order

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[2] This Court's 1982 suggestion that *Gautreaux* was one "continuously active equitable case" was not offered to confirm that plaintiffs were "prevailing parties" forever. The issue before the Court in 1982 was whether the case was "pending" in 1976, when the Civil Rights Attorneys' Fees Awards Act was adopted, even though the final judgment order was entered in 1969----seven years earlier. If the case was deemed "pending," then the plaintiffs could seek fees back to when they filed the case in 1966. The Court found that it was "pending" because the matter continued to be actively litigated from 1966 through 1982. The Court, however, did not hold that plaintiffs were "prevailing parties" forever, or that they were entitled to fees until the end of time. Quite to the contrary, the Court understood that the *Gautreaux* litigation was nearly over in 1982, noting that plaintiffs had decided "to ask for attorneys' fees only as the litigation draws to a close", 690 F2d at 608. Obviously, that did not turn out to be the case, as plaintiffs continue to seek fees twenty-four years after the 1982 fee ruling and forty years after the case was filed.

to qualify for fees"); *Linda T. v. Rice Lake Area School District*, 417 F.3d 704, 707 (7th Cir. 2005) (fees awarded only for "actual relief on the merits"). Plaintiffs cannot be considered to have obtained a judgment in their favor where the agreed orders actually took away portions of the 1969 injunction. If anything, plaintiffs' actions in jointly bringing these motions to modify the 1969 judgment are admissions that this judgment has, to a certain extent, outlived its relevance as current circumstances have "changed dramatically" since 1969. *Alliance*, 356 F.3d at 774.

Finally, in *Alliance* the Seventh Circuit said fees for policing a court decree are particularly inappropriate where a body other than the plaintiff class (there, the Police Board) is charged with monitoring the decree. *Id.*, at 771-72. Again, *Alliance* is closely akin to the situation here. The *Gautreaux* District Court appointed a Receiver in 1987, not merely to monitor the CHA but also to stand in its shoes for purposes of developing new public housing. The Receiver is directly accountable to Judge Aspen, and regularly files reports with the Court about CHA's development work and the Plan for Transformation. The Receiver, in a post-*Alliance* world, plays a far larger role at CHA than the Police Board does with respect to the Chicago Police Department. CHA pays handsomely for the work of the Receiver------the agency shoulders the cost of the Receiver's staff and its attorneys, plus it pays the Receiver 3% of all development costs as a premium, pursuant to court order. SA at 13-14. It is, quite frankly, unreasonable to now require the CHA also to pay the plaintiffs' lawyers, in addition to the Receiver, all in an effort to implement the Plan for Transformation, an initiative unrelated to this lawsuit. In the final analysis, every dollar spent monitoring the monitor is one less dollar available to build public housing in Chicago.

III.

IF FEES ARE PROPER, THE DISTRICT COURT ERRED IN ITS AWARD

Plaintiffs have failed to establish that they are entitled to fees and costs totaling $728,438. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983). To recover these fees, plaintiffs must submit, in the form of an affidavit, the specific hours for which they seek compensation. They must also supply the hourly rate they wish to charge for these hours and some evidence that they have exercised billing judgment to reduce their hours to a reasonable amount *Id.; Walker v HUD,* 99 F.3d 761, 769 (5th Cir. 1996). Plaintiffs' affidavits, however, are improper, muddled and fail to support what amounts to a windfall of $728,438. The hourly rates in the affidavits exceed market rates; the hours logged in the affidavits are excessive; and many of the tasks are unrelated to the litigation or otherwise non-compensable. Plaintiffs clearly have not exercised billing judgment to reduce their hours. Consequently, if this Court finds that plaintiffs are entitled to any fees, this case should be remanded to the District Court for a proper calculation of such fees.

