No. 05-3578

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, et al.,	)	
	)	Appeal from the United States
Plaintiffs-Appellees,	)	District Court for the Northern
	)	District of Illinois, Eastern Division
vs.	)	
	)	
CHICAGO HOUSING AUTHORITY, and, TERRY PETERSON,	)	
	)	
Defendants-Appellants.	)	
vs.	)	66 C 1459
	)	
DANIEL E. LEVIN and THE HABITAT COMPANY LLC,	)	Marvin E. Aspen, Judge
	)	
Receivers-Appellees	)	

DEFENDANTS-APPELLANTS' PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

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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):

Chicago Housing Authority and Terry Peterson

(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:

Johnson Jones Snelling Gilbert & Davis, P.C.
Skadden Arps Slate Meagher & Flom

(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: Jorge V. Cazares Date: July 9, 2007

Attorney's Printed Name: Jorge Cazares

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

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Attorney's Printed Name: Thomas E. Johnson

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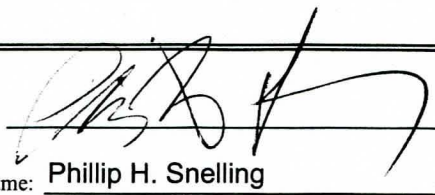
Attorney's Signature:  Date: July 9, 2007

Attorney's Printed Name: Phillip H. Snelling

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BASIS FOR EN BANC REQUEST

The panel's opinion in this case (Appendix Exh. A) must be reconsidered as it is:

1. Directly in conflict with the Supreme Court's decisions in *Pullman-Standard v Swint*, 456 U.S. 273, 291-92 (1982) and *Price v Johnson*, 334 U.S. 266, 291 (1948), as well as a long line of this Court's decisions, exemplified by *Whetsel v Network Property Services, LLC*, 246 F3d 897, 904 (7th Cir. 2001). Where, as here, the Court of Appeals reverses the legal standard the District Court used to decide the case, these cases prohibit the Court of Appeals from making its own factual findings under the new legal standard determined. The Court of Appeals is not intended to perform the fact-finding role, as a jurisprudential matter. This case dramatically illustrates the wisdom of this rule, as the panel incorrectly attributed evidence to parties who never offered it, used 1995 and 1997 statements to support findings about conduct that occurred in 2001-2003 and ignored key pieces of unrefuted evidence in the record. Fact-finding is the province of the District Court, particularly in this forty-year old case, where the District Court is intimately familiar with what has transpired. A remand was required.

2. Directly in conflict with this Court's earlier decision in *Alliance to End Repression v City of Chicago*, 356 F3d 767 (7th Cir. 2004), the Circuit's principal decision on the availability of post-decree fees in civil rights litigation. *Alliance* held that plaintiff's counsel is not entitled to fees where the work involved pertained to the defendant's successful modification of the original judgment order. Here, virtually all of the fees awarded are for time spent in connection with a series of orders modifying the original judgment order, so that its terms would not interfere with CHA's Plan for Transformation.

3. Directly in conflict with the Tenth Circuit's decision in *Johnson v City of Tulsa*, ____F3d____, 2007 WL 1705088 at pp. 15-17 (10th Cir. 2007), a large class action

discrimination case, involving post-decree fees. There, plaintiffs' counsel spent considerable time seeking to correct the underlying race discrimination that was the subject of the case, but the court found that any decree of this type "establishes a particular mechanism for addressing the problem that motivated the initial lawsuit", and fees are due only where plaintiff's counsel spends time "to ensure that the [mechanism provided for] in the decree is being honored, not to ensure that the problems motivating the decree [are] eliminated", *Id.* at p. 15. In the present case, the judgment order was quite explicit in providing a mechanism to prevent race discrimination in the location of public housing. No housing could be built in Limited census tracts (i.e. African-American census tracts) without corresponding construction in General census tracts (i.e. non-African-American areas), and no public housing could be taller than three stories. Plaintiffs here did not spend any time enforcing this mechanism. There is no dispute that CHA was otherwise in compliance with these rules. The entire litigation, for which fees now must be paid, involved CHA asking the Court to vacate these rules, so that it could build mixed-income housing taller than three stories in Limited census tracts, and the Court agreeing to do so. The plaintiffs would not be entitled to fees under *Johnson*, but the panel provided fees because the plaintiffs' decision to vacate their decree offered, in plaintiffs' judgment, "a better chance of achieving ... integration in public housing", which has always been the goal of the *Gautreaux* litigation, (App. A, p. 13).

I. AFTER FINDING THAT THE DISTRICT COURT HAD EMPLOYED AN INCORRECT LEGAL STANDARD, THE PANEL WAS DUTY BOUND TO REMAND SO THAT THE DISTRICT COURT COULD APPLY THE CORRECT LEGAL STANDARD

A. The Duty to Remand

This case began over forty years ago. Over four million dollars in public funds have been awarded as fees. The District Court awarded fees for the 2001 - 2003 period based solely on its view that "this case involves post-judgment work and proceedings that are all part of one active equitable case", so that the plaintiffs' 1969 judgment order (*Gautreaux v. CHA*, 296 F.Supp. 907 (N.D.Ill. 1969)) made them prevailing parties for all time. Given its ruling, the District Court never addressed or made findings on whether any of the plaintiffs' work between 2001 and 2003 amounted to a legal victory, i.e. forced a change in the defendant's conduct.[1]

Relying on the first part of *Alliance to End Repression v City of Chicago*, 356 F3d 767 (7th Cir. 2004), the panel correctly determined that the District Court applied an improper legal standard in resolving the plaintiffs' fee petition:

> The district court here thought that it was enough that the post-decree proceedings for which the plaintiffs sought fees were not "clearly separable" from the original judgment order. After *Alliance*, that strikes us as too lenient a standard. In any event, here as in *Alliance* so many years have passed and so many modifications have been made to the decree, we conclude that we must look at the time period for which fees are being sought (roughly mid-2001 through mid-2003, as we noted earlier) as free-standing litigation. The question before us is whether the *Gautreaux* plaintiffs were correctly characterized as prevailing parties for that set of proceedings.

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[1] Indeed, in the District Court, the plaintiffs never even offered any evidence to show that they had prevailed, i.e. changed CHA's position, on any particular motion during the 2001-2003 period. Their theory of the case was that they had a right to fees because of their initial success in 1969, SA 29. ("SA" is the Supplemental Appendix filed by Defendants-Appellants with the Panel; "PSA" is the Plaintiffs' Supplemental Appendix.)

(App. Exh. A, at pp. 10-11)

It is "elementary", according to the Supreme Court that "when an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings: 'factfinding is the basic responsibility of district courts , rather than appellate courts, and ... the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court'", *Pullman-Standard v Swint*, 456 U.S. 273, 291-92 (1982); *Price v Johnson*, 334 U.S. 266, 291 (1948).[2] Remand is essential, both because the District Court can hold hearings where the parties' dispute the history of what happened or the meaning of documents, and because the Court of Appeals cannot employ its traditional standards of review ("clear error") until there are findings in the first place. Moreover, the District Court is intimately familiar with what has transpired before it, so it is in the best position to apply the new standard (did the plaintiffs' counsel force the defendants' to change their position through negotiation or were the orders entered merely to eliminate the *Gautreaux* judgment order and allow defendants' existing Plan for Transformation to go forward unimpeded). Indeed, this Circuit has followed this rule religiously, even when disposition of long-pending litigation is necessarily delayed. *Stalcup v Peabody Coal* , 477 F3d 482, 484-85 (7th Cir. 2007)(black lung case "regrettably" remanded for fourth time, as ALJ could not get legal standard right); *Whetsel v Network Property Services*, LLC, 246 F3d 897, 904 (7th Cir. 2001).

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[2] The only exception is where the record permits only one resolution of the factual issue. *Kelley v Southern Pacific Co.*, 419 U.S. 318, 331-32 (1974). That is plainly not the case here.

Here, however, the panel ignored the rule in *Pullman-Standard* and proceeded to try to determine if, during the free-standing period of 2001-2003, plaintiffs' counsel had won an order that materially altered the legal relationship between the parties in a way that forced a change in the defendant's conduct, as required by *Buckhannon Board & Care Home, Inc. v West Virginia Dept. Of Health & Human Resources*, 532 U.S. 598 (2001); and *Alliance to End Repression v City of Chicago*, 356 F3d 767 (7th Cir. 2004). The Court attempted to do so without the benefit of any findings by the District Court, and without a fully developed record on the question. In doing so, it seriously misapprehended the facts.

