

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA

CARI. D. SEARCY and KIMBERLY )  
MCKEEAND, individually and as parent and )  
next friend of K.S., a minor, )  
 )  
 *Plaintiffs,* )  
 )  
 v. )  
 )  
 LUTHER STRANGE, in his official capacity as )  
Attorney General of the State of Alabama, )  
 )  
 *Defendant.* )

Civil Action No.  
1:14-cv-208-CG-N

DEFENDANT’S RESPONSE TO PLAINTIFFS’ MOTION  
FOR ATTORNEYS’ FEES (DOC. 76)

Alabama Attorney General Luther Strange, sued in his official capacity, respectfully states as follows in response to Plaintiffs’ Motion for Attorneys’ Fees:

**I. Introduction**

Attorney General Strange does not dispute that Plaintiffs are prevailing parties. Plaintiffs prevailed on summary judgment, and that judgment was affirmed by the Eleventh Circuit (without briefing) when the United States Supreme Court entered an opinion resolving the legal issues in the case. But as discussed below, the amount claimed by Plaintiffs’ counsel – in terms of both the claimed hourly rate and the hours purportedly worked – is excessive in light of the work performed and the results achieved.

“[F]ee awards under § 1988 were never intended to produce windfalls to attorneys.” *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). A reasonable fee is that which is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. *See generally Perdue v. Kenny A.*, 559 U.S. 542 (2010). As such, the purpose of section 1988(b) is to ensure “effective access to the judicial process” for persons whose civil rights have been violated, to

reimburse plaintiff for the cost of vindicating his civil rights, and to hold the violator of federal law accountable. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Fox v. Vice*, 131 S.Ct. 2205, 2213 (2011) (citations and quotations omitted).

In this case, there was no discovery, no hearing, and no trial. With respect to the claims against the Attorney General, Plaintiffs' case involved a complaint (doc. 1), a premature motion for summary judgment and accompanying brief (docs. 21, 22); an expert report that had to be amended for failure to comply with the Rules of Civil Procedure (docs. 41, 51); a response to Defendants' summary judgment motion (doc. 51), and responses to Defendants' motions to stay. There was activity against defendants who were dismissed, and parties (namely, probate judges) who should have been defendants but were not, but none of that activity contributed to relief against the Attorney General, and none of that activity should be part of this fee analysis.

While the case against the Attorney General was a simple case, Plaintiffs claim nearly 700 hours and a total fee award of nearly \$200,000. Plaintiffs seek \$275 per hour even though neither counsel claims particular experience in civil rights litigation. They seek compensation for preparing pleadings that were not filed, for excessive time in some instances, for hearings that did not involve the claims against the Attorney General, for a non-compliant expert report that did not contribute to their relief, and for activity related to non-parties. The fee they claim is entirely excessive and should be cut dramatically.

This Court has set out the applicable law as follows:

The starting point in setting any attorney's fee is determining the "lodestar" figure—that is, the product of the number of hours reasonably expended to prosecute the lawsuit multiplied by a reasonable hourly rate for work performed by similarly-situated attorneys in the community. The fee applicant bears the burden of "establishing entitlement and documenting the appropriate hours and hourly rates." After calculating the lodestar fee, the court should then proceed with an analysis of whether any portion of this fee should be adjusted upwards or downwards. Where the rates or hours claimed seem excessive or lack the

appropriate documentation, a court may calculate the award based on its own experience, knowledge, and observations.

In making the above determinations, the court is guided by the 12 factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir.1974). These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the ‘undesirability’ of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. These *Johnson* factors may “be considered in terms of their influence on the lodestar amount.”

*Young v. International Paper Co.*, 2012 WL 37647 at \*4 (S.D. Ala. Jan. 6, 2012).

The prevailing party bears the burden of establishing entitlement to an award of attorney's fees and of documenting the hours worked and the appropriate hourly rate. *ACLU v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999). “[I]t is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded.” *Id.* at 428.

## II. The Hourly Rate Claimed is Excessive

Both Kennedy and Hernandez seek a \$275 hourly rate. Both have been practicing since 2007 and thus had 7-8 years of experience during the litigation. (Docs. 76-3, 76-4). The amount claimed is not in line with the Mobile market, per cases this Court has recently set out:

*Compare Gulf Coast Asphalt Company, LLC v. Chevron, U.S.A., Inc.*, 2011 WL 612737 (S.D.Ala., Feb.11, 2011) (Granade, J.) (finding that the average or reasonable hourly rate charged by top Mobile lawyers in complex cases is in the range from \$250 to \$350 per hour, and that **\$200.00 per hour is a reasonable hourly rate for an attorney with seven years experience as a law firm associate**) (quotations omitted); *see also Vision Bank v. Anderson*, No. 10–0372–KDM, 2011 WL 2142786, \*3 (S.D.Ala., May 31, 2011) (DuBose, J.) (finding \$250.00 per hour to be a reasonable rate for an attorney with 15 years experience as a law firm partner); *see also Adams v. Austal, U.S.A., LLC*, 2010 WL 2496396, \*6 (S.D.Ala.2010) (finding \$150.00 to be a reasonable rate for an attorney with three years experience as a law firm associate).

*Young v. Int’l Paper Co.*, 2012 WL 37647 at \*5 (emphasis added).

Moreover, this is a civil rights case, and the 7-8 years experience possessed by plaintiffs' counsel was not in civil rights litigation. (Docs. 76-3, 76-4). That matters. In private practice, an attorney with 20 years of experience in product liability litigation may demand higher rates in a product liability case than a 30-year lawyer who has litigated only other types of cases. Thus, in *Oden v. Vilsack*, 2013 WL 4046456 at \*6 (S.D. Ala. Aug. 9, 2013) (DuBose, J.), an attorney with forty years of experience *but only limited experience in civil rights litigation* was awarded the same \$250 per hour rate as a fifteen-year lawyer. *See also Trotter v. Columbia Sussex Corp.*, 2010 WL 383622 at \*3 n.9 (S.D. Ala. Jan. 29, 2010); *Norman v. Hous. Auth.*, 836 F.2d 1292, 1301 (11th Cir. 1988) ("A lawyer who has to educate himself generally [as to the substantive law] may ultimately be as effective as a specialist, but he has no right to expect to be reimbursed at the same rate as a lawyer who begins his preparation with the finer points raised by the particular case."); *Duckworth v. Whisenant*, 97 F.3d 1393, 1397 (11th Cir. 1996) (approving a higher hourly rate to an experienced civil rights lawyer than to an experienced litigator with no civil rights experience); *Johnson*, 488 F.2d at 718 ("An attorney specializing in civil rights may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience.").

