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 Northern District of Illinois
Plaintiffs-Appellees,	)	
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	)	

BRIEF OF PLAINTIFFS-APPELLEES

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 05-3578

Short Caption: Gautreaux v. CHA

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Dorothy Gautreaux(deceased), Odell Jones(deceased),Dorothea R.Crenshaw, Eva Rodgers, James Rodgers, Robert M. Fairfax, Bernadette Adams, Donnie Allen, Lydia Andrews, Mattie Bailey, Nicole Bennett, Pilar Boozer, Samantha Cathion, and a class of similarly situated individuals

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Business and Professional People for the Public Interest

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: _____ Date: September 16, 2005

Attorney's Printed Name: Alexander Polikoff

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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N/A

Attorney's Signature: Julie Elena Brown Date: September 16, 2005

Attorney's Printed Name: Julie Elena Brown

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

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JURISDICTIONAL STATEMENT

The district court has jurisdiction under 28 U.S.C. §§1331 and 1343, for this case involves racial discrimination in the location and tenanting of public housing in violation of the Fourteenth Amendment and was brought under 42 U.S.C. §§1981 and 1983.

Since interim fee awards are generally interlocutory and not appealable, this Court's jurisdiction must be based on 28 U.S.C. §1291 (final decisions) and the collateral order doctrine (money, once disbursed, effectively beyond recall in event of reversal at end of case). *Dupuy v. Samuels*, 423 F.3d 714, 717-18 (7th Cir. 2005).

CHA says its prospects of retrieval of fees paid to plaintiffs or their attorneys is slight or non-existent because BPI is a not-for-profit entity. CHA Brief in this Court ("CHA Brief") 2. This, standing alone, is a non-sequitur. However, given the longevity of this case, and the uncertain timeline for CHA compliance with the judgment order requirement that it disestablish its segregated public housing system, 304 F. Supp. 736, 741 (1969), there is sufficient uncertainty as to when CHA could otherwise seek a reversal of awarded fees as to trigger application of the collateral order doctrine.

Thus, although CHA's jurisdictional statement is not complete and correct, plaintiffs believe the Court does have jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in determining that plaintiffs were "prevailing parties" entitled to a fee award for the current fee period?
2. Did the district court abuse its discretion in awarding plaintiffs fees and expenses in the amounts specified in its order?

RESTATEMENT OF THE CASE

The nature of the case and the course of proceedings to 1999 are summarized in section I of Judge Wood's opinion in *Gautreaux v. CHA*, 178 F.3d 951, 952-956 (1999). Supplemental Appendix of Plaintiffs-Appellees ("PSA") 1-14. From 1999 to the present, both at the locations mentioned there and elsewhere, CHA has continued to carry on the "HOPE VI" and related redevelopment activities described in the opinion.

Plaintiffs have received several previous fee awards. CHA contested the first, 523 F. Supp. 684 (1981), *aff'd* 690 F.2d 601 (1982), but more recently fees have been awarded on motions filed jointly by CHA and plaintiffs. In that manner fees were awarded for the periods October 16, 1996 to September 24, 1999, and September 25, 1999 to July 31, 2001. Defendants-Appellants Supplemental Appendix ("SA") 806. (At CHA's request, plaintiffs began filing fee petitions at regular, relatively brief intervals. SA 20.)

On August 9, 2005, plaintiffs' latest fee petition (for the period August 1, 2001 to July 31, 2003) was granted, this time over the opposition of CHA. Defendants-Appellants Appendix ("A") 2. This appeal followed.

RESTATEMENT OF FACTS

I. ACTIVITY LEADING TO THE CURRENT FEE REQUEST

A. Mixed-Income Housing – A New Form of Relief

On March 8, 1995, in the context of a proposed settlement of a separate tenant lawsuit against CHA at the Henry Horner public housing development, for which approval was required under the Gautreaux judgment order, plaintiffs asked Judge Aspen to consider a new form of relief for plaintiff families - public housing in a mixed-income context. PSA 15. With "an awful lot of plaintiffs who haven't gotten relief yet," and the prospect of continued relief (through scattered sites and rent vouchers) "still long term" (*Id.* at 23) plaintiffs' counsel argued that a proposed mixed-income redevelopment on and around the Henry Horner site offered the prospect of better housing conditions for plaintiff families in the near term as well as the possibility of racial integration in the future. *Id.* 52.

Judge Aspen agreed enthusiastically, calling the mixed-income proposal "a 21st century view" of public housing problems and a possible "model for similar projects all over the city." PSA 56. In the two-stage process plaintiffs' counsel outlined (*Id.* 19), Judge Aspen signed orders on March 9 and August 14, 1995, in which he designated the Horner area as "revitalizing," approved the proposed redevelopment, including a specific number of public housing units in a mixed-income redevelopment context to be treated as remedial units for plaintiff class families, authorized $20 million needed to make the redevelopment possible to be "contributed" from Gautreaux funding available under the companion Gautreaux case against the U.S. Department of Housing and Urban Development, and amended the Gautreaux tenant assignment plan to

afford Horner families a priority to half the scattered sites developed outside the Horner area. PSA 59, 62.

Thus began a series of "revitalizing" or "waiver" orders, continued after 2000 under CHA's "Plan for Transformation." Under these orders, and subject to specific terms and conditions negotiated in each instance among CHA, plaintiffs, the district court's appointed receiver, and others, mixed income public housing (most to be developed pursuant to HUD's HOPE VI program) was authorized as relief for plaintiff class families on and near the sites of various CHA developments:

1995 – Henry Horner, PSA 59 and 62.
1996 – North/Kenwood Oakland (Lakefront), PSA 83.
1997 – A site near Cabrini Green, PSA 98.
1998 – ABLA, PSA 153.
2002 – Madden Wells, PSA 187.
2003 – Stateway Gardens, PSA 244.
2003 – Rockwell Gardens, PSA 241.
2004 – Robert Taylor Homes, PSA 247.

In addition there were amendments to the Horner revitalizing order in 1996, 1998, and 2002, to the North/Kenwood Oakland and Cabrini orders in 2000, to the ABLA, Stateway and Rockwell orders in 2005, and to the Taylor order in 2006. PSA 80, 158, 224, 182, 183, 274, 279, 276, 282.

In 2000 the Plan for Transformation placed all of CHA's HOPE VI revitalizing activities under a single long-term funding agreement with HUD called the Moving to Work Demonstration Agreement (MWDA), subject however to the terms of the Gautreaux judgment order. SA 320, PSA 163. Under the "Resident Protection Agreement," which is incorporated by reference into the MWDA and controls in the event of conflict (PSA 172), CHA agrees to seek "all appropriate review and approval under the terms of the [judgment order]", and HUD's approvals are made "contingent on the redevelopment activities in the Plan meeting the terms of

the [judgment order]." (In both places the inadvertent reference is to "Consent Decree" instead of "judgment order." PSA 181.)

