IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Brooke Henderson and Jennifer Lumley,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 6:21-CV-03219**
	)	
School District of Springfield, R-12; Board of Education for the School District of Springfield R-12; Dr. Grenita Lathan; Dr. Yvania Garcia-Pusateri; and and Lawrence Anderson,	)	
	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF
DEFENDANTS' MOTION FOR ATTORNEY'S FEES

Defendants School District of Springfield, R-12; Board of Education for the School District of Springfield, R-12; Dr. Grenita Lathan; Dr. Yvania Garcia-Pusateri; and Lawrence Anderson, by and through counsel, offer the attached suggestions in support of their Motion for Attorney's Fees pursuant to Federal Rule of Civil Procedure 54(d) and 42 U.S.C. § 1988(b).

Respectfully submitted,

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I. INTRODUCTION

This lawsuit was brought by two employees, Brooke Henderson and Jennifer Lumley ("Plaintiffs"), against six Defendants: The School District of Springfield, R12 (the "District"); the Board of Education; Dr. Grenita Lathan (Superintendent); Dr. Yvania Garcia-Pusateri (Chief Equity/Diversity Officer); Lawrence Anderson (Coordinator, Office of Equity/Diversity); and Dr. Martha Doennig (Director of the Department of Learning Development).[1] As part of their employment with the District, Plaintiffs attended diversity and equity training covering topics including anti-racism. *See* Doc. 88, p. 2. Plaintiffs received compensation and credit for attending the training, suffered no adverse employment action arising out of their participation, and remain employed by the District. *Id.* at pp. 2-3. Plaintiffs brought suit alleging three constitutional violations under the First Amendment of the United States Constitution and 42 U.S.C. § 1983. *Id.* at p. 3. Because Plaintiffs lacked any requisite injury-in-fact sufficient for standing, this Court granted Defendants' Motion for Summary Judgment and Denied Plaintiffs' Motion. *See* Order, Doc. 88. This Court then stated it would entertain a separate motion for attorney's fees on behalf of Defendants under 42 U.S.C. § 1988. *Id.* at p. 24-25. Defendants' motion for attorney's fees follows.

II. STATEMENT OF FACTS

A. Preliminary Matters

Defendants received notice of Plaintiffs' Complaint on August 31, 2021. The 27-page Complaint consisted of 173 allegation paragraphs, with 7 paragraphs of requested relief. Doc. 1. Defendants' counsel spent significant time preparing responses to the allegations as well as researching and submitting appropriate affirmative defenses, including lack of standing. On September 20, 2021, Defendants filed their 31-page Answer and Affirmative Defenses, and when doing so stated: "Plaintiffs lack standing to bring this lawsuit…Plaintiffs have failed to plead any

[1] Defendant Martha Doennig was dismissed from the lawsuit on July 21, 2022 by stipulation.

'concrete and particularized' damage or injury arising from the acts or actions of Defendants." Doc. 17, ¶¶ 177-78. Thereafter, Defendants prepared a 33-page Amended Answer. It was submitted on December 3, 2021. Defendants again asserted that Plaintiffs lacked standing. Doc. 31, ¶ 177.

On November 16, 2021, this Court requested the parties presence at a case management conference. The following occurred relevant to Defendants' request for attorney's fees herein:

- The Court explained that the federal bar civil rules committee changed the rules encouraging courts to have early intervention into certain cases in order to make litigation less expensive and the Court had selected the instant case. *See* Doc. 32, p. 2.

- The Court inquired as to the relief sought. Plaintiffs' counsel replied, nominal damages of one dollar, declaratory and injunctive relief. *Id.* at pp. 3-4.

- The Court inquired as to Defendants' affirmative defenses. Defendants' counsel replied, lack of standing and lack of evidence supporting the claims. *Id.* at pp. 4-5.

- The Court emphasized the fact that Plaintiffs were, and are, employees of the District, to which Plaintiffs' counsel replied, yes. *Id.* at p. 26.

- The Court asked Plaintiffs' counsel if he agreed that Plaintiffs were not required to work at the District, to which Plaintiffs' counsel replied, yes. *Id.* at p. 11.

- The Court asked if any employee had been fired, or demoted, or had their pay cut due to the diversity/equity policy or its associated training, to which Plaintiffs' counsel replied, no (*Id.* at p. 11), as did Defendants' counsel when relaying that no adverse employment action had been taken against any employee (*Id.* at pp. 19-20).

- The Court inquired as to whether if, in a school context, a court had ever found that a school district does not have an affirmative duty to see that racial justice occurs within its district, to which Plaintiffs' counsel replied, no. *Id.* at pp. 9-10.

- The Court inquired as to whether it was true that elected school boards get to decide how to implement policies affirming a school district's duty to comply with civil rights laws, to which Plaintiffs' counsel replied, yes. *Id.* at p. 10.

