COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NO. CA-11-1077

COLLETTE JOSEY COVINGTON AND JADE COVINGTON
Plaintiffs – Appellees

Versus

MCNEESE STATE UNIVERSITY AND THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM
Defendants - Appellants

CIVIL PROCEEDING

On Appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, Docket No. 2001-2355, Division "F," the Honorable Michael Canaday, Judge Presiding

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ORIGINAL BRIEF OF APPELLEES COLLETTE COVINGTON AND JADE COVINGTON

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ASSIGNMENT OF ERRORS

Plaintiffs-Appellees have answered and assert their own assignment of errors.

COVINGTON'S ASSIGNMENT OF ERROR NO. 1:

The Trial Court Erred in Awarding Hopkins Only 4,391.6 Hours Over 10 Years.

(A) The Trial Court Abused its Discretion in Awarding Hopkins Only 4,391.6 Hours When the Suit Record, Time Sheets, Affidavits, and Work Product Establishes that He Earned in Excess of the 5,489.5 Hours Requested Over 10 Years.

(B) The Trial Court Abused its Discretion in Awarding Hopkins Only 4,391.6 Hours Over 10 Years When the Affidavits of Four Attorney Experts Experienced in ADA and/or Federal Fee Shifting Cases Opined that This Case Required that He Reasonably Expend "6,000-6,500" Hours, and When No Counter Affidavits Were Filed and No Disputing Testimony Remains in The Record.

(C) The Trial Court Abused its Discretion in Awarding Hopkins Only 4,391.6 Hours Over 10 Years When Other Courts Consistently Find It is an Abuse of Discretion to Award Less Than 650 Hours Per Year in Comparable Cases.

(D) The Trial Court Abused its Discretion in Reducing Hopkins's Time by 1,097.9 Hours Based on His Lack of Experience When the Evidence in The Record Establishes He Worked More Efficiently and With Far Greater Results Than His Opponents, Even Before Reducing 710 Earned Hours for Billing Judgment.

COVINGTON'S ASSIGNMENT OF ERROR NO. 2:

The Trial Court Erred in Awarding an Excessively Low Hourly Rate Contrary to the Law and Evidence.

(A) In Setting the Hourly Rate, the Trial Court Erred as a Matter of Law by Failing to Consider the Nature of the Case and the Need to Attract Competent Counsel of Equal Caliber for Complex Specialized Litigation.

(B) In Setting the Hourly Rate, the Trial Court Erred as a Matter of Law by Failing to Consider the True Market Value of Counsel's Services, Such As Effecting a $13.8 Million Renovation of McNeese, as provided by *Perdue v. Kenny A.*, 130 S. Ct. 1662 (U.S. 2010).

(C) In Setting the Hourly Rate, the Trial Court Erred as a Matter of Law by Failing to Compensate for the Ten Year Payment Delay, Lack of Prejudgment Interest, and Lost Opportunity Cost and Value of Money, as provided by *Perdue v. Kenny A.*, 130 S. Ct. 1662 (U.S. 2010).

(D) The Trial Court Erred in Awarding a Rate of $240 When Four Experts Experienced in ADA and/or Federal Fee Shifting Cases Opined That the Local Rate "Exceeds" $265 and Should be Enhanced to $795 under the Case Circumstances, and When McNeese's Own Expert Charges $350 per Hour and Raised No Objection to Plaintiffs' Rate Being Enhanced.

(E) The Trial Court Erred in Failing to Award Hopkins At Least His Own Standard Rate for Simple Cases in this Highly Complex and Contingent Case with a 10 Year Payment Delay.

(F) The Trial Court Erred in Awarding a Rate of $240 when the Relevant Regional Case Law Establishes a Prevailing Rate Between $450 and $805 for Complex Civil Rights Work.

(G) The Trial Court Erred as a Matter of Law When It Considered McNeese's Status as a Public Entity as a Factor in Denying an Enhancement, Which Violated Case Law and United States Constitution Article VI, cl. 2, and After This Court Expressly Rejected McNeese's 11th Amendment Immunity Claim.

(H) The Trial Court Erred as a Matter of Law in Denying a Rate Enhancement Based on a Hardship Defense Which Was Never Pleaded, Never Proven, Directly Contradicts the Record, and Was Preemptively Denied by This Court under the Standard Provided by the United States Supreme Court Case of *Olmstead v. L.C.*, 527 U.S. 581, 595 (S.Ct. 1999).

COVINGTON'S ASSIGNMENT OF ERROR NO. 3:

The Trial Court Erred by Failing to Award a Reasonable Fee under Louisiana Law.

(A) Whether the district court erred as a matter of law in not considering the Louisiana factors for awarding attorneys' fees under cases such as *Corbello v. Iowa Prod. Co.*, 806 So. 2d 32, 51-52 (La.App. 3 Cir. Dec. 26, 2001), *rev'd on other grounds*.

ISSUES PRESENTED FOR REVIEW

Covington disputes the incorrect manner in which Appellant-Defendants' frame their Issues of Review (*i.e.* claiming Hopkins "failed to follow virtually every federal fee-shifting rule") and submits the following issues for review:

1. Whether the district court abused its discretion in awarding Hopkins only 4,361.6 hours when the suit record, time sheets, affidavits, and work produce establishes that he earned in excess of the 5,489.5 hours requested over 10 years.

2. Whether the district court abused its discretion in awarding Hopkins only 4,361 hours over 10 years when the affidavits of four attorney experts experienced in ADA and/or federal fee shifting cases opined that this case required that he reasonably expend "6,000-6,500" hours, and when no counter affidavits were filed and no disputing testimony remains in the record.

3. Whether the district court abused its discretion in awarding Hopkins only 4,361.6 hours over 10 years when courts consistently hold it is an abuse of discretion to award less than 650 hours per year for comparable cases.

4. Whether the district court abused its discretion in reducing Hopkins's time by 1,097.9 hours based on his lack of experience when the evidence in the record establishes that he worked more efficiently and with far greater results than his opponents, even before reducing 710 earned hours for billing judgment.

5. Whether the district court erred as a matter of law in awarding an excessively low hourly rate by not considering the need to attract competent counsel to "fairly place the economical burden" of litigation on the wrongdoer, as provided by *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir.1974), *aff'd in part by Perdue v. Kenny A.*, 130 S. Ct. 1662 (U.S. 2010).

6. Whether the district court erred as a matter of law in awarding an excessively low hourly rate by not considering the "true market value" of Covington's attorneys (including a $13.8 million renovation and ancillary societal benefits), as provided by *Perdue v. Kenny A.*, 130 S. Ct. 1662 (U.S. 2010).

7. Whether the district court erred as a matter of law in awarding an excessively low hourly rate by not considering the 10 year payment delay, lost value of money, lack of prejudgment interest, and lost opportunity cost, as provided by *Perdue v. Kenny A.*, 130 S. Ct. 1662 (U.S. 2010).

8. Whether the district court erred in awarding a rate of $240 when four attorney experts experienced in ADA and/or federal fee shifting cases opined that local rate "exceeds" $265 and that this case merited an enhancement of 3.0 to an effective rate of $795 and when McNeese's own expert charges $350 per hour and raised no objection to plaintiffs' rate being enhanced.

9. Whether the district court erred as a matter of law in awarding an excessively low hourly rate by not considering Houston, Texas as the "relevant legal community" for lead counsel Hopkins, due to the lack of attorneys practicing Title II ADA law in Lake Charles and under the recent federal Fifth Circuit Court of Appeal's decision in *McClain v. Lufkin Indus.*, 649 F.3d 374, 379, 381, 382 (5th Cir. 2011).

10. Whether the district court erred in not awarding Hopkins at least his own standard rate (for routine matters with little risk of non-payment) in a highly contingent case with great success and a 10 year payment delay.

11. Whether the district court erred in awarding a rate of $240 when the relevant regional cases establish a prevailing rate between $450 and $805 for complex civil rights work.

12. Whether the district court erred as a matter of law in denying a rate enhancement to protect a state entity from the effects of federal civil rights laws, in violation of established case law and United States Constitution Article VI, cl. 2, and after this Court already expressly rejected an 11th Amendment immunity claim.

13. Whether the district court erred as a matter of law in denying a rate enhancement based on a hardship defense which was never pleaded, never proven, directly contradicts the record, and was preemptively denied by this Court under the standard provided by the Supreme Court in the case of *Olmstead v. L.C.*, 527 U.S. 581, 595 (S.Ct. 1999).

14. Whether the district court erred as a matter of law in not considering the Louisiana factors for awarding attorneys' fees under cases such as *Corbello v. Iowa Prod. Co.*, 806 So. 2d 32, 51-52 (La.App. 3 Cir. Dec. 26, 2001), *rev'd on other grounds*.

15. Whether to award costs and attorneys' fees for appeal.

16. Whether to award sanctions for frivolous appeal.

MAY IT PLEASE THE COURT:

Plaintiffs-Appellees, COLLETTE JOSEY COVINGTON and JADE COVINGTON, ("Covington") respectfully submit, through undersigned counsel, their Original Brief in the captioned matter, in compliance with the Uniform Rules of the Louisiana Courts of Appeal and the Local Rules of this Honorable Court.

INTRODUCTION AND STATEMENT OF THE CASE[1]

The sole issue before this Court is the appropriate compensation for six attorneys in the second longest civil case in Calcasieu Parish resulting in one of the largest single plaintiff Americans with Disabilities Act ("ADA") judgments in history.[2] Ironically, the very defendant that "militantly" fought this case and now opposes any award of attorneys' fees has been the greatest beneficiary of the judgment. McNeese will receive $13.8 million to correct approximately 15,000 ADA violations affecting 1.35 million square feet of buildings and is virtually reconstructing its campus upon the labors of Covington's counsel. Its updated campus will serve generations of students and faculty, and the community will reap lasting benefits from increased accessibility. Moreover, the case has expanded to result in statewide compliance at the entire University of Louisiana System's eight campuses.

These results required a decade of effort involving 23 lawyers (including experts). Covington's counsel participated in 13 days of trial and hearings and filed nearly 700 pages of original briefs and 7,500 pages of exhibits. This case required, among other things, 16 depositions, a summary judgment, several injunctions, six motions to compel, and two protective orders in two states. Plaintiffs' counsel's methodical work spurred a federal

[1] There are three appellate records in this matter. Citations to CV-08-505 are prefaced by (1 R.) and citations to CV-11-1077 are prefaced by (2 R.). There are no citations to CW-10-114. For the court's convenience, and pursuant to Internal Rule 24, Covington intends to file a Corresponding CD-Rom Brief.

[2] Covington received an injunction, $400,000 in cash, a six year scholarship, and attorneys' fees (under appeal) of $1.3 million. As a result of this case, McNeese will receive $13.8 million to update its campus, for a total case value of $15.5 million. The Equal Employment Commission's 2010 nationwide ADA analysis found the largest monetary relief provided to a single client in a Title I ADA case was $391,000. The largest class action judgment was $6.2 million with an average of $26,300 per plaintiff. *See* "The U.S. Equal Employment Opportunity Commission: Twenty Years of ADA Enforcement, Twenty Significant Cases", http://www.eeoc.gov/eeoc/history/45th/ada20/ada_cases.cfm. There has since been one larger class action, but the class members are not expected to receive a record-breaking amount. Covington's counsel have identified cases in which plaintiffs received more attorneys' fees than Covington but only nominal client benefits and one Title II case with a $400,000 judgment but no attorney's fees or injunction. Thus, upon information and belief, Covington may have received the largest single plaintiff ADA judgment in history.

investigation and enforcement action, and the parties have filed 15 appellate briefs (and counting) in three appellate records with 55 volumes. Not surprisingly, the national media has followed this case for several years. (2 R. 1:201-05; 35:8713-17; 36:8787-88).

Covington's attorneys' work product further illustrates the scope of this undertaking. Their 55 boxes of case files and exhibits take nearly 85 linear feet of shelf space stretching more than a quarter the length of a football field and necessitated that lead counsel move from his apartment to a larger home where he could devote an entire floor to storing them. Stretched end-to-end, these papers would reach over 50 miles—the distance from Lake Charles to Crowley. This is in addition to 17,684 electronic files requiring 21.9 gigabytes.