A. Plaintiffs' Original Fees Motion Failed to Provide Necessary Information and the District Court Erred in Relying on the Annotated Affidavits

Before filing their fees motion, plaintiffs, in accordance with Fed. Rule of Civ. Proc. 54, provided time affidavits to CHA claiming 3,306 hours of compensable time. The CHA, in accordance with the Rule, critiqued these affidavits in detail, pointing out excessive time, duplicative billing, billing on matters unrelated to the case, and other deficiencies. When the parties could not reach agreement on the fees, plaintiffs filed their fees motion. In support of their motion, plaintiffs inexplicably filed the same affidavits they had previously served on the CHA, but indicated that they were now claiming only 2,592 hours of compensable time. Plaintiffs did

not make any effort to explain what hours had been eliminated. Alex Polikoff's affidavit attached to their motion on this point was conclusory. SA at 276-77.

In CHA's Memorandum Opposing Plaintiffs' Fees Motion, CHA set forth detailed objections to the attorney affidavits filed in support of plaintiffs' motion and argued that the motion should be stricken, as there was no evidence of the exercise of any billing judgment. SA at 294-304. In their reply brief, plaintiffs provided the District Court and CHA, for the first time, with the actual activities for which they sought payment. In his supplemental affidavit attached to the reply brief, SA at 617, Mr. Polikoff attempts to satisfy plaintiffs' duty to exercise billing judgment by identifying the categories of hours purportedly removed, bringing the total claimed to 2,574 (the amount the Judge awarded). Mr. Polikoff did this by identifying the categories of hours he has eliminated, and then supplying "annotated" versions of the original attorney time affidavits, purporting to show which hours were stricken. These revisions were improper in a reply brief, as the information should have been provided in the initial brief so that the CHA might have had an opportunity to respond.

Arguments and evidence cannot be raised for the first time in a reply brief, as it circumvents the adversary's opportunity to respond. *Parillo v. Commercial Union Ins. Co.*, 85 F.3d 1245, 1249-50 (7th Cir. 1996); *Estate of Philips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997). Because plaintiffs did not tell the CHA or the Court what hours they were actually claiming until they filed their "annotated" time sheets with their reply brief, the supplemental materials and, if necessary, the motion should have been stricken. *Marsh v. Johnson*, 263 F.Supp.2d 49, 54 (D.D.C. 2003). *See also Seay v. TVA*, 339 F.3d 454, 481 (6th Cir. 2003) (district

court required to allow non-moving party opportunity to respond to new evidentiary submissions included in reply brief).

B. The "Annotated" Time Sheets Contain Time Plaintiffs Claim to Have Deleted and Conflicts with Plaintiffs' Original Time Sheets

CHA was prejudiced by not having the opportunity to respond to plaintiffs' new "annotated" affidavits. *First,* a comparison of the original and "annotated" time affidavits shows that all billings by more than two attorneys, for time spent consulting with each other or with third parties, were not eliminated, as Mr. Polikoff's supplemental affidavit indicated would be the case, S.A. 618, *see also,* page 14 of plaintiffs' Reply Mem.[3] SA at 597. Even a limited examination of the some of the 2001 "annotated" fee affidavits shows numerous examples of such multiple attorney conferences. For example:

> 9/19/01 - A. Polikoff's time sheet indicates attorney NJB's time for a meeting with Habitat on the Transformation Plan was deleted but the time sheets for NJB show him billing 1.5 hours for this meeting. SA at 672; 779.
>
> 5/14/03 - A. Polikoff's time sheet indicates that time for an office conference with AEG, EPL & HJF was to be eliminated but time sheets for these attorneys show that only AEG's time was eliminated. EPL and HJF have each billed 3.25 hours for this meeting. SA at 703; 721; and 727.
>
> 8/29/01 - A. Polikoff's time sheet indicates that JMK's time for a meeting at CHA was to be eliminated but JMK bills for this meeting. SA at 671; 763.

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[3] Where, as here, the work claimed involved out of court meetings, there is no reason to bill for even two lawyers. *Jardien v Winston Network, Inc.,* 888 F.2d 1151 (7th Cir. 1989) (billing for two lawyers at jury trial disallowed). Assuming, however, that two lawyers are appropriate, the plaintiffs proposed reduction to two lawyers per task (if it had been properly implemented) was not complete for another reason. This reduction did not encompass the so-called *Gautreaux* team meetings, where up to six plaintiff attorneys met together to discuss the case. The plaintiffs reduced the many hours spent in these meetings by one-half, but that left more than two attorneys billing for this intra-office time.