B. The Panel's Flawed Factfinding

1. The History of *Gautreaux*, the Plan for Transformation And The 2001-2003 Period in Court

A very brief history of the *Gautreaux* litigation is critical to understanding the issue presented here. The case was filed in 1966, alleging that CHA had discriminated against African-Americans by locating virtually all of its developments in African-American neighborhoods and then assigning only white public housing residents to the few developments in white neighborhoods. The District Court entered summary judgment against CHA, 296 F.Supp. 907 (N.D. Ill. 1969). The District Court then developed a specific mechanism (see, the discussion in section III below) designed to prevent any further discrimination and remedy that which existed. The Court's judgment order prohibited CHA from: a) building any new unit of public housing in Limited Areas (where the "non-white" population was greater than 30%) unless three new units were built in General Areas (where the "non-white" population is less than 30%); and b)

prohibiting the CHA from building public housing taller than three stories.[3] The order also required the CHA to promulgate a non-discriminatory Tenant Assignment Plan. 304 F.Supp. 736 (N.D. Ill. 1969).

Following entry of the District Court's 1969 judgment order, there was an extended period of post-judgment litigation. It is summarized in *Gautreaux v CHA*, 178 F3d 951, 953 (7th Cir. 1999). As a result of this litigation, certain two, three and four flats (called "scattered-site housing") was built in non-African American neighborhoods of the city. During this period, the plaintiffs sought fees and were paid a total of $3.37 million prior to the pending fee petition, *Gautreaux v CHA*, 690 F2d 601, 614 (7th Cir. 1982) and SA 21-25.

In 2000, however, the CHA and the City of Chicago embarked upon a new Plan for Transformation. SA at 320. The Plan was not prompted by the *Gautreaux* plaintiffs nor by any other court order. *Id.* It was a policy initiative of the local government, eventually fully embraced by HUD, aimed at ending 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. 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. At these developments, a third of the units are sold on the market, a third are made available to working class families and

[3] The 3:1 ratio was later changed to 1:1.

a third are public housing. They are planned, developed and managed by private developers. The Plan for Transformation is a ten-year, $1.6 billion dollar effort that is well underway. Mixed-income developments now stand where decrepit CHA high-rises once loomed.[4]

The 1969 *Gautreaux* judgment order presented a major obstacle to the Plan for Transformation. It prohibited building at virtually all of the old CHA sites, as they were all Limited Areas, and it prohibited the building of mixed-income condominium buildings, if any of the public housing units ended up above the third floor-----which was generally the case, as developers wanted to intersperse the public housing with the affordable and market units. Consequently, when the CHA and its private developers are ready to build at each site, CHA has sought modifications of the 1969 judgment order, vacating the order's prohibition on building in Limited Areas and sometimes vacating the three-story height restriction.

During the 2001-2003 period at issue here, five court orders were entered. All were by agreement. There were no contested motions, depositions or other ordinary litigation work by either side. Only four of the plaintiffs' 2570 hours were spent in court. These orders are summarized at pp. 10-11 of Defendants' Opening Brief to the Panel. One waived the three floor limit to allow the developer of North Town Village at the Cabrini site to place public housing units above the third floor in his mixed-income condominium buildings. Two others waived the

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[4]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 by the United Center; and the Archer, West End and South Leavitt developments near the Rockwell project on the west side. SA at 321, 334-57.

prohibition on Limited Area building to allow different developers to proceed with their comprehensive plans for the Oakwood Shores development on the south side of the city and Phase II of the Westhaven development at the old Horner site, near the United Center on the west side. The other two orders were minor-----one amending the Tenant Assignment Plan to allow CHA relocatees top priority for the new mixed-income units (rather than those on the CHA waiting list) and the other ministerially updating which census tracts in Cook County were Limited according to the latest census data.

2. The Orders Waiving the Requirements of the Gautreaux Injunction Were Not the Product of Negotiation

The Panel could not point to any order (during 2001-2003) that on its face forced CHA to do anything. If there was such an order, perhaps the Panel would have had authority to make the finding that plaintiffs had prevailed, just by examining the text of the order. Instead, the Panel determined, as a factual matter, that "the *Gautreaux* plaintiffs, through their limited waivers of specific portions of the remedial decree, have achieved success on the merits", (App. Exh. A, at p. 13). This is a troubling finding as, by their terms, these orders vacated various portions of the original 1969 judgment order-----letting CHA build where they were enjoined from building, and letting CHA build to levels that they were enjoined from building. The Panel's implicit suggestion, that the *Gautreaux* plaintiffs exacted concessions from CHA in exchange for the plaintiffs' agreement to vacate parts of the original injunction., is unsupported by the record. Indeed, nothing could be further from the truth, though (without a remand) CHA was never afforded an opportunity to make this clear.

In fact, the only piece of evidence in the record regarding the circumstances giving rise to the five orders at issue in this fee petition is the Affidavit of Terry Peterson, Executive Director of the CHA. It is found at SA 319. The Panel does not even mention the affidavit, much less deal with it in its factfinding. Mr. Peterson describes how local officials developed the Plan for Transformation, without any input from the courts or the *Gautreaux* plaintiffs. He goes on to show how the *Gautreaux* judgment order presented an obstacle to the Plan, unless it was modified, and then details how CHA secured the various modification orders in 2001-2003 so that its developers could go forward with their plans to build the next phase at Horner, Cabrini and at Madden Park. None of the developers' plans were modified or altered because of the need to obtain the *Gautreaux* waivers. No evidence is in the record to the contrary.

Instead, the Panel claims that: "The CHA admits that the agreed orders are the product of negotiation" (App. Exh. A, at p. 13). ***There is no such admission anywhere in the record with respect to the 2001-2003 period.*** To support its claimed admission, the Panel dredges up a 1997 motion, PSA 91, filed by CHA in connection with its claim that the HOPE VI program was not subject to the *Gautreaux* injunction. There, CHA's counsel suggested that "in the past", i.e. before 1997, there were instances where CHA had to negotiate with the *Gautreaux* plaintiffs and, as part of these negotiations, ended up with a development program different than what CHA wanted. What happened before 1997, however, has little pertinence to what happened in 2001-2003. The events of the mid-1990s long predated the 2000 Plan for Transformation and, in any event, the plaintiffs here have already been paid for their work in the 1990s. SA 21-25. As is more fully discussed in the briefs before the Panel, the 2000 Plan for Transformation began an era when the CHA and the *Gautreaux* plaintiffs were no longer at war.

The Panel then goes on to quote Terry Peterson (in 1998) describing his negotiation process with the *Gautreaux* plaintiffs. (App. Exh. A, at pp. 13-14). In fact, Terry Peterson was ***not*** at the CHA in 1998 and these are ***not*** his remarks. The remarks are found at PSA 131-32 and are those of former Judge Susan Getzendanner, who was then representing CHA on the HOPE VI question, which came to this Court in 1999, *Gautreaux v CHA*, 178 F3d 951 (7th Cir. 1999). Again, Ms. Getzendanner was not talking about the 2001-2003 period, and not talking about the Plan for Transformation or the development processes that have taken place since 2000. Whatever she said about the relationship between the parties in the 1990s does not matter, as the plaintiffs were paid for their work then.

Relying on the thin reed of these 1997 and 1998 remarks (while completely ignoring Mr. Peterson's actual testimony about the 2001-2003 period), the Panel then leaps to the conclusion that in 2001-2003 "CHA has had to change its position in order to win plaintiffs' approval of the waiver orders" (App. Exh. A, at p. 15). This conclusion is completely unsupported in the record, and belied by the Peterson affidavit. This Court would not accept this kind of factfinding from an ALJ or a trial court, and it should not permit the Panel to do so either.

The Panel then goes on to say that the CHA's concessions are "embodied in judicial orders" from 2001-2003. (App. Exh. A, at p. 15). Stunningly, the Panel then seizes on the December 12, 2002 order, which permitted CHA's developer to go forward with Phase II of the Westhaven development at the old Horner site. The order vacates the specific provisions of the 1969 judgment order that would have prevented the building of Phase II and prevented any condominium units. The Panel says, however, that the order "conferred numerous benefits and powers on the plaintiffs", including control over the location and configuration of public housing

units above the third floor, the maximum number of public housing units to be build and the ratio of public to non-public housing units that could be built (App. Exh. A, p. 15). The Court noted that the public housing units had to be evenly distributed throughout the complex, that the plaintiffs were to be kept informed of how the project was going, and the order also committed *Gautreaux* set-aside funds to the project. (*Id.*)

Since the District Court never held a hearing or made findings about the plaintiffs' success, the record is thin on how this came to be. The only evidence of record, however, belies the Panel's findings. Terry Peterson's affidavit explains that the Phase II plan----including the number of public housing units to be built, the mix of public and non-public units, the number of mid-rise condominium buildings, the manner in which the units would be financed (including the use of the *Gautreaux* set aside funds) were all worked out before Judge Zagel in an entirely different lawsuit involving Horner, entitled *Henry Horner Mothers Guild v CHA, and HUD*, 91 C 331, where lawyers other than the *Gautreaux* lawyers represent the plaintiffs. These arrangements were embodied in a court order in that case dated February 1, 2000. SA 323. After entry of this order, a developer was selected, who came up with a site plan, architectural drawings, financing and a construction team. Then, nearly three years later, on December 12, 2002, when the developer was ready to close, the CHA obtained the order for which the plaintiffs here are now being paid. It was obtained because the closing could not go forward without the waivers contained in the order. CHA, however, did not have to negotiate the number of public housing units to be built, the mix of units, or what buildings would exceed three stories in 2002. Those issues were long before settled, without the *Gautreaux* plaintiffs making any change

whatsoever in the plan.[5] The *Gautreaux* plaintiffs exacted nothing in exchange for this order. The Peterson affidavit is proof of that, and a hearing on remand would make it overwhelmingly clear. For the Panel to infer that language in the order was negotiated, in the absence of hard evidence, does a complete disservice to the CHA and its developers who worked so hard to create this plan, without help from the *Gautreaux* plaintiffs.