Covington, McNeese's counsel, and even McNeese itself have all been well compensated in this case. The only case participants who have gone unpaid are the attorneys whose work made this happen, particularly lead counsel Seth Hopkins ("Hopkins") who put his career on hold and moved out of state to support himself with contract work while prosecuting this case, "to the preclusion of more lucrative work he could have been performing." (Judgment, 2 R. 39:9663; 41:10055). The record reflects that over 10 years, he often worked grueling 18 to 20 hour days and devoted weekends, vacations, and holidays to his indigent client based on his moral commitment to this case.[3]

In order to finally be paid, Hopkins submitted 10 years of detailed timesheets recorded contemporaneously in great narrative detail in tenth hour increments and supported by affidavits of reasonableness from four expert attorneys, including three from the only attorneys in Calcasieu Parish known to have handled an ADA case and one from a national expert who has evaluated 2,500 fee bills for reasonableness (2 R. 20:4958-60; 4977-94; 32:7918; 40:9942-43; 9971). These four experts opined that Hopkins sought only 83% of the 6,500 hours that they expected would be reasonably required in this case. (2 R.31:7644-61). (*See* pp. 24-26). Moreover, he sought approximately 86% of the 675 average hours per year awarded by Louisiana and federal Fifth Circuit courts in cases of

[3] 2 R. 40:9963-64; 9990-94; 41:10041; 10044-49; 44:10800; 10782-86; 35:8718. This work pattern was supported by the testimony of three attorneys as well as time-stamped emails and other evidence.

similar length and complexity. (2 R. 31:7641-44). (*See*, pp. 26-27). Finally, when compared with McNeese's lawyers, he produced four times as much work product per hour expended and achieved far greater results. (*See* pp. 27-28).

On September 1, 2010, McNeese conceded that Plaintiffs were not only entitled to attorneys' fees, but that, "the fees in this case are likely to be Plaintiffs' single largest category of damages." Moreover, McNeese suggested the court should consider an enhancement to the *Lodestar* under *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974) when it admitted that Covington's success would be the "most critical factor" in awarding fees. (2 R. 24:5813-15). Its own expert did not dispute this, yet McNeese now fails to even cite *Johnson* in its brief.

During the six day trial on attorneys' fees, McNeese forfeited any meaningful challenge of Hopkins's time and introduced ***no witnesses***, ***no affidavits***, ***no relevant evidence***, and raised ***no objection*** when its sole expert's testimony was stricken from the record—stricken testimony ***it now quotes on appeal***. (2 R. 39:9636-57 (Motion to Strike); 2 R. 39:9668 (Order striking)). It questioned Hopkins about only ***two entries*** containing ***16.3 hours*** of time and ***expressly waived objection*** to the rest—making no material complaints about either the substance or narrative detail of his timesheets.[4] Instead, McNeese sought to evade its financial responsibilities by manufacturing *de minimis* quarrels about the clerical manner in which ***1.5%*** of his hours were reported. These complaints were addressed six weeks prior to trial and were again thoroughly explored at trial. (*See* pp. 16-20, 23-24).

McNeese's trial strategy was to wantonly attack unpaid Hopkins. At various times in briefs and argument, it called him "slow," "greedy," and unethical, blamed him for undermining the public's confidence in the law, and accused him of "fraud," "shenanigans," "propaganda," and "misconduct." McNeese referred to him as a "pretty please" lawyer for extending professional courtesies and claimed he was incompetent, "obsessive," dishonest,

[4] 2 R.41:10233. *See* discussion, p. 11-12. While McNeese referred to other entries, it asked no substantive questions about them.

had imaginary friends, committed a "felony," and should be "disbarred." It scoured the Internet and social media sites in an attempt to discredit him (2 R. 44:10873; 10860-62), sought his health, employment, and financial records, investigated his friends, and harassed his former employer until it filed a protective order against McNeese. (2 R. 24:5902-14). In closing arguments, McNeese even resorted to showing a PowerPoint cartoon depicting him as a liar in a desperate attempt to convince the trial judge not to pay him. (2R.45:11020-21).

The trial court found Hopkins's records credible and appropriately declined to acknowledge McNeese's slanderous attacks. Rather than concede the obvious and suggest rational compensation, McNeese argues that the trial court committed an abuse of discretion in awarding anything at all. In doing so, it fails to cite either the standard of review or the correct standard for denying attorneys' fees, irreparably damaging its credibility in this case and bolstering Covington's claim for appellate sanctions.

The trial court awarded Covington approximately $1.3 million in attorneys' fees but, in doing so, erred in reducing 1,079.9 hours and failed to properly apply the factors in *Perdue, et al. v. Kenny A., et. al*, 130 S.Ct. 1662 (2010), *Johnson, supra*, and *State, Department of Transportation and Development v. Williamson*, 597 So.2d 439, 441-42 (La. 1992). This error deprived Covington of approximately $3.8 million in attorneys' fees, which the trial court stated was to protect the taxpayer from "those responsible for the seemingly deliberate disregard for the responsibilities of McNeese." (Judgment, 2 R. 39:9665). Applicable case law and expert testimony establishes Covington's fee award should be $5.1 million—a mere fraction of what ***McNeese itself is receiving*** to right its wrongs due to the decade of labor expended by Covington's counsel.

McNeese's appeal is consistent with its strategy of prolonging this case and manufacturing credibility attacks, no matter how many times they are disproven. The last time Covington was before this Court, the panel criticized McNeese's bad "attitude" and suggested that Covington should have filed sanctions for McNeese's frivolous appeal. This time, she does and seeks additional attorneys' fees and costs of appeal.

FACTS AND PROCEDURAL HISTORY

A history of discrimination. McNeese neglects to provide the Court with the astonishing history of this litigation—a history which makes it clear why Hopkins was so passionate about this case and why it required so many hours and so much skill and doggedness to prosecute. In 2001, wheelchair-bound Covington filed suit when she was forced to urinate on herself and was injured in the McNeese Student Union ("Old Ranch") restroom. Neither that restroom—nor any other at McNeese—complied with the ADA or related state and federal statutes dating to the 1960s. McNeese's approximately 15,000 violations were found even in public buildings which were brand new or still being planned for construction as recently as 2009 with a disregard for long-established building codes.[5]

Covington's story typifies that of hundreds of disabled students, whose plights were documented by McNeese's own student media for 20 years. (2 R. 23:5690-97). In 1996, Covington was a McNeese honor student, student senator, and University Ambassador with 87 credits toward a degree in Early Elementary Education. She began having orthopedic problems as a senior and could no longer access her classes on McNeese's non-compliant campus. This caused her 3.1 GPA to plunge to 2.07 and forced her to drop 92 of the 125 credit hours she attempted over the next four years. (2 R. 2:358-84 at 358-60).

Each semester, Covington pleaded with McNeese's Director of Services for Students with Disabilities Tim Delaney, ("Delaney") whose own office was inaccessible, for modest accommodations such as first floor classes and unlocked doors at the only ramps into buildings. (2 R.358-84 at 361). He denied each request and admitted that while McNeese received $50,000 per disabled student in grant money, it would not accommodate those in wheelchairs, thus forcing most of them to resign.[6] Not surprisingly, no wheelchair-bound student is known to have graduated from McNeese prior to 2004. (2 R. 22:5389).

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[5] This case resulted in a 5,600 page evaluation documenting these violations. (2 R. 2:347-19:4651 and 26:6292-31:7608). This report was filed together but is split into two sections in the record.

[6] Delaney admitted McNeese does not accommodate those in wheelchairs. He further accused them of purchasing their wheelchairs at "pawnshops" to fake their disabilities, and he pretended not to know where the Old Ranch was located when asked why he could not help Covington. (1 R. 2:474-78; 5:1004-05; 2 R. 23:5695).

Desperate to help herself and her peers, Covington started a student organization to raise awareness of this problem, to no avail. (2 R. 2:358-384 at 358-59).

Because of her declining GPA, McNeese stripped Covington of financial aid and denied her six financial aid appeals, until McNeese's president instructed her to stop appealing. She lost her student loan deferments, and with no degree or ability to attend McNeese, her loans defaulted. McNeese reported her to the credit bureaus and repeatedly threatened to sue her for not paying the loans she accumulated while trying to take classes on McNeese's inaccessible campus. (2 R. 23:5745-50).

McNeese launches a "militant defense." Covington might have finally dropped out of school if she had not learned that Hopkins, a former McNeese classmate, had completed law school. He agreed to help recover her medical expenses and persuade McNeese to spend $4,000 so that those in wheelchairs would have ***one*** accessible bathroom on campus. McNeese refused, and this case soon revealed the magnitude of its violations.

As this Court recognized, McNeese had not made even a basic survey of its buildings or drafted a transition plan as required by law.[7] Moreover, it stated that it would ***not*** comply with these regulations and had no fear of litigation. Because McNeese would not identify its violations, it did not know how much ADA funding to request or what it would do if such funding were granted.[8] Instead, it spent its ADA money on "other things" and plastered signs around campus falsely claiming that its buildings complied with the law.

Once Covington filed suit, McNeese accused her of fraud and claimed she was insane. It parked a black SUV outside her home for two years to film her 12-year-old daughter's ritual of loading her wheelchair into the family car for weekly grocery and medical appointments (2 R 1:208-214; 2:361) and sent her 400 miles round-trip to an IME with a "forensic psychiatrist" who refused to accept its hypothesis that she was crazy and faked her disabilities. McNeese claimed—with no evidence—an elaborate conspiracy

[7] These were required before 1992 and 1995, respectively, under 28 CFR 35.105 and 28 CFR 35.150(d).

[8] Prior to 2009, McNeese never asked for more than 20% of its ADA funding needs (2 R. 22:5343-48; 23:5695) even as it raised salaries to the highest levels in Louisiana and accumulate massive surpluses. (2 R. 22:5377-83).

between Covington, her physicians, and the Social Security Administration for Covington to endure unnecessary surgeries so she could sue McNeese for a bathroom.[9] McNeese attacked Covington so viciously and with so little provocation on appeal that this Court later held, *sua sponte,* that it would have awarded sanctions if she had requested them.[10]

McNeese President Dr. Robert Hebert ("Hebert") testified on February 2, 2005 that McNeese would never use its $1.1 million in surplus ADA funds for compliance.[11] He further admitted he did not regard it as a "high priority" or "fundamentally important" for those with disabilities to receive an education:

> Whether or not it's fundamental for them [those with disabilities] to get into that student union annex or that it's fundamentally important for them to obtain an education, I would question that. I'm not sure I would regard it as a high priority. (1 R. 3:501).

Hebert asserted that disabled "students" should pay for renovations if they wanted to access the Old Ranch. (1 R.2:490-92, 503). In fact, Covington and other disabled students gave McNeese money for this purpose (2 R. 2:358-60) and when Hopkins even offered to help pay to upgrade the Old Ranch for his client, McNeese criticized him (2 R. 42:10390).

McNeese ridiculed the plight of those with disabilities and stated in court pleadings—without embarrassment or shame—that it did not need compliant bathrooms because the ADA did not protect the right to urinate. (2 R. 1:43-44; 35:8747). It blamed Covington, who now uses a catheter, for not learning to hold her bladder all day and stated on the record that it would simply not follow federal law despite receiving $61,878,859 in federal funding in the last seven years alone (2 R. 22:5362-74) and spending a ***billion***

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[9] 2 R. 1:208-214. Until 2009, McNeese concealed its ***own infirmary's*** diagnosis that Covington was disabled, even as it argued to this Court in 2008 that she was not disabled because her "credibility is lacking" and she has a "significant problem with accuracy or the truth" (2 R.1:42).

[10] "Further, in essence, McNeese's sole basis for not conceding that Covington has a record of her impairments is that Covington, prior to this alleged incident, endured two knee surgeries, walked with forearm crutches for over a year, used a wheelchair for a month, and continues to use a wheelchair to this day, all so that she could fake an injury and bring this suit. This is completely unfathomable, especially when one considers that for McNeese's concoction to have merit, with respect to the seizure disorder, Covington would have to have faked seizures since 1991 all the while fooling Dr. Shamieh. Moreover, this hypothesis is completely unsupported by any evidence in the record. . . . ***Had Covington brought an action for frivolous appeal on this particular issue, it would seem that this court would have granted such a request.***" *Covington v. McNeese,* 996 So.2d 667, 678-79. (2 R. 1:141-42).