Finally, attorneys who work in small or solo practices "are not entitled to base their fee calculations on the rates charged by large firms with high operating expenses." *Searcey v. Crim*, 692 F. Supp. 1363, 1365 (N.D. Ga. 1988) (crediting the argument but finding it inapplicable).

In sum, if \$200 per hour is a reasonable hourly rate for a seven-year associate in a large firm, with appropriate experience for the matter at hand, then Defendant contends that \$150 per hour would be an appropriate rate for Kennedy and Hernandez in this case.<sup>1</sup>

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<sup>1</sup> While Plaintiffs submitted an affidavit from another attorney conclusorily stating that the claimed fees are reasonable, it is not helpful to submit a declaration that "just offers one attorney's conclusory and general opinion on

### III. The Total Amount Claimed is Excessive in Light of the Work Performed

“[A] lawyer may not be compensated for hours spent on activities for which he would not bill a client of means who was seriously intent on vindicating similar rights, recognizing that in the private sector the economically rational person engages in some cost benefit analysis.” *Norman v. Hous. Auth.*, 836 F.2d 1292, 1301 (11th Cir. 1988). Therefore, in determining the reasonableness of hours expended, a district court should consider the “conduct of the litigation as a whole from the point of view of a cost-conscious client.” *Vaughns v. Bd. of Educ.*, 598 F. Supp. 1262, 1277 (D. Md. 1984), *aff’d*, 770 F.2d 1244 (4th Cir. 1985). When awarding an attorneys’ fee, the “[c]ourts are not authorized to be generous with the money of others, and it is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded.” *Barnes*, 168 F.3d at 428.

The hours Plaintiffs claim for a case resolved on summary judgment, with no discovery, hearing, or trial, are entirely excessive. Kennedy claims 349 hours, and Hernandez 339.4, for a total of 688.4 hours. (Docs. 76-5, 76-6). By comparison, another case in this District involved claims for only 384.2 hours for two attorneys after 16 depositions, and the case settled (except for fees) on the eve of trial. *See Trotter v. Columbia Sussex Corp.*, 2010 WL 383622 (S.D. Ala. Jan 29, 2010) (Steele, J). In *Vision Bank v. Anderson*, 2011 WL 2142786 (S.D. Ala. May 31, 2011) (DuBose, J.), the Plaintiffs sought to recover only \$13,456 in attorneys’ fees after prevailing on summary judgment. The hours claimed by Plaintiffs here exceed other cases taken

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what that rate is . . . [or] simply states that he is familiar with the attorney and the litigation and that he thinks the fee request is reasonable.” *Nat’l Ass’n of Concerned Veterans v. Sec’y of Def.*, 675 F.2d 1319, 1326 (D.C. Cir. 1982). Satisfactory evidence that the requested rates are in line with the prevailing market rates “necessarily must speak to rates actually billed and paid in similar lawsuits,” so that the “[t]estimony that a given fee is reasonable is therefore unsatisfactory evidence of market rate.” *Norman v. Hous. Auth.*, 836 F.2d 1292, 1299 (11th Cir. 1988). The “weight to be given to opinion evidence of course will be affected by the detail contained in the testimony on matters such as similarity of skill, reputation, experience, similarity of case and client, and breadth of the sample of which the expert has knowledge.” *Id.* (at 1299).

all the way through a trial. *See Villano v. City of Boynton Beach*, 254 F.3d 1302 (11th Cir. 2001) (in a case involving a seven-day trial, plaintiffs initially claimed only 473 hours); *Oden v. Vilsack*, 2013 WL 4046456 at \*11 (S.D. Ala. Aug. 9, 2013) (DuBose, J.) (625.65 non-travel hours credited after a time-consuming trial.).<sup>2</sup>

Admittedly, after the Plaintiffs were granted summary judgment, they filed oppositions to motions to stay in this Court, the Eleventh Circuit, and the United States Supreme Court. But those motions and the oppositions thereto involved the same general law. Even with the post-judgment motions, 688.4 hours remains excessive when there was no discovery, no hearing on the claims against the Attorney General, no trial, and when (as discussed below) these issues were thoroughly briefed in many other like cases pending across the country.

It is clear that Plaintiffs failed to exercise billing judgment. “Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.” *Hensley*, 461 U.S. at 434. “Ideally, billing judgment is reflected in the fee application, showing not only hours claimed, but also hours written off.” *Alberti v. Klevenhagen*, 896 F.2d 927, 930 (5th Cir. 1990), opinion vacated in part on reh'g, 903 F.2d 352 (5th Cir. 1990).

The Plaintiffs claim to have exercised billing judgment and omitted certain hours (78 for Kennedy and 65 for Hernandez) and \$28,000 in paralegal time. (Docs. 76-5 and 76-6). They do not, however, set out what was omitted, what work over and above the already-excessive 688.4 hours could possibly have been required, what paralegal time was omitted, or what action in this case could require over \$28,000 in paralegal costs. Neither the Defendant nor the Court can

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<sup>2</sup> *See also McDonald v. ST Aerospace Mobile*, 2013 WL 1389976 (S.D. Ala. April 4, 2013) (Granade, J.) (254.4 hours for two attorneys in a case that went out on summary judgment); *Natures Way Marine, LLC v. Everclear of Ohio*, 2015 WL 1757116 (S.D. Ala. April 17, 2015) (Granade, J.) (counsel credited 564.4 hours, and ultimately awarded about \$70,000 in fees, for taking a case through a six-day trial).

assess what billing judgment the Plaintiffs used. Based on the excessive amounts claimed in light of the work performed, the court should conclude that the petition includes insufficient billing judgment.

