IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

PROJECT VOTE/VOTING FOR AMERICA, INC.,	:	
Plaintiff,	:	
v.	:	Case No.: 2:10cv75
ELISA LONG and NANCY RODRIGUES,	:	
Defendants.	:	

DEFENDANTS LONG AND RODRIGUES' REPLY
TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants, Elisa Long, General Registrar of Norfolk, Virginia ("Long"), and Nancy Rodrigues, Secretary, Virginia State Board of Elections ("SBE")("Rodrigues"), by counsel, hereby reply to Plaintiff's Opposition to their Motion to Dismiss.

I. Plaintiff Still Lacks Standing for the Reasons Cited by the Fourth Circuit in *Salt Institute*

In its Opposition brief, Project Vote alleges that it has suffered an "informational injury" giving it standing because it has been denied information subject to disclosure under the NVRA. In support, Plaintiff cites cases such as *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440 (1989) and *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), which found concrete "injury" where parties entitled to information were denied it. Pl.'s Opp. at 4-8.

As a threshold matter, an organization can claim an "informational injury" only when the harm is not simply a general one, such as the "'common concern for obedience to law.'" *Akins*, 524 U.S. at 23 (citation omitted). When large numbers of people share a widespread, common grievance, courts sometimes hold that the political process, rather than the legal one, is the proper place for remedy. *Id.* Here, Defendants do not believe that Plaintiff, a Washington, D.C.-based group with no ties to the students who applied to vote, alleges facts establishing more than a "common concern" that would support standing even under *Akins*.

Plaintiff also claims that in *Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006), the Fourth Circuit "embraced" the "*Public Citizen* test." Pl.'s Opp. at 12. In reality, however, the Fourth Circuit held that the *Public Citizen* test answered a question different from the one before the Fourth Circuit, which therefore did *not* apply the rule in *Public Citizen*. *Id.* at 159.

More specifically, in *Salt Institute*, the Fourth Circuit held that the plaintiff lacked standing to bring a claim because the statute in question did not give the plaintiff a legal right to the information the plaintiff demanded. Consequently, the plaintiff suffered no "injury" and so had no standing. *Id.*

The Fourth Circuit in *Salt Institute* also criticized the plaintiff-appellant, which, like Project Vote, relied on *Akins*, for confusing two distinct standing inquiries, namely (1) the concreteness of the alleged injury and (2) the status of the claimed right. *Id.* Even accepting that a plaintiff can have a concrete "informational" injury under *Public Citizen*, Project Vote still lacks standing because it lacks the right to the information demanded, just like the plaintiff in *Salt Institute*.[1] Consequently, this Court, like the

[1] Project Vote may try to argue that this case is closer to *Akins*, which involved a statute containing a public disclosure provision, than to *Salt Institute*, which did not. But for the reasons stated in this filing and the Motion to Dismiss, the NVRA cannot reasonably be read to require disclosure of applications

Fourth Circuit in *Salt Institute,* need never reach the "concrete injury" analysis from *Public Citizen*, and should still dismiss this case on standing grounds.

One of the most glaring reasons why Project Vote has no right to see completed voter registration applications is that they contain admittedly confidential information, including social security numbers and information about criminal convictions and mental incapacitation. *See* Virginia Voter Registration Application, attached hereto as Exhibit "A." In response, Plaintiff defends its request for the applications by saying that it would accept disclosure of applications with social security numbers redacted. Pl.'s Opp. at 25 and Exhibit "A" thereto at 6.

Unfortunately, that will still leave information about criminal convictions and mental incapacitation open to public disclosure. *See* Exhibit "A." This sensitive information goes directly to a person's eligibility to vote and so cannot be redacted, because the answers to those questions may form the basis for being denied registration. Because Plaintiff would need a person's name and address to determine whether his or her application was properly processed under the NVRA, there would be no way of preventing Plaintiff *or anyone else interested in seeing these applications* from connecting this sensitive information with an applicant's name and address.

Granting Plaintiff's request would almost certainly discourage people either from applying to vote, or from providing honest answers (about criminal background or mental incapacitation) when applying. This, in turn, would frustrate two core purposes

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containing plainly confidential information. Absent a right to such information, Project Vote has no injury and thus no standing.

of the NVRA, namely to encourage voter registration and integrity in the registration process.