[11] Louisiana taxpayers provided McNeese with a "Building Use Fund" which accumulated multi-million dollar surpluses during this case. Hebert testified in 2005 that McNeese would not use this money for ADA compliance. Five years later, Covington's case finally reversed this policy. (2 R. 23:5600-5610).

dollars since the ADA's passage. (McNeese's $75 million annual budget is not in dispute).

Covington files summary judgment. In January, 2006, Covington filed for summary judgment, injunctive relief, and attorneys' fees. After requiring a full year to research, McNeese responded and claimed that Covington made a "mountain out of a molehill" and accused her of an "all out ADA assault" by seeking to have just ***one*** of McNeese's 15,000 ADA violations corrected. (2 R. 1:35, 69). McNeese raised numerous outrageous defenses which perplexed both the trial court, and later, this Court.[12] After three days of oral argument, the Honorable Wilford Carter praised Covington for bringing this problem to McNeese's attention, granted her summary judgment and ruled on January 24, 2007 that McNeese would be required to pay "substantial" attorneys' fees. The court requested Covington's counsel's updated timesheets to make its award and warned McNeese of the costs of appealing or prolonging the case. (2 R. 23:5562-63).

Failing to heed the court's instructions, McNeese appealed. On November 5, 2008, this Court published its longest civil opinion of 2008, devoting 32 pages to this case and concluding that McNeese's basis for appeal was not only meritless, but its arguments: sanctionable, "frivolous," a "concoction," "completely irrational," "indefensible," having "audacity," and "absurd." This Court held:

> We cannot fathom that McNeese felt no need, regardless of whether it was required by law, to upgrade a single women's restroom into ADA compliance in a building that houses, *inter alia*, the two main student cafeterias on campus, offices for student government and activities, and a state-of-the-art computer laboratory. McNeese's decision to ignore a federal mandate is reminiscent of the intolerance of the past. We had hoped that the days where a court has to step in to ensure that people were treated equally under the laws of this country were gone. Yet, still, McNeese is emboldened enough to bring such a case to an appellate court where a published, written opinion will forever memorialize its discrimination against this country's disabled citizens. It is hoped that McNeese will reassess its attitude toward its disabled students. It is also hoped that McNeese will prepare and publish a transition plan as required by the ADA. (2 R. 1:157).

McNeese's request for a rehearing and its writ application were denied.

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[12] For instance, McNeese claimed that a $4,000 bathroom upgrade would cause undue hardship to its $75 million per year budget. When all else failed, it argued that it ***complied*** with the ADA. On November 13, 2008, McNeese's counsel wrote this Court to apologize for making this misrepresentation during oral arguments, yet maintained the claim in its writ application to the Supreme Court.

McNeese retaliates and becomes the subject of a federal investigation. McNeese's actions attracted national attention, including that of the United States Department of Justice Civil Rights Division ("U.S. DOJ"), which reviewed Hopkins's evidence and declared McNeese's discrimination to be a matter of national significance. The U.S. DOJ flew three lawyers from Washington, D.C. to Lake Charles and warned McNeese to cease retaliation against Covington and her counsel.[13] It also required that McNeese send an anti-retaliation email to its 8,487 students and employees to assure that its officials understood the consequences of retaliation. (2 R. 1:215-16).

The ensuing investigation resulted in a compliance decree against the entire University of Louisiana System's eight campuses.[14] The U.S. DOJ later sent a nationwide press release identifying McNeese's ***counsel's*** unreasonable positions in *Covington* as the basis for its enforcement action, stating:

> The United States initiated an investigation of the university ***after the state attorney general's office took the position*** – in private ADA litigation against the campus – that it was not required to have an accessible toilet room in its primary student union building. (2 R. 35:8706-17 at 8713).

Yet McNeese continued to retaliate against anyone associated with this case. For instance, McNeese Physics Professor Dr. Giovanni Santostasi became confined to a wheelchair in late 2009 and signed an affidavit for Covington describing the difficulties he encountered on campus. Soon after, someone with after-hours access spray-painted "**DEGO DIE**" on his office door and sent an email from the McNeese server stating:

> DEGO DIE !!!!!!!!!!!!!!! No Degos or cripples at McNeese. You complain and talk too much. Shut up or you will die !!!!!!!!!!!! You have been warned. Your killer, Whiteboy (2 R. 20:4967-71 at 4970).

McNeese responded by ***firing*** Dr. Santostasi because he might "hurt himself" on campus in a wheelchair. Dr. Santostasi had been repeatedly rated the best professor in the

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[13] 2 R. 23:5688-89. On September 30, 2008—the day before oral arguments before this Court—McNeese sought to silence Covington's counsel by attempting to file a disciplinary complaint against him. McNeese alleged that this case "ruined" its "good name". The complaint was refused and the U.S. DOJ warned McNeese to cease such retaliation against counsel or face sanctions under 42 U.S.C. § 12203. The trial court also later ordered McNeese to cease retaliation against Hopkins. (2 R. 20:4950-57).

[14] The investigation expanded after Hebert testified in this case that the other colleges in the UL system—one of the 20 largest in the nation—also violated the ADA. (2 R. 36:8785; 23:5678-80).

Physics Department, brought enormous grant money to McNeese, and was affiliated with prestigious associations which brought honor to McNeese. He has since sold his home, fled Louisiana in fear, and filed suit against McNeese.[15]

McNeese criticizes this Court and attacks the trial judge. After this Court's November 5, 2008 ruling, McNeese repeatedly criticized the ADA and called the Third Circuit "wrong" for ruling that Covington was disabled and entitled to attend McNeese.[16] It still refused to acknowledge her disabilities and rejected the courts' rulings, forcing her to seek a new injunction. Two days before McNeese was to be ordered into compliance and respond to six motions to compel and sanctions for false discovery, it again delayed the case—this time by forcing Judge Carter's recusal, claiming he was "paranoid" and could not be fair to his own *alma mater*.[17]

McNeese admits that it was wrong and credits Covington's work with providing it with a $13.8 million windfall. After the recusal, the Honorable Michael Canaday was assigned this case, and McNeese unexpectedly agreed to a 14-point Consent Injunction on April 23, 2010. For the first time—***3,260 days after suit was filed***—McNeese acknowledged that Covington is disabled, has a right to attend college in a wheelchair, and is a prevailing party entitled to attorneys' fees. The Injunction provides Covington and the U.S. DOJ with concurrent rights to enforce the $13.8 million ADA settlement. (2 R. 36:8773-85; U.S. DOJ#204-33-109). Moreover, Covington received $400,000, a six year scholarship with paid tuition, books and supplies, and McNeese judicially admitted:

> Defendants will expend a substantial sum of money to bring the McNeese campus into compliance with the ADA for the benefit of Covington and other disabled students. The parties stipulate that Covington's actions have and will result in substantial changes both to the facilities at McNeese and McNeese's policies toward the disabled. (2 R. 20:4953-57 at 4953-54).

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[15] 2 R. 20:4967-71. (*See also* 2 R. 2:386-89 and *Santostasi v. Board of Supervisors for the University of Louisiana System, et. al.*, 2:10-CV-01799, filed 12/3/10, W.D. La.).

[16] For instance, McNeese counsel Michael Veron suggested during Edward Fonti's deposition that this Court was "wrong" for finding wheelchair-bound Covington disabled. ("Have you ever criticized the Court for being wrong on the facts?" "Have you ever criticized the Court for being wrong on the law?") (2 R. 36:8851-52).

[17] 2 R.19:4652-4890. McNeese participated in the recusal, which was technically filed by the Criminal Division of the Louisiana Attorney General's Office.

As a result of this case, McNeese is being provided with the $13.8 million required to fully comply with the ADA. (Judgment, 2 R. 39:9665; 23:5590-5612). This is money McNeese would never have requested—much less received—had Covington's counsel not, in the words of Judge Canaday, "passionately pursued the interests of his clients" and "worked tirelessly in the face of aggressive opposition." The trial court awarded attorneys' fees, (pleaded at 2 R. 20:4995-21:5110) under various provisions, including 42 U.S.C. § 12205 and 42 U.S.C. § 1988, which are the subject of this appeal.

ARGUMENT

I. RESPONSE TO SPECIFICATION OF ERROR 1:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ACCEPTING HOPKINS'S RECORDS.

A. The Factual Findings upon Which Attorneys' Fees Are Based Are Reviewed Under the Abuse of Discretion Standard.

Once a plaintiff is determined to be a prevailing party, the district court's discretion is limited, and an award of attorneys' fees is virtually obligatory.[18] The scope of a fee inquiry is limited and should not result in secondary protracted litigation.[19] The factual findings upon which a district court bases a fee award cannot be overturned except upon clear abuse of discretion.[20] Moreover, the "[r]eview of purportedly excessive attorney fees should be tempered with judicial restraint." *Oreck Direct v. Dyson, Inc.*, 2009 U.S. Dist. LEXIS 35530 at *15 (April 7, 2009), *citing National Information Services, Inc. v. Warren Gottsegen, et al.*, 737 So.2d 909 (La.App. 5 Cir. 6/1/99).

B. Hopkins Met His Burden and Established He Incurred 5,489.5 Hours, Which McNeese Failed to Properly Challenge.

A prevailing party satisfies the burden of proving his fee by submitting timesheets

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[18] "Although this fee-shifting provision is couched in permissible terminology, awards in favor of prevailing civil rights plaintiffs are virtually obligatory." *Gay Officers Action League, et al. v. Commonwealth of Puerto Rico*, 247 F.3d 288, 293 (1st Cir. 2001). *See also Barrios v. Cal. Interscholastic Fed'n,* 277 F.3d 1128, 1134 (9th Cir.2002) (quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983)) ("'The Supreme Court has explained that in civil rights cases, the district court's discretion is limited. **A prevailing party under the ADA 'should ordinarily recover an attorney's fee** unless special circumstances would render such an award unjust.'")

[19] *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

[20] "The trial court is vested with great discretion in arriving at an award of attorney fees. The exercise of this discretion will not be reversed on appeal without a showing of clear abuse of discretion." *Kem Search, Inc. v. Sheffield*, 434 So.2d 1067, 1070 (La.1983). *See also Singletary v. State Farm, et al.*, 982 So.2d 216 (3rd Cir. 2008).

and affidavits. As the federal courts hold, "Submission of itemized time records, coupled with counsel's affidavits that the work was performed, is certainly *prima facie* showing that the work and hours referenced in the fee petitions are accurate." *Liger v. New Orleans Hornets*, 2010 U.S. Dist. LEXIS 107410 at *28 (E.D.La. Aug. 3, 2010).

Contrary to McNeese's claim that it has no burden, once a party submits time records, the burden then shifts to the opposing party to point out which entries it contests, explain why each is not reasonable in sufficient detail to allow the prevailing party the opportunity to respond, and propose a more reasonable amount. *See Bell v. United Princeton Props, Inc.*, 884 F.2d 713, 720 (3rd Cir. 1989) ("...the adverse party's submissions cannot merely allege in general terms that the time spent was excessive.") Moreover, a court cannot decrease a fee award based on factors not raised by the adverse party. *Id. See also Americans with Disabilities Act Practice & Compliance Manual*, (Lawyers Cooperative Pub.) § 4:206. The Louisiana Eastern District also held last year:

> Defendant acknowledges that the Court charged the Hornets with identifying on a line-by-line basis every time entry with which the Hornets took exception. For, if it is impossible for counsel who are most familiar with the litigation to suggest what is improperly charged time and why that is, in fact the case, the Court is in no better position to second-guess what counsel are seeking [to have reduced] in fees.

Liger, et al. v. New Orleans Hornets 2010 U.S. Dist. LEXIS 107410 at *30 (E.D. La. Aug. 6, 2010).

McNeese had four opportunities to gather facts and argue its burden—first in discovery, second at Hopkins's deposition, third, in its briefings, and finally at trial. Yet by trial, McNeese only directly challenged two entries representing 16.4 hours of work[21] and ***expressly waived objection*** to the rest.[22] On appeal, it complains about one of these entries.

On December 9, 2004, Hopkins spent 3.4 hours learning that McNeese lacked a campus accessibility map mandated under the ADA. This discovery resulted in the U.S. DOJ forcing McNeese to create this map and put it online. (2 R. 36:8781-82 § 24(c)).