“The principle of “billing judgment does not encompass elimination of hours that clearly were not compensable in the first place.” *Walker v. U.S. Dep’t of Hous. & Urban Dev.*, 99 F.3d 761, 769 (5th Cir. 1996). In *Walker*, as here, “there [was] no record of any such billing judgment” represented by writing off excessive, redundant, or unproductive hours, “as the plaintiffs allege they wrote off hours before recording them.” *Id.*

If it did take counsel the claimed amount of hours to litigate a case to summary judgment, when the legal issues had already been fleshed out in numerous cases, that is another indication of lack of experience in the substantive law, and another reason that the claimed amount and hourly fee are unreasonable. Unreasonable time expenditure often is the product of “over-zealousness by inexperienced, young lawyers.” *Hart v. Bourque*, 608 F. Supp. 1091, 1093 (D. Mass. 1985), rev’d and remanded on other grounds, 798 F.2d 519 (1st Cir. 1986). *See also Hensley*, 461 U.S. 424, 438 n.13 (1983) (approving 30% reduction for one lawyer in part “to account for his inexperience”).

“The proper remedy when there is no evidence of billing judgment is to reduce the hours awarded by a percentage intended to substitute for the exercise of billing judgment.” *Walker*, 99 F.3d at 770; *see also Green v. Adm’rs of Tulane Educ. Fund*, 284 F.3d 642, 662 (5th Cir. 2002). Plaintiffs’ hours should be cut to a reasonable amount because of their failure to exercise billing judgment.

#### **IV. Certain Line Items in Plaintiffs’ Billing Records Should Be Disregarded**

“When a district court finds the number of hours claimed is unreasonably high, the court has two choices: it may conduct an hour-by-hour analysis or it may reduce the requested hours

with an across-the-board cut.” *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1350 (11th Cir. 2008). One option for the Court is therefore to simply cut the total hours by a percentage. The Eleventh Circuit noted in one case involving 569.3 hours that “[t]hose hours are extensive enough that we do not expect the district court or the magistrate judge to conduct an hour-by-hour analysis in this case.” *Villano*, 254 F.3d at 1311. Should the Court wish to review the hours in detail, Defendant offers the following analysis.

In Exhibit A, attached, Defendant has compiled a chart that lists individual entries in Plaintiffs' time records, sorted by date, that he contends should be omitted from consideration or should be significantly reduced. The chart includes the reasons for Defendant's objections to each item. Exhibit B is a second chart of the same items sorted by category of objections, along with subtotals for the hours applicable to each objection. Each category is addressed below:

**20.5 hours** for “background research” prior to filing the Complaint. Such “background research” is not compensable, and the hours counsel expended on it should be stricken outright. *See Case v. United Sch. Dist. No. 233*, 157 F.3d 1243 (10th Cir. 1998). *Hours to cut: 20.5.*

**3.0 hours for basic administrative tasks.** These are hours billed for initial file setup, review of basic administrative documents (such as notices of appearance and text orders from the Court), and forwarding pleadings to clients. These hours should be reduced by at least 50%. *Hours to cut: 1.5.*

**16.8 hours** for preparation of documents, such as a motion for a temporary restraining order, that were never filed. The Attorney General should not be billed for unnecessary work. *Hours to cut: 16.8.*

**66.7 hours** of excessive billing for general research throughout the case. This is excessive in light of the limited scope of the issues being litigated and the way the issues had been fleshed out in decisions from other states. While some of that research was to respond to

motions for a stay in different courts, Plaintiffs appeared to start over and fully research each separate stay motion, when much of the same law applied. Additionally, the time entry descriptions for much of the research tend to be vague or generic and undermine the Attorney General's ability to determine the extent to which such research was necessary to effective litigation of the case. For all these reasons, this time should be cut by two-thirds. *Hours to cut: 44.5.*

**52.7 hours** of excessive daily billing. 7.3 hours before 10:30 a.m. on a Sunday is unlikely. 17.2 hours in one day is improbable. 28.2 hours in one day is impossible.<sup>3</sup> This time should be cut by two-thirds. *Hours to cut: 35.*

**21.1 hours** for working with an expert witness. Plaintiffs submitted an expert report on August 22, 2014, but that report did not provide the grounds for the expert's opinion. The parties discussed the matter, seeking to avoid the need for a *Daubert* motion (*see doc. 44*), and Plaintiffs later submitted an amended expert report. While that report did cite studies, Plaintiffs' expert inexplicably cited to studies that supported Defendant's positions (*see doc. 52 at 9-10*). Ultimately, Plaintiffs' expert was not an apparent factor in this Court's decision, and the Attorney General should not be charged with such time. *Hours to cut: 21.1.*

**37.1 hours** for work dated after it possibly could have occurred. This number includes:

- 25.2 hours for drafting pleadings on a date *after* that pleading was filed. On 2/1/14, Hernandez billed 8.2 hours for "Complete drafting of our Response to the Motion to Stay filed with the 11th Circuit" and Kennedy billed 14.2 hours for "Complete and finalize our brief for response to the motion to stay filed with the 11th Circuit." The plaintiffs' response brief was actually filed in the 11th Circuit

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<sup>3</sup> The Attorney General notes that any error in time entry "undermines the credibility of all the hourly entries." *Gaylor v. Comala Credit Union*, 2012 WL 1987183 at \*3 (M.D. Ala. Jun. 1, 2012)

on 1/29/15. Similarly, Kennedy billed 2.8 hours on 2/5/15 for “Complete our brief to SCOTUS.” The Plaintiffs’ Supreme Court brief was actually filed 2/4/15.