> 11/28/01 - A. Polikoff's time sheet indicates that time for a meeting with AEG on various Gautreaux issues is to be stricken as error. AEG, however, still bills for this meeting. SA at 634; 677.[4]

This problem is repeated for the annotated time sheets for 2002 and 2003 as well. Similarly, Ms. Brown's annotated time sheets also reveal instances of meetings and conferences involving more than two BPI attorneys where there is no indication that multiple billings have been eliminated:

> 5/1/02 - J. Brown has an office conference with attorney ALP and a separate conference with attorney NJB on same issue. SA at 739.
>
> 6/25/03 - J. Brown meets at Habitat with EPL, ALP, and AEG. SA at 667; 703;721; and 759.

All of these hours are included in the 2,574 hours the District Court awarded. Thus, the District Court awarded plaintiffs fees for time they were not even claiming as compensable. Perhaps more importantly, the District Court's finding that plaintiffs' hours were reasonable was expressly predicated on their decision to eliminate the work of the third, fourth, fifth and sixth attorneys at a conference or meeting. Plaintiffs, however, did not eliminate all such entries. A at 5.

Second, the time discrepancies between Mr. Polikoff's original time affidavit and his new "annotated" affidavit demonstrate numerous contradictions that should invalidate his time records as a basis for the District Court's decision. Paragraph 2 of Mr. Polikoff's supplemental affidavit says the "annotated" time sheets attached to his reply brief were "the same time records as those attached as Exhibit III to plaintiffs' motion for fee award." SA at 617. They are not. For example:

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[4] Plaintiffs also state that they have eliminated hours billed for getting attorneys up to speed on the case (SA at 251; 619), but H. Ford's time sheets attached to plaintiffs' reply show 21 hours billed in 2003 for preparation work in reading other files and meeting in preparation for staff/working group meetings. SA at 725.

Mr. Polikoff's first time sheet filed with his motion for fees for 8/30/01 bills 1.25 hours (SA at 55) while the same activity in the reply time sheet has 2.25 hours (SA at 671); on 9/4/01 Mr. Polikoff bills a telephone conference with Jeff Head for .25 hours in his original fee affidavit (SA at 55) and in the reply time sheet this same activity is billed as 1.25 hours (SA at 671); on 9/14/01 he bills .5 hours for an office conference with another plaintiffs' attorney on habitability issues (SA at 56) but in his reply time sheet he bills 2.5 hours for this same activity. (SA at 672). In all there are over 100 instances where Mr. Polikoff has billed more time in the time sheets attached to the reply brief than the time billed for the identical activity in the time sheets attached to plaintiffs' motion for award of attorneys' fees. This statement should not be construed as accusing Mr. Polikoff of misconduct in any way, since the time sheets attached to the reply brief also show numerous instances of billing less in the reply time sheets than for the identical activity in his time sheets attached to plaintiffs' motion. What this does demonstrate, however, is that plaintiffs have not met their burden of clearly establishing the basis for their fee, or proving that they exercised billing judgment. *Hensley v Eckerhart*, 461 U.S. 424, 433-34 (2001).

C. If Plaintiffs' Attorneys Are Entitled to Fees, They Should Be for Less Than 865 Hours

Plaintiffs' fee petition is larded with an extraordinarily excessive number of hours billed by an extraordinary number of lawyers. Even if we take the numbers in the "annotated" fee petitions attached to their reply brief, they claim 2,574 hours spent by nine different attorneys in a space of only two years----in a case with no contested motions, and of course no briefing, no hearings and no trials.