B. "[H]ere's how it goes in reality. . ."

In 1997, CHA filed an emergency motion to "clarify" the judgment order. Contending that the order did not apply to replacement public housing funded by the HOPE VI program, it said:

> "In the past the CHA has been forced to negotiate with plaintiffs' counsel for approval of high-rise redevelopments, such as Horner and Lakefront. . . As a result, the CHA ends up with an agreed order to present to the Court, but not the program that it would have created without having to negotiate with plaintiffs' counsel." PSA 91.

In oral argument before the district court, CHA elaborated:

> "[H]ere's how it goes in reality…Mr. Polikoff [plaintiffs' lead counsel] will begin the negotiations by first examining what neighborhood it is we're focusing on; next, what buildings do we want to demolish; next, what buildings do we want to rehabilitate; next, where are we going to build the replacement housing; and then it's going to go all the way down to tenant selection and then to all of the other miscellaneous things. . . [T]he negotiation . . . would bring the plaintiffs into the whole program. It's very intrusive. . . Now, when CHA negotiates. . . they're not happy with that order. That's what they've been able to negotiate. That's not what they wanted, it's not what they hoped for, but it was what they were able to negotiate. . ." PSA 131-132.

Rejecting the CHA-proposed clarification, the district court ruled that the judgment order applied to HOPE VI-funded replacement housing. PSA 146.

Despite this ruling CHA declined to cooperate with the court's receiver and with plaintiffs' counsel, necessitating two further orders by the district court. PSA 151, 156. CHA appealed all three orders to this Court. Concluding that none of the orders brought finality to the litigation and that all "flowed" from the original judgment order, this Court ruled that none of the

three orders was appealable. The appeals were therefore dismissed. *Gautreaux v. CHA*, 178 F.3d 951 (1999). PSA 1.

The ensuing years have been characterized by increased cooperation between CHA and the district court's receiver and by negotiations (albeit frequently lengthy and complex) between CHA and plaintiffs' counsel, leading to the entry of orders at the locations listed above. The orders provide for the development of mixed-income public housing as remedial units for plaintiff class families, subject to negotiated terms and conditions, typically requested by joint motions of plaintiffs and CHA.

While each redevelopment site involves unique facts and circumstances, some of the types of issues addressed in the negotiation of these orders may be illustrated by describing one of the orders entered during the current fee period -- the order of December 12, 2002, addressing a proposal that the Horner Revitalizing Area be expanded and include an additional approximately 271 public housing units. PSA 224.

- The order states that the joint motion of the parties and a detailed affidavit of the receiver constitute a sufficient showing of "revitalizing" circumstances, and that therefore a responsible forecast of economic integration, "with a longer term possibility of racial desegregation," can be made "if the terms and conditions of this order are met." *Id.*

- The order requires that public housing units constitute no more than 35.5% of the total number of units constructed and that this ratio be maintained in each phase of construction. It also requires CHA to provide annual written reports to plaintiffs on the location of public housing units, "including sufficient information to assess whether such units continue to be broadly dispersed throughout the expanded HRA and within buildings." PSA 225.

- The order permits families with children to be housed in certain buildings above the third story "subject to the plaintiff's written approval of the initial location and configuration of such units," describing such units as an appropriate and desirable way to create "viable and mixed-income and desegregated housing opportunities for members of the plaintiff class." *Id.*

- The order allows plaintiffs to allocate up to $12 million of Gautreaux funding (in addition to the $20 million previously allocated) to aid in the expanded development. *Id.*

The joint motion for the order recites, among other things, that CHA has agreed to provide additional funding at least equal to the Gautreaux allocation and will make available another $7.8 million as a result of the settlement of the separate Horner tenants' lawsuit, that HUD has contributed a HOPE VI grant of over $18 million, and that the City of Chicago would fund infrastructure improvements and had already designated a tax increment financing district that included the expanded revitalizing area. PSA 228.

The joint motion also contains this summary statement about mixed-income public housing:

> "Where public housing was once isolated and concentrated in an area roughly three-quarters of a mile long and one block wide, the new public housing units will be integrated among non-public housing units and broadly dispersed throughout the expanded HRA and within buildings." PSA 228.

II. THE CURRENT FEE CONTROVERSY

A. Under Local Rule 54

CHA objected to plaintiffs' most recent fee proposal on the ground that this Court's ruling in *Alliance to End Repression v. Chicago*, 356 F.3d 767 (7th Cir. 2004), disentitled plaintiffs to any further fees. PSA 258. When, by reason of CHA's view, "normal" negotiations under Local Rule 54 proved impossible, plaintiffs filed a motion asking the district court to instruct the parties to negotiate the particulars of plaintiffs' fee request under Local Rule 54. PSA 250. Soon thereafter, and without prejudice to CHA's *Alliance* argument, the parties agreed on that course and plaintiffs withdrew their motion. PSA 259.

During the ensuing Rule 54 negotiations CHA offered several objections to plaintiffs' fee request (in addition to its *Alliance* argument). Two were based on the use of more than a single attorney to perform work ("intra-office meetings and phone calls" and "more than one plaintiffs' attorney in meetings or phone calls," the latter objection also being termed "double billing"), and two were based on the nature of the work performed ("deemed by CHA to be 'non-legal'" and "deemed by CHA to be 'outside the scope' of this case"). SA 39 and 42. CHA also contended that plaintiffs' hourly rates, from $200 to $400 per hour, were too high, and it offered its own proposed rates, ranging from $125 to $350, "if fees were awardable for this period." SA 41-42.

Taking account of CHA's objections (apart from hourly rates), plaintiffs reduced their fee request by some $105,000 and so advised CHA. SA 582. When CHA rejected this reduced offer, plaintiffs filed their fee petition (for the reduced amount), attaching the required Joint Statement of the parties. As provided in Local Rule 54.3(e)(3) the Joint Statement included a brief description of the four CHA objections, as well as CHA's suggested hourly rates and the statement that in CHA's view, based on *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001), and *Alliance*, plaintiffs were not entitled to any fees "as all matters requiring court action were submitted by the parties as motions for agreed orders." SA 41.

B. In The District Court

In its district court brief CHA advanced not only the specific objections set out in the Joint Statement but several others as well, including that plaintiffs' time records were not grouped by task or subject matter, that they did not sufficiently explain how performed work related to the judgment order, and that they did not show which hours had been eliminated in arriving at the $105,000 reduction. SA 294-295. Although CHA's newly stated objections had

not been listed in the Joint Statement as required by Rule 54 (parties obligated to state basis for any objections, and attempt to resolve remaining disputes – LR54.3(d)), plaintiffs addressed CHA's new issues and objections in their reply brief, including explaining -- by means of annotated time sheets and a summary thereof by task -- which hours had been eliminated to arrive at the $105,000 reduction and how each time entry related to the judgment order. SA 623-28, 629-805.

CHA did not move to strike this additional information nor request leave to file a sur-reply to it, although plaintiffs stated they had no objection to a sur-reply and that CHA was "entitled" to it. SA 605. Nor, following the district court's award of fees based on plaintiffs' annotated time sheets and summary, did CHA move for reconsideration under Federal Rule of Civil Procedure 59(e). However, CHA has now included in its brief before this Court (CHA Brief 27-28) factual arguments about the annotated time sheets not made before the district court but made here for the first time.