The Panel also notes the September 7, 2001 order that permitted the Cabrini developer to build four buildings above three stories (which would include public housing units) (App. Exh. A, p. 15). The Panel notes that the specific number of public housing units in each building are set forth in each order. The suggestion is that the *Gautreaux* plaintiffs negotiated these numbers; there is nothing in the record, or in any finding by the District Court, to indicate they had anything to do with them. The developers designed the buildings, determined the number of units in each and proposed how many public housing units would be in each. The order just permitted their plan to go forward, without a single change exacted by the *Gautreaux* plaintiffs. The Panel then describes the other orders, but nothing about them indicates the orders were the product of compromise. The CHA and developer plans were described in the orders only as background. The operative portion of the order is that part which waives the 1969 judgment order's prohibition on all building. To understand the history of each order, one needs a hearing (or at least an exchange

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[5] The order does say that no public housing units shall be built above the third floor "until plaintiffs approve in writing the initial location and configuration of such units", SA 28, ¶4, as the public housing units were to be "well distributed" throughout each building, SA 28, ¶2. However, the CHA, its developers, the CHA residents of Horner (who had separate counsel) and the neighborhood groups all felt this was the only way to build the public housing units----not only in the mid-rises but throughout the development. For the mixed-income plan to work, the public housing had to be indistinguishable from the other units. The developer's plans did just this and the *Gautreaux* plaintiffs's "sign off" had nothing to do with them.

of affidavits) and real factfinding. It was error for the Court of Appeals to attempt it; a remand was and is required.

II. WHERE, AS HERE, A JUDGMENT ORDER IS MODIFIED AT THE DEFENDANT'S BEHEST, *ALLIANCE* HAS ALREADY DETERMINED THAT PLAINTIFFS CANNOT CLAIM PREVAILING PARTY STATUS AND FEES

In *Alliance to End Repression v City of Chicago*, 356 F3d 767 (7th Cir. 2004), a panel of this Court reversed the award of post-decree fees in a longstanding civil rights case alleging unconstitutional spying by the Chicago police. A big chunk of the plaintiff's time had been spent unsuccessfully opposing the defendant's motion to modify the decree. The Court denied fees for this time, as "Section 1988 does not reward failure", 356 F3d at 774. Virtually all of the plaintiff's time in the present case (between 2001 and 2003) involved proceedings initiated by the defendant to obtain modifications of the original 1969 judgment order. While the plaintiffs here acquiesced in the modifications (rather than fighting them), the Panel's decision to afford them fees is squarely at odds with *Alliance*.

The Panel strained to distinguish *Alliance*, saying that the CHA "is not in the same position as the defendant Chicago Police in *Alliance*, for it remains bound by the district court's 1969 *Gautreaux II* remedial order ... As things stand now, we are not at liberty to treat the injunction as though it no longer exists", (App. Exh. A, at p. 12). The Panel, however, has misread *Alliance*. The Police Department's modification petition only sought to eliminate the "periphery of the decree ... a dizzying array of highly specific restrictions on investigations of potential terrorists and other politically or ideologically motivated criminals," *Alliance to End Repression v City of Chicago*, 237 F3d 799, 800 (7th Cir. 2001). "The core of the decree, which the City does not seek to modify, forbids investigations intended to interfere with or deter the exercise of the

freedom of expression that the First Amendment protects, and requires the City to commission independent periodic audits of the City's compliance with the decree," *Id.* In other words, the Police Department remained bound by the core of the decree, despite the City's successful modification petition----just as CHA remains bound by the core of the 1969 judgment order, though it has successfully sought modification of its provisions for the various developments now being built. In neither *Alliance* nor this case can the Court "treat the injunction as though it no longer exists" (App. Exh. A, at p. 12).

III. THE PANEL'S DECISION CONFLICTS WITH THE TENTH CIRCUIT

The Panel decided that fees were appropriate because: "There has been ... no showing (as of the time the district court ruled here) that the public housing system has been desegregated" (App. Exh. A, at p. 12). This view is completely divorced from the standards laid out in *Buckhannon* and *Alliance*, and could very well provide fees forever for the plaintiffs, even in the absence of any post-decree victory. The Panel has confused the goal of the lawsuit with the remedial mechanism the judgment order provides. In its words:

> What plaintiffs have sought all along is the desegregation of public housing in Chicago. The *Gautreaux II* remedial order was nothing more than the means by which the district court believed, in 1969, that such desegregation could be effected. The fact that plaintiffs agreed to give up certain restrictions and that the court agreed to allow CHA to fulfill its obligations through other means does not amount to a white flag from the plaintiffs.
>
> (App. Exh. A, at p. 12)

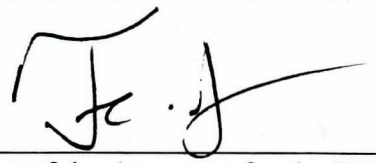
In *Johnson v City of Tulsa*, ___F3d___, 2007 WL 1705088 (10th Cir. 2007), the court remanded to determine the propriety of post-decree fees in a race discrimination case against the police, as part of the plaintiffs' time had not been spent in enforcing the mechanism the decree provided to address the problem, but more generally on the underlying problem of discrimination:

> When a decree establishes a particular mechanism for addressing the problem that motivated the initial lawsuit, the "fruit of the decree" **is a properly functioning mechanism, not the elimination of the problem addressed by the mechanism** ... In other words, the role of the plaintiffs' attorney in protecting the fruits of victory is to ensure that the decree is being honored, not to ensure that the problems motivating the decree have been eliminated.
>
> 2007 WL 1705088, at p. 17

In the present case, the effect of the District Court's orders during the 2001-2003 period was to undo the relief mechanism ordered in 1969, on a project by project basis. The 1969 mechanism was not working. As such, the CHA moved to vacate the key components of that mechanism, as they stood in the way of the Plan for Transformation. Plaintiffs are not entitled to fees when they agree to modify or vacate the relief mechanism they initially established. They have not prevailed or secured "fruit" in *Alliance's* parlance. To have awarded them fees for acquiescing in the CHA's Plan for Transformation was error.

IV. CONCLUSION

For the reasons set forth above, the Defendants-Appellants respectfully request that the Court vacate the Panel's opinion, reverse the District Court's award of fees, and remand for further proceedings.



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In the
United States Court of Appeals
For the Seventh Circuit

No. 05-3578

DOROTHY GAUTREAUX, *et al.*,

Plaintiffs-Appellees,

v.

CHICAGO HOUSING AUTHORITY and TERRY PETERSON,

Defendants-Appellants,

v.

DANIEL E. LEVIN and THE HABITAT COMPANY LLC,

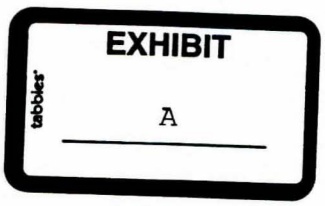
Receivers-Appellees,

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 66 C 1459—**Marvin E. Aspen**, *Judge.*

ARGUED SEPTEMBER13, 2006—DECIDED JUNE 26, 2007

Before CUDAHY, WOOD, and WILLIAMS, *Circuit Judges.*

WOOD, *Circuit Judge.* This appeal presents the latest phase of the long-running litigation over racial discrimination in public housing in Chicago that bears Dorothy Gautreaux's name. See *Gautreaux v. Chicago Housing Auth.* (*CHA*), 296 F. Supp. 907 (N.D. Ill. 1969) (*Gautreaux I*) (finding the CHA liable for racial discrimination in site-selection policy and tenant assignment); *Gautreaux v. CHA*, 304 F. Supp. 736 (N.D. Ill. 1969) (*Gautreaux II*)



(entering remedial order). It concerns the district court's decision to grant attorneys' fees to the plaintiffs' attorneys for work they did between August 1, 2001, and July 31, 2003. The CHA, which is responsible for the fees, argues that this court should reverse that order. It starts from the premise that the proceedings before the district court ought to be treated as free-standing litigation. When seen in that light, the CHA continues, the proceedings did not result in the kind of victory for plaintiffs that would make them "prevailing parties" entitled to fees. In the alternative, the CHA urges us to find that even if plaintiffs are entitled to some fees, the district court abused its discretion in the award it granted. We conclude that even if the link between these proceedings and earlier parts of the case is broken, the plaintiffs nonetheless prevailed, and the district court did not abuse its discretion with this fee award. We therefore affirm.