When plaintiffs filed their first fee petition in this case, it covered fifteen years of work. *Gautreaux v. Landrieu,* 523 F.Supp. 684 (N.D.Ill. 1981). That fee petition included all of the time

spent in preparing the case, litigating it to a judgment, four separate appeals to this Court, as well as a trip to the Supreme Court, and unsuccessful litigation to obtain a court receiver. The petition sought fees for only 3,003 hours of work, by one lawyer (an average of 200 hours per year----15% of the annual hours claimed in the current petition). *Id.*, at 685. When the plaintiffs next filed for fees in 1998, the petition covered thirteen years (1984-1997) where there was substantial litigation, including imposition of the 1987 receivership. Yet plaintiffs claimed only 4,320 hours (332 per year----25% of the annual hours claimed in the present petition). SA at 17.[5]

Another way to demonstrate the excessive nature of the fee petition is to compare the hours plaintiffs' counsel claims for the 2001-2003 period with the hours CHA's outside counsel billed over the same period. Johnson, Jones, Snelling, Gilbert & Davis billed CHA for only 584.72 hours during this time. SA at 363-64. Moreover, Mr. Johnson's billings include not only work on the *Gautreaux* litigation, but also time spent defending CHA in *Henry Horner Mothers' Guild v. CHA*, 91 C 3316, and *Cabrini-Green LAC v. CHA*, 96 C 6949, litigation pending before different federal

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[5] The District Court ignored the first two fee petitions, but pointed out that the plaintiffs' third and fourth fee petitions, covering 1997-July, 2001, were more in line with the number of hours billed in the current petition. A at 4. However, even during the time covered by the third and fourth fee petitions, there was very active litigation between the parties, including whether the 1969 judgment order covered the HOPE VI program (an issue that ultimately was decided against CHA and then appealed, *see Gautreaux v CHA*, 178 F.3d 951 (7th Cir. 1999)); whether Judge Coar or Judge Aspen would resolve disputes that arose with the Cabrini LAC on the nature of redevelopment at Cabrini (including an injunction against CHA, preventing it from proceeding before Judge Coar); whether plaintiffs' counsel was adequately representing the class; the amount of the Receiver's fee; and substantial litigation by tenants at ABLA (represented by counsel other than *Gautreaux* counsel) over the nature of redevelopment at the ABLA project. The same number of hours is now claimed during a period that was entirely tranquil. The District Court ignored the dramatic difference in the level of litigation between the third and fourth fee petitions and this one.

judges, where *Gautreaux* plaintiffs are not a party. *Id.* The District Court ignored this evidence altogether.

Plaintiffs initially presented over 100 pages of attorneys' chronological billing entries. Their original fee petition contained no analysis of these time records, much less any analysis grouping time by task or subject matter. As a result, CHA laboriously analyzed these many pages to isolate three billing categories: 1) intra-office meetings, memorandums, telephone calls all conducted between plaintiffs' attorneys ("intra-office communications"); 2) time entries for activities in which more than one lawyer interacted with a third party at the same time ("double billing"); and 3) non-compensable activities, including clerical work, work on matters outside of the scope of the *Gautreaux* litigation, attendance at meetings in which there was no need for a plaintiffs' lawyer to attend ("non-compensable time"). Exhibit H to CHA's Brief below, entitled Summary Analysis of Plaintiffs' Time, is a summary of the CHA's objections. SA at 391-402. Exhibit I, entitled Detailed Line-by-Line Objections to Plaintiffs' Time, consists of the plaintiffs' actual time records marked-up to reflect work falling in these three categories. SA at 403-557.

Even after plaintiffs filed their "annotated" time records, with their reply brief, the petition remained grossly excessive and duplicative. In the real world, clients flyspeck lawyers' bills to reduce this kind of billing. Private lawyers regularly negotiate the bills once they are sent to clients. Many clients have standing guidelines or rules that set out the kind of work for which outside counsel can recover. Both the City of Chicago and the CHA require outside firms, including the largest firms in the city, to honor these guidelines as part of their contracts, as Gail Niemann explained in her affidavit. SA at 364. Copies of the Guidelines are at SA at 558-79. They explicitly prohibit overstaffing, charging for learning time, holding internal conferences, and

handling specific tasks through persons who are either over-qualified (e.g. routine document review by a senior lawyer) or underqualified (e.g. extensive research by junior associates). SA at 559, 561-66 (City Guidelines); SA at 571, 575-78 (CHA Guidelines). Most significantly, both guidelines clearly prohibit more than one attorney from attending depositions, meetings or arguments and permit additional people to be assigned only for trials and major hearings. *Id.* The District Court completely ignored this evidence of how billing is controlled in the real world.

