IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

VALERIA TANCO and SOPHY JESTY, IJPE DeKOE and THOMAS KOSTURA, and JOHNO ESPEJO and MATTHEW MANSELL,	)	
Plaintiffs,	)	Case No. 3:13-cv-01159
v.	)	Judge Aleta A. Trauger
WILLIAM E. "BILL" HASLAM, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION
FOR ATTORNEYS' FEES, COSTS AND EXPENSES

Plaintiffs file this Reply in further support of their Motion for Attorneys' Fees, Costs and Expenses. Defendants' Response in Opposition to Plaintiffs' Motion ("Response") argues that Plaintiffs' requested fees should be reduced by over one half. Defendants' request for such a massive reduction in Plaintiffs' reasonable fee request, beyond the significant reduction Plaintiffs themselves have already offered voluntarily, asks the Court to accept six incorrect propositions:

1. That the Plaintiffs' attorneys' voluntary reduction of over $1,000,000 in fees and expenses should be completely ignored. The Response fails even to acknowledge these voluntary reductions.

2. That the Plaintiffs' attorneys should receive less than any other attorney team in the consolidated cases, despite the fact that the Plaintiffs' attorneys undertook responsibility not just for briefing in this case at the District, Circuit, and Supreme Court levels, but also for oral argument before the Sixth Circuit and for one of the two questions presented at the Supreme Court. The Michigan attorneys recovered 100% of their requested fees, the Ohio attorneys recovered 118.6% of their requested fees, and the Kentucky attorneys recovered 96.67% of their

requested fees. Defendants propose that the Tennessee attorneys receive only 47.7% of their (already heavily-discounted) requested fees, and less in actual dollars than any other attorney team.

3. That the twelve declarations filed by Plaintiffs, including the declarations of three well-respected, experienced local attorneys – Doug Johnson, Ed Lanquist, and Jerry Martin – and a preeminent Supreme Court practitioner – Paul Smith – supporting the reasonableness of Plaintiffs' fee request can be rebutted without any contrary evidence. No declaration was filed in support of Defendants' Response contradicting the sworn statements of these attorneys.

4. That the law of the Sixth Circuit regarding alleged "block billing" is not dispositive in this case. In this Circuit, block billing is acceptable so long as "the description of the work performed is adequate," *Smith v. Serv. Master Corp.*, 592 F. App'x 363, 371 (6th Cir. 2014); and, therefore, the description of activities need not be "further described by time spent on each individual activity," *Pittsburgh & Conneaut Dock Co. v. Dir., Office of Workers' Comp. Programs*, 473 F.3d 253, 273 (6th Cir. 2007). Neither of these cases, which are directly on point, was acknowledged in Defendants' Response, which instead takes the position that block billing is not allowed at all in the Sixth Circuit, and that the presence of any block billing in Plaintiffs' attorneys' time diaries means that all requested time, whether or not "block billed," should be reduced by twenty percent.

5. That practitioners such as Abby Rubenfeld, whom Defendants correctly describe in their Response as having "worked for decades on behalf of civil rights plaintiffs, specializing in sexual orientation and AIDS-related issues,"[1] should have stepped aside from one of the most important LGBT rights case in a generation after initiating the case and having been retained by Plaintiffs, thereby depriving their clients and their co-counsel of their deep and invaluable

[1] Response, p. 18.

knowledge regarding the issues relevant to this litigation. It is difficult to read with anything other than incredulity these words from Defendants' Response: "Defendants object to all fees billed by Ms. Rubenfeld after the engagement of Sherrard & Roe on August 6, 2013, as duplicative, overstaffing, and unnecessary."

6. That every attorney (save Mr. Harbison) who had worked on the case up until the preparation and filing of the Petition for Certiorari with the United States Supreme Court should have completely ceased working on the matter once Ropes & Gray was retained, leaving a group of attorneys with no prior experience on the case to draft and file the Petition for Certiorari in one week.

Matters Which Are Not at Issue.

Before addressing these six contentions in turn, it should be noted that two issues often litigated in fee disputes are not at issue in this case: whether Plaintiffs are the prevailing party in the litigation, and the proper rate to be charged for the work performed by Plaintiffs' attorneys. The first is apparent and conceded by Defendants, and the Response similarly contains no objection to the (often substantially reduced) rates requested by Plaintiffs and supported by their experts as reasonable. The only issue raised in the Response is whether the amount of work performed by the Plaintiffs' attorneys in successfully prosecuting this landmark civil rights case is compensable.

Plaintiffs' Voluntary Reduction of Fees.

Defendants' Response argues that Plaintiffs' request for attorneys' fees should be reduced in two major ways: the complete exclusion of fees for time entries Defendants contend are "vague" or that include phases of the case during which Defendants argue attorneys should have essentially withdrawn as counsel; and, a general twenty-percent reduction to all other requested fees, even the entries to which Defendants assert no objections at all. Defendants argue that these reductions are appropriate because of purported "overstaffing," "vagueness,"

and "block billing." Defendants also argue anecdotally, *i.e.*, without any evidentiary support, that attorneys should have abstained from attending certain meetings and that certain expenses should have not been incurred. These arguments all suffer from multiple infirmities, as will be discussed. But the one, overarching problem with these arguments is that they completely ignore the voluntary reductions to Plaintiffs' fees and expenses that were detailed in Plaintiffs' fee request.[2]

These voluntary reductions included:

- 320 hours not billed by Ropes & Gray during the time it was getting up to speed on the case (which offsets any argument that then-active counsel should have withdrawn).
- The decision by Ropes & Gray and NCLR to request fees at Nashville rates rather than their substantially higher standard rates (which reflect the national markets in which they practice).
- The decision by NCLR and Ropes & Gray not to request any fee for the valuable time worked by two experienced and well-credentialed appellate lawyers, David Codell of NCLR and Justin Florence of Ropes & Gray.
- The decision not to bill for any paralegal or law clerk time at all.
- The decision not to bill for any attorney who worked fewer than 20 hours on the case.
- The decision by Sherrard & Roe not to bill for 100 hours of attorney time (which offsets any alleged duplication).

As explained in the Memorandum supporting Plaintiffs' motion, the total value of these voluntary reductions surpasses $1,000,000. The Response completely ignores these voluntary reductions—literally never mentioning them—while arguing that over half of the requested fees should be cut. The Response also ignores the fact that four respected attorneys have reviewed

[2] Further, Plaintiffs' attorneys have not sought—but continue to reserve the right to do so—the significant additional fees incurred as a result of Defendants' decision to vigorously contest their fee request, in stark contrast to the States of Michigan and Ohio that quickly agreed to pay all of the fees requested by counsel in those cases (and, in the case of Ohio, voluntarily agreed to an enhancement).

Plaintiffs' requested fees and found them to be reasonable, as stated in their declarations filed in support of the Motion.

Even assuming *arguendo* that any particular meeting or conference call could have been staffed differently, or that a few of the thousands of billing entries made by Plaintiffs' attorneys might be impermissibly imprecise, or that assisting the Plaintiffs with respect to the harms they were suffering because of the unconstitutional refusal by the Defendants to recognize their marriages is not compensable, any warranted reduction in a reasonable fee for work in this case has already been accounted for and subsumed by these voluntary reductions. Plaintiffs have already satisfied their burden to exercise appropriate billing judgment reductions and no further reductions are warranted. *See., e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (explaining that courts can reduce awards if Plaintiffs have not exercised appropriate billing judgment reductions).

Defendants' Position is Unreasonable When the Resulting Recovery Is Compared To The Recovery of Other Similarly-Situated Attorney Teams.

The Court's task in ruling on any fee petition is to identify and award a reasonable fee to the attorneys for the prevailing party. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. In this instance, the Response contends that a reasonable fee for the work by Plaintiffs' attorneys is $1,066,903.55. While comparison with work performed by other attorneys in other cases is not the most relevant factor in determining an appropriate fee,[3] a comparison of the recovery by

[3] The most important consideration in determining an appropriate fee award is whether the award "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. ex rel. Winn*, 559 U.S. 542, 551 (2010). As explained in Plaintiffs' Motion, the fees sought by Plaintiffs in this case ($2,333,095.63 in fees and $65,555.37 in expenses) are already significantly less than the attorneys would have received from paying clients as a result of voluntary reductions made as part of the Motion.

other attorneys in the cases argued along with this case on appeal illustrates the unreasonableness of Defendants' position.

Tanco v. Haslam was briefed and argued in the Sixth Circuit along with cases from Kentucky, Ohio and Michigan, then consolidated with the same cases by the United States Supreme Court. The Michigan and Tennessee teams were responsible for oral argument of the two presented questions presented in the Supreme Court per the court's order, and accordingly worked significantly more hours on the case in preparation for oral argument at the Supreme Court. The attorneys successfully representing the plaintiffs in these other cases requested and received the following fees:

- The Michigan attorneys sought $1,927,450 and received via settlement the amount of their request (recovering 100% of their requested fees)[4]
- The Kentucky attorneys requested $1,192,899 and received via judgment $1,153,230 (recovering 96.67% of their requested fees)[5]
- The Ohio attorneys requested $1,096,142.50 and received via settlement $1,300,000 (recovering 118.6% of their requested fees)[6]

In their Response, the Defendants suggest that Plaintiffs' attorneys in this case should recover $1,066,903.55 in fees, which equates to 47.7% of their requested fees. This would be the lowest recovery in dollars of any plaintiff team despite the fact that the Tennessee attorneys shared responsibility with the Michigan team for the most important and time-consuming aspect

[4] Stipulation and Order, *DeBoer, et al. v. Snyder, et al.*, (No. 12-cv-10285) (E. D. Mich., Oct. 7, 2015) (Copy attached as Exhibit A). *See also Michigan Pays $1.9M in Legal Fees for Gay Marriage Case*, DETROIT NEWS, Oct. 7, 2015 (http://www.detroitnews.com/story/news/local/oakland-county/2015/10/07/michigan-pays-million-legal-fees-historic-gay-marriage-case/73522282/)

[5] Memorandum Opinion, *Love, et al. v. Beshear, et al.* (No. 3:13-CV-750-H) (W. D. Ky, May 14, 2014); Memorandum Opinion, *Bourke, et al. v. Beshear, et al.* (No. 3:13-750-CRS) (W. D. Ky, Jan. 13, 2016) (Copies attached as Exhibit B).

[6] Judgment, *Obergefell, et al. v. Hodges, et al.*, (No. 1:13-cv-501) (S. D. Ohio, Nov. 2, 2015) (Copy attached as Exhibit C).

of the case – the Supreme Court argument. The unreasonableness and, indeed, unfairness of Defendants' position is quickly evident when compared to the recovery obtained by other counsel.

The Declarations Supporting Plaintiffs' Motion are Unrebutted.

There is a "strong presumption" that the lodestar represents the "reasonable" fee. *City of Burlington v. Dague*, 505 U.S. 557, 561 (1992). Moreover, courts should "defer to the winning lawyer's professional judgment as to how much time … was required to spend on the case." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Although a fee applicant bears the initial burden of adequately documenting her time, the opposing party has the burden of rebuttal that requires the submission of *evidence* to the district court challenging the reasonableness of the claimed fee. *See Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991) (holding that "[i]f the defendant asserts that a particular charge is related solely to work done on unsuccessful claims, the burden shifts to the defendant to demonstrate" that fact with "evidence" rather than "mere conclusory allegations that the award was excessive"); *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984) (finding that where the government relied solely on its brief in the District Court it had "waived [its] right to challenge in this Court the District Court's determination that the number of hours billed were reasonable for cases of similar complexity").

The reasonableness of Plaintiffs' requested fees was supported by twelve declarations filed along with the Motion. Among those were the declarations of three well-respected, experienced local attorneys – Doug Johnson, Ed Lanquist, and Jerry Martin – and the declaration of a preeminent Supreme Court practitioner, Paul Smith. In stark contrast, Defendants' Response is not supported by <u>any</u> declaration suggesting that the requested fees are not reasonable, nor does the Response address or attempt to rebut the opinions offered by these third-party practitioners. Plaintiffs have offered detailed and compelling evidence of the

reasonableness of their requested rates and the reasonableness of their requested hours. Defendants, in response, have offered a largely unexplained, color-coded version of the time diaries Plaintiffs submitted with their Motion without any supporting declarations.

An opposing party may offer evidence opposing the claimed rates and impeaching the applicant's time records, but has the burden of doing so through admissible, probative evidence. *See Perotti*, 935 F.2d at 764; *Johnson v. City of Clarksville*, 256 F. App'x 782, 783 (6th Cir. 2007) (affirming the district court's civil-rights fee award where the opposing party "offered no evidence or affidavits to rebut these statements"). Here, Defendants have offered no such evidence rebutting the reasonableness of the requested fees as supported by the declarations.

In addition, aside from highlighting Plaintiffs' attorneys' billing records in various colors, Defendants provide no specific objections to time entries that were purportedly duplicative or overstaffed. Defendants fail to explain, for instance, which attorneys they believe performed the same or similar tasks. Nor do they explain why it would not have been reasonable for multiple attorneys to work on particular briefs, such as the Circuit and Supreme Court briefs, which typically require the work of multiple attorneys. Accordingly, if this Court finds that some duplication of effort occurred that has not already been accounted for by the significant billing judgment reductions Plaintiffs have already made (which Plaintiffs dispute), the solution would be to deduct a small percentage of the total hours. *See, e.g.*, *Northcross v. Bd. of Ed. of Memphis City Sch.*, 611 F.2d 624, 636-37 (6th Cir. 1979) ("In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services."). "It is impermissible, however, to eliminate wholesale the services of attorneys without identifying the particular services which are regarded as duplicative." *Id.* at 637.

Block Billing Is Acceptable in the Sixth Circuit.

In their Response, Defendants allege that Plaintiffs' attorneys engaged in "block billing" and that, as a result, all requested time should be cut by twenty percent, not just the time that was allegedly block billed. No attempt is made to justify the selection of twenty percent as an appropriate deduction, and no attempt is made to explain why an entry that is not considered to be block billed is subject to a twenty percent reduction simply because other entries are alleged to be block billed.