I

For present purposes, all that is necessary is a summary of the history of the case. More than four decades ago, Dorothy Gautreaux and other African-American tenants who lived in public housing projects, along with applicants for public housing, sued the CHA, claiming that its policies with respect to the selection of sites for public housing and for assignment of tenants were racially discriminatory. The plaintiffs prevailed, see *Gautreaux I*, *supra*, and the district court entered a remedial decree that was designed to ban racially discriminatory site selection and tenant assignment policies and to undo the harm that had already occurred. See *Gautreaux II*, *supra*. Central to the remedial decree was the requirement that for every unit built in an area where the population was more than 30% non-white ("Limited Areas"), the CHA had to construct three housing units in an area where the

population was less than 30% non-white ("General Area"). See *Gautreaux II*, 304 F. Supp. at 737-38. The ratio was later modified to one-to-one. See *Gautreaux v. CHA*, 178 F.3d 951, 953 (7th Cir. 1999). The *Gautreaux II* remedial order also limited new construction of public apartments that had more than three floors and required changes to tenant assignment practices. *Gautreaux II*, 304 F. Supp. at 838-40. The order did not, however, require the construction of any new housing.

The CHA reacted to *Gautreaux II* by instituting a virtual moratorium on the construction of new housing that lasted 18 years. At the plaintiffs' behest, in 1987 the district court appointed Daniel Levin and the Habitat Company as a receiver for the development of all new non-elderly housing for the CHA. See *Gautreaux v. Pierce*, Order of Aug. 14, 1987. This indeed prompted some change: the receiver built a number of small-scale public housing units, which were scattered throughout the General Area. In the 1990s, in part because of the availability of federal funds through the HOPE VI program (an acronym for "Homeownership and Opportunity for People Everywhere"), see 42 U.S.C. § 1437l, repealed by Pub. L. 105-276, Title V, § 522(a), Oct. 21, 1998, 112 Stat. 2564, the CHA developed plans to overhaul its public housing stock.

This culminated in 2000 with the CHA's announcement of the Plan for Transformation (the Plan), which the CHA optimistically describes as a "blueprint for positive change." The Plan outlines how the CHA proposes to replace all of Chicago's high-rise public housing projects with lower density mixed-income developments. See http://www.thecha.org/transformplan/plan_summary.html (last visited June 7, 2007). As CHA's Executive Director, Terry Peterson, explains, the "centerpiece" of the Plan is "the creation of new, low-density, mixed-income communities on the sites and in the neighborhoods where [CHA]

ha[s] demolished the old high-rises. . . . [These developments] will allow public housing families to live in the same kind of housing and the same kind of neighborhoods as other Chicagoans."

In deciding where to locate new construction that will benefit from HOPE VI funds and be subject to the Plan, the CHA has used the locations of the old high-rise projects almost exclusively. These were the same locations that were branded as racially isolated in *Gautreaux I*. They fell within the Limited Areas, in which new construction was restricted by *Gautreaux II*. See *Gautreaux v. CHA*, 178 F.3d at 953-55. In addition, some of the developments contemplated by the plan are mid-rise buildings in which public housing units are located above the third floor. To avoid the *Gautreaux II* restrictions when spending federal dollars, the CHA asked the district court in 1998 "to 'clarify' the judgment order and read it as not governing the use of HOPE VI funds." The court declined to do so; instead, it concluded that "any construction of public housing in Cook County must conform to the judgment order's locational requirements." *Gautreaux v. CHA*, 4 F. Supp. 2d 757, 760 (N.D. Ill. 1998). Other construction under the Plan similarly has continued to operate within the restrictions of *Gautreaux II*'s remedial order.

The result of the continued application of the remedial order to this new construction was, as Terry Peterson attested, that "[t]he *Gautreaux* case presented a major obstacle to the Plan for Transformation. . . . [U]nless the 1969 judgment order was modified, [the CHA] could not proceed with the Plan." What the CHA has had to do, in essence, is to negotiate new building plans with plaintiffs, whenever the Plan would require something inconsistent with *Gautreaux II*. The plaintiffs have been cooperative. Beginning with the redevelopment of the Henry Horner housing project on the City's near west side in 1995, the

plaintiffs repeatedly have joined the CHA in requests for waivers from the district court of various restrictions in its remedial decree, so that construction of replacement public housing units can go forward.

In these joint motions, the *Gautreaux* plaintiffs have never conceded that the limits in the decree are no longer relevant. Rather, they have taken a case-by-case approach to waiver requests. For example, in proposing the waiver of *Gautreaux II*'s conditions for the Horner redevelopment, plaintiffs asked the court to relax the site restrictions because they believed "that a proposed mixed-income redevelopment on and around the . . . 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." After the Horner redevelopment, plaintiffs have continued to join the CHA in asking the district court to waive the remedial conditions, but only for redevelopment projects that present the right conditions and only with particular restrictions negotiated by the parties.

The agreed order arrived at by the parties to allow the Horner revitalization to proceed in 1996 provided the model for much of what has occurred over the last decade, including the August 1, 2001, to July 31, 2003, period in which the attorneys' fees at issue were accumulated. During those two years, the district court entered five orders, each of which was agreed to by the parties. The first four were, according to Peterson, "examples of the kind of orders that CHA has sought from the *Gautreaux* plaintiffs so that [it] could proceed with the Plan." An order entered on September 7, 2001, waived the restrictions on units above the third story of any structure in four mid-rise buildings and fourteen walk-ups that were part of the redevelopment of the Cabrini Extension North housing project. An August 29, 2002, order modified *Gautreaux II*'s directives with respect to the Tenant

Assignment plan, giving priority for housing in scattered-site units to individuals and families displaced from their public housing units by the Plan; those units formerly had been earmarked for CHA transfer and waiting-list families. The September 11, 2002, order allowed the building of new mixed-income housing on the sites of the former Ida B. Wells, Darrow, and Madden Park projects in the North Kenwood-Oakland neighborhood. The December 12, 2002, order allowed the expansion of the Horner revitalization area and the construction of an additional 271 units of housing. It also modified the height restriction and released *Gautreaux* funds to be used in the construction. Finally, the order of March 18, 2003, revised the official list of Cook County Limited Area Census Tracts. See *Gautreaux II*, 304 F. Supp. at 742.

Over the years, the *Gautreaux* plaintiffs' attorneys have requested attorneys' fees on a number of occasions for their ongoing work on the case. Since the 1969 judgment, the court has awarded fees on four occasions: (1) for the period from 1965 to 1980, it awarded $375,375 for 3,003 hours of work; (2) for the period from 1984 through 1996, it awarded $1.15 million; (3) for the period from October 16, 1996, to September 24, 1999, it awarded $991,329; and (4) for the period between September 25, 1999, and July 31, 2001, plaintiffs' attorneys received $844,815.38.

The present fee petition requested compensation for work done between August 1, 2001, and July 31, 2003. The district court concluded that the attorneys were entitled to $724,732 in fees and $3,706 in related expenses. In making this award, the district court reasoned that

> [t]he post-decree proceedings and related work for which fees are presently sought are not "clearly separable" from the original judgment order. . . . [T]his case involves post-judgment work and proceedings that are all part of one active equitable case, in which compli-

> ance 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.

In addressing the reasonableness of the fees, the court found that the fees requested were "comparable to the two prior agreed orders involving Plaintiffs' fees." It also found that the plaintiffs' attorneys had appropriately eliminated certain duplicative expenses and had shown that the tasks they performed were within the scope of the consent decree and consistent with the earlier fee orders. Finally, the court was satisfied that the proposed market rates were reasonable. As a result, it granted the requested fees and costs.