SUMMARY OF THE ARGUMENT

In 1995 the district court adopted plaintiffs' proposal that, subject to appropriate conditions, "mixed-income public housing" could be accepted as a new form of relief for plaintiff families under the original judgment order in this case. In the ensuing decade much of plaintiffs' work has revolved around application of the judgment order to the development of this new form of relief. Through joint motions and jointly proffered orders, CHA has twice agreed that plaintiffs' time devoted to this activity is compensable.

CHA's argument that *Buckhannon*, 532 U.S. 598 (2001), and *Alliance*, 356 F.3d 767 (2004), require rejection of plaintiffs' latest fee petition (largely involving continuation of this

same activity) is without merit. The district court correctly perceived that while *Buckhannon* holds that a party must have obtained a merits judgment, consent decree, or other judicially-sanctioned change to qualify as a "prevailing party" entitled to attorney's fees, plaintiffs here have obtained such "judicial imprimaturs" in the form of the original judgment order and multiple remedial orders since then, including during the current fee period. A 2-4.

The district court also correctly found this case to be factually distinct from *Alliance* in that the post-decree proceedings and related work for which fees are presently sought are not "clearly separable" from the judgment order. Rather, as the district court said, "this case involves post-judgment work and proceedings that are part of one active equitable case, in which compliance has always been at issue, and modifications and clarifications of the original judgment order must continuously be made to account for changing conditions and circumstances." A 3-4.

Since the district court's determination in this regard is clearly steeped in the factual circumstances of this case, it should be reviewed under the clear error standard, as of course so should the court's determination as to the amount of fees to be awarded. CHA's four objections to the reasonableness of plaintiffs' fee request, as stated in the Joint Statement of the parties under Local Rule 54, are each without merit, as is its characterization of plaintiffs' work as "monitoring." The district court correctly determined that the hours for which plaintiffs requested fees "are reasonable," and that the underlying tasks to which the hours had been devoted were within the scope of the judgment order. A 5.

The district court also properly rejected CHA's contention that the affidavit submitted to support plaintiffs' proposed hourly rates should be disregarded because the affiant, the senior litigation partner in a major Chicago law firm, was one of some fifty BPI directors (SA 582),

such membership not being a ground for disqualifying a well-supported, sworn statement as to hourly rates charged by lawyers of comparable skill, experience, and reputation to those of plaintiffs' lawyers in the same community.

Finally, this Court should not consider Part III B, pp. 27-29, of CHA's brief because these pages improperly bring before this Court a first-time argument (concerning plaintiffs' annotated time sheets) that CHA could and should have presented initially to the district court. Indeed, CHA rejected four opportunities to raise its questions below, first – in disregard of Local Rule 54 – by not including all its objections in the parties' Joint Statement as required by that Rule, and then by not moving the district court to file a sur-reply, or to strike, or (once the district court had ruled in reliance on plaintiffs' annotated time sheets) for reconsideration. This Court should not give CHA a fifth bite at the apple.

ARGUMENT

I. STANDARD OF REVIEW

This court generally reviews §1988 fee awards for abuse of discretion. *Jaffee v. Redmond*, 142 F.3d 409, 412 (7th Cir. 1998.) "As the Supreme Court has explained, this deferential standard of review 'is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.'" *Id.*, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). A trial court will be reversed for abusing its discretion "only if no reasonable person could agree with its decision." *Sports Center, Inc. v. Brunswick Marine*, 63 F.3d 649, 652 (7th Cir. 1995). In determining whether the district court abused its discretion, the Court will review "purely legal

conclusions" de novo, and factual determinations for clear error. *Palmetto Properties, Inc. v. County of DuPage*, 375 F.3d 542, 547 (7th Cir. 2004).

CHA's assertion that the opinion below is based on an erroneous legal standard misreads the opinion. There is no dispute that, as a result of the original 1969 judgment order in this case, plaintiffs have been previously determined to be prevailing parties. The district court's determination that the "post-decree proceedings and related work for which fees are presently sought are not 'clearly separable' from the original judgment order" (A 3) is plainly steeped in the district court's understanding of the details and factual circumstances of this litigation.

This is evident from the district court's language: "... Unlike *Alliance*, this case involves post-judgment work and proceedings that are all part of one active equitable case, in which compliance has always been at issue, and modifications and clarifications of the original judgment order must continuously be made to account for changing conditions and circumstances." A 4. In other words, the district court distinguished this case from *Alliance* not by reason of legal theories or standards, but because the facts here are so unlike the facts in *Alliance*.

Since the district court's determinations of plaintiffs' entitlement to fees and the amount of fees to be awarded are both steeped in factual matters, both determinations should be reviewed for clear error. *Dupuy v. Samuels*, 423 F.3d 714, 718 (7th Cir. 2005).

II. *BUCKHANNON* AND *ALLIANCE* DO NOT PRECLUDE A FEE AWARD

CHA says the district court erred (1) in determining that plaintiffs' success in winning the 1969 judgment order "made them 'prevailing parties' for all purposes" (CHA Brief 14); (2) in relying on this Court's decision in *Gautreaux v. CHA*, 690 F.2d 601 (7th Cir. 1982), which long

predated *Buckhannon* and *Alliance* and is "inconsistent" with them (*Id.* at 14-15); and (3) in relying also on fee awards, to which CHA had agreed, which likewise predated those two cases. *Id.* at 15. However, in arguing that *Buckhannon* and *Alliance* preclude the fees awarded below, CHA misapplies the cases and misreads the district court's opinion.

A. The District Court Properly Determined that Neither *Buckhannon* nor *Alliance* is Applicable to the Factual Circumstances of this Case.

First, *Buckhannon* does not address post-decree fees but rather fees where no remedial order is ever entered in a case. To qualify as a "prevailing party" under fee-shifting statutes, the Supreme Court ruled, a party must secure either a judgment on the merits or a consent decree or other settlement order. *Buckhannon* rejects the "catalyst theory" under which plaintiffs had been deemed prevailing parties if suits had brought about voluntary changes in defendants' conduct without any enforceable judgment, consent decree, or other settlement order ever having been entered. *Buckhannon*, 532 U.S. 605-06. In Gautreaux there are, of course, both a judgment order and many subsequent remedial orders (including in the current fee period) that provide real relief to the plaintiff class.

Second, *Alliance* applied *Buckhannon's* analysis to post-decree activities that, because the decree had been fully complied with in the post-decree period and had accomplished its purpose and "become obsolete," were viewed as clearly separable from the proceedings leading to the consent decree. *Alliance*, 356 F.3d at 771, 774. Under those circumstances, and because plaintiffs had experienced "nothing but loss" in the separable post-decree proceedings (*Id.* at 770), plaintiffs were not prevailing parties as to those separable matters. *Alliance* did not of course decide that <u>all</u> post-judgment proceedings were <u>always</u> separate, but only that under its

factual circumstances the post-decree proceedings at issue there should be viewed as separate for fee purposes.