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[21] McNeese referred to other entries but asked no questions about the substance of work being performed. The only two entries questioned in any detail were June 1, 2003 and Dec. 9, 2004 (2 R.42:10500-43:10507; 10512-13).

[22] "MR. VERON: ... let us go through cross and then let them respond only to the objections we've raised rather than try to anticipate things that we probably won't go into. Our actual list on cross may not be nearly as long as they're trying to defend." (2 R.41:10233).

McNeese's counsel printed that map from the Internet before trial and ridiculed Hopkins for not being able to do the same thing in 2004—***five years before*** the map even existed.[23] Hopkins welcomed McNeese's questions about this entry and explained his work in detail. (2 R. 43:10501-07). He anticipated more questions about his entries, but they never came.

Instead, McNeese abandoned its burden and tallied Hopkins's time into broad, arbitrary, inaccurate, and unhelpful categories and complained about the results. For instance, it attempts to deceive this Court by incorrectly stating that he spent 1,200 hours—10 per month—on "research" (Response at 2 R. 43:10730-32), 200 hours to prepare a nearly 1,000 page "summary judgment,"[24] and 144 hours to inspect McNeese's 15,000 violations. McNeese also alleged he spent 340 hours on an appellate "brief".[25] Importantly, McNeese did not even attempt to suggest how many hours it believed were appropriate. Moreover, assuming, *arguendo*, that McNeese's statements were correct, it is not abuse of discretion for the trial court to find this time reasonable, as Louisiana courts routinely award attorneys far more hours for these tasks than McNeese claims Hopkins spent.[26]

McNeese next argued that it had no choice but to create broad categories (such as 1,200 hours of "research") because it was too hard for it to challenge specific entries (McNeese brief, p. 20) even with discovery, depositions, and a six day trial. When the New Orleans Hornets opposed a fee application using this tactic, the Eastern District held that it was placed in "exactly the position the Court had hoped to avoid being placed in" by being required to speculate as to what the Hornets objected to and what it proposed. *Liger*, 2010

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[23] Despite McNeese's 2009 admission to the U.S. DOJ that this map did not exist and a federal compliance order requiring one to be created, McNeese's counsel outrageously represented to the court that its Internet map was "there all along." (2 R. 45:11037).

[24] This includes exhibits. Hopkins explained at trial that this wasn't just a summary judgment, but also an application for injunctive relief (later valued at $13.8 million) and attorneys' fees. (2 R. 43:10775-76). Moreover, McNeese required a ***full year to research and respond*** to what it now calls a "simple" summary judgment.

[25] Hopkins's appellate work (ultimately resulting in this Court's longest civil opinion of 2008) was not just for a "brief" but included responding to McNeese's numerous appellate motions and rehearing application and to prepare one of the first electronic briefs filed in this Court, which included hyperlinks to video deposition excerpts, and well as submitting voluminous out of state case attachments. Indeed, some of these items were introduced as Plaintiffs Exhibits 12 and 13 at trial. (2 R. 35:8719-36:8772; 44:10787-80; 10768).

[26] One Louisiana federal court was faced with a 103.25 hour bill at rates between $575 and $1,075 per hour for senior partners to review a 10 page reply brief, 1,098 hours to draft a summary judgment on the single issue of *res judicata*, and 128 hours preparing for oral argument on the *res judicata* motion. The court reduced these hours by only 30%. *Oreck Direct v. Dyson, Inc.*, 2009 U.S. Dist. LEXIS 35530 at *13-17.

U.S. Dist. LEXIS 107410 at *31. It is not unreasonable to expect the party which escalated this case for 10 years to be able to identify which of its opponent's entries it questions, as parties routinely meet this burden, even in cases exceeding 10,000 hours. *See McClain,* 2009 U.S. Dist. LEXIS 27983.

McNeese cites the *Leroy* case to suggest it never had an obligation to challenge any time. *Leroy v. Houston,* 906 F.2d 1068, 1079 (5th Cir. 1990). This case is inapposite. In *Leroy,* the plaintiffs failed to meet their initial burden of proving their hours, so the burden never shifted to the defendants. Indeed, the court noted that counsel's entries were so vague and "cryptic" (n. 19) that it was impossible for their opponents to question their time, and when they tried, the attorneys being questioned admitted that they could not understand their own records, requiring the court to reconstruct them. *Id.*

In contrast, Hopkins submitted timesheets recorded contemporaneously in tenth hour increments with specific and detailed narratives. Significantly, he also removed any hours McNeese questioned—whether justified or not—six weeks prior to trial, answered all questions McNeese posed, no matter how far afield, and satisfied his burden of proving 5,489.5 hours—5,473.1 of them unchallenged. Amazingly, McNeese argues on appeal that the trial court abused its discretion by awarding him 1,081.5 ***fewer*** hours than it challenged.

C. McNeese Misstated the Standard for Denying Attorney's Fees.

Having failed to challenge Hopkins's hours, McNeese implausibly asserts that they should ***all*** be denied. However, McNeese fails to even cite the correct standard to support this outrageous assertion. Attorneys' fees are never denied outright, except in rare and exceptional circumstances in which a fee award would be unjust.[27] As McNeese's own cases demonstrate, those circumstances must be so extreme as to "shock the conscience." *Scham v. District Courts Trying Criminal Cases,* 148 F.3d 554 (5th Cir.1988).

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[27] *Mendez v. Co. of San Bernardino,* 540 F.3d 1109, 1125 (9th Cir. Cal. 2008) which holds that the "special circumstances" exception to deny attorney's fees is extremely narrow. ("We have firmly rejected the district court's authority to refuse a reasonable fee under the 'special circumstances' exception simply because it believes it 'would result in a windfall' to a plaintiff. *Thomas,* 410 F.3d at 648. 'Granting a windfall to plaintiffs was a concern echoed by Congress in enacting Section 1988, but Congress balanced that concern against the need to attract competent counsel to prosecute civil rights cases.'")

Ignoring this high burden, McNeese tries to compare *Covington* with several inapposite cases. In the *Scham* case, a lawyer was denied fees after he demanded $20 million in fees, provided no supporting affidavit or resume, made no court appearances, did not dispute any facts, failed to prevail on any federal issue, and his own expert opined he should be paid $350. For McNeese to suggest these circumstances resemble the *Covington* facts is a sanctionable misrepresentation to this Court. (*See* 2 R. 7672-73).

Likewise, McNeese cites *Brown v. Stacker,* a case involved a lawyer who demanded 800 hours to prepare a six page complaint. 612 F.2d 1057 (7th Cir. 1980). In the *No Barriers* case, a defendant sought sanctions against a plaintiff, a very different circumstance with a higher burden and in which courts generally award minimal or no fees. *No Barriers, Inc. v. Brinker Chili's Texas, Inc.*, 262 F.3d 496 (5th Cir. 2001). In the *Fair Housing Council* case, a plaintiff lost almost every part of trial, demanded $537,113 in fees, and submitted timesheets lacking any detail (*i.e.* "document production"). *Fair Housing Council of Greater Wa. v. Landow,* 999 F.2d 92, 98 (4th Cir. 1993). In the *Lewis* case, a plaintiff was denied fees for achieving minimal results with extremely poor trial performance. *Lewis v. Kendrick* 944 F.2d 949, 958 (1st Cir. 1991). Clearly, these cases do not even compare to the facts in *Covington* and cannot be used to support a finding of abuse of discretion.

D. McNeese Misrepresented the Facts in an Effort to Avoid Paying Attorney's Fees.

In order to manufacture complaints about Hopkins's records, McNeese blatantly misstates the facts. On April 23, 2010, Covington represented to the trial court that she would submit her 1,072 page Attorney Fee Application and exhibits within two weeks. Faced with this deadline, the attorneys printed their time records and advised that they would audit and amend if necessary prior to trial. Contrary to McNeese's assertions, ***no court has ever held*** that an attorney cannot review and amend his records prior to trial, and ethical attorneys frequently do so. In fact, judges in Louisiana's Western District often ***order*** attorneys to amend their time to correct errors. Two months ago the federal Fifth

Circuit noted in the *McClain* case that one counsel made a "self-adjustment" of 3,000 hours, which his opponent welcomed rather than opposed. *McClain*, 649 F.3d at 379.

In the months prior to trial, Hopkins reviewed 55 boxes of printed documents and 16,867 electronic files and compared tens of thousands of time-stamped notes, letters, photos, filings, drafts, transcripts, logs, receipts, emails, memos, and other records to substantiate nearly ***each entry*** with a specific piece of ***physical*** work product which could be ***tracked to that day***. (2 R.43:10616-19). The audit confirmed each hour and even identified hundreds of work product items ***never billed.***[28]

Hopkins also provided McNeese with unprecedented access to his records and answered discovery demanding files from "***each and every case*** in which Seth Hopkins was counsel of record" and "***any and all*** billing by Seth Hopkins to ***any other client***" for 10 years. Three months prior to trial, he even acquired and produced 10,000 hours of raw time data from Kasowitz, Benson, Torres & Friedman ("Kasowitz"), a New York firm where he worked to support himself while prosecuting this case. However, he did not possess or have permission to reveal that firm's entire records.

McNeese demanded additional records from Kasowitz, which Hopkins did not oppose until he learned that McNeese had attempted an unscheduled and unlawful clandestine deposition and records request of a Kasowitz partner ***on a few days' notice***[29] on topics to include—***"without limitation"***—every aspect of his employment, including his confidential ***health and personnel records***, all confidential "***formal or informal evaluations***," the "***circumstances of his departure from the firm***," and confidential Kasowitz client billing agreements. (2 R. 24:5804-11).

Appalled, Kasowitz filed an emergency protective order in the 11th District of Texas enjoining McNeese and its counsel from causing further "unnecessary expense, harassment,

[28] Hopkins testified he has 118 items of substantive unbilled work product from 2001-2004 alone and hundreds more from subsequent years. Further, he never billed for services such as going with Covington on her first day of school or handling administrative tasks such as entering or auditing time. (2 R. 43:10727-29; 43:10671-77; 10740).

[29] McNeese's counsel spent nearly every day for a week with Hopkins and never mentioned their plan to depose his former employer and cart off hundreds of his personal and confidential records in a few days. To further conceal the plot, they sent the only notice of this unscheduled deposition to his Houston address while he was in Lake Charles with them—an outrageous breach of deposition custom and professional responsibility.

and annoyance" and from seeking "burdensome and irrelevant discovery from Kasowitz at the eleventh hour." The Texas court ordered McNeese to cease its "impermissible fishing expedition into Kasowitz files which is prohibited by Texas law." (2 R. 24:5902-14).

Six days later, Covington received a similar protective order in Louisiana,[30] during which the trial court asked McNeese how making Hopkins's confidential health, compensation, employment, and other personal information public could possibly be relevant in an attorneys' fee hearing. McNeese could provide no satisfactory answer and admitted that its motives had implications "***beyond the case***" (2 R. 25:6021). Realizing that it would be unable to get away with this plot, it was forced to withdraw its unlawful demand.[31] Amazingly, McNeese represents to this Court that it ***"fortunately"*** won the protective order hearings that it ***lost*** in two states. (McNeese brief, p. 12) and now goes further to claim Hopkins evaded discovery by protecting himself from further retaliation.

In fact, despite this plot, Hopkins still ***consented*** to release the remaining Kasowitz data,[32] which McNeese's counsel ***admitted on the record*** when he represented to the court, "Mr. Hopkins has said he wants that information."[33] Indeed, this is why Kasowitz released its time data despite the Texas protective order, with the caveat that its probative value was limited based on the way it was recorded and the lack of any way to audit it.

The Kasowitz data and testimony regarding it indicated that Hopkins worked for the firm between 110 and 295 hours per month depending on what was taking place in *Covington* and used his personal and vacation days to represent his indigent client. (2 R. 44:10766-70; 10049). However, unlike the *Covington* records, the Kasowitz data was a series of raw numbers with no descriptions, client information, or other context and not

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[30] Pleaded at 2 R. 24:5842-73.

[31] "MR. PALERMO: We'll withdraw our request for anything regarding his departure, his skill, experience, reputation. . . " (2 R. 25:6028).