- 2.2 hours billed by Hernandez on 6/3/14 for “Receipt and review of Motions to dismiss filed by Luther Strange and Robert Bentley, outlining our response.” The Attorney General and Governor did not file their motion to dismiss until 6/6/14, making it impossible for Hernandez to have reviewed it prior to that date.
- 9.7 hours billed by Hernandez for work on a “brief in support of summary judgment” on 8/6/14 and 8/15/14. Hernandez had no reason to be working on summary judgment pleadings on those particular dates. Plaintiffs filed their motion for summary judgment on 6/12/14 (docs. 21-22), and the court denied their motion as premature on 6/13/14 (doc. 25). Though further briefing on summary judgment did occur later in the case, Plaintiffs did not submit a second motion for the court’s consideration, and the scheduling order for timely consideration of the parties’ motions for summary judgment (setting a due date for the Plaintiffs’ reply brief) was not issued until 8/28/14 (doc. 43).

The hours billed could not possibly be correct because of the dates. *Hours to cut: 37.1.*

**37.5 hours** for work unrelated to the claims against the Attorney General. These entries include matters related to other initial Defendants who did not remain in the case. Primarily, though, they concern activity aimed at unsuccessful (in this case) efforts to bring the non-party Probate Judges under the Court’s injunction. None of this time is attributable to the Attorney General, and shows a blatant disregard for billing judgment. *Hours to cut: 37.5.*

**4.2 hours** of entries with descriptions so vague, neither the Court nor the Defendant can assess them. Plaintiffs did not meet their burden of showing that the time spent was reasonably

required, and these hours therefore cannot be charged against the Attorney General. *Hours to cut: 4.2.*

In sum, then, on an entry-by-entry analysis, at least **218.2** hours should be cut from the time claimed.

### **V. Lodestar Calculation**

Based on the discussion above, there are two ways the Court may wish to undertake the lodestar calculation. In light of the overall excessiveness of the time claimed, a 50% across-the-board cut to the hours is appropriate, and would still credit the movants with more hours than are usually present in a case that goes out on summary judgment:

Original hours claimed:	688.4
Reduced by 50%:	<u>344.2</u>
X \$150/hr =	\$51,630

Or, if the Court wishes to go hour-by-hour, the analysis in Part IV above shows that 218.2 hours should be cut from the amount claimed:

Original hours claimed:	688.4
Hours to subtract:	<u>218.2</u>
Subtotal:	<u>470.2</u>
X \$150/hr =	\$70,530

If the Court takes the hour-by-hour approach, the end result, 470.2 hours, remains excessive for the work performed, in light of comparison cases. The Court should therefore take the simpler cutting-across-the-board approach that results in a more equitable amount. Or, the Court could, as discussed below, reduce the fee award further to approximately \$50,000 through a downward adjustment because of the lack of billing judgment used.

**VI. No upward adjustment is warranted; nor do any factors justify overlooking the excessiveness of the hours claimed**

Courts may approve adjustments to the usual lodestar rate if a case is particularly complex or if the Plaintiff received exceptional results, but no upward adjustment is called for in this case. This matter did not require ample research. It was admittedly one of the first challenges to *Alabama's* marriage laws by a same-sex couple, but the Equal Protection and Due Process arguments had been litigated, written about, and ruled upon by numerous courts around the country. A decent summary of the voluminous research at counsel's disposal can be found in a brief filed by the *pro se* plaintiffs in *Strawser v. Strange*, case no. 14-424, doc. 23 (dated December 14, 2014).

The legal issues presented here may have been novel to this state, but they were not novel to the law, and Alabama's marriage laws presented no unique issues that were not present in the marriage laws of other states. Plaintiffs therefore did not have to reinvent the wheel, and there was nothing complex to require any upward adjustment or that would justify higher rates or a greater number of hours. Furthermore, though Plaintiffs' counsel have asserted that they incurred substantial risk in taking on Plaintiffs' case (docs. 76-3, 76-4), a number of courts across the country had already ruled in favor of same-sex couples litigating the issues presented here.<sup>4</sup> While the Attorney General disagreed with the rulings striking down state marriage laws, there were a substantial number of victories Plaintiffs would have been aware of prior to taking on this case.

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<sup>4</sup> See, e.g., *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah December 20, 2013); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio Dec. 23, 2013); *Bishop v. U.S. ex rel Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. Jan. 14, 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. Feb. 12, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. Feb. 13, 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. Feb. 26, 2014); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. March 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. March 21, 2014); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio Apr. 14, 2014).

In addition, the results obtained (the eighth *Johnson* factor) do not call for an upward adjustment (or for approving the excessive hours and rates claimed). This factor considers the amount obtained, in monetary cases, and the litigation's "effect on the law." *Johnson*, 488 F.2d at 718. Plaintiffs obtained a summary judgment against the Attorney General declaring that Alabama's marriage laws are unconstitutional. However, the Attorney General – as he has argued throughout this litigation – does not issue marriage licenses or control the Probate Judges who do.

Plaintiffs struggled after their judgment to bring in parties who enforce marriage laws. Plaintiffs first filed an odd motion for sanctions against non-parties, and against the Attorney General who never violated this Court's orders. (Doc. 71). Then they filed a separate action where the sole claim was failure to follow the injunction in *this* case. See *Hedgepeth v. Judge Don Davis, et al.*, case no. 1:15-cv-67 (S.D. Ala. filed Feb. 9, 2015) (voluntarily dismissed). These were needless steps that accomplished nothing, but instead reveal a lack of experience in civil rights litigation. It was ultimately the attorneys for the *Strawser* plaintiffs (who retained counsel after receiving a preliminary injunction), rather than counsel here, who joined the Probate Judges into the litigation the correct way and obtained an injunction against officials who issue marriage licenses.

Moreover, the Supreme Court addressed the issue in *Obergefell v. Hodges* just a few months after judgment was entered in this case. The law in Alabama would be exactly the same today if this action had never been filed.

For all these reasons, the lack of any practical effect of the results Plaintiffs received is a consideration in regard to the reasonableness of Plaintiffs' fee petition. The *Johnson* factors do not call for an upward adjustment to the lodestar amount.