II

We begin by noting that, although this fee order may appear to be "non-final," since it is merely one in a line of similar such orders and nothing in the present record purports to be a final termination of the litigation, appellate jurisdiction is secure. It qualifies as a collateral order that is final for purposes of 28 U.S.C. § 1291, because it finally determines the fee question for the period at issue. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); see also *Gautreaux v. CHA*, 690 F.2d 601 (7th Cir. 1982). Our observation in *Alliance to End Repression v. Chicago*, 356 F.3d 767 (7th Cir. 2004), is equally apt here: "Another reason for allowing an immediate appeal is that a decree might never *be* dissolved, so that to treat fee awards as interlocutory might defer appeal to the end of time." *Id.* at 771. Nothing in *Sole v. Wyner*, ___ U.S. ___, 127 S.Ct. 2188 (2007), casts doubt on these rules. *Sole* dealt only with the question whether a party who had won a preliminary injunction but who had ultimately lost on the merits could be a "prevailing party"

for purposes of fees. The Court concluded that it could not, noting at the end of its opinion that it was expressing no view on the question whether, "in the absence of a final decision on the merits of a claim for permanent injunctive relief," fees might sometimes be permissible. Here, of course, the *Gautreaux* plaintiffs did win permanent injunctive relief, albeit relief that has been modified from time to time, and the court's order finally resolved the fee question for the defined period. We thus proceed to the merits of the appeal.

In general, we review a district court's decision to award attorneys' fees for abuse of discretion. *King v. Ill. State Bd. of Elections*, 410 F.3d 404, 411 (7th Cir. 2005). As the Supreme Court pointed out in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), however, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* at 405. Our review of the underlying legal issues is *de novo*. See *Dupuy v. Samuels*, 423 F.3d 714 (7th Cir. 2005). Here, we must decide whether the *Gautreaux* plaintiffs still qualify as "prevailing parties" for purposes of 42 U.S.C. § 1988, the statute that authorizes fees for successful civil rights plaintiffs.

Under the traditional "American Rule," parties to a lawsuit bear their own costs. *Sole*, 127 S.Ct. at 219 (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 412 U.S. 240, 247 (1975)). In actions brought under 42 U.S.C. § 1983, however, "the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of its costs." 42 U.S.C. § 1988. The district court concluded that, once again, the plaintiffs were "prevailing parties" entitled to attorneys' fees. In its challenge to that finding, the CHA argues that the Supreme Court's decision in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human*

Res., 532 U.S. 598 (2001), as well as this court's ruling in *Alliance to End Repression v. Chicago*, *supra*, 356 F.3d 767, require a ruling in its favor.

We agree with the CHA that the Supreme Court's decision in *Buckhannon* throws some light on the issue before us, even though it does not directly control the outcome here, for it was a case in which no remedial order ever was entered by the district court. Nonetheless, *Buckhannon* reshaped litigation over attorneys' fee awards. The narrow question before the Court was whether the definition of "prevailing party" in § 1988 included a plaintiff whose lawsuit was a "catalyst" that "achieved the desired result because [it] brought about a voluntary change in the defendant's conduct." 532 U.S. at 600. The Court concluded that this was not enough. Instead, to be considered a "prevailing party" under § 1988 a plaintiff needs to win a "judicially sanctioned change in the legal relationship of the parties. . . . A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." 532 U.S. at 605. Either an enforceable judgment on the merits or a settlement agreement enforced through a consent decree may qualify as the necessary court-ordered change. Following this logic, we have held that cases in which "the terms of the settlement were incorporated into the dismissal order and the order was signed by the court rather than the parties, or the order provided that the court would retain jurisdiction to enforce the terms of the settlement," have a sufficient judicial imprimatur to entitle the plaintiff to prevailing-party status. *Petersen v. Gibson*, 372 F.3d 862, 866-67 (7th Cir. 2004); see also *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469, 478-80 (7th Cir. 2003).

Alliance applied *Buckhannon* to postjudgment proceedings, where the underlying case resulted in the entry of

an equitable decree. There, a 1981 consent decree limited the ability of the Chicago Police Department to engage in surveillance of allegedly subversive activities. Plaintiffs' attorneys had asked for fees for legal services rendered in two failed proceedings for contempt, as well as an unsuccessful defense of the consent decree (which wound up being modified). See 356 F.3d at 768-69. This court overturned the district court's fee award, rejecting plaintiffs' argument that their initial victory in the litigation was enough to make them the prevailing party for the life of the decree. *Id.* at 770-74.

Alliance necessarily also rejected the argument that post-decree proceedings are inevitably part of only one active, equitable case. At least in the circumstances of *Alliance*, we concluded instead that the particular post-decree proceedings before us had to be evaluated as free-standing litigation. We relied in part on *Buckhannon* in coming to that conclusion. Normally, postjudgment litigation in a complex equitable proceeding is better viewed as largely free-standing from the underlying case. This distinguishes post-judgment efforts from unsuccessful motions made *en route* to the successful conclusion of a lawsuit, which can be compensated as "indispensable inputs in a successful conclusion of litigation." 356 F.3d at 771. In cases like *Alliance*, "the postjudgment proceedings . . . , 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.*

The district court here thought that it was enough that the post-decree proceedings for which the plaintiffs sought fees were not "clearly separable" from the original judgment order. After *Alliance*, that strikes us as too lenient a standard. In any event, here as in *Alliance* so many years have passed and so many modifications have been made to the decree, we conclude that we must look at

the time period for which fees are being sought (roughly mid-2001 through mid-2003, as we noted earlier) as free-standing litigation. The question before us is whether the *Gautreaux* plaintiffs were correctly characterized as prevailing parties for that set of proceedings.

In arguing that the plaintiffs are not entitled to be regarded as having won anything notable, the CHA focuses on the transformation of its relationship with the plaintiffs from one of opposition to one of cooperation. Unlike the earlier periods for which the plaintiffs received fees, when the CHA was actively fighting them, it now depicts the parties as essentially all on the same team. (If this were actually the case, there would be a serious question whether any case or controversy remains to be decided. Given our conclusion below that it is not, however, our jurisdiction is not threatened on this basis.)

As the CHA tells the story, whereas it once was obdurate, it now has "scrupulously honored the terms of the judgment order and diligently sought modification of the judgment order so it could properly proceed with the Plan . . . ." Although the CHA cannot make the legal claim that it is in the same position as the defendants in *Alliance*, it makes the same claim rhetorically, casting the plaintiffs as defenders of an obsolete consent decree that serves almost no function. The CHA submits that *Gautreaux* plaintiffs' only role was to "simply acquiesce[ ] in getting out of the way." Implicitly, the CHA is saying that anything plaintiffs do to allow the CHA to implement the Plan cannot amount to *plaintiffs'* success on the merits.

The glaring difficulty for the CHA, of course, is that it is not in the same position as the defendant Chicago Police in *Alliance*, for it remains bound by the district court's 1969 *Gautreaux II* remedial order. In *Alliance*, the

court found that by the time modification was sought, "[t]he decree in its original form had accomplished its purpose and had become obsolete." *Alliance,* 356 F.3d at 774. Here, in contrast, the CHA's motion to "clarify" the decree to reflect the changed circumstances was rejected. There has been no system-wide modification of the injunction and no showing (as of the time the district court ruled here) that the public housing system has been desegregated enough to warrant dissolution or modification of the decree. Importantly, the CHA has never requested such dissolution, even though it did seek clarification of the judgment in 1998. This court has already commented on the fact that this option remains open to the CHA. See *Gautreaux v. CHA*, 178 F.3d at 958 ("If CHA is displeased with the 1969 injunction, the receivership order, or the recent district court orders flowing from them, then it should seek to modify or terminate any or all of them."). As things stand now, we are not at liberty to treat the injunction as though it no longer exists.

Gautreaux II is still in effect, and the court's five joint orders between August 2001 and July 2003 were shaped by the remedial decree. The CHA makes two errors in arguing that the *Gautreaux* plaintiffs gained nothing from any of the orders related to the Limited Area revitalization. The first mistake is the confusion of means and ends—a mistake that is apparent in the CHA's characterization of plaintiffs' waiver of some of the dictates of *Gautreaux II*'s remedial order as "relinquishing their own victory." What plaintiffs have sought all along is the desegregation of public housing in Chicago. The *Gautreaux II* remedial order was nothing more than the means by which the district court believed, in 1969, that such desegregation could be effected. The fact that the plaintiffs agreed to give up certain restrictions and that the court agreed to allow CHA to fulfill its obligations through other means does not amount to a white flag from the plaintiffs.