Plaintiffs' fee petition would never be paid by a private client as illustrated by the following:

1. Intra-Office Communications

Even in the records attached to plaintiffs' reply brief, plaintiffs' seek compensation for 489 hours in intra-office communications among the nine plaintiffs' attorneys (19% of the total petition). SA at 629-805. In *Jardien v. Winston Network, Inc.*, 888 F.2d 1151 (7th Cir. 1989), this Court denied fees to a second attorney even though that attorney had participated in a six-day trial. *See also, ACLU of Georgia v. Barnes*, 168 F.3d 423, 433-434 (11th Cir. 1999), (noting that the presence of four attorneys was "patently excessive" and that, because plaintiffs had provided no explanation as to why a squad of attorneys was necessary, plaintiff had not met its burden of showing that time spent reflects a distinct contribution of each lawyer to the case and that the customary practice is to staff similar matters with so many attorneys.) Here, plaintiffs have produced no evidence to justify a virtual company of attorneys working on the case. Clearly, nine attorneys, constantly consulting with each other even though there are no contested legal proceedings, have even less of a claim to multiple compensation than the attorneys in *Jardien*. Plaintiffs did not offer the District Court any reason why attorneys with such extensive legal

experience (for example, over fifty years for Mr. Polikoff, over 20 years Ms. Brown), claiming entitlement to hundreds of dollars per hour, needed to consult so often and, exercising billing judgment, would have billed a client for such extensive intra-office communications. More importantly, had this case been staffed by one experienced lawyer, 489 hours in intra-office conferences, meetings, telephone discussions would have been unnecessary. Since plaintiffs have provided no reason why their work on matters directly related to *Gautreaux* could not have been staffed by one lawyer, they have not met their burden to justify all of these intra-office communications. Therefore, all time for intra-office communication should have been denied. The District Court made no findings on any of these arguments, except to note the number of hours awarded in the last two fee petitions, without noting that serious litigation occurred during those periods.

2. Double Billing

Plaintiffs seek over 105 hours for times when more than one, and sometimes three or four attorneys, interacted with a third party at the same time. SA at 629-805. That is, plaintiffs are demanding that CHA pay for the same work two, three or four times. Although Mr. Polikoff has averred that he has reduced all charges where more than two attorneys participated, that did not occur, as described above. Moreover, plaintiffs assume that two attomeys performing the same legal task at the same time is *a priori* a permissible billing practice. They provide no support for this contention. The law does not support them either. None of the activities in which two or more attorneys participated was a trial or a contested motion or even an appellate brief. Principally, the tasks were meetings or telephone conferences with other social agencies, non-lawyers and CHA personnel. Having provided no justification for the involvement of two people (much less more

than two), plaintiffs are not entitled to such double billing, and the time should be reduced by at least two-thirds. The District Court incorrectly assumed that all time beyond that of two lawyers had been trimmed from the bill. It also noted this Court's decision in *Kurowski v. Krajewski*, 848 F.2d 767, 776 (7th Cir. 1988), where this Court suggested that the use of two or more lawyers may be appropriate when such a practice reduces the total bill in the case by taking advantage of a division of labor. Here, precisely the opposite occurred. The use of more lawyers made for a bigger bill.

3. Non-Compensable Activities

Plaintiffs seek compensation for 1,116 hours for activities which are not properly compensable as work related to the *Gautreaux* judgement. SA at 629-805. These non-compensable charges encompass a variety of activities in which these nine attorneys seemingly sought to operate as a shadow government to the CHA, involving themselves in virtually every aspect of CHA operations. Nothing in the *Gautreaux* judgment authorizes such conduct or entitles plaintiffs to compensation for such conduct. In addition, these non-compensable charges encompass activities that did not require any attorney, much less ones who seek fees at such high hourly rates. For example:

> I. Every year, CHA undertakes to devise a capital expenditure program designed to make repairs to boilers, roofs, plumbing lines and other systems in its remaining dilapidated family high-rises and mid-rises. No *Gautreaux* order requires this; it is simply part of CHA's uphill effort to keep its existing housing stock in decent, safe and sanitary condition. These are called habitability meetings. *Gautreaux* does not deal with habitability, but rather development issues and tenant assignment, all as it relates to race discrimination. In 2001, CHA convened meetings to review what capital items it would be addressing and when the procurement and work would take place. Those meetings involved various CHA non-legal staffers, and tenant leaders. BPI attended as well. No CHA lawyers attended and nothing was transpiring before Judge Aspen on "habitability."

