IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,	)	**CASE NO. 17CV193761**
	)	
Plaintiffs,	)	
	)	**JUDGE JOHN R. MIRALDI**
v.	)	
	)	
OBERLIN COLLEGE, et al.,	)	**DEFENDANTS' BRIEF IN**
	)	**OPPOSITION TO PLAINTIFFS'**
Defendants.	)	**APPLICATION FOR ATTORNEYS'**
	)	**FEES & LITIGATION EXPENSES**

Under authority of the Supreme Court of Ohio, Plaintiffs' Application for Attorneys' Fees and Expenses (the "Application") must be rejected in its entirety.[1] That Court has expressly held that when a punitive damages award is both sufficient to compensate Plaintiffs for their attorneys' fees and to punish Defendants—as here—an award of attorneys' fees is improper. Independently, the Supreme Court of Ohio has also instructed that there shall be no award of attorneys' fees when the applying party submits block-billed invoices, fails to bill in increments of tenths of an hour, or both. Here, Plaintiffs submitted invoices disregarding the directive of the Supreme Court of Ohio, thus compelling this Court to deny their Application in full. While awarding no fees may seem harsh, this State's highest court commands this outcome.

[1] Defendants hereby incorporate the entirety of Defendants' Expert Eric Zagrans' Report and Supplemental Report, which have been submitted to this Court and are attached hereto as Exhibits 1 and 2, respectively.

Should the Court decide to award attorneys' fees (and it should not under Supreme Court of Ohio instruction), the Supreme Court of Ohio mandates that any award of attorneys' fees should only account for time spent pursuing claims for which fees may be awarded—here, that would be time spent on claims for which punitive damages were awarded—and for time spent in connection with witnesses not excluded from testifying at trial. And when calculating a reasonable amount of attorneys' fees, the Court should cut Plaintiffs' proposed lodestar amount of $4,855,856 to a range between $2,000,000 and $2,250,000, as Plaintiffs' proposed hourly rate and total hours expended are unreasonably excessive.

Assuming this Court decides to award a reasonable amount of attorneys' fees, it should not apply any enhancement of its lodestar calculation. The Supreme Court of the United States has adopted the "strong" presumption that the lodestar amount alone is inherently reasonable, and that any enhancement—barring the rarest of circumstances—would inappropriately provide a windfall to Plaintiffs (or, more accurately, Plaintiffs' counsel).

Finally, Plaintiffs' request for litigation expenses is unreasonably high, as many of the itemized expenses are improper and thus not chargeable to Defendants.

LAW AND ARGUMENT

I. The Court Should Not Award Any Attorneys' Fees, as the Substantial Punitive Damages Award of Almost $20 Million Sufficiently Compensates Plaintiffs and Punishes Defendants.

In *Digital & Analog Design Corp. v. North Supply Co.*, the Supreme Court of Ohio held that a trial court may exercise its discretion and decline to award attorneys' fees when a substantial punitive damages award sufficiently compensates the plaintiff and punishes the defendant:

> [T]he amount of attorney fees to be awarded in a tort action, after a jury determination that a defendant is liable for such fees, will lie in the **sound discretion of the trial judge**. . . . Although the general rule is that reasonable attorney fees may be awarded in an action where punitive damages have also been

> awarded, a trial court may decline to award **any** amount of attorney fees if the defendant upon whom such fees will be imposed successfully rebuts the presumption that reasonable fees should be awarded. Thus, a trial court may consider whether the punitive damages awarded are **adequate both to compensate the plaintiff for his attorney fees and to fulfill the punitive and deterrent purpose of the exemplary damages awarded**."

(Emphasis added) *Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St.3d 657, 664-665, 590 N.E.2d 737 (1992). Based on *Digital*, numerous Ohio courts have refused to award attorneys' fees. *See, e.g.*, *Wightman v. Consolidated Rail Corp.*, 6th Dist. Erie No. E-97-001, 1997 WL 614962, at *7 (Sept. 30, 1997) (holding that the trial court was within its discretion under *Digital* to refuse to award attorneys' fees, as the "$15,000,000 punitive award provided a sufficient punitive and deterrent purpose."); *Parry Co., Inc. v. Carter*, 4th Dist. Ross No. 01CA2617, 2002-Ohio-2197, ¶¶ 41-45 ("We find appellant has been adequately compensated for any damages suffered as a result of appellee's actions and the trial court did not err in failing to award attorney fees."); *Toole v. Cook*, 10th Dist. Franklin No. 98AP-486, 1999 WL 280804, at *9 (May 6, 1999) (same).