Instead, as the district court has recognized ever since it granted the first limited waiver of *Gautreaux II*'s restrictions for the Horner revitalization in 1995, opinions about how to desegregate public housing have changed over the 30 plus years since the judgment. In addressing the proposed Horner revitalization order, the court remarked that the proposal "addresses a 21st century view of the City of Chicago and its housing problem as opposed to the 1966 view that was properly the view at the time of the filing of the *Gautreaux* litigation." The court's waivers of particular parts of the remedial decree rest on its "being cognizant that the principal remedial purpose of the Orders previously entered in these consolidated cases has been and is to provide plaintiff class families with desegregated housing opportunities." *Gautreaux v. CHA*, Order of Sept. 12, 2002. In accordance with this goal, carefully-tailored waivers have been entered under certain circumstances and for particular geographic areas. The court has allowed housing to be built in Limited Areas only "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." *Gautreaux v. CHA*, Order of June 3, 1996. These waivers have been agreed to because, in plaintiffs' opinion, they offer a better chance of achieving what the *Gautreaux* suit has always sought—integration in public housing—than would rigid insistence on the provisions of the *Gautreaux II* decree.

The CHA's second error is in failing to recognize that the *Gautreaux* plaintiffs, through their limited waivers of specific portions of the remedial decree, have achieved success on the merits. The CHA admits that the agreed orders are the product of negotiation. For example, in one 1997 motion to the district court, the CHA described the effect of the remedial decree on their building of housing under the Plan: "In the past the CHA has been forced to

negotiate with plaintiff counsel for approval of high-rise developments, such as Horner and Lakefront, that were funded in whole or in part with 'Gautreaux development money.' As a result, the CHA's [*sic*] 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 plaintiff's counsel.*" (Emphasis added.) In 1998, Terry Peterson further described the negotiation of agreed orders:

> It's the waiver process that is the most intrusive . . . . [H]ere's how it goes in reality: CHA needs to get a waiver from the Court to do a Hope VI program. That means the Court will ask us to negotiate with Mr. Polikoff, as plaintiffs' representative. . . .
>
> Mr. Polikoff will begin the negotiating 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 that were brought to the attention of the Court . . . .
>
> So the negotiation that would be required by the Court, and properly so, would bring the plaintiffs into the whole program. It's very intrusive. . . .
>
> [T]hey are going to want to negotiate from the beginning, and in order to get an agreed waiver we would have to negotiate.
>
> Now when the CHA negotiates and they agree on a waiver and they bring it to you, 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 there were able to negotiate.

Plaintiffs could not say it any better themselves. The CHA has had to change its position in order to win plaintiffs' approval of the waiver orders, and that change in position is embodied in judicial orders. The success on the merits that plaintiffs achieved through the agreed orders is most evident in the December 12, 2002, order. The court concluded in this order that it should allow building of more new housing in the Horner Revitalization Area because there has been "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 . . . ." Moreover, the order conferred numerous benefits and powers on the plaintiffs: it gave them control over "the initial location and configuration" of the units in which *Gautreaux* families would be housed above the third floor; it fixed the maximum number of units of public housing (271); it fixed the maximum ratio of public to non-public units that could be built in the designated area (35.5% public housing); it required equal distribution of the public units throughout the complex; it required annual written reports to be provided by the CHA to plaintiffs; and it permitted the plaintiffs to allocate some of the moneys from the "set aside" decree in a companion case (*Gautreaux v. Weaver*, 66 C 1460 N.D. Ill.) to the building of the new housing.

The order of September 7, 2001, reflects the same attention to the plaintiffs' demands. That order rests on a similar conclusion about the possibility of creating "viable mixed-income and desegregated housing opportunities for CHA plaintiff families" in the area in which the restrictions were being waived. The order specified the number of units to be built in each of four mid-rise and 14 walk-up buildings. For example, the order waived the three-story height restriction in the Renaissance North Mid-Rise Building, which was to be built at 535 West

North Avenue and was to have 59 units, 18 of which would be public housing dispersed throughout the building. It did the same for the 11 buildings in the order. The third order dealing with revitalization, issued September 11, 2002, added approximately 100 acres to the North Kenwood-Oakland revitalizing area, which had been the subject of a June 3, 1996, order. The later order identified the portion of the Limited Areas in which the receiver would be permitted to develop up to 850 units of public housing. Finally, a fourth order, issued on August 29, 2002, resulted in an improved procedure for placing families displaced from public housing that had been destroyed as a result of the Plan into scattered-site units, which are all located in the General Area. This was designed to provide housing for the displaced families as well as to try to help reduce chronic vacancy in the scattered-site units built by the *Gautreaux* receiver. Even if the fifth order did not deliver as much relief to the plaintiffs, nothing says that they must have prevailed on every single request during the time period at issue in order to be viewed as "prevailing parties." They achieved substantial results, embodied in court orders, and that is enough.

That the CHA and the *Gautreaux* plaintiffs agreed on these orders cannot mean that the substantial benefits flowing to the latter are not "fruits" of the litigation. *Buckhannon* makes it clear that a judicially sanctioned consent decree is a firm basis for a fee award. See 532 U.S. at 604. We conclude that plaintiffs have met their burden of showing they were awarded "judicial relief" and that they are prevailing parties for § 1988 purposes.

III

The CHA's final argument is that even if the *Gautreaux* plaintiffs' attorneys merited fees, the district court abused

its discretion by giving them too much. Our review of the amount of fees awarded is highly deferential to the district court: "If ever there were a case for reviewing the determinations of a trial court under a highly deferential version of the 'abuse of discretion' standard, it is in the matter of determining the reasonableness of the time spent by a lawyer on a particular task in a litigation in that court." *Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir. 1988). CHA raises three principal objections to the district court's decision, none of which is sufficient to demonstrate that the district court abused its discretion. (We have no comment on the CHA's additional complaints about the adequacy of plaintiffs' counsels' annotated time sheets and the few hours that were eliminated from the plaintiffs' total hour count but not their time sheets, apart from saying that we find no merit in them.)

"In calculating reasonable attorneys' fees, the district court should first determine the lodestar amount by multiplying the reasonable number of hours worked by the market rate." *Bankston v. State of Ill.*, 60 F.3d 1249, 1255 (7th Cir. 1995). "The reasonable hourly rate used in calculating the lodestar must be based on the market rate for the attorney's work. 'The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.'" *McNabola v. Chicago Transit Authority*, 10 F.3d 501, 519 (7th Cir. 1993) (quoting *Eddleman v. Switchcraft, Inc.*, 965 F.2d 422, 424 (7th Cir. 1992)) (internal citation omitted). "The burden of proving the market rate is on the party seeking the fee award. However, once an attorney provides evidence establishing his market rate, the opposing party has the burden of demonstrating why a lower rate should be awarded." *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 407 (7th Cir. 1999) (internal citations omitted).

Plaintiffs' attorneys have no paying clients, and so they presented evidence as to what their reasonable fees would have been through the affidavit of Attorney Lowell Sachnoff. He represented that the time of plaintiffs' various lawyers was compensable at the following rates: $400 for lead counsel Alexander Polikoff (who has litigated the case since it was filed); $350 for Julie Elena Brown and Robert L. Jones, Jr.; $265 for Adam Gross; $240 for Jonathan M. Kaden and Mary Anderson; $225 for Nicholas J. Brunick; and $200 for Henry J. Ford, Jr., and Eloise P. Lawrence.

Sachnoff is a director of Business and Professional People for the Public Interest (BPI), the organization that employs plaintiffs' attorneys. The CHA argues that, as a result of this relationship, Sachnoff has an interest in BPI's receiving as large a fee as possible and, therefore, "his self-serving affidavit alone cannot satisfy a plaintiff's burden of establishing market value for that attorney's services." *Uphoff*, 176 F.3d at 408. The district court was aware of Sachnoff's position, however, and was within its discretion to regard this as going to the weight of his evidence rather than its admissibility. Moreover, the district court correctly noted that Sachnoff was just one of more than 40 directors listed on the BPI website, or the more than 50 on the Board as a whole. See *About BPI: Board of Directors*, at http://www.bpichicago.org/board.html (last visited June 7, 2007). Even where the lawyer whose rate is being established works for the firm of the affiant, there is no rule requiring the disqualification of the affiant's evidence about the billing rate. See *Denius v. Dunlop*, 330 F.3d 919, 930-31 (7th Cir. 2003). Second, whatever Sachnoff's incentives, they are not the kind of direct financial incentives that existed in *Uphoff*, the case on which defendant relies. There the district court rejected rates supported only by an affidavit from the lead lawyer in the case, who testified that "all of the requested

hourly rates" that he himself submitted, which also covered the associates and paralegal in his firm, "are commensurate with each respective attorney's market rate." 176 F.3d at 407. Third, although the CHA wants us to accept evidence of the fees it pays attorneys to demonstrate that a lower rate should be awarded, it has offered no convincing argument why the district court was obliged to use the City's pricing structure as a proxy for what the market will bear.