Defendants realize that this rebuttal to Plaintiff's standing argument relates to Defendants' arguments on the merits (i.e., does Plaintiff have a right to disclosure of these documents under the NVRA). Defendants now turn to those other arguments.

II. The Public Disclosure Provision Does Not Require Disclosure of Voter Registration Applications

A. <u>Sections 1973gg-(6)(i)(1) and (2) Must be Considered Together</u>

Plaintiff, in effect, asks the Court to consider the two subsections of the Public Disclosure Provision as two separate statutes, even artificially separating discussion of them in its brief. For example, Plaintiff first mentions § 1973gg-6(i)(1), which requires the states to maintain for two years and make available for public inspection "all records concerning the implementation of programs and activities conducted for the purposes of ensuring the accuracy and currency of official lists of eligible voter . . ." on page 16 of its Opposition. Plaintiff then only briefly mentions § 1973gg-6(i)(2), *which specifies the records to be maintained and made available*, in a footnote on page 24, and summarily dismisses any connection between the two provisions.

In doing so, Plaintiff asserts that § 6(i)(2) addresses only the record maintenance requirement and does not relate to the disclosure requirement. By viewing § 1973gg-6(i)(1) in a vacuum, Plaintiff concludes, erroneously, that completed voter registration applications must be disclosed.

In refusing to acknowledge a connection between the two provisions, Plaintiff ignores "an elementary [rule] of statutory construction," which requires the two parts of the Public Disclosure Provision to be read as one. *Johnson v. Seaboard Air Line R. Co.* 405 F.2d 645, 654 (4th Cir. 1968), *cert. denied by Pilot Freight Carriers, Inc. v. Walker*, 394 U.S. 918 (1969). Section 1973gg-6(i) "must be read as a whole in order to ascertain its true meaning. Each part or section should be construed in connection with every other part or section to produce a harmonious whole." *Id.* (relying on 2 Sutherland, *Statutory Construction*, § 4703; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956); *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288 (1957)).

Only by disingenuously denying the clear relationship between § 6(i)(1) and § 6(i)(2) can Plaintiff argue that *all records* maintained by a state must be disclosed. Taken to its logical conclusion, Plaintiff's skewed construction would allow the inspection of any document within the possession of Long or the SBE.

The statute's plain meaning, reflected in the interplay between subsections (1) and (2), defies that construction. The Public Disclosure Provision provides as follows:

> (1) Each state shall maintain for at least 2 years and shall make available for public inspection and, when available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.
>
> (2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

42 U.S.C. § 1973gg-6(i).

Read as a whole, § 6(i)(2) identifies the records that under § 6(i)(1) states must maintain for disclosure. In other words, the records identified in subsection (2) are those records required to be maintained *and* made available for inspection in subsection (1). In suggesting that subsection (2) speaks only to the maintenance requirement and not to the disclosure requirement as well, plaintiff ignores that the statute clearly intends the records to be maintained for a specific purpose. The rules of statutory construction, and logic, preclude Plaintiff's attempt to parse subsection (2) for its own purpose.

B. Section 6(i)(2) Limits Records to be Maintained for Disclosure

Section 6(i)(2) specifies that the records maintained pursuant to § 6(i)(1) "shall include" lists of persons who receive notices and information regarding responses to the notices. Plaintiff asserts that by using the term "include," Congress intended the records described to be only "illustrative examples" and not a limitation.

In the context of this statute, however, "shall include" must be interpreted as a limitation, not an enlargement. *See Blankenship v. Western Union Tel. Co.*, 161 F.2d 168, 169 (4th Cir. 1947) (interpreting the use of "includes" "as a term of limitation indicating what belongs to a genus, rather than as a term of enlargement"); *see also Montello Salt. Co. v. Utah*, 221 U.S. 452, 466 (1911) (rejecting conclusion that use of the word "including" is "a word of enlargement" in "its ordinary sense," finding that it is used that way only in "its exceptional sense").