As a factual matter, Plaintiffs deny that the entries identified by Defendants contain block billing. Indeed, far from recording an entire day's worth of work, as block-billed entries typically do, the vast majority of the time entries to which Defendants object as "block-billed" record less than two hours of work each. Plaintiffs' entries break down the general tasks that were being performed, thereby providing ample detail for this Court to make reasonableness determinations. Here, Plaintiffs have clearly articulated what tasks they were performing, all of which were necessary and reasonable for the litigation of the underlying claims.[7] Plaintiffs' counsel have sufficiently documented their time to allow this Court's review, and all of that time was reasonably spent achieving the excellent results obtained in this case.

Further, the law is this area is plain, and dispositive of Defendants' argument for an across-the-board reduction of twenty percent based on alleged block billing. As stated in the recent opinion of the Western District of Kentucky in awarding fees to the Kentucky attorneys in the consolidated marriage equality case:

[7] Defendants rely on *Heath v. Metro. Life Ins. Co.*, 2011 WL 4005409, at *10 (M.D. Tenn. Sept. 8, 2011). The billing entries at issue in *Heath* consisted of five identical entries that the attorneys used to describe all of their work on the case. In stark contrast, Plaintiffs' counsel have provided billing records with ample detail to determine the reasonableness of their work.

> The Sixth Circuit Court of Appeals has consistently held that block billing is acceptable as long as "the description of the work performed is adequate." *Smith v. Serv. Master Corp.*, 592 F. App'x 363, 371 (6th Cir. 2014); *see also Pittsburgh & Conneaut Dock Co. v. Dir., Office of Workers' Comp. Programs*, 473 F.3d 253, 273 (6th Cir. 2007). This Court does not require counsel's descriptions of activities in a block billing entry to be "further described by time spent on each individual activity." *Pittsburgh & Conneaut Dock Co.*, 473 F.3d at 273.

Memorandum Opinion, *Bourke v. Beshear* (No. 3:13-CV-00750) (W.D. Ky., Jan. 13, 2016) pp. 12-13.[8] The Sixth Circuit has held that where a party provides "detailed, itemized billing records that specify, for each entry, the date that the time was billed, the individual who billed the time, the fractional hours billed (in tenths of an hour), and the specific task completed … explicitly detailed descriptions are not required." *E.E.O.C. v. Whirlpool Corp.*, No. 3:06-CV 0593, 2011 WL 3321291, at * 9 (M.D. Tenn. Aug. 2, 2011) (quoting *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 554 (6th Cir. 2008)); *see also Smith v. Serv. Master Corp.*, 592 F. App'x 363, 371 (6th Cir. 2014) ("[S]o long as the description of work performed is adequate, block-billing can be sufficient."); *U.S. ex rel. Lefan v. Gen. Elec. Co.*, 397 F. App'x 144, 148-49 (6th Cir. 2010) (finding that Court could determine from entries such as "Telephone Conference w/REL" and "Travel to Owensboro," and the context of the trial timeline that "entries adequately described the work performed").

Plaintiffs' Attorneys Participation in the Case Was Reasonable.

Defendants also argue that certain attorneys should not have been at all involved in the litigation, and that other attorneys should have essentially withdrawn as counsel and removed themselves from participating in the briefing and argument of the matter before the Supreme Court. Response, pp. 8 (Rubenfeld), 10 (Holland), 11 (Lambert), 13 (NCLR) & 15-16 (Sherrard & Roe). Between August 6, 2013 and November 2014, the only attorneys the Defendants would have the Court approve of working on the case are the four attorneys at Sherrard & Roe and the

[8] Copy attached as Exhibit B.

attorneys from NCLR.[9] After that date, Defendants' position is that only the attorneys from Ropes & Gray should have worked on the case (with the minor exception that a single attorney who was experienced in the case would be allowed to continue to participate for "continuity" purposes).

It is absurd to suggest, as Defendants do, that the entire case could have been (much less, should have been) turned over to Ropes & Gray with only a single attorney from the existing team assisting Ropes & Gray in the preparation of the Petition for Certiorari, the briefing on the merits, preparation of the appendix,[10] necessary coordination with the other plaintiff teams, and preparation for oral argument at the Supreme Court. Defendants' position is rebutted by the Supplemental Declaration of Douglas Hallward-Driemeier filed contemporaneously with this reply. ("Hallward-Driemeier Sup. Decl."). In his declaration Mr. Hallward-Driemeier identifies the contributions made by then-existing counsel by giving examples of ways in which Ms. Rubenfeld, Ms. Lambert, Ms. Holland, NCLR and Sherrard & Roe assisted in the litigation of the case before the Supreme Court. Hallward-Driemeier Sup. Decl. at ¶¶ 6-7. If not performed by existing counsel, this work would have been performed—albeit less effectively and efficiently—by attorneys at Ropes & Gray, thereby adding to that firm's requested fee. *Id*. at ¶¶

[9] Defendants also argue that time prior to the filing of the Complaint should not be compensable. Response, p. 9. Contrary to Defendants' Response, the Sixth Circuit has upheld fee compensation for work performed before counsel entered an appearance as long as it was spent "on litigation." *Perotti*, 935 F.2d at 764. It is beyond question that attorneys have a duty to engage in substantial research before filing a complaint and that Plaintiffs must be interviewed to ensure that they are properly before the Court and their claims are well-grounded. Fed. R. Civ. P. 11(b). All of that time was reasonable and is compensable in this litigation. *See* Dkt. 97-2 (Minter Decl.) at ¶ 15 (Explaining that the novel legal theories in this case required extensive legal research and work to develop the complaint and to brief substantive motions).

[10] As shown by the time records presented in support of the Motion, Ms. Holland worked extensively on the Supreme Court appendix. This work was undeniably "necessary," and otherwise would had to have been performed by another lawyer. The fact that Defendants refuse to even concede Ms. Holland is entitled to recover her fees for this essential task demonstrates the unreasonableness of their position.

5-6. Mr. Hallward-Driemeier concludes that the work performed by these attorneys was both "reasonable and necessary to the result achieved on behalf of Plaintiffs." *Id*. at ¶ 8.

Also notable, the financial burden of Defendants' argument that counsel should not have participated during significant portions of the case—and for some, not at all—falls most heavily on the attorneys with a history of protecting civil rights for the LGBT community, as illustrated below:

- Ms. Rubenfeld requested compensation for 325.7 hours of work. 6.6 hours of that time are identified as compensable by Defendants (who then additionally reduced that time by twenty percent because of alleged block billing). In Defendants' view, Ms. Rubenfeld's allowable compensable hours as percentage of requested hours amount to 0.16 percent of her requested total (6.6 – 20% penalty for alleged block billing = 5.28/325.7 = 0.16 percent).

- Ms. Holland requested compensation for 235.35 hours of work. Five hours of that time are identified as compensable by Defendants (who then additionally reduced that time by twenty percent because of alleged block billing). In Defendants' view, Ms. Holland's allowable compensable hours as percentage of requested hours amount to 0.17 percent of her requested total (5 – 20% penalty for alleged block billing = 4/235.35 = 0.17 percent).

- Ms. Lambert requested compensation for 499.6 hours of work. 13.6 hours of that time are indemnified as compensable by Defendants (who then additionally reduced that time by twenty percent because of alleged block billing). In Defendants' view, Ms. Lambert's allowable compensable hours as percentage of requested hours amount to 2.17 percent of her requested total (13.6 – 20% penalty for alleged block billing = 10.88/499.6 = 2.17 percent).

- The total time compensable time requested by Ms. Rubenfeld, Ms. Holland and Ms. Lambert amounts to 1,060.65 hours. Defendants identify 20.16 of these hours as compensable, a mere 1.90 percent of the hours requested by these attorneys together.

- The NCLR attorneys requested compensation for 1329 hours of work. 280 hours of that time are identified as fully compensable by Defendants (who then additionally reduced that time with an unnecessary across the board reduction of twenty percent because of alleged block billing). In Defendants' view, NCLR's allowable compensable hours as a percentage of requested hours amounts to thirty eight percent of the requested total. (20% reduction of 640 (280+360) = 512/1329 = 38%)

Ms. Rubenfeld, Ms. Holland, and Ms. Lambert are veteran attorneys with a history of litigating LGBT rights, as acknowledged by Defendants in their Response.[11] They committed to bringing this case before they even had the support that would be necessary to prosecute it. Their involvement in the case had an acute impact on them financially and professionally. Ms. Holland and Ms. Lambert assisted the Plaintiffs who were located in Memphis and Knoxville as the Defendants fought to deny them the rights and protections granted to other married couples.[12] Although it should be beyond reasonable dispute that Plaintiffs' counsel should be compensated for work they did to mitigate the harms Plaintiffs suffered because of Tennessee's unconstitutional laws, Defendants' position is that these attorneys should recover essentially no fee for working on this case because each of their considerable contributions was somehow "duplicative, overstaffing and unnecessary." To the contrary the contributions of these attorneys were not "unnecessary," but rather were integral to the success eventually obtained for our clients.

Defendants' argument that the NCLR attorneys should receive only 38 percent of their requested fee is also contrary to the extensive evidence supporting the reasonableness of their work. NCLR has been at the forefront of marriage litigation in this country for over a decade, providing a deep well of knowledge and experience for the litigation. Dkt. 97-2 (Minter Decl.) at ¶¶ 7-13. Even a brief perusal of their time records make clear that they performed critical tasks at every stage of the case, including by taking the lead on initial drafts of key pleadings and

[11] Response p. 18-19 ("[Ms. Rubenfeld] has litigated many high-profile and precedent-setting lawsuits in her advocacy for LGBT persons, and her written work on LGBT issues has been published. . . . [Ms. Lambert] has also been active in legal matters related to gay and lesbian rights.").

[12] Ms. Lambert was in Knoxville representing Drs. Tanco and Jesty when their daughter was born, thereby ensuring compliance with this Court's injunction. Absent such compliance in the first instance, the related legal fees would have been much higher than those requested by Ms. Lambert.

briefs in this Court as well as the appellate briefing before the Sixth Circuit. *Id.* at ¶ 15. Mr. Minter and Mr. Stoll also remained heavily involved in the briefing and argument preparation before the Supreme Court. *Id.* at ¶ 20; Hallward-Driemeier Sup. Decl. at ¶¶ 5-7.

Defendants' Response offers no principled or otherwise-supported rationale for their proposed draconian cuts to the fees for these experienced attorneys, and does nothing to counter the opinions of the outside attorney declarants who reviewed the billing records contained in the fee request and found the contributions of these attorneys to be reasonable.

Finally, Defendants make much in their Response of the fact that Ms. Rubenfeld, Mr. Harbison and Mr. Hickman attended a moot court in Ann Arbor, Michigan. Response, p. 8, n. 2 ("In a particularly egregious example of activity for which she seeks compensation from the State, Ms. Rubenfeld billed for attending a Supreme Court moot court in Ann Arbor, Michigan, at which Mr. Hallward-Driemeier, who actually argued the case, was not in attendance") and p. 15 ("Mr. Harbison and Mr. Hickman billed a total of 36.5 hours traveling to and from Ann Arbor, Michigan to participate in a moot court concerning licensure of same-sex marriages. . . . this travel was gratuitous and unnecessary."). The Supreme Court had determined that only two oralists would be allowed from the Tennessee, Ohio, Kentucky and Michigan teams, and the oralist who would argue the licensure question at the Supreme Court was determined at the Ann Arbor moot. Mr. Hallward-Driemeier could not attend the moot because he was preparing for a Supreme Court argument in another case,[13] but that does not mean that the interests of the Tennessee Plaintiffs were not implicated in building the best possible team for oral argument. Far from being an egregious example of overreaching, attendance at this moot was of vital importance to ensure that the necessary coordination between the two oralists would be achieved.

[13] Indeed, the fact that Mr. Hallward-Driemeier could not attend is a perfect example of why Defendants' contention that only Ropes & Gray attorneys handle the case as soon as it was retained would have been unworkable and irresponsible.

Counsels' presence was a necessary and integral part of the preparation of the case for oral argument before the Supreme Court. To be fair, Defendants may not have understood the immense significance of this meeting when they chose to disparage counsels' participation in this critical meeting in support their argument. In proper context, however, requesting a fee for attending this moot does not in any manner demonstrate that Plaintiffs' counsel is "egregious" or "gratuitous" in their fee request.

Work on the Right to Travel Issue is Compensable.

Defendants object to the few hours that Plaintiffs' counsel spent on the right-to-travel issue claiming, incorrectly, that the Plaintiffs were "unsuccessful" on this issue. Not only did the Supreme Court specifically reference the effect of Tennessee's enforcement of the unconstitutional Anti-Recognition Laws on Plaintiffs' travel ("[Sergeant First Class Ijpe DeKoe's and Thomas Kostura's] lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines"[14]), but as the Response admits the Court "did not analyze the right-to-travel claim"[15] because it determined that it didn't need to reach it. Plaintiffs won on other grounds. This does not make an alternative argument unsuccessful, nor does it make recovery for time spent on such argument improper. *Hensley*, 461 U.S. at 435 ("Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's . . . failure to reach certain grounds is not a sufficient reason for reducing a fee").

Conclusion.

Defendants did not have to defend this case. *See* Tenn. Code Ann. § 8-6-109 (allowing the Attorney General to decline to defend if he or she is of the opinion that the challenged legislation is not constitutional). Many officials in other jurisdictions exercised their discretion

[14] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

[15] Response, p. 12.

not to defend unconstitutional marriage bans. But having decided to vigorously defend at every stage Tennessee's Anti-Recognition laws, it is not permissible for Defendants to attempt, after losing their argument, to staff the Plaintiffs' team of attorneys to their liking. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 581 (1986) (defendants cannot "litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response") (*citing Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) (*en banc*)). This is particularly so given that Defendants' preferred staffing would have resulted in no experienced Tennessee LGBT civil-rights lawyer participating in the case, no lawyer being involved from Memphis or Knoxville (where Plaintiff couples were located), and attorneys who were experienced in the facts and issues abandoning the case once the Sixth Circuit issued its opinion.