- The Court provided several analogous hypotheticals, particularly within the employment context, asking questions, such as, if a teacher did not believe smoking was wrong, could the District ask the teacher to enforce that policy, to which Plaintiffs' counsel replied, yes. *Id.* at pp. 15-16.

- After noting that fighting racism is within a school employee's job responsibilities, the Court asked whether within a classroom, a school district has a right to control speech, to which Plaintiffs' counsel replied, yes. *Id.* at p. 17.

- The Court questioned Plaintiffs' counsel as to how the law would be advanced if federal judges, rather than an elected school board, instructed school boards as to how they should implement racial sensitivity training. *Id.* at pp. 21-22.

- The Court asked if the District could require Plaintiffs to implement the racial policy consistent with the training the Plaintiffs received, to which Plaintiffs' counsel replied, yes. *Id.* at p. 24.

- The Court asked if Plaintiffs agreed that if a teacher observed a student treat another student differently due to race, that the District could determine whether the conduct was acceptable under district policy, to which Plaintiffs' counsel replied, yes. *Id.* at p. 27.

- The Court asked if Plaintiffs agreed that when it came to answering questions about the District's positions under its policy, there might only be one correct answer or response, to which Plaintiffs' counsel replied, yes. *Id.* at p. 31-32.

In addition to attending the case management conference, Defendants participated in the Rule 26 conference and jointly submitted a proposed scheduling order. Doc. 22. Defendants also participated in the required early assessment mediation process. The mediation was held on January 28, 2022. It was unsuccessful. *See* Affidavit of Ransom A Ellis, III, attached as Exhibit A, ¶ 13.

B. Factual Discovery

The parties engaged in extensive factual discovery, both written and oral. Defendants were required to provide their Initial Rule 26 Disclosures which identified 16 individuals likely to have discoverable information and which consisted of document identification. Doc. 24. Defendants also reviewed and analyzed Plaintiffs' Initial Rule 26 Disclosures which consisted of the disclosure of 8 individuals, including the District and the Board of Education, and document identification. Doc. 25.

Plaintiffs also served two separate lengthy requests for production on "each" of the six Defendants. Docs. 34, 46. Consequently, Defendants were required to review thousands of pages of documents in order to ascertain what documentation was responsive and additionally, if responsive, to determine what information should be redacted or withheld due to its confidential or privileged nature. *See* Exhibit A, ¶ 14. As a result, Defendants were required to expend time and effort

ascertaining a protective order. Docs. 53 and 55. Ultimately, almost 19,000 pages were produced by Defendants, including 17,000+ email pages. Likewise, almost 680 pages were produced by Plaintiffs requiring Defendants' counsel to spend significant time analyzing the same. *See* Exhibit A, ¶ 14. But, most notably, Plaintiffs relied on only a handful of the emails during summary judgment briefing. *Id.*

Beyond review of documents, Defendants spent a substantial amount of time responding to interrogatories and requests for admission. Plaintiffs propounded on "each" of the six Defendants two lengthy separate sets of interrogatories. Docs. 34, 46. Defendants also issued their own interrogatories to Plaintiff. Doc. 33. Plaintiffs served on "each" of the six Defendants requests for admission. Doc. 34. Defendants likewise served requests for admission on both Plaintiffs. Doc. 39.

In addition to written discovery, Defendants also engaged in extensive oral discovery. *See* Exhibit A, ¶ 14. Plaintiffs took eight depositions. Defendants' counsel attended and defended those depositions and spent significant time preparing Defendants' witnesses for oral examination. Defendants took Plaintiffs' depositions which also required preparation time in advance of those two depositions. Defendants were also required to analyze and provide responses and objections to Plaintiffs' requests for Rule 30(b)(6) designations. Doc. 61.

During fact discovery, Defendants' counsel participated in dozens of meet-and-confer conference calls with Plaintiffs' counsel to address a wide array of discovery issues arising out of Plaintiffs' voluminous discovery requests. These required efforts by Defendants are reflected by the several status reports and other discovery filings submitted in this case. Docs. 33, 34, 37, 47.

C. Cross Motions for Summary Judgment and This Court's Order

After discovery closed, both parties submitted Motions for Summary Judgment. On July 22, 2022, when submitting their motion, Defendants submitted 144 separate paragraphs of undisputed material facts (the majority of which contained subparts) and 12 exhibits, along with 20 pages of suggestions. Docs. 74, 75. Due to the fact that Plaintiffs comingled constitutional claims and relied

on novel and unprecedented legal theories that strained the boundaries of the law, Defendants were required to spend substantial time researching and analyzing applicable case law, as well as substantial time parsing out the undisputed material facts, in order to prepare and submit their motion and supporting suggestions. *See* Exhibit A, ¶ 13. Plaintiffs thereafter opposed the motion by submitting 33 additional alleged paragraphs of undisputed material facts, along with 7 exhibits, and 15 pages of suggestions. Doc. 78. This necessitated additional research and analysis, as well as additional factual review by Defendants. On August 28, 2022, Defendants filed reply suggestions in further support of their motion for summary judgment, consisting of responses to the 33 additional alleged undisputed factual paragraphs by Plaintiffs, as well as 10 pages of suggestions. Doc. 83.