Yet, BPI billed CHA over $3300 for their attendance at one meeting in November, 2001 and internal conferences about that meeting. SA at 614-16, 678 and 789. Other time is billed for "habitability" as well. *See*, e.g., Time Records of Alexander Polikoff, 9/04/01, SA at 671-72; Time Records of Adam Gross, 8/6/01, SA at 630. Because plaintiffs chose to attend does not mean CHA should have to pay, but the District Court ignored this evidence.

ii. Plaintiffs are billing for time spent defending their conduct in *Gautreaux* against disgruntled tenants at the ABLA development, who are members of the plaintiff class. *See,* e.g., Time Records of Robert Jones, 2/4/02, 12/28/01, SA at 708-09; Time Records of Julie Brown, 5/08/02, SA at 739; Time Records of Eloise Lawrence, 1/28/03, SA at 715. There is no reason why the CHA should pay for plaintiffs' counsel's defense of their own conduct vis-a-vis their own clients. Again, the District Court did not address this issue, but ordered CHA to pay.

iii. Plaintiffs are billing for work related to relocation services provided to tenants during the CHA's Plan for Transformation. *See*, e.g, Time Records of Julie Brown, 8/29/01, 8/30/01, 9/24/01, 10/01/01, SA at 730-32; Time Records of Alexander Polikoff, 5/30/02, SA at 688; Time Records of Eloise Lawrence, 1/14/03, SA at 714; Time Records of Adam Gross, 1/13/03, SA at 660. There can be no dispute that this matter is not properly within the scope of the *Gautreaux* case. Plaintiffs' counsel recently filed another lawsuit contesting the CHA's relocation program. *See Wallace v. Chicago Housing Authority*, 298 F.Supp.2d 710, 715 (N.D.Ill.2003). If plaintiffs' counsel are entitled to fees for their work on these issues, they should seek them from the *Wallace* Court.

iv. Plaintiffs also obtained fees to prepare for and attend dozens of meeting where their attendance was unnecessary and where they could easily have sent someone other than a lawyer to monitor the meetings. *See*, e.g., Time Records of Mary Anderson, 8/02/02, SA at 766. Much of this time involves CHA Working Groups. Working Groups are collaborative meetings at CHA developments undergoing transformation. CHA staff, local tenant advisory councils, the City of Chicago, community organizations and the Receiver participate in these meetings. The District Court requires CHA to pay the Receiver to attend these meetings and to monitor the Plan for Transformation for compliance with the *Gautreaux* judgment order. CHA and the Receiver rarely send lawyers to these meetings. The meetings concern a wide variety of development issues, including site design, demolition scheduling, selecting a developer, financing issues and relocation. There is no need for plaintiffs to send a lawyer to these meetings and plaintiffs have offered no reason to do so. It is true that plaintiffs' lawyers are welcome to participate in these meetings and are invited to do so. However, at no time has CHA agreed to pay plaintiffs attorneys to attend such meetings. All of the time spent preparing for, attending, and consulting with

each other over the Working Group meetings should be disallowed.[6] The District Court awarded every penny the plaintiffs sought for these Working Group meetings and never mentioned the issue CHA had raised.

Plaintiffs seek fees for other meetings where lawyers were completely unnecessary and the topics had nothing to do with *Gautreaux*. For example, Mr. Brunick claims fees for "preparing information for 4th Presb. Church about the human capital subcommittee at Cabrini." Time Records of Nicholas Brunick, 9/18/01, SA at 779. Without even a suggestion on how that work was related to the *Gautreaux* judgment order, the District Court ordered the CHA to pay for this work, too.

