UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KENNY A., by his next friend Linda Winn, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	1:02-CV-1686-MHS
NATHAN DEAL, in his official capacity as Governor of the State of Georgia, et al.,	:	
Defendants.	:	

ORDER

Before the Court is plaintiffs' renewed motion for an award of reasonable attorneys' fees and expenses. For the following reasons, the Court denies the motion.

Background

This class action brought on behalf of foster children in Fulton and DeKalb Counties was settled as to the State Defendants[1] in October 2005

[1] State Defendants are the Governor of Georgia, the Georgia Department of Human Services and its Commissioner, the Fulton County Department of Family and Children Services and its Director, and the DeKalb County Department of Family and Children Services and its Director.

with the entry of a Consent Decree. On October 3, 2006, the Court awarded plaintiffs approximately $10.5 million in attorneys' fees, which included a 75% enhancement of the $6 million lodestar amount, or approximately $4.5 million, based on the quality of representation provided by class counsel and the extraordinary results they achieved. Kenny A. ex rel. Winn v. Perdue, 454 F. Supp. 2d 1260, 1288-90 (N.D. Ga. 2006). State Defendants appealed the award, and the Eleventh Circuit affirmed. Kenny A. ex rel. Winn v. Perdue, 532 F.3d 1209 (11th Cir. 2008). After the Eleventh Circuit denied rehearing en banc, State Defendants petitioned for certiorari. The Supreme Court granted review limited to the question whether enhancements based on quality of attorney performance and results obtained are ever justified. Perdue v. Kenny A. ex rel. Winn, 129 S. Ct. 1907 (2009) (granting certiorari limited to Question 1 of the petition); Pet. for Cert., No. 08-970, 2009 WL 245095, at *i (Jan. 29, 2009) (stating question). On April 21, 2010, the Court issued a decision unanimously holding that enhancements may be justified in certain extraordinary circumstances but, by a 5-4 majority, reversing and remanding the enhancement awarded in this case. Perdue v. Kenny A. ex rel. Winn, 130 S. Ct. 1662 (2010).

Addressing the issue "whether either the quality of an attorney's performance or the results obtained are factors that may properly provide a basis for an enhancement," the Court found that "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance." Id. at 1674. Therefore, the Court limited its inquiry to "whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation." Id. The Court identified three "rare" and "exceptional" circumstances in which an enhancement may be warranted if there is "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'" Id. (quoting Blum v. Stenson, 465 U.S. 886, 897 (1984)). These circumstances exist where (1) "the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation"; (2) "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted"; or (3) "an attorney's performance involves exceptional delay in the payment of fees." Id. at 1674-75. An enhancement based on any of these circumstances requires "specific proof" supporting a

calculation that is "reasonable, objective, and capable of being reviewed on appeal." Id. at 1674.

Turning to the enhancement granted in this case, the majority found that this Court "did not provide proper justification for the large enhancement that it awarded." Id. at 1675. Specifically, the majority found that the 75% enhancement was "essentially arbitrary" because this Court: (1) did not point to anything in the record to show that the effective hourly rate resulting from the enhancement was "an appropriate figure for the relevant market," (2) did not calculate the amount of the enhancement attributable to the delay in reimbursement of expenses, (3) did not "sufficiently link" the delay in payment of fees to proof that the delay was "outside the normal range expected by attorneys who rely on [42 U.S.C.] § 1988 for the payment of their fees" or quantify the disparity, (4) did not "provide a calculation of the cost to counsel of any extraordinary and unwarranted delay," (5) improperly relied on the contingency of the outcome, and (6) improperly relied on an "impressionistic" assessment of the performance of counsel in this case as compared to the performance of counsel in other cases. Id. at 1675-76. The Court held that any enhancement must

be supported by "a reasonably specific explanation" so as to permit "adequate appellate review." Id. at 1676. Accordingly, the Court reversed the judgment of the Court of Appeals and remanded for further proceedings consistent with its opinion. Id. at 1677.