Third, rather than overlooking *Alliance* as CHA claims (CHA Brief 19), the district court squarely addressed it and found it to be inapplicable to the factual circumstances of the current fee period in Gautreaux, where "compliance has always been at issue," where "modifications and clarifications of the original judgment order must continuously be made to account for changing conditions and circumstances," and where "[u]nlike *Alliance,* this case involves post-judgment work and proceedings that are all part of one active equitable case..." A 3-4. Because of these crucial fact differences, the court determined that the proceedings and related work for which fees were being sought "are not 'clearly separable' from the original judgment order," and that *Alliance* did not preclude a fee award. *Id.*

The separability contention respecting post-judgment Gautreaux proceedings has previously been expressly considered and rejected by both the district court and this Court. In opposing a prior fees motion, CHA argued that the judgment order was "final" and that "all other matters were supplemental." *Gautreaux v. CHA*, 523 F. Supp. 684, 689 (N.D. Ill. 1981). The district court rejected this "mischaracterization of this case as many separate matters, including independent supplemental proceedings," and granted plaintiffs' fee motion, including for post-judgment work. 523 F. Supp. at 689-90. Affirming, this Court expressly considered CHA's supplemental proceedings argument and rejected it, saying it was "consistent with the history of this particular lawsuit. . . not to divide a continuously active equitable case into a host of separate smaller matters." 690 F. 2d 601, 604-05. The Court then explained why it was proper to treat this case as a continuous litigation:

> The heart of the lawsuit is the remedial stage, where the parties struggle, often for years, over the scope and details of injunctive relief. 690 F. 2d at 610.

This is so in part because the Gautreaux judgment order is not simply an injunction prohibiting CHA from future discrimination; it is a mandatory remedial order that, among other things, requires CHA to develop remedial housing, to provide plaintiff class families with access to it, and to operate in such a way as to disestablish its segregated housing system, and it expressly retains jurisdiction for all purposes, including issuing further orders to achieve results consistent with the judgment order. *Gautreaux v. CHA*, 304 F.Supp 736 (N.D. Ill. 1969).

More recently this Court had occasion to consider once again whether this case was a continuing one, whether the heart of the lawsuit was still beating, as it were, and concluded that it was. *Gautreaux v. CHA*, 178 F.3d 951, 952, 958 (1999). In the district court CHA argued that this decision was "inapposite" because it didn't involve fees (SA 291), but of course it did involve the nature of the ongoing case. Had it not been of a continuing nature, the orders CHA sought to undo would have been appealable, yet this Court said they were not because they "flowed" from the 1969 judgment order. 178 F.3d at 958. So, in like fashion, do the orders in the current period, which are based on – indeed, recite that they are applications of – the judgment order.

It is true that these prior determinations are not good from here to eternity because things may change in relevant ways, but relevant change must be shown. Here there is no such showing. The big change CHA talks about, mixed-income redevelopment, began in 1995 at Horner (see Restatement of Facts above), and the relationship of such redevelopment to the judgment order was precisely the subject of this Court's 1999 decision. More importantly, as the district court determined, activity during the current fee period is in principle indistinguishable

from what has gone before, "modifications and clarifications of the original judgment order . . . to account for changing conditions and circumstances." A 4.

B. Even Viewing the Current Fee Period as a Separable Proceeding, Multiple "Judicial Imprimaturs" Satisfy *Buckhannon's* Requirement.

Suppose, however, contrary to the findings of the district court as to the factual circumstances and current posture of the case, and contrary to two determinations of this Court, the proceedings in the present fee period were for argument's sake viewed as separable activities to which *Buckhannon's* judicial imprimatur requirement was to be separately applied. Even that (unjustified) view would not avail CHA, for there are several "judicial imprimaturs" in this fee period.

CHA's statement that "the District Court never entered an order in the plaintiffs' favor during this two year period" (CHA Brief 14), repeated many times over (plaintiffs "have no victories," are not "winning orders against the CHA," etc., CHA Brief 23, 22), runs smack up against the fact that orders entered during the current period either provided for the development of remedial mixed-income units for plaintiff class families, under conditions specified by the court and over which the court retained continuing jurisdiction, or established ground rules for tenanting remedial units.

For example, in December 2002 plaintiffs filed a motion for an order,

- To expand the Horner Revitalizing Area (HRA);
- To authorize the development of a prescribed number of public housing units within both the existing and expanded HRA;
- To permit some public housing previously constructed within the HRA to be converted to affordable or market units, subject to specified conditions;

- To permit families with children to be housed in certain public housing units above the third floor, subject to plaintiffs' written approval of the location and configuration of such units; and

- To authorize the plaintiffs to allocate up to $12 million of Gautreaux funds to support the proposed additional public housing development, in addition to the $20 million of Gautreaux funding previously contributed. PSA 226.

The motion was filed on behalf of CHA as well as plaintiffs, and was supported by a detailed affidavit of Daniel E. Levin on behalf of the court's receiver. PSA 232. On December 12, 2002, the requested order was entered. PSA 225.

Under *Buckhannon* and *Alliance* two conditions must be met if plaintiffs are to be accorded prevailing party status: (1) plaintiffs must obtain real relief, the *Alliance* "fruit," and (2) the relief must be embodied in a court order, *Buckhannon's* "judicial imprimatur." The new Horner order indisputably meets the first condition (as it obviously does the second) by providing a number of fruits. First, it authorized remedial public housing to be developed for plaintiff families where before it could not have been, based on the following findings among others:

> . . . [T]he principal remedial purpose of the orders previously entered in this case has been to provide the plaintiff class families with desegregated housing opportunities; and
>
> . . . [O]n occasion [the Court] has permitted public or assisted housing to be provided in census tracts other than the General Public Housing Area upon a sufficient showing of "revitalizing" circumstances such that a responsible forecast of economic integration, with a longer term possibility of racial desegregation, could be made; and
>
> The Court being of the view that. . . such a forecast can be made with respect to the expanded HRA <u>if the terms and conditions of this order are met</u>; and. . .
>
> The Court being of the view that permitting families with children to be housed in certain public housing units above the third story within the HRA, <u>subject to the plaintiffs' written approval of the initial location and configuration of such units, will be an appropriate and desirable way to create viable mixed-income and desegregated housing opportunities for members of the plaintiff class</u>. . . PSA 224-225.

The Order thus enables "mixed-income and desegregated housing opportunities" for plaintiff class families (real relief or "fruit"), subject however to multiple conditions imposed at the behest and for the benefit of plaintiffs. For example, to assure the mixed-income character of the new units, CHA's flexibility was limited by imposing a ceiling on the number to be permitted. Not only a ceiling but also a floor, because the new public housing was to bear a continuing, specified percentage relationship to the other housing to be developed. Written reports were required to be provided at plaintiffs' request to include "sufficient information to assess whether such [public housing] units continue to be broadly dispersed throughout the expanded HRA and within buildings." PSA 224-225.

