IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COMMON CAUSE GEORGIA, as an organization, *Plaintiff*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia, *Defendant*.	)	Case No. 18-cv-05102-AT

PLAINTIFF COMMON CAUSE GEORGIA'S REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S SPECIAL MOTION FOR AN AWARD OF ATTORNEYS' FEES

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I. INTRODUCTION

Just two days prior to the November 2018 election, then-Secretary of State Brian Kemp publicized serious vulnerabilities in Georgia's election systems. Plaintiff Common Cause Georgia ("Common Cause") acted quickly. In less than a week, Common Cause's counsel investigated the relevant issues, spoke with fact and expert witnesses, filed a complaint, seven briefs, and 18 declarations, and argued a Motion for a Temporary Restraining Order and Expedited Discovery (the "TRO Motion") in this Court, obtaining a TRO with substantial protections for voters that, only months later, was largely codified into law. Defendant disputes none of this.

Yet Defendant argues that Common Cause is not entitled to its attorneys' fees for these extraordinary efforts and results because, Defendant claims, the TRO Order did not alter the parties' legal relationship *enough*. Such an argument is inconsistent with the law and the facts. As demonstrated below, a plaintiff need not obtain all the relief it seeks in order to be considered a prevailing party. And, the Order here clearly altered the legal relationship, delaying the certification of election results until after a careful review of certain provisional ballots could take place, among other forms of relief.

Defendant next argues that *if* Common Cause is entitled to an award of attorneys' fees, the requested fees should be reduced by nearly 80%. But Defendant

completely ignores the specific evidence that Common Cause submitted in connection with its motion supporting the reasonableness of the requested rates and fees. Instead of putting in its own specific evidence in opposition, Defendant relies on generalized objections of the sort that courts routinely reject. Here, too, these objections should be rejected for the reasons set forth below and Common Cause should be awarded attorneys' fees and expenses in the total amount of $183,632.59.

II. ARGUMENT

A. Common Cause Is Entitled to Fees

Defendant makes a half-hearted attempt to argue that Common Cause is not a prevailing party because, Defendant argues, "[w]hen this Court ultimately ruled, it did not provide any of th[e] relief" requested in Common Cause's Proposed Order, and the Order did not alter the legal relationship. Def.'s Resp. to Pl.'s Mot. for Attorneys' Fees ("Resp.") at 5–6. These arguments are inconsistent with Eleventh Circuit law and contrary to the facts.[1]

[1] Defendant suggests that Common Cause should not be awarded fees because such an award "will be paid by the taxpayers." Resp. at 3. This is contrary to Eleventh Circuit law holding that "[t]he financial impact of a fee award on the taxpayers . . . is clearly not a 'special circumstance' justifying the denial of attorney's fees under section 1988." *Aware Woman Clinic, Inc.* v. *City of Cocoa Beach*, 629 F.2d 1146, 1149–50 (5th Cir. 1980). (Fifth Circuit decisions rendered on or before September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).)

The law is clear that a plaintiff need not succeed on every claim it brings in order to be considered a prevailing party; it is sufficient to succeed on "*any* significant issue in litigation which achieve[d] *some* of the benefit the parties sought in bringing suit." *Tx. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989) (emphasis added). Courts have recognized that "[i]n the context of an injunction, a party need not obtain relief identical to the relief that it specifically demanded, as long as the relief obtained is of the same general type." *Dillard* v. *City of Greensboro*, 213 F.3d 1347, 1354 (11th Cir. 2000) (alteration and internal quotation marks omitted). Nor does a prevailing party "need to obtain relief to the extent demanded; getting *something* suffices to authorize an award of fees." *Id.* (emphasis added) (citing *Farrar* v. *Hobby*, 506 U.S. 103, 111 (1992)).[2]

Defendant is also wrong on the facts. The Court's Order *did* award much of the relief requested and *did* alter the legal relationship. As a starting point,

[2] *See also Ashley* v. *Atl. Richfield Co.*, 794 F.2d 128, 131 (3d Cir. 1986) ("Plaintiff need only demonstrate that she obtained *some* of the benefit sought and that the relief obtained was causally connected to the prosecution of the complaint." (emphasis added)); *Sablan* v. *Dep't of Fin. of N. Mar. I.*, 856 F.2d 1317, 1327 (9th Cir. 1988) (holding that an award of attorneys' fees is not precluded where the plaintiff did not succeed in obtaining the requested permanent injunction because "[c]essation of the government's erstwhile policy . . . is, after all, essentially the same as the injunctive relief sought in the complaint." (alterations and internal quotation marks omitted)).