Following the Supreme Court's decision, State Defendants tendered payment to plaintiffs of $8.13 million, representing the lodestar and expense awards set out in this Court's Order of October 3, 2006, plus post-judgment interest. After an unsuccessful attempt at mediation, the Eleventh Circuit vacated this Court's Order of October 3, 2006, and remanded for further proceedings consistent with the Supreme Court's decision. Kenny A. v. Perdue, 616 F.3d 1230 (11th Cir. 2010). Plaintiffs then filed a renewed motion for an award of reasonable attorneys' fees and expenses. Since the lodestar amount and expenses have been paid, plaintiffs' motion is limited to the proper amount of enhancement, if any, of the lodestar computation.[2]

[2] Plaintiffs have also moved for an award of fees and expenses incurred on appeal. The Court will address that motion in a separate Order.

Discussion

Plaintiffs contend they are entitled to enhancement of the lodestar on each of the three grounds recognized by the Supreme Court. They have submitted evidence that they claim supports a 50.16% enhancement to compensate plaintiffs' counsel at their true market value, a 21.11% enhancement to compensate for the delay in payment of attorneys' fees, and a 6.56% enhancement to compensate for the delay in payment of reimbursable expenses. Plaintiffs have also submitted evidence that they contend supports an additional 20% enhancement to provide the market incentive necessary to attract competent counsel to undertake this civil rights case in light of the increased overhead and opportunity costs. In sum, plaintiffs claim that the evidence supports a total enhancement of the lodestar of 97.83%, or approximately $5.9 million, which is $1.4 million more than the enhancement the Court originally awarded. Based on this evidence, plaintiffs ask the Court to calculate and award an enhancement between 50.16% and 97.83% of the lodestar ($3.02 million – $5.9 million). State Defendants dispute plaintiffs' contentions and argue that no enhancement is justified. The Court addresses the parties' arguments below as they relate to each of the claimed grounds for an enhancement.

A. Attorneys' True Market Value

With respect to this basis for an enhancement, the Supreme Court stated:

> [A]n enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes. But in order to provide a calculation that is objective and reviewable, the trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate.

Perdue, 130 S. Ct. at 1674 (footnotes omitted).

In support of their claim for an enhancement on this basis, plaintiffs have submitted an economic analysis of prevailing market rates in Atlanta by economist Dr. Steven P. Feinstein. Expert Report of Prof. Steven P. Feinstein ("Feinstein Report"), Pls.' Renewed Mot., Ex. 6. Based on this Court's findings regarding the extraordinary performance of class counsel, Dr. Feinstein assumed that the value of their legal services was, at a minimum, equivalent to the lower end of hourly rates charged by the upper

quartile (top 25%) of Atlanta litigation firms. Feinstein Report ¶¶ 34-35. Relying on survey data of such billing rates compiled by PriceWaterhouseCoopers LLP ("PWC"), Dr. Feinstein calculated an enhanced billing rate for each of plaintiffs' attorneys and paralegals based on the rates charged in 2005 by timekeepers with the same position and/or level of experience employed by the upper quartile of surveyed Atlanta law firms. Id. ¶¶ 36-39. Using these quality-enhanced billing rates, total compensation for hours previously approved by the Court came to $9,029,108.22, or $3,016,305.32 more than the Court's original lodestar computation. Id. ¶ 40.

As corroboration of Dr. Feinstein's findings, plaintiffs cite the survey published by the *Fulton County Daily Report* of hourly rates charged in 2005 by Atlanta law firms, which shows that a number of law firms charged significantly higher hourly rates than the rates used to compute the lodestar in this case. Meredith Hobbs, *Behind the Scenes, Behind the Numbers*, FULTON CNTY. DAILY REPORT, Apr. 24, 2006, Pls.' Renewed Mot., Ex. 1-A. All told, plaintiffs contend, comparable market hourly rates charged by similarly situated law firm partners in Atlanta were 30-56% higher than the partner-level hourly rates used to calculate the lodestar in this case. Similarly,

associate-level hourly rates used to calculate the lodestar in this case were as much as 25% below comparable associate-level rates charged by other Atlanta firms. Plaintiffs argue that these figures serve to corroborate Dr. Feinstein's conclusion that Atlanta partner-level rates were approximately 48% higher, and associate-level rates were approximately 23% higher, than the corresponding rates used to calculate the lodestar in this case.