Plaintiffs' attorneys have successfully litigated a complex and novel case before every level of the federal judicial system and won an historic victory in the United States Supreme Court. In seeking their fees, they have exercised substantial billing judgment and request far less than they would have received in fees from a paying client. They have supported their request with detailed billing records and numerous declarations supporting their reasonableness. Defendants have not presented any legitimate arguments contesting the reasonableness of the Plaintiffs' fees, costs and expenses. Accordingly, Plaintiffs respectfully request that the Court award the full amount of such fees, costs and expenses sought in their Motion, and, for the reasons outlined in the Motion, also award an appropriate enhancement in the Court's discretion.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4th, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system, or if filed under seal will be served via electronic mail:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, *et al,*

Plaintiffs,

v

RICHARD SNYDER, *et al*

Defendants.

Civil Action No. 12-cv-10285

HON. BERNARD A. FRIEDMAN

STIPULATION TO DISMISS WITH PREJUDICE PLAINTIFFS' MOTION FOR TAXABLE COSTS AND ATTORNEY FEES AS TO STATE DEFENDANTS ONLY (DOC. ##177, 180)

The Parties, through their respective Counsel, Stipulate and Agree as follows:

1. Plaintiffs filed a Motion for Taxable Costs and Attorney Fees and a corrected Motion for Taxable Costs and Attorney Fees on July 27, 2015. (Doc. ## 177, 180.)

2. The Plaintiffs and State Defendants have entered into an agreement resolving the taxable costs and attorney fees to be paid by the State Defendants.

3. The Parties agree to dismiss the pending Motion for Taxable Costs and Attorney Fees with prejudice as to the State Defendants pursuant to the terms of their agreement.

/s/Kristin M. Heyse
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Dated: October 7, 2015

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Dated: October 7, 2015

ORDER DISMISSING MOTION FOR TAXABLE COSTS AND ATTORNEY FEES AS TO DEFENDANTS SNYDER AND SCHUETTE (Doc. ## 177, 180)

This matter having come before the Court upon the Stipulation of the Parties:

IT IS HEREBY ORDERED, Plaintiffs Motion for Taxable Costs and Attorney Fees and corrected Motion for Taxable Costs and Attorney Fees (Doc. ## 177-182) are DISMISSED with prejudice as to the Defendants Snyder and Schuette.

October 7, 2015_____
Date

s/ Bernard A. Friedman_____
Hon. Bernard A. Friedman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:13-CV-750-H

TIMOTHY LOVE, *et al.* PLAINTIFFS

V.

STEVE BESHEAR DEFENDANT

MEMORANDUM OPINION

Plaintiffs move for attorney's fees in the amount of $66,235.00 and costs in the amount of $453.00 in connection with their successful 42 U.S.C. § 1983 claim. Prevailing parties under § 1983 are entitled to an award of reasonable attorney's fees. 42 U.S.C. § 1988. On February 26, 2014, the Court issued a final order declaring that K.R.S. 402.055, .020, .040, .045 and Section 233A of the Kentucky Constitution violate the Equal Protection Clause of the Fourteenth Amendment of the United States to the extent that they deny validly married same-sex couples equal recognition and benefits under Kentucky and federal law. Consequently, Plaintiffs are "prevailing parties" within the meaning of § 1988.[1] *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (" '[P]laintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278−79 (1st Cir. 1978))).

[1] The prevailing parties are Plaintiffs named in the Amended Complaint filed on November 15, 2013. ECF No. 31 (naming Gregory Bourke and Michael Deleon, and their minor children; Jimmy Lee Meade and Luther Barlowe; Randell Johnson and Paul Campion, and their minor children; and Kimberly Franklin and Tamara Boyd). The prevailing parties do not include Intervening Plaintiffs named in the Intervening Complaint filed on February 27, 2014. ECF No. 54 (naming Timothy Love, Lawrence Ysunza, Maurice Blanchard, and Dominique James). This case was restyled on February 27, 2014. ECF No. 57.

Defendant[2] argues that the motion should be denied without prejudice or held in abeyance pending resolution of the appeal on the merits currently before the Sixth Circuit. He also objects to certain expenses, including (1) fees related to media and public relations, (2) fees related to the intervening plaintiffs, (3) unnecessary fees, and (4) redundant fees from overstaffing. Finally, he argues that any award of fees and costs should be stayed pending appeal.

This was a difficult, novel case in which Plaintiffs' counsel showed considerable skill and determination. Counsel's hourly rate of approximately $250, and their total hours of 275.54, was most certainly reasonable. In fact, the total seems quite modest. Because Plaintiffs undertook a difficult, unpopular case and achieved remarkable success, the Court concludes that counsel is entitled to a small bonus to account for this risk. The Court will now consider Defendant's specific objections.

First, the Court agrees that media and public relations expenses are not properly included in the calculation of Plaintiffs' attorney's fees. *See Halderman by Halderman v. Pennhurst State Sch. & Hosp.*, 49 F.3d 939, 942 (3d Cir. 1995) ("[t]he legitimate goals of litigation are almost always attained in a courtroom, not in the media." (quoting *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 176 (4th Cir. 1994))); *Hopwood v. Texas*, 999 F. Supp. 872, 912−13 (W.D. Tex. 1998) (denying requests for fees related to public and media relations), *aff'd in part, rev'd in part sub nom.* 236 F.3d 256, 280−81 (5th Cir. 2000).[3] Second, the Court agrees that fees

[2] Former Defendant Attorney General Jack Conway also filed a response to Plaintiff's motion but was previously dismissed as a Defendant in this case by the Court's March 24, 2014 Order. The Court therefore cannot consider Defendant Conway's response.

[3] Even if the Court were to consider allowing media-related expenses, the interactions with the media in this case were not "reasonably necessary for the proper prosecution of the lawsuit." *Gratz v. Bollinger*, 353 F. Supp. 2d 929, 941 (E.D. Mich. 2005) (quoting *Keyes v. Sch. Dist. No. 1, Denver, Colorado*, 439 F. Supp. 393, 408 (D. Colo. 1977)) (internal quotation marks omitted). Plaintiffs' counsel contend that their efforts were aimed to "educate the public." Counsel have not shown that these efforts assisted in the litigation. *Compare Davis v. City & County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992) (finding attorney's fees for lobbying the San Francisco Board of

related to the Intervening Plaintiffs, who have not yet been successful on the merits, are not properly included. *See Hanrahan v. Hampton*, 446 U.S. 754, 756 (1980).[4]

However, some of the entries cited by Defendant in its Response include both objectionable and unobjectionable activities. The February 26, 2014 media and public relations entry reads: "Prep hearing for prelim inj/intervention; attend hearing; media contact." To the extent that the four hours billed relate to the Intervening Plaintiffs or to media contact, they should be excluded. For ease, the Court will award half of the billed amount, or $500, instead of $1000. Similarly, the February 28, 2014[5] entry reads: "Prep/research & telephonic hearing on Motion to Stay; corresp w/ counsel; media contact." To the extent the three hours billed relate to media contact, they should be excluded. Again for ease, the Court will award two thirds of the billed amount, or $500, instead of $750.

As to Defendant's third objection, Plaintiffs' counsel properly included expenses incurred while traveling to observe proceedings in related cases. With a case such as this one that presents novel issues, and in which many plaintiffs are involved, the Court does not find staffing multiple attorneys on a single telephonic hearing deciding the important issue of whether the Court would grant a stay of its final order in the case objectionable.

Supervisors was vital to the ultimate employment discrimination consent decree and thus compensable), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993); *Keyes*, 439 F. Supp. at 408 (finding in a public school desegregation case that time spent using the news media to reach some hard-to-reach segments of the plaintiff class was compensable).

[4] Should the Intervening Plaintiffs succeed on their claims, counsel may request attorney's fees and costs related to Intervening Plaintiffs occurring prior to the Court's February 26, 2014 Order.

[5] The entry provided by Plaintiffs' counsel and cited by Defendant is dated 2013 instead of 2014. The Court assumes this is a scrivener's error.

Therefore, the award of attorney's fees and costs to Plaintiffs' counsel will be reduced by $3,600, the amount attributable to media and public relations,[6] and by a further $2,310, the amount attributable to work performed on behalf of the Intervening Plaintiffs.

The Court will award a $10,000 bonus to account for Plaintiffs' risk and success in this litigation. In the interest of judicial economy, execution on this order will be stayed until the Sixth Circuit appeal is resolved.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' motion for attorney's fees and costs is SUSTAINED and Plaintiffs are awarded $70,325.00 for attorney's fees and $453.00 for costs.

IT IS FURTHER ORDERED that this order is STAYED pending the resolution of Defendant's appeal before the Sixth Circuit Court of Appeals.

Date:

May 13, 2014

John G. Heyburn II
Senior Judge, U.S. District Court

cc: Counsel of Record

[6] This amount is the total amount objected to by Defendant, $4,350, minus the Court's disallowances, $750, for a total of $3,600 to be deducted from Plaintiffs' award of attorney's fees.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

GREGORY BOURKE, et al. PLAINTIFFS

and

TIMOTHY LOVE, et al. INTERVENING PLAINTIFFS

v. CIVIL ACTION NO. 3:13-CV-00750-CRS

STEVE BESHEAR, et al. INTERVENING DEFENDANTS

MEMORANDUM OPINION

Plaintiffs move for attorney fees and costs in connection with their successful 42 U.S.C. § 1983 claim.[1] Plaintiffs request:

1. Attorney fees in the amount of $1,126,664.27,[2]
2. Costs in the amount of $32,727.86, and
3. Enhancement to their requested attorney fees by a factor of 75% above their services for which they billed.

For the reasons stated in this opinion, this Court will award Plaintiffs:

1. Attorney fees in the amount of $1,082,905.10 and
2. Costs in the amount of $32,727.86.

In total, the Court will award Plaintiffs $1,115,632.96 in attorney fees and costs.

[1] The Court notes Plaintiffs and Defendants filed briefs to this Court plagued by problematic calculations. Plaintiffs provided multiple inconsistent summaries of attorney fees and costs that never totaled the amount Plaintiffs requested in their motion. *See infra* n.4. Therefore, the Court will construe Plaintiffs' request for attorney fees and costs at the lowest amount based on figures in their supporting memorandum. *Id.*
[2] *See infra* n.4.

The Court declines to award Plaintiffs a fee enhancement because awarding legal fees in excess of the fees actually earned and documented would be unwarranted in this case. The requested attorney fees without an enhancement already account for the attorneys' skill, experience, labor, and success.

Courts award enhanced attorney fees under rare circumstances when an enhancement is necessary to determine a reasonable fee for the services rendered. Courts only award this enhancement when an exceptional factor is present, such as when counsel cannot be obtained without a potential for upward adjustment or counsel takes a significant risk in undertaking the litigation. That was not the case here. While the Plaintiffs were successful in this litigation, they also enjoyed widespread support at the same time many attorneys in other districts took up similar litigation.[3]

In this matter, the law firms of Clay Daniel Walton Adams, PLC and Fauver Law Firm, PLLC were local counsel. Local counsel attorneys included Daniel Canon, Laura Landenwich, L. Joe Dunman, Dawn Elliott, and Shannon Fauver. Local counsel associated with experienced appellate practitioners after the district court phase of litigation, including the American Civil Liberties Union Foundation ("ACLU") and the Stanford Law School Supreme Court Litigation Clinic. These practitioners included James Esseks, Chase Strangio, and Joshua Block of the ACLU, and Jeffrey L. Fisher of the Stanford Law School Supreme Court Litigation Clinic. On June 26, 2015, the United States Supreme Court issued its opinion in this matter under the name

[3] Indeed, it is notable that states defending this and similar lawsuits had a difficult time finding experienced counsel. As Adam Liptak reported in the *New York Times*, "Leading law firms are willing to represent tobacco companies accused of lying about their deadly products, factories that spew pollution, and corporations said to be complicit in torture and murder abroad. But standing up for traditional marriage has turned out to be too much for the elite bar. The arguments have been left to members of lower-profile firms…. Law firms that defend traditional marriage may lose clients and find themselves at a disadvantage in hiring new lawyers." Adam Liptak, "The Case Against Gay Marriage: Top Law Firms Won't Touch It," *The New York Times* (April 11, 2015).

Obergefell v. Hodges. Plaintiffs succeeded on all claims and the parties do not dispute Plaintiffs are "prevailing parties" under Section 1983.

DISCUSSION

1. **The Lodestar Method**

The Court may "allow the prevailing party … a reasonable attorney's fee as part of the costs" in various civil rights suits, including those brought under Section 1983. 42 U.S.C. § 1988(b). In vindicating these civil rights, the plaintiff serves "as a private attorney general, vindicating a policy that Congress considered of the highest priority." *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 824 (6th Cir. 2013) (quoting *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (internal quotations and citations omitted)). Fee shifting serves the dual purpose of reimbursing a plaintiff for vindicating civil rights and holding the violator accountable. *See Fox*, 131 S. Ct. at 2213.

The Court calculates attorney fees with a two-step process. *See Perry v. Autozone Stores, Inc.*, No. 14-5185, 2015 WL 4940121, at *1 (6th Cir. Aug. 20, 2015) (*citing Jordan v. City of Cleveland*, 464 F.3d 584, 602 (6th Cir.2006)). First, the Court determines a reasonable attorney fee based on the "lodestar" amount. *Perry*, 2015 WL 4940121, at *1. The lodestar amount is "calculated by multiplying the number of hours reasonably spent on the case by an appropriate hourly rate in the relevant community for such work." *Id.* "To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004).

The Court may then, within its discretion, "adjust the lodestar to reflect relevant considerations peculiar to the subject litigation." *Perry*, 2015 WL 4940121, at *1 (quoting *Adcock–Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000)) (internal quotations omitted). Although not exclusive, the Court may consider twelve factors in determining whether an adjustment is necessary:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Perry, 2015 WL 4940121, at *1 (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)).