When submitting their Motion for Summary Judgment on July 22, 2022, Plaintiffs submitted 118 separate alleged paragraphs of undisputed material facts, 24 exhibits, and 20 pages of suggestions. Docs. 76, 77. Defendants were required to respond to Plaintiffs' motion, and when doing so, were again required to spend significant time parsing out Plaintiffs' alleged facts and researching and analyzing Plaintiffs' novel, obscure and unprecedented legal theories. On August 12, 2022, Defendants filed suggestions in opposition to Plaintiffs' motion by submitting 10 additional paragraphs of undisputed material facts, along with 11 exhibits and 5 pages of suggestions. Doc. 80.

On January 12, 2023, this Court entered its Order denying Plaintiffs' Motion for Summary Judgment and granting Defendants' Motion, entering judgment in favor of Defendants. Doc. 88. After noting Plaintiffs' "frivolous claim and theory" and "total lack of injury," the Court stated:

> "The court is mindful Defendants have incurred substantial legal fees in defending this claim. Taxpayer dollars which could have been devoted to enhancing the educational opportunity of the students served by the district have instead been diverted to the defense of this lawsuit. The students of the district deserve better. So too do the taxpayers whose hard-earned money is taxed by the district for the purpose of educating the children of the district in which they reside. Accordingly, this Court will entertain a separate motion for attorney's fees on behalf of Defendants."

See Doc. 88, pp. 24-25.

D. Time Spent and Fees and Costs Incurred by Defendants' Counsel

Defendants invested substantial time and resources to achieve their successful outcome. For their considerable and important work, Defendants respectfully request an award of their reasonable attorney's fees in the amount of $312,869.50, summarized in Exhibit 1 to Exhibit A. Defendants will also seek their costs in the amount of $5,073.35 once Judgment in a Civil Case is entered. *Id.* at 16.

III. DISCUSSION

A. Defendants Are Entitled to an Award of Reasonable Attorney's Fees and Expenses Under 42 U.S.C. § 1988

In *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 270 (1975), the United States Supreme Court reaffirmed the "American Rule" that each party ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary. "In response Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizing the district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation." *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). "The Court may allow 'the prevailing party' in certain civil rights actions to recover 'a reasonable attorney's fee . . . .'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 2018 WL 5848994, at *1 (W.D. Mo. 2018) (*quoting* 42 U.S.C. § 1988).

1. Defendants Are the "Prevailing "Parties"

Plaintiffs brought a three-count Complaint against six[2] separate Defendants, and summary judgment was granted in favor of Defendants, in pertinent part (*see* Order, Doc. 88), as follows:

- Plaintiffs' "compelled speech claim related to the professional training session fails because Plaintiffs lack the requisite injury-in-fact to show standing." *Id.* at p. 10.
- Plaintiffs' "chilled speech and content and viewpoint discrimination claims related to the professional training session [including the four corners exercise] fail because Plaintiffs lack the requisite injury-in-fact to show standing." *Id.* at pp. 13 and 15.
- Plaintiffs' "claims regarding the online multiple-choice questions fail due to lack of injury-in-fact." *Id.* at 21.

[2] *See* Note 1, *supra*.

- "Plaintiffs also fail to show the requisite injury required for standing to assert their unconstitutional employment conditions claim." *Id.* at p. 21.
- The Court also held, "For the reasons described, even if plaintiffs could demonstrate injury-in-fact, which they cannot, this court would enter summary judgment on behalf of Defendants and would deny Plaintiffs' motion for summary judgment." *Id.* at p. 24.

As this Court granted summary judgment on January 12, 2023 in favor of Defendants on all claims asserted in Plaintiffs' Complaint, Defendants are "prevailing parties" in this action. It does not matter that Plaintiffs' claims were dismissed for lack of standing. Rather, district courts are free to award attorney's fees to defendants who prevail due to a plaintiff's lack of standing. This fact was solidified by the Supreme Court in *CRST Van Expedited, Inc. v. EEOC*, wherein the Court stated

> There is no indication that Congress intended that defendants should be eligible to recover attorney's fees only when courts dispose of claims on the merits. The congressional policy regarding the exercise of district court discretion in the ultimate decision whether to award fees does not distinguish between merits-based and non-merits-based judgments. Rather, as the Court explained in *Christiansburg…*, one purpose of the fee-shifting provision is "to deter the bringing of lawsuits without foundation." 434 U.S., at 420…; *see also Fox*, 563 U.S., at 836…(noting, in the context of 42 U.S.C. § 1988's closely related provision, that Congress wanted "to relieve defendants of the burdens associated with fending off frivolous litigation"). The Court, therefore, has interpreted the statute to allow prevailing defendants to recover whenever the plaintiff's "claim was frivolous, unreasonable, or groundless." *Christiansburg*, *supra*, at 422…It would make little sense if Congress' policy of "sparing defendants from the costs of frivolous litigation," *Fox*, *supra*, at 840, 131 S.Ct. 2205 depended on the distinction between merits-based and non-merits-based frivolity. Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendant's favor, whether on the merits or not. Imposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available.