In response, State Defendants argue that no increase in hourly rates is justified because there is no question that the rates previously sought and awarded in the Court's original lodestar calculation were prevailing market rates that plaintiffs' counsel would receive in cases not governed by federal fee-shifting statutes. State Defendants point out that (1) these are the rates actually requested by plaintiffs, who contended that these were the same rates paying clients would have been charged; (2) affidavits by other Atlanta attorneys submitted by plaintiffs attested that these were prevailing market rates in Atlanta; (3) these rates were requested after conclusion of the merits litigation, when counsel knew the results they had achieved, the degree of difficulty involved, and the amount of resources required; (4) this Court itself found that the rates reflected true market value based on prevailing market

rates; (5) the 2009 hourly rates sought by plaintiffs in their supplemental fee application for post-judgment monitoring were less than the 2005 rates they now seek; (6) the rates plaintiffs now seek far exceed what counsel have received in similar suits elsewhere; and (7) these rates were not determined by a formula limited to years of experience or some other limited set of factors like the cases cited by the Supreme Court as supporting a rate enhancement.

State Defendants contend that Dr. Feinstein's report fails to satisfy the requirements for expert testimony set out in Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993), and that, in any event, it does not support an enhancement. First, they argue that Dr. Feinstein is not competent to testify as to the market value of legal services in Atlanta because he has no experience in law firm economics. Second, they argue that Dr. Feinstein's report is unreliable because (1) it does not provide documentation of the principal source for his conclusions, the PWC survey; (2) it simply assumes that plaintiffs' counsel should be placed within the top 25% of Atlanta law firms; and (3) it concludes that an enhancement is warranted based on this Court's subjective assessment of counsel's performance, which the Supreme Court held was not a proper basis for an enhancement. State Defendants

argue further that Dr. Feinstein's analysis is irrelevant because he apparently relies in part on common fund/common benefit cases that do not apply in this case. Finally, State Defendants contend that Dr. Feinstein ignores longstanding authority that fee recovery based on current rates at time of judgment plus post-judgment interest adequately compensates for delay in payment and that certain case expenses are not reimbursable.

State Defendants also argue that the *Fulton County Daily Report* survey cited by plaintiffs does not support an enhancement. First, they contend that plaintiffs have selectively emphasized only the highest rates in the survey, and that the full range of rates is substantially lower and more reflective of the hourly rates already awarded in this case. Second, State Defendants argue that plaintiffs cite high outlier rates by a few attorneys at certain firms while ignoring more relevant comparators at the same firms who charge lower rates. Finally, State Defendants note that all of the comparator attorneys cited by plaintiffs practice in specialized areas of the law other than litigation, for which it is commonly recognized that rates are higher than for either general litigation or civil rights litigation.

The Court concludes that plaintiffs have failed to show they are entitled to an enhancement on this ground. The Supreme Court recognized but one, very limited basis for an hourly rate enhancement to measure an attorney's true market value. Such enhancements are permitted in cases where an attorney's hourly rate "is determined by a formula that takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors." Perdue, 130 S. Ct. at 1674 (footnote omitted). In this narrow range of cases, "an enhancement may be appropriate so that an attorney is compensated *at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes.*" Id. (emphasis added).

This action clearly does not fall into this narrow range of cases. The hourly rates awarded to plaintiffs were not based on only a limited number of factors such that they did not adequately measure the attorneys' true market value. On the contrary, there is no dispute that the rates sought and awarded in the Court's lodestar calculation are the same rates plaintiffs' counsel would have received from paying clients in cases not governed by federal fee-shifting statutes.

Plaintiffs contend that these rates do not take into account the delay in payment of fees, the advancement of expenses, and the fact that any recovery of fees and expenses was contingent on the outcome of the case. Under the Supreme Court's decision, however, these factors are not an appropriate basis for an hourly rate enhancement. The first two factors relate to the second and third grounds for a fee enhancement, which are addressed below, and may not also be used as a basis for an hourly rate enhancement since that would amount to double counting. As for contingency, the Supreme Court has made clear that this may not be taken into account at all. Perdue, 130 S. Ct. at 1676 ("reliance on the contingency of the outcome contravenes our holding in [City of Burlington v.] Dague, [505 U.S. 557, 565 (1992)]").