Although this Court "enjoys wide discretion in awarding attorneys fees," the Court is guided by a concern of reasonableness. *Barnes v. City of Cincinnati*, 401 F.3d 729, 746 (6th Cir. 2005); *see also Perry*, 2015 WL 4940121, at *1. The award should "roughly approximate[] 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. ex rel. Winn*, 559 U.S. 542, 551 (2010). The Court strives to reimburse the successful plaintiff, but not overcompensate the attorneys for their efforts. *See Reed v. Rhodes*, 179 F.3d 453, 471-72 (6th Cir. 1999).

2. **The Lodestar Amount**

Plaintiffs inconsistently represent the total amount of attorney fees they seek. While their second motion for attorney fees and costs says the amount is $2,091,297.34, multiple summaries

of the relevant fees included in the memorandum supporting the motion fall below this amount. *See* Pls.' Mem. Supp. Mot. Attorney's Fees & Costs 1-2, ECF No. 150-1; *id.* 10; Proposed Order, ECF No. 150-20. Indeed, Defendants pointed out some of these inconsistencies in their response to the motion. *See* Defs.' Resp., ECF No. 110. Due to Plaintiffs' failure to address these inconsistencies and miscalculations, the Court will construe Plaintiffs' request for attorney fees and costs at the lowest amount based on figures in their supporting memorandum: $2,002,657.83.[4] This figure includes $1,124,354.27 of newly requested attorney fees. Defendants raise numerous objections to the reasonableness of the fees included in that amount. The Court will discuss each objection in turn.

a. Whether Plaintiffs Overstaffed Attorneys to Prepare Supreme Court Briefs

Defendants, relying on a district court case from another district within a different circuit, first argue that the use of nine attorneys, including the director of the Stanford Supreme Court Litigation Clinic, Jeffrey Fisher, to prepare Supreme Court briefs was unnecessary. Plaintiffs submitted time entries for nine attorneys relating to drafting, reviewing, editing, and conferring to produce the petition for certiorari reply brief, merits brief, and merits reply brief. Defendants do not contest Fisher's involvement, but do contest portions of the other eight attorneys' submitted entries. Defendants argue that the issues involved in the case were not new or novel, that previous courts had already issued opinions on questions raised, and that the Stanford

[4] This calculation comes from Plaintiffs' stated attorney fees and costs in their introduction to the supporting memorandum. Pls.' Mem. Supp. Mot. Attorney's Fees & Costs 1-2. Plaintiffs say the attorney fees are as follows: $543,405.27 (Clay Daniel Walton Adams, PLC); $219,150.00 (Fauver Law Firm, PLLC); $206,924.00 (American Civil Liberties Union Foundation); and $154,875.00 (Jeffrey L. Fisher and the Stanford Law School Supreme Court Litigation Clinic). *Id.* Plaintiffs also request an additional $2,310 for attorney fees related to the Intervening Plaintiffs' intervening petition. *See id.* 7, n.1. Further, Plaintiffs say the costs are as follows: $18,948.87 (Clay Daniel Walton Adams, PLC); $5,978.83 (Fauver Law Firm, PLLC); and $7,800.16 (American Civil Liberties Union Foundation). *Id.* 1-2. This results in $1,124,354.27 in requested attorney fees, before the 75% modifier, $2,310 in requested attorney fees relating to work related to the intervening petition, and $32,727.86 in requested costs. After the requested 75% modifier is applied to $1,124,354.27, the total requested amount is $2,002,657.83.

Supreme Court Litigation Clinic and outside counsel provided free legal services in addition to the nine attorneys. This objection amounts to $147,595[5] of the attorney fees sought.

The Court does not find Defendants' arguments persuasive. It is reasonable for local counsel to continue active involvement with the litigation even after associating with a Supreme Court specialist. While Defendants have not contested what they believe to be "original drafting," Defs.' Resp. 10, it is reasonable to have multiple individuals revising and reworking a draft brief. Brief writing is often a collaborative process. Indeed, Fisher only billed 206.5 hours for the certiorari reply brief, merits brief, and merits reply brief. Fisher Time Sheet, ECF No. 110-1. The eight other attorneys spent a total of 390.95 hours drafting, reviewing, editing, and conferring to produce three appellate briefs. Defs.' Resp. 10. Three of those eight attorneys spent less than 27 hours together on those tasks. *Id.* Another attorney only spent 35.9 hours working on the three briefs. *Id.* Hence, the majority of the hours Defendants now challenge were from four attorneys, not eight. These are reasonable costs. Defendants hyperbolize non-existent overbilling by focusing on the number of attorneys staffed and not the hours those attorneys billed.

Defendants' argument that the issues were not new or novel is also misplaced. The existence of previous court decisions concerning similar issues does not limit Plaintiffs to only one attorney to produce three appellate briefs. Although Fisher did have pro bono assistance from students and other attorneys, this should not diminish the fees the billing attorneys now seek.

The Court will deny Defendants' challenge to $147,595 of the requested attorney fees.

[5] Defendants' response contains a calculation error relating to the fees they dispute. Although they claim to challenge $173,695 on overstaffing grounds, Defendants included an errant "0" for the "Canon/Landenwich" time entry. *See* Defs.' Resp. 10. Accounting for this error, Defendants' challenge $147,595 of the sought attorney fees. Regardless, this error is immaterial to the Court's decision.

b. Whether Plaintiffs Charged for Too Many Attorneys to be in Washington, D.C.

Defendants argue that the six attorneys and one paralegal constitute an excessive number of attorneys and staff traveling to and working in Washington, D.C. during the week of Supreme Court oral argument. This objection amounts to $73,830 of the attorney fees sought.

Similar to Defendants' arguments concerning the staffing on the appellate briefing, challenging the *number* of attorneys or staff members assisting with a particular task misses the mark. While Defendants do mention particular tasks that these individuals performed while in Washington, D.C., Defendants do not elaborate on why these entries are unreasonable.

Plaintiffs explain that while Canon, counsel of record for the Kentucky plaintiffs, did attend each moot court, the other members of the legal team did not. Instead, these individuals arrived later to assist with oral argument preparation. As Plaintiffs point out, none of these attorneys argued before the Supreme Court concerning this case. Just as with brief writing, however, preparation for oral argument often requires more than the individual oralist. The immediate feedback provided by attorneys and staff on the ground in Washington, D.C. while oralists were preparing for argument allowed local counsel to advocate for their clients and "shap[e] the direction and substance of oral argument." Pls.' Reply 6, ECF No. 111.

The Court will deny Defendants' challenge to $73,830 of the requested attorney fees.

c. Whether Charging for Meetings with Co-Counsel in California is Reasonable

Defendants argue that it was unreasonable for Plaintiffs to charge for five local attorneys to travel to California with their clients to meet with co-counsel. Defendants say that the purpose

of the trip is unclear and that there is no justification to travel to California instead of digitally conferencing with co-counsel. This objection amounts to $45,817.50 of the attorney fees sought.

Although meetings with co-counsel for a reasonable purpose related to litigation may be an acceptable billing expense, it is unclear from the tendered entries the purpose of these meetings. Plaintiffs also fail to illuminate these entries in their reply brief. Without a more detailed description, the entries as submitted are not reasonable expenses.

The Court must also determine the proper amount of unreasonable fees. While Defendants object to $45,817.50 in attorney fees, some of the entries contested contain multiple tasks that are reasonable and do not relate to travel, or meetings with co-counsel or amici. The reasonable entries relate to brief editing and review, and correspondence related to those tasks. *See* Defs.' Resp. 12-13. The Court will subtract from Defendants' challenge $1,185 in fees related to Landenwich's entries and $5,583.33 related to Elliot and Fauver's entries, which appear to be reasonable and proper.

The Court will deny Plaintiffs' request for $39,049.17 of the requested attorney fees.

d. Whether Charging for Time Resolving Conflicts with Counsel in Joined Cases is Reasonable

Defendants argue that Plaintiffs unreasonably charged for settling a dispute between counsel representing parties joined for Supreme Court oral argument. This dispute related to which oralist would present one of the issues. This objection amounts to $64,780 of the attorney fees sought.

The Supreme Court joined cases from four states prior to oral argument. The Supreme Court only allowed one oralist to argue each of the two questions the briefs addressed. While counsel from each case may have preferred to present oral argument, the Supreme Court required

counsel to agree on only two oralists. Under these involuntary constraints, Plaintiffs reasonably sought to have the best oralist argue each issue. The attorneys, however, initially differed on which attorney would advocate on the first question. In order to determine the oralist, counsel met to determine which attorney would best ensure exemplary presentation of the case. The Court finds billing for this time is reasonable. Counsel did not seek out an alternative advocate, but were compelled by the Supreme Court to compromise with involuntarily joined counsel. In achieving this compromise, they protected their clients' interests.

The Court will deny Defendants' challenge to $64,780 of the requested fees.

e. Whether Charging for Media-Related Expenses is Reasonable

Defendants argue that Plaintiffs fees for media-related expense are unreasonable. Plaintiffs argue these media appearances were essential to effective representation. This objection amounts to $4,710 of the attorney fees sought.

The Court reiterates Judge Heyburn's previous ruling that "media and public relations expenses are not properly included in the calculation of Plaintiffs' attorney's fees." ECF No. 85. These expenses were not "reasonably necessary for the proper prosecution of the lawsuit." *Gratz v. Bollinger*, 353 F. Supp 2d 929, 941 (E.D. Mich. 2005) (quoting *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 439 F. Supp. 393, 408 (D. Colo. 1977) (internal quotation omitted)). Plaintiffs admit their efforts were aimed to "humaniz[e] them in front of national and international audiences" and assist in the "broader social discourse." Pls.' Second Mot. Atty.'s Fees & Costs, 16. While it may also be true that media inquiries were numerous from an interested public, answering these inquiries cannot be considered necessary for the proper litigation of the suit.

The Court will deny Plaintiffs $4,710[6] of the requested attorney fees.

f. Whether the Hourly Rates of Fisher and the ACLU are Reasonable

Beyond local counsel, Plaintiffs request attorney fees for Fisher, Esseks, and two other ACLU attorneys. Local counsel associated with these experienced Supreme Court practitioners prior to submitting their petition for certiorari to the Supreme Court. Plaintiffs seek $750 per hour for Fisher's services, $700 per hour for Esseks' services, and $400 and $325 per hour for the other ACLU attorneys' services. Defendants do not challenge the tasks associated with the fees, but request a substantial fee rate reduction for each of these attorneys. This objection amounts to $158,860.50 of the attorney fees sought.

Defendants do not object to the qualifications of these attorneys or the need for local counsel to associate with experienced Supreme Court practitioners. Rather, Defendants argue that the fees sought are too high. Defendants point to the fees Mary Bonato, who is Counsel and Civil Rights Project Director for Gay & Lesbian Advocates & Defenders, charged for her service in the joined Michigan case. Bonato requested $350 per hour of service. Furthermore, Defendants also argue that Plaintiffs do no cite a single case where fee shifting in a similar civil matter resulted in fees this high.

Defendants' arguments, however, miss the point. The lodestar analysis focuses on the prevailing rate for practitioners in the *relevant community* for such work, not the rate for one chosen attorney in a particular joined case.[7] Defendants' secondary argument that Plaintiffs have

[6] Plaintiffs' billing entries sometimes include a total amount of time billed for multiple tasks without listing the amount of time billed for discrete tasks. Where this has occurred and Defendants' object to some, but not all, of the block billed tasks, Defendants have estimated the time for those discrete tasks it challenges. *See* Defs.' Resp. 15-16.
[7] Notably, the attorney, Mary Bonato, that the Defendants urge as the parallel to Fisher had not previously presented an oral argument to the United States Supreme Court. Pls.' Reply 2.

failed to cite an adequate fee shifting case with similar fees is also a red herring. The lodestar amount is not the reasonable rate based only on previous fee shifting cases that the Plaintiffs also happen to cite in their brief. These arguments do not indicate Fisher, Esseks, or the other ACLU attorneys charged unreasonable rates.

Indeed, the Court finds Defendants provided sufficient justification that the rates sought for these attorneys are reasonable. Fisher is the co-director of the Stanford Supreme Court Litigation Clinic. He has practiced in front of the United States Supreme Court for approximately twelve years. Fisher Decl. ¶ 3, ECF No. 105-5. He has presented oral argument in twenty-seven cases and participated in briefing dozens of additional cases. *Id.* In a considerable number of those cases, Fisher represented plaintiffs in civil rights matters. *Id.* As cited by Plaintiffs, practitioners with similar experience earn between $1,000 and $1,800 per hour in litigating Supreme Court matters. Pls.' Mot. Atty.'s Fees & Cost 19. Defendants do not contest that similar practitioners earn these fees for their representation before the Court.

Esseks is the Litigation Director of the ACLU Foundation's Lesbian, Gay, Bisexual, Transgender and HIV Project. Esseks was co-counsel in *United States v. Windsor* and has been co-counsel in other state and federal court marriage litigation. The other two ACLU attorneys, Chase Strangio and Joshua Block, completed a substantial amount of the Supreme Court briefing. Plaintiffs provide a declaration from a practitioner in Esseks' previous firm attesting to similar fees charged to clients for work in the relevant market with similar seniority to Esseks and the other ACLU attorneys. The Court finds that the rates requested are reasonable for attorneys in the relevant market.

The Court will deny Defendants' challenge to $158,860.50 of the requested fees.

g. Whether Charging for the Solicitation of Amicus Briefs is Unreasonable

Defendants argue that it is unreasonable to charge for the solicitation of amicus briefs. This objection amounts to $6,437.50 of the attorney fees sought. Defendants' argument, however, consists of including a block quoted rule from a district court in another district within a different circuit. Defendants do not provide any explanation why this Court should follow this rule or even any analysis of how that rule would apply to this case.

Plaintiffs do provide sufficiently detailed time entries describing attorney review of amicus briefs and discussions with various potential amici. Amicus briefs are part of appellate practice and can influence the court. These briefs are not solely filed to "make an end run around court-imposed limitations on the length of parties' briefs," *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., in chambers), but also function to "assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Id.* at 545. A paying client would expect an attorney to seek out a variety of amici that could assist in the case's presentation. The Court finds Plaintiffs reasonably charged for the review and solicitation of amicus briefs.