A second example of real relief is the order respecting the tenanting of CHA's scattered site units. SA 373. Due to long-standing vacancy problems in this component of relief, plaintiffs negotiated an agreement with CHA that included detailed procedures and a "maximum lease-up period" which are embodied in paragraph 7 of the 8/29/02 Order. SA 376. It cannot fairly be said that the lease-up and reporting requirements this order imposed on CHA, at the behest and for the benefit of plaintiffs, did not provide relief to them.

Another example of fruit is the 9/7/01 Order (SA 368) that "vacated the three-story height restriction in the 1969 judgment order. . ." (SA 293) because the proposed redevelopment was represented to be "an appropriate and desirable way to create viable mixed-income and desegregated housing opportunities for CHA plaintiff families." SA 368, emphasis added. At the behest of plaintiffs and for their benefit, the order prescribed in detail (thus limiting CHA's freedom of action) just how this benefit was to be achieved:

- In a mid-rise building, "18 public housing units dispersed throughout the development." SA 369.

- In another mid-rise building, "27 public housing units dispersed throughout the development." *Id.*
- In a third mid-rise building, "10 public housing units dispersed throughout the development." *Id.* 370.
- In a fourth mid-rise building, "16 public housing units dispersed throughout the development." *Id.*
- In 12 walk-up buildings, "1 public housing unit per building for a total of 12 public housing units." *Id.*
- In 2 walk-up buildings, "Three public housing units per building for a total of 6 public housing units." *Id.*

Apart from its crucial omission of these benefits or fruits to plaintiffs in its description of these orders (CHA Brief 10-11), CHA argues that because the orders were jointly submitted and agreed to by the parties, and because CHA as well as plaintiffs wanted them entered, they do not satisfy *Buckhannon's* imprimatur requirement. *Id.* 22. Does this "jointness" preclude fees? Of course not. Obviously defendants "join" in the consent decrees they jointly proffer with plaintiffs that unquestionably satisfy *Buckhannon's* imprimatur requirement. Obviously defendants are "benefited" by some decree provisions and desire them to be entered, for otherwise they would not be joining in. But, just as obviously, *Buckhannon* accepts judicially sanctioned settlement agreements and consent decrees -- "agreed orders" jointly proffered by plaintiffs and defendants -- as satisfaction of its judicial imprimatur requirement.

Thus, by virtue of two separate decisions of this Court, this case has been determined to be continuing litigation, not to be cut into separate slices, and nothing has happened to change that determination. Post-judgment proceedings in the current fee period are part and parcel of the still ongoing Gautreaux remedial process – the "struggle. . . over the scope and details of injunctive relief," "the heart of the lawsuit." *Gautreaux v. CHA*, 690 F.2d at 610. Much of plaintiffs' work

during this period (described in further detail in Part III below) is indistinguishable in principle from much of their work during prior periods, which CHA acknowledged was compensable.

What has "changed" is that *Buckhannon* and *Alliance* have been decided. But because plaintiffs do not rely on the catalyst theory rejected by *Buckhannon*, and because during the current fee period they have obtained the real relief missing in *Alliance*, neither *Buckhannon* nor *Alliance*, taken singly or together, precludes the fees awarded below.

III. THE DISTRICT COURT DID NOT ERR IN ITS FEE AWARD

In the Rule 54 Joint Statement of the parties CHA listed four objections to plaintiffs' fee request: 1) intra-office meetings and phone calls, 2) more than one lawyer in meetings or phone calls with third parties ("double billing"), 3) so-called "non-legal" or "non-compensable" work, and 4) work deemed by CHA to be "outside the scope" of this case. SA 39, 42 and CHA Brief 32-37. CHA also contended that plaintiffs' hourly rates were too high (SA 41-42), and in the district court that much of plaintiffs' work was (non-compensable) "monitoring." SA 291. All of these objections are repeated here, together with a new one related to plaintiffs' annotated time sheets, but -- as the following discussion shows – all are without merit.

A. More Than One Lawyer

The first two CHA objections really amount to the single contention that more than one plaintiffs' lawyer on a task was unreasonable – that, indeed, the Gautreaux case should have been "staffed by one experienced lawyer" (CHA Brief 33) – and that lawyers consulting with each other or joining another lawyer in a meeting or phone call cannot be justified. *Id.* The responses may begin with the district court's finding of fact ". . . that the Plaintiffs' requested

hours are reasonable" (A 5), a finding not to be reversed unless clearly erroneous. *Palmetto*, 375 F.3d at 547.

The district court also referred to past fee awards (A 5), in the joint motions leading to which CHA agreed upon "hours reasonably expended" by plaintiffs' attorneys. SA 809, 816. One of these joint motions expressed CHA's agreement that a team of seven lawyers was reasonable (SA 809-10), the other that six was reasonable (SA 816), with no suggestion that plaintiffs' work should have been handled by a single lawyer.

Obviously, as CHA points out, work in the three fee periods was not identical. But much of it was similar, for work on the same subject matters appears in two or even all three fee periods – see, for illustrations, the habitability and ABLA litigation examples discussed below. Revitalizing work – negotiating the arrangements to permit mixed-income remedial public housing to be developed -- appears in all three periods, escalating however in the most recent as more revitalizing projects are initiated. (The dates are given in the Restatement of Facts above at 3.) CHA's recent agreement on the reasonableness of teams of six and seven lawyers, engaged in some of the same kinds of work as were carried on in the current fee period, suggests strongly that CHA doesn't itself take its single lawyer idea seriously. (The cover of CHA's Brief here lists its general counsel and one of her staff, as well as two partners from its outside firm.)

As CHA recounts, revitalizing activity is a multi-year effort involving $1.6 billion in HUD funding, not counting millions more from the City and the private sector (and from the Gautreaux case as well); planning and related activity at ten different mixed-income development sites (each too large to be done in a single phase, necessitating in some cases a series of amendments or "waiver" orders even where an initial revitalizing order has been entered); demolition of thousands of dwelling units; construction of thousands more; and

relocation of many thousands of Gautreaux families (including arrangements to enable them to access remedial mixed-income units and social services to give them a reasonable chance for such access). Parties to the process, in addition to plaintiffs and CHA, include HUD, the City, private developers, social service providers, community organizations, and others. It borders on the bizarre to assert that plaintiffs' interests in this welter of activity should have been handled by a single lawyer consulting with no one.

The law is not so unrealistic. See, for example, *Kurowski v. Krajewski*, 848 F.2d 767, 776 (7th Cir. 1988) (". . . use of two (or more) lawyers. . . may well reduce the total expenditures by taking advantage of the division of labor. . ."). As Judge Easterbrook, sitting as a district judge by designation, said:

> Use of more than one lawyer is common in legal practice. Consultation among lawyers ensures that they do not overlook significant facts or inquiries. . . Two lawyers are the minimum in much private litigation." *Bohen v City of East Chicago*, 666 F. Supp. 154, 157 (N.D. Ind. 1987).