[32] Hopkins testified, "I didn't have any objection to the Kasowitz time sheets. What we were objecting to were the other five things that you were seeking, you wanted to go into my medical records, you wanted to go into my personnel file. That's what I had a problem with, Mr. Veron." (2 R.V. 42:10288).

[33] "MR. PALERMO: Mr. Hopkins has testified he wants that—not testified—he has argued that he wants that information to cross-check his attorney fee bill because, obviously, if there is more than 24 hours in a day, I'm sure he wants to reduce that amount. So, I don't see where the big argument here is on us needing that information. ***Mr. Hopkins has said he wants that information***." (2 R. 25:6017-18).

subject to audit or verification.[34] It also had peculiarities such as a requirement that each day show a ***minimum of eight hours whether the time was worked or not***.[35]

Kasowitz attorney Robert Breen and Hopkins testified that while the time was generally accurate, the daily numbers were not always reliable because firm attorneys worked long, arduous hours with "informal" timekeeping rules[36] due to the firm's flat-fee billing arrangements with its clients, its internal policies, and the nature of its work (2 R.41:10009-11; 42:10256). For instance, they testified that they often traveled and were unable to access the firm's billing software—at one point for four straight months. (2 R. 42:10256; 44:10816). Moreover, because Hopkins worked on *Covington* at the firm, the Kasowitz data duplicated the *Covington* records. (2 R.41:10054-55; 10012-13; 40:9992-95). Had Covington tried to submit such data to the court for reimbursement, it would certainly have been rejected. Nevertheless, this only encouraged McNeese to rely upon the Kasowitz data as its sole means to criticize the *Covington* records.

E. In an Effort to Conclude This Case, Hopkins Reduced Ten Times More Hours than McNeese Opposed.

Not surprisingly, when the Kasowitz data was compared with *Covington*, it created the appearance of an average of ***three clerical errors per year***—all obvious and readily explainable and affecting about ***1.5% of the 16,000*** combined hours (2 R.44:10759). Hopkins notified McNeese of this "within days"[37] and provided courtesy copies of his

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[34] 2 R.42:10263; 44:10740. McNeese takes Hopkins's statement out of context when he explains, "those [Kasowitz] time sheets would be used as a sword against us and we wouldn't have any way of examining [auditing] those time sheets." (McNeese Original brief, p. 11).

[35] Kasowitz asserted that its daily records were not relevant in *Covington* in part because time was adjusted to show a minimum of eight hours per day, as explained by the business records affidavit McNeese used to introduce the Kasowitz records. ("However, because Hopkins was hired as a staff attorney, ***the daily hour totals starting in 2007 do not necessarily reflect work billed to either a KBTF matter or administrative file requiring Hopkins' attention to KBTF matters***.") (2 R. 35:8559).

[36] Breen testified that Kasowitz attorneys had "informal" billing rules and frequent all-night emergency projects where days would overlap (2 R.40:9986-87; 41:10013-14) and that because of the nature of their work, they logged all time at the office, even while on breaks (2 R.40:10003-4). Hopkins testified that billing was "informal" (2 R.41:10049-50) and that, "[t]here was some entries that didn't necessarily collate [correlate] to files...some entries in their billing system that might be for sort of block projects that wouldn't collate [correlate] to a particular client or a particular file" (2 R.42:10257).

[37] Hopkins testified at trial, "I've corrected that. I've done what any lawyer would be expected to do, and I did it reasonably promptly, within days of finding the errors, and I let you guys know and I let the court know." (2 R. 42:10349)

timesheet revisions during his long audit process.[38] Six weeks prior to trial, Hopkins filed amended timesheets to eliminate the 1.5% of time with the appearance of errors (even though it was earned) and 15%—710 hours—for billing judgment and to satisfy ***each*** of McNeese's time complaints. He amended 108 entries, even though only a few conflicted with the Kasowitz data[39] and filed an affidavit and chart explaining each removed hour.[40]

At trial, McNeese spent six days pretending the amended timesheets did not exist (2 R.43:10758-59) and even now falsely claims "there are 21 separate days where the total hours for the day exceed 24 hours." In its brief, McNeese ***still*** refuses to even cite the amended records before the court for one simple reason—if it stops pretending that they do not exist, it will have nothing to write about on appeal.

Still, Hopkins patiently explained each amended entry and the trial court even took notice that one "24 hour" day occurred when the MCLE Committee consolidated the two day Bench Bar Conference at The Houstonian into one entry and then reported it on the wrong day—a common practice which makes virtually every lawyer and judge in Louisiana guilty of billing more than 24 hours in a day (2 R.V. 43:10552-55). At least four "errors" were because McNeese double counted time. One was a typographical error and two occurred when Hopkins consolidated four days (July 14-18, 2008) into two entries. Each remaining "error" was explained with "absolute certainty" and occurred when time was listed on the wrong days or entries were consolidated. (2 R. 44:10779-82; 10800-02; 43:10743-46; 24:5874-78). All were corrected, and Hopkins reduced ***10 times*** the number of hours that conflicted with the Kasowitz data to accommodate McNeese's complaints.

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[38] Hopkins testified, "as a professional courtesy, I was giving you guys the changes as we were making them, rather than dumping it on you at the end." (2 R. 42:10301). When Hopkins provided McNeese with amended records at Edward Fonti's September 2, 2010 deposition, McNeese counsel Michael Veron admitted he ***did not want*** Hopkins to review his time because that would make it harder to attack him. (2 R.32:7999-8000). This is an outrageous admission of McNeese's bad faith.

[39] For instance, Hopkins reduced over 100 hours pertaining to McNeese's retaliation and entries involving conversations with the U.S. DOJ. His goal was to work with McNeese in good faith so that it would have no entries left to complain about at trial. (2 R. 44:10759-60).

[40] The amended affidavit and timesheets which were before the Court are in the record at 2 R. 34:8438-35:8553.

F. Hopkins Reasonably Defended Against McNeese's Motion to Recuse the Trial Judge of Nine Years.

McNeese next argues Hopkins should not be paid to oppose its six month effort to recuse the trial judge, which it filed hours before Covington's hearings on six motions to compel and $13.8 million injunction. The trial court aggressively questioned Hopkins and agreed that he acted in his client's best interest by opposing the recusal at such a crucial phase. (2 R. 43:10543-48; 10587; 44:10802-03). Moreover, the U.S. Supreme Court holds that when a party has a good overall result, "...the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."[41]

G. McNeese's Manufactured Its "Raw Data" Attack.

McNeese deposed Hopkins and asked whether he had software that recorded the start and stop times of his work, which it referred to as "raw data". He did not. When he later mentioned he used raw data from his file to audit time, McNeese accused him of lying about having the software. This was explained at trial, but McNeese still maintains this bizarre accusation. (2 R. 42:10306-09; 10441).

H. Covington's Fee Arrangement Is Irrelevant.

McNeese criticizes the fact that Covington changed her fee agreement after she asked Hopkins to expand the scope of representation from personal injury to ADA compliance, resulting in her $13.8 million injunction and six year scholarship. A contract change was appropriate, as civil rights cases are not susceptible to a contingency agreement, which Hopkins explained (2 R. 41:10190; 42:10425) and McNeese's expert and counsel admitted (2 R. 33:8098; 8237). *See Blanchard v. Bergeron,* 489 U.S. 87, 95 (1989); *McCarroll v. Airport Shuttle, Inc.,* 773 So.2d 694 (La.11/28/00); *Rivet, et al. v. State of Louisiana, DOTD,* 800 So.2d 777 (La. 11/28/01). Therefore, it would be inappropriate for

[41] *Hensley*, 461 U.S. at 435. *See also, Baker v. Windsor Republic Doors,* 414 Fed. Appx. 764, 781 (6th Cir. March 8, 2011), where the plaintiff lost 50% of his claims but the Court still awarded full fees and enhanced by 120%, holding, "because the plaintiff still obtained exactly the relief he sought, even after the district court's partial grant of Windsor Republic's motion for judgment as a matter of law, we cannot say that the district judge abused his discretion in denying the defendant's request to reduce the attorneys' fees awarded the plaintiff."). *See also, Goff v. John Hancock Mutual Life Insurance*, 497 So.2d 747 (La.3rd Cir. 1986).

Hopkins to produce a superseded agreement signed 10 years earlier.[42]

McNeese's argument about Covington's new fee agreement is also a red herring. Covington possessed a fully executed copy of the agreement, while Hopkins's copy contained her original signature but not his own. He later signed it and testified as to its authenticity, though he did not recall on which date he signed. While attorneys often testify as to their fee agreements with their clients, McNeese objected and Covington withdrew the exhibit, since a private fee agreement is persuasive but not controlling evidence of the hourly rate in a fee shifting case, and its existence or lack thereof is otherwise irrelevant.[43] *Moody v. Arabie*, 498 So.2d 1081, 1086 (La.1986), *rev'd on other grounds*.

I. Hopkins's Time Was Detailed and Contemporaneously Recorded.

Finally, McNeese brazenly claims Hopkins had no contemporaneous records and "no detailed records ***at all.***" Hopkins testified that for 10 years he ***immediately*** wrote his time on a scratchpad and transcribed it into his computer within two or three days. He occasionally got a date wrong but otherwise maintained this practice while submitting regular updates to the court for the last five years. (2 R. 44:10742-43; 10746; 10440-43). McNeese fails to explain what could be more contemporaneous than immediately writing time as it is worked and transcribing it within two or three days. With respect to McNeese's claim about a lack of detail, McNeese has not and cannot identify a ***single*** instance of a vague entry, and it has already been forced to recant this accusation once before.

J. McNeese Avoids Addressing Relevant Case Law Which Clearly Supports Covington's Attorneys' Fee Request.

In its zeal to attack, McNeese lost sight of the court's task—to award reasonable attorneys' fees, which is often done without records at all. In the *Rivet* case, the Louisiana Supreme Court accepted 950 hours of reconstructed time. *Rivet*, 800 So.2d at 780, 782. In

[42] McNeese apparently continues to suggest that Hopkins should be limited to a contingency award, even though it judicially admitted on September 1, 2010 its expectation that, "the fees in this case are likely to be plaintiffs' ***single largest category of damages***." (2 R. 24:5812-18) and its counsel stated, "The Fifth Circuit held that a contingency fee is not a factor." (2 R. 33:8237). Why would McNeese raise this on appeal?

[43] McNeese cannot seriously claim a sudden concern for Covington's financial well being after it destroyed her credit because she could not pay loans incurred trying to attend classes on its inaccessible campus. (2 R. 2:361).

the *Gold* case, a client disputed 141 of 1,131 billing entries and proved that 8% of them did not match the timesheets of other attorneys. Despite these errors, which were not amended, this Court held that the complaining party failed to satisfy his burden of proving, "that the fees charged were for work that was clearly excessive and unnecessary." *Gold, Weems, Bruser, Sues & Rundell v. Granger,* 947 So.2d 835, 843 (La.App. 3 Cir., Jan. 31, 2007).

Federal courts have made similar rulings. A court accepted time records where 19 days in one year contained more than 24 billed hours. *In Re: Marin Place Hospital, et al. v. United States,* 1986 U.S. App. LEXIS 26522 (6th Cir., May 5, 1986). In one ADA case, an attorneys' time sheets contained entries so vague that the district court did not know what he was doing ("general case work and review") but nevertheless held that, "time documentation is not a perfect science, and Mr. Parker's time entries are significantly more detailed than that with which this court is normally presented." *Knutson v. AG Processing, Inc.,* 273 F.Supp.2d 961, 1016 (N.D. Iowa 2003), *rev'd on other grounds*.

McNeese's cases establish that even without time records, courts accept ***any*** "sufficient documentation so that the [court] can fulfill its duty to examine the application for compensable hours." *Bode v. United States,* 919 F.2d 1044, 1047 (5th Cir. 1990). It also cites *La. Power & Light Co. v. Kellstrom,* which holds, "[f]ailing to provide contemporaneous billing statements does not preclude an award of fees per se, as long as the evidence produced is adequate to determine reasonable hours." 50 F.3d 319, 324 (5th Cir. 1995).