Indeed, if any adjustment to the lodestar amount is required, it is a downward adjustment. If “the court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such conduct would be reduction of their fee to what they should have asked for in the first place.” *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554, 557 (5th Cir. 1998). Courts have therefore denied fees outright or imposed steep reductions when claimants have blatantly failed to exercise good billing judgment. *See, e.g., Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1301 (1st Cir. 1997); *Bd. of Trustees of Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 800 (D.C. Cir. 1998) (quoting *Goos v. Nat’l Ass’n of Realtors*, 68 F.3d 1380, 1387 (D.C.Cir.1995)). Defendants do not ask for such an outright denial here; rather, as discussed above, there should be an across-the-board reduction in hours performed when calculating the lodestar amount.

#### **VII. Costs**

Plaintiffs claim \$8400 in costs, but they have provided no accounting of what those costs are. They have not met their burden of proving that the costs are related to the claims against the Attorney General or that they were reasonably incurred. Therefore, no costs should be awarded.

#### **VIII. Conclusion**

For all of these reasons, while Plaintiffs are prevailing parties, their fee petition should be cut to approximately \$50,000.

Respectfully submitted,

LUTHER STRANGE  
*Attorney General*

s/ James W. Davis  
Andrew Brasher  
*Solicitor General*

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Luther Strange**

#### CERTIFICATE OF SERVICE

I certify that on October 21, 2015, I electronically filed the foregoing document using the Court's CM/ECF system which will send notification of such filing to the following persons:

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s/James W. Davis  
Counsel for the Defendant

# **EXHIBIT**

# **A**

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA**

CARI. D. SEARCY and KIMBERLY )  
 MCKEEAND, individually and as parent and )  
 next friend of K.S., a minor, )  
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 LUTHER STRANGE, in his official capacity as )  
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**DEFENDANT’S RESPONSE TO PLAINTIFFS’ MOTION  
FOR ATTORNEYS’ FEES**

**CHALLENGED TIME ENTRIES SORTED BY DATE**

<b>Date</b>	<b>Individual Hours</b>	<b>Atty</b>	<b>Description</b>	<b>Reason for Reduction</b>
4/19/14	8.5	CH	Research relevant cases and pleadings in other matters in order to draft Complaint in this matter	“[B]ackground research” designed to familiarize the attorney with the relevant area of law [is not] compensable. <i>See Case v. United Sch. Dist. No. 233, 157 F.3d 1243 (10th Cir. 1998).</i>
4/24/14	8.5	DK	Research various cases from other jurisdictions and prepare complaint	“[B]ackground research” designed to familiarize the attorney with the relevant area of law [is not] compensable. <i>See Case v. United Sch. Dist. No. 233, 157 F.3d 1243 (10th Cir. 1998).</i>
4/26/14	3.5	CH	Continue researching relevant cases and pleadings in other matters in order to draft Complaint in this matter	“[B]ackground research” designed to familiarize the attorney with the relevant area of law [is not] compensable. <i>See Case v. United Sch. Dist. No. 233, 157 F.3d 1243 (10th Cir. 1998).</i>

Date	Individual Hours	Atty	Description	Reason for Reduction
5/13/14	0.9	DK	Initial file set up	Basic administrative task – noncompensable
5/15/14	0.2	DK	Receipt and review of correspondence from Brian Hale indicating that he will be representing defendant McDonald.	Basic administrative task; would not bill to cost-conscious client
5/18/14	18.5	DK	Multiple descriptions	Excessive daily hours billed for one day
5/19/14	0.3	CH	Receipt and review of notice of service	Basic administrative task; would not bill to cost-conscious client
5/28/14	6.2	DK	Research case law and statutes in preparation to prepare a motion for preliminary injunctive relief	Document never filed
6/2/14	0.2	DK	Receipt and review of Notice of Appearance of Felicia Brooks, attorney for defendant Buckner	Basic administrative task; would not bill to cost-conscious client
6/3/14	6.0	CH	Legal research in preparation to respond to the motions to dismiss.	Excessive hours; billed prior to two of the motions to dismiss being filed
6/3/14	2.2	CH	Receipt and review of Motions to dismiss filed by Luther Strange and Robert Bentley, outlining our response.	Questionable timing; Bentley and Strange motions to dismiss not filed until 6/6/14
6/7/14	4.5	CH	Legal research in preparation to draft a motion for temporary restraining order and request for immediate injunctive relief.	Document never filed
6/8/14	3.8	CH	Conference with co-counsel regarding briefing required and to strategize our request for injunction.	Document never filed; excessive hours
6/8/14	1.8	CH	Conference with Dr. Bennet, an expert witness.	Expert not relied upon by court; report did not comply with <i>Daubert</i>
6/10/14	2.3	DK	Draft motion for temporary injunction	Document never filed
7/14/14	0.2	DK	Email correspondence with counsel for defendant Davis	Unrelated to claims against AG; relates solely to Probate Judges

Date	Individual Hours	Atty	Description	Reason for Reduction
7/15/14	0.1	CH	Receipt and review of notice of endorsement filed by Don Davis	Unrelated to claims against AG; Relates to probate judges; excessive hours/routine administrative task
8/6/14	7.5	CH	Continue drafting brief in support of summary judgment	Questionable timing - Plaintiffs filed their motion for summary judgment on 6/12/14 (docs. 21-22). Judge Granade denied the motion as premature on 6/13/14 (doc. 25), and did not issue a briefing schedule for timely consideration of the motion until 8/28/14 (doc. 43). No reason to be working on a summary judgment motion at this time
8/15/14	2.2	CH	Continue drafting our brief in support of summary judgment	Questionable timing. See entry for 8/6/14.
8/20/14	0.1	CH	Receipt and review of order adopting magistrate judge's order	Basic administrative task; would not bill to cost-conscious client
8/20/14	2.0	DK	Meeting with Dr. Tom Bennet, our expert	Expert witness not relied upon by Court in issuing ruling; report did not comply with <i>Daubert</i>
8/21/14	9.0	CH	Receipt and review of our expert's report and all accompanying documents; cross check the same against other leading expert opinions to confirm its usefulness; also cross reference a portion of the studies and cites relied upon therein to comply with all requirements of <i>Daubert</i> .	Expert not relied upon by court; excessive hours; report did not comply with <i>Daubert</i>
8/21/14	6.5	DK	Receipt and Review of Dr. Bennet's expert report and review all materials cited by him.	Expert witness not relied upon by Court in issuing ruling; report did not comply with <i>Daubert</i>
8/22/14	1.0	DK	Prepare and file our notice of expert disclosure.	Expert witness not relied upon by Court in issuing ruling; report did not comply with <i>Daubert</i>
8/29/14	0.8	CH	Telephone conference call with DGK and our expert.	Expert not relied upon by court; report did not comply with <i>Daubert</i>