578 U.S. 419, 432 (2016) ("involv[ing] the interpretation of a statutory provision allowing district courts to award attorney's fees to defendants in employment discrimination actions.").

Although *CRST* considered the fee-shifting provision of Title VII, the Supreme Court explained that "Congress has included the term 'prevailing party' in various fee-shifting statutes, and it has been the Court's approach to interpret the term in a consistent manner." *Id.* at 422. Thus, in light of *CRST*, district courts do not err in finding that defendants are prevailing parties under various

fee-shifting statutes, such as the one at issue here, where a plaintiff's claims have been dismissed for lack of standing. *See*, *e.g.*, *Raniere v. Microsoft Corp.*, 887 F.3d 1298, 1303 (Fed. Cir. 2018) ("Even without *CRST*, we conclude that the district court's dismissal with prejudice of Raniere's case for lack of standing is tantamount to a judgment on the merits."); *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 327-28 (1st Cir. 2017) (concluding that under *CRST*, the district court did not abuse its discretion in awarding fees when that court "resolved the parties' copyright dispute on standing grounds without reaching the merits of ownership."); and *Rutherford v. Evans Hotels, LLC*, 2021 WL 1945729, at *2-3 (S.D. Cal. 2021) (finding defendant in ADA action prevailing party although case was dismissed for lack of standing); *also see Garmong v. County of Lyon*, 807 Fed. Appx. 636, 639 (9th Cir. 2020) (rejecting argument that district court could not award defendant fees after dismissing complaint due to plaintiff's failure to establish Article III standing).

2. Plaintiffs' Action Was Frivolous, Unreasonable, or Without Foundation

Where the prevailing party is a defendant, as here, "a district court may in its discretion award attorney's fees to a prevailing defendant…upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Defendants are not required to show either subjective or objective bad faith on the part of plaintiffs in order to recover § 1988 attorney's fees. *Id.* at 417-418. This is true both at the inception of litigation and if "the plaintiff continued to litigate *after* it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." *Id.* at 422 (emphasis added). *Also see Grant v. Farnsworth*, 869 F.2d 1149, 1152 (8th Cir. 1989), *cert. denied*, 493 U.S. 898 (1989) (awarding fees to defendant in civil rights action as suit was frivolous); *Nguyen v. Foley*, 2022 WL 1026477, at *3 (D. Minn. 2022) (after granting motion to dismiss for lack of subject matter jurisdiction/failure to state a claim, awarding defendant attorney's fees as plaintiff "identified no

factual or legal basis" for his § 1983 action); and *Wilson v. Cont'l Mfg. Co*., 599 F. Supp. 284, 286 (E.D. Mo. 1984) (awarding defendant fees in civil rights/employment discrimination action).

Here, Plaintiffs should have known from Defendants' initial Answers, the Court's inquiries (or admonitions)[3] during the Case Management Conference, and the extensive discovery exchanged between the parties that their claims were frivolous and without foundation. *See Flowers v. Jefferson Hosp.*, 49 F.3d 391, 392-93 (8th Cir. 1995) (affirming defendants' fee award in § 1981 claim as plaintiff should have known from discovery his claim was without foundation). Defendants repeatedly challenged Plaintiffs' standing, or lack injury-in-fact, as did this Court, to no avail.

At a minimum, once discovery closed, Plaintiffs should have recognized that there was not one scintilla of evidence showing that they suffered any injury-in-fact. The following facts were true at the litigation's inception, and remained true: Plaintiffs received credit and compensation for attending the training; Plaintiffs never faced any official discipline; Plaintiffs suffered no adverse employment action arising out of their participation; Plaintiffs were not fired, demoted, suspended, or transferred; and Plaintiffs' participation, or any opinion they expressed, never impacted their compensation or benefits. These facts remained true for other employees as well.