Here, Congress provided for the disclosure of "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 42 U.S.C. § 1973gg-6(i)(1). Congress then specifically excepted two types of records from maintenance and disclosure, declinations to vote and records identifying voter registration agencies, *id.*, and specifically identified two types of records subject to maintenance and disclosure, both related to notices. 42 U.S.C. § 1973gg-6(i)(2). If Congress intended the term "include" in § 6(i)(2) as merely illustrative, rather than restrictive, it would not have specifically excepted certain records in § 6(i)(1). *See Morris Friedman & Co. v. United States*, 69 Cust.Ct. 184, 351 F. Supp. 611, 614 (1972) ("[B]y coupling a specific description of articles to be included with express exceptions thereto, we must conclude that the legislature intended that all other articles be excluded.").

Moreover, even assuming *arguendo* that Congress intended "shall include" to be "illustrative," Plaintiff's argument would make sense only if the records requested bore *some* relationship to the "illustrations." That is not the case here. The two illustrations in § 6(i)(2) relate to the § 1973gg-6(d)(2) notices discussed on page 12 of Defendants' Memorandum of Law, and attached to that Memorandum as Exhibit "B." Original voter registration applications are not even of the same general class.

C. Plaintiff Misrepresents *Jenkins v. Ousse* as Precedent

Plaintiff errs in representing to the Court that the District Court's docket sheet and the Fifth Circuit's related opinion in *Jenkins v. Ousse,* 145 F.3d 359, 1998 WL 307588 (5^{th} Cir. May 12, 1998), support its position that access to voter registration applications must be granted under the Public Disclosure Provision.

In *Jenkins v. Ousse*, the plaintiff, an unsuccessful candidate for the United States Senate in Louisiana, sought immediate accessibility to registration records and precinct sign-in logs, in order to challenge the election. At the time, Louisiana law required that voter registration applications could only be made available for inspection and copying upon a court order. The docket sheet, Exhibit "C" to Pl's. Opp., reveals that an *ex parte* TRO was granted on November 11, 1996 (Docket Entry #3). Within days, the defendants moved to dissolve the TRO (Docket Entry #5), and the plaintiff moved for a preliminary injunction (Docket Entry #7). The District Court then denied the request for declaratory and injunctive relief, as evidenced by the plaintiff's request for reconsideration on January 9, 1997 (Docket Entry #9), and entered judgment for the defendants, with costs, on March 5, 1997 (Docket Entry #15).

The parties' briefs on appeal to the Fifth Circuit, attached hereto as Exhibit "B," reveal that after the plaintiff filed his appeal, the Louisiana legislature repealed the requirement that a court order the inspection and copying of voter registration applications, thus rendering the plaintiff's challenge to that statute moot. The only NVRA issue before the Fifth Circuit was the alleged failure to permit inspection of precinct sign-in logs and the circuit court remanded the case for evidence on that issue alone. *Jenkins v. Ousse*, 145 F.3d 359, 1998 WL 307588 (5th Cir. May 12, 1998).

Upon remand, the district court once again entered judgment for the defendants (Docket Entry #38), and the Fifth Circuit affirmed. *Id.* In the subsequent District Court decision determining costs (Docket Entry #43), the Magistrate Judge found that "the registrars were 'wrongfully enjoined or restrained' and are entitled to recovery of their damages." *Louis Jenkins v. Edwin W. Ousse, et al.*, Civil Action No. 96-2613, Report and Recommendation, March 1, 1999, attached hereto as Exhibit "C."

The history of *Jenkins v. Ousse* thus lend no support to plaintiff's bold statement that the issue before this Court has been considered by "a federal court" and that "access to the completed voter registration applications was sought and granted under the Public Disclosure Provision." Pl.'s Opp. at 18 - 19.

III. Conclusion

For these reasons and those set forth in their Memorandum of Law, Defendants Elisa Long and Nancy Rodrigues respectfully request that the Court dismiss Plaintiff's claim, with prejudice.

Respectfully submitted,

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Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2010, I electronically filed the foregoing *Defendants Long and Rodrigues' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss* with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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EXHIBIT

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A

Virginia Voter Registration Application Form

→ Use this form to register to vote in Virginia or report a change in name or address. If you are already registered with your current name and address, you do not need to re-register.

