IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs,

-vs.-

OBERLIN COLLEGE, et al.,

Defendants.

Case No.: 17CV193761

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

PLAINTIFFS' MOTION FOR LEAVE TO FILE

REPLY IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES & LITIGATION EXPENSES, *INSTANTER*

To correct the misstatements of law and fact in Defendants'[1] response in opposition to Plaintiffs'[2] Application for Attorneys' Fees & Litigation Expenses, Plaintiffs hereby seek leave from this Court to file the attached Reply in Support of Application for Attorneys' Fees & Litigation Expenses, *Instanter*. In their response brief, Defendants asserted numerous incorrect legal arguments and factual assertions, and Plaintiffs file this motion for leave and reply brief to ensure a clear record.

A copy of Plaintiffs' Reply in Support of Application for Attorneys' Fees & Litigation Expenses is attached to this Motion as **Exhibit 1**.

DATED: July 15, 2019

Respectfully submitted,

JAMES N. TAYLOR CO., L.P.A.

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[1] "Defendants" refers collectively to Defendant Oberlin College & Conservatory ("Oberlin College") and Meredith Raimondo ("Dean Raimondo").
[2] "Plaintiffs" refers collectively to Gibson Bros., Inc. ("Gibson's Bakery"), David R. Gibson ("Dave"), and Allyn W. Gibson ("Grandpa Gibson").

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A copy of the foregoing was served on July 15, 2019, pursuant to Civ.R. 5(B)(2)(f) by sending it by electronic means to the e-mail addresses identified below:

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PLAINTIFFS' REPLY IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES & LITIGATION EXPENSES

I. INTRODUCTION

Plaintiffs submit this Reply in Support of Application for Attorneys' Fees & Litigation Expenses to ensure a clear record and to correct the numerous misstatements in Defendants' response brief. As outlined in detail below, during the July 10, 2019 hearing, and in their initial Application, Plaintiffs submit that the reasonable fees for legal services rendered in this case are between $9.5 million and $14.5 million, which is the lodestar amount with a two to three multiplier enhancement.

II. LAW & ARGUMENT

A. *Plaintiffs' are entitled to an award of attorneys' fees.*

Defendants put forth two arguments allegedly supporting their position that Plaintiffs are not entitled to an attorneys' fee award at all: (1) that Defendants were sufficiently punished by the punitive damages award; and (2) that block billing precludes an award of attorneys' fees. Both arguments are wrong.

1. The jury unanimously decided that Plaintiffs are entitled to an award of attorneys' fees.

Defendants begin their response brief by arguing that the punitive award, which was capped at approximately $20 million, sufficiently deterred and punished Defendants for their conduct, thereby obviating the need for an award of attorneys' fees. This argument is wrong for two reasons.

First, Defendants' entire argument relies on the Ohio Supreme Court case *Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St.3d 657, 590 N.E.2d 737 (1992). In *Digital*, the Ohio Supreme Court held that, in cases in which punitive damages are awarded, the question of liability relating to attorneys' fees should first be submitted to the jury, and, if the jury finds an award of attorneys' fees appropriate, the amount should be calculated by the trial court. *Id.* at 662-63. The *Digital* court also stated that the trial court could choose not to award attorneys' fees. What Defendants conveniently failed to mention in their brief is that *Digital* ***was overturned by the Ohio Supreme Court*** in *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 557, 1994-Ohio-461, 644 N.E.2d 397.

In reaching its decision, *Digital* specifically relied on a prior version of the punitive damages cap. *Digital* at 663. But, when the Ohio Supreme Court considered the constitutionality of the statute two years later in *Zoppo*, it found that the statute violated Ohio's constitutional right to trial by jury and overturned *Digital*. *See, Zoppo* at 557. Since that time, the Ohio Supreme Court has held that the discussion on attorneys' fees in *Digital* is dicta, and thus neither binding authority nor persuasive precedent. *See, Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 15 ("But *Digital*'s discussion of attorney fees was ***explicitly characterized***

as dicta in *Zoppo*").[3] Since *Digital*, the Ohio Supreme Court has determined that attorneys' fees, although awarded in conjunction with punitive damages, are compensatory in nature. *See, id.* at ¶ 16. Thus, Defendants' argument that they have been sufficiently punished by the punitive award is completely irrelevant to Plaintiffs' application for attorneys' fees that are compensatory in nature.[4]

Second, even if the analysis in *Digital* applies, which it does not, the *Digital* court found that when a jury rules that the plaintiff is entitled to attorneys' fees, there is a "***presumption***" in favor of awarding attorneys' fees that can only be rebutted where the defendant shows that the punitive damages award was sufficient deterrence and punishment. *Digital* at 664-65. In this case, the jury determined, unanimously, that all three Plaintiffs are entitled to attorneys' fees. Thus, if *Digital* applies, it is up to Defendants to rebut the presumption that the trial court should award fees. Defendants claim that the punitive award was sufficient punishment. This is clearly not true because Defendants continue to argue both in intra-trial public communications and in numerous post- trial public media communications that, despite the jury's verdicts – both compensatory and punitive, they did nothing wrong. Within days of the jury's verdict on punitive damages, Oberlin College issued a widely disseminated document with frequently asked questions (FAQs), which included the following:[5]

---

[3] Defendants argued this point when they erroneously attempted to prevent Plaintiffs from asking the jury for attorneys' fees during the punitive phase of trial.

[4] Interestingly, Defendants point this Court to *Maynard v. Eaton Corp.*, 3rd Dist. Marion No. 9-06-33, 2007-Ohio-1906, reversed on other grounds, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, for the proposition that the trial court has discretion to not award attorneys' fees. However, the *Maynard* court ***reversed*** a trial court decision refusing to award attorneys' fees. *Id.* at ¶ 20.

[5] The frequently asked questions released by Oberlin College can be found in their entirety at https://www.oberlin.edu/sites/default/files/content/office/general-counsel/current-issues/faqs.pdf.

> *Did the College defame or libel the Gibsons?*
>
> No. The College did not create, endorse or condone the student senate resolution or the protest flyer that were the subject of this lawsuit.

In addition to the FAQs, Oberlin College President Carmen Ambar sent a blast email to alumni stating, "This is not the final outcome. This is, in fact, just one step along the way of what may turn out to be a lengthy and complex legal process."[6] Clearly, the jury's verdict had no effect on Defendants' conduct as they continue to claim that they did nothing wrong even after the jury determined, unanimously, that both Oberlin College and Dean Raimondo libeled Plaintiffs and acted with actual malice.

Defendants also continue to cry poor by claiming that they "only" have $59.1 million in unrestricted endowment. (Def. Resp. Br., 4). However, Defendants misrepresent the financial position of Oberlin College. During the punitive phase of trial, Oberlin College Vice President for Finance, Rebecca Vazquez-Skillings, testified that Oberlin College has $1.4 ***billion*** in assets and more than ***$300 million in unrestricted endowment funds***:

> 1 A. So I need to correct my earlier statement. So
> 2 in terms of the permanently restricted endowment
> 3 funds -- I'm sorry, I was reading the wrong line -- it's
> 4 $285,043,000 of permanently restricted; in terms of the
> 5 temporarily restricted endowment funds, it's
> 6 309,670,000; and *then the unrestricted endowed funds is*
> 7 *$301,056,000*.

[June 12, 2019 Tr. Trans., p. 94, emphasis added]. The $59.1 million figure represents the amount

[6] A copy of Ambar's email blast can be found at http://www.chroniclet.com/news/2019/06/14/Oberlin-alumni-letter-predicts-lengthy-and-complex-legal-process.html.

of money Oberlin College has in its checking account for immediate payment. [Id., p. 95].

Thus, even if *Digital* applies, Defendants have not learned their lesson and have access to more than $300 million to pay any judgment. Defendants have not rebutted the presumption in favor of awarding Plaintiffs' attorneys' fees as decided by the jury.

2. Plaintiffs utilized proper billing practices.

Next, Defendants claim that Plaintiffs are not entitled to attorneys' fees because of alleged "block billing" in Plaintiffs' counsel's billing statements. For support, Defendants rely on *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, ---N.E.3d--- (Ohio) for the proposition that any fee application that contains block billing must be rejected in its entirety. This argument is wrong for several reasons.

First, Defendants misrepresent the nature of Plaintiffs' fee bills. While some entries may be dedicated to more than one task, most are not.

Second, *Rubino* was specifically dealing fee applications made to the Ohio Supreme Court in mandamus actions and has nothing to do with Plaintiffs' fee application in this case. *See, Rubino* at ¶ 7 [emphasis added] ("Further fee applications ***submitted to this court*** should contain separate time entries for each task"). Obviously, Plaintiffs' fee application is not being submitted to the Ohio Supreme Court related to a mandamus action, which eliminates the precedential value of *Rubino*. Further, the volume and minutia of the multifactorial tasks involved in a complex jury trial with dozens of witnesses and evolving issues that consumes entire days and weeks is much different that the far fewer issues and tasks involved in a mandamus action, which does not involve constantly changing daily trial and pre-trial developments.

Third, to the extent Plaintiffs' invoices contain some block billing time entries, the practice is usual and customary for contingency fee cases and does not warrant denial of the fee application.

Matter of Estate of Schwenker, 10th Dist. Franklin No. 18AP-320, 2019-Ohio-2581, ¶ 19 (overruling an assignment of error related to block billing in a probate case where "it was customary, and in fact nearly universal in local probate practice."). Logically, this makes sense. Plaintiffs' counsel took this case on a contingency fee basis, meaning, Plaintiffs' counsel had no guarantee of payment for the hours worked on this case. Because there was no guarantee of payment, Plaintiffs' counsel had no incentive to artificially increase their hours in this case. *See, Santacruz v. Standley & Associates, LLC*, D. Colorado No. 10-cv-00623, 2011 WL 3366428 *2 (Aug. 5, 2011) ("it is unlikely that an attorney, working on a contingency basis, would intentionally run up the time expended on a case when the risk of not being able to recover is high.").

Therefore, Plaintiffs' are entitled to an award of reasonable attorneys' fees.

B. *Plaintiffs' claims were intertwined.*

Defendants next claim that Plaintiffs' are only entitled to receive attorneys' fees on those claims that the jury awarded punitive damages. While this putative defense may be true in the abstract, where claims "involve a common core of facts or will be based on related legal theories," then it would be "difficult to divide the hours expended on a claim-by-claim basis." *Edlong Corp. v. Nadathur*, 1st Dist. Hamilton No. C-120369, 2013-Ohio-1283, ¶ 16 quoting *Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *see also New Concept Hous., Inc. v. United Dept. Stores Co., No. 1, Inc.,* 1st Dist. No. C–080504, 2009–Ohio–2259, ¶ 41. This can be seen where the claims are "rooted in the same allegations, facts, discovery, and legal arguments" as those that are successful. *Id.*

Plaintiffs' claims all related to the same core of facts: the publication of defamatory materials and Defendants' actions related thereto. In their brief, Defendants attempt to artificially separate the claims with a series of hypothetical questions postulating that Plaintiffs "would have

still brought their Libel claim" even if the other claims did not exist. (See, Def. Resp. Br., pp. 9-10). However, these hypothetical questions have no bearing whatsoever on the common core of facts. Plaintiffs asserted numerous causes action, all of which were related to Defendants' defamatory and related tortious conduct. Indeed, as noted in Plaintiffs' Application for Attorneys' Fees and Litigation Expenses, Defendants' counsel ***admitted*** that several of the claims were intertwined during the punitive phase of trial. [See, June 13, 2019 Tr. Trans., pp. 40-41].

As the Court succinctly noted during the hearing on attorneys' fees, anyone who sat through the trial of this matter clearly noticed that the claims at issue all related to the same core of operative facts:

> 16 THE COURT: But I sat through this trial, and
> 17 they really were intertwined. Intentional infliction of
> 18 emotional distress, the defamation, you've got actual
> 19 malice, you've got ill will. I mean, it really -- it
> 20 really was uniquely blended in this case. So I'm
> 21 struggling with the fact that it's just two claims, the
> 22 punitive damages are only related to two claims. I
> 23 mean, I sat through this trial, and I just don't see it
> 24 quite that way.

[July 10, 2019 Tr. Trans., p. 90].

Defendants next claim that the Court should disregard time spent developing witnesses that did not testify at trial. Defendants did not cite any authority for this proposition and for good reason. Attorneys have the professional responsibility to explore and prepare for all potentially material sources of evidence and/or support for case issues, and do not communicate with potential lay or expert witnesses solely for the benefit of the potential witness testifying at trial. While that may be one of the goals, many times, attorneys speak with potential witnesses and discover

additional facts that may, in the end, not be relevant at trial. Also issues, evidence, or witnesses which may have been important at an earlier stage of the case diminish in their importance as the case progresses. For instance, Defendants' counsel subpoenaed and deposed nearly the entire Oberlin Police Department during the pendency of this case. The majority of these witnesses had no relevant information and did not testify at trial. Almost certainly, Defendants' counsel did not "no-charge" the time spent deposing witnesses that had no relevant information. Indeed, this is the very purpose of the broad discovery rules – they allow a party to discover a broad scope of information and a narrowed portion of that evidence is presented at trial. Plaintiffs' expert recognized this fact, specifically as it relates to expert witnesses:

8 And I would say that with respect to experts who
9 were -- may not have testified, that doesn't mean that
10 they didn't advance the costs. I mean, we often
11 have -- in any litigation, counsel from either side will
12 have experts that they don't ultimately call to the
13 stand, but they can learn a lot. They can help shape
14 the direction of certain part of the litigation. They
15 can help develop themes. They can educate the counsel
16 on various concepts. It doesn't mean they -- because
17 they didn't testify, for one reason or another, whether
18 the court excluded them or at the litigation strategy
19 they were excluded or both sides decided they were going
20 to take their experts off on that subject, it doesn't
21 mean that those experts weren't responsible in part for
22 the result that was achieved.

[July 10, 2019 Tr. Trans., p. 42].

Therefore, Plaintiffs are entitled to attorneys' fees on all claims prosecuted in this litigation.

C. *Plaintiffs' counsel's hourly rates and hours expended are reasonable.*

Because the reasonableness of Plaintiffs' counsel's hourly rates and total hours were discussed in substantial detail during the July 10, 2019 hearing and in Plaintiffs' Application for Attorneys' Fees, Plaintiffs will provide a limited response to the arguments in Defendants' response brief.

As detailed by Plaintiffs' expert, Plaintiffs' counsel's hourly rates and hours expended are reasonable.

1. Defendants' counsel's hourly rates and hours expended are obviously relevant.

Defendants' counsel initially argue that their hourly rates and fee bills have no relevance to Plaintiffs' request for attorneys' fees. But, using common sense, they are obviously highly relevant. The lodestar calculation requires the trial court to develop reasonable hourly rates then multiply them by the reasonable hours expended. The hourly rates and hours expended by another law firm ***in the very same litigation*** are clearly important for deciding the market rate for an attorney for the specific type of litigation involved and meet the relatively low relevancy test. *See,* Evid.R. 401 [emphasis added] ("'Relevant evidence' means evidence having ***any tendency*** to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Because of their obvious relevancy, Ohio courts permit discovery of a defendant's attorneys' fees in preparation for an attorneys' fees hearing. *See, e.g. Boggess v. Dayton Cycle, Inc.*, C.P. Montgomery No. 2003 CV 4810, 2003 WL 25500569 (July 23, 2003) ("Pertinent to any consideration of a reasonable amount of time expended in the prosecution of a law suit is the amount of time expended by the defendant in defending that law suit."). Indeed, in *Bittner v. Tri-*

County Toyota, Inc., the Ohio Supreme Court recognized that both the plaintiff and defendant presented evidence for each respective side's hourly rates and hours expended. 58 Ohio St.3d 143, 145, 569 N.E.2d 464 (1991). Further, this Court already impliedly determined that Defendants' counsel's hourly rates and hours expended are relevant because it ordered Defendants to produce that information. [See, July 8, 2019 Order].

Thus, Defendants' billing information is highly relevant to the reasonableness of Plaintiffs' counsel's hourly rates and hours expended.

2. Plaintiffs' counsel's hourly rates are reasonable.

Defendants challenge the hourly rates of several of Plaintiffs' counsel's attorneys, most notably Attorneys Lee Plakas ($675.00), Matthew Onest ($325.00), Brandon McHugh ($315.00), and Jeananne Ayoub ($275.00).[7] For several reasons, these rates are reasonable.

First, Plaintiffs' expert, Attorney Dennis Lansdowne, testified, based on his experience and expertise, that all of Plaintiffs' counsel's hourly rates were reasonable. [July 10, 2019 Tr. Trans., p. 19]. Specifically, as it relates to Attorneys Onest, McHugh, and Ayoub, Attorney Lansdowne's opinion was based not only on his experience, but on a survey of several firms in the area of Northeast Ohio:

[7] Defendants do not challenge the hourly rates for Attorneys Terry Moore, Owen Rarric, or Jim Taylor or for any Plaintiffs' paralegals.

3 So I did some surveying of firms of various
4 sizes in the Cleveland areas and simply found out what
5 is the one-to-three-year rate. It's a pretty broad
6 range. But if you look at the highest billing rates for
7 one-to-3-year lawyers, they're from $315 to $325 an
8 hour. And there are, in a lower rates that I learned of
9 in terms of a smaller firm, was with a Cleveland office,
10 might be $285, $295 and 305 -- that's one-, two- and
11 3-year lawyers -- and on down to the low 200s for the
12 firms that I surveyed.

[July 10, 2019 Tr. Trans., p. 20]. Defendants' expert, when opining on the reasonableness of Plaintiffs' counsel's rates, merely assigned a number to each attorney based on his perception of reasonable hourly rates in Lorain County.

Second, it is also important to compare the actual tasks undertaken by Plaintiffs' counsel during trial compared to those tasks completed by Defendants' attorneys. When compared, **Attorney Plakas did the same work as three attorneys for Defendants**, and Plaintiffs' younger attorneys did the same or more tasks than more experienced attorneys for Defendants:

PLAINTIFFS' ATTORNEY	RESPONSIBILITIES DURING TRIAL	COMPARABLE WORK BY DEFENDANTS' ATTORNEYS
Lee E. Plakas (**$675.00** per hour)	**Totals: 1 Voir Dire, 2 Opening Statements, 4 Direct Examinations, 11 Cross Examinations, 2 Closing Arguments & 2 Closing Rebuttals**	Ronald D. Holman, II (discounted $REDACTED) Totals: 1 Opening Statement, 2 Direct Examinations, 4 Cross Examinations Richard D. Panza (discounted $REDACTED) Totals: 1 Voir Dire, 3 Direct Examinations, 1 Cross Examination, 1 Closing Argument

		Rachelle Kuznicki Zidar (discounted $REDACTED) Totals: 1 Opening Statement, 2 Cross Examinations, 1 Closing Argument **Combined Totals: 1 Voir Dire, 2 Opening Statements, 5 Direct Examinations, 7 Cross Examinations, 2 Closing Arguments**
Brandon W. McHugh (**$315.00** per hour)	**Totals: 5 Direct Examinations, 2 Cross Examinations**	Julie A. Crocker (discounted $REDACTED) **Totals: 2 Direct Examinations, 5 Cross Examinations**
Jeananne M. Ayoub (**$275.00** per hour)	**Totals: 3 Direct Examinations, 2 Cross Examinations**	William A. Doyle (discounted $REDACTED) Totals: 3 Cross Examinations[8] Josh M. Mandel (discounted $REDACTED) Totals: 2 Cross Examinations[9] **Combined Totals: 5 Cross Examinations**

The analysis is similar when comparing the various issues argued throughout trial:

PLAINTIFFS' ATTORNEY	PRE-TRIAL ARGUMENTS	COMPARABLE WORK BY DEFENDANTS' ATTORNEYS
Lee E. Plakas (**$675.00** per hour)	2 Motions *in Limine* 1 Daubert/702 Challenge	Ronald D. Holman, II (discounted $REDACTED) 1 Motion *in Limine* Matthew W. Nakon (discounted $REDACTED) 2 Daubert/702 Challenges

[8] Attorney Doyle's combined cross examinations equaled approximately 11 total questions.
[9] Attorney Mandel's combined cross examinations equaled approximately 9 total questions.

Brandon W. McHugh (**$315.00** per hour)	4 Motions *in Limine* 1 Daubert/702 Challenge	Rachelle Kuznicki Zidar (discounted $REDACTED) 3 Motions *in Limine* 1 Daubert/702 Challenge
Jeananne M. Ayoub (**$275.00** per hour)	3 Motions *in Limine*	William A. Doyle (discounted $REDACTED) 1 Motion *in Limine* 1 Daubert/702 Challenge
Matthew W. Onest (**$325.00** per hour)	7 Motions *in Limine* 1 Daubert/702 Challenge	Julie A. Crocker (discounted $REDACTED) 1 Motion *in Limine*

Considering that Defendants' counsel's rates were ***discounted***, the comparison of actual trial tasks shows that Plaintiffs' counsel's rates are reasonable.

It must also be noted that Defendants charged far more than the alleged reasonable hourly rate for a first-year attorney for their paralegals and/or support staff. For example, Defendants charged $REDACTED for the work of Elizabeth Werner, a paralegal who was present with Defendants during trial, as well as multiple other paralegals or support staff, and even charged $REDACTED for two paralegals that were not present during trial.

Third, a comparison between Plaintiffs' counsel's and Defendants' counsel's blended hourly rates shows the reasonableness of Plaintiffs' counsel's hourly fees. By Plaintiffs calculation, Defendants' two firms charged a total of $REDACTED and expended a total of REDACTED, which results in a blended average (amount charged divided by hours expended) of $REDACTED.[10] Whereas, Plaintiffs' three firms charged a total of $4,855,854.00 and expended a total of 14,414.02, which results in a blended average of **$336.88** per hour, REDA [redacted].

[10] Defendants' counsel's hourly rates and hours expended can be found in Plaintiffs' Exhibit 6 for the attorney fee hearing.

Considering these factors, in addition to those discussed during the July 10, 2019 hearing and in Plaintiffs' Application for Attorneys' Fees, Plaintiffs' counsel's hourly rates are reasonable.

3. Plaintiffs' counsel's hours expended are reasonable.

Defendants also challenge the hours expended by Plaintiffs' counsel in this litigation. However, for several reasons, the hours expended by Plaintiffs' counsel were reasonable.

First, Defendants' counsel expended REDACTED more hours on this case than Plaintiffs' counsel, which is astounding considering that Plaintiffs' counsel was working on the case for approximately six (6) months longer. Of particular note, Attorney Holman expended REDACT hours on this case, which was REDACTED than Attorney Rarric (1,736.59) who had the most hours out of Plaintiffs' counsel. Attorney Snyder, another of Defendants' attorneys, expended REDAC**0** hours on this case and he ***did not even participate in the trial.*** Clearly, considering the number of hours expended on this case by Defendants' counsel, Plaintiffs' counsel's hours are reasonable.

Second, Defendants and their expert take issue with the hours expended by Plaintiffs' counsel related to the application for attorneys' fees and other post-trial activities. However, Defendants and their expert do not cite to one authority to support this proposition, other than Attorney Zagran's "opinion" that these fees are not reasonable. However, where a party is awarded fees, courts routinely award attorneys' fees in connection with the fee application and related hearing. *See, e.g. Faieta v. World Harvest Church*, 147 Ohio Misc.2d 51, 2008-Ohio-3140, 891 N.E.2d 370, ¶ 144 (C.P.) (awarding attorneys' fees for time expended related to an attorney fee application).

D. *Plaintiffs are entitled to an enhancement of two to three times the lodestar amount.*

Defendants do not even discuss the enhancement analysis outlined in *Bittner*. Thus,

Plaintiffs' focus this reply brief to address the narrow issue raised by Defendants in their response brief: the application of *Perdue v. Kenny*, 559 U.S. 542, 553-54, 130 S.Ct. 1662 (2010) under Ohio law.

1. *Perdue v. Kenny* has not been adopted by the Ninth District Court of Appeals or any other Ohio Court.

Defendants have misstated the current status of Ohio law as it relates to the correct standard of review for determining reasonable and appropriate attorneys' fees. Defendants and their expert have advocated that this Court should adopt the analysis in *Perdue*, which holds that there is a strong presumption that the lodestar calculation is a reasonable amount of attorneys' fees. *Id.* Defendants do not even take the time to argue that *Perdue* should be applied in this case. Instead, they claim that *Perdue* is binding law in the State of Ohio. (See, Def. Resp. Br., p. 15). This assertion is a head scratcher and obviously wrong because the Ohio Supreme Court accepted jurisdiction and has yet to rule on a case ***asking*** for the adoption of *Perdue*. *See, Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 153 Ohio St.3d 1495, 2018-Ohio-4092.[11] Indeed, *Perdue* has ***no application*** to the calculation of attorneys' fees under ***Ohio*** statutory and common law.

First, *Perdue* was expressly interpreting federal fee shifting statutes generally and 42 U.S.C. § 1988 specifically. *See, Perdue* at 551 [emphasis added] ("Our prior decisions concerning ***federal fee-shifting*** statutes have established ..."). This case involves the award of attorneys' fees under ***Ohio*** statutory and common law. As such, *Perdue* has no precedential value and is only relevant ***to the extent that it does not conflict with Ohio law***. *See, e.g. State v. Taylor*, 8th Dist. Cuyahoga No. 102020, 2015-Ohio-1314, ¶ 15 (ignoring Sixth Circuit precedent that conflicted

[11] This is another instance of Defendants' counsel misrepresenting the law of the State of Ohio. *See, supra* Sec. II(A)(1). This claim is especially egregious because Defendants' expert admitted from the stand that *Perdue* has not been adopted by ***any*** court in the State of Ohio. [July 10, 2019 Tr. Trans., p. 103].

with Ohio law). *Perdue* is in ***direct conflict*** with Ohio Supreme Court precedent (*Bittner*) and has no application to an award of attorneys' fees under Ohio law. Importantly, Defendants' expert admitted that *Perdue* dealt with federal statutory fee shifting provisions:

> 3 Q. It may or may not. And in fact, the Perdue case
> 4 was a statutory fee-shifting case, wasn't it?
> 5 A. Perdue was a Section 1983 case in which an award
> 6 of attorneys' fees was requested under 42 U.S.C. Section
> 7 1988. The Civil Rights Attorney's Fee Award Act of
> 8 1976.
> 9 Q. So in other words, you agree. It was
> 10 statutorily identified, right?
> 11 A. It was.

[July 10, 2019 Tr. Trans., p. 104].[12]

Second, as admitted by Defendants' expert, no Ohio court has adopted *Perdue*:

> 18 Q. Perdue is not -- the Supreme Court decision in
> 19 Perdue is not the law of Ohio as we speak today, is
> 20 it? That's an easy question we can agree to. Can't we
> 21 agree to that?
> 22 A. Perdue has not yet been explicitly adopted by
> 23 any Ohio state court opinion of which I am aware.

[July 10, 2019 Tr. Trans., p. 103]. Indeed, the only Ohio court that has considered *Perdue* rejected it as not in line with Ohio law:

> We note that the United States Supreme Court has stated that there is a strong presumption as to the reasonableness of the lodestar and that an enhancement should be reserved for rare circumstances in which the lodestar does not adequately take into account a factor important to determining a reasonable fee. However, **the**

[12] Interestingly, several ***federal courts*** have declined to apply *Perdue* under different federal fee shifting statutes. *See, e.g. In re BioScrip, Inc. Securities Litigation*, 273 F.Supp.3d 474, 481 (S.D. N.Y. 2017) (declining to adopt *Perdue* to a request for attorneys' fees after a class action settlement).

Ohio Supreme Court's *Bittner* test does not read as strict.

Bigler v. Personal Serv. Ins. Co., 7th Dist. Belmont No. 12 BE 10, 2014-Ohio-1467, ¶ 210, n. 6 [citation omitted] [emphasis added].[13]

Importantly, in a 2016 decision, the Ninth District Court of Appeals in *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 9th Dist. Summit No. 28082, 2018-Ohio-2393, ¶¶ 68-71 specifically applied the *Bitter* test to an attorneys' fees award and approved a multiplier of two-times the lodestar amount. This case is ***binding*** on these proceedings and ***precludes*** the application of *Perdue*.

2. Even if the Court adopts *Perdue*, Plaintiffs are entitled to an enhancement of attorneys' fees.

Even if *Perdue* applies (it does not), Plaintiffs are entitled to a multiplier of the lodestar amount. *Perdue* recognizes that the lodestar calculation is not sufficient in the "rare" and "exceptional" cases and where the hourly rates do not take into account an important factor that should be considered in reaching a reasonable attorney fee. *Perdue* at 554-55. Both of these considerations require enhancement.

First, this was a rare and exceptional case. As explained in significant detail in Plaintiffs' Application for Attorneys' Fees, this case involved ***substantial*** motion practice (mostly initiated by Defendants), ***substantial*** discovery, and the ***largest defamation verdict in Ohio history***. Further, at the very beginning of this litigation, Defendants promised to "vigorously defend this ill-advised and unfortunate lawsuit." (Def. Ans., p. 2). While the jury verdict sent a clear message that Plaintiffs' case was neither ill-advised or unfortunate, Defendants' counsel kept their word by utilizing a scorched earth, take no prisoners litigation strategy that involved, among other things,

[13] The *Bigler* court affirmed an attorneys' fees enhancement of two-times the lodestar amount. *Id.* at ¶ 218.

deposing 90-year-old Grandpa Gibson for ***19 hours*** and deposing Dave for ***14 hours***.[14] The exceptional nature of this case was recognized by Plaintiffs' expert:

> 5 THE WITNESS: But even if you accepted that the
> 6 Perdue case or its factors or the way it looks at the
> 7 factors, it still talks about the exceptional case. If
> 8 this is not an exceptional case, I don't know what is.

[July 10, 2019 Tr. Trans., p. 46]. Simply put, this was an extraordinary case that was made more difficult by Defendants' counsel's actions, warranting an enhancement of the lodestar amount.

Second, the *Perdue* analysis does not take the contingency fee agreement into account when calculating a reasonable attorney fee.[15] As recognized by Defendants' expert (and Plaintiffs' expert), the contingency fee agreement is generally the only method for individuals to gain access to the court room:

> 12 Q. And finally, I think I heard you say while I was
> 13 up there that you recognize the beneficial aspect of
> 14 contingency fee agreements. You recognize even in your
> 15 own practice that contingency fees are often the only
> 16 way individuals, a David versus Goliath, can have access
> 17 to the court system, correct?
> 18 A. That is absolutely correct.

[14] This type of litigation strategy seems to be a theme for one of Defendants' law firms. In another case, one of Defendants' law firms promised and followed through with opening "the floodgates of litigation" and filing "every available dispositive and evidentiary motion permitted by the Ohio Rules of Civil Procedure and Evidence." *See, Phoenix Lighting Group LLC v. Genlyte Thomas Group, LLC*, Ohio Supreme Court Case No. 2018-1076, Response Brief of Appellee, pp.6-7 http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=860287.pdf.

[15] While *Perdue* and other federal cases do not consider the contingency nature of an agreement when deciding a reasonable attorney fee, those cases dealt specifically with federal fee shifting statutes and are not the position of Ohio law. *See, e.g. Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991).

19 Q. Even the Davids in our world, they have a right
20 to competent counsel; it's not just Goliaths that should
21 have competent counsel, correct?
22 A. You get no argument from me on that.

[July 10, 2019 Tr. Trans., p. 104]. While the contingency fee agreement provides access to justice for numerous plaintiffs across the State of Ohio, it also places enormous risk on the attorneys who agree to take the cases, particularly where significant sums in litigation expenses are advanced. While Defendants' counsel is entitled to payment regardless of their performance, Plaintiffs' counsel could only receive compensation in the event of victory during trial. Further, because Plaintiffs were financially devastated by Defendants' conduct, Plaintiffs' counsel were required to advance extraordinary litigation expenses in excess of $400,000.00 with no guarantee of repayment. These factors require enhancement of the lodestar calculation in this case. *See, Perdue* at 555 (recognizing the appropriateness of an enhancement where the litigation required the advancement of substantial sums for litigation expenses).

III. CONCLUSION

Therefore, in accordance with the jury's verdicts, Plaintiffs submit that they are entitled to attorneys' fees between $9.5 million and $14.5 million, which is the lodestar amount with a two to three multiplier enhancement, and litigation expenses of $404,139.22.

DATED: July 15, 2019

Respectfully submitted,

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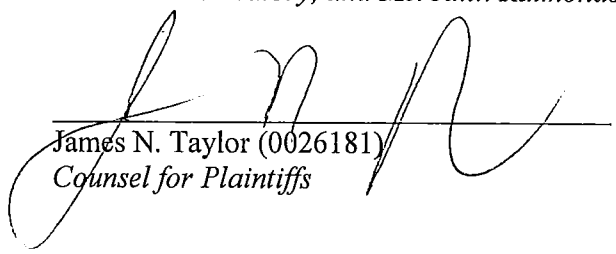

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