Date	Individual Hours	Atty	Description	Reason for Reduction
9/5/14	0.5	CH	Review various documents filed with the court	Vague; Insufficient detail
10/27/14	7.5	CH	Legal Research for Response brief.	Excessive hours billed; billed total of 65.9 hours for "research" of material for own pleadings
10/28/14	8.2	DK	Legal research in preparation to draft response to AG's motion for summary judgment	Excessive hours
11/30/14	1.0	CH	Update file with memo	Vague; basic administrative task; would not bill to cost-conscious client
1/23/15	0.1	CH	Forward order [awarding plaintiffs summary judgment] to clients	Basic administrative task; would not bill to cost-conscious client
1/23/15	0.5	CH	Memo to file	Vague; insufficient detail
1/25/15	8.5	DK	Begin detailed research to respond to forthcoming appeal and motion to stay.	Excessive hours; no new research should be necessary at this stage of the litigation
1/25/15	7.3	CH	Multiple entries relating to Plaintiffs' motion for clarification and response in opposition to Defendant's motion to stay	Excessive daily hours. Pleading was filed at 10:30AM on a Sunday. Entry is therefore for 7.3 hours before 10:30AM Sunday.
1/26/15	8.9	DK	Receipt and review of Defendant's motion to stay filed with the 11th Circuit. <u>Begin research and analysis of the same.</u>	Excessive hours
1/27/15	14.2	DK	Continue research necessary to prepare response to AG's motion for stay filed with the 11th Circuit	Excessive hours
1/27/15	8.7	CH	In depth legal research necessary to draft response to the Defendant's motion to stay filed with the 11th Circuit	Excessive hours; "detailed research" purportedly began the day before

<b>Date</b>	<b>Individual Hours</b>	<b>Atty</b>	<b>Description</b>	<b>Reason for Reduction</b>
1/28/15	0.7	DK	Receipt and review of various notices of appearances filed and update file to reflect new counsel	Basic administrative task; would not bill to cost-conscious client
1/28/15	0.5	CH	Receipt and review of various notices of appearance filed and update file to reflect counsel	Basic administrative task; would not bill to cost-conscious client
1/29/15	3.5	DK	Receipt and review of APJA's brief on motion to stay. Review cases cited therein.	Unrelated to claims against AG
1/29/15	1.0	CH	Receipt and review of Alabama Probate Judges Association's brief on the motion to stay	Unrelated to claims against AG
2/1/15	8.2	CH	Complete drafting of our Response to the Motion to Stay filed with the 11th Circuit	Questionable timing: Pleading already filed 1/29/15
2/1/15	14.2	DK	Complete and finalize our brief for response to the motion to stay filed with the 11th Circuit	Questionable timing; Past filing date (Plaintiffs' response to motion to stay in 11th Circuit was filed 1/29/15)
2/3/15	18.2	CH	Multiple entries, including "Review cases cited by the Defendant in their SCOTUS petition" (6.0 hours) and "Begin preparing our response to the Defendant's petition before SCOTUS" (11.0 hours)	Excessive daily hours billed; apparent double-billing; all motions to stay relied on essentially the same case law
2/3/15	28.2	DK	Multiple descriptions	Excessive daily hours; impossible to bill 28.2 hours in a single 24-hour period.
2/3/15	2.2	DK	Strategy meeting with paralegal and research clerk	Vague; insufficient detail; excessive hours
2/4/15	17.2	DK	Continue drafting response for filing with SCOTUS	Excessive daily hours; little research should be required by responding to a third stay motion

<b>Date</b>	<b>Individual Hours</b>	<b>Atty</b>	<b>Description</b>	<b>Reason for Reduction</b>
2/5/15	2.8	DK	Complete our brief to SCOTUS	Questionable timing; past filing date (Plaintiffs' brief to SCOTUS was filed 2/4/15)
2/8/15	0.5	CH	Receipt and review of Administrative Order from Judge Roy Moore to the Probate Judges of Alabama	Unrelated to claims against AG
2/9/15	1.2	DK	In person conference with Mark Erwin and other Probate court staff regarding their compliance with the court's order	Unrelated to claims against AG
2/9/15	1.2	CH	In person conference with Mark Erwin and other Probate court staff regarding their compliance with the court's order.	Unrelated to claims against AG
2/11/15	4.5	DK	Plan and prepare for tomorrow's hearing before Judge Granade.	Unrelated to claims against AG; hearing was concerned with legal status of probate judges
2/11/15	4.2	CH	Plan and prepare for tomorrow's hearing before Judge Granade	Unrelated to claims against AG; hearing was concerned with legal status of probate judges
2/12/15	2.8	DK	A/A hearing before Judge Granade	Unrelated to claims against AG; hearing was concerned with legal status of probate judges
2/12/15	2.8	CH	Attend and appear for hearing before Judge Granade; meeting with clients afterward	Unrelated to claims against AG; hearing was concerned with legal status of probate judges
3/10/15	7.3	CH	Receipt and review of writ of mandamus filed with the Alabama Supreme Court to determine how it applies, if at all, to the present case; review several of the citations and arguments therein to determine its applicability to our case	Unrelated to claims against AG; concerned with legal status of probate judges