To register to vote in Virginia, you must:

- Be a **United States citizen**
- Be a **resident of Virginia**
- Be **18 years old by the next general election**
- Have **had your voting rights restored** if you have ever been convicted of a felony
- Have **had your capacity restored** if you have ever been declared mentally incapacitated in a Circuit Court

→ **Starred (*) items are required.** If you do not complete all of the items that are marked with *, your application may be denied. Once your local registrar approves your application, you will receive a voter card **by mail.**

1

*Are you a citizen of the United States of America? ☐ YES ☐ NO

*Will you be at least 18 years of age on or before the next General Election day? ☐ YES ☐ NO

If you checked "NO" in response to either of these questions, do not complete this form.

2

___-__-____ * Social Security Number

☐ Male ☐ Female * Gender

MM/DD/YYYY * Date of Birth

___-___-____ Daytime Telephone Number

* Last Name

* First Name

☐ None * Full Middle or Maiden Name

☐ None * Suffix (Jr., Sr., III, Etc.)

3

* Residence (Permanent) Home Address | Apt/Unit/Lot/Rm/Ste | City/Town | Zip Code

If Rural Address or Homeless, please describe where you reside | E-mail address

Mailing Address (*If different*)/ Virginia P.O.Box or Uniformed Service Address, if applicable (*include Zip Code*)

☐ City or ☐ County *Name of City or County of Residence*

4

* **Have you ever been convicted of a felony?** ☐ YES ☐ NO State where convicted

If *YES*, have your voting rights been restored? ☐ YES ☐ NO If *YES*, when restored? MM/DD/YYYY

5

* **Have you ever been judged mentally incapacitated?** ☐ YES ☐ NO

If *YES*, has court restored you to capacity? ☐ YES ☐ NO If *YES*, when restored? MM/DD/YYYY

6

Registration Statement: I swear/affirm, under felony penalty for making willfully false material statements or entries, that the information provided on this form is true. I authorize the cancellation (entered in Box 7 below) of my current registration and I have read the Privacy Act Notice on the front of this form.

→ * **Signature** (*or mark if unable to sign*) MM/DD/YYYY

If applicant is unable to sign due to a physical disability, write the name/address of person who assisted. (Required). ☐ Check/describe if you have a disability that requires accommodation in order to vote.

☐ **I'm interested in being an Election Official on Election Day. Please send me information.**

You may request that your home address not be released if you or member of your household are (a) **active or retired law enforcement**, or (b) have been granted a **protective court order**, or (c) are in fear of your personal safety from someone who has **threatened or stalked** you and have filed a complaint against that person with a magistrate or law enforcement (must attach copy of complaint) or (d) participate in the **Address Confidentiality Program**. You must show a Virginia P.O. box under mailing address in Box 3 above. ☐ **Law Enforcement** ☐ **Protective Order** ☐ **Threatened/Stalked** ☐ **Address Confidentiality Program**

7 ***Previous Voter Registration Information**–Commonwealth of Virginia

☐ No, I am not currently registered to vote in Virginia or another state.

☐ Yes, I am registered to vote at another address in Virginia or in another state. **If YES, the information below must be completed:**

Full Name as Registered | Date of Birth MM/DD/YYYY | Social Security Number ___-__-____ (last 4 digits required)

Address at which you were previously registered to vote | City/Town | State | Zip Code

City/County/Town of Residence (if applicable). This cancellation information will be sent to the county or city and state you entered above.

FILED
ROBERT H. SHEMWELL, CLERK
USDC, WESTERN DISTRICT LA
BY :
DATE: 3-1-99

EXHIBIT
C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

LOUIS JENKINS	CIVIL ACTION NO. 96-2613
versus	JUDGE WALTER
EDWIN W. OUSSE, ET AL.	MAGISTRATE JUDGE PAYNE

REPORT AND RECOMMENDATION

Procedural History

Louis "Woody" Jenkins ("Jenkins") was an unsuccessful candidate in the November 5, 1996 election of a United States Senator for Louisiana. On November 12, 1996 Jenkins filed in this court a complaint for declaratory and injunctive relief along with an application for a temporary restraining order ("TRO"). Jenkins alleged that there were voting irregularities in the election and requested that the court order the 64 registrars of voters throughout Louisiana to immediately make available to Jenkins certain voter registration and election records. He contended that immediate relief was necessary because any state court challenge to the election had to be filed by November 14. Judge Walter granted the TRO by signing an order that provided, in pertinent part, as follows:

> Defendants shall instruct their agents and employees to cooperate to the fullest extent with [Jenkins] and his designated agents in making the records available for inspection and copying, including keeping defendants' offices open until the inspecting and copying is completed. *Upon application, the Court shall impose upon*

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> *[Jenkins] reasonable costs associated with this order.* (emphasis added)

Jenkins did file a timely state court election contest, but voluntarily dismissed it three days later, complaining of a lack of cooperation by election officials in providing evidence to support his claims. He also filed an unsuccessful challenge to the election in the United States Senate. Judge Walter later entered a judgment that denied on the merits the request for declaratory and permanent injunctive relief, and directed the defendant-registrars to file a bill for costs. (Doc. 15) The Fifth Circuit later remanded the case for the district court to complete the record. (Doc. 37) Judge Walter again rendered judgment against Jenkins, and the Fifth Circuit affirmed. (Docs. 38 and 42)

Now before the court is a Motion for Costs (Doc. 17) filed by Louisiana's 64 registrars of voters. They seek a total of $64,067.33 as reimbursement for the costs incurred by them in complying with the TRO. The individual registrars request amounts varying from a low of $62.50 by Union Parish to a high of more than $11,000 by Orleans Parish.[1] Jenkins does not contest the registrars' right to costs but complains that the amounts requested are excessive. See Response and Supplement at Docs. 26 & 32. For the reasons that follow, it is recommended that costs totaling

[1] Several registrars either incurred no extra expenses or have claimed none in this litigation.

$56,404.23 be awarded to the registrars in the amounts set forth on Exhibit A attached hereto.

The Court May Act On the Motion

Taxation of costs is ordinarily performed by the Clerk of Court. Local Rules 54.3 and 54.4 The registrars' motion was, however, originally referred to the undersigned Magistrate Judge. In a later Minute Entry Order, the undersigned stated that the motion would be transferred to the Clerk of Court in accordance with F.R.C.P. 54(d)(1) and the cited local rules. (Doc. 25) The Clerk of Court later requested that the undersigned address the cost issues in the first instance. The undersigned must first examine its authority to do so.

"The function of the court in the process of taxing costs is merely to review the determination of the Clerk. Therefore, nothing normally can come before the court until the Clerk has acted and an objection has been made." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §2679, p. 488 (1998). Courts have, however, recognized the ability of the court to tax costs without any prior proceeding before the clerk if the items involved are not routine or pose too difficult a burden for the clerk. Id. This case presents such an exceptional situation. Furthermore, the court is the proper body to assess damages under F.R.C.P. 65(c), as discussed below.

Legal Basis For Awarding Costs

No party has addressed the legal basis for the court to award the requested costs. The court should ordinarily award costs to a prevailing party under F.R.C.P. 54(d), but costs awarded under that rule are strictly limited to those categories of expenses listed in 28 U.S.C. §1920. Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 334-35 (5th Cir.), cert. denied, 516 U.S. 862, 116 S.Ct. 173 (1995). Among the categories in §1920 is "fees for exemplification and copies of papers necessarily obtained for use in the case." It is less than certain that the costs sought by the registrars would be covered by that provision, and no other categories appear to be applicable.

Another source of law is F.R.C.P. 65(c) which requires that the court require the party seeking a TRO to give security for the payment of costs and damages incurred by a party who was found to have been wrongfully restrained. Judge Walter set the bond in this case in the amount of $20,000. The amount of the bond both assures the enjoined party of ready recovery of damages without regard to the possible insolvency of the plaintiff and provides the plaintiff with notice of the maximum extent of his potential liability. The amount of the bond limits the damages a defendant can obtain from either a surety or even the plaintiff for a wrongful injunction if the plaintiff requested the TRO in good faith. Continuum Co. v. Incepts, Inc., 873 F.2d 801 (5th Cir. 1989), reconsidered in part, 883 F.2d 333 (5th Cir. 1989). See also, Coyne-Delany Co., Inc. v. Capital Development Board, 717 F.2d 385, 392-93 (7th Cir. 1983). Thus, it might appear at first blush that Jenkins' liability is capped at $20,000.