The Court will deny Defendants' challenge to $6,437.50 of the requested attorney fees.

h. Whether there Should be an Overall Reduction for Block Billing and Vagueness

Defendants' objection to the Plaintiffs' billing format lacks merit. Defendants cite no authority binding on this Court to support its argument that block billing is inconsistent with requesting reasonable attorney fees. The Sixth Circuit Court of Appeals has consistently held that block billing is acceptable as long as "the description of the work performed is adequate." *Smith v. Serv. Master Corp.*, 592 F. App'x 363, 371 (6th Cir. 2014); *see also Pittsburgh & Conneaut*

Dock Co. v. Dir., Office of Workers' Comp. Programs, 473 F.3d 253, 273 (6th Cir. 2007). This Court does not require counsel's descriptions of activities in a block billing entry to be "further described by time spent on each individual activity." *Pittsburgh & Conneaut Dock Co.*, 473 F.3d at 273.

Plaintiffs' descriptions of local counsel's activities are sufficient to assess "whether the cost o[f] the service is reasonably related to the quality or extent of service." *Id.* Using an example Defendants cite to argue the insufficiency of the entries, one attorney time entry includes the description: "Correspondence to and from potential marriage license clients; draft, edit, and finalize intervening complaint and motion for preliminary injunction; research re motion to intervene standard." Defs.' Resp. 23. Another example Defendants highlight says, "Prep cover page for 6CA, corresp re editing timeline and moots for oral argument; conference with cocounsel re briefing." *Id.* Although these are block entries, these descriptions detail the attorney's activities and are sufficient to assess the reasonableness of the quality and extent of service. *See Pittsburgh & Conneaut Dock Co.*, 473 F.3d at 273.

The Court will deny Defendants' challenge to Plaintiffs' block billed entries.

i. The Unmodified Attorney Fees

Plaintiffs request $1,126,664.27[8] in attorney fees. The Court will grant Defendants' challenge to $43,759.17 of those fees. The Court will award Plaintiffs $1,082,905.10 in attorney fees.

3. **The Fee Adjustment**

[8] This amount includes the $2,310 requested for attorney fees related to the Intervening Plaintiffs' intervening petition. *See* Pls.' Mot. Attorney's Fees & Costs 7, n.1.

The Court has discretion to adjust the lodestar amount under rare and exceptional circumstances. *Perry*, 2015 WL 4940121, at *1. The party seeking to enhance attorney fees "bears the burden of showing that such an adjustment is necessary to the determination of a reasonable fee." *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 621 (6th Cir. 2007) (internal quotations and citations omitted). The Sixth Circuit has said that the Court may consider a variety of factors in determining the appropriateness of a fee enhancement, including:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Barnes v. City of Cincinnati, 401 F.3d at 745-46 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). In the majority of cases, the lodestar amount already reflects these factors within the Court's calculation of a reasonable hourly rate and hours billed. *See Gonter*, 510 F.3d at 621; *Blum v. Stenson*, 465 U.S. 886, 898 (1984). That is the case here.

Plaintiffs request a 75% upward fee adjustment. They argue that the litigation was a great success, although it was exceptionally complex, unpopular, and included many risks for the attorneys involved. While the Plaintiffs were clearly successful, the Court finds this litigation does not merit a fee enhancement. First, Plaintiffs mischaracterize this case as "unpopular." Plaintiffs enjoyed support from a wide-range of individuals and organizations at every level of litigation, including amicus briefs filed in support by the American Bar Association, 167 United States Congressmen, 44 United States Senators, and officials from multiple states.

This widespread and varied support differs from the Sixth Circuit's affirmation of similar multipliers in civil rights litigation. For example, in *Barnes v. City of Cincinnati*, the Sixth Circuit affirmed a 75% enhancement because the district court found that counsel could not be obtained without applying this multiplier. 401 F.3d at 746; *see also Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir. 1996) (noting that a 100% fee enhancement was appropriate in part because of the "likelihood that no other attorney … would have accepted the case"). In *Barnes*, multiple attorneys submitted affidavits to the court that few attorneys locally or nationally would represent a transsexual police officer in bringing a sex discrimination claim against a city. 401 F.3d at 746.

Here, Plaintiffs did not face this overwhelming adversity. Not only would many attorneys have taken up similar cases, many attorneys across the country had and were representing similar clients with similar claims. *See, e.g.*, *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014). The lack of undesirability which may merit a fee enhancement is underscored by the number of similar cases that were joined for oral argument. While this litigation had an important effect on society, a fee enhancement was not required to attract attorneys to take up this call to litigate.

Furthermore, the alleged complexity and novelty of this case is tempered by the previous and ongoing litigation in other districts and circuits during litigation. *See, e.g.*, *Bostic*, 970 F. Supp. 2d 456; *Whitewood*, 992 F. Supp. 2d 410; *Geiger*, 994 F. Supp. 2d 1128. This case did not exist within a vacuum and Plaintiffs did not tread their path to the Supreme Court on their own.

The issues in this case were important to the clients and to the general public. The attorneys provided high quality representation and certainly did achieve a successful result. These reasons alone, however, are not enough for the Court to enhance the requested attorney fees. The lodestar calculation already accounts for the attorneys' skill, experience, labor, and success.

The Court finds that the lodestar amount is appropriate and declines Plaintiffs' request to upwardly enhance that amount.

4. **Conclusion**

The Court will grant Plaintiffs' request for costs in full for the amount of $32,727.86. In total, the Court will grant in part Plaintiffs' request for attorney fees and costs in the amount of $1,115,632.96 and will deny the remainder of their request.

A separate order will be entered in accordance with this opinion.

January 13, 2016

Charles R. Simpson III, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES OBERGEFELL, *et al.*,	:	Case No. 1:13-cv-501
	:	
Plaintiffs,	:	Judge Timothy S. Black
vs.	:	
	:	
RICHARD HODGES, *et al.*,	:	
	:	
Defendants.	:	

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict: This action came before the Court for a trial by jury. The issues have been tried and the Jury has rendered its verdict.

[x] Decision by Court:

IT IS ORDERED AND ADJUDGED that, as agreed by the parties, attorney fees in the amount of $1,300,000.00 in fees and expenses are awarded to Gerhardstein & Branch Co. LPA and to be paid by Defendant Hodges for the benefit of all Plaintiffs' attorney fees and expenses incurred in this case, in full satisfaction of all Plaintiffs' attorney fees and expenses incurred in this case, in full satisfaction of all Plaintiffs' attorney fees and expenses incurred in *Henry v Hodges*, SDOH Case No. 1:14-cv-129, and in full satisfaction of all Plaintiffs' attorney fees and expenses incurred *Gibson v Himes*, SDOH Case 1:14-cv-347 through October 20, 2015. (*See* Stipulated Judgment Entry for Attorney Fees Doc. 89).

Date: November 2, 2015

RICHARD W. NAGEL, CLERK

By: *s/ M. Rogers*
Deputy Clerk

Johnson v. City of Clarksville

United States Court of Appeals for the Sixth Circuit

December 7, 2007, Filed

File Name: 07a0830n.06

No. 06-6478

Reporter
256 Fed. Appx. 782; 2007 U.S. App. LEXIS 28820; 2007 FED App. 0830N (6th Cir.)

KEVIN JOHNSON, et al, Plaintiffs-Appellants, v. CITY OF CLARKSVILLE, et al, Defendants-Appellees.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: **[**1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.
Johnson v. City of Clarksville, 186 Fed. Appx. 592, 2006 U.S. App. LEXIS 15750 (6th Cir. Tenn., 2006)

Core Terms

per hour, attorney's fees, district court, award of attorney's fees, civil rights, customary, prevailing market rate, calculated, attorneys, salary

Case Summary

Procedural Posture
Plaintiffs appealed a decision of the United States District Court for the Middle District of Tennessee, which awarded attorneys fees pursuant to *42 U.S.C.S. § 1988* in favor of defendant city following plaintiffs' unsuccessful civil rights lawsuit against the city.

Overview
The district court granted summary judgment in favor of the city in plaintiffs' action under Title VI of the Civil Rights Act of 1964. The city moved for attorneys fees based on a lodestar amount of $ 250 per hour. The district court awarded attorneys fees at the $ 250 per hour rate. Plaintiffs argued that the district court erred by awarding legal fees of $ 250 per hour, when the city was represented by salaried in-house counsel who earned only $ 62 per hour. In affirming the district court's decision, the court held that the actual fee charged by the city's counsel was irrelevant because an award of attorneys fees was calculated according to the prevailing market rates in the relevant community, not by the actual salary paid to the prevailing party's attorney.

Outcome
The court affirmed the district court's decision.

LexisNexis® Headnotes

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Appellate Review

HN1 A court of appeals reviews a district court's award of attorneys fees under *42 U.S.C.S. § 1988* for abuse of discretion, and will affirm unless the district court's ruling is based on an erroneous view of the law or a clearly erroneous assessment of the record. Because the same standards are generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party, the court relies on precedents involving attorneys fees without regard to whether they involved Title VI of the Civil Rights Act of 1964 or some other federal statute.

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Award Calculations

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Reasonable Fees

HN2 In an action to enforce Title VI of the Civil Rights Act of 1964, a court, in its discretion, may allow the prevailing party, other than the United States, a

reasonable attorney's fee as part of the costs. *42 U.S.C.S. § 1988*. When such an award of attorneys fees is issued, the statute and legislative history establish that "reasonable fees" under *42 U.S.C.S. § 1988* are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. A court's initial point of departure, when calculating reasonable attorneys fees, is the determination of the fee applicant's lodestar, which is the proven number of hours reasonably expended on the case by an attorney, multiplied by a reasonable hourly rate.

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Award Calculations

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Reasonable Fees

HN3 "Reasonable fees" under *42 U.S.C.S. § 1988* are to be calculated according to the prevailing market rates in the relevant community.

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Award Calculations

HN4 An award of attorneys fees under *42 U.S.C.S. § 1988* is calculated according to the prevailing market rates in the relevant community, not by the actual salary paid to the prevailing party's attorney.

Counsel: For KEVIN JOHNSON SR., JAMES E. COSSINGHAM, JERRY C. JONES, Plaintiffs - Appellants: Barbara W. Clark, Clark, Brown & Waters, Knoxville, TN.

For CITY OF CLARKSVILLE, et al., Defendant - Appellee: David Haines, City Attorney, Clarksville, TN.

For R. DOUGLAS WEILAND, et al., Defendant - Appellee: Daniel Mark Nolan, Batson, Nolan, Brice, Williamson & Girsky, Clarksville, TN.

Judges: BEFORE: CLAY, SUTTON and McKEAGUE, Circuit Judges.

Opinion by: CLAY

Opinion

[*782]

CLAY, Circuit Judge. Plaintiffs Kevin Johnson, James Cossingham and Jerry Jones contest the amount of an award of attorneys fees issued in favor of Defendant City of Clarksville following Plaintiffs' unsuccessful civil rights lawsuit against Defendant. While Plaintiffs offer no arguments contesting the district court's decision to award attorneys fees to Defendant, they claim that the district court erred by awarding legal fees of $ 250.00 per hour, when Defendant was represented by salaried in-house counsel who earns only $ 62.00 per hour. Because Plaintiffs present no arguments that the district court departed from the prevailing market rates for legal services in the City of Clarksville, **[**2]** we **AFFIRM** the award of attorneys fees.

STATEMENT OF FACTS

On February 18, 2004, Plaintiffs filed a civil rights lawsuit against Defendant City of Clarksville alleging that, by denying them access to certain city facilities, Defendant illegally discriminated against them on the basis of race, violating Title VI of the Civil Rights Act of 1964. The district court granted summary judgment in favor of Defendant, and this Court affirmed on June 21, 2006, holding that Plaintiffs failed to present either "direct evidence of discrimination or a prima facie case of discrimination . . . ." *Johnson v. City of Clarksville, 186 Fed. Appx. 592, 596 (6th Cir. 2006)*.

Defendant moved for attorneys fees of $ 18,575.00, based on a lodestar amount of $ 250 per hour. In support of this request, Defendant submitted the affidavit of David Haines, City Attorney, who stated that he has been licensed to practice law since 1984, that he has handled civil and criminal cases in federal court, and that he has completed jury trials in both. Haines further stated that, while his present salary **[*783]** amounts to about $ 62.00 per hour, he believes that a rate of $ 250.00 per hour would be reasonable and customary for an attorney **[**3]** of his level of experience handling civil rights cases and with his number of years in practice.

Additionally, Defendant submitted the affidavit of W. Timothy Harvey, who stated that he has been licensed to practice law in Tennessee since 1983, and that he is certified as a "civil trial specialist" by the Tennessee Commission on Continuing Legal Education and Specialization. (J.A. 64.) Harvey stated that he is familiar with the hourly rate charged for work in the Middle District of Tennessee, particularly in the area of civil rights and discrimination, and that he believes that $ 250.00 is a reasonable and customary hourly rate for an attorney of Haines' level of experience.

Plaintiffs offered no evidence or affidavits to rebut these statements, instead arguing that the city could not receive attorneys fees in excess of Haines' salary. Faced with no evidence contradicting Defendant's claims, the district court awarded attorneys fees at the $ 250.00 per hour rate suggested by Defendant. Plaintiffs appeal the amount of this award.

DISCUSSION

Standard of Review

HN1 This Court reviews a district court's award of attorneys fees for abuse of discretion, and will affirm unless the district court's **[**4]** ruling is based on an erroneous view of the law or a clearly erroneous assessment of the record. *Isabel v. City of Memphis, 404 F.3d 404, 415 (6th Cir. 2005)*. Because the same standards are "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,'" *Hensley v. Eckerhart, 461 U.S. 424, 433 n. 7, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*, this Court relies on precedents involving attorneys fees without regard to whether they involved Title VI or some other federal statute. *Isabel, 404 F.3d at 415*.