Date	Individual Hours	Atty	Description	Reason for Reduction
3/10/15	8.2	DK	Receipt and review of writ of mandamus filed with the Alabama Supreme Court to determine how it applies, if at all, to the present case; review several of the citations and arguments therein to determine its applicability to our case	Unrelated to claims against AG; concerned with legal status of probate judges
6/30/15	2.5	DK	Research and review of case law to prepare necessary pleadings with the 11th Circuit	Excessive hours; little or no research required; duplicative
6/30/15	2.2	CH	Researched and review of case law to prepare necessary pleadings with the 11th Circuit.	Excessive hours; little or no research required; duplicative

# **EXHIBIT**

# **B**

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA**

CARI. D. SEARCY and KIMBERLY )  
 MCKEEAND, individually and as parent and )  
 next friend of K.S., a minor, )  
     *Plaintiffs,* )  
     v. )  
 LUTHER STRANGE, in his official capacity as )  
 Attorney General of the State of Alabama, )  
     *Defendant.* )

Civil Action No.  
1:14-cv-208-CG-N

**DEFENDANT’S RESPONSE TO PLAINTIFFS’ MOTION  
FOR ATTORNEYS’ FEES**

**CHALLENGED TIME ENTRIES SORTED BY OBJECTION**

<b>Date</b>	<b>Individual Hours</b>	<b>Atty</b>	<b>Description</b>	<b>Reason for Reduction</b>
4/19/14	8.5	CH	Research relevant cases and pleadings in other matters in order to draft Complaint in this matter	“[B]ackground research” designed to familiarize the attorney with the relevant area of law [is not] compensable. <i>See Case v. United Sch. Dist. No. 233</i> , 157 F.3d 1243 (10th Cir. 1998).
4/24/14	8.5	DK	Research various cases from other jurisdictions and prepare complaint	
4/26/14	3.5	CH	Continue researching relevant cases and pleadings in other matters in order to draft Complaint in this matter	
<b>Subtotal</b>	<b>20.5</b>			
5/13/14	0.9	DK	Initial file set up	Basic administrative task – noncompensable

<b>Date</b>	<b>Individual Hours</b>	<b>Atty</b>	<b>Description</b>	<b>Reason for Reduction</b>
5/15/14	0.2	DK	Receipt and review of correspondence from Brian Hale indicating that he will be representing defendant McDonald.	Basic administrative task; would not bill to cost-conscious client
5/19/14	0.3	CH	Receipt and review of notice of service	Basic administrative task; would not bill to cost-conscious client
6/2/14	0.2	DK	Receipt and review of Notice of Appearance of Felicia Brooks, attorney for defendant Buckner	Basic administrative task; would not bill to cost-conscious client
8/20/14	0.1	CH	Receipt and review of order adopting magistrate judge's order	Basic administrative task; would not bill to cost-conscious client
1/23/15	0.1	CH	Forward order [awarding plaintiffs summary judgment] to clients	Basic administrative task; would not bill to cost-conscious client
1/28/15	0.7	DK	Receipt and review of various notices of appearances filed and update file to reflect new counsel	Basic administrative task; would not bill to cost-conscious client
1/28/15	0.5	CH	Receipt and review of various notices of appearance filed and update file to reflect counsel	Basic administrative task; would not bill to cost-conscious client
<b>Subtotal</b>	<b>3.0</b>			
5/28/14	6.2	DK	Research case law and statutes in preparation to prepare a motion for preliminary injunctive relief	Document never filed
6/7/14	4.5	CH	Legal research in preparation to draft a motion for temporary restraining order and request for immediate injunctive relief.	Document never filed
6/8/14	3.8	CH	Conference with co-counsel regarding briefing required and to strategize our request for injunction.	Document never filed; excessive hours
6/10/14	2.3	DK	Draft motion for temporary injunction	Document never filed

Date	Individual Hours	Atty	Description	Reason for Reduction
<b>Subtotal</b>	<b>16.8</b>			
5/18/14	18.5	DK	Multiple descriptions	Excessive daily hours billed for one day
2/3/15	18.2	CH	Multiple entries, including "Review cases cited by the Defendant in their SCOTUS petition" (6.0 hours) and "Begin preparing our response to the Defendant's petition before SCOTUS" (11.0 hours)	Excessive daily hours billed; apparent double-billing; all motions to stay relied on essentially the same case law
10/28/14	8.2	DK	Legal research in preparation to draft response to AG's motion for summary judgment	Excessive hours
1/26/15	8.9	DK	Receipt and review of Defendant's motion to stay filed with the 11th Circuit. <u>Begin research and analysis of the same.</u>	Excessive hours
1/27/15	14.2	DK	Continue research necessary to prepare response to AG's motion for stay filed with the 11th Circuit	Excessive hours
6/3/14	6.0	CH	Legal research in preparation to respond to the motions to dismiss.	Excessive hours; billed prior to two of the motions to dismiss being filed
10/27/14	7.5	CH	Legal Research for Response brief.	Excessive hours billed; billed total of 65.9 hours for "research" of material for own pleadings
1/27/15	8.7	CH	In depth legal research necessary to draft response to the Defendant's motion to stay filed with the 11th Circuit	Excessive hours; "detailed research" purportedly began the day before
6/30/15	2.5	DK	Research and review of case law to prepare necessary pleadings with the 11th Circuit	Excessive hours; little or no research required; duplicative