This Court expressed concern during the July 10, 2019 attorneys' fees hearing that the cases cited for this principle by defense counsel pre-dated the punitive damages cap, which was enacted in 2005. (Hearing Tr., July 10, 2019,[2] at 11:1-10.)[3] In response, Defendants point the Court to the 2007 decision, *Maynard v. Eaton Corp.*, where the Third District acknowledged and applied *Digital*. *Maynard v. Eaton Corp.*, 3rd Dist. Marion No. 9-06-33, 2007-Ohio-1906, ¶¶ 13, 20.

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[2] The excerpts of the July 10, 2019 hearing transcript cited herein are attached to this Brief as Exhibit 3.

[3] During the July 10, 2019, the Court also asked Defendants if they were going to pay the punitive damages award, to which Defendants responded they will challenge the award. (Hearing Tr., July 10, 2019, at 11:19-25.) Under Ohio law, punitive damages are the necessary predicate to an award of attorneys' fees. *See Digital* at 662. Thus, if Defendants' successfully challenge the punitive award, this Court's decision to not award any attorneys' fees is unaffected, as the necessary predicate to an award of attorneys' fees would no longer exist.

Here, under *Digital* and its progeny, the Court should exercise its discretion and **decline** to award Plaintiffs' any attorneys' fees. The Court capped Plainitffs' punitive damages award at just under **$20 million**, which is a **substantial amount**. Thus, the punitive damages award of almost $20 million more than sufficiently compensates Plaintiffs for their attorneys' fees of only $4,855,856. Pls.' Application for Attorneys' Fees ("Pls.' App."), at 2.

The punitive damages award of almost **$20 million** also sufficiently punishes Defendants. The College possesses only $59.1 million of unrestricted endowment funds to pay any dollar judgment. (Trial Tr., June 12, 2019, at 95:6-12.[4]) And of that $59.1 million, $10 million has already been committed to the College's roughly $200 million of debt. (Trial Tr., June 12, 2019, at 95:13-21.) Importantly, the College is a non-profit educational institution that relies on donations to serve an important public purpose; payment of a substantial punitive award will drastically hamper the institution's ability to serve that public purpose. Under these circumstances, a punitive damages award of almost **$20 million**—which constitutes about **one-fourth** of Defendants' unrestricted endowment fund—will sufficiently punish Defendants.

Accordingly, the Court should exercise its discretion and award Plaintiffs no attorneys' fees. A punitive damages award of almost **$20 million** sufficiently covers Plaintiffs' actual attorneys' fees of $4.85 million and punishes Defendants.

II. Plaintiffs' Block Billing Precludes Any Award of Attorneys' Fees.

In *State ex rel. Harris v. Rubino*, the Supreme Court of Ohio held that "attorney-fee applications that include block-billed time entries" will no longer be granted. *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, -- N.E.3d --, ¶ 7. The Court defined block billing as "lumping multiple tasks into a single time entry," and noted that the practice is heavily disfavored by clients and

[4] The excerpts of the June 12, 2019 trial transcript cited herein are attached to this Brief as Exhibit 4.

courts because "there is simply no way . . . to assess whether the time spent on each of those tasks was reasonable when they are lumped together." *Id.* at ¶ 6. The Court further explained that attorney fee applications "should contain separate time entries for each task, with the time expended on each task denoted in **tenths** of an hour." (Emphasis added) *Id.* at ¶ 7. The Court also instructed that "[a]pplications failing to meet these criteria" lead to a "**denial in full**." (Emphasis added) *Id.*

Here, the invoices from the Tzangas Plakas Mannos, Ltd. ("TPM") and Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A. ("KWGD") firms ignore and violate the mandate of the Supreme Court of Ohio on proper billing for attorney fee applications. Specifically, the TPM and KWGD billing invoices include countless block-billed time entries, time entries not denoted in tenths of an hour, or both. Below are several examples—and there are countless others—from just the month of April 2019:

KWGD's INVOICES

[REDACTED]

TPM's INVOICES[5]

[REDACTED]

Even a cursory review of the above time entries—which are, again, just from the month of April 2019—shows that there are numerous entries that are either block-billed, billed in increments other than tenths of an hour, or both. In fact, **REDACTED**. Again, these are just a handful of examples of the completely defective, sloppy, and unreliable billing practices of Plaintiffs' counsel. Plaintiffs' invoices contravene the directive of the Supreme Court of Ohio. *See Rubino* at ¶¶ 6-7.