Analysis

A. Underlying Law

HN2 In an action to enforce Title VI of the Civil Rights Act of 1964, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." *42 U.S.C. § 1988 (2000)*. When such an award of attorneys fees is issued, "the statute and legislative history establish that 'reasonable fees' under *§ 1988* are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)*. A "court's initial point of departure, when calculating reasonable attorney[s] **[**5]** fees, is the determination of the fee applicant's 'lodestar,' which is the proven number of hours reasonably expended on the case by an attorney, multiplied by a reasonable hourly rate." [1] *Isabel, 404 F.3d at 415* **[*784]** (citing *Hensley, 461 U.S. at 433*).

B. Plaintiffs' Claim

At the outset, it is important to note the narrowness of Plaintiffs' claim on appeal. **[**6]** Plaintiffs raise no arguments suggesting that the district court abused its discretion in finding that $ 250.00 per hour is the reasonable and customary rate for an attorney of Haines' experience. [2] Nor do Plaintiffs contest the reasonableness of the number of hours claimed by Defendant. Nor do Plaintiffs present any arguments which undermine the district court's decision to award attorneys fees in the first place. Instead, Plaintiffs argue simply that the district court erred by awarding fees in excess of Defendant's counsel's $ 62.00 per hour salary.

Plaintiffs' argument runs counter to a decision of the United States Supreme Court. In *Missouri v. Jenkins by Agyei, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989)*, the plaintiff was represented in part by the

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[1] While not relevant here, as Plaintiffs do not claim that the district court misapplied these factors, the reasonableness of an attorney's hourly rate is normally measured according to twelve factors:

> (1) time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time and limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in "similar cases."

Isabel, 404 F.3d at 415.

[2] Plaintiffs do argue that the district court erred in relying on Attorney Timothy Harvey's affidavit stating that $ 250.00 was a reasonable and customary fee for the work Defendant's counsel performed because "[t]he affidavit did not affirm that the $ 250.00 per hour rate is the affiant's customary rate." (Plaintiffs' Br. at 9.) This argument is waived, however, because it is raised for the first time on appeal. *Union Planters Nat'l Bank of Memphis v. Commercial Credit Bus. Loans,* 651 F.2d 1174, 1187 ("It is axiomatic that an issue not presented to the trial court cannot be raised for the first time on appeal."). Furthermore, Plaintiffs **[**7]** cite no case, and we can find none, which suggests that a party seeking attorneys fees under ***§ 1988*** must rely exclusively on the statements of attorneys who charge exactly the same fee requested by that party.

NAACP Legal Defense and Education Fund ("LDF"), a not-for-profit corporation whose attorneys and other legal staff were paid at a below-market rate. *Id. at 284*. Although LDF paid its paralegals only $ 15 per hour, the Supreme Court held that the *Jenkins* plaintiff could seek an award of attorneys fees at the "same level of compensation that would be available from the market . . . ." *Id. at 286*. Accordingly, the award of attorneys fees in *Jenkins* calculated paralegal costs at the rate of $ 35-50 per hour, the prevailing market rate for the work performed in that case. *Id. at 284-87*; *see also Blum, 465 U.S. at 895* ("The statute and legislative history establish that ***HN3*** "reasonable fees" under *§ 1988* are to be calculated according to the prevailing market rates in the relevant community . . . ."); *Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974)* **[**8]** (holding that an award of attorneys fees may issue even when the prevailing party received *pro bono* legal services).

Just as in *Jenkins,* the actual fee charged by Defendant's counsel is irrelevant to the instant case. ***HN4*** An award of attorneys fees is calculated according to the "prevailing market rates in the relevant community," not by the actual salary paid to the prevailing party's attorney. *Blum, 465 U.S. at 895*. Accordingly, Plaintiffs' argument lacks merit, and must be rejected.

CONCLUSION

Plaintiffs properly raise only one argument on appeal to this Court, and that argument conflicts with a decision of the Supreme Court. *See Jenkins, 491 U.S. at 286*. The decision of the district court is **AFFIRMED.**

Smith v. Serv. Master Corp.

United States Court of Appeals for the Sixth Circuit

November 14, 2014, Filed

File Name: 14a0858n.06

Case No. 14-5481

Reporter
592 Fed. Appx. 363; 2014 U.S. App. LEXIS 21852; 165 Lab. Cas. (CCH) P36,287; 23 Wage & Hour Cas. 2d (BNA) 1383; 2014 FED App. 0858N (6th Cir.)

JOHN SMITH, et al., Plaintiffs-Appellees, v. SERVICE MASTER CORP., et al., Defendants-Appellants.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: **[**1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.
Smith v. Servicemaster Holding Corp., 2013 U.S. Dist. LEXIS 71661 (W.D. Tenn., May 21, 2013)

Core Terms

district court, attorneys, Plaintiffs', costs, attorney's fees, arbitration, hourly rate, billing, electronic, charges, collection action, legal research, expenses, travel time, fee award, fees awarded, unsuccessful, lodestar, entries, rates, block-billing, associates, circuits, expended, spent, number of hours, law clerk, compensable, recoverable, prevailing

Case Summary

Overview
HOLDINGS: [1]-When plaintiffs employees were awarded *29 U.S.C.S. § 216(b)* attorney's fees, the award had to be vacated and remanded because the court did not develop the record on local practice for computer research charges, the charges were insufficiently described, the court did not explain its departure from associates' local rate or discuss governing criteria, nor did it address law clerks' reasonable rates, the court made no findings on an award for work on unsuccessful claims and defenses or the sufficiency of billing explanations, a block-billing objection had to be assessed when reconsidering other issues, a reduction for counsel's clerical work, and whether awards for multiple attorneys' work on one task were warranted, had to be considered, and the court did not find local practice on travel time, or if counsel worked while traveling.

Outcome
Judgment vacated, case remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1 An appellate court reviews a district court's award of attorney's fees for abuse of discretion. An abuse of discretion can be found when the lower court relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard or when the reviewing court is firmly convinced that a mistake has been made.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Remands

HN2 In order to facilitate appellate review of a fee award, a district court must provide a concise but clear explanation of its reasons for the award. The district

court should state with some particularity which of the claimed hours the court is rejecting, which it is accepting, and why. Failure to provide such an explanation requires an appellate court to remand the case for further consideration.

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

HN3 A district court is required to address a party's non-frivolous objections to a requested fee award: Where a party raises specific objections to a fee award, a district court should state why it is rejecting them. Even if a defendant raises objections in a generalized manner, a district court has an obligation to review the billing statement and eliminate those portions of the fee which are unreasonable on their face.

Labor & Employment Law > Wage & Hour Laws > Remedies > Costs & Attorney Fees

HN4 The Fair Labor Standards Act, *29 U.S.C.S. § 201 et seq.*, provides that a court in such an action shall, in addition to any judgment awarded to a plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. *29 U.S.C.S. § 216(b)*. An award of attorney's fees under *29 U.S.C.S. § 216(b)* is mandatory.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN5 There is no reason for an absolute rule that the cost of computer research is or is not recoverable as an attorney's fee. Any recovery should be for the actual cost of the online access or service. If a lawyer or firm pays a blanket access fee, rather than per search, there is no reason to distinguish the on-line research cost from the cost of the books that at one time lined the walls of legal offices, which was treated as overhead. If distinct charges are incurred for specific research directly relating to the case, and the general practice in the local legal community is to pass those charges on to the client, there is no reason why such properly documented charges should not be included in the recoverable expenses.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN6 In the United States Court of Appeals for the Sixth Circuit, a trial court, in calculating the reasonable hourly rate component of the lodestar computation, when determining an award of attorney's fees, should initially assess the prevailing market rate in the relevant community. The starting point for determining the reasonable amount of attorney's fees has been a "lodestar" calculation—the product of the number of hours reasonably spent on the case by an attorney times a reasonable hourly rate. The amount of fees awarded can be adjusted as the district court finds necessary under the circumstances of the particular case.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN7 District courts are not required to always base fees awarded non-private attorneys on local rates. District courts are free to look to a national market, an area of specialization market, or any other market they believe appropriate to fairly compensate particular attorneys in individual cases. Further, a district court has discretion to consider the following factors and adjust the award accordingly: (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN8 A trial court considering an award of attorney's fees is required to assess the prevailing market rate in the relevant community.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN9 The most critical factor governing the reasonableness of a fee award is the degree of success obtained. Where a plaintiff obtains limited success, a district court should award only that amount of fees that is reasonable in relation to the success obtained. However, where the plaintiff's claims for relief involve common facts or related legal theories, such that much of counsel's time will have been devoted generally to

the litigation as a whole, the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. Further, it has been held that attorney's fees related to a failed effort to pursue collective action can be recovered if these expenses benefitted the plaintiffs' individual claims.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN10 Attorneys who seek an award of fees have an obligation to maintain billing time records that are sufficiently detailed to enable courts to review the reasonableness of the hours expended. A party seeking fees has the burden of providing for the court's perusal a particularized billing record. Although a plaintiffs' counsel is not required to record in great detail how every minute of his or her time was expended, at least counsel should identify the general subject matter of time expenditures. In obtaining the number of hours expended on the case, the district court must conclude that the party seeking the award has sufficiently documented its claim. Where the documentation is inadequate, the district court may reduce the award accordingly.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN11 When considering an award of attorney's fees, so long as the description of the work performed is adequate, block-billing can be sufficient.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN12 When considering an award of attorney's fees in a case in which multiple attorneys work on a task, in complicated cases, involving many lawyers, the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services has been approved.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Travel Expenses

HN13 When considering an award of attorney's fees, the United States Court of Appeals for the Sixth Circuit has often found travel time to be compensable if determined by the district courts to be the local practice regarding payment for travel time.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Trials > Bench Trials

HN14 Although a request for attorney's fees should not result in a second major litigation, and a district court has discretion in determining the amount of a fee award, it remains important for the district court to provide a concise but clear explanation of its reasons for the fee award.

Counsel: For William G. Craig, Jr., Billy Simpkins, John Smith, Dominick Massaro, Troy Yates, Plaintiffs - Appellees: Lori Erin Andrus, Law Offices, San Francisco, CA; R. Christopher Gilreath, Law Offices, Memphis, TN.

For Servicemaster Holding Corp., The Servicemaster Company, Inc., The Terminix International Company, L.P., Terminix International, Inc., Defendants - Appellants: Paul E. Prather, Steven W. Likens, Littler Mendelson, Memphis, TN.

Judges: BEFORE: COOK and WHITE, Circuit Judges; MICHELSON, District Judge.[*]

Opinion by: HELENE N. WHITE

Opinion

[*364] **HELENE N. WHITE, Circuit Judge**. Defendants-Appellants ServiceMaster Holding Corp., ServiceMaster Company, Inc., Terminix International Company, L.P., and Terminix International, Inc. (collectively ServiceMaster), provide services to residential and commercial customers, including termite and pest control, lawn care, landscape maintenance, home warranties, disaster response and reconstruction, house cleaning, furniture repair, and home inspection. Plaintiffs, all at one **[**2]** point employees of Terminix International Company, L.P., or Terminix International, Inc. (collectively Terminix),[1] brought an action against ServiceMaster for violations of the Fair Labor Standards

[*] The Honorable Laurie J. Michelson, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] We will refer to Terminix and other Defendants as ServiceMaster except where additional clarification is necessary.

Act (FLSA), alleging that ServiceMaster had a policy of not compensating technicians for all hours worked and for overtime, and seeking to represent a class of similarly-situated employees. **[*365]** After an arbitrator determined that Plaintiffs could proceed collectively, ServiceMaster settled with the individual Plaintiffs. Plaintiffs' counsel then sought attorney's fees and costs of the action. The district court awarded the full amount requested, and ServiceMaster appeals.

We VACATE the award of attorney's fees and costs and REMAND to the district court for further consideration.

I. BACKGROUND

A. Smith's FLSA Claim

Smith filed an action against ServiceMaster on July 14, 2009, in the Western District of Tennessee, alleging individual claims under the FLSA pursuant to *29 U.S.C. § 201*, and sought certification of a class under *29 U.S.C. § 216(b)* on behalf of himself and all similarly-situated employees. Smith worked in **[**3]** Terminix's Baton Rouge, Louisiana, branch. He alleged that the number of appointments technicians were required to complete in a day often necessitated working more than eight hours, and that ServiceMaster did not properly compensate him for the overtime. Further, the complaint alleged that the time-keeping device carried by technicians did not accurately record all hours technicians worked.

B. Smith's First Amended Complaint

The district court granted ServiceMaster's motion to transfer the case to the Middle District of Louisiana on July 1, 2010.[2] However, on October 11, 2011, Smith filed an unopposed motion for leave to amend the complaint and to transfer the action back to the Western District of Tennessee. In the motion, Smith sought to add two named plaintiffs, Dominick Massaro (Massaro) and Troy Yates (Yates), to replace Smith as the collective action representatives. Massaro worked as a service representative for Terminix in Palm Beach, Florida, from the time his former employer, ServicePro, was bought by Terminix, until August 2010. Yates worked as a service representative for Terminix in Glenview, Illinois, from 2007 to 2009.

Both Massaro and Yates claimed they were improperly classified as exempt employees and thus not paid overtime wages. The amended complaint also included allegations that ServiceMaster failed to provide employees with meal breaks in accordance with *29 C.F.R. § 785.19* (Claim II). The district court granted the motion to amend and transfer on October 19, 2011. In addition, William Craig (Craig) and Billy Simpkins (Simpkins) filed motion-to-join forms on April 8, 2010, and February 9, 2012, respectively. Although Smith's counsel spent many hours preparing a motion for collective action certification, it was never submitted; thus, the district court never certified this matter as a collective action.

C. Arbitration of the Claims

On January 11, 2012, ServiceMaster moved to compel Massaro and Yates to arbitrate their claims pursuant to the arbitration provision in the employment agreements they entered into at the beginning of their employment with ServiceMaster. The agreement provided, in relevant portions, that a third-party arbitrator would decide employment **[**5]** disputes and that both parties would be bound by the arbitrator's decision. Massaro and Yates objected to the motion to compel, but on March 13, 2012, the district court granted the motion.[3] **[*366]** The district court did not decide whether the arbitration could proceed as a collective action; it concluded that the issue was properly within the purview of the arbitrators. Massaro and Yates submitted their individual claims to the arbitrator and sought a certification of collective action.