The following facts as to Defendants were true at inception, and remained true: the District did not fail to promote Plaintiffs; the District did not change their work duties in retaliation; the District did not condition pay or credit on Plaintiffs' expression of a specific viewpoint; the District did not enact a policy requiring Plaintiffs to adopt certain views or face undesirable professional consequences; the District did not require Plaintiffs, by compulsion or coercion, to express a specific

[3] *See Bond v. Keck*, 629 F. Supp. 225, 227 (E.D. Mo. 1986), *aff'd*, 802 F.2d 463 (8th Cir. 1986) (awarding fees to school defendants in civil rights action stating "[t]his Court…expressed its concern to plaintiffs over the lack of credible evidence…Despite these admonitions, plaintiffs insisted on pursuing their complaint. This Court believes that an award of attorney's fees in this case to the prevailing defendants will promote the policy of discouraging these types of lawsuits.").

message after encountering discrimination; and the District only required Plaintiffs to show that they understood the training's suggested approach. These facts also remained true for other employees.

The above facts, among others, remained true through discovery, solidifying Plaintiffs' lack of Article III standing, yet Plaintiffs went so far as to ask for summary judgment based on frivolous[4] and unfounded constitutional claims. *See*, *e.g.*, *Garmong*, *supra*, 807 Fed. Appx. at 640 (finding claims frivolous as plaintiff "alleged only generalized, speculative injuries, or, even assuming he had Article III standing, failed to articulate or plausibly allege necessary elements of his constitutional claims."). Defendants should be awarded their fees. It makes no difference that Defendants engaged in discovery before filing their summary judgment motion. This is because "[a]lthough in some instances a frivolous case will be quickly revealed as such, it may sometimes be necessary for defendants to 'blow away the smoke screens the plaintiffs had thrown up' before the defendants may prevail." *See Flowers*, *supra*, 49 F.3d at 393; *also see EEOC v. CRST*, 944 F.3d 750, 756 (8th Cir. 2019) (same); and *Animal Welfare Inst. v. Feld Entertainment, Inc.*, 944 F.Supp.2d 1, 16 (D.D.C. Cir. 2013) ("Courts have awarded attorneys' fees to prevailing defendants where…the defects…are of such magnitude that the plaintiff's ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the plaintiff continues to litigate.") (citation omitted).

In this regard, the case of *Access Now, Inc. v. Town of Jasper, Tenn.*, 2004 WL 1873734 (E.D. Tenn. 2004) is particularly instructive. The defendant sought its attorney's fees as to Count II of the plaintiff's complaint on the basis that the ADA complaint was frivolous, even though it was not brought in bad faith. The court granted the defendant's fee motion stating

> When the defendant moved for summary judgment under FED. R. CIV . P. 56 to dismiss Count II of the complaint on the ground of lack of standing…, it should have been obvious to an objectively reasonable litigant in the same position as [the plaintiffs] that the plaintiffs clearly

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[4] The fact that Plaintiffs only sought nominal damages and equitable relief does not make their claims nonfrivolous. *Nielsen v. Hart*, 1995 WL 901297, at *3 (W.D. Mo. 1995), *aff'd*, 95 F.3d 701 (8th Cir. 1996) (affirming fee award in ERISA action; court has inherent equitable power to award prevailing defendant fees).

> lacked standing. Instead of voluntarily dismissing or dropping Count II of the complaint to avoid the further unnecessary expense and waste of time in continuing to litigate a futile claim, [the plaintiffs] deliberately chose to vigorously oppose the defendant's summary judgment motion to dismiss Count II. [The plaintiffs] unreasonably persisted in litigating and pursuing Count II right up to the eve of trial.

Id. at *3 (finding plaintiffs either knew or could have known that Count II claim was frivolous, unreasonable, and groundless from its inception).

Further, when awarding a defendant its fees, courts are allowed to consider that meritless cases trivialize and squander the important business of the federal courts. For example, in *Whitson v. LM Serv., Inc.*, 2003 WL 685873 (E.D. Mo. 2003), the court concluded that it was proper to award attorney's fees against plaintiff, even if he was *pro se*, for he knew or should have known that his Title VII action was frivolous. In so finding, the court noted that the plaintiff "continued litigating despite his knowledge that his claims were baseless" and that the defendant was "forced to bear the burden of defending a baseless claim; a burden made weightier by the [p]laintiff's misuse of the litigation process." *Id.* at *3. In order to "serve to deter baseless…claims," the court awarded defendant its fees stating, "Defendant is not the only victim…because 'the entire public inevitably suffers when a vindictive plaintiff squanders limited judicial resources by prosecuting frivolous lawsuits.'" *Id.* at *3 (*quoting Wilson*, *supra*, 599 F. Supp. at 287 (*quoting American Family Life Assur. Co. of Columbus v. Teasdale*, 733 F.2d 559, 570 (8th Cir.1984)).