The law is clear. Covington is the undisputed prevailing party, and her attorneys are entitled to reasonable fees. Hopkins has proven that he reasonably expended 5,489.5 billable hours in this case with more than sufficient evidence. McNeese introduced no witnesses, affidavits, testimony, or rational analysis to counter Hopkins's evidence, and the trial court did not commit abuse of discretion in finding his records and testimony credible.

II. COVINGTON'S ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED IN AWARDING HOPKINS ONLY 4,391.6 HOURS OVER 10 YEARS.

As noted, it is an abuse of discretion for a trial court to reduce hours that are not questioned by an opposing party. *Bell,* 884 F.2d at 719. A court is also required to "provide a concise but clear explanation of its reasons" for reducing attorneys' fees. *Hensley,* 461 U.S. at 437. Indeed, the federal Fifth Circuit Court of Appeals recently overturned a 25% time reduction after the district court did not provide a sufficient explanation. *McClain v. Lufkin Indus.*, 342 Fed. Appx. 974, 975 (5th Cir. 2009). In this case, the trial court erred in reducing 1,097.9 hours based on its unexplained belief that a more experienced attorney would work faster. The record not only fails to support this, but directly contradicts it.

A. The File and Record Confirms Hopkins Earned In Excess of the 5,489.5 Hours Requested Over 10 Years.

An attorney's file, the suit record, and testimony are given great deference in establishing statutory fees. In the *Rivet* case, the Louisiana Supreme Court accepted 950 hours of an attorney's reconstructed time against the State, holding:

> Plaintiffs' attorney, who had the benefit of his own file, DOTD's billing records, and court records, was obviously in the best position to calculate the amount of time he spent on the case for purposes of determining the fees actually incurred.

Rivet, 800 So.2d at 782.

As noted, Hopkins not only kept contemporaneous time records but also verified them against 55 boxes of paper files, 17,684 electronic files, and the second longest civil suit record in Calcasieu Parish. At trial, he offered to introduce hundreds of pieces of day-by-day physical evidence to substantiate each of his 5,489.5 hours of entries. This alarmed opposing counsel and the court, who stated this was unnecessary, as Hopkins was proving his time "beyond a reasonable doubt." (2 R. 43:10636).

Hopkins still illustrated his detailed audit process by introducing a sample email sent to co-counsel Lee Archer at 6:24 a.m. June 24, 2008, in which he stated, "Sadly, I'm still up" and attached a copy of the brief he spent the night drafting. Two hours later, he reported

to Kasowitz for a day's work. Hopkins identified ***90 more emails***—20 between midnight and 6 a.m.—sent to Ms. Archer that month alone. (2 R.35:8718; 44:10782-86). This physical, time-stamped evidence established that Hopkins worked at least 18 hours per day between his job and indigent client for 20 of the 30 days in June, 2008, discrediting McNeese's argument that lawyers cannot work more than eight hours per day.[44]

B. Four Attorneys Submitted Affidavits that Hopkins Earned 6,199.5 Hours but Sought Only 5,489.5 Hours.[45]

Four neutral, unpaid attorney experts opined that Hopkins's original 6,199.5 hours were reasonable, even ***before*** he removed 710 hours and the trial court reduced another 1,097.9 hours. The parties ***stipulated*** that the court should consider these affidavits, subject to McNeese's objections, which it never made. (2 R. 45:11663-64). McNeese failed to submit ***any*** affidavits or witnesses and raised no objection when its expert's deposition testimony on this topic (which it relies on heavily on appeal) was stricken from the record on February 24, 2011. (2 R.39:9668). *See* Motion to Strike (2 R. 39:9636-57).

1. ADA Expert Edward Fonti Submitted Two Affidavits and Opined "Approximately 6,000 Hours" Were Required in This Case.

Mr. Fonti, who McNeese's expert conceded is more qualified than he is to handle an ADA case, (2 R.33:8186-88) signed two affidavits of reasonableness—in December, 2006 and May 13, 2010. He reviewed the record, briefs, and each line-by-line entry and affirmed each of Hopkins's "approximately 6,000" hours:

> The itemized billing summary in this case reflects only services and fees necessary for the prosecution of this case and which I and other practitioners of this area of the law (ADA) might have reasonably charged if in the position of prosecuting this case under the same circumstances. (2 R. 20:4984-86).

2. Jonathan Prejean, An Expert Who Evaluates Legal Bills For a Living, Opined That 6,000-6,500 Hours Was "Entirely Reasonable."

Mr. Prejean, a Harvard Law graduate who has evaluated 2,500 legal bills from firms throughout the world, followed this case from its inception. He reviewed the record,

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[44] McNeese claimed no lawyer can work more than eight hours per day. Ironically, McNeese counsel Michael Veron submitted a fee bill to this court in 2001 representing that the lawyers in his firm routinely worked 16 hour days in *Corbello v. Iowa Prod.*, 806 So.2d 32, 51-52 (La.App.3Cir.12/26/01). He was awarded $4 million in fees.

[45] For a more detailed discussion, see 2 R. 31:7644-61.

praised Hopkins's "lean staffing," and swore in his May 7, 2010 affidavit:

> Based on my review of the complexity and detail of the *Covington* case and particularly the requirements for extensive expert testimony, appeals, and contested motions, I consider this case to reach a level of complexity that rivals other complex litigation like patent litigation. I consider 6000-6500 hours of attorney time entirely reasonable for such a case. I have also reviewed the billing summary for this case, and the billing entries appear to reflect reasonable tasks to be performed personally by an experienced attorney. Work with the Department of Justice, for example, should rightly be seen as valuable attorney work toward the outcome in this case. There do not appear to be any substantial charges for administrative tasks that might have been performed by less experienced attorneys who would be reasonably compensated at a lower rate than the blended and multiplied hourly rate being requested in this case. (2 R. 20:4987-94).

Mr. Prejean traveled 740 miles round trip without pay to testify that Hopkins's time was reasonable. When the court refused to allow live testimony as to reasonableness of hours, Prejean testified as a fact witness that the *Covington* file dominated Hopkins's home, that he sacrificed social contacts for 10 years to pursue the case out of a "moral obligation," that the case was "foremost on his mind" for years, and that his work habits allowed him to "produce long stretches of sustained and productive activity." (2 R.40:9942-43, 62-64, 71).

3. Former Southwest Louisiana Bar Association President Winfield Little Opined that 6,000 hours Is Consistent With Local Billing Practices.

Mr. Little, an unpaid expert with 36 years of experience and one of only two or three local attorneys who has ever handled an ADA case, testified by affidavit:

> I am aware that the *Covington* case has been a long, contentious, and novel case which has resulted in a summary judgment for the plaintiffs, has involved a significant federal civil rights investigation, and has made a significant impact in the field of disability discrimination law in Louisiana. I consider it completely reasonable and consistent with local billing practices for a case of this length and impact to require 6,000 or more hours of billable time to prosecute. (2 R. 20:4958-60).

4. Louisiana Bar Association Distinguished Attorney of 2007 Thomas Lorenzi Opined "6,000-6,500 or More Hours of Billable Time" Was Reasonable in this Case.

Mr. Lorenzi, who has handled many fee shifting cases in his 35 year practice, including "one of the few Title II ADA cases that I am aware of in Southwest Louisiana" testified in his May 17, 2010 affidavit, "I consider it completely reasonable and consistent

with local billing practices for a case of this length and impact to require 6,000-6,500 or more hours of billable time to prosecute during the last nine years." (2 R. 20:4977-83).

It was an abuse of discretion for the trial court to reduce 1,097.9 hours based on its opinion that Hopkins was not as efficient as older attorneys, when the three most experienced ADA attorneys in Lake Charles opined he earned up to 6,500 hours—not the 5,489.5 sought or the 4,391.6 awarded.

C. The Case Law Suggests Hopkins Earned 6,750 Hours, but He Sought Only 5,489.5 Hours Over 10 Years.

To further establish that the trial court's reduction was an objective abuse of discretion, Hopkins compared his time with similar cases within 200 miles of Lake Charles.[46] The average similar major fee shifting case sampled in Louisiana and the federal Fifth Circuit has required ***675 hours per year***[47] to prosecute in recent years. Over the course of 10 years, Hopkins sought an average of 548 per year and was awarded only 439.

Two months ago, the Fifth Circuit affirmed an 11,850 hour award—987 per year in the neighboring Eastern District of Texas in a similar civil rights case. *McClain v. Lufkin Industries*, U.S. Dist. LEXIS 27983 (E.D. Tex. Apr. 2, 2009), *hours aff'd at* 649 F.3d 374 (5th Cir.2011). Three years ago, the Fifth Circuit affirmed an award of 2,200 hours over four years—550 per year in a civil rights case against the Orleans Parish District Attorney.[48] *Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008), *rev'd on other grounds.* The Louisiana Fourth Circuit affirmed 3,800 hours of legal services over seven years—543 per year. *See Vela v. Plaquemines Parish Gov't*, 811 So. 2d 1263, 1280 (La.App. 4th Cir. 2002).

Most significantly, this Court awarded 4,970 hours over eight years—621.25 per year at a blended attorney/paralegal rate of $805 per hour to McNeese counsel Michael Veron in a fee shifting case involving the interpretation of an oil lease 10 miles from

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[46] 2 R.31:7641-7643. While it is not included in this comparison, just last year, the U.S. Supreme Court affirmed the reasonableness of approximately 25,500 hours (after a 15% reduction from 30,000 hours) billed over eight years. This averages 3,187.5 hours per year. *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010).

[47] This includes paralegal time, which was also compensated, often at a blended rate, by the courts.

[48] Counsel also represented Mr. Thompson in his criminal case for many years, but at the time of the fee award, his civil representation was for four years. He was awarded $1,031,841.79.

McNeese. Mr. Veron demanded $12 million, and the Honorable Patricia Minaldi awarded only $689,510. This Court reviewed the record—which was 30% smaller than *Covington*—and found it was abuse of discretion to award any less than ***$4 million***. *Corbello v. Iowa Prod.*, 806 So.2d 32, 51-52 (La.App.3 Cir.12/26/01), *rev'd on other gnds*.

D. McNeese's Attorneys Spent More Time per Task than Covington's Attorneys.

Hopkins even compared his time with his opponents, who admitted over a year ago (before six days of trial and appeal) that nine of its 12 lawyers billed at least 2,077 hours. This is remarkable, considering that, unlike Covington, McNeese had no burdens of proof, could have prevailed if it had identified a single issue of material fact, had its arguments called santionable by this Court, and litigated a $4,000 claim into a $15.5 million liability.

But this is not nearly all of the time McNeese's lawyers billed the taxpayer. McNeese refused to provide records for at least three lawyers and provided no records for most of the recusal it claims Hopkins should not be paid to defend. Moreover, time is missing when McNeese's counsel were known to be billing, such as Hopkins's deposition and ***eight of the 13*** trial and hearing dates ***reflecting 24 lawyer days*** of in-court work (McNeese staffed three lawyers on most court dates) (2 R.43:10577). In all likelihood, McNeese's hours are at least twice what it reported, and it is outrageous for a losing party with no burden to criticize its opponent for spending the same amount of time to prevail,[49] especially when federal courts have recognized, "ADA cases are notoriously difficult to win." *Baker v. Windsor Republic Doors*, 414 Fed. Appx. 764, 769 (6th Cir. Tenn. 2011).

Moreover, Covington's attorneys filed nearly 700 pages of briefs and 7,500 pages of exhibits (90% of the pleadings) versus McNeese's 200 pages of briefs and less than 500 pages of exhibits (10% of the pleadings).[50] Hopkins's 5,489.5 hours reflects an average of

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[49] Courts often find that prevailing parties spend ***three to four times*** as many hours to win a case as its opponents spend to lose, even when both parties have done equally "excellent work." *See Oreck Direct v. Dyson, Inc.*, 2009 U.S. Dist. LEXIS 35530 at *13-19 (E.D.La. Apr. 7, 2009) (prevailing party spent four times number of hours as its "excellent" opponent, reduced to approximately three times).

[50] 2 R.V. 43:10726. Some of these documents are contained in the first two appellate records.

0.67 hours per page filed verses McNeese's counsel's minimum of three hours (and more likely six) per page filed. Thus, Hopkins was ***at least four times*** as efficient at drafting pleadings as his opponents while achieving an injunction worth ***3,875 times*** the $4,000 bathroom his client initially sought.