See also, *Berberena v. Coler*, 753 F.2d 629 (7th Cir. 1985) (allowing fees for strategy conferences and meetings); *In Re: Aimster Copyright Litigation*, No. 01-C8933, 2003 U.S. Dist LEXIS 6270 (N.D. Ill., 2003) (approving fees for five lawyers working together on the same matter); and *Egert v. Conn. General Life Ins. Co.*, No. 88-C5689, 1991 U.S. Dist. LEXIS 6693, at *11 (N.D. Ill., 1991) (cases often argued and prepared "by far more than two attorneys").

Yet, except with respect to Gautreaux team meetings, as to which plaintiffs have reduced their fee request by half (SA 619 – the reduced figure works out to about $260 per week for the two-year fee period), plaintiffs have opted to eliminate consultation hours of every lawyer above two. SA 618.

The bottom line is the district court's specific finding of reasonableness. When, as here, that finding is buttressed by CHA's own agreement upon the reasonableness of teams of six and

seven lawyers, it is impossible to conclude that the district court committed clear error by not siding with CHA's latter-day contention that all of plaintiffs' work should have been handled by a single lawyer.

B. "Non-Compensable" and "Outside the Scope" Work

A third CHA objection is called "non-legal" work (SA 39), which CHA now describes as "activities which are not properly compensable as work related to the Gautreaux judgment." CHA Brief 34. Giving several examples (such as "habitability," ABLA litigation, and serving on "Working Groups" – *Id.*, 34-35), CHA also says these activities "did not require any attorney." *Id.* 34, emphasis added.

We may note first that the district court specifically found that the tasks for which plaintiffs sought compensation were related to the judgment order (inadvertently referring to a consent decree, "underlying task is within the scope of the consent decree" – A 5). This finding of fact by a district judge who knows the litigation intimately will not be reversed unless it is clearly erroneous. *Palmetto*, 375 F.3d at 547.

Second, CHA's examples are utterly unpersuasive. To illustrate, CHA agreed in the most recent joint fee motion that habitability work is compensable (SA 598, 621), yet it makes no effort to show that such work has so changed during the current fee period as to render it non-compensable.

The same is true of Working Groups. SA 621. CHA has described one Working Group's role as follows:

> [It] has provided significant input at every stage of the development planning process. . . . helping with decisions relating to demolition, consolidation and phasing, and also determining how the development will proceed at each step of the process. SA 281.

Thus Working Group meetings are the venues where plans are discussed that become the basis for negotiating and crafting the revitalizing and other orders entered by the district court that lead to plaintiffs' mixed-income housing remedy. Once again, against the background of its recent agreement that such time is compensable (SA 621), CHA utterly fails to explain why plaintiffs' Working Group participation during the current fee period was "unnecessary." CHA Brief 35. "[T]he fact that the work done. . . did not occur in the context of traditional judicial litigation does not preclude an award of reasonable attorney's fees...." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558, 560-561(1986).

A final illustration is the ABLA litigation, also included in prior fee awards (SA 621), which involved a direct attack on the district court's ABLA revitalizing order; on its face this work is thus clearly "related" to the remedial revitalizing process. PSA 153, 262, 274.

For more detailed descriptions of the work in each of these three areas, as well as others that CHA says are "unrelated" to the judgment order, we respectfully refer the Court to our reply brief in the district court, SA 598-599. Since all of these activities involve in one way or another hard-earned relief for plaintiff families, CHA's unexplained notion that they "did not require any attorney" (CHA Brief 34) defies understanding. Is CHA suggesting that plaintiffs should not be represented by lawyers in crafting their relief or defending it against attack?

CHA's fourth objection is "work deemed by CHA to be 'outside the scope' of this case." SA 39. What "outside the scope" turns out to mean is work on which, in CHA's opinion, too many hours were spent by too many lawyers, thus demonstrating that plaintiffs had not "exercised billing judgment." CHA Brief 36.

Once again, CHA's objection runs smack into the contrary finding of fact "that the Plaintiffs' requested hours are reasonable." A 5. How does CHA attempt to demonstrate that the

district court's finding is clear error? The answer is by naked assertion that hours are unreasonable, coupled with ignoring the explanations plaintiffs advanced in the district court respecting the same supposed illustrations of too many hours.

For example, one such CHA assertion has to do with 28 hours on the Rockwell revitalizing motion, which CHA says were too many because the Rockwell motion "was based on other similar motions and orders." CHA Brief 36. Exactly this same contention was made in the court below ("akin to similar agreed orders," SA 302), to which plaintiffs responded with an affidavit showing that the Rockwell work was not similar to others but was "significantly different from the process at any of the mixed-income developments on which we had worked previously. . .". SA 611-13. In this Court, while remaining silent about this affidavit, CHA repeats its assertion of similarity, presumably expecting this Court to reverse the district court's finding of reasonableness simply because of CHA's contention to the contrary, unadorned with mention of facts that were before the district court.

Like observations can be made about the Madden Wells revitalization order – involving, among other things, the replacement of three large contiguous public housing developments with mixed-income housing that include the proposed development of 850 new public housing units, 150 elderly public housing units, together with 680 tax credit and 1,320 market units, a $35 million HOPE VI grant, major infrastructure commitments from the City of Chicago, and an analysis of the experience under the contiguous North Kenwood-Oakland revitalizing area order entered earlier. PSA 182 and 221.

We respectfully refer the Court to our discussion of other CHA examples of "unreasonableness" in our reply brief to the district court (SA 599-601), but enough has been

said already to make it clear that this CHA objection too fails by a wide margin to show that the district court's contrary finding of reasonable hours was clearly erroneous.

C. "Monitoring"

CHA is quite fond of calling plaintiffs' work "monitoring," even "classic monitoring" (CHA Brief 22), but the label doesn't change what's inside the package. For example, plaintiffs' participation in Working Group meetings is said to be "monitoring pure and simple." SA 291. Yet, CHA itself describes the Working Group role as including "*determining* how the development will proceed at each step of the process," as well as providing "*significant input* at every stage of the development planning process." SA 281. Such activity, intrinsic to the crafting of plaintiffs' mixed-income remedy, is obviously not what is normally meant by "monitoring."

Moreover, even if by lexicographic distortion CHA persists in calling Working Group activity monitoring, it doesn't help the CHA argument. *Alliance* held that under *Buckhannon* monitoring was not fee-generating if it produced no orders ("if it [monitoring] does not produce a judgment or order, then under the rule of *Buckhannon*, it is not compensable"). 356 F.3d at 771. Here of course, as discussed above, numerous remedial orders have been "produced" as a result of precisely the Working Group activity CHA would call "monitoring."

Part of CHA's argument is that monitoring is what the receiver does, for the receiver here is "akin" to the Police Board in *Alliance*; ergo it must be duplicative if the plaintiffs are doing it too. CHA Brief 24. But unlike the Police Board, which was expressly given a monitoring function, 356 F.3d at 772, the receiver here -- whose appointing order does not mention the word "monitor" (SA 8) -- was not told to take over plaintiffs' roles in tenant assignment, or in assuring Gautreaux families reasonable access to remedial units, or in defending the district court's revitalizing orders against attack, or in seeing to it that CHA performs its judgment order duty to

disestablish its segregated public housing system, etc. Consistent with their separate and distinct roles, court orders obligate CHA to make reports to plaintiffs, not to the receiver. See e.g., PSA 76 and 80.