4. Legal Work

The remaining 865 hours are for what could be described as legal work related to *Gautreaux*, though not related to any order that would satisfy *Buckhannon*. Even here however, plaintiffs have not exercised billing judgment. For example, Henry Ford spent over seventeen hours preparing one agreed, three-paragraph motion updating which census tracks were in Limited Areas (using data from a HUD website). SA at 386-89. *See* Time Records of Henry Ford, 8/13/02-8/29/02. 3/13/03, SA at 724 and 726. Similarly, plaintiffs billed 28 hours for work by Messrs. Polikoff and Gross and Ms. Brown (at extremely high rates) to draft the Rockwell Revitalizing motion and order, though it was based on other similar motions and orders. SA at 703-04, 667-68, 759-60. The Madden/Wells motion and affidavit required 17 hours by Messrs. Anderson and Jones, though the affidavit was drafted by the Receiver (at CHA's separate expense) and the motion merely parroted the affidavit. SA at 711, 765-66.

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[6]Similarly, all of plaintiffs' expenses consist of the cost of transportation to these meetings, and should, therefore be disallowed as well.

BPI spent $3,322.50 to have *four* separate lawyers read the Sullivan Report, an analysis of the CHA's relocation efforts. SA at 660, 669, 714 and 751. It cost CHA $3,112.50 to have multiple BPI lawyers review CHA's Third Year Transformation Plan, SA at 671, 706, 731, 778-79. These are but examples of billing that would not be acceptable in the private market, or where lawyers represent public bodies, like the City of Chicago and the CHA. All of these examples were tendered to the District Court which nonetheless ordered CHA to pay for it all.

D. The District Court Erred in Sustaining the Plaintiffs' Hourly Rates

The plaintiffs bear the burden of establishing that the rates they seek are market rates for the kind of work performed. *McNabola v. CTA*, 10 F.3d. 501, 518 (7th Cir.1993). Here, plaintiffs were awarded all of the rates they sought, without reduction. The rates run from $400 per hour for Mr. Polikoff to $200 per hour for new lawyers. The only support plaintiffs offered was the Declaration of Lowell Sachnoff, who is a member of the Board of Directors of BPI, the not-for-profit that employs all of plaintiffs' counsel. *See* Ex. X, Letterhead of BPI, including Lowell Sachnoff, as a director, SA at 582. As a Director of BPI, Mr. Sachnoff has a clear interest in BPI receiving as much in attorneys fees as possible. The District Court erred when it found that Mr. Sachnoff's affidavit was a sufficient basis to support the rates awarded, without even examining the defendant's evidence about rates.

In determining hourly rates for §1988 fee awards, this Court has held that:

> The attorney's actual billing rate for comparable work is "presumptively appropriate" to use as the market rate. *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993). If the court is unable to determine the attorney's true billing rate, however, (because he maintains a contingent fee or public interest practice, for example), then the court should look to the next best evidence----the rate charged by lawyers in the community of "reasonably comparable skill, experience, and reputation", *Blum v Stenson*, 465 U.S. 886, 892 (1984) ...

> Once an attorney provides evidence of his billing rate, the burden is upon the defendant to present evidence establishing "a good reason why a lower rate is essential. *Gusman*, 986 F.2d at 1151.

People Who Care v. Rockford Bd. of Education, 90 F.3d 1307, 1310 & 1313 (7th Cir. 1996).

Here, plaintiffs have no fee-paying clients, so they have not provided their billing rate or any actual bills charged to regular clients. They have opted for the next-best evidence----proof that their proposed rates match what similarly experienced lawyers are paid in the private market for comparable work. The District Court held this may be established by a member of the plaintiffs' own firm, citing *People Who Care.* SA at 5-6. That, however, is not what happened in *People Who Care.* There, the attorney seeking fees had private clients and presented his rate and bills at that rate to back up the claim that he was charging a market rate. He did so for each year the case was pending, except for one year. There, he used his partner's billing rate, supported by bills the partner charged to actual clients. This Court said the partner's actual billing rate constituted fair evidence for the court to consider. Mr. Sachnoff did not provide his billing rate, or bills to clients, as was the case in *People Who Care.* He just offered an opinion that the plaintiffs' rates matched those charged in the market.