Plaintiff was clear that the nature of the relief it sought was to prevent properly cast ballots from being rejected. *See, e.g.*, TRO Hr'g Tr. 116:16–21 ("We want a very limited and segregatable and identifiable number of ballots to not be rejected. And ultimately we want a process for ensuring that every ballot that was rejected needed to be rejected for a reason and that there is some sort of review so that people are being deliberate and thoughtful about it."). The Court, in direct response to Common Cause's motion, enjoined Defendant from certifying the election results prior to November 16, 2018 (a component of the Court's Order that Defendant fails to mention—let alone discuss—in its Opposition); required Defendant to direct county election officials to remit certified returns and engage in a good faith review of the eligibility of provisional ballot voters using all available documentation; and required Defendant to establish a hotline or website for provisional ballot voters that explained why provisional ballots were not counted. Order at 52–53, ECF No. 62. These requirements were necessary to ensure that votes that might have otherwise been rejected were counted, therefore "materially alter[ing] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Atlanta Journal & Constitution* v. *City of Atlanta Dep't of Aviation*, 6 F. Supp. 2d 1359, 1366 (N.D. Ga. 1998).

B. **Common Cause's Requested Fees Are Reasonable**

Defendant spends most of its Opposition arguing that, at most, Common Cause is entitled to only approximately 20% of the fees it seeks because its hourly rates are not reasonable and the number of hours expended was too high. Again, neither argument has merit.

1. Common Cause's Requested Rates Are Reasonable in the Market

Defendant argues that Common Cause "only supports their proposed rates with declarations that provide conclusory or otherwise unsupported evidence that those rates are in line with other rates in the Atlanta market for attorneys with similar skill."[3] Resp. at 7. That could not be further from the truth. Common Cause submitted a detailed declaration from David G.H. Brackett, a partner with Atlanta's Bondurant Mixson & Elmore LLP, who has extensive experience in complex commercial litigation and voting rights matters. *See* Brackett Decl. ¶ 4, ECF No. 119-7. Mr. Brackett's Declaration was far from conclusory. He specifically discussed "the complexity of this litigation and the experience in the area of voting

[3] Although Defendant seeks a 25% reduction of all rates, Defendant does not make any specific arguments about the rates sought in connection with Common Cause's senior lawyers. Resp. at 8 (explaining only why the rates of attorneys Feldman, Freeland, Meneguin Layerenza, Fuhrman, and Sieber are, in Defendant's view, too high). Defendant's failure to provide a single specific argument or piece of evidence supporting why he believes the senior lawyers' rates are also unreasonable should alone result in rejection of that argument.

rights of Mr. Atkins, Ms. Berse and the Brennan Center lawyers," "[t]he skill and experience of Plaintiff's counsel, including their expertise in voting rights litigation," which "allowed them to work very quickly in this matter on a compressed time schedule to obtain an outstanding result," and the "expedited nature of the proceedings" which made it "necessary for more than one lawyer to carry the laboring oar." Brackett Decl. ¶¶ 18–19, 22. Mr. Brackett paired his specific observations with his more than 20 years of familiarity with hourly rates in the Atlanta market and his "familiar[ity] with the legal standard for determining a reasonable attorney fees award." Brackett Decl. ¶ 24. And, he compared the rates sought here to eight specific similar cases, some of which awarded rates higher than those sought here. Brackett Decl. ¶ 10. The rates sought here are reasonable, when compared to those cases, which he believes are reflective of reasonable rates in the Atlanta market. For example, the range of rates approved by those courts was $200–$350 for junior associates and $395–$425 for mid-level and senior associates; Common Cause seeks rates of $250 for a first-year law clerk and associate, $300 for a second-year associate, and $400 for mid-level associates.

Defendant, on the other hand, did not provide *any* evidence regarding rates in the Atlanta market. Instead, Defendant relies on two conclusory arguments. First, Defendant claims that this case concerned a "straightforward" legal question.

Resp. at 7. Not so. This action was the first case challenging Georgia's provisional balloting scheme in light of the security issues with the state's voter registration systems. The case involved complex, technical questions regarding election security and the vulnerability of Georgia's voter registration database. Litigating it required expert analysis and extensive investigation by Common Cause on a compressed timeline, exacerbated by the November 13, 2018 deadline for counties to certify election returns. As this Court noted in its Order, this case involved a "stream of evidence" that included "statistical evidence" in addition to numerous declarations. Order at 38–39, ECF No. 62.