The receivership, moreover, has been in place since 1987. SA 8. If, as CHA seems to argue (CHA Brief 24), the appointment of the receiver rendered unnecessary much of what plaintiffs' counsel has been doing, is it credible that it would have taken CHA nearly two decades to awaken to that fact, during which time – without a suggestion that they were performing essentially duplicative tasks – it agreed to pay the fees of both? A "course of dealing" between parties is often helpful in resolving differing views of past events. *Cody v. Hilliard*, 304 F. 3d 767, 778-79 (8th Cir. 2002).

D. Hourly Rates

There is no dispute that under the circumstances here (plaintiffs' lawyers in public interest practice), the best evidence of an hourly rate is the rate charged by lawyers of reasonably comparable skill, experience, and reputation in the same community. CHA 37, citing *Blum v. Stenson*, 465 U.S. 886 (1984). Plaintiffs offered exactly such evidence in the form of an affidavit from Lowell Sachnoff, the senior litigation partner in a 140-person Chicago law firm. SA 45.

For many years Sachnoff's practice has involved representation of both plaintiffs and defendants in complex actions in the Northern District of Illinois, including civil rights, antitrust, and securities cases as well as class actions of other kinds; he is familiar with customary hourly rates charged in Chicago in "all types of litigation, including civil rights matters." *Id.* 45-46. He has also represented attorneys in several recent fee shifting and common fund cases in this Court, is familiar with the current and historical hourly schedules of charges used by ten Chicago law

firms ranging in size from 25 to 200 lawyers, and is familiar with the backgrounds, experience, skill, and reputations of each of plaintiffs' attorneys. *Id.* 46.

CHA objects to this hourly rate evidence on the ground that Sachnoff has a "clear interest" (CHA Brief at 37) as one of fifty or so BPI directors, and criticizes the district court's citation in this context of *Rockford People Who Care v Rockford Bd. Of Educ.*, 90 F.3d 1307, 1312 (7th Cir. 1996), because in *Rockford* the affidavit, although coming from a member of the fee-seeker's own firm, supplied the member's billing rates and not an opinion as to community rates for comparable lawyers.

Yet it is clear that the district court cited *Rockford* on the issue of disqualification, not the nature of the evidence supplied, and both *Rockford* and *Denius v. Dunlap*, 330 F.3d 919, 930-31 (7th Cir. 2003) (affidavit from attorney's employer), make it plain that Sachnoff's membership on BPI's board does not disqualify him as an evidence-giver. That being so, and since he is otherwise qualified on the issue of market rates (which CHA does not question), it was not error for the district court to look to the Sachnoff affidavit as one of the grounds for its conclusion on reasonable hourly rates.

(A second CHA objection, not really directed at Sachnoff, takes his affidavit to task because it does not adopt and then opine upon CHA's characterization of the work done by plaintiffs' lawyers as "routine." CHA Brief 39. The characterization being so obviously flawed, so is the criticism.)

However, although not noted by CHA, the district court did not rely solely on the Sachnoff affidavit for the reasonableness of the requested hourly rates, but looked to two other sources as well -- past hourly rates in this litigation, and current market rates within the Chicago legal community. A 6. The former, both relatively recent and agreed to by CHA, seems a

particularly good source of evidence. The district court does not describe the latter source, but hourly rates were recently approved by other judges of the Northern District for lawyers with less seniority than Mr. Polikoff that were higher than the rate requested for his time. See, e.g., *Johnny's Icehouse Inc. v. Amateur Hockey Ass'n of Illinois*, No. 00-C7363, 2001 U.S. Dist. LEXIS 11671, at *6 (N.D. Ill. Aug. 7, 2001), and *Flaherty v. Marchand*, 284 F.Supp. 2d 1056, 1065 (N.D. Ill. 2003) (approving hourly rates from $450 to $495 for attorneys with fewer than 30 years' experience), both cited in plaintiffs' brief below but not commented on by CHA.

Finally, without explaining the source of its knowledge, CHA insists that the district court "did not even consider" CHA's competitive bidding approach to rate evidence. CHA Brief 40. However, CHA's suggested approach has not received judicial sanction; market rates are the clearly established standard. See *Lightfoot v. Walker*, 826 F.2d 516, 525 (7th Cir. 1987) (rejecting lower rate opposing party had procured for outside counsel).

E. Plaintiffs' Annotated Time Sheets

In utter disregard of the rule against making new arguments for the first time at the appellate level, CHA has done just that with three pages of its brief directed at plaintiffs' annotated time sheets. CHA Brief 27-29. See *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002); *Schoenfeld v. Apfel*, 237 F.3d 788, 793 (7th Cir. 2001); and *Maloney v. Brandt*, 123 F.2d 779, 782 (7th Cir. 1941) (arguments not made to the district court are waived on appeal). CHA's action is all the more distressing because it had not one but four previous opportunities to address these time sheets.

First Opportunity -- Rule 54

The first opportunity arose in the drafting of the Joint Statement required by Local Rule 54.3 which obligates parties to identify "the basis of any objections" to fees (¶(d)(5)) and to include in their Joint Statement "a brief description of each specific dispute remaining." ¶(e)(3).

Responding to CHA objections, during the Rule 54 negotiations plaintiffs reduced their fee request by some $105,000, including eliminating "hours for time spent by any more than two BPI attorneys attending the same meeting," and eliminating "hours of time in categories which CHA questioned," and plaintiffs so advised CHA. SA 582. Plaintiffs did not however identify which specific hours had been eliminated to arrive at this reduction.

If it remained a CHA "basis of any objection" that the eliminated hours had not been identified, CHA was obligated by Rule 54(d)(5) to "specifically identify" that basis of objection. If plaintiffs' failure to tell CHA which particular hours had been eliminated was a "specific dispute remaining," then CHA was obligated by Rule 54(e) to list that remaining dispute in the Joint Statement.

But CHA did neither. The Joint Statement, prepared jointly by the parties, was signed and filed with the district court without any indication from CHA that it desired plaintiffs to specifically identify the eliminated hours, let alone any indication that plaintiffs' failure to identify those hours was the "basis of any objection" and a "specific dispute remaining." Had CHA complied with Rule 54, what became the annotated time sheets (one of whose purposes was to identify the eliminated hours) would have become a part of Rule 54 negotiations. (With the almost certain consequence of resolving CHA's questions about them even before the fee petition was filed, for Rule 54 obligates the parties to "attempt to resolve any remaining disputes" after "the basis of any objections" has been stated and "before the [fee] motion is

filed." Rule 54(d)(5), emphasis added. At the very least, any dispute would have surfaced in the district court, not here.)