Plaintiffs also point out that the Supreme Court left undisturbed this Court's findings regarding the superior quality of counsel's performance. Based on these findings, they argue that they are entitled to an hourly rate enhancement under the law of the case doctrine. It is true that the Supreme Court did not question either the sincerity or the accuracy of this Court's assessment of counsel's performance; however, the Supreme Court held that

such an "impressionistic" assessment was not an appropriate basis for an enhancement. Perdue, 130 S. Ct. at 1676. The Supreme Court expressly disapproved the award of an enhancement that is influenced, or appears to be influenced, "by a judge's subjective opinion regarding particular attorneys or the importance of the case." Id. Therefore, although this Court's factual findings regarding counsel's performance may remain undisturbed, plaintiffs' entitlement to an enhancement based on these findings is clearly not the law of the case. See United States v. Escobar-Urrego, 110 F.3d 1556, 1561 (11th Cir. 1997) ("[A] decision of a legal issue or issues . . . establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, *unless . . . controlling authority has since made a contrary decision of the law applicable to such issues. . . .*") (quoting White v. Murtha, 377 F.3d 428, 431-32 (5th Cir. 1967)) (emphasis added).

Plaintiffs' reliance on Dr. Feinstein's report is misplaced for the same reason. Dr. Feinstein assumes that plaintiffs are entitled to an enhancement based on this Court's finding of superior performance. Feinstein Report ¶ 34. Based on this assumption, Dr. Feinstein proceeds to "true up" plaintiffs'

counsel's hourly billing rates "to the upper echelon of prevailing billing rates among Atlanta area attorneys." Id. ¶ 35. But the Supreme Court held that this Court's subjective assessment of counsel's performance is not an appropriate basis for an enhancement. Therefore, even assuming his competence as an expert, the reliability of his data, and the validity of his calculations, the underlying assumption on which Dr. Feinstein bases his conclusions is erroneous.

B. Delay in Payment of Attorneys' Fees

With respect to this basis for an enhancement, the Supreme Court stated:

> [T]here may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. An attorney who expects to be compensated under § 1988 presumably understands that payment of fees will generally not come until the end of the case, if at all. Compensation for this delay is generally made either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

Perdue, 130 S. Ct. at 1675 (citations and internal quotation marks omitted).

Based on this Court's previous finding that State Defendants' "strategy of resistance undoubtedly prolonged this litigation," Kenny A., 454 F. Supp. 2d at 1266, plaintiffs contend they are entitled to an enhancement due to the delay in payment of their attorneys' fees from November 2001, when counsel began work on this case, until October 2005, when the Consent Decree was entered.[3] Although the Court used 2005 hourly rates in calculating the lodestar, plaintiffs contend that this did not fully compensate them for the delay in payment. They rely on Dr. Feinstein's opinion that the appropriate standard measure of interest, or discount rate, for the advancement of attorneys' fees in this case is at the higher end of corporate borrowing rates, as represented by the Merrill Lynch High Yield CCC and Lower Rated Corporate Bond Index. Feinstein Report ¶¶ 52-56. Using these rates, as adjusted to take into account the hourly rate increases already included in the Court's use of 2005 hourly rates to calculate the lodestar, Dr. Feinstein

[3] Plaintiffs acknowledge that they have been fully compensated for the delay in payment of attorneys' fees from October 2005 until May 2010, when State Defendants paid the lodestar, by receipt of post-judgment interest on the lodestar amount. Pls.' Br. at 50 n.27.

concluded that plaintiffs incurred an additional $1.27 million in effective financing costs for the delay in payment of their fees, which is equivalent to 21.11% of the lodestar. Id. ¶¶ 57-63 & Ex. 5. As corroboration for this analysis, plaintiffs cite the declarations of three Atlanta attorneys who state that a competent law firm with sufficient resources to prosecute this case would require payment of a premium of between 20% and 100% of standard hourly rates to compensate for the delay in payment of attorneys' fees. Supplemental Decl. of John A. Chandler ¶ 12; Supplemental Decl. of Ralph I. Knowles, Jr. ¶ 12; Supplemental Decl. of James C. Rawls ¶ 11.