Second, Defendant seems to be arguing that because the Court reduced the requested rates by 25% in *Ga. State Conf. of the NAACP* v. *Kemp*, the Court should also apply a 25% reduction here. *See* Resp. at 7–8; *Ga. State Conf. of the NAACP* v. *Kemp*, No. 1:17-cv-1397-TCB, 2018 WL 2271244, at *3 (N.D. Ga. April 11, 2018). That argument also misses the mark. If any comparison to the *Kemp* case is justified at all, it is a comparison to the actual rates approved by the court there, not to the size of the reduction applied. If anything, the rates approved by the *Kemp* court support a finding that the rates Common Cause seeks for those attorneys who Defendant challenges, *see* n.3 above, are within a reasonable range. For example, while *Kemp* questioned a $300 hourly rate "for someone who has not yet passed the

bar," *Kemp*, 2018 WL 2271244, at *3, Common Cause only seeks a $250 rate for a first-year associate admitted in New York and a law clerk who, while not yet admitted, has passed the bar.[4]

For the reasons set forth in Common Cause's motion and above, Common Cause respectfully requests that the Court award its requested rates.

2. The Amount of Time Billed Was Also Reasonable

The objections and proof from fee opponents must be "specific and reasonably precise." *P&K Rest. Ent., LLC* v. *Jackson*, 758 F. App'x 844, 850–51 (11th Cir. 2019); *see also Norman* v. *Hous. Auth. of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988). "Generalized statements that the time spent was reasonable or unreasonable of course are not particularly helpful and not entitled to much

[4] Defendant argues that Mr. Sieber's "customary rate" of $640 per hour shows that Common Cause is "disconnected" from the Atlanta market. Resp. at 9 n.4. That argument completely ignores the fact that Common Cause reduced Mr. Sieber's customary rate by 61% to $250 specifically "to seek the prevailing rate[] in the Atlanta legal market." *See* Brackett Decl. ¶¶ 14–17. Nor does the fact that Mr. Sieber is not yet admitted to the bar mean that Common Cause is not entitled to be reimbursed for his reasonable work. *See Missouri* v. *Jenkins ex rel. Agyei*, 491 U.S. 274, 284–89 (1989) (holding that fee awards under § 1988 may properly include the services of law clerks at prevailing market rates). As Common Cause's expert stated, the requested rate of $250 for Mr. Sieber's time is within the range of reasonable rates billed by firms in the Atlanta market for work performed by comparably skilled and experienced individuals. *See* Brackett Decl. ¶¶ 14–17. The Defendant has put forth no evidence or expert testimony to the contrary.

weight." *Norman*, 836 F.2d at 1301. "[F]ailure to explain exactly which hours it views as unnecessary or duplicative is generally viewed as fatal." *Tanner* v. *Bacon Cty. Dev. Auth.*, No. CV 509-098, 2012 WL 13005940, at *5 (S.D. Ga. May 25, 2012) (citing *Gray* v. *Lockheed Aeronautical Sys. Co.*, 125 F.3d 1387, 1389 (11th Cir. 1997)). Defendant's opposition is plagued by generalized, imprecise statements that should be rejected.

First, Defendant argues generally that the Court should not award attorneys' fees for "time spent on emails with various individuals that were apparently unrelated to the drafting of the complaint." Resp. at 11. But Defendant does not point to any specific time entries that it believes were "apparently unrelated to the drafting of the Complaint." Instead, Defendant generally opposes "all of the entries for the Brennan Center on the preparation of the complaint." Resp. at 12. This is exactly the type of sweeping statement that courts afford little weight. *See Norman*, 836 F.2d at 1301. In addition to participating in the type of "productive attorney discussions and strategy sessions" that are compensable, *Webster Greenthumb Co.* v. *Fulton Cty.*, 112 F. Supp. 2d 1339, 1350 (N.D. Ga. 2000), the Brennan Center for Justice ("Brennan Center") assisted with researching for and drafting the Complaint. Pérez Decl. ¶¶ 2, 9. Similarly, Defendant's argument that Paul, Weiss, Rifkind, Wharton & Garrison LLP's ("Paul, Weiss") time drafting the

Complaint should be reduced by 25% because the time was excessive, Resp. at 12, is also the type of objection rejected by courts. *Webster Greenthumb*, 112 F. Supp. 2d at 1353–54, 1361–62 (refusing 60% reduction in time spent on complaint and amended complaint, and only reducing time that plaintiff conceded was not compensable). Defendant makes no effort to justify its across-the-board proposed reduction.