To this end, while "section 1988 of the Civil Rights Act…[was] enacted to ensure that private citizens have a meaningful opportunity to vindicate their rights and encourage citizen enforcement of important federal policies," frivolous suits do not aide the cause of protecting and enriching the education of the students that a school district serves. *Cf. Animal Welfare Inst.*, *supra*, 944 F.Supp.2d at 14 (stating in the context of the Endangered Species Act, "frivolous suits…do not aide the cause of" protecting the earth's species). "On the contrary, they undermine the legitimate efforts of those bringing legitimate suits, and draw scarce judicial resources away from these cases." *Id.* (*quoting*

Harris v. Group Health Ass'n, 662 F.2d 869, 874 (D.C. Cir. 1981)). "In such cases, the Court should exercise its discretion to award fees to a prevailing defendant." *Id.*

In sum, Plaintiffs should have known that their claims were unreasonable and frivolous and that their continued pursuit of this litigation trivialized the important functions of this Court, and moreover, served as a detriment towards the very important policies the District put forth in the interests of its students. The training strove to address, increase, and enhance employees' understanding and sensitivity to race issues likely to be confronted by minority students. As this Court aptly stated, "The claim that the district should not conduct training for [Plaintiffs] to attend on policies applicable at work involving their employment because they disagree with them…is untenable. Such a ruling would make administration of a governmental unit such as a…school district wholly unworkable. It would distort the employer-employee relationship. It is a frivolous claim and theory." Doc. 88, p. 24. Hence, Defendants should be awarded their reasonable attorney's fees.

Defendants recognize that while the purpose of a defendant's attorney's fee award is "to protect defendants from burdensome litigation having no legal or factual basis…to discourage groundless lawsuits," (*See Steelman v. Rib Crib No. 18*, 2012 WL 4026686, at *5 (W.D. Mo. 2012)), the Eighth Circuit cautions that an award of attorney's fees might have a chilling effect upon the filing of meritorious claims. *See Flowers*, *supra*, 49 F.3d at 392 (affirming defendant's fee award even under this standard). In light of this, Defendants only seek recovery for attorney hours reasonably, necessarily, and actually performed. *See* Section III.B.2, *infra*; *also see Koester v. YMCA*, 2018 WL 10425458, at *1 (E.D. Mo. 2018) (reducing fee request as it was unreasonable, per se, given defendant required an excess of attorneys to work on a case it deemed frivolous).

B. Defendants Should Recover Their Reasonable Attorney's Fees Under the Lodestar Standard

"District courts have substantial discretion in determining the reasonableness of attorney's fees." *Sheppard v. U.S. Dpt. of Justice*, 2022 WL 245480, at *2 (W.D. Mo. 2022) (citations omitted).

"The basis for any fee award under § 1988 is the lodestar calculation, the product of a reasonable hourly rate and the number of hours reasonably expended on the litigation." *Trinity Lutheran*, *supra*, 2018 WL 5848994, at *1 (*citing Hensley*, 461 U.S. at 433; *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005)). "There is a strong presumption that the lodestar calculation represents a reasonable fee award." *Stallsworth v. Mars Petcare US Inc*., 2018 WL 2125950, at *1 (W.D. Mo. 2018) (*citing City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)).

In determining a reasonable amount of attorney's fees, a proper lodestar figure is calculated by taking the reasonable hourly rate and multiplying it by the hours expended throughout litigation. *DES Development, LLC v. RevHoney, Inc.*, 2021 WL 2697538, at *4 (W.D. Mo. 2021) (citation omitted). In order to substantiate the requested fee amount, the party requesting the fees should provide reliable documentation and avoid duplicative and excessive billing. *Id.* (*citing Armstrong v. ASARCO, Inc*., 149 F.3d 872, 873 (8th Cir. 1998)). In addition, while there are numerous factors to consider when making an award,[5] "the most critical factor is the degree of success obtained." *Id.* at *3 (*citing Hensley*, *supra*, 461 U.S. at 439) ("We hold that the extent of…success is a crucial factor in determining the proper amount of an award…under 42 U.S.C. § 1988.") (other citations omitted).

1. Defendants' Requested Hourly Rates are Reasonable

For the purposes of the lodestar calculation, "[i]n the Eighth Circuit, 'a reasonable hourly rate generally means the ordinary fee for similar work in the community.'" *Trinity Lutheran*, *supra,* 2018 WL 5848994, at *2 (*quoting Little Rock Sch. Dist. v. State Ark. Dep't of Educ*., 674 F.3d 990 (8th

[5] "The Eighth Circuit has stated that the following factors should be used in setting the reasonable number of hours and reasonable hour rate components…: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *DES Dev.*, *supra*, 2021 WL 2697538, at *4 (*citing McDonald v. Armontrout,* 860 F.2d 1456, 1459 (8th Cir. 1988)).