In response, State Defendants argue that no enhancement for pre-judgment delay in payment of attorneys' fees is appropriate because plaintiffs have already been compensated for this delay by the Court's use of 2005 hourly rates in calculating the lodestar, and that any further enhancement is prohibited by controlling law. State Defendants also argue that this case did not involve the type of "extraordinary circumstances" that the Supreme Court said might support an enhancement. Perdue, 130 S. Ct. at 1675. State Defendants contend that the delay in payment was neither "exceptional" nor "unanticipated" nor "unjustifiably caused" by State Defendants. Id.

The Court concludes that plaintiffs are not entitled to an enhancement on this ground. The Court agrees with State Defendants that the "extraordinary circumstances" required by the Supreme Court to support an enhancement due to delay in payment of attorneys' fees are simply not present in this case. There is no evidence that the delay in payment was either exceptional or unanticipated. The Supreme Court requires "proof in the record that the delay here was outside the normal range expected by attorneys who rely on § 1988 for the payment of their fees . . . ." Perdue, 130 S. Ct. at 1676. Plaintiffs have offered no such proof. From the date suit was filed (June 6, 2002) until entry of the Consent Decree (October 27, 2005) was less than three-and-a-half years. In this Court's experience, three-and-a-half years from filing to final judgment is not an exceptional length of time to resolve a complex civil rights class action like this, and plaintiffs civil rights attorneys would generally anticipate the possibility of such a delay.[4]

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[4] A review of some of the other cases brought by Children's Rights shows that the time required to resolve this case was not unusual. See Olivia Y. v. Barbour, No. 3:04-CV-00251 (S.D. Miss.) (filed Mar. 30, 2004; consent decree entered Jan. 4, 2008); Charlie and Nadine H. v. Corzine, No. 99-3678 (D. N.J.) (filed Aug. 4, 1999; consent decree entered Sept. 2, 2003); Marisol A. v. Giuliani, No. 1:95CV10533 (S.D. N.Y.) (filed Dec. 13, 1995; consent decree entered Mar. 31, 1999); Jeanine B. v. Doyle, No. 2:93-cv-00547 (E.D. Wis.) (filed Jun. 1, 1993; consent decree entered Dec. 2, 2002); Joseph A. v. New Mexico Dept. of Human Servs., No. 80-0623-JB (D. N.M.) (filed July 25, 1980; consent decree entered September 23, 1983); Wilder v. (continued...)

Plaintiffs rely on this Court's previous finding that State Defendants prolonged the litigation through a strategy of resistance. This Court's view of State Defendants' litigation strategy has not changed, but this finding alone is not sufficient to meet the standard established by the Supreme Court. There must be a showing of "extraordinary and *unwarranted* delay" or "*unanticipated* delay, particularly where the delay is *unjustifiably* caused by the defense." Perdue, 130 S. Ct. at 1675-76 (emphasis added). The fact that State Defendants chose to raise every possible defense and to challenge plaintiffs' claims at every turn certainly prolonged this litigation, but the Court cannot say that State Defendants' strategy was legally unwarranted or unjustified. As plaintiffs themselves have acknowledged, this case "presented questions of unsettled and, in some respects, groundbreaking law." Pls.' Br. in Supp. of Award of Att'ys' Fees and Expenses of Litigation [Doc. 495-1] at 12. State Defendants were entitled to raise non-frivolous arguments opposing plaintiffs' claims, and plaintiffs' counsel could not have reasonably anticipated that they would not do so.

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[4](...continued)
Bernstein, No. 78 Civ. 957 (S.D. N.Y.) (filed Mar. 3, 1978; consent decree entered Apr. 28, 1987).

Since the extraordinary circumstances necessary to justify an enhancement for delay in payment of attorneys' fees are not present in this case, the Court need not address Dr. Feinstein's method of calculating such an enhancement.

C. Delay in Payment of Expenses

With respect to this basis for an enhancement, the Supreme Court stated:

> [A]n enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. As Judge Carnes noted below, when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case, and therefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases. In such exceptional cases, however, an enhancement may be allowed, but the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses.