In *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 408 (7th Cir. 1999), this Court rejected precisely this kind of evidence when it was offered by a fee-seeking attorney and his partner, stating, "an attorney's self-serving affidavit alone cannot satisfy a plaintiff's burden of establishing market value for that attorney's services." *Id.*, at 408. *Accord Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) ("the burden is on the fee applicant to produce satisfactory evidence---in addition to the attorney's own affidavits----that the requested rates are in line with those prevailing in the

community for similar services"). If a lawyer and a lawyer's partner cannot offer self-serving assessments, surely a lawyer who employs the attorney petitioning for fees cannot do so either.

Mr. Sachnoff's declaration fails for another reason. Although he opines as to the rate commonly charged in "all types of litigation," he offers no opinion as to whether the work of these nine lawyers is of the same type as would warrant such fees. There is very little time here that could be called "litigation." Mr. Sachnoff offers no opinion on whether the rates he endorses are appropriate when there have been extensive intra-office discussions between attorneys, plaintiffs have staffed the case with over nine attorneys, and attorneys spend an enormous numbers of hours attending meetings with non-lawyers discussing mundane development details. Absent such information, Mr. Sachnoff's declaration simply fails to establish what the reasonable and appropriate hourly rates would be for the actual services provided by these attorneys. See, *Bebble v. National Air Traffic Controllers Assoc.*, 2001 WL 1286794, *3 (N.D. Ill. 2001) (rejecting requested hourly rate of $350 as excessive for relatively routine work and reducing it to $200).

Even if Mr. Sachnoff's affidavit constitutes some evidence pertaining to the rates charged in the market, the defendant offered very specific evidence to rebut Mr. Sachnoff. CHA annually seeks competitive bids for its legal work, and seventy-five law firms have submitted proposed fees. SA at 363. This tells us the market for legal services in a much more comprehensive and exact manner than does Mr. Sachnoff's affidavit. Based on this competitive bidding, CHA pays rates of $105 to $325 per hour, including for senior partners at the biggest firms. This work includes federal civil rights work, like *Gautreaux*, as well. Plaintiffs' rates substantially exceed these rates. Indeed, CHA's outside counsel in this case, with thirty years of experience, is paid $170 per hour---below the rate the District Court awarded in this case to the plaintiffs for brand new attorneys.

The District Court did not even consider the defendants' evidence, much less make an effort to resolve the dispute between Mr. Sachnoff's affidavit and the rates firms bid to work for the CHA. When the defendant has discharged its burden to come forward with rebuttal evidence, the trial court must determine whether the plaintiffs have carried their burden of persuasion on rates, which always remains with them. *McNabola*, 10 F.3d at 518. The District Court simply did not consider CHA's evidence as to rates, much less determine whether plaintiffs presented evidence overcoming CHA's rebuttal evidence.

CONCLUSION

For all the foregoing reasons, the District Court's award of $724,732 in attorneys' fees and $3,706 in related expenses should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I certify that this brief, exclusive of the Table of Contents, the Table of Authorities, and the certificates of compliance and of service is 12,618 words.

Dated: March 24, 2006

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CIRCUIT RULE 30(a) and (b)STATEMENT

The undersigned attorney certifies that all the material required by Circuit Rule 30(a) is included in the appendix attached to appellants' brief.

Dated: March 24, 2006

Phillip H. Snelling

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned attorney certifies that a digital version of this brief has been furnished to the Court at the time the hard copy was filed. The undersigned also certifies that the contents of the Circuit Rule 30(a) appendix are not available to defendants in a searchable non-scanned PDF form.

Dated: March 24, 2006

Phillip H. Snelling

CERTIFICATE OF SERVICE

Phillip H. Snelling, an attorney, hereby certifies that on March 24, 2006, he caused to be served two physical copies and a disk of the foregoing **Brief of Defendants-Appellants** and one copy of the Supplemental Appendix by messenger to:

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