Finally, even if its prior agreements on fee awards does not bind the CHA here, see *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (*en banc*), the rates established there are legitimate evidence as to whether these rates are reasonable. Because many of the lawyers have remained the same, the district court was entitled to find that the comparison was particularly instructive. In March of 2002, for the period covering September 25, 1999, to July 31, 2001, plaintiffs' attorneys were granted fees for which the rates were as follows: $360 for Polikoff; $275 for Brown and Jones; $190 for Gross; $135 for Kaden; and $130 for Brunick, then the most junior lawyer. In June of 2000, for the period covering October 16, 1996, to September 24, 1999, the rates were as follows: $360 for Polikoff; $260 for Brown and Jones; $190 for Gross; and $120 for Kaden, then the most junior lawyer. When this evidence of the prior fees is taken together with the affidavit, we can find no justification for concluding that the district court abused its discretion in approving these rates.

The CHA also objects to the number of attorneys plaintiffs assigned to the case. It is unhappy that plaintiffs used the services of nine lawyers over the two-year period, even though none of the lawyers spent all of his or her time on this project. The greatest number of hours billed by any one attorney over the two-year period was 530.675

by Nick Brunick (notably, an attorney with a billing rate of $225); the fewest was Jonathan Kaden with 28.5.

Use of one or more lawyer is a common practice, primarily because it often results in a more efficient distribution of work. See *Kurowski v. Kajewski*, 848 F.2d 767, 776 (7th Cir. 1988). It allows more experienced, accomplished, and expensive attorneys to handle more complicated matters and less experienced, accomplished, and expensive counsel to handle less complicated ones. Having one lawyer handle all of the work, as the CHA suggests, would not necessarily result in lower costs for the defendant. For example, had plaintiff's lead counsel, Mr. Polikoff, billed all of the hours, the cost to the CHA would have been around $1,029,600—an increase of almost 42% over the $724,732 that plaintiffs actually billed. If Polikoff had been the sole lawyer and the 489 hours of intra-team communications were cut, the bill would still have been around $834,000, more than 15% greater than the fees approved by the district court. Hypothetical illustrations aside, the fact that nearly 65% of the hours billed were for work by attorneys whose fees were at the low end of the range ($200-$265) illustrates how multiple lawyers can lead to a more cost-efficient allocation of work.

The district court also did not abuse its discretion in concluding that the time spent on intra-team communications was compensable. There is no hard-and-fast rule as to how many lawyers can be at a meeting or how many hours lawyers can spend discussing a project. Where the district court has found, as it did here, that appropriate trimming took place to bring the billed hours within a reasonable range, it is not this court's job to second-guess that judgment.

The CHA's third and final category of objections focuses on the types of work for which plaintiffs' attorneys billed. CHA complains that the lion's share of this work was

either not related to the postjudgment relief received or it was non-compensable monitoring. CHA points to the work of plaintiffs' attorneys with respect to habitability, tenant assignments, and participation in Working Groups related to the development of certain revitalization projects. On this point, the CHA again has the steep burden of convincing us that the district court abused its discretion when it held that "Plaintiffs have categorized each billing entry to show that the underlying task is within the scope of the [judgment order] and is consistent with the past orders awarding fees to the Plaintiffs."

Hensley v. Eckerhart, 461 U.S. 424 (1983), makes clear that while the district court has no authority to order a defendant to pay fees for time spent on matters unrelated to the issues on which plaintiff prevailed, efforts on matters related to the plaintiffs' success are compensable. See *id.* at 435-37. There is no specific formula to be used in determining which efforts of plaintiffs' counsel are related, and appellate review of such decisions is deferential. See *Jackson v. Illinois Prisoner Review Bd.*, 856 F.2d 890, 894 (7th Cir. 1988). So long as the plaintiffs' lawyers' activities are factually related to issues on which the plaintiffs have achieved postjudgment judicial relief and the work was reasonably calculated to result in relief, the district court may grant attorneys' fees.

The district court did not abuse its discretion in finding that the efforts of plaintiffs' attorneys here merited attorneys' fees. This work was related to the successful postjudgment strategies that the plaintiffs pursued: getting new mixed-income public housing built in accordance with specific conditions, as well as ensuring that scattered-site developments in the General Area are habitable and being inhabited—precisely the issues for which the district court has entered orders in this period.

Finally, with respect to the claim that plaintiffs' activities were non-compensable monitoring, the prior agreed fee

orders establish a course-of-dealing in this case that demonstrates what the expectations of the parties and the court were at the time this work was undertaken. In *Alliance*, we held that plaintiffs were not entitled to fees for post-decree monitoring because such activities produced no enforceable order and because the Chicago Police Board had been set up for the purpose of monitoring. See 356 F.3d at 772-73. Plaintiffs' counsel were not "expected to be the enforcers of the decree." *Id.* at 772. Every case is different, however, and here, the court's orders and the course-of-dealing between the parties demonstrates that plaintiffs—at times, in addition to the court-appointed receiver—were expected to be the enforcers of the decree. They could not perform the latter function without at least some monitoring of their own. We cannot find that the district court abused its discretion in finding that the challenged activities of plaintiffs' attorneys were compensable.

IV

In the end, the CHA is really arguing that the supervision of the building of public housing by the federal district court is no longer necessary. Plaintiffs have made it clear that they do not share that view. We reiterate what we said in 1999: "If CHA is displeased with the 1969 injunction, the receivership order, or the recent district court orders flowing from them, then it should seek to modify or terminate any or all of them." 178 F.3d at 958. If it does so, all interested parties will have an opportunity to present their views to the district court. That broad issue is not properly before this court. The only question we have been asked to decide is whether plaintiffs' attorneys are entitled to the fees that the district court awarded them for their work from August 2001 through July 2003. We conclude that the plaintiffs are

still "prevailing parties" and that the district court did not abuse its discretion in the amount of the fees it awarded.

The order of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

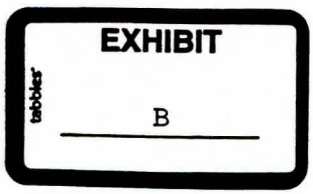
AFFIDAVIT OF TERRY PETERSON

Terry Peterson, being first duly sworn on oath and having personal knowledge of the facts set forth herein, states as follows:

1. I am the Executive Director of the Chicago Housing Authority, and have served in this capacity since June of 2000. Prior to taking this position, I served as a Special Assistant to the Mayor of the City of Chicago, with particular responsibilities for public housing, among other matters. Before that, I was elected an Alderman for the City of Chicago. As Executive Director of the CHA, and as a Special Assistant to the Mayor, I have detailed knowledge as to how the CHA's Plan for Transformation was developed, our progress to date in implementing the plan and the various challenges that face the Plan, including the various court cases that limit or seek to limit the Plan for Transformation.

2. Prior to 2000, the biggest problem facing CHA was that virtually all of its families were living in dilapidated high-rise and low-rise buildings. Not only was the condition of the buildings deplorable with very low occupancy rates, but our residents were socially and economically isolated. Only the very poor lived at CHA, and they were separated from the rest of the community. Gangs and drugs were commonplace at the CHA, and we had a very unhealthy environment for children. Despite the diligent efforts of the *Gautreaux* plaintiffs, over many decades, virtually all of our residents continued to live in racially segregated housing.

3. The Plan for Transformation was devised by the Mayor of Chicago and senior officials at the Chicago Housing Authority, in conjunction with The Habitat Company, which serves as the Receiver for the CHA. Planning took place throughout 1999, and included twenty-three town hall meetings and four region-wide meetings, throughout the city; over fifty briefings for civic,



community development, housing service and philanthropic organizations, as well as elected and appointed leaders; and a large public meeting at McCormick Place. The planners worked closely with CHA residents, through the elected Central Advisory Council (composed of all CHA tenant leaders). The Plan was presented and discussed on talk radio and in numerous television shows; it was available at every public library and on the internet. The Plan was formally adopted by the CHA board on January 6, 2000. The Plan was approved by HUD and resulted in a Moving to Work Demonstration Agreement between the City of Chicago, CHA and HUD, dated February 6, 2000. The Moving to Work Agreement contains numerous HUD waivers of federal regulations and approvals, which facilitated and expedited CHA's development of mixed-income housing throughout the city. No court proceeding or order required us to adopt the Plan for Transformation. Nor was the Plan prompted by a court proceeding or order. It was an initiative developed by those of us responsible for public housing in the city, designed to get at long-standing and difficult issues that plagued public housing residents and our city.

