IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT COURT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
-vs-	)	No. 66 C 1459
	)	
CHICAGO HOUSING AUTHORITY, et al.,	)	Hon. Marvin E. Aspen
	)	
Defendants.	)	

THE CHICAGO HOUSING AUTHORITY'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND RELATED EXPENSES

I. INTRODUCTION

No one disputes that almost forty years ago, plaintiffs brought an historic civil rights case against the CHA. Nor could anyone doubt that the plaintiffs' 1969 judgment order (304 F.Supp. 736 (N.D. Ill., 1969)) was a watershed moment in the history of our city. Following entry of the judgment order, there was lots of litigation between the plaintiffs and the CHA, up and down the court system and all the way to the Supreme Court. The plaintiffs deserved to be paid, and have been paid $3.4 million, for filing the case, winning the judgment order and litigating with the CHA.

Times, however, have changed. In 2000, CHA adopted its ambitious and nationally significant Plan for Transformation, under which all of its crime-ridden and dysfunctional high rises would be torn down, and 25,000 public housing units would be rehabilitated or developed, with the centerpiece being the development of many new and exciting mixed-income developments. Neither the plaintiffs nor this Court prompted the adoption of the Plan for Transformation. Indeed, virtually all of the units to be developed are in Limited Areas, and thus would be proscribed by this Court's 1969 judgment order. Since 2000, CHA has worked cooperatively with the plaintiffs. However, the goal in court has been to vacate those portions of the *Gautreaux* judgment order that stand in the way of the Plan for Transformation. So, the prohibition on building in Limited Areas has been set aside in various revitalizing orders, the prohibition on building public housing over three stories tall has been set aside to allow for mid-rise construction, and the Tenant Assignment Plan has been modified to benefit the many CHA relocatees.

During this period, CHA has scrupulously honored the terms of the judgment order, and when those terms were modified, CHA honored the modified terms of the order. The plaintiffs have not held CHA in contempt, or even sought contempt or any other enforcement remedy. Nor has this Court admonished CHA for being unfaithful to the judgment order, or otherwise slow to comply with the Court's orders-----as was the case in the past. On the contrary, the Court has repeatedly praised CHA for working hard with all of the interested parties (most of whom are not parties in *Gautreaux*) to make the Plan for Transformation a reality.

To be sure, the plaintiffs have supported CHA's sweeping new initiative and CHA has obtained great results. But those results do not flow from court victories the plaintiffs have won. Nonetheless, plaintiffs now seek $732,534.36 for the time spent by nine attorneys between August of 2001 and July of 2003. To recover fees under 42 U.S.C. § 1988, a plaintiff must be a "prevailing party". Our Circuit has made it clear in *Alliance to End Repression v. City of Chicago* 356 F3d 767 (7th Cir. 2004), that after entry of a judgment order or consent decree, plaintiffs can only be considered prevailing parties and earn fees (from the defendant) if they win real relief against the defendant in court. That did happen in the early stages of the *Gautreuax* litigation and the plaintiffs were paid. It has not, however, occurred during the period from August 2001 to July 2003 and, therefore, the plaintiffs are not entitled to fees. In the future, should the plaintiffs be forced into litigating to protect their 1969 judgment order, a fee remedy would potentially be available.

If the Court disagrees with CHA's construction of the *Alliance* case, then the Court must still examine the reasonableness of the $732,534.36 in fees and costs plaintiffs seek. *Farrar v Hobby* 506 U.S. 103, 114 (1992). Plaintiffs' fee petition is bloated by too many attorneys, too many hours, and too many meetings, all billed at rates that the market would not bear for such non-litigation tasks. Moreover, the evidentiary support for the petition is insufficient as a matter of law.

II. PLAINTIFFS ARE NOT PREVAILING PARTIES UNDER SECTION 1988

A. The *Buckhannon* and *Alliance* Cases

In *Buckhannon Board and Care Home v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), the Supreme Court changed the standard used to determine prevailing party status in fee-shifting cases. *Buckhannon* held that a plaintiff could no longer recover fees because his or her lawsuit served as a "catalyst" prompting the defendant to change its policies or practices. Rather, to be a prevailing party, the plaintiff had to obtain a judgment on the merits or a consent decree causing a judicially sanctioned change in the material relationship of the parties. In essence, a party had to win something in court and directly alter the defendant's behavior. Under the *Buckhannon* test, the legal work has to cause the defendant to change its ways.

In *Alliance to End Repression v. City of Chicago* 356 F3d 767 (7th Cir. 2004), our Circuit considered the *Buckhannon* standard in the context of a plaintiff who, like the *Gautreaux* plaintiffs, sought fees for post-decree work. In the *Alliance* case, the plaintiffs had won a consent decree against the Chicago police department to curtail improper surveillance activities and recovered fees for their work in securing the decree. Later, the plaintiffs sought an additional fee award for work following entry of the decree. They claimed fees for time monitoring the defendant's compliance with the decree, for opposing a city effort to modify the decree and for two unsuccessful contempt petitions.

The *Alliance* plaintiffs, however, did not win an order granting them further relief against the city during the period for which they sought fees.