For the four compelling reasons provided, it was a clear abuse of discretion for the trial court to reduce Hopkins's time by 1,097.9 hours based on lack of experience.

III. RESPONSE TO SPECIFICATIONS OF ERROR NOS. 2 & 3.

McNeese's second and third specifications of error allege that the trial court *did not explain* how it determined the rate it awarded while simultaneously accusing it of relying on non-local rates. The court stated that it would not consider rates outside of Lake Charles and did not consider *Covington's* cases from neighboring districts. It properly declined to consider McNeese's unpublished cases because they contradicted the testimony of all five experts (including McNeese's) and also reflected the lowest possible contracted rate with insurance company clients for bulk, routine work—not the rate for complex and specialized litigation with exceptional results, contingent risks, and a 10 year payment delay.[51]

The federal Fifth Circuit ruled just two months ago that specialized civil rights litigation requires rates that reflect the "customary fee ***for similar work***." *McClain*, 649 F.3d at 381. *McClain* also established that when there is evidence local attorneys would not take a case, a non-local rate should be awarded, discussed, *infra. See also Thompson*, 553 F.3d 836 at 868 ("finding [local] counsel who could bring the suit is not the same as finding counsel who could win the suit."). McNeese's ADA violations went unchallenged for 20 years, which along with expert testimony about the lack of ADA cases or practitioners in Lake Charles, is *prima facie* evidence that the local bar was reluctant to take this case. Accordingly, the trial court should have considered national rates in its award.

[51] McNeese's expert, who has 46 years of litigation experience and charges $350 per hour, admitted that he would not attempt to handle an ADA case if one were ever brought against his client, Calcasieu Parish. (2 R. 33:8186-88). Moreover, only "two or three" Lake Charles lawyers have ever handled an ADA case. (2 R. 20:4958-60). This is a clear indication of the specialized nature of ADA work, thus requiring an enhanced rate.

IV. COVINGTON'S ASSIGNMENT OF ERROR NO. 2 AND RESPONSE TO SPECIFICATIONS OF ERROR NOS. 4 & 5:

THE TRIAL COURT ERRED IN AWARDING AN EXCESSIVELY LOW HOURLY RATE CONTRARY TO THE LAW AND EVIDENCE

A. The Trial Court's Misapplication of Law Is Reviewed *De Novo.*

A trial court's findings of fact in awarding attorneys' fees are reviewed for abuse of discretion. However, in this case, the trial court misinterpreted recent United States Supreme Court and federal 5th Circuit decisions in declining to award a rate enhancement and issued a ruling in violation of Article 6 of the United States Constitution. These incorrect interpretations of law impacted the trial court's findings and are therefore subject to *de novo* review. The Louisiana Supreme Court has held that:

> Where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine a preponderance of the evidence.

Evans v. Lungrin, 97-541, 97-577, pp. 6-7 (La.2/6/98), 708 So.2d 731, 735 (citations omitted); *Rosell v. ESCO,* 89-0607, p. 4 (La.9/12/89), 549 So.2d 840, 844; *Menard v. Lafayette Ins. Co.*, 13 So.3d 794 (La. App. 3 Cir. 6/01/09), *re'v on other grounds*.

B. The Trial Court Failed to Consider the Nature of the Case, 10 Year Payment Delay, and the Need to Attract Competent Counsel of Equal Caliber for Complex Specialized Litigation in Establishing a Rate.

42 U.S.C. § 1988 Senate Report 94-1001 at 2 notes that:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizens who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it cost them to vindicate these rights in court.

A court is required to set an hourly rate high enough to "encourage qualified counsel to take on such complicated and time consuming cases"[52] and to "enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their

[52] *McClain v. Lufkin Industries, Inc.,* 2009 U.S. Dist. LEXIS 27983 at fn. 6 (E.D. Tex. Apr. 2, 2009).

opposition and to fairly place the economical burden" of litigation on the wrongdoer. *Johnson,* 488 F.2d at 719-20. *See also Jankey v. Poop Deck,* 537 F.3d 1122, 1129 (9th Cir.2008) (Applying these principles to the ADA).

A civil rights attorney's only hope of compensation is through a court's award of attorneys' fees. Unlike his adversaries, he must first overcome the difficult and highly contingent task of gaining standing as a prevailing party. If he accomplishes this, he must then subject himself to public scrutiny and delay in the hope of someday being paid. No lawyer would do this for the same rate as his adversaries, who accept no risk and are paid monthly. Thus, in exceptional cases, courts are required to enhance hourly rates beyond those customarily charged in the community to honor Congress's mandate of creating a market incentive for attorneys to represent indigent discrimination victims who need access to our courts. As noted, it is clear that the prevailing rates in Lake Charles have not historically been high enough to accomplish this.

C. The Trial Court Erred in Its Interpretation of *Johnson* and *Perdue* and Failed to Properly Enhance Plaintiffs' Attorneys' Rate Based On Results Obtained and the Market Value Of Services.

Last year the United States Supreme Court upheld the longstanding rule that lower courts may award prevailing parties a *Lodestar* enhancement but instructed them to identify an objective basis for doing so. *Perdue,* 130 S.Ct. 1662 (2010). The trial court declined to enhance Covington's fees because it was persuaded by the fact that the Supreme Court had not yet sustained an enhancement. (Judgment, 2 R. 39:9666).

But this is not surprising, as the Supreme Court has had the opportunity to review only a few enhancement cases. Moreover, it specifically remanded *Perdue* so that the lower court ***could*** enhance a prevailing party's lead counsel's rate from $495 to $866 per hour, thereby increasing the total fee from $6 million to $10.5 million. Since *Perdue,* the circuit courts have spoken loudly and frequently about the need to award enhancements.

For example, two months ago, the federal Fifth Circuit Court of Appeals, citing *Perdue,* upheld an enhancement and affirmed the district court's decision to adjust, ***"the***

local prevailing rate upward to award the principal trial counsel, Mr. Garrigan, a local attorney, ***$400 per hour.***" *McClain*, 649 F.3d at 382. The Fifth Circuit even remanded with instructions to increase an out of state counsel's rate (presumably to $650). The Sixth Circuit also affirmed an enhancement of 120% this year, explaining, "ADA cases are notoriously difficult to win." *Baker,* 414 Fed. Appx. at 769.

Perdue provides three bases to enhance a fee. Two of which are applicable to *Covington*: (1) When an attorney's true market value exceeds the *Lodestar* and (2) When an attorney suffers exceptional delay in the payment of fees, particularly if caused by the defense's conduct. *Perdue,* 130 S.Ct. at 1674-75.

With respect to the first basis, the trial court recognized that, "Plaintiff did achieve substantial success through this litigation—having ultimately effected a $13.8 million renovation of the campus of McNeese State University to finally bring it into compliance with the ADA." (Judgment, 2 R. 39:9665). Having recognized this, its next task was to determine whether the *Lodestar* adequately compensates for the market value of this $13.8 million result and Covington's scholarship and money judgment. *Perdue* at 1674-75. As noted, Covington's attorneys have secured one of the largest—if not the largest—single client ADA judgment and injunction in history. If the largest ADA judgment in history does not qualify for an increased hourly rate above that paid for routine work, then what does?

The court's second task was to identify "specific proof that is objective and reviewable" of the attorneys' true market value. *Perdue* at 1674-75. This can be quantified by noting that ***McNeese will receive $2,128.97 for every hour Covington's six attorneys worked in this case*** ($13,800,000 divided by 6,482 hours).[53] Stated another way, had McNeese hired Covington's counsel on a contingency to lobby for—rather than oppose—ADA funding, McNeese would have gladly paid them ***$4.55 million ($702.56 per hour)*** for their results in a case that would have been far less protracted. Thus, Covington's attorneys' true market value can easily be quantified at or near $5,153,190 ($795 per hour

[53] McNeese can also now welcome disabled students to its campus at $4,400 apiece in tuition each year.

for 6,482 hours after restoring 1,098 removed hours).

Alternatively, Covington's attorneys are entitled to an enhancement for an exceptional 10 year delay due to McNeese's "militant defense" (Judgment, 2 R. 39:9665). This Court may compensate for this using "a method that is reasonable, objective, and capable of being reviewed on appeal" such as a rate that accounts for lost interest. *Perdue*, 130 S.Ct. at 507-08. Covington sought interest from her January 24, 2007 summary judgment. The trial court denied this, effectively resulting in a 30% loss of fees, as the judicial interest rates since 2007 have been 9.5%, 8.5%, 5.5%, 3.75%, and 4.0%. Covington alternatively argues for a $265 hourly rate enhanced by 30% to $344.50.

D. Four Experts Opined That $795 per Hour Is the Appropriate Enhanced Rate under These Circumstances and McNeese's Own Expert Did Not Dispute that an Enhancement Should Apply.

Four unpaid experts signed affidavits opining that the prevailing base rate for routine civil rights litigation in Lake Charles exceeds $265 and that this case requires an enhancement to $795 due to the success obtained, risks, and payment delays. Indeed, the Lake Charles experts charge their own paying clients (with little payment delay or contingent risk of non-payment) rates between "$250-$275" (Mr. Little) and $385 per hour (Mr. Lorenzi). (2 R. 20:4958-70; 4977-94). The only outlier was Mr. Fonti, who charges $200 per hour (though some clients have not transitioned from $180). Mr. Fonti stated that he has increased his rate by only $75 in 30 years and would not accept that rate in a case like *Covington.* (2 R. 32:7844-45).

McNeese paid Lake Charles attorney Allen Smith his customary $350 per hour[54] to testify that the prevailing rate in Lake Charles is only $200 per hour.[55] Smith admitted that he testified once on this topic 10 years ago and his opinion was rejected as too low by the

[54] 2 R. 33:8179. Amazingly, Smith testified that he charged $200 per hour himself as a young lawyer ***in the 1970s.*** (2 R. 33:8180).

[55] Smith testified, based on what his friends charge, that Hopkins's rate should increase from $150 to $200 over 10 years. (2 R. 33:8113-14). It is well-settled that fee awards reflect the ending rate only. *McClain,* 2009 U.S. Dist. LEXIS 27983 at *6. ("To adjust for inflation, deferred payment, and unpaid interest, the court may award attorneys' fees at the current hourly rate instead of historic hourly rates charged during the litigation process. *Missouri v. Jenkins by Agyei,* 491 U.S. 274, 284 (1989) (plaintiffs are entitled to "an appropriate adjustment for delay in payment by utilizing current rather than historic hourly rates.)

Louisiana Western District. (2 R. 33:8093). Moreover, he based his rate on volume contract work and timely payment in insurance defense cases, where rates are lower than other fields. Smith has never handled an ADA case and does not know what rates ADA lawyers command. (2 R. 33:8186-88; 8240). However, the Fifth Circuit Court of Appeals holds that rates must consider the "customary fee ***for similar work***." *McClain*, 649 F.3d at 381.

Furthermore, when asked whether he disputed Covington's entitlement to an enhancement of 300%, Smith could offer no testimony to oppose it (2 R. 33:8238-39) and admitted that Covington's counsel created tremendous societal benefits such as helping disabled citizens gain an education and transition from public assistance to becoming taxpaying citizens.[56] Thus, ***even McNeese's own expert*** raised no objection to a rate of $200, enhanced to $600. Clearly, the trial court erred in awarding a rate of ***30%*** of what Covington's experts advocated and ***40%*** of what McNeese's own expert did not oppose.

E. The Trial Court Failed to Award Hopkins His Own Standard Rate for Simple Cases in this Highly Complex Case.

At a minimum, a prevailing party should be paid what he charges his clients. ("That a lawyer charges a particular hourly rate, and gets it, is evidence bearing on what the market rate is, because the lawyer and his clients are part of the market.") *Carson v. Billings Police Dept.*, 470 F.3d 889, 892 (9th Cir.2006). Hopkins testified that his clients, including Financier Allen Stanford and professional baseball players Prince Fielder, Joseph Crede, and Bruce Chen, pay him $325 per hour for transactional work. (2 R. 44:10807; 34:8434-36). This rate is lower than that of Mr. Lorenzi, Mr. Prejean, and Mr. Smith—three of the five experts—and assumes straightforward work with little risk of non-payment. It is certainly error to deny an attorney his usual contract rate in a highly successful and contingent case in which he is forced to wait more than a decade for payment.