[5] All typographical errors in the narrative column are copied verbatim from the TPM billing invoices.

Full and accurate copies of the KWGD and TPM bills are attached to this Brief as Exhibit 5 and 6, respectively, and Defendants have highlighted for the Court's review each time entry that is either block-billed, not billed in tenths of an hour, or both. Defendants have calculated that, of the **REDACTED** total time entries in the TPM bill, **REDACTED** of the time entries (or **REDACTED%** of the time entries) are defective. And, of the **REDACTED** total time entries in the KWGD bill, **REDACTED** of the time entries (or **REDACTED%** of the time entries) are defective.

Plaintiffs' sloppy and improper billing practices make it impossible for this Court to make a proper determination as to the reasonable amount of Plaintiffs' attorneys' fees. Pursuant to express authority from the Supreme Court of Ohio, Plaintiffs' counsel must be handed a "denial in full" after submitting their defective billing invoices. *See Rubino* at ¶ 7. Accordingly, this Court is required to decline to award Plaintiffs attorneys' fees.

III. If the Court Awards Reasonable Attorneys' Fees, it Should Only Award Fees for Time Spent Pursuing Claims for Which Fees May be Awarded and in Connection with Witnesses Not Excluded From Testifying.

In the event the Court finds that Plaintiffs should be awarded fees, it should only award fees for time spent pursuing the claims for which fees may be awarded. *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 145, 569 N.E.2d 464 (1991). In *Bittner*, the Supreme Court of Ohio held that when "the claims can be separated into a claim for which fees are recoverable and a claim for which no fees are recoverable, the trial court must award fees only for the amount of time spent pursuing the claim for which fees may be awarded." *Id.* Applied here, Plaintiffs' claims for Libel and IIED are the only claims for which fees are recoverable, as these were the only claims for which Plaintiffs were awarded punitive damages. *See Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657, 662, 590 N.E.2d 737 (1992) (a plaintiff can only recover fees for

claims for which they were awarded punitive damages). Thus, per Supreme Court of Ohio binding precedent, Plaintiffs may only recover reasonable attorneys' fees for time spent pursuing their Libel and IIED claims.

Despite the above, Plaintiffs argue that they should recover fees for time spent pursuing all of their claims, as they all involve a common core of facts. But this argument is based on flawed reasoning, as all Plaintiffs' claims **do not** involve a common core of facts. For example, Plaintiffs would have still brought their Libel claim, even if only the protest Flyer and the Student Senate Resolution—but none of the other allegedly libelous documents[6]—were created. Plaintiffs would have still brought their Libel claim, even if the November 10-11, 2016 protests had never occurred and thus there were no allegedly slanderous statements directed at Plaintiffs. Plaintiffs would have still brought their Libel claim, even if the College had never decided to suspend its business with Gibson's Bakery on November 14, 2016 and thus there was no interference with business that could have possibly been tortious. Plaintiffs would have still brought their Libel claim, even if the parking lot at issue for Plaintiffs' Trespass claim failed to exist. And finally, Plaintiffs would have still brought their Libel claim, even if the employees at issue for Plaintiffs' Negligent Hiring, Retention, and Supervision claim were never employed by the College. Stated more simply, the facts underlying each of Plaintiffs' independent claims—i.e., Slander, Tortious Interference, Negligent Hiring, and Trespass—are all entirely distinct from the facts underlying Plaintiffs' successful Libel claim. To say that each of Plaintiffs' eight separate claims are based on a common core of facts is simply incorrect; ignores the various rulings by the Court dismissing some claims,

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[6] Importantly, the Libel claim consisted of allegedly libelous documents: (1) the protest Flyer; (2) the Student Senate Resolution; (3) the Department of Africana Studies Facebook post; (4) Oberlin College emeritus professor Booker Peek's letter to the Oberlin Review newspaper; and (5) a November 11, 2016 email from Oberlin College former president Marvin Krislov and Dean Raimondo. If four of these five documents failed to exist, Plaintiffs would have still brought a Libel claim against Defendants.

but not others, and Plaintiffs' voluntary dismissals of some claims, but not others; and would swallow the rule set forth in *Bittner*.