Cir. 2012)). Courts have found that reasonable hourly rates are determined by reference to the "prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *also see DES Dev.*, *supra*, 2021 WL 2697538, at *4 ("the Court should consider the locality of where the case was litigated"). "Nonetheless, where local community rates would not be sufficient to attract experienced counsel in a specialized legal field, the appropriate rate may be determined by reference to a national market or a market for a particular legal specialization…" *Trinity Lutheran*, *supra,* 2018 WL 5848994, at *2 (citations, internal quotation marks omitted). In addition, "courts may draw on their own experience and knowledge of prevailing market rates." *Timber Ridge Escapes, LLC v. Quality Structures of Ark., LLC,* 2020 WL 4717622 (W.D. Mo. 2020), *aff'd* (as to attorney fee issue), 6 F.4th 781 (8th Cir. 2021).

Defendants' counsels' rates are well within the reasonable range when compared to rates in the local Missouri legal community. For their most senior litigators, Defendants seek rates between $205 and $215 per hour. For their associates, Defendants seek rates between $195 and $205 per hour. For their paralegal, Defendants seek rates between $90 and $95 per hour. *See* Exhibit A, ¶ 10.

Local attorneys have attested that these rates are within, if not well below, the range of fees normally charged by lawyers within Missouri for comparable civil rights litigation and employment litigation. *See* Affidavits of Amanda Cochran and Craig Heidemann, attached as Exhibits C and D, respectively. This is further supported by the Missouri Lawyers Weekly study, the preeminent study of attorney's fee rates within the state. *See* Exhibit A, ¶ 11, and its Exhibit 2; *also see Sheppard*, *supra*, 2022 WL 245480, at *2 (considering rates identified as average rates by Missouri Lawyers Weekly when determining a requested rate's reasonableness). Per the most recent study, Missouri Lawyers Weekly examined fee applications, primarily from cases subject to a fee-shifting statute, such as employment and civil rights cases, "to give a glimpse…into the amounts that lawyers in [Missouri] charge per hour for their services." *See* Exhibit A, ¶ 11, and its Exhibit 2. Per the recent

study the "median hourly rate for Missouri lawyers as a whole was $400, up from last year's figure of $330 an hour. The statewide median was $450 per hour for partners and $325 for associates." *Id.*

The Missouri Lawyers Weekly study results are consistent with the information provided by Defendants' declarants. Declarant Ransom A Ellis, III, has been a member of the Missouri Bar, in good standing, since 1979. *See* Exhibit A, ¶ 4. He has extensive experience representing public and private sector educational entities, public municipalities and business entities in federal and state court, and has successfully represented the District in multiple cases since 1983. *Id.* at ¶¶ 4-7. Declarant Tina G. Fowler has been a member of the Missouri Bar, in good standing, since 1997. *See* Affidavit of Tina G. Fowler, Exhibit B, ¶ 4. She has extensive experience in employment-related matters, litigation and motion practice in federal and state court, as well as substantial public sector experience. *Id.* at ¶¶ 5-6. In addition, Mr. Ellis has reviewed the rates sought, and he attests that the standard hourly rate for lawyers and paralegals at Ellis, Ellis, Hammons & Johnson, P.C., of similar years of experience and expertise, is higher than the rates sought by Defendants here. *Id.* at ¶ 11.

Thus, the requested rates are particularly reasonable when considered in relation to the considerable experience and expertise of Defendants' counsel. *See Stallsworth v. Staff Mgmt.*, 2018 WL 2125952, at *3 (W.D. Mo. 2018) (in addition to the local market rates, "[t]he rate charged should also take into account the experience, skill, and expertise of the attorneys as well as the complexity, significance, and undesirability of the case"). Such expertise was crucial to the success of this case, which involved highly specialized areas of law. In this regard, District Courts routinely recognize that "[c]omplex civil rights litigation is lengthy and demands many hours of lawyers' services." *See Gerling v. Waite*, 2022 WL 558083, at *8 (W.D. Mo. 2022). The same is true for complex employment litigation. *See D.L. v. St. Louis City Pub. Sch. Dist.,* 2019 WL 1359282, at *2 (E.D. Mo. 2019) (approving counsel's requested "billing rates of $200-$350 for 'attorneys' or 'associates'

practicing employment or civil rights law in the St. Louis metropolitan area and billing rates of $350-$500 for 'partners' practicing employment or civil rights law in the St. Louis metropolitan area.").

Further, courts have previously deemed higher rates reasonable for attorneys in Missouri possessing Defendants' counsel's experience in civil rights and employment-related litigation. *See Gerling*, *supra*, 2022 WL 558083, at *8 (accepting counsel's requested partner median hourly rate of $490 in 2021, and associate median hourly rate of $300); *Toigo v. DHHS*, 2022 WL 212413, at *3 (W.D. Mo. 2022) (under § 1988, awarding $325 hourly rate for 10-year attorney litigating constitutional claim); *Fernandez v. St. Louis Cty.*, 538 F.Supp.3d 888, 906 (E.D. Mo. 2021) (approving $575 hourly rate for experienced civil rights attorneys); *Chestnut v. Wallace*, 2020 WL 5801041, at *3 (E.D. Mo. 2020) (approving $450 hourly rate for lawyer who litigated constitutional and civil rights claims for more than 38 years); *M.B. v. Tidball*, 2020 WL 1666159, at *10 (W.D. Mo. 2020), *aff'd*, 18 F.4th 565 (8th Cir. 2021) (awarding rate of up to $500 per hour for civil rights attorneys with more than 30 years' experience); and *Holland v. City of Gerald, Mo*., 2013 WL 1688300, at *4 and Doc. 270-1 (E.D. Mo. 2013) (approving $450 hourly rate for civil rights litigators who had more than 30 years of experience); *also see D.L., supra*, 2019 WL 1359282, at *2.