The Seventh Circuit denied fees. Had the consent decree expressly provided the plaintiffs with the right to charge for monitoring the decree, the Court conceded they could recover. The decree, however, did not. Similarly, the *Gautreaux* order does not permit plaintiffs to charge for monitoring compliance with the order. In the absence of such a provision in the *Alliance* decree, the *Alliance* plaintiffs argued that the original consent decree made them prevailing parties and their effort to police the decree deterred the defendant from violating the decree. The *Gautreaux* plaintiffs make the same contention. Our Circuit, however, rejected this argument, for two reasons. *First,* "the rationale is attenuated in a case such as this in which someone else----not the plaintiff----is the appointed monitor". 356 F3d at 771. In *Alliance,* the Chicago Police Board was monitoring police surveillance conduct. Similarly, in the *Gautreaux* case, the Court has appointed a Receiver to not only monitor but to conduct the development activity governed by the original judgment order. *Second*, in the Court's words: "More fundamentally, the cases [the plaintiff had cited] are inconsistent with the Supreme Court's rejection in *Buckhannon* of the "catalyst" theory of fee-shifting ... Monitoring may reduce the incidence of violations of a decree, but if it does not produce a judgment or order, then under the rule of *Buckhannon*, it is not compensable". *Id.* After *Alliance*, the bottom line is that post-decree work is not compensable under §1988, absent authority for post-decree fees in the decree or an order causing real change in the defendant's conduct. *Accord: Petersen v. Gibson,* 372 F3d 862, 865 (7th Cir. 2004) (orders that do not force a material change in the defendant's conduct, e.g. declaratory judgments, orders for nominal damages, or situations where the defendant changes its conduct in the face of a related order do not qualify plaintiffs for an award of fees).

Nor is this result limited to the Seventh Circuit. In *Blackman v. District of Columbia,* 328 F.Supp.2d 36, 43 (D.D.C., 2004), the court rejected plaintiffs' argument that because the court had granted plaintiffs' motion for summary judgment on liability, "the plaintiffs have *de facto* 'prevailing party' status for the duration of these actions with respect to any issues that arise for which attorneys' fees are incurred", and in *Cody v. Hillard,* 304 F3d 767, 773 (8th Cir. 2002), the court concluded the fact that the plaintiff "has once established prevailing party status does not make all later work compensable".

B. The 1969 Judgment Order Is Not Sufficient To Make Plaintiffs Prevailing Parties Thirty-Two to Thirty-Four Years Later, During the 2001-2003 Period

The *Gautreaux* plaintiffs do not contend that the 1969 judgment order, or any other *Gautreaux* order, contains language entitling them to fees for post-decree work. Instead, they claim that by winning the judgment order back in 1969, plaintiffs established a right to recover fees thereafter and forever-----not just thirty-two years later, but fifty or one-hundred years later.[1] This, of course, is precisely the claim the *Alliance* plaintiffs made and lost.

Plaintiffs here, however, say the *Gautreaux* case is different than *Alliance*. They contend that the CHA has not complied with the 1969 judgment order, while the city police had complied with

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[1] Plaintiffs suggest that they are entitled to fees until the *Gautreaux* order has fully accomplished its purpose (Pltf. Br., at 4). When might that be? The order has no expiration or termination date and the only set program the order ever established was the "scattered-site" program established in the HUD consent decree, which was completed years ago, and prompted HUD's dismissal from the case. CHA has not built any new public housing in Limited areas, other than as permitted by the Court. Nor has CHA steered black public housing applicants to particular developments since the 1960s. When, according to plaintiffs, is CHA no longer obligated to pay fees to the plaintiffs?

the *Alliance* decree. As such, the plaintiffs here say the 1969 judgment order is not separable from any of their work, even decades later, as *Gautreaux* "is a continuous litigation and is not to be cut into separate slices for fee purposes" (Pltf. Br., at 7). In support of this argument, the plaintiffs rely on *Gautreaux v. CHA,* 690 F2d 601 (7th Cir. 1982).

The Plaintiffs' argument fails for several reasons. *First,* the factual predicate of the argument is wrong. The plaintiffs blithely say: "as the Court well knows, the CHA has not complied with the Judgment Order throughout the period since 1969". They offer nothing, however, to support such a sweeping indictment. In fact, during the relevant period, i.e. the period for which the plaintiffs seek fees (August of 2001 to July, 2003), CHA has honored the judgment order. The judgment order prohibits CHA from building in Limited Areas, and requires CHA to follow the Tenant Assignment Plan. *Gautreaux v. CHA*, 304 F.Supp. 736 (N.D. Ill, 1969); and 690 F2d 601, 605 (7th Cir. 1982) (summarizing the terms of the order). There is no evidence of any contempt petitions being filed during the 2001 to 2003 period, nor a shred of evidence in the court record that CHA violated or was about to violate the mandates of the 1969 order.

On the other hand, in *Gautreaux v. CHA,* 690 F2d 601 (7th Cir. 1982), there is no question that CHA was not complying with the judgment order during the period for which fees were sought (1965-1980). The Seventh Circuit's opinion, at 605-607, outlines in detail the battles plaintiffs fought with CHA before 1980. Among other fights, CHA refused to submit public housing sites to the City Council because of aldermanic opposition until this Court ordered it to do so. CHA refused to bypass the City Council and eliminate the Council's "pre-approval" process until the Court ordered it to do so. CHA fought the effort to freeze all Model Cities funds, and CHA assisted HUD in opposing metropolitan-wide relief. Throughout the post-decree period, until 1980, in the Court's words: "CHA's response to orders by the court and magistrate ranged from lethargic to obdurate", 690 F2d at 606. Given this factual record, it is understandable why the Court awarded fees to the plaintiffs for the period in question.