Date	Individual Hours	Atty	Description	Reason for Reduction
6/30/15	2.2	CH	Researched and review of case law to prepare necessary pleadings with the 11th Circuit.	Excessive hours; little or no research required; duplicative
1/25/15	8.5	DK	Begin detailed research to respond to forthcoming appeal and motion to stay.	Excessive hours; no new research should be necessary at this stage of the litigation
<b>Subtotal</b>	<b>66.7</b>			
1/25/15	7.3	CH	Multiple entries relating to Plaintiffs' motion for clarification and response in opposition to Defendant's motion to stay	Excessive daily hours. Pleading was filed at 10:30AM on a Sunday. Entry is therefore for 7.3 hours before 10:30AM Sunday.
2/4/15	17.2	DK	Continue drafting response for filing with SCOTUS	Excessive daily hours; little research should be required by responding to a third stay motion
2/3/15	28.2	DK	Multiple descriptions	Excessive daily hours; impossible to bill 28.2 hours in a single 24-hour period.
<b>Subtotal</b>	<b>52.7</b>			
6/8/14	1.8	CH	Conference with Dr. Bennet, an expert witness.	Expert not relied upon by court; report did not comply with <i>Daubert</i>
8/29/14	0.8	CH	Telephone conference call with DGK and our expert.	Expert not relied upon by court; report did not comply with <i>Daubert</i>
8/21/14	9.0	CH	Receipt and review of our expert's report and all accompanying documents; cross check the same against other leading expert opinions to confirm its usefulness; also cross reference a portion of the studies and cites relied upon therein to comply with all requirements of <i>Daubert</i> .	Expert not relied upon by court; excessive hours; report did not comply with <i>Daubert</i>
8/20/14	2.0	DK	Meeting with Dr. Tom Bennet, our expert	Expert witness not relied upon by Court in issuing ruling; report did not comply with <i>Daubert</i>

<b>Date</b>	<b>Individual Hours</b>	<b>Atty</b>	<b>Description</b>	<b>Reason for Reduction</b>
8/21/14	6.5	DK	Receipt and Review of Dr. Bennet's expert report and review all materials cited by him.	Expert witness not relied upon by Court in issuing ruling; report did not comply with <i>Daubert</i>
8/22/14	1.0	DK	Prepare and file our notice of expert disclosure.	Expert witness not relied upon by Court in issuing ruling; report did not comply with <i>Daubert</i>
<b>Subtotal</b>	<b>21.1</b>			
8/6/14	7.5	CH	Continue drafting brief in support of summary judgment	Questionable timing - Plaintiffs filed their motion for summary judgment on 6/12/14 (docs. 21-22). Judge Granade denied the motion as premature on 6/13/14 (doc. 25), and did not issue a briefing schedule for timely consideration of the motion until 8/28/14 (doc. 43). No reason to be working on a summary judgment motion at this time
8/15/14	2.2	CH	Continue drafting our brief in support of summary judgment	Questionable timing. See entry for 8/6/14.
2/1/15	8.2	CH	Complete drafting of our Response to the Motion to Stay filed with the 11th Circuit	Questionable timing: Pleading already filed 1/29/15
6/3/14	2.2	CH	Receipt and review of Motions to dismiss filed by Luther Strange and Robert Bentley, outlining our response.	Questionable timing; Bentley and Strange motions to dismiss not filed until 6/6/14
2/1/15	14.2	DK	Complete and finalize our brief for response to the motion to stay filed with the 11th Circuit	Questionable timing; Past filing date (Plaintiffs' response to motion to stay in 11th Circuit was filed 1/29/15)
2/5/15	2.8	DK	Complete our brief to SCOTUS	Questionable timing; past filing date (Plaintiffs' brief to SCOTUS was filed 2/4/15)
<b>Subtotal</b>	<b>37.1</b>			

<b>Date</b>	<b>Individual Hours</b>	<b>Atty</b>	<b>Description</b>	<b>Reason for Reduction</b>
1/29/15	3.5	DK	Receipt and review of APJA's brief on motion to stay. Review cases cited therein.	Unrelated to claims against AG
1/29/15	1.0	CH	Receipt and review of Alabama Probate Judges Association's brief on the motion to stay	Unrelated to claims against AG
2/8/15	0.5	CH	Receipt and review of Administrative Order from Judge Roy Moore to the Probate Judges of Alabama	Unrelated to claims against AG
2/9/15	1.2	DK	In person conference with Mark Erwin and other Probate court staff regarding their compliance with the court's order	Unrelated to claims against AG
2/9/15	1.2	CH	In person conference with Mark Erwin and other Probate court staff regarding their compliance with the court's order.	Unrelated to claims against AG
3/10/15	7.3	CH	Receipt and review of writ of mandamus filed with the Alabama Supreme Court to determine how it applies, if at all, to the present case; review several of the citations and arguments therein to determine its applicability to our case	Unrelated to claims against AG; concerned with legal status of probate judges
3/10/15	8.2	DK	Receipt and review of writ of mandamus filed with the Alabama Supreme Court to determine how it applies, if at all, to the present case; review several of the citations and arguments therein to determine its applicability to our case	Unrelated to claims against AG; concerned with legal status of probate judges
2/11/15	4.5	DK	Plan and prepare for tomorrow's hearing before Judge Granade.	Unrelated to claims against AG; hearing was concerned with legal status of probate judges

<b>Date</b>	<b>Individual Hours</b>	<b>Atty</b>	<b>Description</b>	<b>Reason for Reduction</b>
2/11/15	4.2	CH	Plan and prepare for tomorrow's hearing before Judge Granade	Unrelated to claims against AG; hearing was concerned with legal status of probate judges
2/12/15	2.8	DK	A/A hearing before Judge Granade	Unrelated to claims against AG; hearing was concerned with legal status of probate judges
2/12/15	2.8	CH	Attend and appear for hearing before Judge Granade; meeting with clients afterward	Unrelated to claims against AG; hearing was concerned with legal status of probate judges
7/14/14	0.2	DK	Email correspondence with counsel for defendant Davis	Unrelated to claims against AG; relates solely to Probate Judges
7/15/14	0.1	CH	Receipt and review of notice of endorsement filed by Don Davis	Unrelated to claims against AG; Relates to probate judges; excessive hours/routine administrative task
<b>Subtotal</b>	<b>37.5</b>			
2/3/15	2.2	DK	Strategy meeting with paralegal and research clerk	Vague; insufficient detail; excessive hours
9/5/14	0.5	CH	Review various documents filed with the court	Vague; Insufficient detail
11/30/14	1.0	CH	Update file with memo	Vague; basic administrative task; would not bill to cost-conscious client
1/23/15	0.5	CH	Memo to file	Vague; insufficient detail
<b>Subtotal</b>	<b>4.2</b>			