In sum, Defendants' counsel requests rates that are lower than the local standard market rate and lower than their standard market rates, based on their specialized expertise and experience, and lower than rates paid by their private clients. *See* Exhibit A, ¶¶ 10-11; and Exhibit B, ¶ 7.

2. Defendants Only Seek Recovery for Attorney Hours Reasonably, Necessarily, and Actually Performed

" 'By and large, the Court should defer to the winning lawyer[s'] professional judgment as to how much time [they were] required to spend on the case,' especially in cases in which recovery of fees is not certain." *Sheppard*, *supra*, 2022 WL 245480, at *2 (citations omitted). Defendants' counsel, after applying thorough billing judgment, submit that the number of hours reasonably expended on the litigation for which they should be compensated is 1,538.60 hours. *See* Exhibit A,

¶¶ 10, 14, and 15. In support, Defendants have "submit[ted] documentation supporting the requested amount," detailing the hours that their counsel expended in pursuing this litigation, and "making 'a good faith effort to exclude from [the] fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.'" *Trinity Lutheran*, *supra*, 2018 WL 5848994, at *2 (citation omitted). Defendants' counsel understands that "[i]n the private sector, 'billing judgment' is an important component in fee setting...[and] [h]ours that are not properly billed to one's *client* also are not properly billed to one's adversary pursuant to statutory authority." *Hensley*, 461 U.S. at 434 (emphasis in original).

The 1,538.60 hours submitted by Defendants' counsel represents tremendous work by Defendants' counsel in defending this case. *See* Exhibit A, ¶¶ 12-14. Counsel conducted large-scale discovery, in-depth legal research as to Plaintiffs' meritless, cryptic, and inscrutable claims, and extensive motion practice. *Id.* at ¶¶ 13-14. Despite the lack of foundation for their frivolous claims, Defendants' counsel had an obligation to devote the time necessary to advance the case as quickly as reasonably possible. The time spent by Defendants' counsel on this case increased substantially as a result of Plaintiffs' voluminous discovery requests. *Id.* Regardless, Defendants' counsel's immense efforts, particularly at the summary judgment phase, resulted in judgment being granted in favor of Defendants. *Id.* at 11.

Taking seriously the obligation to be mindful that hours that are not properly billed to one's client also are not billed to one's adversary pursuant to statutory authority, Defendants have carefully reviewed each attorney's time entries to eliminate excessive, redundant, or otherwise unnecessary hours. *See* Exhibit A, ¶ 16. Defendants' firm has also waived all time that was not central to the litigation. *Id.* By exercising this discretion, Defendants' counsel reduced the overall fee request by approximately seventeen percent. *Id.* Further, and although fees incurred in preparing a motion for attorney's fees are recoverable, *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994), Defendants'

counsel is not seeking to recover for time spent in preparing the instant motion. *Id.* After this meticulous application of billing judgment, and utilizing the reasonable rates addressed above, Defendants submit that the proper measure of the lodestar for the 1,538.6 hours rendered through January 12, 2023 is $312,869.50. *See* Exhibit A, ¶¶ 10, 16 and 17.

C. Defendants Will Seek Costs Once Judgment is Entered, but Do Not Seek Reasonable Expenses

"Counsel to a prevailing party in a § 1983 action is entitled to an award reimbursing reasonable expenses of the kind normally charged to clients by attorneys." *Trinity Lutheran*, *supra*, 2018 WL 5848994, at *14. Items such as "travel expenses for attorneys and other expenses that a law firm normally would bill to its client are properly characterized as part of an attorney's fees award." *Id.* (*quoting Williams v. ConAgra Poultry Co*., 113 Fed. Appx. 725, 728 (8th Cir. 2004)). Although Defendants will seek their costs once this Court enters its Mandate and Judgment in a Civil Case is entered by the Clerk, Defendants do not seek recovery for reasonable expenses. *See* Exhibit A, ¶ 16.

V. CONCLUSION

As authorized under Federal Rule of Civil Procedure 54(d) and 42 U.S.C. § 1988(b), Defendants respectfully request that the Court award them their reasonable attorney's fees in the amount of $312.869.50 and for such other relief as the Court deems just.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and a copy was made available to all electronic filing participants.

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