In fact, during the relevant period (2001-2003), the plaintiffs were not forcing CHA to comply with the judgment order; they were agreeing to orders that vacated or modified various provisions of the 1969 judgment order, so that the Plan for Transformation could go forward. *See,* Peterson Affd., Exh. B hereto, which describes the adoption of the Plan and the relationship of the orders. For example, the December, 2002 order, featured on pages 5-6 of plaintiffs' brief, was entered at the behest of the CHA, so that it could build units at Horner (otherwise expressly prohibited by the judgment order), and so that some of those buildings could exceed three stories (otherwise expressly prohibited by the judgment order). The Horner development, including Phase II (to which this order relates) is the subject of separate federal litigation, entitled *Henry Horner Mothers Guild v. CHA*, 91 C 3316, pending before Judge Zagel. The details of Horner Phase II were worked out with plaintiffs' counsel in the *Mothers' Guild* case (along with many other interested parties), and embodied in a February 1, 2000 order entered in the *Mothers Guild* case. A copy of this order is Exh. A hereto. The 2002 *Gautreaux* order was entered, after a developer was selected, only because the deal with the *Mothers' Guild* plaintiffs would have violated the *Gautreaux* judgment order, unless that order was vacated or modified. The December 12, 2002 order that plaintiffs here cite was entered solely to provide relief from the 1969 judgment order, so as to let Horner Phase II proceed. *See,* Terry Peterson Affd.,¶ 9, attached as Exhibit B hereto. The other orders, as discussed below (see section IV and the Terry Peterson affidavit), are no different in character.[2]

Surely, when plaintiffs agree to set aside or modify provisions of the 1969 judgment order, they are not thereby entitled to fees from the defendant who needs such a modification. It is precisely the **opposite** of the kind of legal victory necessary under *Buckhannon* to trigger fee liability. Indeed, in the *Alliance* case, plaintiffs sought fees for the time they spent in connection with the city's modification of their consent decree, and it was denied.

Second, wholly apart from the critical factual difference between the pre-1980 *Gautreaux* era and the present *Gautreaux* era, the Seventh Circuit decided *Gautreaux v. CHA*, 690 F2d 601 (7th Cir. 1982) long before the Supreme Court changed the standard for fee liability in *Buckhannon* and before cases like *Alliance* were decided. As a result, the reasoning in the 1982 *Gautreaux* fees litigation is no longer valid. Part of the basis for awarding fees for the pre-1980 period was that the plaintiffs' litigation, even where unsuccessful, pressured CHA into progress in building units. 523

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[2] If any party could be considered to have prevailed with respect to the December 12, 2002 order, it must be the CHA. As a direct result of this order, CHA won permission to build in a Limited Area, and to build mid-rise buildings. The order then further provided CHA with up to $12 million in *Gautreaux* set aside funds to subsidize the development. Given this transfer of funds to CHA and its Receiver, how could the plaintiffs be considered to have won in court?

F.Supp. 684, 690 (N.D.Ill., 1981).[3] This "catalyst" approach has now been specifically condemned by the Supreme Court. Legal victories are now the litmus test.

Further, the 1982 notion that the original judgment order and the post-judgment proceedings can be non-separable is now squarely put in doubt by *Alliance.* Not only did the *Alliance* court reject precisely such a claim, but it found the whole notion now to be "questionable" ("Some cases have suggested that if postjudgment proceedings are 'inextricably intertwined' with the original decree, in the sense of involving the same facts and legal issues, they can be considered part of the original case in which the plaintiff prevailed [citations omitted] ... That is a questionable extension of the sound and settled principle that attorneys' fees incurred in interim defeats en route to a successful conclusion are compensable...", 356 F3d at 771.

Third, when the Seventh Circuit decided the fee issue in 1982, it was hardly writing a blank check to the plaintiffs forever. Indeed, the Court understood that the plaintiffs had waited to "ask for attorneys' fees only as the litigation draws to a close". There is nothing in its opinion to suggest that the Court understood it was granting plaintiffs prevailing party status for the next twenty-three years.[4] Its most recent pronouncement, in *Alliance*, takes a dim view of class plaintiffs' earning fees

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[3] The District Court found that: "plaintiffs' pursuit of the proceedings before the Master, the 1979 order and the motion to appoint a receiver undoubtedly contributed in a substantial way to CHA starting to provide housing in compliance with the court's orders. Moreover those pursuits were unquestionably a material factor in bringing about changes in defendants' conduct, especially since the motion for appointment of a receiver was denied without prejudice to renew. The motion was a substantial factor in compelling the CHA to show demonstrable progress. Therefore, plaintiffs' must be considered the prevailing party in the case as a whole." *Gautreaux v. CHA,* 523 F.Supp. 684, 690 (N.D. Ill., 1981).