Separately, the Court should not award fees for time spent in connection with lay or expert witnesses who were excluded from testifying at trial. In its May 8, 2019 Entry and Ruling on All Motions in Limine, the Court excluded all witnesses who were first identified after the close of discovery from testifying at trial. This meant that of the 70 lay witnesses identified in Plaintiffs' April 25, 2019 witness list, 17 of them were precluded from testifying at trial. *See* Defs.' Letter, dated May 8, 2019, attached hereto as Exhibit 7; *see also* Pls.' Witness List, dated April 25, 2019, attached hereto as Exhibit 8. Further, of Plaintiffs' six expert witnesses, three of them—Richard Maggiore, William Shanklin, and Dr. Michael Linz—were excluded from testifying at trial. *See* Entry and Ruling on Defs.' Motions to Exclude Pls.' Expert Witnesses, dated May 8, 2019.

Based on the foregoing, should the Court decide to award reasonable attorneys' fees to Plaintiffs—and it should not—Plaintiffs should only recover fees for time spent on claims for which fees may be awarded, and in connection with witnesses not excluded from testifying at trial.

IV. Plaintiffs' Requested Lodestar Amount is Unreasonable.

Determining a reasonable attorney fee begins with multiplying a reasonable hourly rate by the number of hours reasonably expended. *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, -- N.E.3d --, ¶ 3; *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 145, 569 N.E.2d 464 (1991). The result of this calculation is customarily called the "lodestar" amount. Here, Plaintiffs' proposed lodestar is unreasonably high for two reasons: (1) various timekeepers' hourly rates are too high; and (2) Plaintiffs' total hours expended are too high.

a. Defendants' invoices are not relevant to whether Plaintiffs' proposed lodestar amount is reasonable.

During the attorneys' fees hearing, Plaintiffs, their expert, and the Court often discussed (over Defendants' objections) defense counsel's billing information seemingly as a baseline or reference point for whether Plaintiffs' proposed lodestar amount was reasonable. (*See, e.g.*, Hearing Tr., July 10, 2019, at 12:20-25, 25:16-28:8, 29:14-30:22) This is improper: **Defendants' billing information has no relevance to the reasonableness of Plaintiffs' lodestar amount**.

Courts across the country hold that the challenging party's fees and invoices are not relevant to whether the moving party's lodestar amount is reasonable. *See, e.g.*, *Marks Constr. Co. v. Huntington Nat'l Bank,* No. 1:05CV73, 2010 WL 1836785, at *7 (N.D. W.Va. May 5, 2010) ("[T]here is no relevance shown with respect to the issues of the amount and reasonableness of attorney's fees and costs claimed by Plaintiffs' counsel that justifies the required production of the billing records of [defense counsel]."); *Samuel v. University of Pittsburgh*, 80 F.R.D. 293 (W.D. Pa. 1978) (holding that (1) the number of hours expended by defense counsel in representing several educational institutions had no relevance to determining the reasonableness of time assertedly spent by class counsel representing noncorporate plaintiffs, and (2) the hourly rate charged by defense counsel was not relevant to the reasonableness of the hourly rate sought by plaintiffs' counsel.); *Mirabal v. General Motors Acceptance Corp.*, 576 F.2d 729, 731 (7th Cir. 1977) (holding that opponent's fees had no bearing on the reasonableness of the fee petitioner's request for fees).

Indeed, the billing practices of one party's counsel may be different than those of the other party's counsel for obvious and sensible reasons. For example, "a given case may have greater precedential value for one side than the other." *Mirabal* at 731; *see Samuel* at 294. Another reason could be that "a plaintiff's attorney, by pressing questionable claims and refusing to settle except

on outrageous terms, could force a defendant to incur substantial fees which he later uses as a basis for his own fee claim. Moreover, the amount of fees which one side is paid by its client is a matter involving various motivations in an on-going attorney-client relationship. . . ." *Mirabal* at 731.