A party may, however, supplement a bond with an agreement to undertake liability in excess of the face amount of the bond. Courts often accept that undertaking as an additional form of security if they are satisfied that (1) the plaintiff would be able to satisfy any judgment for damages for wrongful issuance of the injunction, and (2) providing a bond for the maximum potential amount would impose a great hardship on the plaintiff. Continuum Co., Inc., 873 F.2d at 804. Such an undertaking is a valid form of security and is enforceable in federal court. Continuum Co., Inc., 883 F.2d at 335.

Neither Jenkins' complaint nor memorandum in support of his request for a TRO addressed the issue of security, but it appears that it was Jenkins' own proposed form of order that was entered by Judge Walter and which provided that the court "shall impose upon [Jenkins] reasonable costs associated with this order". Furthermore, Jenkins has not raised any limitation defense to the Motion for Costs. He confines his arguments to the reasonableness of the amounts requested. Based on these facts, the court finds that Jenkins agreed to compensate the defendants for their costs, without limitation to the amount of the bond, as an additional form of security.

Equity Also Requires an Award of Damages

In this case it appears that Jenkins agreed to reimburse the registrars' costs associated with the TRO whether or not it was wrongfully issued. Even if that were not the case, controlling law would require the reimbursement. District courts use at least three competing standards when assessing damages in favor of a party who is found to have been "wrongfully enjoined or restrained" under Rule 65(c). Some cases favor an "automatic damage" standard while others require a "malicious prosecution" standard. The rule in the Fifth Circuit appears to fall in the middle. It employs what is called the "judicial discretion" standard. Under that standard, the court should exercise its equity power to effect justice between the parties, avoiding any result that would be inequitable or oppressive for either party. H&R Block Inc. v. McCaslin, 541 F.2d 1098, 1099 (5th Cir. 1976), cert. denied, 430 U.S. 946, 97 S.Ct. 1582 (1977); State of Alabama v. U.S. EPA, 925 F.2d 385, 388-89 (11th Cir. 1991) (discussing Fifth Circuit law); and Cappaert Enterprises v. Citizens & Southern International Bank, 564 F.Supp. 214, 217-18 (E.D. La. 1983).

Judge Walter remarked later in these proceedings that "I'm inclined to believe I never should have granted that order". (Doc. 39, p. 3, l. 7-8) He also denied any further injunctive relief.

Thus, it appears that the registrars were "wrongfully enjoined or restrained" and are entitled to recovery of their damages. The court finds that the exercise of equity compels an award of costs or damages for these registrars who were not merely enjoined from engaging in an activity but were mandated by the court to perform acts that were almost certain to cause them to incur expenses. Furthermore, Jenkins proposed from the outset to reimburse those costs, and his response to the motion does not contest his obligation to do so.

Fixing the Amounts

The court now turns to determining the appropriate amount to be awarded to the registrars. In assessing an amount due under Rule 65 the court is not confined to the categories of costs set forth in 28 U.S.C. §1920 or actual out-of-pocket expenses, but may award "such costs and damages as may be incurred or suffered." The documents requested by Jenkins were assembled and copied in various ways. Some registrars used their own staff and their own copy machines to accomplish the task. In some cases, employees had to work overtime or registrars had to hire additional staff on a part-time basis to pull records, black out privacy-protected information, make copies and otherwise assist in the TRO-related work. Some registrars did not own a copy machine so requested other local agencies such as the police jury or the clerk of court to make the copies and bill the registrar on a per page basis. A few registrars leased copy machines. In some parishes Jenkins supplied all or some of the paper that was used in the registrar's copiers. In a few other parishes he provided both copiers and paper. Accordingly, the claim for each parish must be separately analyzed and calculated, but general principles can be developed that will consistently and equitably guide the award of damages and costs to each registrar.