A telephonic arbitration-management conference was held on October 31, 2012. The arbitrator asked the parties to submit additional briefing regarding whether the arbitration clause permitted collective actions. The parties submitted their briefs, and on December 27, 2012, the arbitrator entered a partial final award finding that the "arbitration agreement [did] not preclude this arbitration from proceeding on behalf of a class." ServiceMaster then filed a motion to vacate the arbitrator's award, which the district court denied on May 21, 2013.

D. Settlements with Plaintiffs and Award of Fees and Costs

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[2] Because Smith worked for ServiceMaster in Louisiana, **[**4]** Terminix claimed that it would be prejudiced if forced to defend the action in Tennessee. Smith objected, but the district court agreed with ServiceMaster.

[3] ServiceMaster did not move to compel arbitration of Smith's claims.

Between August 16, 2013, and September 6, **[**6]** 2013, ServiceMaster extended Fed. R. Civ. P. Rule 68 offers to Massaro, Yates, Craig, Simpkins, and Smith. After all plaintiffs accepted an offer, the district court entered judgment on each individual's FLSA claim in the following amounts: $6,552 for Smith, $2,295.30 for Massaro, $10,733.06 for Yates, $5,137.96 for Craig, and $57,623.20 for Simpkins. Thus, Plaintiffs' total combined recovery was $82,341.52.

Plaintiffs filed a revised motion requesting $516,890.25 in attorney's fees and $18,908.85 in costs on October 15, 2013.[4] ServiceMaster objected, contesting the amount and also arguing that Plaintiffs were not prevailing parties in the collective action portion of the case and should therefore not recover fees for work done in pursuit of collective action. The district court granted Plaintiffs' motion in a five-page order awarding $516,890.25 in attorney's fees and $18,908.85 in costs.

II. DISCUSSION

A. Standard of Review

HN1 "We review a district court's award of attorney's fees for abuse of discretion." *Moore v. Freeman, 355 F.3d 558, 565 (6th Cir. 2004)* (citing *Fegley v. Higgins, 19 F.3d 1126, 1134 (6th Cir. 1994)*). An abuse of discretion can be found when **[**7]** the lower court "relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard" or "when the reviewing court is firmly convinced that a mistake has been made." *Adcock—Ladd v. Sec'y of Treasury, 227 F.3d 343, 348-49 (6th Cir. 2000)* (quoting *Phelan v. Bell, 8 F.3d 369, 373 (6th Cir. 1993)*).

This court has held that

> ***HN2*** [i]n order to facilitate appellate review of a fee award, a district court must provide a concise but clear explanation of its reasons for the award. The district court should state with some particularity which of the claimed hours the court is rejecting, which it is accepting, and why. Failure to provide such an explanation requires us to remand the case for further consideration.

U.S. Structures, Inc. v. J.P. Structures, Inc., 130 F.3d 1185, 1193 (6th Cir. 1997) (observing that the Plaintiffs' "summary merely lists the number of hours U.S. **[*367]** Structures' attorneys worked on various stages of the case, the hourly rate charged by each attorney, and a total for all attorneys' fees and costs incurred. The court's order provides no elaboration and makes no finding that the hours expended were reasonable, or that the hourly rates were customary.") (internal citations and quotations omitted).

HN3 A district court is required to address a party's non-frivolous objections to the requested fee award:

> Where a party raises specific **[**8]** objections to a fee award, a district court should state why it is rejecting them. Even if the defendant raises objections in a generalized manner, a district court has an obligation to review the billing statement and eliminate those portions of the fee which are unreasonable on their face.

Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169, 1176 (6th Cir. 1990), *abrogated on other grounds by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)*.

B. Attorney's Fees and Costs Under the FLSA

ServiceMaster argues that the district court erred in granting the Plaintiffs' full request for fees and costs. Specifically, ServiceMaster maintains that the district court erred when it: 1) awarded Smith the costs of electronic research; 2) granted compensation for law clerks and associates at rates that exceeded local rates; 3) awarded fees for motions, issues, and claims on which Plaintiffs did not prevail; 4) awarded fees for time entries that did not adequately describe the task performed; 5) awarded fees for unnecessary work completed by billing professionals; and 6) awarded fees for attorney travel time. Each of these claims was raised below, although only superficially addressed by the district court. ServiceMaster also contends that remand is necessary because the district court did not provide a clear explanation **[**9]** for the fee award.

HN4 The FLSA provides that "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid

[4] Plaintiffs slightly decreased the amount of fees and costs requested from the original motion to account for time attorneys spent performing clerical duties.

by the defendant, and costs of the action." *29 U.S.C. § 216(b)*. An award of attorney's fees under *§ 216(b)* is mandatory. *See United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G & M Roofing & Sheet Metal Co., 732 F.2d 495, 501 (6th Cir. 1984)* (citing *Montgomery Ward & Co. v. Antis, 158 F.2d 948 (6th Cir. 1947)*).

1. Expenses of Electronic Legal Research

ServiceMaster alleges that Smith's award of $3,590.69 for costs incurred performing electronic legal research on Westlaw and PACER is not recoverable, and even if it is recoverable, the charges were not described with sufficient detail.

Sixth Circuit law is unsettled regarding whether costs for electronic legal research are properly awarded or whether these costs should be considered part of the overhead included in the attorney's hourly fee. *See Auto Alliance Int'l, Inc. v. U .S. Customs Serv., 155 F. App'x 226, 229 (6th Cir. 2005)* ("[T]his circuit has not definitively ruled on this question . . . ."); *see also Deal v. Hamilton Cnty. Dep't of Educ., 258 F. App'x 863, 866 (6th Cir. 2007)* (the district court did not "abuse its discretion in denying the [Plaintiffs'] request for certain litigation expenses, including electronic legal research, travel expenses, and overtime meals"). Further, there is a split within the district courts of this circuit. *Compare Moore v. Menasha Corp., No. 1:08-CV-1167, 2013 U.S. Dist. LEXIS 10126, 2013 WL 308960,* **[*368]** at *6 (W.D. Mich. Jan. 25, 2013)* (holding that "[w]hile it is a close question, **[**10]** the Court concludes that the modern practice is to charge clients separately for computer-research costs"), *with Fharmacy Records v. Nassar*, 729 F. Supp. 2d 865, 894 (E.D. Mich. 2010) (denying the expense, holding "the majority of courts which have considered the matter have denied recovery for computer legal research as a separate expense").[5]

Some circuits consider electronic research costs to be incorporated in the attorney's billing rate and thus not separately compensable. "The idea is that computer-assisted legal research essentially raises an attorney's average hourly rate as it reduces (at least in theory) the number of hours that must be billed. As a form of attorney's fees, the charges associated with such research are not separately recoverable expenses." *Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 409 (7th Cir. 2000)* (citing **[**11]** *Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago, 38 F.3d 1429, 1440-41 (7th Cir. 1994))*; *see also Standley v. Chilhowee R-IV Sch. Dist., 5 F.3d 319, 325 (8th Cir. 1993)* ("[T]he law of this Circuit is that computer-based legal research must be factored into the attorneys' hourly rate, hence the cost of the computer time may not be added to the fee award."). But other circuits routinely award electronic research as separate costs. "It is undisputed that a plaintiff may receive an award of costs for legal research." *Porter v. Astrue, 999 F. Supp. 2d 35, 43 (D.D.C. 2013)* (citing *Hirschey v. F.E.R.C., 777 F.2d 1, 6, 250 U.S. App. D.C. 1 (D.C. Cir. 1985)* ("[A] charge of $142.61 for computer research is appropriate.")).

Some circuits find that efficiency justifies awarding the cost of computerized legal research. "We agree that the use of online research services likely reduces the number of hours required for an attorney's manual search, thereby lowering the lodestar, and that in the context of a fee-shifting provision, the charges for such online research may properly be included in a fee award." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 369 F.3d 91, 98 (2d Cir. 2004)*.

HN5 We see no reason for an absolute rule that the cost of computer research is or is not recoverable. Any recovery should be for the actual cost of the online access or service. If the lawyer or firm pays a blanket access fee, rather than per search, there is no reason to distinguish the on-line research cost from the cost of the books that at one time lined the walls of legal offices, **[**12]** which was treated as overhead. If distinct charges are incurred for specific research directly relating to the case, and the general practice in the local legal community is to pass those charges on to the client, we see no reason why such properly documented charges should not be included in the recoverable expenses.

In the instant case, the record of the local practice regarding computer research charges has not been developed. *Auto Alliance Int'l, Inc., 155 F. App'x at 229*

[5] There is a similar split within other circuits regarding the recoverability of computer research. In the Eastern District of New York, for example, courts "differ on whether to allow electronic research costs as a reimbursable item." *Adams v. City of New York*, Nos. 07-CV-2325, 13CV271, 2014 U.S. Dist. LEXIS 131637, 2014 WL 4649666, at *11 (E.D.N.Y. Sept. 16, 2014) ("The Court favors the approach of accounting for electronic research fees as part of the proportionate share of attorney's fee and declines to award such expenses as a separate reimbursable item.").

("Nor did [Plaintiffs] submit any evidence about general industry practice . . . concerning billing of computerized research charges."). ServiceMaster further **[*369]** asserts that Plaintiffs' record of the charges is inadequate. A typical entry for Plaintiffs' electronic research reads: "Timekeeper: Jaime Pacheco; Date: 10/31/2009; Narrative: October 2009 Westlaw charges; Units: 1; Total Price: $2.84." Plaintiffs explain that they ensured the costs were properly billed to the ServiceMaster case because their attorneys "designate[d] a client-specific billing code for each PACER or Westlaw session at the time the charge is incurred. When the bills for the electronic research are received, the bills are reviewed and recorded for each client in the law firm's internal billing software." **[**13]** Br. of Appellees at 33. This practice establishes that the expenses were actually incurred in connection with the litigation. However, the entries, without more do not establish that each charge was reasonably related to the issues raised in the case. Accordingly, even if the costs of electronic legal research can be separately awarded, it is not apparent that Plaintiffs have provided descriptions of their charges sufficient to justify such an award. We therefore remand to the district court for further development of the record and reconsideration of an award for the expenses of computer-based research.

2. Rates of Compensation for Law Clerks and Associates

ServiceMaster argues that the district court erred in granting fees based on Plaintiffs' requested hourly rates of $300, $375, and $450 for associates, and $175 and $225 for law clerks because these rates exceed the local rates of the forum.[6] The district court found the rates reasonable, explaining that

> Plaintiffs' Counsel, based in San Francisco, California, litigated the case against Defendants, national corporations. The Court finds the hourly rates requested by Plaintiffs' counsel to be reasonable, particularly considering the **[**14]** rate discounts[7] Plaintiffs' Counsel provided in its lodestar figure.

However, ***HN6*** in this circuit, "[a] trial court, in calculating the reasonable hourly rate component of the lodestar computation, should initially assess the *prevailing market rate in the relevant community."* Adcock—Ladd, 227 F.3d at 350 (internal quotation marks omitted) (emphasis in original) (quoting Blum v. Stenson, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)). "[T]he starting point [for determining the reasonable amount of attorney's fees] has been a 'lodestar' calculation—the product of the number of hours reasonably spent on the case by an attorney times a reasonable hourly rate." Moore, 355 F.3d at 565. The amount of fees awarded can be adjusted as the district court finds necessary under the circumstances of the particular case. *Id*.

There is some Sixth Circuit authority that the relevant market need not be local to the venue. ***HN7*** "Today's holding is not to be interpreted as *requiring* district courts to always base the fees awarded non-private attorneys on local rates. **[**15]** District courts are free to look to a national market, an area of specialization market or any other market they believe appropriate to fairly compensate particular attorneys in individual cases." Louisville Black Police Officers Org. v. City of Louisville, 700 F.2d 268, 278 (6th Cir. 1983) (emphasis in original). Further, a district court has discretion to consider the following factors and adjust the award accordingly:

> (1) the time and labor required by a given case; (2) the novelty and difficulty **[*370]** of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Adcock—Ladd, 227 F.3d at 349 n.8 (citing Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)).

The Tennessee Rate Report indicates that the local hourly rates for associates range from $190 to $335,

[6] ServiceMaster does not dispute that this circuit uses the lodestar to calculate attorney's fees; it only takes issue with the rates charged for the associates and law clerks.

[7] Andrus and Anderson, LLP discounted their hourly rates by 25 percent.

well below the rates charged by Plaintiffs' counsel. The report reflects that only **[**16]** partners commanded the $450 hourly rate. Plaintiffs submitted declarations from two Tennessee-area FLSA attorneys and from a fee expert and professor of law at Vanderbilt University. William B. Ryan, one of the FLSA attorneys, found the requested hourly rates justified because of the sophisticated nature of the litigation and of Plaintiffs' counsel. Professor Brian T. Fitzpatrick testified that his research indicates that FLSA cases in other circuits command a higher hourly rate.

The district court did not adequately explain its reasons for departing from the local rate for associates and did not discuss the governing criteria. Thus, we remand for further consideration.

Additionally, the district court did not specifically address the reasonable hourly rates for law clerks, and neither party provided evidence of the market rates for such work. Because ***HN8*** the trial court is required to "assess the prevailing market rate in the relevant community" (*Adcock—Ladd, 227 F.3d 343 at 350*), we remand the law clerk-rate issue for additional consideration as well.

3. Fees for Unsuccessful Motions, Issues, and Claims

ServiceMaster argues that the district court erred in awarding fees for work on unsuccessful **[**17]** motions, issues, and claims. Specifically, ServiceMaster requests that the award be reduced by: 1) at least $46,897.20 for time spent on Smith's unsuccessful defense of the motions to compel arbitration and 2) $126,092.20 for work related to Smith's unsuccessful motion to compel discovery of class information and Smith's unsuccessful pursuit of collective action. The district court did not address this objection in its order.