Perdue, 130 S. Ct. at 1674-75 (citation omitted).

Plaintiffs claim they are entitled to an enhancement on this basis because of the extraordinary amount of expenses in this action combined with

State Defendants' litigation conduct, which unnecessarily prolonged the litigation and delayed the recovery of expenses. Plaintiffs incurred a total of $835,443.75 in reimbursable expenses. Assuming these expenses were incurred continuously over the four-year period from November 2001 through October 2005 and using the same corporate borrowing rates described above in reference to the delay in payment of attorneys' fees, Dr. Feinstein concludes that plaintiffs incurred $394,578.45 in borrowing costs, or 6.56% of the lodestar, over the course of the litigation. Feinstein Report ¶¶ 67-71 & Ex. 6. As corroboration of Dr. Feinstein's analysis and as evidence that his conclusion is conservative, plaintiffs cite the declarations of Mr. Chandler, Mr. Knowles, and Mr. Rawls, who each state that the delayed payment of expenses would have commanded a premium between 7.5% and 50% above standard hourly rates. Supplemental Decl. of John A. Chandler ¶ 13 (25%); Supplemental Decl. of Ralph I. Knowles, Jr. ¶ 12 (10%-50%); Supplemental Decl. of James C. Rawls ¶ 12 (7.5%).

In response, State Defendants argue that this case was not exceptionally protracted and thus does not qualify for an enhancement on this ground. Even if an enhancement were warranted, State Defendants

contend that the rate of interest applied should be the same as for post-judgment interest, and that the calculation should run from the date each expense item was incurred, which would result in a substantially smaller enhancement than that sought by plaintiffs.

The Court concludes that plaintiffs are not entitled to an enhancement on this ground. As discussed above regarding the delay in payment of attorneys' fees, this case does not satisfy the Supreme Court's requirement that the litigation be "exceptionally protracted." Perdue, 130 S. Ct. at 1674. As with attorneys' fees, "when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case." Id. (citation omitted). Therefore, "enhancements to compensate for delay in reimbursement of expenses must be reserved for unusual cases." An unusual case would be one in which the delay in reimbursement of expenses exceeded what the attorney reasonably would have expected at the outset. As noted above, plaintiffs have offered no evidence that the length of time required to resolve this case – some three-and-a-half years from filing to entry of the Consent Decree – was unusual, or

that a reasonable plaintiff's attorney would not have anticipated the possibility of such a delay. Under the Supreme Court's decision in this case, absent such evidence, an enhancement for the delay in reimbursement of expenses is not authorized.

D. Incentive Needed to Attract Competent Counsel

Plaintiffs argue that in light of the extraordinary investment of human and capital resources required to pursue this class action and the opportunity costs associated with accepting this case in lieu of other, potentially more profitable class-action representations, an additional 20% enhancement of the lodestar is minimally necessary "[t]o adequately attract class counsel and provide incentive for the private bar to devote the necessary resources in lieu of other class action matters." Pls.' Br. at 35. Plaintiffs cite the supplemental declarations of Mr. Chandler, Mr. Knowles, and Mr. Rawls, who each state that only a relatively small number of law firms in Atlanta are qualified to serve as class counsel under the standards and considerations identified in Fed. R. Civ. P. 23(g); that of that small number, many have chosen to practice almost exclusively on the defense side where they will be paid accrued fees and reimbursed for expenses within 60-90 days; that of the few qualified

firms that practice on the plaintiffs' side, most devote their efforts and resources to more lucrative securities and antitrust class actions; and that no Atlanta law firm specializes in the complex issues presented in this litigation. As a result, according to these attorneys, qualified lawyers with the experience and resources necessary to prosecute this action would insist on an additional and separate premium of between 20% and 100% above the fee amount generated by an hourly-rate based lodestar calculation. Supplemental Decl. of John A. Chandler ¶ 11; Supplemental Decl. of Ralph I. Knowles, Jr. ¶ 12; Supplemental Decl. of James C. Rawls ¶ 10. As corroboration of the need for at least a 20% premium to attract competent counsel, plaintiffs cite Dr. Feinstein's conclusion that a 20.15% enhancement of the lodestar is necessary to compensate counsel for the outlay of some $800,000 in non-reimbursable expert fees. Feinstein Report ¶¶ 72-76.