[4] In fact, the specific issue before the Court was not prevailing party status at all, but rather whether the 1976 Civil Rights Attorneys Fees Awards Act (42 U.S.C. §1988), which went into effect October 19, 1976, would govern a case resolved by a 1969 judgment order. This, in turn, required the Court to decide if there were substantive disputes still pending in 1976.

for years and years ("the class action device is not intended to be a lawyers' gravy train", 356 F3d at 773), at least in the absence of real relief won in the courtroom.[5]

The *Gautreaux* plaintiffs, like other plaintiffs, must show they have won court battles to collect fees. They have made no such showing in connection with the present fee petition.

III. THE EXTENSIVE TIME CLAIMED BY THE PLAINTIFFS FOR WORKING GROUP MEETINGS AND OTHER PURPORTED MONITORING ACTIVITIES IS ENTIRELY INAPPROPRIATE GIVEN THE PRESENCE OF THE RECEIVER

The lion's share of the time the plaintiffs claim in their fee petition is for attending Working Group meetings at the various developments, and internal meetings at which the issues were discussed among plaintiffs' various attorneys. This is monitoring pure and simple. It is plainly not compensable under *Buckhannon.* Here, however, it is particularly inappropriate, as the Court, on August 14, 1987, appointed a Receiver not only to monitor but actually to conduct CHA's development activities. The Receiver is present at every Working Group meeting, and at every other important meeting involving the development of CHA public housing units. The Receiver regularly meets with and monitors the activities of all of the various developers engaged to produce new public housing throughout the city. The Receiver is amply compensated for this work pursuant to this Court's receivership orders. CHA records show that from 1987 through 2003, the Receiver has been paid millions of dollars for its own fees and expenses, and millions more for its own lawyers. *See,* Niemann Affd., Exh. C hereto, ¶10.

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[5] The plaintiffs also cite the Seventh Circuit's decision in *Gautreaux v CHA*, 178 F3d 951 (7th Cir. 1999) for the proposition that all *Gautreaux* litigation is non-separable when it comes to fees. In fact, this decision had nothing to do with attorneys fees. It concerns only the scope of appellate jurisdiction. The Court there dismissed CHA's appeal of orders, finding that the 1969 judgment covered development under the HOPE VI program on grounds that the District Court had not modified but merely enforced the original judgment order in its rulings. The case is inapposite to the fee issues now before the Court.

The *Alliance* case had a similar arrangement. The Chicago Police Board had been charged with monitoring the police department's surveillance activities. When the plaintiffs' counsel sought time for its own monitoring activities of the department, the Seventh Circuit characterized the plaintiffs' actions as "piggyback monitoring". It quickly denied any such claim for fees, finding that it did not "survive *Buckhannon*", 356 F3d at 772. The same result should apply here. The CHA has limited resources with which to build housing. The money used to pay the Receiver, the Receiver's counsel and the plaintiffs' counsel is all money that would otherwise go to build housing.[6] To pay lawyers $300 to $400 per hour to sit at development meetings to monitor the CHA, when the CHA's work has already been turned over to a Receiver and its counsel, is nothing short of a waste of limited governmental resources.

IV. DURING THE RELEVANT PERIOD (2001-2003), THIS COURT DID NOT ENTER ANY ORDERS THAT PROVIDED RELIEF THAT MATERIALLY ALTERED THE LEGAL RELATIONSHIP OF THE PARTIES, OTHER THAN TO VACATE OR LIMIT THE ORIGINAL *GAUTREAUX* JUDGMENT ORDER

The plaintiffs say that if *Buckhannon* and *Alliance* require court orders, they have them. They then point to a series of agreed orders (Pltfs. Br., at 5-6) and say that these orders satisfy the requirement of "judicial imprimatur" set out in *Buckhannon*. To prevail, however, the Supreme Court required that the plaintiff obtain orders that changed the legal relationship between the parties in a material way that favors the plaintiff. 532 U.S. at 604. The orders the plaintiffs rely upon changed the legal relationship between the parties, but in ways that benefitted the defendant. Each order vacated or limited the provisions of the original 1969 judgment order the plaintiffs won. *See,* the Affidavit of Terry Peterson, Exhibit B hereto, ¶9.

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[6] Indeed, the payments made to the Receiver equate to hundreds of units of public housing, assuming a cost of $140,000 per unit.

The December 12, 2002 order permitting implementation of the Horner Phase II deal CHA struck with the *Mothers Guild* plaintiffs was explained earlier. The other orders the plaintiffs claim satisfy *Buckhannon* did not provide relief to the plaintiffs at the expense of the CHA:

> The September 7, 2001 Order----was jointly offered by the plaintiffs and the CHA. It vacated the three-story height restriction contained in the 1969 judgment order, so that mid-rise buildings, like the ones at North Town Village, could be built at Cabrini. The plan to build North Town Village, and the 700 other new public housing units in the Cabrini Extension North area was not, however, the result of litigation brought by the *Gautreaux* plaintiffs, but rather initiated by the city and CHA. A copy of this order is Exh. D hereto.
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> The August 29, 2002 Order----was jointly offered by the plaintiffs and the CHA. This Order modified the 1969 judgment order's Tenant Assignment Plan, so that CHA families forced to relocate, as a result of the Plan for Transformation, would have top priority for CHA's share of the scattered-site units available thoughout the city. A copy of this order is Exhibit E hereto.
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> The September 11, 2002 Order----was another joint motion by the plaintiffs and the CHA that expanded the North Kenwood-Oakland revitalizing area thereby permitting CHA and its Receiver to build new public housing units on the site of the old CHA Ida B. Wells, Clarence Darrow, and Madden Park developments. Without this order, building the new mixed-income units at Oakwood Shores and the other mixed-income units planned for the area would be squarely prohibited by the 1969 judgment order. A copy of this order is Exhibit F hereto.
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> The March 18, 2003 Order----is another joint motion filed by the plaintiffs and the CHA. The 1969 judgment order had an exhibit that listed each of the Limited area census tracts in the county, by number. This order does nothing more than update that list to account for the results of the 2000 census. It was a totally ministerial matter that did not alter, in any way, the relationship between the parties. A copy of this order is Exh. G hereto.

Apart from the fact that these orders did not change the CHA's policies or practices, and therefore cannot satisfy *Buckhannon*, they do not involve very many of the plaintiffs' claimed hours. The plaintiffs' time is spent largely in meetings and monitoring activities. Thus, even if the Court were to pay plaintiffs' counsel for their work on these orders, (which it should not) the award would be minimal.

V. PLAINTIFFS' FEE REQUEST IS INADEQUATE AND EXCESSIVE.

A. The Legal Standard

Even if this Court should find that plaintiffs were prevailing parties on some or all of the matters for which they seek fees, this Court must deny plaintiffs' application for fees because it is legally insufficient. The burden rests upon plaintiffs to establish that they are entitled to the fees they seek. *Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (2001). This burden requires plaintiffs to demonstrate that they have exercised billing judgment, before presenting their bill, and are charging an appropriate hourly rate for the work actually performed. Plaintiffs have failed in both regards.

B. Plaintiffs Have Not Exercised Billing Judgement.

Plaintiffs say they have exercised billing judgment. Polikoff Additional Affidavit ¶¶ 3, 4. Yet, they present no evidence in support of their claim. Mr. Polikoff has stated that he excluded all hours in certain categories of work. *Id.* ¶ 3(a). Yet, Mr. Polikoff does not state what categories of work were excluded, why they were excluded, how much time was involved in these categories, or which of the nine lawyers performed the work. Similarly, Mr. Polikoff states that he has excluded all categories of work on any task lasting less than fifteen minutes. *Id.* ¶ 3(d). Mr. Polikoff does not, however, state whether these exclusions are reflected in the voluminous time records submitted for the nine attorneys. Nor does he indicate how much time this represents. Absent such information, the Court cannot, as a matter of law, determine whether Mr. Polikoff exercised billing judgment before submitting the fee claim.

Mr. Polikoff also states that he has excluded half of what would otherwise have been the fee request attributable to hours spent in "Gautreaux team meetings." *Id.* ¶ 3(e). Gautreaux team meetings are internal meetings only of plaintiffs' counsel. Not only does Mr. Polikoff not tell the

Court how much time this reduction involves or whether such reductions are reflected in the time records submitted, he does not state why he has made this reduction. If, as seems likely, this reduction was made because he concluded that excessive time was spent in intra-office discussions among the nine plaintiffs' attorneys in meetings or telephone conferences, then such reductions should have extended to all intra-office communication, not just the time entries labeled "*Gautreaux* team meetings.". That is, the mere fact that a billing entry is labeled "Gautreaux team meeting" does not distinguish it from a billing entry of "Mtg with ALP, JEB, AEG " (all of whom are plaintiffs' counsel). Yet, there is no indication that Mr. Polikoff exercised billing judgment with respect to the latter type of entry.

Mr. Polikoff goes on to state that he "eliminated hours spent by more than two attorneys consulting together, or participating in meetings or phone calls with third parties," and eliminated some hours spent by attorneys deemed "getting up to speed". *Id.* ¶ 4(a). Again, Mr. Polikoff does not tell the Court the amount of time involved or whether such reductions are reflected in the submitted time records, and if not, which entries have been modified. Plaintiffs have left if to this Court to guess about the time entries for which fees are sought and whether billing judgment has been reasonably exercised.

In *Walker v. HUD*, 99 F.3d 761 (5th Cir. 1996), the appellate court reviewed a fee award relating to post-decree work in a class action. The Court noted that "the plaintiffs are charged with the burden of showing the reasonableness of the hours they bill and, accordingly are charged with *proving* that they exercised billing judgment"(emphasis added, citation omitted), at 770. There the court stated that "the proper remedy when there is no evidence of billing judgment is to reduce the hours awarded by a percentage intended to substitute for the exercise of billing judgment." *Id.* CHA believes the fee petition should be stricken in its entirety until the plaintiffs provide evidence of billing judgment rather than Mr. Polikoff's conclusory affidavit. In the alternative, the fees should be reduced as set out below.

C. A Proper Analysis Reveals That Even if Plaintiffs' Attorneys Are Entitled to Some Fees, They Are Entitled to Fees For No More Than 833 Hours

The plaintiffs have filed a fee petition that is larded with an extraordinarily excessive number of hours billed by an extraordinary number of lawyers. They claim 2,592 hours spent by nine different attorneys in a space of only two years. However, when BPI filed its first fee petition in this case, it covered fifteen years of work. That fee petition included all of the time spent in filing the case, litigating it to a judgment, four separate appeals to the Seventh Circuit, as well as a trip to the Supreme Court, and an unsuccessful effort to obtain a court receiver. The petition only sought fees for 3,003 hours or work, by one lawyer. 523 F.Supp. at 685. Another way to demonstrate the excessive nature of the petition is to compare the hours BPI claims for 2001-2003 with the hours CHA's outside counsel billed over the same period. Johnson, Jones, Snelling, Gilbert and Davis billed CHA for only 584.72 hours during the same period, Niemann Affd. ¶ 6. Moreover, Mr. Johnson's billings include not only work on the *Gautreaux* litigation, but also time spent defending CHA in *Henry Horner Mothers Guild v. CHA, 91 C 3316* and *Cabrini-Green LAC v. CHA, 96 C 6949*, pending before different federal judges, where BPI does not represent a party. *Id.*
Without even considering the line-by-line entries in plaintiffs' fee petitions, the Court should find that at least one-half of the plaintiffs' hours are unnecessary and non-compensable.

Plaintiffs present over 100 pages of attorneys' chronological billing entries. They did not offer an analysis of these time records, much less any grouping of time by task or subject matter.

Defendant CHA has done so, analyzing these many pages for three categories: 1) intra-office meetings, memorandums, and telephone calls, all conducted between plaintiffs' attorneys ("intra-office communications"); 2) time entries for activities in which more than one plaintiff's lawyer interacted with a third party at the same time ("double billing"); and 3) non-compensable activities, including clerical work, work on matters outside of the scope of the *Gautreaux* litigation, and attendance at meetings in which there was no need for a plaintiff's lawyer to attend, ("non-compensable time"). Exhibit H, entitled Summary Analysis of Plaintiffs' Time, is a summary of the time to which objection is made for these reasons. Exhibit I, entitled Detailed Line-by-Line Objections to Plaintiffs' Time, consists of the plaintiffs' actual time records marked up to reflect the specific time falling into these three categories.

In the real world, clients flyspeck lawyers' bills to eliminate unnecessary or excessive work, and double-billing. Private lawyers regularly negotiate the bills once they are sent to clients. Many clients have standing guidelines or rules that set out what kind of work outside counsel are able to bill for. Both the City of Chicago and the CHA require outside firms, including the largest firms in the city, to honor these guidelines as part of their contracts, *see* Niemann Affd., ¶ 7-8. Copies of the Guidelines are in Joint Ex. J hereto. These guidelines explicitly prohibit overstaffing, charging for learning time, holding internal conferences, and handling specific tasks through persons who are either over-qualified (e.g., routine document review by a senior lawyer) or underqualified (e.g., extensive research by junior associates). *See,* City of Chicago Department of Law Outside Guidelines, pp.1, 3-8 ; Chicago Housing Authority Outside Counsel Guidelines, pp. 1, 5-8. Most significantly, both clearly prohibit more than one attorney from attending depositions, meetings or arguments and, permit additional people to be assigned only for trials and major hearings. *Id.*

1. Intra-Office Communications

Plaintiffs seek compensation for 595 hours in intra-office communications among the nine plaintiffs' attorneys. In *Jardien v. Winston Network, Inc.*, 888 F.2d 1151 (7th Cir. 1989), the court denied fees to a second attorney even though that attorney had participated in a six-day trial. *See also, ACLU of Georgia v. Barnes*, 168 F.3d 423, 433-434 (11th Cir 1999), (noting that the presence of four attorneys was "patently excessive"and that because plaintiffs had provided no explanation as to why a squad of attorneys was necessary, plaintiff had not met his burden of showing that time spent reflects a distinct contribution of each lawyer to the case and that the customary practice is to staff similar matters with so many attorneys.) Here, plaintiffs have not limited themselves to a squad of lawyers; they have deployed an entire squadron. Nine attorneys, constantly consulting with each other when there are no contested legal proceedings, have even less of a claim to multiple compensation than the attorneys in *Jardien*. So, here, for example, on August 1, 2001 plaintiffs seek compensation for a GTX team meeting involving Polikoff, Kaden, Brunick, Brown, Gross and Jones. The total time billed for this meeting at the requested attorney fees rate is $2628.75, though it lasted less than 2 hours and there is no indication it contributed to any successful proceeding in court. Even applying the one-half reduction factor to this meeting, the bill is still over $1300. The fee affidavits reveal that there were 34 of these GTX team meetings for which over $38,000 is sought even after plaintiffs' proposed reduction factor has been applied. Plaintiffs have not offered any reason why attorneys with such extensive legal experience (for example, over fifty years for Mr. Polikoff, over 20 years Ms. Brown), claiming entitlement to hundreds of dollars per hour, needed to consult so often and, exercising billing judgment, would have billed a client for such extensive intra-office communications. More importantly, had this case been staffed by one or two experienced lawyer, 595 hours in intra-office conferences, meetings, telephone discussions would have been unnecessary.[7] Since plaintiffs have provided no reason why their work on matters directly related to *Gautreaux* could not have been staffed by one lawyer, they have not met their burden to justify intra-office communications. Therefore, all time for intra-office communication should be denied.

2. Double Billing

Plaintiffs seek over 129 hours for times when more than one, and often three or four attorneys, interacted with a third party at the same time. That is, plaintiffs are demanding that CHA pay for the same work two, three or four times. While Mr. Polikoff has averred that he has reduced these charges where more than two attorneys participated, he has provided no documentation of such a reduction. Moreover, plaintiffs assume that two attorneys performing the same legal task at the same time is *a priori* a permissible billing practice. They provide no support for this contention. The law and good billing judgment, as evidenced by the City and CHA's guidelines, does not support such a practice. None of the activities in which two or more attorneys participated was a trial, a deposition, a contested motion or even an appellate brief. Principally, the tasks were meetings or telephone conferences with other social agencies, non-lawyers and CHA personnel. Having provided no justification for two people (much less more than two), plaintiffs are not entitled to such double billing, and the time should be reduced by at least two-thirds. *Jardien, supra*, 888 F.2d at 1154.

3. Non-Compensable Activities

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[7] The Receiver and CHA are both essentially represented by a single lawyer in these proceedings.

Plaintiffs billed 1,342 hours for activities which are not properly compensable as work related to the *Gautreaux* judgment, or at least are not explained sufficiently for CHA to understand how they would relate to the judgment. In addition, these non-compensable charges include some activities which did not require any attorney, much less ones who seek fees at such high hourly rates.

1. Plaintiffs are billing for clerical work. For example, Henry Ford billed multiple hours for inputting census data into a computer. See Ford Time Records, 6/19/02-8/12/02, p. 1. Mary Anderson billed 1.5 hours to file a motion. See Anderson Time Records, 9/10/02. p. 3. Good billing practice does not countenance charging clients attorneys' rates for clerical work.

2. Plaintiffs are billing for time on "habitability" issues. See, e.g., Time Records of Alexander Polikoff, 9/04/01, p. 3; Time Records of Adam Gross, 8/6/01, p.1. Plaintiffs have offered no explanation as to why the existence of the *Gautreaux* judgment order (which deals with the location of CHA housing and Tenant Assignment Plan) would authorize time on "habitability issues". *Gautreaux* itself has nothing to do with "habitability."

3. Plaintiffs are billing for work defending their conduct in *Gautreaux* against disgruntled tenants at the ABLA development. See, e.g., Time Records of Robert Jones, 2/4/02, 12/28/01, p.4; Time Records of Julie Brown, 5.08/02, p. 10; Time Records of Eloise Lawrence, 1/28/03, p.3. There is no reason why the CHA should pay for plaintiffs' counsel's defense of their own conduct against their own clients.

4. Plaintiffs are billing for work related to relocation services to tenants during the CHA's Plan for Transformation. See, e.g, Time Records of Julie Brown, 8/29/01, 8/30/01, 9/24/01, 10/01/01, pp. 2-4; Time Records of Alexander Polikoff, 5/30/02, p.4, Time Records of Eloise Lawrence, 1/14/03, p.3,; Time Records of Adam Gross, 1/13/03, p.27. There can be no dispute that this matter is not properly within the scope of the Gautreaux case. This is because plaintiffs' counsel themselves filed another lawsuit against the CHA about these matters. *See, Wallace v. Chicago Housing Authority*, 298 F.Supp.2d 710, 715 (N.D.Ill.2003), from which they later withdrew. If plaintiffs' counsel are entitled to fees for their work on these issues, they should seek them from the *Wallace* Court.

5. Plaintiffs seek fees for preparing for and attending dozens of meeting where their attendance was unnecessary and where they could easily have sent someone other than a lawyer to monitor the meetings. See, e.g., Time Records of Mary Anderson, 8/02/02, p.2. Much of this time involves the CHA's Working Groups. Working Groups are collaborative meetings at each CHA Development undergoing transformation. CHA staff, local tenant advisory councils, community organizations and the Receiver participate in these meetings. The Receiver is paid by CHA to attend these meetings and to monitor all of the Plan for Transformation for compliance with the Gautreaux judgment order. CHA and the Receiver

rarely send lawyers to these meetings. The meetings concern a wide variety of development issues, including site design, demolition scheduling, landscaping, and selecting a developer. There is no need for plaintiffs to send a lawyer to these meetings, and plaintiffs have offered no reasons. It is true that plaintiffs' lawyers are welcome to participate in these meetings and are invited to do so. However, at no time has CHA agreed to pay plaintiffs attorneys to attend such meetings and, indeed, if the Court were to determine that participation by the *Gautreaux* plaintiffs at these sessions will cost the CHA $300 to $400 per hour, CHA will not be able to afford the presence of plaintiffs' counsel on a regular basis. All of the time spent preparing for, attending, and consulting with each other over the Working Group meetings should be disallowed.[8]

Plaintiffs seek fees for other meetings where lawyers were completely unnecessary and the topic of which had nothing to do with *Gautreaux*. For example, Mr. Brunick claims fees for "preparing information for 4th Presb. Church about the human capital subcommittee at Cabrini." Time Records of Nicholas Brunick, 9/1/801, p. 4. What does this work have to do with the 1969 judgment order, much less any judicial order granting relief against the CHA between 2001 and 2003. Mr. Brunick also seeks time for work generally on the Cabrini Service Connector program and for reading engineer's estimates about the cost of fixing up 93 units at Jane Addams. *Id.* p.6.

Because plaintiffs have provided no justification for their entitlement to bill as attorneys in this case for these activities, all of the related time should be stricken.

D. Legal Work

The remaining 987 hours are for what could be described as legal work related to *Gautreaux*, though not related to any order that would satisfy *Buckhannon*. Even here however, plaintiffs have exercised no billing judgment. They have made no reduction for inefficiencies from multiple lawyers performing the same task. For example, plaintiffs seek over 50 hours in compensation for preparing the March 2003 joint motion to modify Exhibit A-2 to the Judgment Order. Time Records

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[8]Similarly, all of plaintiffs' expenses consist of the cost of transportation to these meetings, and should, therefore be disallowed in their entirety.

of Henry Ford, 8/13/02-8/29/02. 3/13/03, pp.1,3; Time Records of Julie Brown,8/15/02, 8/26/02, 8/28/02, 8/29/02, 3/13/03, pp.16-17, 22 . A copy of this motion is attached as Exhibit G hereto. This motion consists of one page and three paragraphs with a one page attachment of Cook County Limited Area Census Tracts. The census information was derived from the HUD website. Similarly, concerning the Rockwell Gardens Agreed Revitalization motion and order, which was akin to similar agreed orders, plaintiffs billed 28 hours for work by Messrs. Polikoff and Gross and Ms. Brown, at extremely high rates. For the Madden/Wells Agreed Revitalization Area Motion and affidavit, plaintiffs bill for 17 hours of work for Messrs. Anderson and Jones, when the affidavit is from the Receiver. These orders are not complicated and have been entered, in essentially the same form, many times by this Court.

Another form of excessive and duplicative billing is multiple attorneys billing for reviewing the same documents. Thus, for example, in January 2003, A. Polikoff, J. Brown, A. Gross, and E. Lawrence all bill for reviewing the Sullivan Report, totaling 9.75 hours billed or $3322.50 at the rates sought, for reading this report. Similarly, in September 2001, BPI bills 9.75 hours, or $3112.50, for BPI staff reading and meeting on the CHA Third Transformation Plan. This practice is repeated throughout the two year period.

The foregoing are merely a few examples of the many instances of duplicative and excessive time expended on the comparatively few legal issues within the scope of *Gautreaux.* The CHA's specific objections are set forth in Exhs. H and I. These "legal work" hours should be reduced by at least 20 percent to account for these inherent inefficiencies.

4. Plaintiffs Have Not Met Their Burden to Establish Appropriate Market Rates

The second element upon which the plaintiffs bear the burden of proof is submitting evidence of appropriate hourly rates. Here plaintiffs have submitted one declaration, from Lowell Sachnoff. But that declaration must be rejected. First, Mr. Sachnoff is a member of the Board of Directors of Plaintiffs' attorney organization. See Exh. K, Letterhead of BPI, including Lowell Sachnoff, as a director. As a Director of BPI, Mr. Sachnoff has a clear interest in BPI receiving as much in attorneys fees as possible. Because the declaration is not from a disinterested attorney, it must be disallowed. Without any evidentiary support, plaintiffs have not met their burden to establish the appropriate market rate.

Mr. Sachnoff's declaration fails for another reason. Although he opines as to the rate commonly charged in "all types of litigation," he offers no opinion as to whether the work of these nine lawyers is of the same type as would warrant such fees. Bluntly put, there is very little time here that could be called "litigation." Mr. Sachnoff offers no opinion on whether such fees are appropriate when there has been extensive intra-office discussions between attorneys, the staffing of the case with over nine attorneys, enormous numbers of hours spent attending meetings with non-lawyers, and the like. Absent such information, Mr. Sachnoff's declaration simply fails to establish the reasonable and appropriate current hourly rates for the actual services of these attorneys.

The rates sought by plaintiffs here exceed that which the market pays. The Niemann Affd., Exh. C hereto, demonstrates that when a client (here, CHA) seeks the services of lawyers, through a competitive RFP, they can presently secure those services for an hourly rate that ranges between $325 at the highest end, for senior partners at the largest and most prestigious law firms in the city to $105 per hour. Defense counsel in this case, with thirty years of experience, is paid $170 per hour, lower than the rate charged by the most junior of BPI's lawyers. *See,* Niemann Affd., at ¶ 2-6. The real world determines the market for lawyers' services, and CHA's competitive procurement of legal services, which gives us information on 75 law firms, tells us what that real world pays. Given their experience, the plaintiffs here are entitled to rates ranging from $350/hour to $125/hour, as set out in Exh. H hereto.

D. The Appropriate Fee Award If Fees Are Allowed At All.

Applying reasonable market rates to the reasonable time claimed by plaintiffs' attorneys, assuming they are entitled to any fee under the *Buckhannon* and *Alliance* cases, yields a fee of $175,085.00, as set forth in Exh. H hereto.

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CERTIFICATE OF SERVICE

Thomas E. Johnson, an attorney, hereby certifies that a copy of the CHA'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND RELATED EXPENSES and APPENDIX was served upon the parties listed below by hand delivery on June 9, 2005:

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