Second, Defendant argues that the fees should be reduced because multiple attorneys worked on the same projects. But this objection is based on an apparent misunderstanding of the law. It is well-established that "[w]ork performed by multiple attorneys . . . is not subject to reduction where the attorneys were not unreasonably doing the same work." *Webster Greenthumb*, 112 F. Supp. 2d at 1350. This work can include "productive attorney discussions and strategy sessions" and even "routine activities such as making telephone calls and reading mail related to the case." *Id.* While Common Cause submitted a declaration from Mr. Brackett explaining why, in his view, the work by multiple attorneys, including their communication with each other, was "essential to manage the tasks necessary for the litigation," and was "the most efficient means by which to share ideas and research," Brackett Decl. ¶ 23, Defendant relies only on conclusory objections.

Third, Defendant argues that Common Cause's counsel over-relied on "block billing" and that this justifies a 75% across-the-board reduction of rates in the TRO, oral argument, and post-argument briefing phases of the case. Resp. at 10. As a starting point, again, this overly general, imprecise objection is not sufficient to overcome the evidence submitted by Common Cause in support of its motion. While Defendant points to certain examples of block billing that it contends are improper, Defendant does not argue that *every* entry is inappropriate block billing and thus offers no justification for applying a reduction on all entries. "[B]y complaining generally of block-billing, without substantiating their claim," Defendant asks the Court "to shoulder its burden of scouring the record to find any objectionable billing entries." *Williams* v. *R.W. Cannon, Inc.*, 657 F. Supp. 2d 1302, 1312 (S.D. Fla. 2009). Moreover, Defendant's argument, even as to its examples, is inconsistent with relevant law. "[T]he mere fact that an attorney has included more than one task in a single billing entry is not, in itself, evidence of block-billing. When those tasks are intertwined, including a thorough description of the activities performed clarifies, rather than obscures, the record." *Id.* The few examples Defendant does provide are precisely the type of intertwined tasks that are

permissible.[5] For example, Farrah Berse's entry for "[d]rafting, revising and filing TRO papers; prepare for hearing on same" describes interrelated tasks. Resp. at 14. Melina Meneguin Layerenza's November 10, 2018 entry and Kyle Sieber's November 11, 2018 entry capture intertwined tasks required for the filing of Common Cause's supplemental submission in support of the TRO Motion and the TRO Motion briefing, respectively.[6]

Defendant's other arguments for reducing the rates are also unpersuasive. For example, Defendant argues that the Court should award *no* fees in connection with drafting the Complaint because Common Cause's Motion sought

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[5] Curiously, Defendant even claims that entries that clearly describe single tasks, such as "[m]eeting with Georgia team to research potential motion" and "[a]ttention to team emails and documents," amount to improper block-billing. Resp. at 14.

[6] Defendant's focus on Makiko Hiromi's November 8, 2018 entry is similarly misplaced and in fact demonstrates the unusual and expedited nature of this litigation. On November 7, Ms. Hiromi worked until the early morning hours of November 8 on filings in connection with the TRO Motion. Berse Decl., Ex. A at 2, ECF No. 119-2. Ms. Hiromi's travel to Georgia then began, with a taxi to the airport at 4 a.m. Berse Decl., Ex. B at 7, ECF No. 119-3. After spending all morning preparing for the TRO Motion and assisting with finalizing the declarations filed, Ms. Hiromi then attended the TRO hearing, and then flew back to New York, arriving at her destination at 10:43 P.M. *Id.* at 11-12. In its effort to dismiss Ms. Hiromi's "22-hour workday" as excessive, Defendant makes Common Cause's point about the extraordinary and expedited nature of this matter.

fees "in connection with the TRO Motion." Resp. at 11. This is nonsensical. Filing the Complaint was a necessary prerequisite to obtaining the TRO Motion.[7]

Defendant also argues that Common Cause should not be reimbursed for time spent responding to a motion to strike that *Defendant* elected to file. Resp. at 16. Such a rule would set a perverse precedent: that a defendant could bring a motion, lose, and then argue that a plaintiff should not be compensated for attorneys' fees for responding to that motion because it was denied.