[56] Smith testified that civil rights statutes must compensate attorneys high enough to create a market incentive for them to take on these cases (2 R. 33:8098). Moreover, he testified that there is "no question" this case benefitted an entire class of people, McNeese, and "society", including "students getting off of welfare and being able to have jobs." (2 R. 34:8256-58).

F. The Trial Court Erred in Awarding a Rate of $240 when the Relevant Regional Cases Establish a Prevailing Rate between $450-$805 for Complex Civil Rights Work.

Significantly, neither party could find published civil rights fee shifting cases from Lake Charles, further indicating that the local civil rights market is underserved. However, Covington cited the most recent attorney's fee case from Lake Charles at the time—*Rohrer v. Astrue,* 2009 U.S. Dist. LEXIS 123386 (W.D.La.—Lake Charles, 12/7/09), in which Lake Charles Magistrate Judge Kathleen Kay ruled in a routine Social Security matter:

> As noted in *Brannen,* courts have allowed de facto hourly rates of greater than $1400.00 per hour. *Brannen,* 2004 U.S. Dist. LEXIS 14893, 2004 WL 1737433 at 5. ***Even within the Western District of Louisiana, courts have allowed fees reaching greater than $450 per hour.*** *See, e.g. Reese v. Astrue,* Civil Action No. 5:06-cv-1787, Docs. 26, 27 (June 24, 2008). . . .
>
> The court notes that while a $531.79 rate would be high for local counsel in the Western District of Louisiana, plaintiff hired counsel from New York where legal services are far more costly. Therefore, the undersigned finds that the award requested by plaintiff's counsel is reasonable.

Rohrer v. Astrue, 2009 U.S. Dist. LEXIS 123386 at fn.4 and *14 (W.D.La.—Lake Charles, December 7, 2009).

Covington also cited cases within a 200 mile radius of Lake Charles and found the prevailing rate for similar complex litigation ranges from $400 to $805. As noted, the district neighboring Lake Charles awarded a fee of $4,740,195 in a civil rights case at a rate of $400 for local counsel in rural Lufkin. The Fifth Circuit remanded with instructions to increase that to $650 for out-of-town attorneys. *McClain* 649 F.3d 374 (5th Cir. 2011). In Houston, where Hopkins practices, the Southern District of Texas routinely awards $450 per hour, and fee opponents seldom file affidavits suggesting a rate lower than $300. *Pruett v. Harris County Bail Bond Bd.,* 593 F.Supp.2d 944, 948 (S.D. Tex. 2008). In New Orleans, the Louisiana Eastern District has held the local rate to be $400-$450.[57]

State courts have awarded higher rates. Ten years ago, the Louisiana Fourth Circuit found the prevailing rate in rural Plaquemines Parish to be $200, which it tripled to $600 because the public benefitted from the case. *Vela*, 811 So.2d at 1279. In 2001, the Louisiana

[57] *Oreck,* 2009 U.S. Dist. LEXIS 35530 at *18-19.

Supreme Court held $250 to be the "midpoint" rate in rural St. Charles Parish even back in the 1990s. *Rivet,* 800 So.2d at 782. As noted, this Court held it was an abuse of discretion to award a blended lawyer/paralegal rate of less than $805 in a case which lasted two fewer years and had a 30% smaller suit record. *Corbello,* 86 So.2d at 51-52. Covington's counsel seeks $10 per hour less than this Court awarded McNeese's counsel in that case.

G. The Trial Court Erred as a Matter of Law in Providing McNeese with Partial Immunity from Attorneys' Fees Based on Its Status as a Public Entity.

The trial court denied a sanction or enhancement out of concern that the taxpayer would bear the burden for "those responsible for the seemingly deliberate disregard for the responsibilities of McNeese." (Judgment, 2 R. 39:9665). Instead, the trial court imposed that burden on indigent Covington and her counsel. In *Louisiana Debating and Literary Association, et al v. New Orleans, et al.,* 1995 U.S. Dist. LEXIS 12746 at *7-8 (E.D.La. 1995), the City of New Orleans argued against an attorney fee award because the burden would fall on the taxpayers. That rationale was expressly rejected.[58]

First, in passing Title II, which applies ***exclusively*** to public entities, Congress chose to hold them accountable for full attorneys' fees and did not impose a statutory cap or limit on an enhancement. Courts lack discretion to second guess this important policy decision.

Second, public entities may prove an ADA "hardship" affirmative defense, but McNeese ***failed to even plead*** one.[59] Still, Covington preemptively addressed it and this Court expressly rejected it during McNeese's first appeal.[60] The trial court cannot *sua sponte* reduce attorneys' fees based on an argument that this Court has already rejected. Moreover, this rationale fails to consider that McNeese will be ***enriched*** by this case.[61]

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[58] *See also Riddell v. Ntl' Democratic Party,* 624 F.2d 539, 545 (5th Cir. 1980) (the fact that taxpayers would ultimately pay attorney's fees is insufficient to deny them) & *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir.1979).

[59] *See Olmstead v. L.C.,* 527 U.S. 581, 595 (S.Ct. 1999) ("Congress wanted to permit a cost defense ***only in the most limited of circumstances.***"); *Kinney v. Yerusalim,* 9 F.3d 1067, 1074 (3rd Cir. 1993) ("There is no general undue burden defense in the ADA."); and *Matthews v. Jefferson,* 29 F.Supp.2d 525, 534 (W.D.Ark.1998).

[60] *See also* Covington's most recent evidence refuting any hardship claim. (2 R. 22:5362-83).

[61] In 1998, McNeese's former Director of Facilities and Planning Larry Derouen publically suggested that a lawsuit might ***help*** McNeese get the mere $2.3 million in ADA funding it then sought. Covington's attorneys have accomplished ***five times*** McNeese's own objectives. (2 R. 23:5695).

Third, attorneys' fees are awarded based only on factors in *Johnson/Perdue* and *Williamson.* The trial court erred by creating a new factor—concern for the taxpayer. This is not authorized by law[62] and is not a basis for adjusting fees.

Fourth, by denying an enhancement, the trial court placed the economic burden upon the prevailing party in violation of *Johnson* and *Perdue*. Without an enhancement, Covington's attorneys will suffer a significant lost value of money and opportunity cost that the trial court recognized when it ruled that Hopkins pursued this case, "to the preclusion of more lucrative work he could have been performing." (Judgment, 2 R. 39:9663).

Fifth, this Court has already dismissed McNeese's 11th Amendment immunity defense, and the trial court's decision not to award full fees is tantamount to providing McNeese with partial immunity in violation of the Supremacy Clause. *See Brinn, et al. v. Tidewater Transportation District Commission,* 242 F.3d 227, 232-33 (4th Cir. 2001) (""But there is yet another, even more compelling, reason why we decline to hold that the VDA does not limit the award of attorneys' fees in actions like this one, brought exclusively under federal law—to do so would violate the Constitution.")

Sixth, making McNeese accountable does not hurt the taxpayer—it ***protects*** the taxpayer by forcing officials who would needlessly escalate litigation using public resources to rethink their strategy and apply the same business judgment used in the private sector. Indeed, this is precisely the market incentive Congress proposed when it passed the fee shifting statutes. As noted by the federal Fifth Circuit Court of Appeals:

> If a defendant may feel that the cost of litigation, and particularly that the financial circumstances of an injured party may mean that the chances of suit being brought or continued in the face of opposition will be small, there will be little brake upon deliberate wrongdoing.

Copper Liquor II, 624 F.2d 575, 581 (5th Cir. 1980), *rev'd. on other grounds*.

Seventh, Covington's attorneys ***represent*** the taxpayer and forced McNeese to spend

[62] The closest thing to authority for this comes from a comment in *Perdue,* mentioning a concern that excessive enhancements would be a burden on taxpayers. *Perdue* does not establish a new defense or authorize the denial of an enhancement based on a defendant's status as a public entity. Indeed, the Supreme Court remanded *Perdue* precisely so that a ***public entity could*** be subject to a $4.5 million attorney fee enhancement.

ADA funds as they were supposed to have been spent. Indeed, this case even ***creates*** taxpayers by allowing generations of disabled citizens the opportunity to become educated workers.[63] This is why civil rights counsel are referred to as "private attorneys general." In this case, the U.S. DOJ expressly endorsed this cause—a clear indication that Covington's attorneys represented the interests of the United States. State courts also recognize this important function, and the Louisiana Fourth Circuit enhanced a $200 rate to $600 precisely ***because*** the taxpayers benefitted from counsel's work. *Vela*, 811 So.2d at 1281.

V. COVINGTON'S ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT ERRED BY FAILING TO AWARD A REASONABLE FEE UNDER LOUISIANA LAW

Covington also prevailed under La. R.S. 49:148.1, La. R.S. 46:2254(A), (F), and (J), La. R.S. 51:2231, and the Louisiana Commission on Human Rights and is entitled to fees under Louisiana law under the criteria set forth by *Williamson*, 597 So.2d at 441-42. The trial court erred in failing to consider the state factors as an additional enhancement basis. Covington pleaded and extensively briefed this at 2 R. 21:5624-5710 at 5663-65.

VI. APPELLATE ATTORNEYS' FEES AND SANCTIONS

This Court should award additional attorneys' fees for work on appeal and sanctions for frivolous appeal.

Covington answered and seeks additional attorneys' fees on appeal for the instant brief, Corresponding CD Rom Brief, Motion to Strike, and all additional appellate work to date in the amount of 158 hours for Seth Hopkins, 80 hours for James Hopkins, and 36 hours for Lee Archer, at the rate established on appeal. As this Court holds, "Generally, when an award for attorney's fees is granted at the trial level, additional attorney's fees are proper for work done on appeal. This is to keep the appellate judgment consistent with the underlying judgment." *Goulas v. B & B Oilfield Services, Inc.* 69 So.3d 750 (La.App.3 Cir.8/10/11), *quoting Wilczewski v. Brookshire Gro. Store,*

[63] As Mr. Smith admitted, there is "no question" this case benefitted an entire class of people, McNeese, and "society", including "students getting off of welfare and being able to have jobs." (2 R. 34:8256-58).

2 So.3d 1214, 1226 (La.App.3 Cir.1/28/09), *writ denied* 5 So.3d 170 (La.4/13/09). Moreover, Covington seeks sanctions for frivolous appeal for the reasons provided.

CONCLUSION AND PRAYER

McNeese manufactured a six day attack on Hopkins based on clerical errors affecting 1.5% of his time, which he identified, explained, and addressed six weeks prior to trial. It now escalates that attack on appeal and makes blatant misrepresentations of fact and law in order to evade its responsibility to pay reasonable attorneys' fees.

The trial court reviewed the record and, after a six day trial, reached the only conclusion possible—that Covington's attorneys have earned substantial fees and worked "tirelessly in the face of aggressive opposition" for 10 years. It further found that they achieved great success, having "ultimately effected a $13.8 million renovation of the campus of McNeese State University." Nevertheless, in direct conflict with the evidence and law, it reduced 1,097.9 hours of earned time—1,081 more than McNeese challenged.

The trial court also awarded an excessively low hourly rate which is only 40% of what Covington's four experts contend is reasonable after the U.S. Supreme Court's recent pronouncement in *Perdue*, well below similar awards, and even $110 per hour less than McNeese's own expert. In reaching its rate, the trial court failed to consider the true market value of Covington's attorneys' services, the 10 year payment delay, and the need to attract competent civil rights counsel in the Lake Charles market. Instead, it admittedly penalized Covington in order to protect the taxpayers from the actions of McNeese's officials. This is unlawful for the seven reasons provided and is reviewed *de novo*. Finally, the trial court erred in failing to consider the *Williamson* factors as a basis for an enhancement.

Plaintiffs-Appellees, COLLETTE JOSEY COVINGTON and JADE COVINGTON, respectfully request this Court to increase the fee award to $5,153,190 for Covington's six attorneys for the reasons provided, with judicial interest from February 24, 2011. Moreover, Plaintiffs-Appellees request that the district court's costs and expenses be affirmed and for attorneys' fees, cost of appeal, and sanctions for frivolous appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion was sent by United States mail, postage prepaid and properly addressed to all counsel of record:

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On this the 26th day of October, 2011.

_____
SETH HOPKINS