Second Opportunity – Sur-reply

Once CHA's brief in the district court belatedly raised the objection that the eliminated hours had not been specifically identified, plaintiffs were faced with two options: to move to strike the objection on the ground that it had not been included in the Joint Statement, or to supply the belatedly-requested information.

Plaintiffs chose the second course and included the annotated time sheets as an exhibit to their reply brief in the district court, noting that they were "[r]esponding to objections CHA failed to raise in the Rule 54 negotiations but now presents to the Court," and that plaintiffs were therefore "necessarily supplying new matter with this reply brief." The brief also stated that under the circumstances CHA would be "entitled to a surreply." SA 605.

Astonishingly, CHA chose not to ask leave to file a sur-reply. In *Sports Center, Inc. v. Brunswick Marine,* 63 F.3d 649 (7th Cir. 1995), this Court confronted a similar situation. Sports Center believed that a Brunswick motion "had been improperly brought as part of [Brunswick's] reply brief" but did nothing effective in response, contenting itself with writing a letter to the judge. *Sports Center, Inc.*, 63 F.3d at 651-52. In denying Sports Center's claim that it had been deprived of a right to respond, this Court said, "Sports Center could have moved for leave to file a sur-reply," adding that with its motion Sports Center "could have tendered its proposed sur-reply. . .". *Id.* at 651. See also, *Hamilton v. O'Connor Chevrolet, Inc.*, No. 02-C1897, 2005 U.S. Dist. LEXIS 9963 at *9 (N.D. Ill. Mar. 23, 2005) (contention that issues improperly raised in reply brief waived by, among other things, not moving to file a sur-reply).

Had a sur-reply raising objections to the annotated time sheets been filed, there is little doubt that in one way or another the district court would have resolved the matter before ruling on plaintiffs' fee request. Over a month elapsed between the service of plaintiffs' reply brief on July 7, 2005 (SA 608) and the district court's fee ruling on August 9, 2005 (A 6), but no sur-reply or motion to file one was submitted during that time. See *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000) (plaintiff forfeited objection to new affidavit submitted with defendants' reply by not raising objection before district court ruled).

Third Opportunity– Motion to Strike

If for some unfathomable reason CHA did not wish to file a sur-reply, it could at the very least have moved to strike the annotated time sheets filed with plaintiffs' reply brief. *Sports Center* speaks to this opportunity too. "[I]f Sports Center truly believed that the motion had been improperly brought as part of the reply brief, it could have moved to strike the motion and any part of the brief it believed to be improper." *Sports Center,* 63 F.3d at 651. See also, *Hamilton*, 2005 U.S. Dist. LEXIS 9963 at *9 (argument that issues improperly raised in reply brief waived by not moving to strike).

CHA now tells *this* Court that it was "improper" for the district court to consider the new matter. CHA Brief 15. If so, why not call the "impropriety" to the district court's attention with a motion to strike? (CHA *now* says the petition should be stricken with leave to amend, *Id.* 16.) Though this would have been a wasteful course – putting plaintiffs through the pointless exercise of amending their fee petition by adding the very annotated time sheets already filed, at least it would have prevented the wastefulness of dragging the matter before this Court.

Fourth Opportunity – Motion to Reconsider

Having passed up three bites at the apple, CHA had yet another opportunity to avoid the embarrassment of bringing a first-time argument to this Court. It could, after the district court ruled on fees, have filed a reconsideration motion on the ground that the ruling was based on matter as to which CHA had not yet expressed its views. Though the district court might well have denied CHA still another bite at the apple, it might not. Certainly CHA was obligated to test the waters. See *Matter of Prince*, 85 F. 3d 314, 324 (7th Cir 1996) ("if movant points to evidence in record that clearly establishes manifest error of law or fact" then "court may grant a Rule 59(e) motion to alter or amend the judgment").

Now, disregarding repeated admonitions of this Court, CHA says the fee petition should be sent back to the district court (CHA Brief 25), where plaintiffs are to perform the exercise of refiling the very annotated time sheets CHA has already had four opportunities to address but about which, until now, it has been resoundingly silent.

This Court should not entertain CHA's proposal, in violation of well-established law and at obvious cost to judicial efficiency. Plaintiffs therefore ask the Court to disregard Part III B, pages 27-29, of CHA's brief.[1]

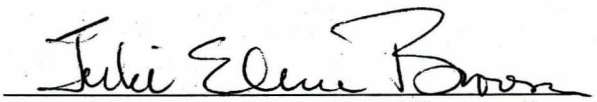
[1] Although CHA has thus waived several times over arguments it now seeks to advance concerning the annotated time sheets, and we therefore believe this Court should not ask the district court to enter upon that terrain, we wish to advise the Court that only a few pebbles – no boulders or even rocks – are to be found there. To illustrate, comparison of the original and annotated time sheets discloses "slippage" of one line in transferring time entries from one to the other in several categories of work. This may be seen by comparing the time entries at SA 85 with those at SA 703. Thus (for example), the time entry of 5/21/03 at SA 85 shows 1.50 hours for a "Mtg. at Habitat re Taylor revitalizing order…" yet the same time entry at SA 703 shows only .50 hours for that meeting while the 1.50 hours appears on the line below for a different activity. The consequences go "both ways," as CHA notes (Brief 29), and the result when balanced is negligible -- a difference it appears of fewer than 10 hours of the total 2,574 hours in which fees were awarded.

CONCLUSION

By virtue of two separate decisions of this Court, this case has been determined to be a continuous litigation, not to be cut into separate slices. Nothing has happened to change that determination. Post-judgment proceedings in the current fee period are part and parcel of the still ongoing Gautreaux remedial process – the "struggle, often for years, over the scope and details of injunctive relief," "the heart of the lawsuit." *Gautreaux*, 690 F.2d at 610. Much of plaintiffs' work during the present fee period is indistinguishable in principle from work which, during prior fee periods, CHA acknowledged was compensable.

What has "changed" is that *Buckhannon* and *Alliance* were decided. But because plaintiffs do not rely on the catalyst theory rejected by *Buckhannon,* and because during the current fee period they have obtained the real relief missing in *Alliance*, neither *Buckhannon* nor *Alliance,* taken singly or together, precludes the fees awarded below. Since the district court's fact-based determinations – reasonable hours, related to the judgment order, charged at market rates are not clearly erroneous, that court did not abuse its discretion in deciding as it did. The ruling below should therefore be affirmed.

Respectfully submitted,



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

I certify that this Plaintiffs-Appellees' Brief, exclusive of the Table of Contents, the Table of Authorities, and the certificates of compliance and of service is 10,311 words.

Julie Elena Brown

Dated: April 24, 2006

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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 appendix are not available to plaintiffs in a searchable non-scanned PDF form.

Julie Elena Brown

Dated: April 24, 2006

Julie Elena Brown

CERTIFICATE OF SERVICE

Julie Elena Brown, an attorney, hereby certifies that on April 24, 2006, she caused to be served two physical copies and a disk of the foregoing **Brief of Plaintiffs-Appellees** and one copy of the **Plaintiffs' Supplemental Appendix** by messenger to:

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