SUPREME COURT

STATE OF LOUISIANA

NO. 2012-C-2182

COLLETTE JOSEY COVINGTON AND JADE COVINGTON
Plaintiffs - Respondents

Versus

McNEESE STATE UNIVERSITY AND THE BOARD OF SUPERVISORS
FOR THE UNIVERSITY OF LOUISIANA SYSTEM
Defendants – Applicants

CIVIL PROCEEDING

Opposition to Defendants' Application for a Writ of Certiorari and Review to the Third Circuit Court of Appeal, State of Louisiana, Docket No. CA 11-1077 (9/5/2012);
Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana,
Docket No. 2001-2355, Division "G," the Honorable
Michael Canaday, Judge Presiding

PLAINTIFF/RESPONDENTS' COLLETTE COVINGTON AND JADE COVINGTON'S OPPOSITION TO DEFENDANTS' APPLICATION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

APPENDIX

Deposition Excerpts of Louisiana Attorney Fee Expert Edward Fonti	Exhibit “A” (As provided by Rule X, Section 6).
Affidavit of Louisiana Attorney Fee Expert Winfield Little	Exhibit “B” (As provided by Rule X, Section 6).
April 23, 2010 Consent Judgment signed by McNeese and Covington	Exhibit “C” (As provided by Rule X, Section 6).
U.S. Department of Justice Office of Public Affairs Release	Exhibit “D” (As provided by Rule X, Section 6).

TABLE OF AUTHORITIES

Federal Statutes and Rules

Federal Administrative Actions and Reports

Federal Publications

Louisiana Constitution, Statutes, and Rules

Other Publications

Louisiana Supreme Court Filings Related to This Case

COLLETTE COVINGTON AND JADE COVINGTON'S OPPOSITION TO DEFENDANTS/APPLICANTS' APPLICATION FOR WRIT OF CERTIORI

MAY IT PLEASE THE COURT:

Plaintiffs-Respondents, COLLETTE JOSEY COVINGTON and JADE COVINGTON, ("Covington") respectfully submit their Opposition to Defendants' Application for Writ of Certiorari, in compliance with the Louisiana Code of Civil Procedure and the Rules of this Honorable Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For 20 years, the Defendants (collectively, "McNeese") misappropriated millions of dollars in public funds designated for Americans with Disabilities Act ("ADA") compliance as it systematically excluded 75% of its disabled students from its campus. When Covington, a wheelchair-bound grandmother, requested a single accessible restroom so that she would no longer be forced to urinate on herself on campus, McNeese unleashed 12 lawyers to mount a vicious war of attrition on her and her solo-practitioner attorney. Covington ultimately prevailed in a "landmark" ADA case and secured the largest single plaintiff ADA judgment in history.[1] Her attorneys' work uncovered 15,000 violations in 1.35 million square feet of public buildings and resulted in McNeese receiving $13.8 million to virtually reconstruct its campus to comply with the law.

On September 1, 2010, McNeese judicially admitted that Covington was not only entitled to attorney's fees, but that "the fees in this case are likely to be Plaintiffs' single largest category of damages" in this $16 million case and that Covington's attorneys' success would be the "most critical factor" in enhancing their fees. (2 R. 24:5813-15). At trial, McNeese failed to challenge Covington's counsel's time and offered no witnesses or testimony to oppose the fee request. Yet now it files its third writ application in five years and contradicts its own judicial admissions by demanding a reversal of the unanimous and strongly worded factual findings of four neutral, unpaid experts, two trial judges, and five appellate judges. It also complains about Covington's counsel's understated hours and modest $265 rate and enhancement[2] awarded pursuant to *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010) to compensate for Covington's counsel's "superior" results and the exceptional payment delay caused by McNeese's "shameful" misconduct. (Third Circuit Sept. 5, 2012 "Ruling", pp. 18-23).

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[1] Covington received an injunction valued at $13.8 million, $400,000 cash, a six year scholarship, and attorney's fees (under appeal) of approximately $1.8 million. As a result of this case, McNeese will receive $13.8 million to update its campus, for a total case value of $16 million. The Equal Employment Commission's 2010 nationwide ADA analysis found the largest monetary relief provided to a single client in a Title I ADA case was $391,000. The largest class action judgment was $6.2 million with an average of $26,300 per plaintiff. *See* "The U.S. Equal Employment Opportunity Commission: Twenty Years of ADA Enforcement, Twenty Significant Cases", http://www.eeoc.gov/eeoc/history/45th/ada20/ada_cases.cfm. There has since been one larger class action, but the class members are not expected to receive a record-breaking amount. Covington has identified cases in which plaintiffs received more attorney's fees or injunctive relief than Covington but only nominal client benefits and one Title II case with a $400,000 judgment but no injunction or scholarship. Thus, upon information and belief, this is the largest single plaintiff ADA judgment in history.

[2] Covington's counsel was awarded a rate of $265 per hour, yet in its Writ Application, McNeese insists it was $260.

To avoid paying any fees, McNeese manufactured false and defamatory attacks against Covington's lead counsel, Seth Hopkins, because he agreed to amend his time to remove a few earned hours slated on the wrong days, which created the appearance of three errors per year affecting 1.5% of his time. In a show of "good faith and fair dealing," he voluntarily removed not only these earned hours, but another 710 hours—10 times more than McNeese complained about—to resolve any questions about his records. Ignoring that the hours were earned and the records amended, McNeese seeks this Court's attention by misrepresenting that he was awarded more than 24 hours per day. To the contrary, Hopkins was awarded an average of only 1.2 hours per day for the most significant case of his career—a landmark case which is the largest of its kind in history.

McNeese's application also includes four "charts" falsely claiming Hopkins reconstructed records in 2006 to increase his total fee request by 8%. In fact, the January 26, 2006 document McNeese refers to was an unsigned and unsworn compromise fee offer presented to settle this case—not his full timesheets, which were presented several months later when negotiations broke down. Significantly, McNeese abandoned this argument at trial and on appeal, yet makes it the centerpiece of its writ application.

McNeese also alleges—for the first time in this case—that Covington's $13.8 million injunction had nothing to do with her success in this case. But McNeese judicially admitted otherwise on April 23, 2010, when it signed a Consent Injunction acknowledging the "substantial" benefits Covington earned. (Exhibit "C").

Finally, McNeese goes beyond suggesting that the lower courts erred and accuses six judges of utterly failing to conduct a "meaningful review" of the evidence. But the lower courts patiently listened to McNeese launch one discredited argument after another as the six day trial descended into nothing more than a "lengthy proceeding full of personal venom." (Ruling, p. 23). The trial court found Hopkins' hours "neither exaggerated nor unexpected" and the Third Circuit devoted, "an exceptional number of judicial work hours" for 245 days after oral argument to review 45 volumes of records and found, "Hopkins presented a well-orchestrated case worthy of emulation by the most seasoned attorneys." (Ruling, p. 13).

On one hand, McNeese rails against the appellate court for not giving enough deference to the trial judge, who erred by inexplicably reducing Covington's counsel's rate by $25 per hour and his hours by 20%. On the other hand, it implores this Court to grant writs to give no deference whatsoever to the six lower court judges for awarding anything at all. McNeese sees no irony in advancing positions that it judicially foreclosed on, even as it attacks the credibility of everyone associated with this case. It presents no Rule X reasons to grant a writ on this narrow, factual issue of fees, except to rehash arguments that even its own expert disagreed with and to manufacture new ones that it never presented at trial or on appeal. McNeese's writs should be denied.

STATEMENT OF THE CASE[3]

A history of discrimination. Covington's story typifies that of hundreds of disabled students, whose plights were documented by McNeese's student media for 20 years. (2 R. 23:5690-97). In 1995, Covington was a McNeese honor student and student senator and ambassador with 87 credits toward a degree in Early Elementary Education. She became confined to a wheelchair her senior year and could no longer access the classrooms on McNeese's non-compliant campus. This caused her 3.1 GPA to plunge to 2.07 and forced her to drop 92 of the 125 credit hours she attempted over the next four years. (2 R.2:358-84; 24:5751-54).

Covington witnessed other disabled students suffer the same fate and saw them forced to abandon their dream of a college education. Desperate to help herself and her peers, she started a student organization to raise money for McNeese to provide minimal accommodations for disabled students, but McNeese simply took the students' money and demanded that they raise more. (2 R. 2:358-59; 22:5754-60).

McNeese's Director of Services for Students with Disabilities Tim Delaney, whose own office was not handicapped-accessible, refused Covington even modest accommodations such as first floor classes and unlocked doors at the only ramps into buildings. (2 R.358-84 at 361). He admitted that McNeese received $50,000 per disabled student in grant money but would not accommodate those in wheelchairs,[4] resulting in systematic discrimination that prevented 75% of McNeese's disabled population from receiving an education. (1 R. 2:482). Not surprisingly, no wheelchair-bound student is known to have graduated from McNeese prior to 2004, and McNeese's own officials urged Covington to sue. (2 R. 22:5389; 24:5757-58).

Covington soldiered on, attempting to maneuver through obstacles such as sidewalks without curb cuts, buildings without ramps (or where the only ramp led to a locked door), narrow and heavy doors, and broken elevators with buttons too high for her to reach in her wheelchair. When she was strong enough to hobble from her wheelchair into a narrow stall, she could use the restroom. Otherwise, she was forced to urinate on herself and spend the rest of the day drenched, reeking, and humiliated on campus. (2 R. 2:358-84).

On January 31, 2001, Covington unsuccessfully attempted to use the McNeese Student Union ("Old Ranch") women's restroom. Urine-soaked and degraded, she tried to exit the restroom when her wheelchair became trapped in the door, resulting in her falling and injuring her arm. McNeese admitted that this door was too narrow and three times too heavy for someone in a wheelchair to use. (1 R. 2:284-86, 343).

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[3] For a more complete Statement of the Case, see Covington's Writ Application, pp 3-9, Docket No. 2012-C-2231.

[4] Delaney admitted that McNeese's disabilities office would not accommodate students in wheelchairs. Instead, he accused them of purchasing their wheelchairs at "pawnshops" to fake their disabilities and pretended not to know where the student union was located when asked why he could not help Covington. (1 R. 2:465-66, 472-78, 482. 1 R. 5:1004-05; 2 R. 23:5695; 2 R. 24:5764-68).

McNeese launches a "militant defense." Covington might have given up her dream of an education and a better life for herself and her daughter if she had not learned that Hopkins, a former McNeese classmate, had completed law school. He agreed to ask McNeese to spend $4,000 so that she would have **one** accessible restroom on campus. McNeese refused, and this case soon revealed the magnitude of its violations.

McNeese had not made even a basic survey of its buildings or drafted a transition plan as required by law.[5] Because McNeese would not identify its violations, it did not know how much ADA funding to request or what it would do if such funding were granted.[6] Instead, it spent its ADA money on "other things" and plastered signs falsely claiming that its buildings complied with the law despite the fact that not **a single restroom** on McNeese's 1.35 million square foot campus complied with the ADA or related statutes dating to the 1960s. McNeese's 15,000 violations were found even in public buildings which were brand new or still being planned for construction as recently as 2009 with a disregard for long-established building codes.[7]

Once Covington filed suit, McNeese accused her of fraud and claimed she was insane. It parked a black SUV outside her home for two years to film her 14-year-old daughter's ritual of loading her mother's wheelchair into the family car for grocery and medical appointments (2 R 1:208-214; 2:361) and sent her 400 miles round-trip to a "forensic psychiatrist" who refused to accept its hypothesis that she was crazy and faked her disabilities. McNeese claimed—with no evidence—an elaborate conspiracy between Covington, her physicians, and the Social Security Administration for Covington to endure painful and unnecessary surgeries so she could sue McNeese for a bathroom.[8] McNeese's unprovoked attacks were so vicious that the Third Circuit later held, *sua sponte*, that it would have sanctioned McNeese if Covington had requested.[9]

The taxpayers provided McNeese with money for ADA compliance, but McNeese President Dr. Robert Hebert vowed on February 2, 2005 to never use McNeese's **$1.1 million** in **surplus** ADA funds on compliance, refusing to spend even $4,000 to end this case.[10] He kept his word, and the idle fund doubled as this litigation raged. Hebert justified this pointless war of attrition against Covington by testifying that it was

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[5] These were required before 1992 and 1995, respectively, under 28 CFR 35.105 and 28 CFR 35.150(d).

[6] Prior to 2009, McNeese never asked for more than 20% of its ADA funding needs (2 R. 22:5343-48; 23:5695) even as it raised its administrators' salaries to the highest levels in Louisiana and accumulate massive surpluses. (2 R. 22:5377-83).

[7] This case resulted in a 5,600 page evaluation documenting these violations. (2 R. 2:347-19:4651 and 26:6292-31:7608). This report was filed together but is split into two sections in the record.

[8] Until 2009, McNeese concealed its ***own infirmary's*** diagnosis of Covington's disabilities, even as it argued to this Court that she was not disabled because her "credibility is lacking" and she has a "significant problem with accuracy or the truth." (2 R.1:42, 208-14).

[9] McNeese's "concoctions" were "completely unfathomable," "completely unsupported by any evidence in the record," and "[h]ad Covington brought an action for frivolous appeal . . . it would seem that this court would have granted such a request." (2 R. 1:141-42).

[10] McNeese's "Building Use Fund" rose from **$1,094,952** in 2005 to **$2,032,018** in 2010, even as it refused to upgrade a single restroom to end this litigation. In 2010, Covington's case forced McNeese to use $1.4 million for ADA upgrades. (2 R. 23:5600-12).

not part of the "role of the institution" or "fundamentally important" to allow disabled students access to the Old Ranch, which includes the cafeteria, student government, newspaper, and job placement offices:

> Whether or not it's fundamental for them [those with disabilities] to get into that student union annex or that it's fundamentally important for them to obtain an education, I would question that. I'm not sure I would regard it as a high priority.

(1 R. 3:501).

McNeese ridiculed the plight of those with disabilities and stated in court pleadings—without embarrassment or shame—that it did not need compliant bathrooms because the ADA did not protect the right to urinate. (2 R. 1:43-44; 35:8747). It blamed Covington, who now uses a catheter, for not learning to hold her bladder all day and stated on the record that it would simply not follow federal law despite receiving **$61,878,859** in federal funding in the last seven years alone (2 R. 22:5362-74).

Hopkins pleaded with McNeese to accommodate Covington, but McNeese refused and obstructed this case, seeking eight continuances and requiring Hopkins to document 54 letters, emails, and phone calls seeking basic discovery and corrections to blatantly untruthful discovery. (2 R. 1:242-43, 260-63; 40:9821-23). Hopkins finally had to file six motions to compel and threaten sanctions. (2 R. 1:164-2:265). Incredibly, McNeese later blamed him for not asking for sanctions against it sooner and mocked him as a "pretty please" lawyer for extending professional courtesies and offering to settle this case rather than escalate it. (2 R. 42:10396-98).

Covington files summary judgment. In January, 2006, Covington filed for summary judgment, injunctive relief, and attorney's fees. After requiring a full year to research, McNeese responded and claimed that Covington made a "mountain out of a molehill" and accused her of an "all out ADA assault" by asking McNeese to correct **one** of its 15,000 ADA violations. (2 R. 1:35, 69). McNeese raised numerous outrageous defenses which perplexed both the trial and appellate courts.[11] After three days of oral argument, the trial court praised Covington for bringing this problem to McNeese's attention, granted her summary judgment, and ruled on January 24, 2007 that McNeese would be required to pay "substantial" attorney's fees.

The court warned McNeese of the costs of prolonging this case (2 R. 23:5562-63) and indicated it was prepared to award Hopkins **$270,052.74 in undisputed fees**. Hopkins omitted entire months of earned time from his records, agreed to work for a lower rate, and even offered to ***sacrifice*** all of his six years of earned fees and expenses if McNeese would simply provide his client with a single accessible restroom, which he offered to help pay for. (2 R. 43:10515). He temporarily deferred his fee request in the hope of reaching a settlement.

[11] For instance, McNeese first claimed that it could not find $4,000 in its $75 million budget to upgrade a bathroom. Then, it argued that it ***complied*** with the ADA after admitting that it did not. On Nov. 13, 2008, McNeese's counsel wrote the Third Circuit to apologize for making this misrepresentation during oral argument, yet maintained the claim in its first writ application to this Court.

Rather than walk away with no liability, McNeese appealed. On November 5, 2008, the Third Circuit published its longest civil opinion of 2008 and concluded that McNeese's arguments were: sanctionable, "frivolous," a "concoction," "completely irrational," "indefensible," having "audacity," and "absurd." It held:

> We cannot fathom that McNeese felt no need, regardless of whether it was required by law, to upgrade a single women's restroom into ADA compliance in a building that houses, *inter alia*, the two main student cafeterias on campus, offices for student government and activities, and a state-of-the-art computer laboratory. McNeese's decision to ignore a federal mandate is reminiscent of the intolerance of the past. We had hoped that the days where a court has to step in to ensure that people were treated equally under the laws of this country were gone. Yet, still, McNeese is emboldened enough to bring such a case to an appellate court where a published, written opinion will forever memorialize its discrimination against this country's disabled citizens. It is hoped that McNeese will reassess its attitude toward its disabled students. It is also hoped that McNeese will prepare and publish a transition plan as required by the ADA.

(2 R. 1:157).

This court denied McNeese's writ application.

McNeese retaliates and becomes the subject of a federal investigation. McNeese's actions attracted national attention. Under President Bush's Administration, the U.S. Department of Justice Civil Rights Division ("U.S. DOJ") reviewed Hopkins' evidence and declared McNeese's discrimination to be a matter of national significance. The U.S. DOJ flew three lawyers from Washington, D.C. to Lake Charles and warned McNeese to cease retaliation against Covington and her counsel.[12] McNeese was required to send an email on October 2, 2008 to its 8,487 students and nearly 1,000 employees regarding the consequences of retaliation under 42 U.S.C. § 12203. (2 R.1:215-16; 23:5688-89). The ensuing investigation resulted in a compliance decree against the entire University of Louisiana System's eight campuses,[13] and the U.S. DOJ sent a nationwide press release identifying McNeese's **counsel's** unreasonable positions in *Covington* as the basis for its enforcement action.

Yet McNeese continued to retaliate against anyone associated with this case, including its own professors, such as Dr. Giovanni Santostasi, who became confined to a wheelchair in late 2009 and signed an affidavit for Covington. His campus email account was soon purged and he received a death threat sent from the McNeese server instructing him to "shut up or you will die." A second death threat was spray painted on his office door. McNeese fired Dr. Santostasi, who has since brought his own ADA suit against McNeese.[14]

McNeese admits that it was wrong and credits Covington's counsel with providing it a $13.8 million windfall. After this Court denied McNeese's writ application, McNeese's counsel called Louisiana's

[12] On Sept. 30, 2008—the day before the first Third Circuit oral arguments—McNeese attempted to file a grievance against Hopkins, alleging he "ruined" its "good name" in this case. The complaint was refused and both the U.S. DOJ and trial court warned McNeese to cease retaliation against counsel. (2 R. 20:4950-57). As the Sept. 5, 2012 Ruling demonstrates, McNeese has flouted these orders.

[13] The investigation expanded after Hebert testified in this case that the other colleges in the University of Louisiana System—one of the 20 largest in the nation—also violated the ADA. (2 R. 36:8785; 23:5678-80).

[14] (2 R.20:4967-71; 2:385-389; 20:4967-71); *see also Santostasi v.McNeese*, 2:10-CV-01799 (W.D. La. filed Dec. 3, 2010).

courts "wrong" for ruling that Covington was entitled to attend college in a wheelchair. McNeese refused to accommodate her for another year, until it unexpectedly agreed to a 14-point Consent Injunction on April 23, 2010. For the first time—***3,260 days after suit was filed***—McNeese acknowledged that Covington is disabled, has a right to attend college in a wheelchair, and is a prevailing party entitled to attorney's fees. The Injunction provides Covington and the U.S. DOJ with concurrent rights to enforce the $13.8 million ADA settlement. (2 R. 36:8773-85; U.S. DOJ#204-33-109). Moreover, Covington received $400,000, a six year scholarship for tuition, books and supplies, and accommodations so she could finally graduate. (2 R. 20:4953-54).

As a result of this case, McNeese is being provided with $13.8 million to fully comply with the ADA. (Judgment, 2 R. 39:9665; 23:5590-5612). This is money McNeese would never have requested—much less received—had Covington's counsel not, in the words of Judge Canaday, "passionately pursued the interests of his clients" and "worked tirelessly in the face of aggressive opposition." Moreover, McNeese has used Hopkins' work as a springboard to file **its own** ADA lawsuit against its own architects and contractors to gain a **double recovery** from its discrimination. *See Cowboy Facilities, Inc. and McNeese State University v. Ambling Development Company,* 2011-2407 (14th JDC, Calcasieu Parish, La. filed 5/25/11).

PROCEEDINGS BELOW

On May 19, 2010, Covington served a 1,072 page Application for Attorney's Fees and Sanctions and exhibits. Hopkins offered to review with McNeese any time entries it questioned as he devoted months to self-auditing more than 6,000 hours of records over 10 years by comparing them against 17,684 electronic files (requiring 21.9 gigabytes of data) (2 R. 34:8400) and 55 boxes of paper work product containing a quarter of a million pages of time-stamped notes, letters, photos, filings, drafts, transcripts, logs, receipts, emails, memos, and other documents. Stacked end-to-end, these paper documents alone would extend nearly 50 miles—more than half the distance between the Supreme Court and the State Capitol. This audit confirmed each hour and identified hundreds of items never billed. (2 R. 43:10616-19; 10727-29; 10671-77; 10740).

McNeese spent four months reviewing the Application, deposed Hopkins and his four unpaid experts, and then judicially admitted on September 10, 2010 that, "McNeese does not dispute that Plaintiffs are entitled to an award of at least some of their [$5.1 million] attorneys' fees" and that these fees would be "Plaintiffs' single largest category of damages" in this $16 million case (2 R. 24:5812, 15). Yet only five days later, McNeese demanded that the trial court "deny the plaintiff's fee application altogether" and has maintained this irrational position, even over its own expert's objection. McNeese is judicially estopped from making this

argument, was admonished for making it on appeal, yet continues to advance it in its writ application.[15]

In contrast, Hopkins exhibited the utmost of "good faith and fair dealing" and voluntarily eliminated every entry McNeese did not like—for any reason. (Ruling, p. 11-12). He sought **710 fewer hours** than the four unpaid experts opined he should have requested and far less than courts award in analogous cases.

Yet McNeese consumed six days for an attorney's fee trial, during which it presented **no witnesses**, **no expert reports**, and **no affidavits** and asked substantive questions about only **two entries** comprising 16.4 hours of Hopkins' time. Its only strategy was to brutally and inexplicably personally attack Hopkins, calling him obsessive, incompetent, and dishonest, accusing him of fraud and committing a felony, and suggesting he should be disbarred. McNeese's lawyers harassed Hopkins' former employer until it was forced to file a protective order against McNeese, (2 R. 24:5902-14) and its lead counsel's conduct grew so outrageous that the trial court was forced to admonish him for his "offensive" outbursts which disrupted the proceedings. (2 R. 44:10761-62). By closing, McNeese had made such a mockery of the trial that it resorted to showing a cartoon depicting Hopkins as a liar in a desperate bid to persuade the judge not to award any fees. (2 R.45:11020-21).

The trial court found that Hopkins proved his hours "beyond a reasonable doubt." (2 R. 43:10636). Yet it arbitrarily reduced the rate and deducted 1,098 earned hours without identifying any that were improper, despite unquestionable proof from the file, cases, McNeese's own records, and the unanimous opinions of four unpaid experts that Hopkins should have received **1,808 hours more** than the court awarded, in addition to a fee enhancement. This deprived Covington's counsel of $3.8 million in earned fees, which the court admitted was to protect McNeese. Incredibly, McNeese—still unsatisfied with its own victory—appealed again.

McNeese used its appellate pleadings—most notably its Reply Brief—to make new arguments and to again launch "numerous offensive, insulting, abusive, discourteous, and irrelevant criticisms of Covington's counsel" which violated many Uniform Rules of Court. The appellate court declined to strike this brief only because it wanted the world to see "the vitriolic behavior engaged in by McNeese on appeal." Even the dissent held that, "McNeese and its agents acted deplorably towards Covington, its lawyers used every dilatory tactic in the book to avoid compensating her or addressing her grievances, and . . . the abuse continued into this litigation over the attorney fees." None of these attacks changed the fact that McNeese could not point to a single unreasonable time entry in over 6,500 hours of documented work. Likewise, neither the trial judge nor a

[15] *See Jackson v. Host International,* 426 Fed.Appx. 215, 225-28 (5th Cir.2011). ("The district court calculated the lodestar amount using an hourly rate of $300. Not only did Host not object to this figure, in its supplemental response to the motion for attorney's fees, it abandoned its position that the rate should be $225 per hour and expressly stated that it did not object to the $300 per hour rate. Because Host now argues a position that is inconsistent with its position in the district court, it is foreclosed from arguing that the hourly rate was improper.")

single member of the five judge panel was critical of any of Hopkins' records. Even McNeese's own paid expert refused to dispute Covington's enhancement, acknowledged the enormous societal benefits provided by this case, and admitted that Hopkins had a right to be "really mad" at McNeese and its counsel for their misconduct. (2 R. 33:8098, 8238-42; 34:8256-58).

The Third Circuit published an eloquent, well-reasoned, and thorough opinion after the five judge panel devoted **245 days** after oral argument to review an **11,000** page record—one of three in this case—"exhaust[ing] an exceptional number of judicial work hours." The panel concluded that, "Hopkins presented a well-orchestrated case worthy of emulation by the most seasoned attorneys" and held that McNeese's conduct "shocked the conscience" and turned the six day trial into a "lengthy proceeding full of personal venom, extending even on this appeal." (Ruling, pp. 10, 23). The Third Circuit found Hopkins' records "neither exaggerated nor unexpected" (Ruling, p. 6) and restored the virtually uncontested hours, reinstated the modest $265 rate, and awarded a small 6% interest enhancement from 3.5% to 9.5%. This "minimal remedy" (Ruling p. 24) is approximately $3 million less than the experts urged, yet McNeese is once again unhappy with yet another victory and again seeks writs, claiming that all of the lower judges erred in awarding anything at all.

ARGUMENT

I. McNEESE'S WRIT APPLICATION SHOULD BE DENIED UNDER RULE X

The Louisiana Supreme Court's grant of a civil writ is a matter of discretion. As noted in *Boudreaux v. State Dept. of Trans. and Dev.* 2001-1329, p. 2-3 (La. 2/26/02); 815 So.2d 7, 10, "any further review after the first appeal should be provided only in the interest of the law and the legal system." Further,

> [t]he question involved in considering a petition for review is not whether a case is meritorious, or even when it arguably might have been decided the other way, but whether it is more important for decision than other cases competing for the attention of the court.

Id. at fn. 6, *citing* ABA Standards Relating to Appellate Courts § 3.10, 16-18 (1976).

Louisiana Supreme Court Rule X provides that writs are granted within this Court's discretion based upon five factors: (1) the resolution of conflicting decisions; (2) significant unresolved issues of law; (3) overruling or modification of controlling precedents; (4) erroneous interpretation or application of Constitution or laws; and (5) gross departure from proper judicial proceedings.

McNeese fails to identify which of these factors it alleges merits a writ, claiming only that the bar would benefit from having "succinct and clear guidance" on how to analyze applications for attorney's fees. But what additional guidance would McNeese have this Court issue? McNeese was granted virtually unlimited discovery and a six day trial to explore Covington's attorneys' records. Covington's counsel supported their

application with the unanimous opinions of four state and national attorney's fee experts, 6,500 hours of contemporaneously documented time records, the deposition and trial testimony of the recording attorney, and comparable case law, buttressed by a 55 volume suit record in three appellate records. Covington's counsel removed ten times more hours than McNeese complained about and offered to introduce day-by-day proof of each hour from their 250,000 pages of paper files and 17,684 electronic files.

This more than satisfies the well-established requirements for proving fees and completely satisfied six lower court judges, who held that Covington's counsel proved his fees "beyond a reasonable doubt." (2 R. 43:10636). In no other published case have records been so thoroughly scrutinized, and even McNeese could only substantively question two entries at trial and elected not to submit an expert report or testimony. If any further guidance is needed, perhaps it would be to instruct losing parties that they should, at the very least, present their own expert's testimony suggesting rational compensation before burdening the courts with baseless attacks on their opposing counsel. McNeese has no grounds to burden this Court with a writ.

II. RESPONSE TO McNEESE'S FIRST ARGUMENT: THE LOWER COURTS PROPERLY ACCEPTED COVINGTON'S COUNSEL'S FEE APPLICATION

A. The U.S. Supreme Court and This Court Have Established Clear Standards to Award Attorney's Fees

Once a plaintiff is determined to be a prevailing party under the ADA, a court's discretion is limited, and an award of attorney's fees is virtually obligatory.[16] The scope of a fee inquiry is limited and should not result in secondary protracted litigation, *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), and the findings upon which a fee award is based cannot be overturned except upon abuse of discretion. *Kem Search v. Sheffield*, 434 So.2d 1067, 1070 (La.1983). Moreover, the "[r]eview of purportedly excessive attorney fees should be tempered with judicial restraint." *Oreck Direct v. Dyson*, 2009 WL 961276 at *5 (E.D.La. April 7, 2009).

Indeed, the hours expended are only one of 12 factors considered in awarding fees under *Johnson v. Georgia Highway Express*, 488 F.2d 714 (1974). Last year, the U.S. Supreme Court held in *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011) that the award of attorney's fees in federal civil rights cases is "rough justice" and:

> trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time.[17]

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[16] "Although this fee-shifting provision is couched in permissible terminology, awards in favor of prevailing civil rights plaintiffs are virtually obligatory." *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293 (1st Cir. 2001). *See also Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir.2002) (quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983)) ("'The Supreme Court has explained that in civil rights cases, the district court's discretion is limited. **A prevailing party under the ADA 'should ordinarily recover an attorney's fee** unless special circumstances would render such an award unjust.'")

[17] *See also*, *Lindy Bros. Builders v. American Radiator & Standard Sanitary*, 487 F.2d 161, 167 (3rd Cir. 1973). ("it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainment of each

This Court has held that attorney's fees are to be awarded based upon the best available information, even if no time records are kept. In *Rivet v. State Dept. of Trans. & Dev.,* 2001-0961(La.11/28/01); 800 So.2d 777, 780, 782, this Court awarded 950 hours of reconstructed time against the State, holding:

> [p]laintiffs' attorney, who had the benefit of his own file, DOTD's billing records, and court records, was obviously in the best position to calculate the amount of time he spent on the case for purposes of determining the fees actually incurred.

McNeese's own cases establish that even without records, courts accept **any** "sufficient documentation so that the [court] can fulfill its duty to examine the application for compensable hours." *Bode v. United States*, 919 F.2d 1044, 1047 (5th Cir. 1990).[18] Contrary to McNeese's claim, Hopkins supplied not only contemporaneous records, but an avalanche of un-rebutted supporting evidence.

B. Hopkins Met His Burden and Established He Incurred 5,489.5 Hours, Which McNeese Failed to Properly Challenge *(response to Writ pages 5-13 and 17-19)*

A prevailing party may satisfy the burden of proving his fee by submitting timesheets and affidavits. As the federal courts hold, "[s]ubmission of itemized time records, coupled with counsel's affidavits that the work was performed, is certainly *prima facie* showing that the work and hours referenced in the fee petitions are accurate." *Liger v. New Orleans Hornets*, 05-1969, 2010 WL 3952006 at *10 (E.D.La. Aug. 3, 2010).

Contrary to McNeese's claim that it has no burden, the burden then shifts to the opposing party to point out which entries it contests, explain why each is not reasonable in sufficient detail to allow the prevailing party the opportunity to respond, and propose a more reasonable amount. *Bell v. United Princeton Props*, 884 F.2d 713, 720 (3rd Cir. 1989) ("the adverse party's submissions cannot merely allege in general terms that the time spent was excessive.") Moreover, a court cannot decrease a fee award based on factors not raised by the adverse party. *Id. See also ADA Practice & Compliance Manual* § 4:206. As Louisiana Courts have explained:

> the Court charged the Hornets with identifying on a line-by-line basis every time entry with which the Hornets took exception. For, if it is impossible for counsel who are most familiar with the litigation to suggest what is improperly charged time and why that is, in fact the case, the Court is in no better position to second-guess what counsel are seeking [to have reduced] in fees.

Liger v. New Orleans Hornets, 05-1969, 2010 WL 3952006 at *10 (E.D.La. Aug. 3, 2010).

In *Riddell v. N'tl Democratic Party*, 545 F.Supp. 252, 260 (D.C.Miss.1982), *hours aff'd* at 624 F.2d 539 (5th Cir.1980), a federal Fifth Circuit district court noted that a fee opponent must take seriously his obligation to examine and dispute time and may not simply make a "blunderbuss" attack on his opponent:

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attorney" and attorneys are expected to have only "some fairly definite information as to the hours devoted to various general activities" so that the court will understand "the nature of the services for which compensation is sought.")

[18] *See also La. Power & Light v. Kellstrom,* 50 F.3d 319, 324 (5th Cir. 1995). ("[f]ailing to provide contemporaneous billing statements does not preclude an award of fees per se, as long as the evidence produced is adequate to determine reasonable hours.")

> Counsel opposite failed to assist the Court in any manner with their "blunderbuss" attack which stated no more than that the hours claimed were excessive. This type of objection to a fee application is wholly insufficient.

McNeese had every opportunity to gather facts and argue its burden. It was granted "overly broad" discovery into every aspect of Covington's counsel's personal and professional life, deposed Hopkins and his four experts, and spent $350 per hour for its own expert (who submitted no report) to examine the record and files. At the six day attorney's fee trial, McNeese presented no witnesses or reports and directly challenged only two entries representing 16.4 hours of work,[19] ***expressly waiving objection*** to the rest.[20] On appeal, it complained about only one of those entries, yet now seeks writs to have them all denied.

McNeese cites the *Leroy* case to suggest it never had an obligation to challenge any time. *Leroy v. Houston*, 906 F.2d 1068, 1079 (5th Cir. 1990). However, in *Leroy,* the plaintiffs failed to meet their initial burden, so the burden never shifted to the defendants. Indeed, the court noted that the time entries were so vague and "cryptic" (n. 19) that it was impossible to question their time, and when they tried, the lawyers admitted that they could not understand their own records, requiring the court to reconstruct them. *Id.*

In contrast, Hopkins submitted timesheets recorded contemporaneously in tenth hour increments with specific and detailed narratives. Significantly, he also removed any hours McNeese questioned—whether justified or not—six weeks prior to trial, answered all questions McNeese posed, no matter how far afield, and satisfied his burden of proving 5,489.5 hours—5,473.1 of them unchallenged.[21]

In a final effort to salvage its case, McNeese tallies Hopkins' time into broad, arbitrary, inaccurate, and unhelpful categories. For instance, it incorrectly claims that he spent 1,000 hours—8 per month—on "research"[22] and 200 hours to prepare a nearly 1,000 page "summary judgment."[23] Importantly, McNeese has never suggested how many hours it believes are appropriate. Assuming, *arguendo*, that McNeese's statements were correct, it is not an abuse of discretion to find this time reasonable, as Louisiana courts routinely award attorneys far more hours for these tasks than McNeese claims Hopkins spent.[24]

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[19] McNeese referred to other entries but asked no questions about the substance of work being performed. The only two entries questioned in any detail were June 1, 2003 and Dec. 9, 2004 (2 R.42:10500-43:10507; 10512-13).

[20] "MR. VERON: ... let us go through cross and then let them respond only to the objections we've raised rather than try to anticipate things that we probably won't go into. Our actual list on cross may not be nearly as long as they're trying to defend." (2 R.41:10233).

[21] In total, Covington's six attorneys established that they earned more than 6,500 hours.

[22] This number fluctuates with each of McNeese's briefs, further illustrating its unreliability. (*See* response, 2R.43:10730-32),

[23] This includes exhibits and Covington's first injunction and fee application. (2 R. 43:10775-76). McNeese required a ***full year to research and respond*** to what it now calls a "simple" summary judgment as it complains about the 26 days Hopkins spent drafting it.

[24] One Louisiana court was faced with a 103.25 hour bill at rates between $575 and $1,075 for partners to review a 10 page reply brief, 1,098 hours to draft a summary judgment on the single issue of *res judicata*, and 128 hours preparing for oral argument on the *res judicata* motion. The court reduced this by only 30%. *Oreck Direct v. Dyson*, 2009 WL 961276 (E.D.La. April 7, 2009).

C. McNeese Misstated the Standard for Denying Attorney's Fees *(response to Writ pages 5-13)*

Having failed to challenge Hopkins' hours, McNeese implausibly asserts that they should **all** be denied. Not only did McNeese judicially confess to the contrary, but it now fails to even cite the correct standard to support this outrageous position. (2 R. 24:5812, 15). Attorney's fees are never denied outright, except in rare and exceptional circumstances in which a fee award would be unjust[25] and where a lawyer's conduct "shocks the conscience." *Scham v. District Courts Trying Criminal Cases,* 148 F.3d 554 (5th Cir.1988).

Ignoring this high burden, McNeese tries to compare *Covington* with several inapposite cases. In the *Scham* case, a lawyer worked for less than a year, failed to prevail on any federal issue, provided no supporting affidavit or timesheets, made no court appearances, did not dispute any facts, and demanded $624,000 in fees. When the trial court offered him the opportunity to resubmit his application, he contemptuously demanded $20 million and was denied fees completely. For McNeese to suggest these circumstances resemble the *Covington* facts is a sanctionable misrepresentation to this Court. (*See* 2 R. 31:7672-73).

Likewise, McNeese cites *Brown v. Stacker,* a case involving a lawyer who demanded 800 hours to prepare a six page complaint. 612 F.2d 1057 (7th Cir. 1980). In the *No Barriers* case, a defendant sought sanctions against a plaintiff, a very different circumstance with a higher burden and in which courts generally award minimal or no fees. *No Barriers, Inc. v. Brinker Chili's Texas, Inc.,* 262 F.3d 496 (5th Cir. 2001). In the *Fair Housing Council* case, a plaintiff lost almost every part of trial, demanded $537,113 in fees, and submitted timesheets lacking any detail (*i.e.* "document production"). *Fair Housing Council of Greater Wa. v. Landow,* 999 F.2d 92, 98 (4th Cir. 1993). In the *Lewis* case, a plaintiff was denied fees for achieving minimal results with extremely poor trial performance. *Lewis v. Kendrick* 944 F.2d 949, 958 (1st Cir. 1991). These cases cannot be used to support a finding of abuse of discretion. Indeed, the lower courts held that it was McNeese's conduct in making this argument which "shocks the conscience." (Ruling, p. 11).

D. McNeese Misrepresented the Facts in an Effort to Avoid Paying Attorney's Fees *(response to Writ pages 6-8 and 17-19)*

In order to manufacture complaints about Hopkins' records, McNeese blatantly misstates the facts and dishonestly accuses him of submitting a "falsified" fee application, failing to keep contemporaneous records, and "reconstructing" time. The record reflects the opposite.

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[25] *Mendez v. County. of San Bernardino,* 540 F.3d 1109, 1125 (9th Cir. 2008) which holds that the "special circumstances" exception to deny attorney's fees is extremely narrow. ("We have firmly rejected the district court's authority to refuse a reasonable fee under the 'special circumstances' exception simply because it believes it 'would result in a windfall' to a plaintiff. 'Granting a windfall to plaintiffs was a concern echoed by Congress in enacting Section 1988, but Congress balanced that concern against the need to attract competent counsel to prosecute civil rights cases.'")

On April 23, 2010, Covington represented to the trial court that she would submit her 1,072 page Attorney's Fee Application and exhibits within two weeks. Faced with this deadline, the attorneys printed their time records and advised that they would audit and amend if necessary prior to trial. This is a common practice, and last year, the federal Fifth Circuit noted in the *McClain* case that one counsel made a "self-adjustment" of 3,000 hours, which his opponent welcomed rather than opposed.[26]

1. McNeese manufactured its "24 hour" and "duplicative and excessive billing" attacks to avoid paying attorney's fees *(response to Writ pages 6-8 & 17-19)*

In the months prior to trial, Hopkins reviewed 55 boxes of printed documents and 17,684 electronic files (2 R. 34:8400) and compared tens of thousands of time-stamped notes, letters, photos, filings, drafts, transcripts, logs, receipts, emails, memos, and other records to substantiate nearly ***each entry*** with a specific piece of physical work product which could be tracked to that day. (2 R.43:10616-19). The audit confirmed each hour and even identified hundreds of work product items never billed.[27]

Hopkins also provided McNeese with unprecedented access to his records and answered "overly broad" discovery demanding files from "***each and every case*** in which Seth Hopkins was counsel of record" and "***any and all*** billing by Seth Hopkins to ***any other client***" for 10 years. Three months prior to trial, he even acquired and produced 10,000 hours[28] of raw time data from Kasowitz, Benson, Torres & Friedman ("Kasowitz"), a Houston firm where he worked to support himself while prosecuting this case.[29]

However, both Hopkins and Kasowitz explained to McNeese that the Kasowitz data was not relevant in *Covington.* For instance, the Kasowitz data was a series of raw numbers with no descriptions, client information, or other context and not subject to audit or verification. It also had peculiarities such as a requirement that each day show a ***minimum of eight hours whether the time was worked or not***.[30]

Kasowitz attorney Robert Breen and Hopkins further testified that while the Kasowitz data was generally accurate, the daily numbers were not always reliable because firm attorneys worked long, arduous

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[26] *McClain v. Lufkin Industries*, 649 F.3d 374, 379-82 (5th Cir. 2011), *affirming* 2009 WL 921436 (E.D. Tex. Apr. 2, 2009). *See also, Hutchinson v. Patrick*, 683 F.Supp.2d 121, 128-129 (D.Mass.2010), *aff'd at* 636 F.3d 1, 13 (1st Cir. 2011). (attorneys were "eminently fair" and showed "laudable restraint" by reducing $1.1 million fee to $780,000 after three years of Title II ADA work.

[27] Hopkins testified he has 118 items of substantive unbilled work product from 2001-2004 alone and hundreds more from subsequent years. Further, he never billed for services such as going with Covington on her first day of school or handling administrative tasks such as entering or auditing time. (2 R. 43:10727-29; 43:10671-77; 10740).

[28] The Kasowitz data established that Hopkins worked for the firm between 110 and 295 hours per month depending on what was taking place in *Covington* and used his personal and vacation days to represent his indigent client. (2 R. 44:10766-70; 10049).

[29] Hopkins was forced to thwart an unscheduled and unlawful clandestine plot by McNeese to acquire his medical records, personnel evaluations, and other privileged and confidential documents from his former employer.

[30] (2 R.42:10263; 44:10740). Kasowitz asserted that its daily records were not relevant in *Covington* in part because time was adjusted to show a minimum of eight hours per day, as explained by the business records affidavit McNeese used to introduce the Kasowitz records. ("***the daily hour totals starting in 2007 do not necessarily reflect work billed to either a KBTF matter or administrative file requiring Hopkins' attention to KBTF matters***.") (2 R. 35:8559).

hours with "informal" timekeeping rules[31] due to the firm's flat-fee billing arrangements with its clients, its internal policies, and the nature of its work (2 R.41:10009-11; 42:10256). For instance, they testified that they often traveled and were unable to access the firm's billing software—at one point for four straight months. (2 R. 42:10256; 44:10816). Moreover, because Hopkins worked on *Covington* at the firm, the Kasowitz data often duplicated the *Covington* records. (2 R.41:10054-55; 10012-13; 40:9992-95).

Finally, Hopkins explained that during a few periods of intense and sustained work in the last 10 years and after disruptive events such as Hurricane Ike, he occasionally consolidated several days of *Covington* time into one entry. McNeese was aware of this, yet attempted to add the raw Kasowitz data daily time totals to the Covington daily totals to manufacture the appearance of an average of three clerical errors per year between the records. Though this was clearly a desperate ploy, Hopkins still agreed to eliminate these entries—affecting ***1.5% of the 16,000*** combined hours and provided McNeese with courtesy copies of his revisions "within days."[32] At one point, McNeese's counsel was satisfied with this,[33] yet when Hopkins submitted a draft of his amended time to McNeese six weeks prior to trial, its counsel angrily complained on the record because Hopkins' good faith efforts would make it harder to personally attack him at trial. (2 R. 32:7999-8000).

2. In a "Demonstration of Good Faith and Fair Dealing," Hopkins Reduced 10 Times More Hours than McNeese Opposed, yet McNeese Still Misrepresents the Award Being Appealed *(response to Writ pages 5-13 & 17-19)*

Six weeks prior to trial, in a "demonstration of good faith and fair dealing," (Ruling, p. 11-12) Hopkins eliminated not only the 1.5% of earned time questioned, but also another **15%—710 hours**—to satisfy each of McNeese's anticipated complaints, leaving no basis for it to challenge a single entry.[34] Thus, he removed ***10 times*** the hours McNeese questioned. At trial, Hopkins patiently offered to explain each entry with "absolute certainty," but McNeese insisted that was unnecessary. (2R.44:10779-82;10800-02; 43:10743-46; 24:5874-78).

Hopkins still illustrated his detailed audit process by introducing a sample email sent to co-counsel Lee Archer at 6:24 a.m. June 24, 2008, in which he stated, "Sadly, I'm still up" and attached a copy of the brief he spent the night drafting. Two hours later, he walked the four blocks from his home to Kasowitz for a day's

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[31] Breen testified that Kasowitz attorneys had "informal" billing rules and frequent all-night projects where days would overlap (2 R.40:9986-87; 41:10013-14) and that because of the nature of their work, they logged all time at the office, even while on breaks (2 R.40:10003-4). Hopkins testified that billing was "informal" (2 R.41:10049-50) and that, "[t]here was some entries that didn't necessarily collate [correlate] to files...some entries in their billing system that might be for sort of block projects that wouldn't collate [correlate] to a particular client or a particular file" (2 R.42:10257).

[32] Hopkins testified at trial, "I've corrected that. I've done what any lawyer would be expected to do, and I did it reasonably promptly, within days of finding the errors, and I let you guys know and I let the court know." (2 R. 42:10349) and "as a professional courtesy, I was giving you guys the changes as we were making them, rather than dumping it on you at the end." (2 R. 42:10301; 44:10759).

[33] "MR. PALERMO: obviously, if there is more than 24 hours in a day, I'm sure he wants to reduce that amount." (2 R. 25:6017-18).

[34] For instance, he reduced 100 hours pertaining to McNeese's retaliation and conversations with the U.S. DOJ. (2 R. 44:10759-60).

work. Hopkins identified ***90 more emails—***20 between midnight and 6 a.m.—sent to Ms. Archer that month alone. (2 R.35:8718; 44:10782-86). This physical, time-stamped evidence illustrated the sacrifices Hopkins made for his indigent client and proved that he worked at least 18 hours per day between *Covington* and his firm for 20 of the 30 days in June, 2008. He offered to submit hundreds of exhibits of day-by-day physical evidence to substantiate each of his 5,489.5 hours of entries. This alarmed McNeese and the court, who again stated this was unnecessary, as Hopkins had proven his time "beyond a reasonable doubt." (2 R. 43:10636).

In contrast to Hopkins' detailed and substantiated offers of proof, McNeese spent the six day trial "offering nothing to rebut his reasonable explanation, except. . . insinuations followed by verbal cries of dishonesty and like attacks on young Hopkins' character." (Ruling, p. 11). It failed to take the trial seriously and—almost comically—pretended the amended timesheets did not exist and refused to address the records before the court, challenging only a few entries—which had been removed six weeks earlier.(2R.43:10758-59).

Even now, McNeese falsely claims on page six of its writ application, "there are twenty-one (21) separate days on which Counsel worked more than 24 hours in a day." This is untrue, and McNeese has misrepresented that Covington's counsel was awarded more than 24 hours in a day in an effort to secure writs. In fact, Covington's counsel requested an average of only 1.2 hours per day in a case so important that he left a federal clerkship and devoted his career to pursuing it.

3. McNeese Exploits Hopkins' Settlement Offers by Making a New Argument Falsely Accusing Him of "reconstructing records" and Submitting "conflicting affidavits" *(response to Writ pages 8-12)*

On pages 8-12 of its writ application, McNeese presents several "charts" to attack 8% of Hopkins' time by manufacturing false, abandoned, and insulting inferences regarding an unsworn 2006 fee compromise offer.

In 2005, McNeese claimed it lacked funds for ADA compliance. Sensitive to this and simply wanting his client to have the opportunity to obtain an education, Hopkins offered to **waive** his fees and help McNeese upgrade the Old Ranch restroom so that Covington could attend college in her wheelchair. He hoped this generous offer would end this litigation and encourage McNeese to voluntarily accommodate Covington. (42:10385-86, 89-90, 95-96; 43:10549-50).

When this failed, Hopkins was forced to file for summary judgment, injunction, and attorney's fees, which he hoped might "speed those negotiations along" and resolve the case without undue expense. (2 R. 42:10395). Still in the midst of negotiation, and upon McNeese's request, he sought only about half of his earned hours and attached the January, 2006 document which is the subject of McNeese's four "charts." This document requested only 553 hours and was clearly the product of negotiations, as it had **no** accompanying

affidavit, **no** affidavit of reasonableness, was not sworn or verified, not in a proper form to be considered by the court, and did not indicate that it was a complete record. Hopkins was aware that if McNeese hurried and spent the $4,000 required to update its Old Ranch restroom into ADA compliance before Covington received an injunction, he might receive no fees under *Buckhannon Board & Care Home v. West Virginia,* 532 U.S. 598 (2001). He accepted this risk because he was more concerned with encouraging McNeese to voluntarily accommodate Covington than he was with being paid, a fact that was discussed in open court. (1 R.8:p.72).

In 2006, the tone of the litigation changed. McNeese sought a year of continuances to delay Covington's summary judgment, retaliated against her, and made her unwelcome on campus. (2 R. 2:361). Hopkins still attempted to compromise with McNeese but became disillusioned by its conduct and wrote on July 14, 2006, that he would be forced to press forward and seek his full fees. (2 R. 2:260-61). One month later, he wrote again and advised that he was going to submit his full time to the court. (2 R. 2:263; 40:9821-23).

Five months later, Hopkins was forced to litigate and submitted a more complete but still understated request for 1,395 hours of work "over the course of 70 months," supported by an affidavit of reasonableness from attorney expert Edward Fonti. (1 R. 5:1180). McNeese raised no substantive objection to these hours or fees, and the trial court was prepared to award Hopkins **$270.052.74** on December 14, 2006.[35] Three days later, during a recess, McNeese pleaded with Hopkins for more time to accommodate Covington and filed numerous exceptions—during the middle of oral argument—to further delay the case.[36] Hopkins agreed on the record one last time to ***sacrifice*** $270,052 in fees to make things "more manageable" for McNeese and to give it more time to voluntarily accommodate Covington before being cast in judgment. (1 R. 8:82, 136). Instead, McNeese litigated for another three years, and Hopkins withdrew his fee compromise offer.

Thus, the January, 2006 offer for 533 hours referenced by McNeese's four "charts" differs from the 2010 records because McNeese violated the parties' agreement and lost the benefit of having these hours voluntarily removed—**not** because Hopkins "threw away" records and "was forced to reconstruct his time" or engaged in an "unilateral ex post facto increase of nearly 100% in the number of hours he allegedly expended" or because hours "miraculously appeared" as McNeese outrageously alleges on page 9 of its Writ Application.

Amazingly, McNeese admits that it fabricated these accusations and faults Hopkins for not "explaining" the 2006 document at trial. But McNeese is well-aware that it loudly objected when Hopkins testified about this history and insisted that the earlier fee compromise offers were "irrelevant"—just as it now insists that the "merits of this case are irrelevant." After abandoning any argument about this January, 2006

[35] 1 R. Vol. 8, page 72 of the summary judgment hearing transcript.

[36] McNeese filed its summary judgment response Nov.14, 2006. (1 R. 4:959-5:1053). Oral arguments began Dec. 14, 2006, and the trial court ruled he was prepared to award the unopposed $270,052 in fees once court reconvened. (1 R. Vol. 8, p. 82). On Dec. 18, 2006, McNeese filed a Dilatory Exception of Unauthorized Use of Summary Judgment (1 R. 5:1205-08).

document at trial and on appeal, McNeese raised this issue for the first time in its appellant ***reply brief***—from which Covington had no certain opportunity to respond. Understandably, this raised the appellate court's ire.

If this argument is important enough to become the centerpiece of McNeese's writ application, why was it never presented at trial? There is only one conclusion—McNeese's counsel intended to wait until now to manufacture its own facts regarding this document and then blame the lower courts for not adopting an outrageous hypothesis that it neither presented to them nor has any evidence to support. This type of conduct is why the lower courts became so angry with McNeese, and it should subject McNeese to extreme sanctions.

4. Hopkins's Time Was Detailed and Contemporaneously Recorded *(response to Writ pages 6-9)*

Next, McNeese falsely and repeatedly asserts that Hopkins "did not maintain billing records," "did not retain copies of his timesheets," and "failed to provide any contemporaneous billing records" simply because he discarded his scratch pads after recording time from them into his computer. This argument is hard to follow. Hopkins testified that for 10 years he ***immediately*** wrote his time on a scratchpad and transcribed these notes into his computer within "two or three days." (2 R. 43:10742-43; 10746; 42:10440-43). McNeese fails to explain what could be more contemporaneous or why an attorney should keep scratch pads once they are no longer needed. With respect to McNeese's claim about a lack of detail, McNeese cannot identify a ***single*** instance of a vague entry and has already recanted this accusation once before.

5. Covington Reasonably Defended Against McNeese's Motion to Recuse the Trial Judge of Nine Years *(response to Writ page 15)*

McNeese next argues Covington should not be paid to oppose its six month effort to recuse the trial judge, which it filed hours before her hearings on six motions to compel and $13.8 million injunction. The trial court aggressively questioned Hopkins and agreed that he acted in his client's best interest by opposing the recusal at such a crucial phase. (2 R. 43:10543-48; 10587; 44:10802-03). Moreover, the U.S. Supreme Court holds that when a party has a good overall result, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." [37] Furthermore, Covington's counsel already eliminated twice as many earned hours as McNeese complains about in its writ application.

[37] *Hensley*, 461 U.S. at 435. *See also, Baker v. Windsor Republic Doors*, 414 Fed. Appx. 764, 769, 781 (6th Cir. 2011), where the plaintiff lost 50% of his claims but the Court still awarded full fees and enhanced by 120%, holding, "because the plaintiff still obtained exactly the relief he sought, even after the district court's partial grant of Windsor Republic's motion for judgment as a matter of law, we cannot say that the district judge abused his discretion in denying the defendant's request to reduce the attorneys' fees awarded the plaintiff."). *See also, Goff v. John Hancock Mutual Life Insurance*, 497 So.2d 747 (La.App. 3 Cir. 11/5/86); 85-957.

III. RESPONSE TO McNEESE'S SECOND ARGUMENT: THE FEE AWARD IS SIGNIFICANTLY LOWER THAN THOSE AWARDED IN COMPARABLE CASES BASED ON COVINGTON'S COUNSEL'S SUCCESS *(Response to Writ pages 13-15)*

A. McNeese's claim reflects its fundamental misunderstanding of civil rights litigation

McNeese complains that Covington's counsel's fee award is somehow unreasonable because it is three times Covington's cash recovery. This not only fails to account for the $13.8 million injunction, scholarship, and other benefits to Covington and society as a whole, but it reflects McNeese's fundamental misunderstanding of how civil rights litigation works. In *City of Riverside v. Rivera*, 477 U.S. 561, 564 (1986), the U.S. Supreme Court held that it expected attorney's fees to eclipse a client's recovery in civil rights cases because such suits are filed to vindicate rights, not recover monetary damages:

> Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms . . . Congress has determined that, 'the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in Section 1988, over and above the value of a civil rights remedy to a particular plaintiff.'[38]

Indeed, Covington's counsel's fee request is modest compared to the extraordinary results they achieved, and there are hundreds of civil rights cases where attorneys received at least 30 times—and some exceeding **40 times** a client's recovery.[39] The most analogous case is another landmark Title II ADA case, *Gaskin v. Pennsylvania*, 389 F.Supp.2d 628 (E.D.Pa. 2005), which settled for $350,000 in compensatory damages after 11 years. The State of Pennsylvania volunteered to pay **compromise** attorney's fees of $1,825,000—5.2 times the client recovery. In contrast, McNeese argues that Covington's $400,000 ADA settlement and $13.8 million injunction merits ***no fees*** after nearly 12 years of litigation, and it appeals a hard-fought fee award that is significantly less than most states would settle for if given the opportunity.

B. McNeese judicially admitted on April 23, 2010 that Covington's counsel's work securing a $13.8 million injunction satisfies *Buckhannon*, but now claims otherwise

After the Third Circuit pointed out that McNeese, "neither urges nor could it rely on the 'catalyst theory'" under *Buckhannon*, 532 U.S. 598 (2001) (Ruling, p. 11), McNeese raised this issue (for the first time) in its writ application. First, McNeese claims that there is "no alteration of the legal relationship of the parties" sufficient for Covington to seek fees. Yet McNeese's own words betray it, as it signed a Consent Injunction with Covington on April 23, 2010 in which it judicially admitted: "The parties stipulate that **there has been an**

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[38] In *Blanchard v. Bergeron*, 489 U.S. 87 (1989), the U.S. Supreme Court again stated this important policy in holding that a contingency agreement between a prevailing plaintiff and his attorney may not be used to limit a fee in a civil rights case.

[39] *See also Humphries v. Powder Mill*, 35 A.3d 1177, 1193-96 (N.J.2012) (ADA case awarding $97,706 fees for $2,500 recovery (40 to 1 ratio)); *Wyatt v. Ralphs Grocery*, 65 Fed. Appx. 589 (9th Cir.2003) (ADA case—32 to 1 ratio); *Small v. Dellis*, 211 F.3d 1265 (D.Md. Apr. 25, 2000) (ADA case—4.5 to 1 ratio); *Smith v. State*, 2003-1450, p. 10 (La. App. 3 Cir. 4/28/04); 872 So.2d 594, 601, *rev'd. on other grounds* (5.2 to 1 ratio); and *Liger v. New Orleans Hornets*, Civ. No. 05-1969, 2010 WL 3951506 (Oct. 6, 2010), *aff. fees from* Civ. No. 05-1969, 2010 WL 3952006 (Aug. 3, 2010) (2.5 to 1 ratio).

alteration in the legal relationship of the parties thus establishing that Covington is a prevailing party under the ADA with standing to seek attorney's fees." (2 R. 20:4953-54; Exhibit "C").

Next, McNeese alleges that Covington should not recover any fees because she does not benefit from the U.S. DOJ settlement. Yet, once again, on April 23, 2010, McNeese stipulated that Covington has the **independent** right to enforce the $13.8 million U.S. DOJ settlement[40] and that the trial court, "retains jurisdiction to the extent allowed by law to enforce this Injunction until the completion of all renovations required at McNeese under the terms of the U.S. Department of Justice settlement." (2 R. 20:4956). Furthermore, McNeese judicially admitted that "**as a result**" of Covington's counsel's work:

> [t]he Defendants will expend a substantial sum of money to bring the McNeese campus into compliance with the ADA **for the benefit of Covington** and other disabled students. **The parties stipulate that Covington's actions have and will result in substantial changes both to the facilities at McNeese and McNeese's policies toward the disabled**.

(2 R. 20:4953-56 at 4954; Exhibit "C").

Clearly, even McNeese admitted that its actions were not voluntary, that Covington's counsel's work resulted in the injunction, and that this "benefitted" Covington. If this were not enough, McNeese further agreed that the $13.8 million injunction secured "permanent, enforceable rights in connection with this case **which are specific to Covington**." *Id.* at 4954; (Exhibit "C"). This admission could not be more clear.

Even the U.S. DOJ acknowledged the role Covington's counsel had in its settlement with McNeese, and then went further to take the astonishing step of squarely identifying McNeese's own lawyers' unreasonable positions in *Covington* as the cause of its investigation in the first place:

> The United States initiated an investigation of the university ***after the state attorney general's office took the position*** – in private ADA litigation against the campus – that it was not required to have an accessible toilet room in its primary student union building.

(Exhibit "D"; 2 R. 35:8706-17 at 8713; and http://justice.gov/opa/pr/2010/September/10-crt-1014.html).

McNeese next hypothesizes that Covington's counsel "expended substantial amounts of time on activities not remotely related to his clients ultimate success." Yet McNeese has never identified a single such example and now complains about only 144 hours of campus inspections, which McNeese disputes solely because Covington's settlement supposedly provides for "no continued monitoring" of McNeese's compliance. (McNeese Writ, p. 14, fn. 4). But McNeese's own words once again betray it, as there are 14 different monitoring components to the April 23, 2010 Consent Injunction. (2 R. 20:4953-56; Exhibit "C").

Finally, contrary to McNeese's assertions, Covington's settlement is not "modest" and is the largest of its kind in history (see fn. 1). Indeed, the Louisiana Advocacy Center opined:

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[40] McNeese insists that Covington should not recover any fees because her name is not on a government website where the U.S. DOJ settlement is published. (McNeese writ, p. 14). But Covington's injunction is in Volume 20 of the record, not on the Internet.

> In our 33 years of advocating for those with disabilities, we find that the results achieved by the Plaintiffs in this case to be truly impressive. We regard this as a landmark Louisiana case, because of the intransigence of the defendants, the extreme dedication and perseverance of the plaintiff's counsel, and the excellent results achieved, not merely for the individual plaintiff, but for all persons with disabilities who use the campus of McNeese State University.

(*See* Covington's Writ Application, Docket No. 2012-C-2231, Exhibit "G", p. 2)

IV. RESPONSE TO McNEESE'S THIRD ARGUMENT: THIS COURT SHOULD GRANT WRITS FOR THE LIMITED PURPOSE OF INCREASING THE LOWER COURTS' ENHANCEMENT FOR THE REASONS PROVIDED IN COVINGTON'S WRIT APPLICATION *(Response to Writ pages 15-17)*

McNeese's third argument is that the Third Circuit's modest 6% enhancement should be reversed. Covington urges the granting of a writ to increase the enhancement. *See* Docket No. 2012-C-2231.

V. RESPONSE TO McNEESE'S FOURTH AND FIFTH ARGUMENTS: THE THIRD CIRCUIT PROPERLY HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REDUCING COVINGTON'S COUNSEL'S HOURS AND RATE *(Response to Writ pages 17-19)*

McNeese's fourth and fifth arguments are that the Third Circuit applied the wrong standard of review in restoring Hopkins' hours. As noted, it is an abuse of discretion to reduce time not questioned by an opposing party and a court must "provide a concise but clear explanation of its reasons" for reducing fees. *Hensley,* 461 U.S. at 437. Indeed, the federal Fifth Circuit Court recently overturned a 25% hour reduction based on a district court's insufficient explanation. *McClain v. Lufkin Indus.*, 342 Fed. Appx. 974, 975 (5th Cir. 2009).

A trial judge is normally afforded deference in setting fees because he has personal knowledge of the case. However, Judge Canaday had presided in this 11 ½ year case for only **two weeks** when the application was filed and **10 months** when he rendered judgment. Moreover, he never indicated how thoroughly he reviewed the 55 volume record and simply accepted McNeese's unsupported accusation that an older attorney would have billed fewer hours. The record not only fails to support this, but directly contradicts it and conclusively establishes that no attorney—no matter how experienced—would have recorded so few hours while accomplishing so much, particularly in a case where the law was still developing. Four metrics support Covington's fee request, and the trial court clearly abused his discretion in inexplicably discounting them.

A. The File and Record Confirms Hopkins Earned In Excess of the 5,489.5 Hours Requested Over 10 Years.

First, an attorney's file, the suit record, and testimony are given great deference in establishing statutory fees. *See Rivet,* 800 So.2d at 782. As noted, Hopkins verified his records against 55 boxes of paper files, 17,684 electronic files, and the second longest civil suit record in Calcasieu Parish. At trial, he offered to introduce hundreds of pieces of day-by-day physical evidence to substantiate each of his 5,489.5 hours of

entries, but both McNeese and the court stated that was unnecessary proof "beyond a reasonable doubt." (2 R. 43:10636). If the trial court had any doubt about the reasonableness of any hours, it should have allowed Hopkins the opportunity to respond, rather than inform him that he met his burden and then later reduce 1,098 unchallenged hours without sufficient explanation.

B. Four Attorneys Submitted Affidavits that Hopkins Earned 6,199.5 Hours but Sought Only 5,489.5 Hours.[41]

Second, the only attorneys in Calcasieu Parish known to have handled an ADA case—all with more than 30 years experience—testified that Hopkins ***underreported*** his time, and a national attorney's fee expert who has evaluated 2,500 fee bills for a living praised Hopkins' efficiency and found he had earned every hour. Significantly, this was **before** Hopkins discounted 710 hours. McNeese stipulated that the court should consider these opinions (2 R. 45:11663-64) and raised no objection when its own expert's deposition testimony was stricken from the record on February 24, 2011. (2 R.39:9636-68). The experts testified as follows.

1. Louisiana ADA Expert Edward Fonti Submitted Two Affidavits and Opined "Approximately 6,000 Hours" Were Required in This Case.

Mr. Fonti, who McNeese's expert conceded is more qualified than he is to handle an ADA case, (2 R.33:8186-88) signed two affidavits of reasonableness—in December, 2006 and May, 2010. He reviewed the record, briefs, and each line-by-line entry and affirmed each of Hopkins's "approximately 6,000" hours:

> The itemized billing summary in this case reflects only services and fees necessary for the prosecution of this case and which I and other practitioners of this area of the law (ADA) might have reasonably charged if in the position of prosecuting this case under the same circumstances.

(2 R. 20:4984-86).

McNeese aggressively deposed Mr. Fonti and personally attacked him for rendering his opinion. Yet Mr. Fonti repeatedly opined, "I didn't find anything inordinate at all," and, in response to Hopkins' 710 hour reduction, "I wouldn't cut anything at all." (2 R. 32:7887-88). Mr. Fonti further testified:

> I read every entry and I looked at the hours next to that entry. . . in my view from the beginning of the case until its culmination with the [3rd] Circuit's opinion, it appeared to me that all of the work described by Seth Hopkins in his entries was time necessary, necessarily devoted to either responding to McNeese's defenses or developing the law that would be needed to argue to prosecute his case. I didn't see anything in there—and there is lots of entries, six thousand hours. I didn't come across anything that caused me to question his time.

(2 R. 32:7884; *see* Exhibit "A").

2. National Attorney's Fee Expert Jonathan Prejean, Who Evaluates Legal Bills for a Living, Opined that 6,000-6,500 Hours Was "Entirely Reasonable."

Mr. Prejean, a Harvard Law graduate who has evaluated 2,500 legal bills from global firms, followed

[41] For a more detailed discussion, see 2 R. 31:7644-61.

this case from its inception. He reviewed the record, praised Hopkins' "lean staffing," traveled 740 miles round trip to testify that Hopkins's time was reasonable and that his work habits allowed him to "produce long stretches of sustained and productive activity" (2 R.40:9942-43, 62-64,71) and swore in his affidavit:

> Based on my review of the complexity and detail of the *Covington* case and particularly the requirements for extensive expert testimony, appeals, and contested motions, I consider this case to reach a level of complexity that rivals other complex litigation like patent litigation. I consider 6000-6500 hours of attorney time entirely reasonable for such a case. I have also reviewed the billing summary for this case, and the billing entries appear to reflect reasonable tasks to be performed personally by an experienced attorney.

(2 R. 20:4987-94; *See* Covington's Writ Application, Docket No. 2012-C-2231, Exhibit "E").

3. Former Southwest Louisiana Bar Association President and Current Member of the Louisiana Bar Association Board of Governors Winfield Little Opined that 6,000 hours is Consistent With Local Billing Practices.

Mr. Little, an unpaid expert with 36 years of experience and one of only two or three local attorneys who has ever handled an ADA case, opined, "I consider it completely reasonable and consistent with local billing practices for a case of this length and impact to require 6,000 or more hours of billable time to prosecute." (2 R. 20:4958-60; *See* Exhibit "B").

4. Louisiana Bar Association Distinguished Attorney of 2007 Thomas Lorenzi Opined "6,000-6,500 or More Hours of Billable Time" Was Reasonable in this Case.

Mr. Lorenzi has handled many fee shifting cases in his 35 year practice, including "one of the few Title II ADA cases that I am aware of in Southwest Louisiana." He opined, "I consider it completely reasonable and consistent with local billing practices for a case of this length and impact to require 6,000-6,500 or more hours of billable time to prosecute during the last nine years." (2 R. 20:4977-83; *See* Covington's Writ Application, Docket No. 2012-C-2231, Exhibit "F").

The trial court abused its discretion in reducing 1,097.9 hours based on its unexplained opinion that Hopkins was not as efficient as older attorneys, when the parish's three most experienced ADA attorneys and a national fee expert opined he earned up to 6,500 hours—not the 5,489.5 sought or the 4,391.6 awarded.

C. The Case Law Suggests Hopkins Eared Far More Hours Than He Sought

Third, to further establish that the trial court's reduction was an objective abuse of discretion, Covington's counsel compared their 560 hour per year timesheets and $265 rate with similar cases within 200 miles of Lake Charles[42] and discovered that their "minimal" award was, indeed, far less than is customarily awarded, in terms of the hours requested per year, the hourly rate, and the total fee award:

[42] The *Perdue* case was filed in Atlanta but is included because it is a seminal fee-shifting case. The *Gaskin* case was filed in Pennsylvania but is included because it is the most analogous ADA case in the nation.

Case	Total Hours/ Hours Per Year	Lead Counsel Hourly Rate	Fee Award
"Buddy" Caldwell, Attorney General ex rel. State v. Janssen Pharmaceutical, 11-1184 & 11-1185 (La. App. 3 Cir. 8/31/12), -- So.3d--	None provided	None provided	$70,000,000 (Louisiana)
Perdue v. Kenny A., 130 S.Ct.1662 (2010).	30,000 (8,571 per year)	$495 (base) $866 (enhanced)	$6,000,000 (base) $10,500,000
McClain v. Lufkin Industries, U.S. Dist. LEXIS 27983 (E.D. Tex. Apr. 2, 2009), *hours affirmed at* 649 F.3d 374 (5th Cir.2011).	11,850 (987 per year)	$400 (local) $650 (national)	$4,740,195 (120 miles from Calcasieu Parish)
Altier v. Worley Catastrophe Response, 2012 WL 161824 (E.D.La. Jan. 18, 2012).	5,452 (5,452 per year)	$400 (base) $868 (enhanced)	est. $4,732,336 (Louisiana)
Corbello v. Iowa Prod., 2001-567, p. 27 (La. App. 3 Cir.12/26/01); 806 So. 2d 32, 51, *fees aff'd*, 2002-826 (La.2/25/03), 850 So.2d 686.	4,970 (621 per year)	$805	$4,000,000 (Calcasieu Parish)
Gaskin v. Pennsylvania, 389 F.Supp.2d 628 (E.D.Pa. Sept. 16, 2005)	Title II ADA case settled--unknown	Title II ADA case settled-unknown	$1,825,000 (settled case)
Vela v. Plaquemines Parish Gov't, 2000-2221, p. 24-25, 28 (La. App. 4 Cir. 3/13/02); 811 So. 2d 1263, 1279, 1281, *writ denied*.	3,800 (543 per year)	$600 (enhanced)	$1,500,000 (Louisiana)
Liger v. New Orleans Hornets, 05-1969, 2010 WL 3951506 (Oct. 6, 2010), *affirming fees from* 2010 WL 3952006 (Aug. 3, 2010).	3,528.8 (1,176 per year)	$400	$1,303,788.25 (Louisiana)
Thompson v. Connick, 553 F.3d 836 (5th Cir. 2008), *rev'd on other grounds*	3,800 (950 per year)	$450	$1,166,177.45 (Louisiana)
Rohrer v. Astrue, No. 06-1242, 2009 WL 173829 at *5 and fn.4 (W.D.La. Dec. 7, 2009)		$265 (base) $530 (enhanced)	(Calcasieu parish)

The average comparable case resulted in an award of 957 hours per year. Covington's counsel sought **half** of this—560 hours per year. Likewise, the average enhanced rate was $646 per hour. The trial court awarded Covington's counsel **$406 per hour less** than the average rate in comparable cases, and the Third Circuit restored a rate that is still **$381 per hour less** than this average. Clearly, the Third Circuit's award is modest, and the trial court's award was unquestionably an abuse of discretion.

D. Covington's Counsel Worked Four Times More Efficiently than McNeese's Counsel

As a final "test" of their hours, Covington's counsel compared their records against McNeese's. McNeese failed to produce records for three of its lawyers and submitted timesheets which, though heavily redacted, still exposed glaring errors, such as missing time on eight of the 13 court dates (reflecting 24 lawyer-days of trial work). Even these incomplete records revealed that McNeese's lawyers—who had no burdens and litigated a $4,000 request into a $16 million liability—spent at least three hours (and more likely six) for every page they filed into the record. Hopkins sought only 0.67 hours for every page he filed to win this "landmark" case. Clearly, it was an abuse of discretion for the trial court to conclude—without any factual support—that

unpaid Hopkins was not as efficient as more experienced attorneys, when he was objectively at least **four times** as efficient as McNeese's paid lawyers and achieved far greater results.

VI. RESPONSE TO McNEESE'S SIXTH ARGUMENT: THE THIRD CIRCUIT PROPERLY AWARDED A MODEST BASE RATE OF $265 PER HOUR FOR THE LAKE CHARLES COMMUNITY BUT ERRED IN NOT ENHANCING IT AS PROVIDED IN COVINGTON'S WRIT APPLICATION *(Response to Writ, pp. 19-20)*

In its last assignment of error, McNeese manages to appeal the wrong rate, insisting that Covington was awarded $260 per hour.[43] In fact, the Third Circuit awarded $265, which the four experts uniformly opined was the lowest reasonable base rate in Lake Charles and is far lower than Hopkins and most of the experts charge their promptly paying clients. *See Carson v. Billings Police Dep't,* 470 F.3d 889, 892 (9th Cir. 2006).

McNeese argues that the lower courts should have relied only on its three cases, which were either 15-years-old or clearly distinguished. Its only recent case involved a defendant seeking sanctions for frivolous appeal using a standard contract rate for volume work. This was clearly inapposite; as such rates are always lower than those awarded to prevailing plaintiffs in highly contingent cases.

As the table on the previous page demonstrates, Covington submitted a dozen cases with recent, relevant, and local rates—all of which exceeded $400 per hour. Yet Covington's counsel sought the more modest $265 rate that every expert agreed was low for Lake Charles. The trial court completely discounted all of Covington's cases and expert testimony and awarded an unsupported rate, which was clearly an abuse of discretion. The Third Circuit simply reinstated the lowest possible rate supported by the case law and evidence.

CONCLUSION

In a final effort to prolong this 11 ½ year case and avoid its statutory duty to pay attorney's fees, McNeese has launched another series of false attacks on its opposing counsel and demanded that this Court devote precious judicial resources to reviewing one of the largest and most thoroughly examined records in state history. Many of McNeese's arguments are brand new—having never been made in any lower court. Others have been so thoroughly disproven that McNeese was nearly sanctioned for making them. The Third Circuit acknowledged that its "minimal remedy" was the lowest possible award supported by the evidence. If this Court is inclined to grant writs, it should be to increase Covington's fee award for the reasons provided in Covington's Writ Application, Docket No. 2012-C-2231—not to re-litigate a six-day trial during which McNeese could not substantiate the claims it now makes. Thus, Covington respectfully requests that this Court DENY McNeese's Writ Application.

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[43] After making such an egregious error in its Writ Application, it is ironic that McNeese insists Covington's counsel should be awarded nothing based on the appearance of three *de minimis* and corrected clerical errors per year in his timesheets.

Respectfully submitted,

_____/s/ Seth Hopkins_____

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Opposition to McNeese's Writ Application has been served upon (or filed with) the following counsel of record and lower courts by electronic mail and/or personal delivery and/or depositing same, postage prepaid, in the United States Mail, this 19th day of October, 2012:

Appellate Court:
Louisiana Third Circuit Court of Appeal
P.O. Box 16577
1000 Main Street
Lake Charles, LA 70616

District Court Judge:
The Honorable Michael Canaday
14th Judicial District Court, Calcasieu Parish, Louisiana
1001 Lakeshore Drive
Lake Charles, LA 70601

Counsel for Respondents McNeese State University and the Board of Supervisors for the University of Louisiana System:
Mr. Michael Veron
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On this, the 19th day of October, 2012

_____/s/ Seth Hopkins_____
SETH HOPKINS