4. The Plan for Transformation is unprecedented in the history of public housing, and certainly no other city is undertaking the kind of sweeping plan we have embarked upon. The Plan for Transformation is a ten-year, $1.6 billion dollar effort to demolish all of the CHA's high-rises, as well as some of our low-rise buildings, and then redevelop or rehabilitate a total of 25,000 units across the city----enough units for every family and senior living at CHA on October 1, 1999, provided they remain lease-compliant. While we are rehabilitating some of our existing housing stock, including our 9500 senior units (now nearly complete) and our nearly 3100 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 we have demolished the old high-rises. These new mixed-income communities are being developed and are owned by some of the leading real estate firms in the nation. 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. They will allow public housing families to live in the same kind of housing and the same kind of neighborhoods as other Chicagoans.

5. Through the end of fiscal year 2004, we are proud to say that we have finished work on 13, 213 units. As of April 20, 2005, 1069 of the mixed-income replacement units were completed, another 364 are under construction and another 3116 were in other stages of development. All across the City, vibrant mixed-income developments now stand where decrepit CHA high-rises used to be. These include North Town Village, Old Town Square, the Domain Lofts, and River Village at the old Cabrini site; Roosevelt Square on the site of the ancient ABLA development at Roosevelt Rd. west of Blue Island; Lake Park Crescent and Jazz on the Boulevard, at 40th and Drexel, on the site of the old Lakefront high-rises; Legends South, on the site of the Robert Taylor Homes; Oakwood Shores, near 35th and Lake Park, where the Madden-Wells development used to sit; Park Boulevard, on the site of the Stateway Gardens development at 39th and State Streets, near U.S. Cellular field; Westhaven Park, on the site of the old Horner development, just west of Ashland and near the United Center; the Archer, West End and S. Leavitt developments near the old Rockwell project on the west side, and others as well. The booklet attached hereto as Exh. 1 describes, in summary fashion, some of these projects.

6. In addition to bricks and mortar, the Plan for Transformation includes substantial programs to increase the self-sufficiency of CHA residents. This includes the entire service-

connector program, which assists residents in resolving a wide variety of social issues, e.g. drug issues, DCFS issues, day-care problems, credit problems, and housekeeping issues. In addition, we have brought in the most innovative job training programs and have partnered with both the private and public sector to maximize employment opportunities for our residents. Further, each of the developers involved with our mixed-income communities has social services, designed to assist residents become self-sufficient, and to meet stringent property-specific requirements, like working 30 hours per month and maintaining a drug-free lifestyle.

7. The *Gautreaux* case presented a major obstacle to the Plan for Transformation. The 1969 *Gautreaux* judgment order prohibits CHA from building in Limited census tract areas, i.e. where the non-white population exceeds 30% of the total, unless we also build in General, i.e. white, areas. Every one of the sites where we intended to demolish CHA high-rises and replace them with new, mixed-income communities is a Limited area. Thus, unless this provision of the 1969 judgment order was modified, we could not proceed with the Plan. In addition, the 1969 judgment order precludes CHA from building family housing taller than three stories.

8. Since the inception of the Plan for Transformation, we have sought modifications of the 1969 *Gautreaux* judgment order from the plaintiffs in that case. The plaintiffs have agreed to these modifications or waivers of the judgment order, and that has allowed CHA's Plan for Transformation to proceed.

9. I have had an opportunity to look at five orders that were entered by the *Gautreaux* court during the 2001 through 2003 period. Four of these are examples of the kind of orders that CHA has sought from the *Gautreaux* plaintiffs so that we could proceed with the Plan for Transformation. In particular:

A. The **December 12, 2002 order** was entered to facilitate Phase II of our Westhaven development on the Horner site. Phase II involved a mix of market rate units that are being sold to homeowners, along with affordable units, available both for purchase and sale to working families, and public housing units. As at our other mixed-income sites, there are many stakeholders at Horner, whose interests must be considered. In addition to the Receiver, these include the developer selected to design, plan, finance and manage the property (Brinshore-Michaels), the developers various investors, the elected resident leadership at Horner (who is represented by counsel other than BPI), the surrounding neighborhood groups and institutions, the Alderman and other elected officials, HUD, the City, and the *Gautreaux* plaintiffs. An existing consent decree governs redevelopment at Horner. It is the *Henry Horner Mothers Guild v CHA* case, pending before Judge Zagel.

As we planned Phase II of the development, we conducted many, many meetings involving these various parties. We eventually reached agreement on an order, entered February 1, 2000 before Judge Zagel. This set out the parameters of the plan, including the manner in which we would select the developer, CHA's agreement to long-term lease the land to the developer, the number of public housing units to be built for very low income families and the number to be built for other public housing families, the ratio of public housing families to other families in Phase II, the number of mid-rise buildings (over three stories), the manner in which public subsidies would be provided, when various buildings would be demolished, whether CHA would have any obligation to build other units at Horner, the extent to which construction would be phased to limit displacement of the residents, the building of New Homes for Chicago, as part of the plan, the provision of TIF financing, tax-credit assistance and infrastructure work by the city, and assistance with a program that would reduce the property tax assessment for the new buildings, as well as other issues.

When the developer was then selected, and a site plan developed, we proceeded to obtain the December 12, 2002 order from the *Gautreaux* court. This order vacated or modified the original 1969 judgment order so that CHA could build on the Horner site, as it was in a Limited area. The 2002 order also vacated or modified the height restriction in the 1969 judgment order so that CHA could build the mid-rise buildings contemplated by the February 1, 2000 order entered in the *Mothers Guild* case. Finally, the order provided CHA up to $12 million in *Gautreaux* set aside funds to use as part of the subsidy for the development of Phase II at Horner. The Receiver and the CHA needed this order to proceed with the Phase II development; otherwise it would have been prohibited by the 1969 judgment order.

B. The **September 7, 2001** order was entered at the behest of the Receiver and the CHA to permit the construction of four separate mid-rise buildings at Cabrini and a series of walk-up buildings. The buildings were part of the Renaissance North, North Town Village, Old Town Square and Old Town Village developments at Cabrini. The various developers sought to build these buildings, and were fully supported by the Receiver and the CHA. The 1969 judgment order would have prohibited all of the buildings, so this order was sought and entered to permit these developments to go forward.

C. The **August 29, 2002** order modified the 1969 *Gautreaux* order's provisions dealing with the *Tenant Assignment Plan*. Prior to the entry of this order, one-half of the scattered-site units built in the city were to be occupied by CHA. Part of the CHA families were people who sought to transfer from an existing CHA apartment to a scattered site building. The rest of the CHA families came from the general CHA waiting list. Because of the Plan for Transformation, many of our developments are in the midst of demolition and construction. As a result, we must relocate large numbers of families. Many of these families elect to participate in the Section 8 program (either temporarily or permanently). Many of these relocatees, however, were interested in the scattered-site units. So, we sought this order to change the *Gautreaux* rules so that our Plan for Transformation relocatees could have all of the scattered site units that became available. Without this modification of the *Gautreaux* judgment order, our relocation activities during the Plan for Transformation would be much more difficult.

D. The **September 11, 2002** order was another instance where the Receiver and CHA sought to build units on the site of an existing CHA development, in this case the old Ida B. Wells, Darrow and Madden Park projects, but could not do so because the 1969 judgment order prohibited construction in this Limited Area. The order served to eliminate this prohibition, and allow the building of new mixed-income communities, including Oakwood Shores.

E. The **March 18, 2003** order merely updated the list of Limited area census tracts in Cook County. Inasmuch as virtually all of the Plan for Transformation construction takes place in Limited census tract areas, this order was inconsequential to us.

10. During the Plan for Transformation, we have welcomed the support of the *Gautreaux* plaintiffs, as well as the many other interested parties who have joined with CHA to help accomplish the extraordinary goals of the Plan for Transformation. We are proud of the fact that we have not spent our time litigating with the *Gautreaux* plaintiffs, but rather working together to accomplish the reinvention of Chicago's public housing.

Terry Peterson

Signed and sworn to before me
by Terry Peterson this 9th day of
June, 2005

Notary Public

OFFICIAL SEAL
DONALD ANDERSON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 08/28/06

NOTICE OF FILING AND CERTIFICATE OF SERVICE

Thomas E. Johnson, an attorney for the Defendants-Appellants, hereby certifies that on July 9, 2007, he filed the attached Defendants-Appellants' Petition for Rehearing, With Suggestion for Rehearing En Banc, to be filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit, 219 S. Dearborn St., 27th Floor, Chicago, IL, and on the same day hand-delivered two copies of the Petition and a disk containing the Petition to:

Alex Polikoff
Julie Elena Brown
Business & Professional People for
the Public Interest
25 E. Washington St., Suite 1515
Chicago, IL 60602

Michael L. Shakman
Edward W. Feldman
Miller, Shakman & Hamilton
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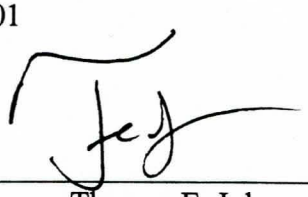

Thomas E. Johnson