Accordingly, the Court should not reference defense counsel's billing information in any manner or for any reason when calculating the lodestar amount.

b. Plaintiffs' proposed hourly rates are unreasonable.

On pages 5 through 8 of their Application, Plaintiffs outline their proposed reasonable hourly rate for each timekeeper. Many of these proposed hourly rates, however, are unreasonably high. And the hourly rate at which each timekeeper billed in 2017 should be lower than that in 2018; this rationale equally applies from 2018 to 2019.

It is first important that this Court accurately identify the prevailing market for the lodestar inquiry: Lorain County. Other than Attorney James Taylor, each of the other timekeepers from the TPM and KGWD law firms billed at their Canton, Ohio hourly rate. What is reasonable in Canton is not reasonable in Lorain.

The hourly rates of Attorneys Lee Plakas ($675), Brandon McHugh ($315), and Jeananne Ayoub ($275) are unreasonably high—for both Stark County and Lorain County. In Lorain County, a reasonable hourly rate for a lead counsel engaged in complex litigation with the accomplishments and accolades of an attorney like Lee Plakas should be roughly $450. A reasonable hourly rate in Lorain County for a second-year associate engaged in complex litigation, such as Brandon McHugh, should be between $200 and $225. Finally, a reasonable hourly rate in Lorain County for a first-year associate engaged in complex litigation, such as Jeananne Ayoub, should be between $175 and $200. *See* Exhibit 1, Expert Report of Attorney Eric Zagrans

("Zagrans Report"), Section E; Exhibit 2, Supplemental Expert Report of Eric Zagrans ("Zagrans Supp. Report").

Second, the proposed hourly rates of many timekeepers from KWGD are unreasonably high. Defendants cannot determine the seniority of the following associate-timekeepers from KWGD: Wayne Boyer, Danielle Halachoff, Amanda Connelly, Zachary Soehnlen, Jessica Kincaid, Matthew Hull, and Andrew Byler. But, each of these associates billed at the same hourly rate: $275. Unless these are senior associates, an hourly rate of $275 for complex litigation in Lorain County is unreasonably high. As to James Williams and Matthew Onest—eighth and seventh year associates, respectively—their hourly rate of $325 is unreasonably high. A reasonable hourly rate in Lorain County for an experienced senior associate engaging in complex litigation should be roughly $275. *Id.*

Accordingly, for each of the above-identified timekeepers, the Court should refuse to adopt Plaintiffs' proposed hourly rates, and instead adopt Defendants' proposed hourly rates.

c. Plaintiffs' proposed total hours billed are unreasonable.

The Supreme Court of Ohio has held that hours improperly billed to a client are thus improperly billed to an adversary, meaning that "hours that are excessive, redundant, or otherwise unnecessary" are unreasonable. *Rubino* at ¶ 5.

Here, Plaintiffs' proposed number of hours expensed are unreasonably high for several reasons. First, many timekeepers billed duplicative time on the same day for performing the same or equivalent tasks. Second, there are many billing entries for non-legal activities. For example, Plaintiffs' counsel billed considerable time at a full hourly rate for local travel and for time spent reading newspaper articles about the lawsuit. Some of the billed non-legal activities are identified below:

- From December 2018 through June 2019, there are at least 81 separate time entries by timekeepers for the TPM firm for travel time billed at the full hourly rate.

- From December 2018 through June 2019, there are at least 36 time entries by timekeepers for the KWGD firm for local travel billed at the full hourly rate.

- The time entry "reviewed newspaper publications regarding articles relating to the case" appears in KWGD's billing invoices at least 109 times between December 2018 and June 2019.

- Timekeepers from the KWGD firm billed time for reviewing or consulting with the Chronicle-Telegram and other newspaper accounts of the lawsuit.

- Timekeepers for the TPM firm also billed time for inappropriate activities, such as researching Defendants' lead counsel, Ron Holman, to learn whether he has ever been sued, and researching Howard Chambers' former attorney, James Sammon.

- Timekeepers from the TPM firm billed for non-legal administrative activities, such as coordinating with hotels regarding accommodations, reserving meeting rooms, checking the Chronicle-Telegram for comments, picking up a projector from the office, moving into a hotel room, attending dinner, purchasing a new hard drive, setting up a meeting room, driving cars, and unpacking and putting away trial equipment.

See Zagrans Report, Section E; Zagrans Supp. Report.

These examples—and there are countless more—reveal the extent to which Plaintiffs' counsel's total hours are by definition unreasonable, as excessive, redundant, and otherwise unnecessary. *See Rubino* at ¶ 5.

Further, Plaintiffs spent a total of 266.48 hours, representing $99,684.30, in post-verdict activities relating to their Application. This time, while necessary to any award of fees and expenses, should not be included in any such award. *See* Zagrans Report, Section E; Zagrans Supp. Report.

Plaintiffs' lodestar should be significantly cut.

V. Any Enhancement of the Multiplier is Improper in this Case.

Traditionally, after calculating the lodestar, a court has considered whether the lodestar should be adjusted upward or downward based on the eight factors listed in Rule 1.5(a) of the Ohio Rules of Professional Conduct:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent.

Plaintiffs are seeking an enhancement of two to three times the lodestar based on **factors 1, 2, 4, 7, and 8** above. Pls.' App. at 9-13. But, under binding precedent from the Supreme Court of the United States, any enhancement based on these five factors is inappropriate.

In *Perdue v. Kenny A. ex rel. Winn*, the Supreme Court of the United States adopted a "strong" presumption that the lodestar determination results in a reasonable fee, meaning an enhancement is unnecessary. 559 U.S. 542, 552 (2010). In fact, the Court held that the lodestar amount includes most factors bearing on reasonableness, and that enhancements above the lodestar amount are reserved only for **rare** and **exceptional** circumstances, such as when "the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value." *Id.* at 552, 554-55. The Court explained that any enhancement must be supported by "specific evidence" showing that "the lodestar does not adequately take into account a factor that may properly be considered." *Id.* at 553-54.

The Court further described how most of the eight factors listed above are already subsumed within the lodestar amount. For instance, novelty, complexity of a case, and time and labor are improper bases for an enhancement because these factors are "fully reflected in the number of billable hours recorded by counsel." *Id.* at 553. As applied here, counsel for both parties billed thousands of hours in this matter, meaning the novelty, complexity, and time and labor of this case are sufficiently accounted for in the lodestar. Similarly, an attorney's skill, experience, reputation, and abilities are already "reflected in the hourly rate." *Id.* As applied here, the hourly rate of Lee Plakas, as an experienced litigator with numerous accolades and accomplishments, is rightfully higher than that of his colleague Jeananne Ayoub, who is a first-year associate recently graduated from law school. And this rationale applies to all of Plaintiffs' timekeepers (e.g., Owen Rarric's hourly rate is rightfully higher than Matthew Onest's).

The *Perdue* Court also explained that an enhancement based on the "results obtained" factor would be inappropriate, as the outcome of a lawsuit may be the result of counsel's performance or the result of "unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck." *Id.* at 554. Additionally, the *Perdue* Court specifically held that enhancements based on the "contingency of the outcome" are inappropriate, as it would contravene its prior precedent in *Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638 (1992). *Id.* at 558.

Simply put, because a "reasonable attorney's fee is one that . . . does not produce windfalls to attorneys," *id.* at 552, this Court should decline to apply an enhancement, as the five factors identified by Plaintiffs are already subsumed within the lodestar or are inappropriate under *Perdue*.

VI. Plaintiffs' Proposed Litigation Expenses and Costs are Unreasonable.

Plaintiffs also request $404,139.22 of litigation expenses. Pls.' App. at 15-16. But many of Plaintiffs' purported litigation expenses are improper costs to be charged to Defendants. *See* Zagrans Report, Section E; Zagrans Supp. Report. The total amount of litigation expenses that could be properly awarded to Plainitffs—should this Court grant their Application—is $241,247.84. *Id.* The remainder of the more than $404,000 of proposed litigation expenses constitute costs that may not be charged to Defendants. *Id.*

Examples of proper litigation expenses that may be charged to an opposing party are filing fees, court reporter fees, fees for testifying expert witnesses, and costs for transcripts and preparing exhibits. *Id.* Examples of improper litigation expenses that may not be charged to an opposing party are local travel expenses, tolls, meals, snacks, parking, hotel expenses, late checkout fees, and overhead costs (such as costs of postage, conference telephone calls, making copies, and trial supplies). *Id.*; *compare Rubino* at ¶ 13. Thus, based on the itemized expenses listed at the end of the TPM and KWGD bills, the only expenses for which Defendants may be charged are:

(1) Deposition transcripts, videos, and court reporter fees;
(2) Witness fees;
(3) The focus groups organized by Decision Point Marketing & Research, Inc.;
(4) Trial transcripts;
(5) Mediation services by Mediation, Inc.;
(6) The filing fee for the Complaint;
(7) The expert witness fees for the 415 Group, Dr. Deborah Owens, and Dr. John McGrath;
(8) Out-of-state travel to New York for the deposition of Oberlin College former president Marvin Krislov;
(9) Process service by Bryan Thomas; and
(10) Preparation of exhibits actually introduced at trial, including photographs or videography if available.

Thus, if any of Plaintiffs' proposed litigation expenses do not fall within one of the categories of proper expenses listed above, they must not be charged to Defendants. Accordingly,

should this Court award any litigation expenses to Plaintiffs (it should not), the Court should only award $241,247.84.

CONCLUSION

While the result may seem harsh, Supreme Court of Ohio authority expressly directs and commands this Court to decline to award Plaintiffs any reasonable attorneys' fees. Plaintiffs' substantial punitive damages award of almost **$20 million** sufficiently compensates them to pay for their counsel's fees, and sufficiently punishes Defendants. And Plaintiffs' bills are fundamentally defective, as they are largely block-billed and/or are billed at increments other than tenths of an hour.

Should this Court decide to award fees (it should not under Supreme Court of Ohio authority), it should only award fees for time pursuing claims for which fees may be recovered—i.e., for time spent pursuing claims for which punitive damages were awarded. Similarly, this Court should not award fees for time spent in connection with lay or expert witnesses who this Court excluded from testifying at trial. But should this Court decide to calculate a lodestar, Plaintiffs' proposed hourly rates and total hours expended are unreasonably high, and must be cut significantly to result in a lodestar amount between $2,000,000 and $2,250,000.

This Court should also decline to apply any enhancement to a lodestar amount. The Supreme Court of the United States holds that an enhancement—barring the absolute rarest of circumstances—is inappropriate and would provide Plaintiffs (or, more accurately, Plaintiffs' counsel) with an unacceptable and impermissible windfall.

Respectfully submitted,

Ronald D. Holman, II (0036776)
rholman@taftlaw.com
Julie A. Crocker (0081231)
jcrocker@taftlaw.com
Cary M. Snyder (0096517)
csnyder@taftlaw.com
William A. Doyle (0090987)
wdoyle@taftlaw.com
Josh M. Mandel (0098102)
jmandel@taftlaw.com
TAFT STETTINIUS & HOLLISTER LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
Phone: (216) 241-2838
Fax: (216) 241-3707

Richard D. Panza (0011487)
RPanza@WickensLaw.com
Matthew W. Nakon (0040497)
MNakon@WickensLaw.com
Malorie A. Alverson (0089279)
MAlverson@WickensLaw.com
Rachelle Kuznicki Zidar (0066741)
RZidar@WickensLaw.com
Wilbert V. Farrell IV (0088552)
WFarrell@WickensLaw.com
Michael R. Nakon (0097003)
MRNakon@WickensLaw.com
Wickens, Herzer, Panza, Cook & Batista Co.
35765 Chester Road
Avon, OH 44011-1262
Phone: (440) 695-8000

Co-Counsel for Defendants Oberlin College and Dr. Meredith Raimondo

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 12th day of July 2019, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

Owen J. Rarric
Terry A. Moore
Matthew W. Onest
Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.
4775 Munson Street, NW
P.O. Box 36963
Canton, OH 44735
orarric@kwgd.com
tmoore@kwgd.com
monest@kwgd.com

Lee E. Plakas
Brandon W. McHugh
Jeananne M. Ayoub
Tzangas, Plakas, Mannos & Raies
220 Market Avenue South
8th Floor
Canton, OH 44702
lplakas@lawlion.com
bmchugh@lawlion.com
jayoub@lawlion.com

James N. Taylor
James N. Taylor Co., L.P.A.
409 East Avenue, Suite A
Elyria, OH 44035
taylor@jamestaylorlpa.com

Attorneys for Plaintiffs Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson

One of the Attorneys for Defendants
Oberlin College and Dr. Meredith Raimondo