Most of the registrars seek to recover: (1) either (a) the actual costs incurred to have another agency copy documents or (b) \$.25 per page for copies that the registrar made with his machines and paper; (2) reimbursement for wages attributed to "overtime" hours worked by registrar employees in addition to their regular eight hour day; (3) reimbursement for wages paid to outside employees that had to be hired especially to comply with the TRO; and (4) a few miscellaneous out-of-pocket expenses.

Jenkins complains that a \$.25 per copy charge for copies produced in-house by a registrar is sufficient to cover both the actual costs of copying plus the related labor involved. He contends, therefore, that to also reimburse the registrars for the extra labor expenses would double charge him. In support of this argument Jenkins submits the affidavit of John B. Levins, III, who operates a commercial printing and copying business in Metairie. Levins testifies that the hard cost (paper, toner, electricity, equipment depreciation) of copying is about \$.02 per page, and the soft cost (labor) is about \$.07 per page for copying at an off-site location.

The damages permitted under Rule 65 include all incidental and consequential costs that are directly attributable to the TRO. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §2673, p. 465 (1995) The registrars should not be permitted to profit from their copying, but they should be fairly compensated for the costs that they have incurred. Mathematical precision in determining those costs may not be possible based on the limited evidence submitted by the parties, but the court believes that the guidelines set forth below are fair and equitable.

The first component of an appropriate measure of the damages suffered by the registrars is the value of the hours worked by registrar employees beyond their ordinary office schedule and the cost of any additional labor that had to be hired.[2] The registrars call their extra-hours work "overtime." Jenkins points out that the registrars actually afford only compensatory time to their employees, but that does not mean that the time is valueless. Someone has to work when an employee later takes advantage of the earned compensatory time, and the employee may cash in his compensatory time upon separation from service. Compensatory time obviously has value and may not ignored by Jenkins merely because

[2] Those registrars who were able to produce all of the documents requested by Jenkins during ordinary working hours without the hiring of additional staff may have been inconvenienced but were not actually damaged except to the extent they incurred copy expenses. Those are addressed below. Appropriately, no registrar has requested reimbursement for ordinary labor costs incurred in manning the office unless compensatory time was earned or if an employee was an extra hire necessitated by the TRO.

it does not require the registrar to make an immediate out-of-pocket expenditure. The registrars also paid some part-time or extra employees actual cash as opposed to compensatory time. This component of the damages will be referred to hereinafter as the "extra labor costs."

The second component of damages is the actual costs, other than extra labor costs, that the registrars incurred to produce copies. Jenkins should compensate those registrars who made copies with their own machines and paper at a rate of $.10 per copy. That amount, based on Mr. Levins' affidavit and the fact that several of the registrars requested it, appears adequate to compensate for the ordinary cost of producing a copy. Jenkins should make straight reimbursement to those registrars who incurred charges when they turned to other agencies to make copies for a fee. Some of those fees are $.25, $.50 and even $1.00 per copy, but given the exigencies of the situation and the lack of commercial copy services in many parishes, the registrars cannot be faulted for not finding a better bargain.[3] When Jenkins provided the paper, he should be credited 1/2 cent per copy.

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[3] The court has assumed in each case that the price per copy set forth in the invoices from the other agencies that made copies is the actual amount that the registrar has or will have to pay for the copies. Accordingly, the full amount charged by the agencies has been included in the cost component of the recommended award. If the court's assumption is incorrect in any instance, then the registrar should remit to or credit Jenkins for any amount in excess of the actual amount paid or due the other agency.

The third component is other out-of-pocket expenses. This includes the cost of leasing copy machines, as well as miscellaneous matters such as black markers purchased by a few registrars to delete private information from copies, cellular phone calls($21.56 in St. Landry Parish), mileage paid to an employee ($5.28 in West Feliciana) and the employer portion of FICA taxes for employees borrowed from other agencies ($12.88 in East Baton Rouge). Jenkins does not quibble with any of the out-of-pocket expenses, and they appear to be quite reasonable, so they should be awarded as documented.

Accordingly,

IT IS RECOMMENDED that the **Motion for Costs (Doc. 17)** be **GRANTED**, awarding costs in the amounts set forth on Exhibit A attached hereto. The amounts set forth therein have been calculated in accordance with the findings and principles set forth in this recommendation. Copy costs and out-of-pocket expenses have been aggregated under the heading Copy Costs.

Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ. Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed.R.Civ.P. 6(b). A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 10 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 25th day of February, 1999.

Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

COPY SENT BY: OH
DATE: 3-1-99
TO: ROY S. PAYNE
Hoover
Rice
Arcineaux
Baker
Mongue
Langston

EXHIBIT A
Report & Recommendation (CV 96-2613)

PARISH	EXTRA LABOR COSTS	COPY COSTS	**TOTAL**
Acadia	$ 478.46	$ 250.00	**$ 728.46**
Allen	126.12	47.00	**173.12**
Ascension	664.49	18.30	**682.79**
Assumption	134.34	28.60	**162.94**
Avoyelles	43.25	159.00	**202.25**
Beauregard	80.74	108.75	**189.49**
Bienville	75.78	127.50	**203.28**
Bossier	-0-	91.00	**91.00**
Caddo	826.97	821.20	**1,648.17**
Calcasieu	639.64	-0-	**639.64**
Caldwell	12.54	284.00	**296.54**
Cameron	350.55	150.00	**500.55**
Catahoula	123.90	212.00	**335.90**
Claiborne	295.53	350.00	**645.53**
Concordia	339.03	1,018.72	**1,357.75**
DeSoto	97.88	244.25	**342.13**
E. Baton Rouge	4,400.86	1,290.31	**5,691.17**
E. Carroll	-0-	47.00	**47.00**
E. Feliciana	96.24	-0-	**96.24**
Evangeline	-0-	-0-	**-0-**
Franklin	237.05	321.00	**558.05**
Grant	29.11	305.20	**334.31**
Iberia	473.23	131.80	**605.03**
Iberville	549.69	370.50	**920.19**
Jackson	87.45	80.50	**167.95**
Jefferson	3,438.00	850.00	**4,288.00**
Jefferson-Davis	145.18	918.00	**1,063.18**
Lafayette	811.64	153.37	**965.01**
Lafourche	1,584.50	267.50	**1,852.00**
Lasalle	47.49	10.00	**57.49**
Lincoln	332.36	50.00	**382.36**
Livingston	330.80	860.00	**1,190.80**
Madison	859.40	2,648.00	**3,507.40**
Morehouse	53.23	119.30	**172.53**
Natchitoches	1,211.58	538.39	**1,749.97**
Orleans	10,897.85	100.00	**10,997.85**
Ouachita	314.80	2.20	**317.00**
Plaquemines	-0-	-0-	**-0-**
Pointe Coupee	95.04	57.00	**152.04**
Rapides	2,061.39	1,269.00	**3,330.39**
Red River	93.47	56.50	**149.97**

EXHIBIT A (cont'd)
Report & Recommendation (CV 96-2613)

PARISH	EXTRA LABOR COSTS	COPY COSTS	**TOTAL**
Richland	246.73	147.25	**393.98**
Sabine	397.05	1,003.00	**1,400.05**
St. Bernard	322.16	755.75	**1,077.91**
St. Charles	-0-	-0-	**-0-**
St. Helena	$ 76.98	$ 9.50	**$ 86.48**
St. James	-0-	-0-	**-0-**
St. John	-0-	-0-	**-0-**
St. Landry	486.48	127.26	**613.74**
St. Martin	747.63	767.10	**1,514.73**
St. Mary	118.84	260.35	**379.19**
St. Tammany	684.23	463.20	**1,147.43**
Tangipahoa	564.56	169.50	**734.06**
Tensas	75.26	46.35	**121.61**
Terrebonne	-0-	-0-	**-0-**
Union	-0-	62.50	**62.50**
Vermilion	190.56	250.00	**440.56**
Vernon	106.48	58.30	**164.78**
Washington	-0-	193.75	**193.75**
Webster	-0-	246.25	**246.25**
W. Baton Rouge	409.25	9.00	**418.25**
W. Carroll	26.44	34.80	**61.24**
W. Feliciana	126.90	79.28	**206.18**
Winn	185.32	160.75	**346.07**
			$56,404.23