In response, State Defendants argue that the lodestar already fully compensates counsel for their investment of human resources and reimbursable expenses, and that the amount of non-reimbursable expenses is not a proper basis for an enhancement. State Defendants also argue that plaintiffs improperly seek to equate this litigation to typical contingency-

based class actions in which counsel recover fees from their own clients' common fund or common benefit, whereas in this case the fees are paid by the government defendants and, by extension, the taxpayers. Finally, State Defendants argue that the 2005 hourly rates used in the lodestar calculation are sufficient to attract competent counsel to handle civil rights cases, and that any enhancement would be an illicit windfall to plaintiffs' counsel.

The Court concludes that plaintiffs are not entitled to an enhancement on this ground. First, the Supreme Court's decision did not recognize the incentive needed to attract competent counsel as a separate and independent basis for an enhancement of the lodestar. Although a reasonable fee must be "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case," there is a "strong" presumption that the lodestar is "sufficient to achieve this objective." Perdue, 130 S. Ct. at 1672-73 (citations omitted). According to the Supreme Court, "that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." Id. at 1673. With regard to the one such factor at issue here – superior attorney performance – the Supreme Court

concluded that there were only three such circumstances. Id. at 1674-75. This Court has already addressed each of these circumstances in the preceding sections of this order and found that the evidence does not support an enhancement. Nowhere in the Supreme Court's opinion is there any indication that, in addition to these three specific circumstances, the district court should also independently assess whether the lodestar is sufficient to attract competent counsel. Thus, under the Supreme Court's decision, absent evidence to support an enhancement based on any of the three specific circumstances recognized by the Court, plaintiffs cannot overcome the presumption that the lodestar is sufficient to attract competent counsel.

Furthermore, even if this were a separate basis for an enhancement, the evidence in the record does not support a finding that the lodestar is not sufficient to attract competent counsel in cases like this. Plaintiffs rely on the declarations of three Atlanta attorneys who state that no qualified attorney would agree to take a case like this without insisting on at least a 20% enhancement over and above standard hourly rates to compensate for the increased overhead and lost opportunity costs. But these declarations are contradicted by the historical facts, which show that Children's Rights and

numerous large and prestigious law firms have brought similar cases in other states without seeking such an enhancement. See State Defs.' Resp. Br. at 58-59 & nn.39-40 (citing cases). Nor is there any evidence that the extreme rarity with which enhancements have been awarded in the past, which the parties do not dispute, has in any way interfered with civil rights plaintiffs' ability to obtain competent counsel either in this district or nationally.

Finally, the fact that plaintiffs incurred substantial non-reimbursable expenses in the form of expert fees cannot support an enhancement. Plaintiffs rely on Dr. Feinstein's conclusion that a 20.15% enhancement is "necessary to compensate attorneys for case-related expenditures that would not be reimbursed separately." Feinstein Report ¶ 76. Recovery of these expenses, however, was precluded by the Supreme Court's decision in West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 102 (1991), which held that 42 U.S.C. § 1988 did not authorize recovery of expert fees. See Kenny A., 454 F. Supp. 2d at 1291. To base an enhancement, even in part, on plaintiffs' inability to recover such expenses would effectively allow plaintiffs to recover indirectly expenses that they could not legally recover directly. This the Court cannot do. Cf. Perdue, 130 S. Ct. at 1674-75 (enhancement for delay

in recovery allowed only as to "*qualifying* outlays of expenses") (emphasis added).

Summary

The guidelines established by the Supreme Court in this case significantly limit the circumstances under which a district court may enhance the lodestar based on superior attorney performance. Notwithstanding the truly outstanding performance of plaintiffs' counsel in this case and the resulting benefit to the plaintiff class, the evidence in the record does not support the award of an enhancement under these newly established guidelines. Therefore, the Court DENIES plaintiffs' renewed motion for an award of reasonable attorneys' fees and expenses [#683].

IT IS SO ORDERED, this 19th day of July, 2011.

Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia