No. 10-1268

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Catherine Hutchinson, by her guardian Sandy Julien, et al.,

Plaintiffs-Appellees,

v.

Deval L. Patrick, Governor, et al.,

Defendants-Appellants.

Appeal from Order of the United States District Court
for the District of Massachusetts

BRIEF OF *AMICI CURIAE*,

AARP, CENTER FOR LAW AND EDUCATION, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL CONSUMER LAW CENTER, INC., NATIONAL HEALTH LAW PROGRAM, INC., PUBLIC CITIZEN, INC., THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL DISABILITY RIGHTS NETWORK, INC., PUBLIC JUSTICE, P.C., WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS, MASSACHUSETTS LAW REFORM INSTITUTE, INC., ARC MASSACHUSETTS, INC., AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, DISABILITIES RIGHTS CENTER, INC., DISABILITY LAW CENTER, INC., DISABILITY RIGHTS CENTER, GREATER BOSTON LEGAL SERVICES, INC., LEGAL ASSISTANCE CORPORATION OF CENTRAL MASSACHUSETTS, RHODE ISLAND DISABILITY LAW CENTER, INC., SOUTH COASTAL COUNTIES LEGAL SERVICES, INC., WESTERN MASSACHUSETTS LEGAL SERVICES, INC.

In Support of Plaintiffs-Appellees and Affirmance of the District Court's Order

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Jeffrey S. Follett (First Circuit # 43270)
Brian P. Bialas (First Circuit # 1133816)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
(617) 832-1000

June 1, 2010

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the following Amici Curiae state that they are each non-profit corporations exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, are not publicly held corporations that issue stock, and have no parent corporations:

Arc Massachusetts, Inc.
Center for Law and Education, Inc.
Disabilities Rights Center, Inc.
Disability Law Center, Inc.
Disability Rights Center
Greater Boston Legal Services, Inc.
The Judge David L. Bazelon Center for Mental Health Law
Lawyers' Committee for Civil Rights Under Law
Legal Assistance Corporation of Central Massachusetts
Massachusetts Law Reform Institute, Inc.
National Consumer Law Center, Inc.
National Disability Rights Network, Inc.
National Health Law Program, Inc.
Rhode Island Disability Law Center, Inc.
South Coastal Counties Legal Services, Inc.
Western Massachusetts Legal Services, Inc.
Women's Bar Association of Massachusetts

AARP

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae AARP hereby states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(4) of the Internal Revenue Code, is not a publicly held corporation that issues stock, and has no parent corporations.

American Civil Liberties Union Foundation of Massachusetts

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae American Civil Liberties Union Foundation of Massachusetts states that it is a Massachusetts charitable trust exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and, to the extent that Rule 26.1 applies, it is not a publicly held corporation that issues stock and has no parent corporation.

Public Citizen, Inc.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Public Citizen, Inc. states that it is a non-profit organization that issues no stock and has no parent corporation.

Public Justice, P.C.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Public Justice, P.C. hereby states that it does not issue stock and has no parent corporation. No publicly held corporation owns any of its stock.

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INTEREST OF AMICI CURIAE

Amici Curiae ("Amici"), the groups listed in the Corporate Disclosure Statements, are organizations devoted to the cause of furthering civil rights and the legal rights of vulnerable populations. Amici join here in support of the Plaintiffs to urge affirmance of the District Court's award of attorney's fees because Amici rely on litigation to vindicate these rights. Most cases settle, and therefore it is critically important to Amici and their constituents that fees be available for settlements that are court-approved and over which the district court retains enforcement jurisdiction. Limiting the class of settlements for which fees are available only to consent decrees would undermine the purposes of the fee-shifting statutes by making the prospect of fees, even for the strongest of claims, highly speculative, thereby undermining the financial ability of Amici to undertake such cases and their constituents' ability to obtain legal redress.

Furthermore, such a limitation will make achieving settlements in civil rights cases more difficult. Amici Disability Law Center, Inc., Legal Assistance Corporation of Central Massachusetts, Greater Boston Legal Services, Inc., Massachusetts Law Reform Institute, Inc., South Coastal Counties Legal Services, Inc., and Western Massachusetts Legal Services, Inc. represent that it is the stated policy of the Massachusetts Attorney General's office not to enter into formal

consent decrees in settling cases against the Commonwealth, its officers or agencies.

All parties have consented to the filing of this amicus brief. See Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE

Amici adopt the Statement of the Issue, Statement of the Case, and Statement of the Facts included in Appellees' Brief.

SUMMARY OF ARGUMENT

This brief addresses the District Court's determination that Plaintiffs are "prevailing parties" permitted an award of attorney's fees under 42 U.S.C. § 12205. See App'x Vol. II at 962-81 ("Memorandum and Order Regarding Motion for Attorney Fees and Costs" dated February 8, 2010). The District Court's decision should be affirmed by this Court because the District Court's Order Approving Final Comprehensive Settlement Agreement of September 18, 2008 (the "Order") and the Comprehensive Settlement Agreement ("CSA") contain sufficient "judicial imprimatur" under the law of the Supreme Court, this Court, and most Circuits.

The Congressional purposes behind fee-shifting statutes such as 42 U.S.C. § 12205 are to ensure access to the courts for civil rights plaintiffs and to encourage enforcement of civil rights through private lawsuits. These purposes can only be

promoted if the Supreme Court's standard for judicial imprimatur, as articulated in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), is applied in a flexible manner. Most Circuit Courts, including this one in Aronov v. Napolitano, 562 F.3d 84 (1st Cir. 2009) (en banc), cert. denied, 130 S. Ct. 1137 (2010), have adopted such flexibility.

In considering whether a particular court-approved settlement meets the requisite standard for judicial imprimatur, the majority of Circuit Courts eschew labels and focus on the essentials: namely, whether the district court's order reflects judicial approval of the settlement agreement and continuing oversight to enforce the agreement's binding obligations. Aronov explains that this determination requires consideration of "the content of the order against the entire context before the court." Id. at 92. Viewed in the context of the underlying litigation and the CSA, the level of judicial imprimatur here is more than ample to permit an award of attorney's fees. The Defendants' argument to the contrary is at odds with Aronov and would thwart Congressional intent by discouraging civil rights enforcement actions.

ARGUMENT

I. THIS FEE AWARD FURTHERS THE CONGRESSIONAL PURPOSES OF ENSURING ACCESS TO THE JUDICIAL PROCESS AND ENCOURAGING THE ENFORCEMENT OF CIVIL RIGHTS BY PRIVATE LITIGANTS.

Recently, in interpreting 42 U.S.C. § 1988, this Court ruled on the particularly "difficult" question left open by the Supreme Court of "whether a plaintiff can be deemed a 'prevailing party' in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal." Diffenderfer v. Gomez-Colon, 587 F.3d 445, 454 (1st Cir. 2009) (brackets and quotation omitted). This Court followed the authority of "[n]umerous circuits," determined that, "[i]n the end, this is a question of what Congress would have intended under the circumstances," id. at 454-55, and ruled that the plaintiffs were entitled to an award of attorney's fees, see id. at 454.

As it did in Diffenderfer, the Court should follow Congressional intent and the consensus approach of its sister Circuits by affirming the District Court's award of attorney's fees. Diffenderfer explained that Congress's purposes in creating the civil rights attorney's fees scheme were "to ensure effective access to the judicial process for persons with civil rights grievances and to encourage the enforcement of federal law through lawsuits filed by private persons." Id. at 455 (quotations, internal citations, and brackets omitted). Diffenderfer recognized that awarding attorney's fees to civil rights plaintiffs served these purposes by correcting a defect Congress identified in the market for legal services: many victims of civil rights violations lacked access to the judicial process because they could not afford to purchase legal services at private-market rates and the damages

in most civil rights lawsuits were too low to otherwise cover the cost of a lawyer. Id. Awarding attorney's fees to prevailing civil rights plaintiffs ameliorates this market defect by allowing such plaintiffs—regardless of financial means—to find counsel who may receive payment if their clients prevail.

This Court wrote:

> [t]o hold that mootness of a case pending appeal inherently deprives plaintiffs of their status as 'prevailing parties' would detract from § 1988's purposes. Such a rule could result in disincentives for attorneys to bring civil rights actions when an event outside the parties' control might moot the case after the district court rendered a favorable judgment but before the judgment could be affirmed on appeal. Our solution is our best view of what Congress, in designing the civil rights attorney's fees scheme, would intend.

Id. at 455 (citation omitted) (second emphases added).

Although Diffenderfer interpreted 42 U.S.C. § 1988, the Congressional purposes identified by the Court in that case also are applicable to 42 U.S.C. § 12205 of the Americans with Disabilities Act of 1990 ("ADA"), the statute at issue here. The Supreme Court has held that these "prevailing party" fee-shifting statutes should be interpreted uniformly. See Buckhannon, 532 U.S. at 603 n.4; see also Bercovitch v. Baldwin Sch., Inc., 191 F.3d 8, 11 (1st Cir. 1999) ("Creating a different standard for ADA cases would break the commonly used analogy between the ADA and those other causes of action arising in the discrimination and civil rights areas.").

Accordingly, the Court should proceed here as it did in Diffenderfer and rely on the weight of Circuit authority and overriding Congressional purposes to rule that Plaintiffs are prevailing parties entitled to attorney's fees under 42 U.S.C. § 12205. The Court should avoid creating new "disincentives" for attorneys, and the undersigned Amici, to bring actions to enforce civil rights.

II. BUCKHANNON AUTHORIZES AN AWARD OF ATTORNEY'S FEES WHEN A SETTLEMENT MATERIALLY ALTERS THE LEGAL RELATIONSHIP OF THE PARTIES AND INVOLVES JUDICIAL APPROVAL OF THAT CHANGE.

A. *The Supreme Court in* Buckhannon *recognized that a wide variety of court-approved settlements can provide the bases for attorney's fees awards.*

In Buckhannon, the Supreme Court made clear that fee awards in connection with a settlement would require at least some judicial involvement, but it allowed a flexible assessment of that involvement. The Buckhannon Court rejected the "catalyst theory," which treats a plaintiff as the "prevailing party" merely if the lawsuit brought about a voluntary change in the defendant's conduct. See 532 U.S. at 600-01. The Court noted that it had previously held "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." Id. at 604. By contrast, however:

> the 'catalyst theory' falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship

> of the parties. . . . A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees without a corresponding alteration in the legal relationship of the parties.

Id. at 605 (emphases in original). Consequently, the rule from Buckhannon is that, "[t]o be a prevailing party, a party must show both a material alteration of the legal relationship of the parties and a judicial imprimatur on the change." Aronov, 562 F.3d at 89 (quotations and citations omitted).

Nothing in Buckhannon requires the parties to have entered into a traditional consent decree or its equivalent in order for the plaintiff to be permitted an award of fees. The Buckhannon Court listed enforceable judgments on the merits and court-ordered consent decrees merely as "examples" of relief permitting awards of attorney's fees. 532 U.S. at 605. Justice Scalia, in his concurring opinion in Buckhannon, stated that both "court-approved settlements and consent decrees" bear the sanction of judicial action in the lawsuit, even if there has been no judicial determination of the merits. Id. at 618 (Scalia, J., concurring) (emphasis added). Justice Ginsburg, in her dissent, also recognized that the majority had ruled that a plaintiff, in order to be a prevailing party, must receive "a court entry memorializing her victory. The entry need not be a judgment on the merits. Nor need there be any finding of wrongdoing. A court-approved settlement will do."

Id. at 622 (Ginsburg, J., dissenting) (emphasis added); see Roberson v. Giuliani, 346 F.3d 75, 81 (2d Cir. 2003) (stating that Buckhannon Court "intended its statements about judgments on the merits and court-ordered consent decrees as merely 'examples' of the type of judicial action that could convey prevailing party status" (footnote omitted)); see also Carbonell v. Immigration & Naturalization Serv., 429 F.3d 894, 898 (9th Cir. 2005) (same).

In this case, the District Court, in its Order, explicitly approved the CSA and retained jurisdiction over the case, directing that the case "not be closed and that judgment not enter pending compliance with the terms of the Comprehensive Settlement Agreement." App'x Vol. I at 281-82. This approval and retention of jurisdiction, particularly when read alongside the CSA's provision that "[t]he Court shall retain jurisdiction to hear and adjudicate noncompliance motions in compliance with ¶¶ 43 through 44," is well within the broad scope of enforcement mechanisms justifying an award of attorney's fees under Buckhannon. Id. at 132.

B. *If applied narrowly, as Defendants urge, Buckhannon will have a chilling effect on the very forms of public-interest litigation that Congress intended to encourage through fee-shifting provisions.*

The Buckhannon Court did not expect rejection of the catalyst theory to create "disincentives for attorneys to bring civil rights actions" because of increased difficulty in receiving attorney's fees awards. Diffenderfer, 587 F.3d at 455; see Buckhannon, 532 U.S. at 608. The Court found "entirely speculative and

unsupported by any empirical evidence" that "rejection of the catalyst theory will deter plaintiffs with meritorious but expensive cases from bringing suit." Buckhannon, 532 U.S. at 608.

Experience shows, however, that Buckhannon can create disincentives to civil rights enforcement actions, and that an overly restrictive reading of that case, such as the Defendants urge here, would further discourage public-interest organizations like Amici from litigating civil rights cases. Following Buckhannon and its rejection of the catalyst theory, many public-interest organizations have reported difficulty in settling cases because out-of-court settlements alone are insufficient to permit an award of attorney's fees. See Catherine R. Albiston & Laura Beth Nielsen, The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for the Private Attorney General, 54 U.C.L.A. L. Rev. 1087, 1128-29 (2007). "[P]laintiffs must be very careful to structure settlement agreements in a way that preserves their right to recover fees, assuming defendants will agree to such a settlement after Buckhannon." Id. at 1114-15. Many public-interest organizations, and the outside co-counsel who may assist them, are less willing to take on cases after Buckhannon because the possibility of obtaining attorney's fees is more doubtful. Id. at 1129-30.

Indeed, in Amici's experience, State Attorneys General are generally unwilling to enter into agreements resembling formal consent decrees in settling

civil rights cases. See Interest of Amici Curiae, supra. As counsel for Plaintiffs noted at the Motion Hearing held on October 15, 2009, and the District Court acknowledged:

> MR. SCHWARTZ: They don't want things called a consent decree.
>
> THE COURT: A lot of states don't like it anymore. They've become much less fashionable.

App'x Vol. II at 943. If this Court were to limit recovery of fees to only those cases in which the settlement is acknowledged as a consent decree, or bears every feature of a traditional consent decree except its name, it will go well beyond anything required by Buckhannon and will exacerbate that case's unintended consequences in discouraging civil rights enforcement.

Accordingly, this Court should not create additional "disincentives for attorneys to bring civil rights actions" by limiting the flexibility of Buckhannon and making it more difficult for civil rights plaintiffs to settle. Diffenderfer, 587 F.3d at 455; see Albiston, et al., supra at 1129-30.

III. THE OVERWHELMING MAJORITY OF CIRCUIT COURTS HAVE CONCLUDED THAT SETTLEMENTS IN CIVIL RIGHTS CASES THAT ARE APPROVED BY THE DISTRICT COURT AND THAT CONTAIN A PROVISION GIVING THE DISTRICT COURT THE AUTHORITY TO ENFORCE THE SETTLEMENT RELECT THE REQUISITE "JUDICIAL IMPRIMATUR" FOR AN AWARD OF ATTORNEY'S FEES.

Although their precise formulations differ, most Circuits that have applied Buckhannon to settlement agreements have clarified that the "judicial imprimatur" requirement involves two elements: (1) court approval of the settlement; and (2) judicial oversight to enforce the terms of the settlement, which is fulfilled if a district court expressly retains jurisdiction over the settlement. The Order here clearly satisfies both requirements and the Court should not require more. As demonstrated below, the Order here would permit Plaintiffs to receive fees in multiple Circuits which this Court cited with approval and relied upon in Aronov. See 562 F.3d at 90 n.7.

A. *The Eleventh Circuit*

In American Disability Association, Inc. v. Chmielarz, 289 F.3d 1315, 1317 (11th Cir. 2002), the Eleventh Circuit considered whether a plaintiff that entered into a settlement agreement "which was 'approved, adopted and ratified' by the district court in a final order of dismissal, and over which the district court expressly retained jurisdiction to enforce its terms" was a prevailing party entitled to attorney's fees under 42 U.S.C. § 12205. The court ruled the plaintiff was a prevailing party, id. at 1321, and that a formal consent decree was not necessary because "the district court's explicit approval of the settlement and express retention of jurisdiction to enforce its terms are the functional equivalent of a consent decree," id. at 1319 n.2.

Similarly, the District Court here explicitly "approved" the CSA, found it "fair, reasonable, and adequate," and "retain[ed] jurisdiction over the case . . . pending compliance with the terms of the Comprehensive Settlement Agreement" which were enforceable by the District Court per the CSA. App'x Vol. I at 281-82; see id. at 132. Therefore, the Order in this case, just like the district court's order in Chmielarz, contains the necessary judicial approval and oversight to permit an award of attorney's fees.

B. *The Second Circuit*

The Second Circuit in Roberson, 346 F.3d at 83, held that a district court's express retention of jurisdiction to enforce the terms of a settlement agreement provided "judicial sanction to a change in the legal relationship of the parties" sufficient to make plaintiffs prevailing parties, even though the district judge had not conducted any review of the terms of the settlement agreement and had not otherwise incorporated the terms of the settlement agreement into its order. See id. at 78. The district court retained jurisdiction to enforce the settlement agreement, necessarily making compliance with the settlement agreement's terms part of its order. Id. at 82. Further, because a district court has the duty to ensure that its orders are fair and lawful, any settlement agreement made part of a district court's order is "stamp[ed]" with judicial imprimatur. Id. at 83 (quotation omitted).

Consequently, the district court's retention of jurisdiction provided both judicial approval of, and oversight over, the settlement agreement. See id.

The Roberson court further noted that the settlement agreement included a clause "conditioning its effectiveness on the district court's retention of jurisdiction." Id. The district court's order therefore "effectuated the obligations of the parties under the Agreement because until the district court signed the dismissal Order retaining jurisdiction, the Agreement was not yet in effect." Id. (emphasis in original). Thus, "[i]n a very literal sense, it was the court's order that created the change in the legal relationship between plaintiffs and City defendants." Id.

The court in Roberson also concluded that it was inconsequential whether the district court could, in the first instance, enforce a settlement agreement over which it retains enforcement jurisdiction with an order of contempt. See id. If the district court initially could not enforce the settlement agreement with a contempt order, "the court at most would need to take an extra step by first ordering specific performance and then, if a party does not comply, finding that party in contempt. We doubt that the definition of 'prevailing party' should turn on such a difference." Id.

The District Court in this case "effectuated" the obligations of the parties through the Order because, under the CSA and Federal Rules of Civil Procedure,

the District Court had to approve the CSA. Id. (emphasis omitted); see App'x Vol. I at 132; Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled . . . only with the court's approval."). By its terms, the CSA was effective upon approval by the District Court and can only be enforced by the District Court which "retain[s] jurisdiction to hear and adjudicate noncompliance motions" under it. App'x Vol. I at 132.

Moreover, although the CSA provides for enforcement mechanisms in the event of Defendants' noncompliance which do not include an order of contempt in the first instance, Plaintiffs remain prevailing parties. See Roberson, 346 F.3d at 83. After the parties discuss and mediate any noncompliance issues, the CSA allows the District Court to entertain a noncompliance motion brought by the Plaintiffs. App'x Vol. I at 132-33. The District Court then may enter an order "consistent with equitable principles," such as an order for specific performance, to achieve compliance, but may not enter an order of contempt. Id. at 133. If Defendants do not comply with such an equitable order, then the District Court may "use any appropriate equitable or remedial power then available to it," including a contempt order, to affect compliance. Id. Plaintiffs are prevailing parties even if the District Court must undertake this "extra step" to enforce the CSA. See Roberson, 346 F.3d at 83.

The Second Circuit's subsequent decision in Perez v. Westchester County Department of Corrections, 587 F.3d 143 (2d Cir. 2009), further supports the conclusion that the District Court in this case "effectuated" the change in the legal relationship between the parties by "stamp[ing]" the CSA with judicial imprimatur. Roberson, 346 F.3d at 83 (quotation omitted) (emphasis omitted). In Perez, the court held that the district court intended to place its judicial imprimatur on a settlement agreement that explicitly was "not a consent decree." 587 F.3d at 148 (quotation omitted). The district court entered an "Order of Settlement" that "provided that Plaintiffs' lawsuits would only be dismissed upon the Court's approval and entry of this Stipulation and Order." Id. at 152 (quotation and brackets omitted). This was "not a case where dismissal was effectuated by stipulation, or mutual agreement of the parties, and did not require any judicial action; rather, the settlement was only made operative by the Court's review and approval." Id. (quotation, brackets, and citation omitted). Indeed, "[i]n a quite literal sense, it was the District Court's imprimatur that made the settlement valid." Id. (footnote omitted).

In this case, the CSA, by its terms and Federal Rule of Civil Procedure 23(e), was subject to the District Court's approval and review. See App'x Vol. I at 132. The CSA was "null and void and of no force and effect" without the District

Court's approval. Id. "[I]t was the District Court's imprimatur that made the settlement valid." Perez, 587 F.3d at 152 (footnote omitted).

C. *The D.C. Circuit*

The approach of the D.C. Circuit also supports the District Court's award of attorney's fees here. The court in Davy v. Central Intelligence Agency, 456 F.3d 162, 166 (D.C. Cir. 2006), adopted a three-pronged framework for determining whether an order "is functionally a settlement agreement enforced through a consent decree" that provides the necessary approval and oversight to make a plaintiff a prevailing party. The Davy court ruled that an order is functionally a consent decree if, on its face, it: (1) contains mandatory language; (2) is entitled an "order"; and (3) bears the district court's signature, not those of the parties. Id. "That the order is styled 'order' as opposed to 'consent decree' is of no consequence." Id.

Here, the District Court's "Order Approving Final Comprehensive Settlement Agreement" certainly is entitled an "order" and bears the judge's signature. See id.; App'x Vol. I at 281-82. Furthermore, the Order contains mandatory language ordering "that this case not be closed and that judgment not enter pending compliance with the terms of the Comprehensive Settlement Agreement." App'x Vol. I at 281-82.

Of course, the CSA, by its terms, can only be enforced by the District Court. See id. at 132-33. It is immaterial that the District Court did not include the terms of the CSA in the Order because "the district court retained jurisdiction to enforce the Agreement. . . . [W]hen the district court retained jurisdiction, it necessarily made compliance with the terms of the agreement a part of its order so that a breach of the agreement would be a violation of the order." Roberson, 346 F.3d at 82 (quotation omitted). Thus, functionally, the CSA is enforced through a consent decree that permits an award of attorney's fees in this case. See Davy, 456 F.3d at 166.

D. *The Third Circuit*

Similar to the D.C. Circuit, the Third Circuit, in an opinion authored by now Supreme Court Justice Alito, held that a district court's order containing mandatory language, entitled an "order," bearing the signature of the judge, and giving the plaintiff the right to request judicial enforcement of the settlement was "a proper vehicle for rendering one side a 'prevailing party' under § 1988." Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 165 (3d Cir. 2002).

E. *The Fourth Circuit*

The Fourth Circuit's decision in Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002), is instructive because it articulates the reasoning behind the requirements of judicial approval and oversight. The Smyth court examined whether a settlement

agreement and a district court's order "were, in combination, equivalent to a consent decree," id. at 279 (emphasis added), and distinguished the characteristics of a consent decree from those of a settlement agreement, emphasizing that a consent decree "receives court approval and is subject to the oversight attendant to the court's authority to enforce its orders, characteristics not typical of settlement agreements," id. at 281; see Aronov, 562 F.3d at 91. Consent decrees are "a special case": privately negotiated, they do not always include an admission of liability but contain judicial approval and oversight that may suffice to demonstrate a court-ordered change in the legal relationship between the parties. Smyth, 282 F.3d at 281.

The Fourth Circuit noted that a district court's obligation to ensure that its orders are fair and lawful "stamps an agreement that is made part of an order with judicial imprimatur, and the continuing jurisdiction involved in the court's inherent power to protect and effectuate its decrees entails judicial oversight of the agreement." Id. at 282. A settlement agreement is made part of an order if the district court clearly incorporates the terms of the agreement into the order or retains jurisdiction over the agreement. See id. at 283. "Where the obligation to comply with the terms of the agreement is not enforceable as an order of the court but only as a contractual obligation, neither judicial approval nor oversight are ordinarily involved." Id. at 282.

Here, judicial approval and oversight are involved because the District Court expressly approved the CSA and retained jurisdiction in the Order. See id.; App'x Vol. I at 281-82. The District Court had to approve the terms of the CSA in order for the CSA to become effective, including the provision that the District Court "retain jurisdiction to hear and adjudicate noncompliance motions" under the CSA. App'x Vol. I at 132; see Smyth, 282 F.3d at 282. Further, the District Court ordered that the case would not be closed and judgment would not enter "pending compliance with the terms of the Comprehensive Settlement Agreement," i.e., the District Court would oversee the implementation of these terms. App'x Vol. I at 281-82; see Smyth, 282 F.3d at 283. Clearly, the Order, when considered in combination with the CSA, makes Plaintiffs prevailing parties eligible for attorney's fees.

F. *Seventh Circuit*

In T.D. v. LaGrange School District Number 102, 349 F.3d 469 (7th Cir. 2003), the Seventh Circuit followed "the Fourth Circuit's recent conclusion that some settlement agreements, even though not explicitly labeled as a 'consent decree' may confer 'prevailing party' status, if they are sufficiently analogous to a consent decree." Id. at 478 (citing Smyth, 282 F.3d at 281). The court considered whether (1) the settlement agreement was embodied in a court order or judgment, (2) the settlement agreement bore the district court judge's signature, and (3) the

district judge had continuing jurisdiction to enforce the agreement. See id. at 479. "There must be some official judicial approval of the settlement and some level of continuing judicial oversight." Id.

G. *The Tenth Circuit*

Similarly, the Tenth Circuit in Bell v. Board of County Commissioners of Jefferson County, 451 F.3d 1097 (10th Cir. 2006), stated that "[m]ost circuits recognize 'that some settlement agreements, even though not explicitly labeled as a 'consent decree' may confer 'prevailing party' status, if they are sufficiently analogous to a consent decree.'" Id. at 1003 (quoting T.D., 349 F.3d at 479). The court emphasized judicial approval and oversight. See id. Like the Seventh Circuit, the Bell court listed several factors, including whether (1) the district court incorporated a private settlement into an order; (2) the district judge signed or otherwise provided written approval of the terms of a settlement; and (3) the district court retained jurisdiction to enforce the obligations assumed by the settling parties. Id.

H. *The Federal Circuit*

Like most of its sister Circuits, the Federal Circuit requires only that a party have obtained the equivalent of an enforceable judgment or court-ordered consent decree that materially changed the legal relationship between the parties. Rice Services, Ltd. v. United States, 405 F.3d 1017, 1025 (Fed. Cir. 2005); see id.

("This approach is consistent with the approach taken by the majority of the circuits that have considered the issue.").

I. *The Ninth Circuit*

The Ninth Circuit, "in agreement with the vast majority of circuits that have considered the issue since Buckhannon," recognizes that a plaintiff who "obtained relief that was not an enforceable judgment on the merits or a consent decree . . . nonetheless can qualify as a prevailing party" provided there is sufficient judicial imprimatur. Carbonell, 429 F.3d at 899. A plaintiff even "'prevails' when he or she enters into a legally enforceable settlement agreement against the defendant." Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128, 1134 (9th Cir. 2002).

J. *Eighth Circuit: Minority Approach*

In addition to the approach discussed in the cases above, the Eighth has expressed a more restrictive minority view. See Christina A. v. Bloomberg, 315 F.3d 990, 992-94 (8th Cir. 2003) (holding a party prevails only if it receives either an enforceable judgment on the merits or a consent decree, ruling a district court's retention of jurisdiction over, and Federal Rule of Civil Procedure 23(e) approval of, a settlement agreement insufficient to create judicial imprimatur, and concluding an order not enforceable by contempt not a consent decree).

Even the Eighth Circuit, however, has indicated that its rule is more flexible and has been misinterpreted by other courts. See N. Cheyenne Tribe v. Jackson,

433 F.3d 1083, 1085 n.2 (8th Cir. 2006) (stating that Christina A. has been misread by some Circuits as limiting prevailing party status to those who obtain consent decrees and judgments on the merits).

IV. ARONOV SHOULD BE APPLIED IN A MANNER CONSISTENT WITH THE WEIGHT OF AUTHORITY FROM OTHER CIRCUITS TO AUTHORIZE AN AWARD OF ATTORNEY'S FEES IN THIS CASE WHERE THERE IS JUDICIAL APPROVAL OF, AND ONGOING JUDICIAL ENFORCEMENT AUTHORITY OVER, THE CSA.

This Court should apply its en banc decision in Aronov in a flexible manner consistent with this and other Circuits' emphasis on judicial approval and oversight and affirm the District Court's award of attorney's fees. In Aronov, this Court held that a district court's one-sentence electronic order remanding a case to the U.S. Citizenship and Immigration Service ("USCIS") did not contain sufficient judicial imprimatur to make the plaintiff a "prevailing party" under Buckhannon, a vastly different factual situation than this case. See 562 F.3d at 92. Applying the principles this Court articulated in Aronov compels the opposite result here.

Consistent with the majority approach of the Circuit courts, Aronov explains that a district court's order need not have the formal label "consent decree" because "it is the reality, not the nomenclature which is at issue." Id. at 90. Instead, reviewing courts should decide the question of judicial imprimatur "by determining the content of the order against the entire context before the court." Id. at 92. In this case, "the entire context before the court" includes the Order,

submissions to the District Court, hearings before the District Court, and, of course, the CSA itself. Id.; see Smyth, 282 F.3d at 279.

In Aronov, this Court determined the relevant question is "whether the order contains the sort of judicial involvement and actions inherent in a 'court-ordered consent decree.'" 562 F.3d at 90. It described several characteristics of consent decrees to determine whether the order contained the requisite judicial approval and oversight, including whether, in Buckhannon's terms, there was: (1) a court-ordered change in the legal relationship of the parties; (2) judicial appraisal of the merits of the case; and (3) judicial oversight and ability to enforce obligations imposed on the parties, obligations that can only be modified by the district court after a party meets a significant burden. See id. at 90-91. The Court used these characteristics to distinguish consent decrees from settlement agreements.

The Aronov court never stated, let alone required, that each and every characteristic of a consent decree has to be present in order for a settlement agreement to satisfy Buckhannon's criteria for an award of fees. The remand order in Aronov "lacked all of the core indicia of a consent decree"; thus, the Aronov court did not deny attorney's fees because the remand order had some characteristics of a consent decree, but not others. Id. at 92 (emphasis added). Further, the Buckhannon Court listed a court-ordered consent decree only as an example of what creates the material alteration of the legal relationship of the

parties necessary to permit an award of attorney's fees. See 532 U.S. at 604-05; Carbonell, 429 F.3d at 898; Roberson, 346 F.3d at 81. Justice Scalia stated that "court-approved settlements and consent decrees," not only consent decrees, bear the sanction of judicial action in the lawsuit, Buckhannon, 532 U.S. at 618 (Scalia, J., concurring) (emphasis added), and Justice Ginsburg recognized the Court's holding that a court-approved settlement permits a plaintiff to obtain an award of attorney's fees, id. at 622 (Ginsburg, J., dissenting). This Court should not rule that only a judgment on the merits or a consent decree can confer prevailing party status on a plaintiff by requiring every aspect of a consent decree, because to do so would create disincentives for attorneys to bring civil rights actions. See Diffenderfer, 587 F.3d at 455. It would be more difficult for civil rights attorneys to settle cases, especially where State Attorneys General have policies against entering into consent decrees.

The characteristics in Aronov, rather than being absolute requirements that must be met in every case, are illustrative of what judicial approval and oversight can encompass. When applied to this case, these characteristics permit an award of attorney's fees. See Aronov, 562 F.3d at 90-91.

A. *The District Court approved the CSA.*

This Court emphasized that, in contrast to private settlements, "a court entering a consent decree must examine its terms to be sure they are fair and not

unlawful. . . . There must be some official judicial approval of the settlement." Id. at 91 (quotation omitted). The District Court here explicitly approved the CSA under Federal Rule of Civil Procedure 23(e), finding the settlement's terms "fair, reasonable, and adequate." App'x Vol. I at 281. Simply put, with the District Court's retention of jurisdiction, this is more than enough. See Roberson, 346 F.3d at 82-83. Nevertheless, the District Court did even more.

1. The District Court effectuated the binding obligations contained in the CSA.

Under Aronov, approval of a consent decree may be satisfied, in part, by a court-ordered change in the legal relationship of the parties. 562 F.3d at 91. The district court's remand order in Aronov "did not order USCIS to do anything," in stark contrast to the Order in this case. Id. The District Court actually effectuated the binding legal obligations contained in the CSA. Without the District Court's approval in all respects, the CSA, by its terms, was "null and void and of no force and effect." App'x Vol. I at 132. Indeed, "it was the court's order that created the change in the legal relationship between the" parties. Roberson, 346 F.3d at 83. It was the Order that "effectuated the obligations of the parties under the Agreement." Id. (emphasis in original). The District Court created the change in the legal relationship of the parties by formally approving the CSA and retaining jurisdiction to enforce it. See App'x Vol. I at 132; Perez, 346 F.3d at 152 ("The Order of Settlement provided that Plaintiffs' lawsuits would only be dismissed

'upon the Court's approval and entry of this Stipulation and Order.' This is not a case where dismissal was effectuated by stipulation, or mutual agreement of the parties, and did not require any judicial action; rather, the settlement was only made operative by the Court's review and approval. In a quite literal sense, it was the District Court's imprimatur that made the settlement valid." (brackets, quotation, citation, and footnote omitted).).

2. The District Court appraised the merits of the case.

In its Order, the District Court stated that it had reviewed affidavits and memoranda submitted by the parties and held a hearing on July 25, 2008. App'x Vol. I at 281. At the hearing itself, the District Court highlighted its appraisal of the merits, concluding "[s]ubstantively I think if this case had gone to trial it would have been something of a horse race." Id. at 224. Considering "the content of the order against the entire context before the court," this case is a far cry from the facts in Aronov, where the district court made no evaluation of the merits because it was only asked to dismiss the case. 562 F.3d at 92. Defendants in Aronov did not even file an answer. Id.

Moreover, as the Supreme Court has indicated, any approval of a settlement agreement that permits an award of attorney's fees should not place a substantial burden on district courts. In this case, the District Court held multiple hearings and reviewed multiple submissions before approving the CSA. The Buckhannon Court

sought to provide "a clear formula allowing for ready administrability and avoiding the result of a second major litigation over attorney's fees." Id. at 89 (citing Buckhannon, 532 U.S. at 609-11). If this Court were to require more for approval than the District Court's extensive review in this case, Buckhannon's purposes would be thwarted.

Furthermore, a district court may appraise the merits of a case in a variety of ways, and any rule from this Court should be flexible to account for this fact. See, e.g., Chmielarz, 289 F.3d at 1317 (settlement agreement was "approved, adopted, and ratified" by the district court in a final order of dismissal); Truesdell, 290 F.2d at 165 (order contained mandatory language, was entitled an "order," and bore the signature of the district court judge); Tri-City Cmty. Action Program v. City of Malden, 680 F. Supp. 2d 306, 312 (D. Mass. 2010) ("The Third, Fifth, Ninth, and District of Columbia Circuits have held in cases similar to the one at bar that a preliminary injunction does confer prevailing party status on a plaintiff, even post-Buckhannon. The reasoning of those cases is persuasive.").

Finally, no one disputes a formal consent decree satisfies the judicial approval requirement of Buckhannon. The standard that must be met for court approval of a consent decree is "that it is fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; and that it is consistent with the objectives of Congress." Conservation Law Found. v.

Franklin, 989 F.2d 54, 58 (1st Cir. 1993) (quoting Durrett v. Hous. Auth. of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990)) (brackets and quotation marks omitted). This is, of course, part of the test that this Court requires for approval of class action settlements, see Durrett, 896 F.2d at 604, and is the test the District Court applied to the CSA.

B. *The District Court retained jurisdiction to enforce the terms of the CSA and must approve any modifications.*

With respect to judicial oversight, the Aronov court remarked that a consent decree provides for "judicial oversight and ability to enforce the obligations imposed on the parties." 562 F.3d at 90. "'The parties to a consent decree expect and achieve a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order.' Smyth, 282 F.3d at 280. A private settlement agreement, by contrast, does not require the same level of judicial oversight." Id. at 91. Further, "the judicially approved obligations in a consent decree" can only be modified after a party meets a "significant burden" because a "consent decree contemplates a court's continuing involvement in a matter." Id. at 91-92. The one-sentence remand order in Aronov did not contain such provisions for future enforcement but merely returned jurisdiction to the agency to allow the parties to carry out their agreement. Id. at 92.

In determining whether there is sufficient judicial imprimatur for an award of attorney's fees, context matters. This Court must determine the content of the

order "against the entire context before the court," id., including the CSA and the Order in combination, see Smyth, 282 F.3d at 279. The terms of the CSA can only be modified by mutual agreement of the parties and approval of the District Court, a higher burden for the parties to meet than is required for relief from an order under Federal Rule of Civil Procedure 60(b), which only requires a motion and court approval. See App'x Vol. I at 134; Aronov, 562 F.3d at 91-92. The District Court retained jurisdiction over the case in the Order and ordered that judgment would not enter and the case would not be closed pending compliance with the terms of the CSA. App'x Vol. I at 281-82. Furthermore, the terms of the CSA can only be enforced by the District Court, first by an order consistent with equitable principles short of contempt, and then, if Defendants do not comply, by any equitable or remedial order, including an order of contempt. Id. at 132-33. Consequently, like parties to a consent decree, the parties in this case obtained a continuing basis of jurisdiction to enforce the terms of the CSA explicitly set forth in the District Court's Order, as well as broad oversight and enforcement authority that includes contempt powers in the CSA itself. See Aronov, 562 F.3d at 91; Roberson, 346 F.3d at 83; Chmielarz, 289 F.3d at 1319 n.2; see also Aronov, 562 F.3d at 91 (noting consent decrees ultimately enforceable by contempt); Roberson, 346 F.3d at 83 (concluding that determination of "prevailing party" should not turn on whether a court may issue an order of contempt in the first instance).

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the District Court's determination in its February 8, 2010 Memorandum and Order Regarding Motion for Attorney Fees and Costs that Plaintiffs are prevailing parties permitted an award of attorney's fees.

Respectfully submitted,

AARP, CENTER FOR LAW AND EDUCATION, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL CONSUMER LAW CENTER, INC., NATIONAL HEALTH LAW PROGRAM, INC., PUBLIC CITIZEN, INC., THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL DISABILITY RIGHTS NETWORK, INC., PUBLIC JUSTICE, P.C., WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS, MASSACHUSETTS LAW REFORM INSTITUTE, INC., ARC MASSACHUSETTS, INC., AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, DISABILITIES RIGHTS CENTER, INC., DISABILITY LAW CENTER, INC., DISABILITY RIGHTS CENTER, GREATER BOSTON LEGAL SERVICES, INC., LEGAL ASSISTANCE CORPORATION OF CENTRAL MASSACHUSETTS, RHODE ISLAND DISABILITY LAW CENTER, INC., SOUTH COASTAL COUNTIES LEGAL SERVICES, INC., WESTERN MASSACHUSETTS LEGAL SERVICES, INC.,

By their attorneys,

/s/ Brian P. Bialas
Jeffrey S. Follett (First Circuit # 43270)
Brian P. Bialas (First Circuit # 1133816)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
(617) 832-1000

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,858 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

/s/ Brian P. Bialas
Brian P. Bialas
Attorney for Amici
Dated: June 1, 2010

CERTIFICATE OF SERVICE

1. I hereby certify that I filed this brief through the Court's ECF system on June 1, 2010 and thus copies will be served electronically on that date on the following counsel:

Michael R. Dube
Wilmer Cutler Pickering Hale & Dorr LLP
60 State Street
Boston, MA 02109
michael.dube@wilmerhale.com

J. Paterson Rae
Center for Public Representation
22 Green Street
Northampton, MA 01060
PRae@cpr-ma.org

Jennifer Grace Miller
MA Attorney General's Office
One Ashburton Place
Boston, MA 02108
jennifer.miller@state.ma.us

Steven J. Schwartz
Center for Public Representation
22 Green Street
Northampton, MA 01060
SSchwartz@cpr-ma.org

2. I hereby certify that on June 1, 2010, I served two paper copies of this brief via U.S. Mail, postage prepaid, to counsel at each of the following addresses:

Richard Alan Johnston
Miranda Hooker
Anne M. McLaughlin
Wilmer Cutler Pickering Hale & Dorr LLP
60 State Street
Boston, MA 02109

Kathryn Rucker
Center for Public Representation
22 Green Street
Northampton, MA 01060

/s/ Brian P. Bialas
Brian P. Bialas
Attorney for Amici
Dated: June 1, 2010

No. 10-1268

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CATHERINE HUTCHINSON, BY HER GUARDIAN SANDY JULIEN, ET AL.,
Plaintiffs-Appellees,

v.

DEVAL L. PATRICK, GOVERNOR, ET AL.,
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF PLAINTIFFS-APPELLEES

Steven J. Schwartz
Kathryn Rucker
J. Paterson Rae
Ctr. For Public Representation
22 Green Street
Northampton, MA 01060
413-586-6024
First Cir. No. 22217
First Cir. No. 1140855
First Cir. No. 27094

Richard A. Johnston
Michael R. Dube
WilmerHale
60 State Street
Boston, MA 02109
617-526-6000
First Cir. No. 21113
First Cir. No. 94072

June 1, 2010

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, plaintiff-appellee, the Brain Injury Association of Massachusetts and Stavros Center for Independent Living, Inc., are non-profit corporations pursuant to Section 501 (c) (3) of the Internal Revenue Code and are not a publicly held corporations that issue stock. They have no parent corporations.

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JURISDICTIONAL STATEMENT

The Court has jurisdiction to review the district court's award of attorney's fees and costs, entered on February 8, 2010, pursuant to the collateral order doctrine. This Court consistently has invoked the doctrine to review attorney's fee awards. *See Matter of Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation,* 982 F.2d 603, 608-10 (1st Cir. 1992) (recognizing that the finality requirement of 28 U.S.C. § 1291 is met when a court orders an award of attorney's fees, because such award is distinct from the merits of the case); *U.S. v. Horn*, 29 F.3d 754 (1st Cir. 1994) (finding appellate jurisdiction to review an award of fees because the conditions of the collateral order doctrine were satisfied); *Brewster v. Dukakis,* 3 F.3d 488 (1st Cir. 1993) (awarding fees despite ongoing injunction and in absence of final judgment); *Brewster v. Dukakis,* 786 F.2d 16 (1st Cir. 1986) (approving an interim award of fees for monitoring an ongoing settlement). *See also* 15B Charles Wright, Arthur Miller, and Edward Cooper, Federal Practice and Procedure, § 3915.6 (an interim award of fees "represents compensation for work that is compensable no matter

what the course of subsequent events" and therefore is "conclusive" within the meaning of the collateral order doctrine).[1]

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion in concluding that the plaintiffs were the prevailing party and entitled to an award of attorney's fees, after the court approved and adopted a Settlement Agreement that altered the relationship between the parties, that invested the court with broad equitable authority to enforce, modify, and exclusively determine compliance with the Agreement, and that explicitly retained jurisdiction to oversee and enforce the Agreement, so as to constitute a judicial imprimatur of the Agreement?

2. Whether the District Court abused its discretion in its calculation of the award of attorney's fees, based upon its first-hand knowledge of the litigation and the extensive time spent obtaining the landmark settlement agreement, and based upon its adoption of hourly rates

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[1] Because the District Court recognized in its fee decision that its order might be appealed, *see* App. 980-81, and because the collateral order doctrine so clearly provides a basis for the appeal, it declined to enter a separate Rule 54(b) judgment, as the defendants' had requested. App. 19, Endorsed order of 3/1/2010 ("the court's fee decision is appealable without entry of judgment under rule 54(b)"). A separate judgment was not only unnecessary, it was also improper, since the defendants' claim in the fee dispute that they were under no obligation to do anything clearly overlaps with the resolution of the civil rights claim via the settlement agreement.

that are substantially below the market rates of private counsel and that are consistent with its prior award to the same firms and many of the same attorneys in another unappealed decision involving the Commonwealth?

STANDARD OF REVIEW

A district court's grant or denial of attorneys' fees is reviewed "for manifest abuse of discretion, mindful that the district court has an 'intimate knowledge of the nuances of the underlying case.'" *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (quoting *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 292 (1st Cir. 2001)). Because "the district court is in the best position to determine whether its statements … should be considered the functional equivalent of a judicial order within the meaning of *Buckhannon*," deference is particularly appropriate in such circumstances. *Kinton*, 284 F. 3d at 30; *see also Lefkowitz v. Fair*, 816 F.2d 17, 22 (1st Cir. 1987); *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185, 192 (1st Cir. 2006).[2]

The District Court's calculation of the fees awarded is reviewed only for "manifest abuse of discretion." *Burke v. McDonald*, 572 F.3d 51, 63

[2] Of course, a clear error of law in applying the prevailing party standard is an abuse of discretion. *Aronov v. Napolitano*, 562 F.3d 84, 88 (1st Cir. 2009), *cert denied* 130 S.Ct. 1137 (2010).

(1stCir. 2009); *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 455-56 (1st Cir. 2009) Similarly, awards of costs are reviewed under a deferential abuse of discretion standard. *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 125 (1st Cir. 2008) ("an award of costs is the type of discretionary ruling to which appellate courts should give "virtually complete" deference").

STATEMENT OF THE CASE

A. The Complaint and Claims

The plaintiffs filed their initial Complaint in this case on May 17, 2007. App. 8 (Doc. 1). The plaintiffs amended the Complaint on June 18, 2007. App. 9 (Doc. 7). The Amended Complaint sought to compel the Commonwealth to develop new services in integrated community settings for a class of over 9,000 persons with brain injuries in nursing and rehabilitation facilities in Massachusetts, based upon claims under the Americans with Disabilities Act, 42 U.S.C. § 12132, as well as the Medicaid Act, 42 U.S.C. §§ 1396a(a)(8) and 1396n(c). App. 20-24. The defendants filed their Answer on July 16, 2007. App. 10 (Doc. 19).

B. Initial Procedural Motions

The defendants initially opposed virtually every aspect of the litigation. *See* App. 305. They unsuccessfully sought to transfer the case from the

Western Division and remove the case from Judge Michael Ponsor, App. 8-9, (Doc. 4, endorsed order of 6/25/2007). They disputed a proposed pre-trial schedule and sought to extend discovery deadlines, to modify the sequencing of expert reports, and to inject multiple opportunities for more motion practice. App. 10 (Docs. 17, 21). They delayed mandatory disclosures and moved to stay all discovery. App. 11 (Doc. 24). They vigorously opposed release of confidential information about persons with brain injuries pursuant to a protective order, requiring extensive briefing and a conference followed by a hearing before the Magistrate. App. 10-11. Ultimately, the Court adopted the plaintiffs' proposed version of a protective order, affording broad access to information about putative class members and non-class members. App. 11 (Doc. 25).

C. Class Certification

The defendants vigorously contested a motion for class certification, arguing first, that no class should be certified, and second, for a much narrower class definition if the court were to allow certification. App. 12-13 (Docs. 32, 37). Once again, extensive briefing and two hearings were needed, and once

again, the plaintiffs prevailed, with the District Court certifying the class proposed by the plaintiffs.[3] *Id.* (Doc. 39).

D. Discovery

In August 2007, the plaintiffs submitted a detailed discovery request. App. 306. At the instruction of the Magistrate, the request was voluntarily withdrawn until the court ruled on the class certification motion. Within days of the certification order, the plaintiffs resent the initial discovery request, and indicated additional requests would be forthcoming. *Id.* During this period the parties also discussed and reached a preliminary agreement on the preservation and exchange of electronic data, which likely would be voluminous in this case. *Id.*

In October 2007, after this string of favorable judicial decisions for the plaintiffs, the defendants proposed a ninety-day suspension of discovery and other litigation activities in order to discuss possible settlement options. The plaintiffs accepted this offer with the understanding that the negotiation process needed to be time-limited, that the agenda for the negotiations needed to include specific topics, including the enforcement by the court of any agreement, and that the process, if successful, needed to result in an

[3] The certified class includes: "All Massachusetts residents who now, or at any time during this litigation: (1) are Medicaid eligible; (2) have suffered a brain injury after the age of 22; and (3) reside in a nursing or rehabilitation facility or are eligible for admission to such a facility."

enforceable commitment to remedy the violations alleged in the Amended Complaint. When the defendants accepted these conditions, the plaintiffs agreed to stay the litigation process temporarily. App. 306.

E. The Final Comprehensive Settlement Agreement

For the next six months, the parties met frequently – usually bi-monthly – to negotiate a comprehensive settlement agreement. App. 307. They finally reached a preliminary agreement in early April 2008. A Final Comprehensive Settlement Agreement (hereafter "the Agreement") was signed in May, after concerns from the Governor were eventually resolved. During this final phase of negotiations, the plaintiffs insisted upon, and the defendants agreed to, language that made clear that the obligations in the Agreement were judicially enforceable, that the court retained jurisdiction to enforce these obligations, and that even obligations that depended upon third parties, such as funding by the Massachusetts legislature, were subject to the court's oversight and enforcement authority. There was no doubt by anyone that the Agreement, if approved and adopted by the court, constituted legally enforceable commitments by the Commonwealth to the plaintiff class. App. 308.

The District Court preliminarily approved the Agreement on June 13, 2008, and gave its final approval on July 26, 2008. App. 167, 236-37. In doing so, the District Court evaluated the merits of the Amended Complaint,

the defenses raised in the Answer, and each party's likelihood of success, in rendering its determination that the Agreement was fair and reasonable. The District Court conducted this analysis after a careful review of each party's detailed description of the merits of their legal positions, the supporting case law for their positions, the likely outcome of further litigation, and the risks and benefits of settlement. App. 186-89, 219-220, 223-25. In addition, since this case is a class action on behalf of thousands of institutionalized persons with disabilities, the District Court took special care to assess whether the Agreement adequately protects their interests, vindicates their rights, and results in a substantial expansion of community services. App. 225. Finally, the District Court maintained jurisdiction and oversight of the case, so that it could enforce the Agreement and ensure that its promises were implemented. The District Court and all parties understood, from the outset, that the Agreement needed to be approved by the court, would be subject to its implementation orders, and would not terminate until *the court* determined that all obligations under the Agreement had been implemented. App. 159. ("We agree that this is going to be a court order, that you are going to retain jurisdiction over the court order.")

On September 18, 2008, the District Court entered its Order Approving Final Comprehensive Settlement Agreement, App. 281-82, and made clear

that it would retain the ongoing authority to ensure compliance with the Agreement, since it understood the Agreement to incorporate binding and enforceable legal provisions.

On June 2, 2009, the plaintiffs filed a Motion for an Award of Attorney's Fees and Costs ("Motion"). App. 283-85. They supported their Motion with affidavits from co-counsel, fee experts, brain injury experts, and experienced private and public interest attorneys in the Boston area, App. 294-399, as well as detailed time records for all counsel. App. 403-696. They described their entitlement to fees under federal law, as well as the reasonableness of their fee request, in a comprehensive memorandum. App. 697-735. The defendants opposed the Motion, arguing that the plaintiffs had not prevailed and were not entitled to any fees, or, alternatively, were not entitled to all of their requested fees. App. 736-71. Other than a two-page published billing survey, the defendants did not include any evidence in their Opposition. App. 886-87.[4]

The District Court held a non-evidentiary hearing on the Motion on October 15, 2009. It first noted that the defendants had never sought a waiver of fees. App. 912. It then observed that the Supreme Court, in *Buckhannon*

[4] The only attachments to the Opposition were copies of the docket sheet, transcripts of various court hearings, and a summary analysis of plaintiffs' counsels' time records. App. 772-877.

Board & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001), held that court-approved settlements constituted a sufficient judicial imprimatur to support an award of fees. App. 920. The District Court noted that the key question was "the substance of the court's role in this settlement, and the court's ongoing responsibilities with regard to the settlement." *Id.* It decided that there "could be little debate" that the court had given its "judicial imprimatur" to the Agreement. App. 921. Finally, it concluded that the combination of "imprimatur, continuing jurisdiction, and enforcement power," including the use of its contempt power, satisfied the First Circuit's test in *Aronov* for an award of attorney's fees. App. 924, 931-33.

On February 8, 2010, the District Court issued its decision. App. 962-81; 683 F. Supp. 2d 121 (D. Mass. 2010). Based upon a careful review of the record, its first-hand experience overseeing this litigation, and its unique understanding of what it did in approving the Agreement and drafting its approval order, the District Court concluded that the plaintiffs were the prevailing party under the Supreme Court's decision in *Buckhannon* and this Court's decision in *Aronov*. App. 971-77 (holding that all three criteria for prevailing party status set forth in *Aronov* are met). Specifically, the District Court held that: (1) the label of Agreement, and the fact that it was not a

consent decree, was not determinative of prevailing party status, App. 970-71; (2) the approval of the Agreement by the court was the critical factor that altered the legal relationship between the parties, since without the court's approval, the Agreement would be null and void, App. 971-72; (3) the court had carefully considered the merits of the plaintiffs' claims in determining that the Agreement was fair, adequate, and reasonable, App. 972-73; (4) the provisions of the Agreement create binding obligations that can only be modified by the court, App. 973-74; (5) the Agreement is fully enforceable by the court, through all available equitable remedies including contempt, App. 974-75; and (6) the court retains jurisdiction over the Agreement to ensure and determine compliance, App. 976-77. Finally, the District Court determined, in an exercise of its discretion, that the time expended by the plaintiffs' counsel was well documented and reasonable in light of the litigation activity, the negotiation process, and the success obtained. App. 979-80. It also found that the hourly rates were more than reasonable, were considerably lower than the market rates of the plaintiffs' private attorneys, and were consistent with hourly rates awarded to many of the same counsel and the same firms in a recent fee decision, *Rosie D. v. Patrick,* 593 F. Supp. 2d 325, 330 (D. Mass. 2009), that the Commonwealth had elected not to appeal. App. 980. The District Court

also awarded costs consistent with its prior practice in *Rosie D.* as well as decisions of other courts. App. 980-81.

STATEMENT OF THE FACTS

A. The Facts Prompting Settlement

The plaintiffs brought this case to end the harm suffered by thousands of class members who are segregated and inappropriately confined in nursing facilities. Prior to filing, the plaintiffs engaged in an extensive and time-consuming analysis of the conditions in nursing facilities for persons with brain injuries, the community-based services and supports necessary to meet the needs of these individuals, and the legal claims and proof required to prevail on a community integration case on behalf of persons with brain injuries in Massachusetts. App. 301-04. The plaintiffs also engaged in extensive efforts to resolve these issues with the defendants without the necessity for litigation. App. 304. Only when those negotiations failed did the plaintiffs file suit. *Id.*

The suit sought to require the Commonwealth's executive officials to comply with Title II of the ADA and Section 504 of the Rehabilitation Act, as well as the reasonable promptness provision of the Medicaid Act, by offering their services and programs in integrated community settings to persons with brain injuries who would benefit from them.

After extensive and exhaustive defensive actions designed to delay or derail this litigation, and only after the District Court rejected each such effort and certified a broad class, entered a broad protective order, and allowed voluminous discovery to proceed, the defendants agreed to negotiate a binding settlement agreement. The Agreement requires the defendants to create an entirely new community service system for persons with brain injuries, including new integrated services, new rights, new procedural protections, new quality safeguards, new monitoring programs, new data collection methods, and new judicial oversight. None of these elements was even considered by the defendants specifically for persons with brain injuries prior to the filing of this lawsuit. In no sense were all of the provisions and commitments of the Agreement purely voluntary acts or what the defendants otherwise intended to do.

B. The Final Comprehensive Settlement Agreement

The Agreement itself is sweeping as well as comprehensive. Its specific provisions require the Commonwealth to: (1) dramatically expand community services and supports for 1900 Medicaid-eligible persons with an acquired brain injury; (2) establish a process and schedule for transitioning class members into community settings over the next eight years (App. 115-24, ¶¶ 2, 13, 14, 20); (3) develop an individualized service

planning (ISP) and appeal process (App. 116-27, ¶¶ 4, 5, 25) that ensures that individuals will receive all of the services set forth in their ISP (App. 117, ¶ 7) and that they have a choice of where to live and what services to receive (App. 117, 126, ¶¶ 9, 24); (4) create an educational program to inform class members, guardians, families, and providers about new community opportunities; and (5) design the infrastructure for this new community service system through the creation of eligibility criteria (App. 119, 127, ¶¶ 12, 27), policies and procedures for service provision (App. 116, 122, ¶¶ 6, 16.), quality assurance standards (App. 119, 126, ¶¶ 12, 25), and safeguards to ensure that class members are properly supported in the community, including monitoring by plaintiffs' counsel of all class member placements. (App. 128-33, ¶¶ 28-31, 46) Although the defendants' obligations are subject to legislative appropriation and federal approval, the defendants must make their best efforts to obtain this funding. App. 131, ¶ 35.

It is a requirement of the Agreement that it be approved by the District Court and that it be subject to the court's ongoing oversight and monitoring authority. App. 131, ¶ 33. The court retains jurisdiction to enforce the Agreement, App. 132, ¶ 40, and to enter supplemental orders, using the full range of its equitable authorities other than contempt in the first instance.

App. 132-33, ¶ 43. Noncompliance with any implementation order is subject to all equitable authorities including contempt. App. 133, ¶ 44. Finally, the District Court will dismiss the case only when *it* determines that the defendants have complied with the provisions of the Agreement. *Id.,* ¶ 45.

C. The Order Approving the Agreement

At the conclusion of the fairness hearing on July 25, 2008, the District Court invited the parties to confer and submit a proposed order for the court to sign approving the Agreement. When the parties could not agree on the form of the order, App. 240-44, the court requested that the parties submit briefs addressing the differences in their respective proposed orders and scheduled a third hearing regarding approval of the Agreement for September 16, 2008. App. 15.

At the September 16, 2008 hearing and in entering its Order approving the Agreement, the District Court left no doubt that the Agreement was enforceable, that it retained jurisdiction, that it could compel compliance if the defendants failed to honor their obligations, and that the case would only end when the District Court determined that the defendants had substantially complied with the entire Agreement. App. 270. (Court states its understanding of the Agreement that "the parties have agreed that

the court will retain jurisdiction and *further orders* that this case will not be closed and judgment will not enter pending compliance with the terms of the settlement agreement….") (emphasis supplied) Despite the defendants' persistent arguments that the court need not and should not incorporate into its order a provision that it was retaining jurisdiction, as described in *Kokkonen v. Guardian Life Insurance Co.,* 511 U.S. 375 (1994), the Court did precisely that.[5] It also rejected any suggestion that the Agreement was not enforceable by the court. App. 271 (the Commonwealth could not refuse to comply with the Agreement without triggering the Court's enforcement authority); *see also* App. 275 ("if there is a noncompliance motion, the court has all the equitable authority except contempt in the first round").

The District Court ultimately dismissed the defendants' arguments in opposition to the plaintiffs' proposed order and, instead declared:

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[5] The defendants acknowledged that the Agreement contained binding and enforceable obligations and that the court would retain jurisdiction over the case to enforce the Agreement. Nevertheless, the Attorney General strongly argued against incorporating any language about ongoing jurisdiction into the approval order, insisting that doing so would transform the Agreement into a functional consent decree. App. 267-69. The final order entered by the court did incorporate a provision on its ongoing jurisdiction, thereby indicating that the order satisfied the *Kokkonen* standard and complied with its condition for ongoing enforcement authority.
App. 281-282.

> Therefore, the court approves the Comprehensive Settlement Agreement, noting that the parties agree that this agreement does not constitute a consent decree, and that the court will retain jurisdiction over the case. The court orders that this case not be closed and that judgment not enter pending compliance with the terms of the Comprehensive Settlement Agreement.

App. 281-82. While it simultaneously noted that the Agreement was not labeled or considered to be a consent decree,[6] it ensured that its Order contained the elements necessary to ensure full oversight and enforcement of the Agreement.

SUMMARY OF THE ARGUMENT

The District Court's award of attorney's fees was correct under the Supreme Court's holding in *Buckhannon* that plaintiffs can recover attorney's fees for securing a settlement agreement in a civil rights case, where the

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[6] The provision in the Agreement that it could not be enforced by contempt, but only in the first instance, is what renders it not a traditional consent decree. *See* App 132-33, ¶ 43. This is the sole reason why the plaintiffs conceded it technically was not a consent decree. App. 275.

The plaintiffs explained that *they* had offered to exclude contempt sanctions for the first round of noncompliance, based upon practical considerations and respect for government officials, not to restrict in any way the court's full equitable authority to ensure compliance with the Agreement. App. 941-2. *See also id.* 934-44 ("…when we agreed at the hearing last year in September that it was not a consent decree, we meant that it did not include one of the classic features ….of a technical consent decree … the authority to [bring] contempt in the first instance"). The defendants concurred in this distinction and this history. App. 272, 934. The District Court found determinative the provision in the Agreement that the court *could* invoke its contempt power, but simply not on the first noncompliance motion. App. 933-34, 975-76.

plaintiffs obtain a change in the legal relationship between the parties and the agreement contains a judicial imprimatur that reflects court approval of that change and that invests the court with the ongoing authority to enforce its provisions. *See* pp. 20-22. The District Court's award is also consistent with this Court's decision in *Aronov,* which eschewed the formal label of a consent decree and instead adopted a flexible test that focuses on the context of the litigation, the terms of the settlement agreement, and the provisions of the approval order, in assessing whether there was a sufficient judicial imprimatur to support a fee award. *See* pp. 22-24. This Court's approach mirrors most of its sister circuits which have affirmed fee awards in a wide variety of settlement agreements that are approved in a court order signed by the district court judge, that create enforceable obligations, and that specifically include continuing jurisdiction to oversee compliance with its provisions. *See* pp. 25-31.

The District Court, after carefully appraising the merits of the case, approved a settlement agreement that created binding and enforceable obligations to the plaintiff class, and that invested the court with the exclusive power to modify the Agreement and with broad equitable authority to compel compliance with its terms, including the contempt power. The Order approving the Agreement was signed by the district

judge, explicitly retained jurisdiction to enforce the Agreement, and ordered that the case would not be dismissed until it determined that the defendants had complied with all provisions of the Agreement. The District Court did not abuse its discretion when it determined, based upon its first-hand understanding of the Agreement which it had approved and the Order which it had drafted, that the Order and the Agreement satisfied the three *Aronov* factors. *See* pp. 31-46.

Nor did the District Court engage in a manifest abuse of discretion when it determined that the plaintiffs should be awarded fees based upon their lodestar. Viewing the evolution of this litigation from the court's unique perspective and based upon voluminous, uncontested evidence, the court properly determined that the plaintiffs' attorneys' requested time was reasonable, their requested hourly rates were significantly below market rates for the plaintiffs' private attorneys and effectively lower than rates that the same court had awarded to the same firms and the same attorneys against the same defendants in a recent unappealed fee decision, and that their requested costs were modest and appropriate. *See* pp. 46-60.

ARGUMENT

I. Civil Rights Plaintiffs Are Entitled to an Award of Attorney's Fees For Court-Approved and Supervised Settlement Agreements.

A. The Supreme Court Has Made Clear That Fees Should Be Awarded for Settlement Agreements That Materially Alter the Legal Relationship Between the Parties and That Contain a Judicial Imprimatur of that Change.

In *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the Supreme Court held that a plaintiff obtains prevailing party status by succeeding on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Six years later, in *Texas State Teachers Ass'n v. Garland Independent School Dist.,* 489 U.S. 782, 792 (1989), the Supreme Court decided that "to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."[7] Then in *Buckhannon,* the Court held that in order to satisfy the "material alteration of the legal relationship" test set forth in *Texas State Teachers Ass'n*, there must be a "judicial imprimatur on the change." 532 U.S. at 605.

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[7] *Hensley* and *Texas State Teachers* involved fees under 42 U.S.C. § 1988. However, § 12205 uses the same "prevailing party" language as § 1988. Courts have applied the Supreme Court's prevailing party jurisprudence to all fee shifting statutes utilizing that terminology, including the ADA.

The *Buckhannon* Court identified two non-exclusive examples of situations which satisfy the "judicial imprimatur" test: judgments on the merits and "settlement agreements enforced through a consent decree." *Buckhannon,* 532 U.S. at 604, 606. The Supreme Court made clear that the key indices of judicial imprimatur are judicial approval and ongoing oversight.[8] Settlements which meet these criteria qualify the plaintiffs as prevailing parties, even if the agreement is not a consent decree. Justice Ginsburg described the majority's holding as follows:

> The Court today holds that a plaintiff whose suit prompts the precise relief she seeks does not "prevail," and hence cannot obtain an award of attorney's fees, unless she also secures a court entry memorializing her victory. The entry need not be a judgment on the merits. Nor need there be any finding of wrongdoing. *A court approved settlement will do.*

Id. at 622 (Ginsburg, J., dissenting) (emphasis added).[9] Justice Scalia, in his concurrence, similarly recognized that a court-approved settlement satisfies the "judicial imprimatur" test:

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[8] The majority explained that settlements which *do not* meet the "judicial imprimatur" test are those that "do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking…." *Id.* at 604 n.7.

[9] It is significant that while the majority opinion and the concurrence took issue with many points made by the dissent, *id.* at 605-06 & n.8, 614-21, they did not take issue with this description of the Court's holding.

> [I]n the case of court-approved settlements and consent decrees, even if there has been no judicial determination of the merits, the outcome is at least the product of, and bears the sanction of, judicial action *in the lawsuit*. There is at least *some* basis for saying that the party favored by the settlement or decree prevailed *in the lawsuit*.

Id. at 618 (Scalia, J., concurring) (emphasis in original).

Since the District Court plainly approved the Agreement, retained jurisdiction to ensure compliance with its terms, and reserved the explicit authority to assess the defendants' compliance, the judicial imprimatur requirement of *Buckhannon* is clearly satisfied.

B. The First Circuit's Decision in Aronov v. Napolitano Follows Buckhannon's Criteria for Determining Whether the Plaintiffs Prevailed and Are Entitled to Attorney's Fees for Settlements.

As this Court has made clear, the examples cited in *Buckannon* are not exclusive and the label "consent decree" is not determinative. *Aronov,* 562 F.3d at 90 ("the formal label of 'consent decree' need not be attached; it is the reality, not the nomenclature which is at issue."). Rather, the appropriate inquiry is "whether the order contains the sort of judicial involvement and actions inherent in a 'court ordered consent decree.'" *Id*. The Court explained that this inquiry can only be answered by assessing "the content of the order against the entire context before the court." *Id.* at 92. Thus, the inquiry, by its very nature, requires an assessment of the evolution of the

litigation, the provisions of the settlement, and the terms of the approval order.

Aronov held that there are three criteria for assessing adherence to *Buckhannon's* judicial imprimatur requirement. First, the change in the legal relationship must be court ordered. Second, judicial approval of the relief must reflect an assessment of the merits of the case. Third, there must be judicial oversight and the ability to enforce the obligations imposed by the Agreement.

The Court also identified several characteristics of consent decrees that reflect the *Buckhannon* criteria,[10] but indicated that it is the Supreme Court's criteria, not the consent decree characteristics, which ultimately determine prevailing party status. *Id.* at 90-91. Applying these criteria, the Court reversed an award of fees by the lower court, concluding that its remand order contained *none* of the characteristics of a judicially-

[10] These characteristics are useful in distinguishing judicially-enforceable agreements from private settlements. First, judicially-enforceable agreements receive court approval and ongoing oversight, while private settlements do not. Second, judicially-enforceable agreements involve some appraisal of the merits, while private settlements do not. Third, judicially-enforceable agreements incorporate an obligation to comply and the power of the court to compel compliance, while private settlements do not. Fourth, judicially-enforceable agreements provide for continuing jurisdiction, while private settlements do not. Fifth, judicially-enforceable agreements can be modified by a court, while private settlements can not. *Aronov,* 562 F.3d at 90-91.

enforceable agreement and failed at least the second and third of the Supreme Court's judicial imprimatur criteria (an assessment of the merits, and judicial oversight and ongoing jurisdiction to enforce). *Id.* at 92.

In reaching its conclusion, the *Aronov* Court focused on the unique facts of that case, the language of that order, and the context of that litigation. Just as the label of a settlement does not control the outcome of the prevailing party determination, this Court also found that the language of an order cannot be divorced from the evolution of the litigation or the provisions of the settlement document. *Id.* Applying this Court's contextual analysis, the District Court's Order, particularly when read together with the specific enforcement provisions of the Agreement which the Court itself quoted at the hearing, constitutes a judicial imprimatur that entitles the plaintiffs to an award of attorney's fees.[11] App. 924.

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[11] The defendants erroneously characterize the entire litigation as reflecting nothing more than a catalyst for change. Appellants' Br. at 15-16. To the contrary, the plaintiffs secured a judicially-enforceable agreement, overseen by the federal court, with explicit authority "to hear and adjudicate noncompliance motions" and "to order the defendants to take appropriate steps to remedy the noncompliance, using all of its equitable authorities" including contempt. App. 132-33, ¶¶ 40, 43. The Agreement is clearly more than a private settlement and certainly more than a voluntary unenforceable commitment. Finally, the Order approving the Agreement explicitly incorporated the provision vesting the court with ongoing jurisdiction to enforce it. The Agreement and Order easily satisfy the judicial imprimatur requirement of *Buckhannon,* as interpreted by *Aronov* and all of the other courts of appeals on which it relies.

C. Most of the Other Courts of Appeals Have Applied Buckhannon To Allow Fees Where a Settlement Agreement Is Approved by a District Court and Where the District Court Retains Jurisdiction to Enforce the Agreement.

Most of the other Courts of Appeals have interpreted and applied *Buckhannon* to a wide range of settlement scenarios. The vast majority of these Circuits have held that court-approved settlements over which the court has retained jurisdiction satisfy the "judicial imprimatur" requirement. *Aronov*, 562 F.3d at 90 & n.7 (listing cases). In each of these circuits, the District Court's Order finding that *Buckhannon*'s judicial imprimatur criteria are satisfied would be affirmed.

The Second Circuit focuses primarily on the district court's ongoing authority to enforce the settlement. "The district court's retention of jurisdiction over the Agreement in this case provides sufficient judicial sanction to convey prevailing party status." *Roberson v. Guiliani,* 346 F.3d 75, 81 (2d Cir. 2003). Neither the fact that the court did not specifically review the agreement nor the fact that it did not include injunctive language in its order was determinative. *Id.* at 78. Even though the action was dismissed, and the dismissal order did not incorporate the terms of the agreement, the court of appeals awarded fees, concluding that "when the district court retained jurisdiction, it necessarily made compliance with the

terms of the agreement a part of its order so that 'a breach of the agreement would be a violation of the order.'" *Id.* at 82 (quoting *Kokkonen*).

Similarly, in *Perez v. Westchester County Dep't of Corr.*, 587 F.3d 143, 148 (2d Cir. 2009), the Court of Appeals found that: "While the agreement expressly indicated that it was 'not a consent decree,' the dismissal of the lawsuits only took effect '[u]pon the Court's approval and entry of this Stipulation and Order.'" In light of the fact that "the settlement was only made operative by the Court's review and approval," and that the district court was closely involved in managing the case and reaching a settlement, the court of appeals found that the district court "intended to place its 'judicial imprimatur' on the settlement." *Id.* at 152-53.

The Third Circuit relies upon *Buckhannon*'s citation of *Kokkonen* and adopts *Kokkonen's* bright line rule: if the order provides that the court retains jurisdiction to enforce the agreement, then it is sufficient to bestow prevailing party status on the plaintiff. *Truesdell v. Philadelphia Housing Authority,* 290 F.3d 159 (3d Cir. 2002). The appeals court found that the plaintiff was entitled to fees when the settlement was approved by the district court, there was an approval order signed by the court, and the order provided for ongoing oversight and enforcement. *Id.* at 165. The Third Circuit applied these same standards in *P.N. v. Clementon Bd. of Educ.*, 442

F.3d 848, 853 (3d Cir. 2006) (holding that consent order entered by an ALJ in IDEA proceedings satisfied the *Buckhannon* standard).

The Fourth Circuit looks to a combination of the court order and settlement document to determine if settlements not formally demarcated as consent decrees may nevertheless entitle plaintiffs to fees. *Smyth ex rel Smyth v. Rivero,* 282 F.3d 268, 279 (4th Cir. 2002) (whether agreement and order "were, in combination, equivalent to a consent decree").[12] The appeals court concluded that if the settlement is reviewed by the district court, determined to be fair and reasonable and made subject to the court's continuing jurisdiction, it satisfies *Buckhannon*'s judicial imprimatur test. *Id.* at 279. The court analyzed in detail the differences between private settlements and consent decrees, concluding that "[t]he parties to a consent decree expect and achieve a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order…. By contrast, a private settlement, although it may involve a dispute before the court, ordinarily does not receive the approval of the court." *Id.* Finally, the appeals court concluded that the best measure of whether a settlement was

[12] This analytical approach, which is consistent with the one adopted by the other circuits, is directly contrary to the defendants' argument that only the order is relevant and that all the enforcement provisions of the Agreement are irrelevant to the court's determination. *See* Section II(C), *infra.*

"functionally a consent decree," *id.* at 281, was whether it met the test enunciated in *Kokkonen*: were its terms incorporated into the order *or* did the court retain jurisdiction to enforce the settlement.[13] *Id.* at 280-81.

The Seventh Circuit follows the Third and Fourth Circuits in rejecting the label of "consent decree"; rather, what matters is if the court has continuing jurisdiction to enforce the settlement and signs an order to that effect. *T.D. v. LaGrange School District, No. 12,* 349 F.3d 469 (7th Cir. 2003). "There must be some judicial approval of the settlement and some level of continuing judicial oversight." *Id.* at 479 (citing *Buckhannon*). *See also Petersen v. Gibson*, 372 F.3d 862, 866-867 (7th Cir. 2004) ("[A] settlement short of a consent decree may qualify if … the order provided that the court would retain jurisdiction to enforce the terms of the settlement").

The Ninth Circuit allows fees based upon a finding that the parties have entered a legally enforceable agreement. *Barrios v. Cal. Interscholastic Fed'n,* 277 F. 3d 1128, 1134 n.4 (9th Cir. 2002); *see also*

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[13] The defendants assert that the District Court "mistakenly cited *Smyth* for the proposition that "[t]he Fourth Circuit asks whether the agreement and the order are 'in combination, equivalent to a consent decree.'" Appellants Br. at 23 n.7. This is the precise standard that the Circuit applied to determine that the disposition of the case under review did not qualify for an award of fees. *Smyth*, 282 F.3d at 285 (because the "settlement agreement … is neither incorporated explicitly in the terms of the district court's dismissal order nor the subject of a provision retaining jurisdiction … [it] cannot be equated with a consent decree").

Carbonell v. Immigation & Naturalization Service, 429 F.3d 894, 899 (9th Cir. 2005) (interpreting the Circuit's test consistent with those of the other circuits).

The Eleventh Circuit looks simply to whether the district court's approval of a settlement agreement constitutes a "judicially sanctioned change in the legal relationship of the parties" and the retention of jurisdiction to enforce the agreement renders it the "functional equivalent of a consent decree." *Am. Disability Ass'n v. Chmielarz,* 289 F.3d 1315, 1320 (11th Cir. 2002). Because both conditions were satisfied, the plaintiff was deemed a prevailing party, entitled to fees. *See also Smalbein ex rel. Estate of Smalbein v. City of Daytona Beach*, 353 F.3d 901, 904-07 (11th Cir. 2003) (approving a fee award for a settlement where the case was dismissed, holding that: "What is important is that 'the plaintiff thereafter may return to court to have the settlement enforced.'") (quoting *Chmielarz*).

The D.C. Circuit relies upon the rule in *Smyth* and *Truesdell* which focuses on the retention of jurisdiction under *Buckhannon* and *Kokkonen.* The appeals court awarded fees to a plaintiff that obtained an agreement that was approved by the district court, through a signed document that was titled as an "order." *Davy v. Central Intelligence Agency,* 456 F.3d 162 (D.C. Cir. 2006). *See also Judicial Watch, Inc. v. F.B.I.*, 522 F.3d 364, 367-70 (D.C.

Cir. 2008) (plaintiff was a prevailing party because the parties stipulated that the FBI would produce particular records on particular days, the court memorialized this agreement in an order, the defendant was required to do something that it had not been required to do before the order, and failure to comply would expose the defendant to sanctions by the court); *Campaign for Responsible Transplantation v. FDA*, 511 F.3d 187 (D.C. Cir. 2007).

Finally, the Federal Circuit follows the majority rule that ongoing jurisdiction to enforce a settlement renders the plaintiffs prevailing parties. *Rice Services v. United States,* 405 F.3d 1017, 1026 (Fed. Cir. 2005) (citing *Roberson* and *Am. Disability Ass'n*).

Although the facts of each leading circuit case differ, one consistent theme emerges from their holdings: where a court approves a settlement agreement and then retains jurisdiction to enforce its terms, that approval contains the requisite judicial imprimatur and renders the plaintiffs the prevailing party.

Since the District Court' Order was labeled as an order, since it was signed by the judge and "So Ordered," since it approved enforceable obligations, and since it retained jurisdiction and oversight of the agreement until the court determined that compliance was achieved, the standards used by the Second, Third, Fourth, Seventh, Ninth, Eleventh, D.C. and Federal

Circuit Courts of Appeals are met and the plaintiffs here are entitled to an award of attorney's fees.[14] All of these appellate decisions, many of which were cited with approval by this Court in *Aronov,* look to "whether the order contains the sort of judicial involvement and actions inherent in a 'court-ordered consent decree.'" 562 F.3d at 90 (quoting *Buckhannon*).

II. The District Court Correctly Concluded That the Plaintiffs Are the Prevailing Parties and Are Entitled to an Award of Attorney's Fees.

A. There Is No Dispute That the Agreement Altered the Legal Relationship Between the Parties.

Without a doubt, plaintiffs have obtained "some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433. In fact, they have obtained virtually all of the benefits they sought in their Amended Complaint, and more, since the Agreement obligates the Commonwealth not only to create new integrated community services for almost 2,000 persons, but a well-structured and organized community service system as well. The parties agreed upon and intended that the Agreement would create legally-binding and judicially-enforceable obligations on the defendants for the benefit of the plaintiff class, thereby clearly constituting a "material alteration of the legal relationship of the parties." *Buckhannon*, 532 U.S. at

[14] Thus, unlike the remand order in *Aronov* that failed the judicial imprimatur test in *every* sister circuit, the District Court's Order here satisfies the same test in *all* of those circuits.

604 (quoting *Texas State Teachers Ass'n*, 489 U.S. at 792-93); *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (noting that a judgment, consent decree or *settlement* can effect a material alteration in legal relationship); *Smith v. Fitchburg Public Schools*, 401 F.3d 16, 26 (1st Cir. 2005) (holding that provisions of private settlement agreement satisfied the "material alteration of the legal relationship" test). Significantly, the defendants do not claim that this prong of the prevailing party test was not met. Appellants' Br. at 18. Therefore, the District Court's determination on this issue should be affirmed.

B. The District Court's Approval of the Agreement, Its Retention of Jurisdiction to Enforce the Agreement, and Its Authority to Ensure Compliance with the Agreement Satisfy the Judicial Imprimatur Requirement.

The District Court's Order satisfies the "judicial imprimatur" requirement because: (1) the court considered, adopted, and approved the Agreement after a careful assessment of the merits; (2) the court retained jurisdiction to oversee compliance with the Agreement; (3) the terms of the Agreement are enforceable and cannot be modified without the court's approval; and (4) the court has broad authority to compel and determine compliance with the Agreement.

1. The District Court considered, adopted, and approved the Agreement, after a careful assessment of the merits.

There is no question that the District Court considered and approved the Agreement, as required by the Agreement itself, *see* App. 132, ¶¶ 38-39, as evident from the transcript of the fairness hearing, *see* App. 223-25, and as reflected in its Order of September 18, 2008. App. 281-82. The court cited these contextual aspects of the litigation and the words of its Order in concluding that this case clearly satisfied the first and second *Buckhannon* and *Aronov* factors: whether the court's order alters the legal relationship of the parties and whether judicial approval reflected some consideration of the merits of the case. App. 971-72.

As required by ¶ 38 of the Agreement, the parties submitted the Agreement to the District Court for its review and approval. The court held three separate hearings regarding the Agreement. At the first hearing on June 13, 2008, the court noted that it had read the Agreement, considered it in light of the claims in the Amended Complaint and presentations by counsel, preliminarily approved it, and authorized notice to the class. App. 148. The court then scheduled a formal fairness hearing for July 25, 2008 to determine whether to finally approve the Agreement.

In their briefs to the court in support of approval, both parties discussed the legal claims raised in the case and the fairness of the

Agreement in light of those claims, their defenses, the relief obtained, and the risks to both parties of litigation. App. 186-190 (Pls' Mem); 219-20 (Defs' Mem.). At the hearing, the court evaluated the merits of the case and concluded that the outcome of the litigation was uncertain. App. 224-25. The court had before it ample information to ensure that its approval "involve[d] some appraisal of the merits." *Arovov*, 562 F.3d at 91.[15] Moreover, its duty under Fed. R. Civ. P. 23(e) to ensure that the Agreement was fair and reasonable, particularly given the vulnerability and pervasive disabilities of the plaintiff class, imposed a heightened duty to evaluate the legal claims in the plaintiffs' Amended Complaint, to assess the defenses presented in the defendants' Answer, and to ensure that the Agreement afforded the plaintiff class the full protection of federal law.[16] The District Court's careful and searching review of the terms of the Agreement to

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[15] The fact that the defendants did not admit liability is not significant. *Buckhannon*, 532 U.S. at 604.

[16] The standard that must be met for court approval of a consent decree is "that it is 'fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; [and] that it is consistent with the objectives of Congress.'" *Conservation Law Foundation v. Franklin,* 989 F.2d 54, 58 (1st Cir. 1993). This is, of course, the very same test that this Court requires for approval of class action settlements. *City Partnership Co. v. Atlantic Acquisition Ltd. Partnership*, 100 F.3d 1041, 1043 (1st Cir. 1996); *Durrett v. Housing Authority of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990). And this is the same test that the District Court applied.

ensure that it was "fair, reasonable and adequate" easily satisfies the *Buckhannon* Court's requirement for court approval and this Court's requirement of an assessment of the merits.[17] *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring).

2. The District Court retained jurisdiction to oversee compliance with the Agreement.

Similarly, there can be no question that the District Court explicitly retained jurisdiction to ensure compliance with the Agreement, as evident by the context of the litigation, the provisions of the Agreement, *see* App. 132, ¶ 40, and the terms of its Order. App. 281.

The District Court interpreted its own Order, as it is entitled to do, to confirm its authority to enforce the Agreement:

> Thus, even if the Agreement contained no specific procedures governing enforcement, this court would have sufficient authority to enforce the Agreement upon a motion from either party. The Order itself confers such authority by its own terms and without incorporating the Agreement.

App. 976 (citing *Kokkonen*).

[17] The court's searching review and approval of the Agreement, encompassing three separate hearings (App. 146, 222, 259) is a far cry from the entry of an electronic docket entry granting a motion for remand without a hearing, without retaining ongoing enforcement jurisdiction, and before the defendant had even filed an answer to the complaint, which the closely divided *Aronov* Court found insufficient to establish judicial imprimatur. 562 F.3d at 87, 92.

3. The terms of the Agreement are enforceable and cannot be modified without the Court's approval.

The District Court had no difficulty in finding that the provisions of the Agreement created binding and enforceable obligations. App. 973. As described above, the Agreement obligates the defendants to take a wide range of actions, including, among many others, providing up to 1,900 persons with brain injuries who currently are segregated in nursing facilities with integrated community services. App. 115-131 ¶¶ 1-35.

These provisions can only be modified if the parties consent *and* the court concurs. App. 134, ¶ 48. The District Court aptly noted that this dual requirement is even stricter than the traditional modification process under Fed. R. Civ. P. 60(b), thereby strengthening the claim that *Aronov's* enforceability prong is satisfied and its modification element met. App. 974. *See Aronov,* 562 F.3d at 91-92 ("court's continuing involvement" is another characteristic of a consent decree or judicially enforceable agreement).

4. The District Court has broad enforcement authority to ensure and determine compliance with the Agreement, including the full range of a federal court's equitable powers, including the power to hold the defendants in contempt.

Not only are the discrete provisions of the Agreement clearly binding and enforceable, but the Agreement itself spells out in considerable detail the means by which the court's enforcement authority will be exercised. App.

132-33, ¶¶ 40-44. First and foremost, it specifically provides that "[t]he Court shall retain jurisdiction to hear and adjudicate noncompliance motions filed in accordance with ¶¶ 43 through 44." *Id.* ¶ 40. Prior to filing an enforcement motion, there is an informal dispute resolution process followed by mediation. *Id.* ¶¶ 41-42. If mediation is unsuccessful, the plaintiffs can then file a motion seeking relief from the court for the defendants' noncompliance. In response to the first enforcement effort, the court may *order* the defendants to take appropriate steps to remedy the noncompliance, using any of its equitable authorities.[18] *Id.* ¶ 43. However, should the defendants fail to adhere to the court's initial enforcement directive, the District Court may enforce its order using "any appropriate equitable or remedial power then available to it including contempt." *Id.* ¶ 44.

The fact that contempt cannot be imposed in the first instance for a violation of the terms of the Agreement in no way detracts from its

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[18] This reference to the court's broad equitable authority is yet another indication, and a powerful one, that the court has given its imprimatur to the Agreement. A federal court's equitable authority includes the power to interpret, clarify, modify, and enforce an order or agreement. The District Court correctly determined that its enforcement authority extended far beyond traditional contract remedies. App. 974. The District Court is, of course, in the best position to determine the scope of its own authority under its Order and the Agreement that it approved. *Id.* 975. *See Kinton*, 284 F.3d at 30; *F.A.C., Inc.*, 449 F.3d at 192.

enforceability. *See* nn. 5 & 6, *supra.* As the Second Circuit said in *Roberson*, 346 F.3d at 83, a case cited by this Court in *Aronov:*

> Even if … a court [is precluded] from using its contempt power in the first instance to enforce a private settlement agreement over which it has retained jurisdiction, we do not think this is significant enough to deprive plaintiffs of prevailing party status.

See also Rolland v. Cellucci, 191 F.R.D. 3, 8 (D. Mass. 2000) (settlement agreement that defendants concede provides a proper basis for fees, Appellants' Br. 11-12, precludes contempt in the first instance, and even requires a judicial determination that a stay of all litigation should be lifted before any enforcement action can begin). The District Court properly found that neither *Buckhannon* nor *Aronov* establishes a rule that contempt must be available "as an enforcement mechanism of first resort" in order for a settlement to contain a sufficient judicial imprimatur to support an award of attorney's fees. App. 975-76.

The enforcement provisions in this Agreement are more than sufficient to empower the court to ensure that the defendants comply with its terms. Enforceability, of course, is the *sine qua non* to establish a judicially-sanctioned material alteration in the legal obligations of the parties for prevailing party purposes. *Aronov*, 562 F.3d at 91 ("an obligation to comply and the provision of judicial oversight to enforce that obligation are the *sine qua non* for a consent decree").

The context of this case, the detailed provisions of the Agreement, and the explicit terms of the District Court's approval order are far different from the one-line remand order that this Court found insufficient to support a fee award in *Aronov*. As the *Aronov* court noted, the district court's order in that case was deemed insufficient to constitute a judicial imprimatur of the legal alteration between the parties because the court: (1) dismissed the case; (2) never considered the merits of the claims; (3) never took any action other than the dismissal order; (4) did not retain jurisdiction; and (5) did not provide for ongoing oversight and enforcement.[19] Here, the court: (1) kept the case open; (2) assessed the merits of the case in considering the plaintiffs' claims, as set forth in their Amended Complaint, and the defendants' defenses, as set forth in their Answer, as part of the fairness hearing; (3) entered a number of other orders, including certification of the class over the vigorous objection of the defendants; (4) explicitly retained jurisdiction; and (5) noted its authority to enforce the Agreement through rulings on noncompliance motions, as provided in the Agreement. Given these diametrically contrasting facts, when this Court's *Aronov* analysis is

[19] The *en banc* court noted that the district court's order would not satisfy the judicial imprimatur test as applied by any of its sister courts. *Aronov,* 562 F.3d at 92. As explained above, just the opposite is true here.

applied to the District Court's Order in this case, the plaintiffs are the prevailing parties and, therefore, are entitled to an award of fees.

C. The District Court Properly Refused to Focus Solely on the Label of the Agreement or to Consider Only Its Approval Order and Disregard the Terms of the Agreement.

The defendants claim that the plaintiffs are not entitled to any fees because the plaintiffs did not obtain a "judicial imprimatur" of "the material alteration in the parties' legal relationship." First they argue that the Agreement does not constitute a consent decree or a functional consent decree, since the parties acknowledged that the Agreement is not a consent decree.[20] Appellants' Br. 19. The District Court rejected this myopic focus, noting that it was really an "argu[ment] that the court should not look to the three *Aronov* factors," but instead should rely entirely on the label, or the disavowal of a label, in the Order. App. 970-71. The court recognized that the defendants' emphasis on labels could not survive this Court's *en banc* decision in *Aronov* that focused on substance, not form.

As this Court has explained, whether an agreement is called a "consent decree" is not the end of the matter and certainly is not dispositive of the plaintiffs' entitlement to fees. *Aronov,* 562 F.3d at 90 ("it is the reality

[20] As more fully described above, the plaintiffs acknowledged this point solely because the contempt remedy was limited to the second enforcement motion. *See* n.5, *supra.*

not the nomenclature which is at issue"). *See Perez,* 587 F.3d at 148 (agreement expressly indicated it was not a consent decree). Rather, as the defendants acknowledge, "context matters." Appellants' Br. 22, n. 6. The context in this case, and in most civil rights class actions that are resolved by settlements agreements or consent decrees, focuses on whether the approval order and the underlying agreement include the type of judicial oversight and involvement characteristic of a consent decree.[21] *Aronov,* 562 F.3d at 93.

Moreover, the Order itself made the Agreement enforceable by retaining jurisdiction over it. In *F.A.C., Inc.,* 449 F.3d at 189-90 (citing *Kokkonen*), the Court held that in order for a district court to retain jurisdiction to enforce a settlement agreement when it was otherwise dismissing a case pursuant to Fed. R. Civ. P. 41, the district court had to *either* incorporate the terms of the agreement directly into the dismissal order *or* indicate in the order that it was retaining jurisdiction to enforce it. Here, the District Court clearly did the latter, and, in addition, kept the case open – rather than dismissing the action – to enforce compliance with the

[21] At the hearing on the fee motion, the court recognized that the Attorney General of Massachusetts and the attorneys general of other states are rather adamant that they will not sign settlements entitled "consent decrees." App. 943 ("They've become less fashionable").

terms of the Agreement. Thus, the Court's Order clearly meets the *Kokkonen* test for an enforceable agreement in federal court, as applied in *F.A.C.,* and thereby clearly satisfies *Buckhannon's* judicial imprimatur test.

Second, the defendants invent a new interpretation of *Aronov,* and the circuit cases on which it relies, in arguing that the Agreement itself is irrelevant and that the only relevant document for determining whether a settlement is similar to a consent decree is the order approving the agreement.[22] Appellants' Br. 20-24. Neither *Aronov* nor any of the court of appeals decisions supports this artificial distinction between the order and the settlement document. To the contrary, this Court eschewed labels and artificial distinctions and chose to focus, instead, on the meaning of the documents in the larger context of the litigation. *Aronov,* 562 F.3d at 92. Moreover, the characteristics of a consent decree cited by the Court in *Aronov*,[23] such as an appraisal of the merits or the court's role in modification and enforcement, clearly involves a review of more than the

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[22] A literal application of the defendants' "order only" test would produce anomalous, if not absurd, results. For example, even if a settlement agreement clearly had many of the characteristics of a consent decree, included a full range of judicial sanctions for noncompliance, and provided for ongoing jurisdiction and oversight, but the court's order simply stated that the agreement was approved by the court, under the defendants' analysis this would not create an entitlement to fees. No case has ever so held, and, tellingly, the defendants cite none.

[23] *See* n.10, *supra.*

order, and, instead, demands an examination of the entire litigation and specifically, the provisions of the settlement document. Looking at the order, and only the order, is plainly inadequate and unreasonably restrictive.

The defendants' novel interpretation also is directly at odds with the opinions of the Justices in *Buckhannon.* *See* 532 U.S. at 618 (holding that a court-approved settlement satisfies the judicial imprimatur test) (Scalia, J. concurring), at 622 (“A court approved settlement will do”) (Ginsburg, J. dissenting). Moreover, most of the appellate courts cited in *Aronov* specifically hold that the *Buckhannon* test is based upon both the district court's order *and* the requirements of the settlement. *See, e.g., Smyth,* 282 F.3d at 279 (whether agreement and order "were, *in combination*, equivalent to a consent decree") (emphasis supplied). The District Court properly rejected the defendants' misapplication of *Buckhannon* and *Aronov,* and held that neither decision required the court to disaggregate the order approving the settlement from the settlement itself. App. 976-77 (consistent with *Aronov*'s focus on context, "the Agreement is part of such context").

The plain words of the Agreement make clear that the defendants are legally required to undertake a host of enforceable obligations, including the creation of a range of community services for over 1900 persons with brain injuries, the development of treatment planning and appeal procedures, the

establishment of quality assurance safeguards, and the implementation of education and outreach programs.[24] These characteristics of the Agreement form the "context" for understanding the District Court's Order, and must be read together with the Order under *Aronov*.[25]

D. The Fact That This Agreement Is Not a Final Judgment and May Be Modified in the Future Does Not Bar an Award of Attorney's Fees.

Finally, the defendants contend that any fee award at this time would be "premature" because the case is ongoing and no final judgment has entered. Appellants' Br. 27. This contention is directly contrary to the Supreme Court's holding in *Buckhannon* and this Court's holding in *Aronov,*

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[24] It is quite remarkable that the defendants attempt to characterize these obligations – all of which are subject to motions for noncompliance and the broad enforcement authority of the court, exercising its full equitable powers – as no requirement to do anything. Appellants' Brief 21 ("This Court's order did not require the defendants to do anything"). This characterization is directly contrary to the defendants' representations at the September 16, 2008 hearing, in which they concurred that the Agreement created legally-binding obligations enforceable by the court. App. 269. This characterization, and its underlying analysis, also is contrary to the Supreme Court's decision in *Kokkonen*, 511 U. S. at 381-82.

[25] Indeed, the defendants even argued "that if the Court were to incorporate the provision of the Agreement's provision concerning jurisdiction into the approval order, then the Commonwealth would not "be getting the benefit of [its] bargain." App. 269. As the order makes clear, the District Court did precisely that. In so doing, it satisfied the Supreme Court's test in *Kokkonen* for an enforceable order and a court's authority to enforce it. Significantly, the defendants did not appeal the approval order.

both of which concluded that a fee award is appropriate *either* when a final judgment is entered *or* when an enforceable settlement is approved. *Buckhannon,* 532 U.S. at 605; *Aronov,* 562 F.3d at 89. Enforceable settlement agreements, like consent decrees, often take a significant period of time to implement, during which modifications or other revisions in the obligations are often made. Moreover, many, if not most, settlement agreements and decrees provide for modification and/or vacation under certain circumstances, and even if they do not, courts can do so anyway. *See Rufo v. Inmates of Suffolk Co. Jail,* 503 U.S. 367 (1992); *Horne v. Flores,* __ U.S. __, 129 S.Ct. 2579 (June 25, 2009).

No case has ever held, and the defendants cite none, that fees should not be awarded until the trial court finds the defendants in substantial compliance with the agreement or decree and enters a final judgment dismissing the case. Yet that is precisely what the defendants argue here. If the defendants' theory is applied to this case, which requires the defendants to transfer class members from nursing facilities to integrated community settings over an eight-year period that only begins when the federal government approves both new Medicaid programs, then the plaintiffs could not even apply for fees until *at least twelve years* after the case was filed and eleven years after it was settled.

The District Court correctly rejected this argument, noting that the cases relied upon by the defendants only addressed preliminary phases of a lawsuit (denying fees for opposing a motion to dismiss or obtaining a preliminary injunction that was ultimately reversed), and that both *Buckhannon* and *Aronov* permit fee awards for obtaining enforceable settlements that contained a judicial imprimatur, without having to wait until the settlement was fully implemented and a final judgment entered. App. 978; *see also Brewster,* 786 F.2d at 17-19.

III. The District Court Did Not Manifestly Abuse Its Discretion in Calculating the Attorney's Fees Award.

After a careful consideration of the pleadings, prior transcripts of court proceedings, App. 911, and arguments at a hearing on October, 15, 2009, App. 956-57, the District Court awarded the plaintiffs their requested fees and costs. App. 980-81. Its assessment of the reasonableness of the requested time was based upon its first hand observation and knowledge of the evolution of this case. The District Court was in a unique, and the best position, to determine that this was a case of significant "importance and difficulty, with the extremely beneficial results for this vulnerable class" and, therefore, that "this request is eminently fair." App. 979. The court noted that the requested hours reflected "substantial voluntary reductions of what might easily have been claimed." App. 979. It then considered and

overruled the defendants' objections, holding that: "The court will not penalize counsel for its laudable restraint." *Id.*

The District Court's determination of reasonable hourly rates relied, in significant part, upon the rates that it had adopted in a recent prior fee decision for the same law firms and many of the same attorneys. *Rosie D. v. Patrick,* 593 F. Supp. 2d 325, 330-31 (D. Mass. 2009). That decision, which was not appealed by the Commonwealth, had applied hourly rates that were substantially (38%) below the actual market rates of the private attorneys. Because the same attorneys were seeking the same rates for work performed several years later, and because these rates also were supported by similarly-experienced public interest attorneys who submitted detailed affidavits, the District Court properly concluded that the requested rates were reasonable. App. 980.

Lower court fee calculations are entitled to considerable deference and will only be reversed for a manifest abuse of discretion. *Burke*, 572 F.3d at 63. Because the District Court's fee award was well supported by the evidence and certainly not an abuse of discretion, it should be affirmed.

A. The District Court's Determination of the Reasonableness of the Time Spent to Achieve the Significant Success of the Agreement Was Based Upon Its First-Hand Knowledge of the Litigation and Was Well Within Its Discretion.

In conjunction with their Motion, the plaintiffs' attorneys submitted detailed time records that itemized, in six minute intervals, every activity that they performed over a several-year period.[26] App. 403-696. The Motion also included affidavits from all lead counsel describing their role and specific contributions to the litigation, App. 294-362, and affidavits from two national brain injury experts. This voluminous and persuasive evidence provided the foundation for the District Court's determination that the hours requested were reasonable and necessary, and produced an exceptional result.

The novelty and complexity of the case demanded an experienced team of legal experts. As the Supreme Court noted in *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992), the difficulty of a case "is ordinarily reflected in the lodestar – either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced" to litigate the case. The First Circuit has also specifically

[26] The requested time eliminated over 145 hours of actual time, as each attorney exercised the requisite billing judgment expected by this Court in reviewing his/her records, and deleted or "no charged" numerous activities. App. 333-34.

held that the "retaining of multiple attorneys in a significant, lengthy discrimination case...is understandable and not a ground for reducing the hours claimed." *Lipsett v. Blanco*, 975 F.2d 934, 939 (1st Cir. 1992). The legal complexity of the Medicaid Act and the integration mandate of the ADA,[27] the factual complexity of the first statewide class action case in the country brought on behalf of all institutionalized persons with brain injuries, App. 302-04, and the remarkable results achieved demanded an experienced team of attorneys.[28]

The defendants claim the amount of time requested in the Motion is unreasonable because: (1) time spent prior to filing the Complaint is not compensable; (2) there were too many attorneys involved in this litigation;

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[27] The Commonwealth relied heavily upon the complexity of its Medicaid waiver programs to defend the legal violations alleged in the Amended Complaint.

[28] Dr. Gregory O'Shanick, the medical director of the National Head Injury Foundation and the chair of the Brain Injury Association of America termed the success of this case "unprecedented" and stated that: "From my national perspective, *Hutchinson* is one of the most far reaching and important cases in the country for institutionalized persons with brain injuries." App. 370. Dr. Mel Glenn, a professor at the Harvard Medical School and the medical director of the outpatient brain injury program at the Spaulding Hospital in Boston, concluded that: "Based upon my experience and knowledge, I believe the Settlement Agreement can radically transform services to persons with brain injuries in Massachusetts. Its scope and breadth is unique in the Nation, and should, if fully implemented, provide a model for other States." App. 376-77.

and (3) there was excessive co-counsel conferencing and travel. Appellants' Br. 32-39. Each of these justifications for reducing the requested number of hours is inconsistent with the District Court's prior, unappealed fee decisions, and inconsistent even with the defendants' own practices.

While the defendants eventually agreed to settle this matter a year after it was filed, they did so only after steadfastly refusing to do so for almost a year prior to its filing. App. 301-04. They continued this determination to litigate the case through the first six months after filing, during which they staunchly opposed virtually every aspect of this lawsuit, even including the venue in which it was filed. App. 304-06. In all likelihood, it was precisely because the plaintiffs prevailed on every preliminary motion, including class certification, that the defendants eventually agreed to consider settlement. *Id*. Moreover, the fact that this case did not involve extensive discovery, intensive expert involvement, and a lengthy trial means that the time requested is far less than otherwise would have been the case. Simply because this lawsuit did not involve such a lengthy and expensive effort does not mean it was not challenging and complex, nor that all of the time spent on achieving the settlement is any less reasonable or less compensable.

1. Pre-Filing Time

After investigating the facts, researching the law, identifying the individual and organizational plaintiffs, meeting with potential experts and fact witnesses, and drafting the complaint – all of which were necessary to file the lawsuit – the plaintiffs made a serious effort to avoid litigation. App. 301-02. They met with senior officials from the Romney Administration during the fall of 2006, and with even more senior officials from the Patrick Administration in the spring of 2007, to discuss potential actions by the Commonwealth that would avoid the need to file a lawsuit. *Id.* 304. Neither of these efforts was even remotely successful nor resulted in any offer whatsoever to address the needs of class members. As a result, the District Court properly concluded that the pre-filing time "was justified by the need for preparation and the reasonable hope for a non-litigated resolution." [29] App. 979.

[29] The defendants erroneously cite Judge Ponsor as the author of the fee decision in *Rolland v. Cellucci,* 106 F. Supp. 128 (D. Mass. 2000). Appellants' Br. 38-39. In fact, Magistrate Judge Neiman presides over that case and wrote that opinion. Thus, Judge Ponsor did not fail "to distinguish its own prior decision denying fees for such work." *Id.* at 38. To the contrary, since Judge Ponsor had awarded fees in *Rosie D.*, 593 F. Supp. 2d at 327-28, 332, for pre-filing research, drafting, and negotiations, which the defendants never challenged or appealed, his decision here is entirely consistent with the court's prior awards.

2. Number of Attorneys

The District Court reviewed extensive pleadings, held multiple hearings, and issued numerous rulings on the defendants' post-filing motions. From this first-hand perspective, it understandably concluded that "Defendant's opposition during the months following filing made the commitment of attorneys and attorney time on Plaintiffs' side both necessary and inevitable." App. 979.

That the defendants eventually agreed to settle this matter – after an arduous negotiation process that spanned eight months – does not mean that time spent by more than three attorneys to negotiate the settlement and time spent by more than one attorney to secure approval of the settlement is, as the defendants' claim, *per se* unreasonable. Appellants Br. 32-35. To the contrary, the defendants' willingness to even discuss settlement required the concerted effort of several attorneys from WilmerHale and the Center for Public Representation. App. 303. Similarly, securing the Agreement demanded the research, planning, expert consulting, drafting, and strategizing of all members of the core legal team. App. 310. Finally, obtaining court approval and contesting the terms of the approval order necessarily required several attorneys and certainly all of the four primary co-counsel. *Id.*

Significantly, the defendants were represented by at least five attorneys at every single negotiation session.[30] To argue, as they do, that it is excessive and unreasonable for the plaintiffs to be represented by more than three lawyers (Schwartz, Rucker, and Johnston) is plainly inconsistent with their own professional judgment and staffing decisions. Similarly, the defendants involved at least three, and usually four, attorneys in the efforts to secure court approval of the Agreement.[31] To argue that it is excessive and unreasonable for the plaintiffs to be represented by more than one lawyer (Schwartz) also is inconsistent with their own staffing decisions. Moreover, because the plaintiffs already voluntarily eliminated several attorneys from their request, and because such voluntary reductions more than adequately addressed any concern for over-lawyering, *see Rosie D.*, 593 F. Supp. 2d at 330, the District Court properly applied the same analysis here and made no further reduction in the number of attorneys for whom an award of fees is appropriate.

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[30] At least three assistant attorney generals (Mss. Willoughby, Roney, Grace Miller, and Cartee), as well as the two General Counsels for EOHHS and MRC attended every meeting and participated in every interim conference call. App. 307-08.

[31] Two assistant attorney generals and both general counsels were involved in the fairness process and court order debates, even though they did not all attend the fairness hearing.

3. Co-counsel conferencing

The defendants next claim that the amount of time spent by the plaintiffs' co-counsel discussing litigation and settlement strategies was excessive. Appellants' Br. 35-38. They argue that the percentage of total time spent by Mr. Muller conferencing (11%) was reasonable and any amount or percent of time spent by any of the other plaintiffs' attorneys above this figure is *per se* unreasonable. *Id.* at 37. This comparison is faulty both because Mr. Muller joined the legal team solely during the negotiation phase of the case, and because he played a less central role than lead co-counsel, Schwartz, Johnston, Rucker, and Dube. It is also directly contradicted by the defendants' prior legal position in another case before the same court.[32]

4. Travel

Finally, the defendants argue that all of the time spent by WilmerHale traveling to court hearings in Springfield should be eliminated because they were not separately marked and the rates reduced. But the District Court

[32] In the most recent *Rolland* fee dispute, where the issue of excessive conferencing was also raised, these same defendants conceded that it was reasonable for lawyer[s] in a complex class action to spend 21% of their time conferring with co-counsel when they were negotiating and securing approval of a new settlement agreement. *See Rolland v. Patrick,* 2009 WL 3258401(D. Mass. Oct. 2, 2009).

found that WilmerHale had already reduced its actual time by over a hundred hours and its rates by 43%.

It was clearly not a manifest abuse of discretion for the District Court to conclude that the time spent by the plaintiffs' counsel was reasonable, in light of the defendants' initial legal position in this case, their own staffing of this case, and their prior arguments on reasonableness in the *Rolland* case, upon which they rely in other arguments here. Given the court's direct observation and knowledge of the evolution of this litigation, its careful review of the time records and fee affidavits in this matter, and its prior unappealed ruling in *Rosie D.,* the District Court's finding that the time spent on all aspects of this litigation was eminently reasonable and certainly not a manifest abuse of discretion. *Burke,* 572 F.3d at 63.

B. The District Court Applied Hourly Rates That Were Substantially Below the Market Rates of Private Counsel, That Were Well Supported by the Record, and That Were Identical to the Unchallenged Rates It Had Adopted Recently For Many of the Same Attorneys.

Congress, the Supreme Court, and the First Circuit have made clear that actual billing rates by private counsel – such as WilmerHale – are the best evidence of a reasonable rate for their services. S.Rep. No. 94-1011 at 6 (1976), *reprinted in* 1976 U.S. C.C.A.N. at 5913; *Blum v. Stenson,* 465 U.S. 886, 893-95 (1984); *Bogan v. City of Boston,* 489 F.3d 47, 429 (1st Cir. 2007)

(while courts are not bound by a lawyer's requested rate, it should only adjust an attorney's actual billing rate based upon a finding that the attorney did not perform the type of work that she or he ordinarily performs for that rate).

In *Blum v. Stenson*, 465 U.S. at 893-95, the Supreme Court held that fee awards under 42 U.S.C. § 1988 should "be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." In support of this conclusion, the *Blum* Court pointed to the legislative history where Congress explained that fee awards under § 1988 should "be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases…." S.Rep. No. 94-1011 at 6, *reprinted* in 1976 U.S.C.C.A.N. at 5913. Where private counsel are involved, "the best evidence [of their reasonable hourly rate] is the hourly rate customarily charged by counsel…." *Tomazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir. 1986). Significantly, the Supreme Court recently reaffirmed that market rates are presumptively reasonable, since "'the prevailing market rates in the relevant community' … produce[] an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue v. Kenny A.*, __ U.S. __, 130 S.Ct. 1662, 1672 (2010).

For public interest counsel – like the Center for Public Representation – who do not regularly bill for their services or do so at below market rates, documentation in the form of affidavits from practitioners with knowledge of the market, analyses of fees charged in the market, or other data evidencing the market rate for counsel of comparable skill and experience – such as their co-counsel from WilmerHale – should form the basis for the rate utilized in the fee calculation. *Blum*, 465 U.S. at 895 n.11.

The plaintiffs' Motion requested hourly rates that were identical to those which the same firms and many of the same attorneys had received in *Rosie D.*, despite the fact that the work performed in this case took place several years later. Thus, the requested rates here diverged even further (43% lower) from the attorney's market rates than they did in *Rosie D.* (38% lower). In addition to its decision in *Rosie D.*, the District Court relied upon affidavits from a national fee expert and two Boston public interest attorneys on hourly rates, App. 379-399, all of which demonstrated that the requested rates were eminently fair and significantly below what would be reasonable under the Supreme Court's standards. [33]

[33] Stephen Hanlon, the director of the *pro bono* program at Holland and Knight, calculated a reasonable rate for each of the plaintiffs' attorneys, based upon their experience and expertise, market rates in the relevant community, and Mr. Hanlon's representation of civil rights attorneys in other fee matters and in the *pro bono* work of his own firm. Mr. Hanlon's

The defendants devote a considerable portion of their Brief to a challenge to the hourly rates approved by the District Court. Appellants' Br. 40-48. Strikingly, they have not submitted any affidavits or any evidence at all of a reasonable rate for the plaintiffs' attorneys.[34] *Id.* Instead, they simply argue that the market rates actually charged by WilmerHale attorneys are not their real market rates, *id.* at 45-46, that the substantial voluntary reductions to these actual market rates offered by WilmerHale are not relevant, *id.* at 43, that there is a different and distinctly lower rate for civil rights litigation, *id.* at 40-41, and that the court's recent order in *Rosie D.* rejecting this position and determining that the requested rates are reasonable is not controlling. *Id.* at 46-48.[35] Once again, the District Court properly dismissed each of these arguments. App. 980. *See Foley v. City of Lowell,* 948 F.2d 10, 21 (1st Cir. 1999) (failure "to submit evidence

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determination of reasonable hourly rates generally *exceeded* the rate requested for each lawyer by almost 175%. Put another way, each of these attorneys reduced their market rate by roughly 43%.

[34] In the absence of evidence, the defendants essentially conjure up what they think are reasonable rates. Appellants' Br. 43. Their proposed rates are far lower than their own rate scale developed by the Attorney General's Office.

[35] Even those cases relied on by the defendants concede that "prior cases . . . provide a reflective picture of what is happening in the market." *McDonough v. City of Quincy*, 353 F. Supp. 2d 179, 187 (D. Mass. 2005).

challenging the facts asserted in the affidavits" results in a waiver of the right to challenge the court's rate determination).

First, as reaffirmend in *Perdue,* the rates charged to paying clients is the best evidence of an attorney's market rates. 130 S.Ct. at 1673, 1674 & n.5 (citing *Blum*). As the District Court noted in *Rosie D*, there is no "'good guy' or 'white hat' fee discount" which applies only to civil rights litigation. *Rosie D.*, 593 F. Supp. 2d at 330.

Second, as the District Court determined in *Rosie D.*, WilmerHale's voluntary reduction from its market rates is "an eloquent expression of the good faith of the WilmerHale contingent." This forty-three percent reduction more than accounts for any difference between what an attorney charges and what she may actually receive from a paying client. Finally, the District Court had additional, persuasive evidence that WilmerHale's reduced rates are consistent with rates charged by qualified and experienced public interest attorneys in Boston and elsewhere. App. 379-99. *See also Rosie D.,* 593 F. Supp. 2d at 331. It was certainly not a manifest abuse of discretion to adopt the same, unappealed rates that it had used previously – in fact, a lower rate, taking into consideration the time covered by this fee motion – in calculating the lodestar here.

C. The District Court's Award of Costs Was Reasonable, and Consistent with Its Prior Decisions and Decisions of Other Courts on Reimbursable Costs.

The District Court properly awarded the plaintiffs very modest costs, consistent with this Court's longstanding directives and the District Court's prior decisions. *See Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983); *Rosie D.,* 593 F. Supp. 2d at 334. All litigation expenses are normally compensable, including stenographic transcripts of depositions; daily trial transcripts; witness fees including necessary travel, meals and lodging; copying costs; computer assisted legal research; attorney travel including parking, meals and lodging; telephone expenses; and more. *See also* Newberg, Attorney Fee Awards, §§ 4.43-44 and 2.19 (1986) (listing cases approving allowance of travel, copying, postage, long distance telephone, and computerized legal research as reimbursable litigation costs under both fee shifting statutes and common fund lawsuits). The District Court did not abuse its discretion by awarding costs for litigation expenses that are properly reimbursed under this Court's precedents and that it had awarded, unchallenged, in *Rosie D.*

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's decision that the plaintiffs are entitled to attorney's fees for securing a judicial imprimatur of the Agreement, and the District Court's award of fees and costs, as an appropriate exercise of its discretion. The Court should award the plaintiffs their fees and costs for this appeal, and remand the matter to the District Court for a calculation of fees for this appeal.

RESPECTFULLY SUBMITTED,
THE PLAINTIFFS,
BY THEIR ATTORNEYS,

/s/ Steven J. Schwartz_____
Steven J. Schwartz
Kathryn Rucker
J. Paterson Rae
Center for Public Representation
22 Green Street
Northampton, MA 01060
(413) 586-6024
First Cir. No. 22217
First Cir. No. 1140855
First Cir. No. 27094

Richard A. Johnston
Michael R. Dube
Wilmer Hale, LLP
60 State Street
Boston, MA 02109
(617) 526-6000
First. Cir. No. 21113
First Cir. No. 94072

Dated: June 1, 2010

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Steven J. Schwartz, certify that:

1. This brief contains 13,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word 97-2003 in 14 point Times Roman.

June 1, 2010

/s/ Steven J. Schwartz_____
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I, Steven J. Schwartz, certify that on this the 1st day of June, 2010 an electronic copy of this brief was filed and served through the Electronic Case Filing (ECF) system to:

Jennifer Grace Miller
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
Jennifer,.miller@state.ma.us

Brian P. Bialas
Jeffrey S. Follett
Foley Hoag LLP
155 Seaport Blvd.
Boston, MA 02210
bbialas@foleyhoag.com
jsf@foleyhoag.com

/s/ Steven J. Schwartz_____
Steven J. Schwartz, Esq.
Attorney for Plaintiffs-Appellees