Finally, Defendant suggests that Common Cause should not be reimbursed for work in connection with procuring *all* of the declarations it submitted in support of the TRO Motion because the Court "ultimately relied on *some* of the declarations." *Id*. (emphasis added). As a starting point, the test for awarding attorneys' fees is not whether the Court ultimately relied on a specific piece of evidence. In any event, Defendant does not specify which declarations it believes the Court did and did not rely upon, perhaps because the Court referred generally to Common Cause's "multiple supplemental sworn declarations," "additional sworn

[7] On the first page of its Fee Motion, Common Cause explained that "*to obtain the TRO*, Common Cause's lawyers . . . in the course of one week, *filed a Complaint*, seven briefs, and eighteen declarations from fact and expert witnesses, and argued Common Cause's [TRO] Motion . . . ." *See* Pl.'s Mot. for Attorneys' Fees, at 1, ECF No. 119 (emphasis added).

declarations of poll watchers and voters," and "the combination of the statistical evidence and witness declarations in the record here." Order at 38-39, 41.

C. **The Expenses Sought Are Reasonable**

Defendant objects to only one of the expenses for which Common Cause seeks reimbursement—a $134.76 taxi fare. Resp. at 19. Defendant argues only that this expense should not be reimbursed because a "similar taxi fare" was only $20.17. *Id.* at 19. But the fares were not actually similar. The $20.17 fare was for transportation from LaGuardia Airport to Astoria, Queens, a roughly three mile trip that can take approximately ten minutes without traffic. *See* Driving Directions from LaGuardia Airport to Astoria, Queens, Google Maps, http://maps.google.com (follow "Directions" hyperlink; then search starting point field for "LaGuardia Airport" and search destination field for "Astoria, Queens"). By contrast, the inter-state trip from LaGuardia Airport to Jersey City is approximately 13 miles, requires travel across multiple bridges and/or tunnels, some of which are tolled, and can take more than an hour. *Id.* (follow "Directions" hyperlink; then search starting point field for "LaGuardia Airport" and search destination field for "Jersey City, New Jersey"). The expense is reasonable and should be reimbursed. But, even if the Court were to credit Defendant's generalized objection to this expense, it should be reduced, not completely uncompensated, as Defendant suggests.

D. Common Cause Should Be Awarded Attorneys' Fees in Connection with This Motion

In its opening brief, Common Cause established that if it is successful in obtaining attorneys' fees, it is also entitled to its fees in connection with bringing this fee motion. *See Thompson* v. *Pharmacy Corp. of Am., Inc.*, 334 F.3d 1242, 1245 (11th Cir. 2003) ("We have said that an attorney may recover fees for time spent litigating the award of a section 1988 fee."); *see also Jackson* v. *State Bd. of Pardons & Paroles*, 331 F.3d 790, 799 (11th Cir. 2003); *Williams* v. *City of Atlanta*, No. 1:17-cv-1943-AT, 2018 WL 2284374, at *14 (N.D. Ga. Mar. 30, 2018); Pl.'s Mot. for Attorneys' Fees at 23–24, ECF No. 119. Defendant does not appear to contest this.

Applying the same reduced hourly rate Common Cause sought in its initial Fee Motion, and based on 100.4 total hours combined between Paul, Weiss and the Brennan Center, Common Cause seeks $39,625.00 in connection with this fee motion. Suppl. Decl. of Farrah R. Berse ¶ 8; Suppl. Decl. of Myrna Pérez ¶ 5.

III. CONCLUSION

For the foregoing reasons and those set forth in its opening brief, Common Cause respectfully requests that the Court award it attorneys' fees in the amount of $139,480.00 and litigation expenses in the amount of $4,527.59 in connection with the TRO Motion, and its fees in the amount of $39,625.00 in connection with the Fee Motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing PLAINTIFF COMMON CAUSE GEORGIA'S REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S SPECIAL MOTION FOR AN AWARD OF ATTORNEYS' FEES was prepared double-spaced in 14-point Times New Roman pursuant to Local Rule 5.1(C).

/s/ F. Skip Sugarman
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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2019, I served the within and foregoing PLAINTIFF COMMON CAUSE GEORGIA'S REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S SPECIAL MOTION FOR AN AWARD OF ATTORNEYS' FEES with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification or otherwise.

This 26th day of August, 2019.

/s/ F. Skip Sugarman
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