HN9 "'[T]he most critical factor' governing the reasonableness of a fee award 'is the degree of success obtained.'" *Waldo v. Consumers Energy Co., 726 F.3d 802, 822 (6th Cir. 2013)* (quoting *Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*). Where "a plaintiff obtains 'limited success, the district court should award only that amount of fees that is reasonable in relation to the success obtained.'" *Isabel v. City of Memphis, 404 F.3d 404, 416 (6th Cir. 2005)* (quoting *Hensley, 461 U.S. at 435*). However, "where the plaintiff's claims for relief involve common facts or related legal theories, such that much of counsel's time will have been devoted generally to the litigation as a whole, the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Imwalle v. Reliance Med. Prods., Inc., 515 F.3d 531, 552 (6th Cir. 2008)* (quoting *Hensley, 461 U.S. at 435*). Further, this court has held that attorney's fees related to a failed effort to pursue collective action can be recovered **[**18]** if "these expenses benefitted the . . . plaintiffs' individual claims." *O'Brien* **[*371]** *v. Ed Donnelly Enters., Inc., 575 F.3d 567, 576 (6th Cir. 2009)*.

The district court made no findings supporting the award of attorney's fees for work relating to the unsuccessful claims and defenses. There was no discussion of whether and to what extent the work related to the successful claims. We therefore remand for a determination and discussion of the issue whether the award should be reduced to account for the time attorneys spent on Plaintiffs' unsuccessful claims, and if so, by how much.

4. Time Entry Descriptions

ServiceMaster alleges that the district court erred by awarding fees based on time entries that lacked sufficient detail and impermissibly block-billed the time charged. Accordingly, ServiceMaster seeks a $8,738.50 reduction of the award for vague entries and $649 reduction for block-billed entries. The district court did not address these objections in its order.

i. Insufficiently Detailed Descriptions

HN10 Attorneys who seek fees have an obligation to "maintain billing time records that are sufficiently detailed to enable courts to review the reasonableness of the hours expended." *Wooldridge, 898 F.2d at 1177*. The party seeking fees has "the burden of providing for the court's perusal a particularized **[**19]** billing record." *Perotti v. Seiter, 935 F.2d 761, 764 (6th Cir. 1991)*. Although Plaintiffs' counsel "is not required to record in great detail how every minute of his [or her] time was expended," "at least counsel should identify the general subject matter of [] time expenditures, *Hensley, 461 U.S. at 437 n.12*); *see also Wooldridge, 898 F.2d at 1177*; *Cleveland Area Bd. of Realtors v. City of Euclid, 965 F. Supp. 1017, 1020 (N.D. Ohio 1997)*.

This court has held that "[in] obtaining the number of hours expended on the case, the district court must conclude that the party seeking the award has

sufficiently documented its claim." *United Slate, Local 307 v. G & M Roofing & Sheet Metal Co., 732 F.2d 495, 502 (6th Cir. 1984)*. Where the documentation is inadequate, the district court may reduce the award accordingly. *Hensley, 461 U.S. at 433*. Because the district court in the instant case failed to make any findings regarding the sufficiency of the explanations provided by Plaintiffs' counsel, we remand.

ii. Block-Billing

Regarding block-billing, this court has held that ***HN11*** so long as the description of the work performed is adequate, block-billing can be sufficient.

> [Plaintiff] has cited no authority to support its argument that the use of block billing is contrary to the award of a reasonable attorney fee . . . in fact, our sister circuits have rejected block-billing objections to fee awards in a number of contexts. . . . [C]ounsel, of course, is not required to record in great detail how each minute of his time **[**20]** was expended.

Pittsburgh & Conneaut Dock Co. v. Dir., Office of Workers' Comp. Programs, 473 F.3d 253, 273 (6th Cir. 2007); *see also Oakley v. City of Memphis, No. 06-2276 A/P, 2012 U.S. Dist. LEXIS 95067, 2012 WL 2682755, at *3 (W.D. Tenn. June 14, 2012) report and recommendation adopted*, *No. 06-2276-STA-tmp, 2012 U.S. Dist. LEXIS 93364, 2012 WL 2681822 (W.D. Tenn. July 6, 2012) aff'd*, *566 F. App'x 425 (6th Cir. 2014)* ("As far as this court is aware, the Sixth Circuit has never explicitly rejected the practice of block billing."). However, we remand so that the district court can assess this objection in light of its reconsideration of the other issues addressed in this opinion.

5. Unnecessary Work

ServiceMaster next argues that the total award should be reduced by $1,732 **[*372]** for clerical tasks completed by lawyers and other billing professionals, and by $20,122.50 for entries that reflect multiple attorneys working on the same task. The district court did not address this argument. Accordingly, we remand to the district court for determination as to whether the award should be reduced to account for any clerical work performed by Plaintiffs' counsel.

ServiceMaster also contends that "[i]n multiple instances, Plaintiffs sought fees for two attorneys to perform the same task." ServiceMaster points to instances where more than one lawyer billed for meetings, calls, and depositions in which all billing lawyers participated. However, ServiceMaster does not provide any relevant authority from this **[**21]** jurisdiction stating that when multiple attorneys work on a task, only one attorney can bill his or her time. ***HN12*** This court has, "[i]n complicated cases, involving many lawyers, [] approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services." *Sigley v. Kuhn*, 205 F.3d 1341, 2000 WL 145187, at *8 (6th Cir. 2000) (table). We remand this issue to allow the district to determine if the duplicative entries are warranted.

6. Fees for Attorney Travel Time

Finally, ServiceMaster alleges that the district court erred by awarding Plaintiffs 95.2 hours of travel time, totaling $49,028, in attorney's fees because Smith did not provide evidence that the attorneys worked while traveling.[8] ***HN13*** "The Sixth Circuit has often found travel time to be compensable if determined by the district courts to be the local practice regarding payment for travel time." *Monroe v. FTS USA, LLC, No. 2:08-cv-02100-JTF-cgc, 2014 U.S. Dist. LEXIS 128451, 2014 WL 4472720, at *7 (W.D. Tenn. July 28, 2014)* (quoting *Robinson v. Elida Sch. Dist., Bd. of Educ.*, 99 F.3d 1139, 1996 WL 593535, at *3 (6th Cir. Oct. 1996)); *see also Perotti, 935 F.2d at 764* ("We believe that matters of this sort [travel time] are within the discretion given the district court, which has greater familiarity with local practice than does this court, and we will not reverse on this record.").

The district court made no findings pertinent to the local practice regarding travel time, or whether the attorneys were performing legal services while traveling. Therefore, we remand this issue as well.

III. CONCLUSION

The district court's order included minimal explanation for the substantial award. In approximately four pages of analysis, it emphasized that fee and cost awards are within the discretion of the district court and cited relevant precedent. The court explained, citing *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G & M Roofing & Sheet Metal Co., 732 F.2d 495, 501 (6th Cir. 1984)*, that "[t]he

[8] ServiceMaster does not contend that any of the travel time submitted **[**22]** by Plaintiffs' counsel was unnecessary.

determination of a reasonable fee must be reached through an evaluation of a myriad of factors, all within the knowledge of the trial court, examined in light of the congressional policy underlying the substantive portions of the statute providing for the award of fees." The court further stated that the lodestar method is used to calculate reasonable attorney's fees, and "modifications [to the lodestar] are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." (Citing *Adcock—Ladd, 227 F.3d at 350*). **[*373]** However, the court did not acknowledge this court's prevailing **[**23]** legal standard for determining the reasonable hourly rate for the local market, did not evaluate the reasonableness of the hours spent, and did not address most of ServiceMaster's objections.

HN14 Although "[a] request for attorney's fees should not result in a second major litigation" and "the district court has discretion in determining the amount of a fee award, . . . [i]t remains important . . . for the district court to provide a concise but clear explanation of its reasons for the fee award." *Hensley, 461 U.S. at 437*.

For these reasons, we VACATE the award of fees and costs, and REMAND for further consideration consistent with this opinion.

2011 WL 4005409
Only the Westlaw citation is currently available.
United States District Court,
M.D. Tennessee,
Nashville Division.

Gregory HEATH, Plaintiff,
v.
METROPOLITAN LIFE
INSURANCE COMPANY, Defendant.

No. 3:09–cv–0138.
|
Sept. 8, 2011.

Attorneys and Law Firms

James Gerard Stranch, III, Branstetter, Stranch & Jennings, Nashville, TN, for Plaintiff.

Joel T. Galanter, Adams and Reese LLP, Nashville, TN, for Defendant.

ORDER

JOHN T. NIXON, Senior District Judge.

***1** Pending before the Court is Plaintiff Gregory Heath's ("Plaintiff" or "Mr. Heath") Motion for and Award of Attorney's Fees and Reimbursement of Expenses ("Motion") (Doc. No. 37), filed with a supportive Memorandum (Doc. No. 38), to which Defendant Metropolitan Life Insurance Company ("MetLife") filed a Response (Doc. No. 44). Plaintiff then filed a Reply (Doc. No. 45–1) and Supplemental Citation of Authority (Doc. No. 47) in further support of his Motion, and Defendant also filed a further Response to the Supplement (Doc. No. 48).

For the reasons stated below, Plaintiff's Motion is **GRANTED.**

I. BACKGROUND

Plaintiff worked as a maintenance supervisor at a Honeywell International, Inc. chemical plant in Illinois. (Doc. No. 29 at 2.) As an employee, he participated in the company's short-term and long-term disability Plans administered by MetLife. (*Id.*) Plaintiff applied for long-term disability ("LTD") benefits on August 10, 2006, claiming that he was disabled, having been diagnosed with segmental or spinal myoclonus and suffering from related symptoms such as jerking, pain, fatigue and memory loss. (*Id.* at 3.) MetLife approved Plaintiff's claim for LTD benefits, effective September 22, 2006. (*Id.*)

Subsequently, MetLife continued to receive medical information on Plaintiff's condition from his neurologist, and also enlisted an investigator to perform surveillance on Plaintiff regarding a tip that Plaintiff was working at his family's health food store. (*Id.* at 3–5.) pj By letter dated October 12, 2007, MetLife informed Plaintiff that, based on a review of his claim to determine if he was eligible for LTD benefits pursuant to the Plan, MetLife was withdrawing the claim and no further benefits would be paid past October 11, 2007. (*Id.* at 6.) After an appeal, Defendant again denied Plaintiff's LTD benefits claim and informed Plaintiff that he had exhausted all of his administrative remedies. (*Id.* at 8–9.) On February 11, 2009, Plaintiff brought this action pursuant to section 502(e) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1332(e), *et seq.* (Doc. No. 1.)

On August 31, 2009, Plaintiff and Defendant both filed Motions for Judgment on the Administrative Record. (Doc. Nos. 17 & 19.) Magistrate Judge Brown issued a Report and Recommendation ("Report") on November 23, 2009, recommending that Plaintiff's Motion for Judgment on the Administrative Record should be granted in part and denied in part, that Defendant's Motion for Judgment on the Administrative Record should be denied, and that Plaintiff's claim for LTD benefits should be remanded back to MetLife for further consideration. (Doc. No. 29.) Magistrate Judge Brown found that MetLife's denial of Plaintiff's LTD benefits was arbitrary and capricious, specifically, that MetLife had submitted a paper review and failed to adequately consider Plaintiff's medical record. (*Id.* at 16.) However, Magistrate Judge Brown declined to award benefits because there were factual issues to be resolved regarding Plaintiff's condition. (*Id.*) The parties subsequently filed a Joint Notice of Intent Regarding Report and Recommendation ("Joint Notice") stating that neither party intended to submit objections to the Report, and that the claim would be remanded to MetLife. (Doc. No. 34.) This Court adopted the Report in its entirety on January 21, 2010. (Doc. No. 35.)

***2** On February 22, 2010, Plaintiff filed the Motion now under consideration (Doc. No. 37) along with a Memorandum in Support (Doc. No. 38), claiming entitlement to $69,750.00

in fees and expenses available under ERISA. Defendant filed its Response on March 19, 2010 (Doc. No. 44). Plaintiff filed a Motion for Leave to File Reply (Doc. No. 45), along with a copy of the Reply (Doc. No. 45–1) on April 7, 2010.

On April 26, 2010, Defendant filed a Response opposing Plaintiff's request for leave to file the Reply, asking in part for the Motion for Attorney's Fees to be held abeyance pending the Supreme Court's decision in *Hardt v. Reliance Standard Life Insurance Co.*, —— U.S. ——, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010). (Doc. No. 46.) After the *Hardt* case was decided, Plaintiff filed a Supplemental Citation of Authority on May 26, 2010 (Doc. No. 47), and Defendant responded to this last filing on June 11, 2010 (Doc. No. 48). The Court ultimately granted Plaintiff leave to file his Reply later, on April 1,2011. (Doc. No. 51.)

II. LEGAL STANDARD

In *Hardt*, the Supreme Court held that it is within the discretion of the court to award attorney's fees to either party in an action seeking relief under ERISA, but that this discretion is not unlimited. 130 S.Ct. at 2158. The Supreme Court held that § 1132(g)(1), which provides for the awarding of attorney's fees, contains a threshold requirement:

> [A] fees claimant must show "some degree of success on the merits" before a court may award attorney's fees under § 1132(g) (1). A claimant does not satisfy that requirement by achieving "trivial success on the merits" or a "purely procedural victor[y]," but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a "lengthy inquir[y] into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.' "

Id. (quoting *Ruekelshaus v. Sierra Club*, 463 U.S. 680, 694, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983)) (internal citations omitted). In *Hardt*, after the district court noted its inclination to rule for the plaintiff but remanded her case to the insurer for further consideration of her disability claim, the insurer reversed course and determined that the plaintiff was entitled to benefits. *Id.* at 2154. The Court found that this was clearly more than a trivial success or procedural victory, and reserved judgment on whether a remand order, without more, would constitute "some success on the merits" and make a claimant eligible for an award of fees. *Id.* at 2159. Once the district court determines the threshold requirement under § 1132(g)(1) has been met, however, there is discretion as to the decision to award fees. See *id.* at 2158.

Prior to *Hardt*, courts within the Sixth Circuit applied a five-factor test known as the "*King* factors" to determine whether to award fees. *Moore v. Menasha Corp.*, Case No. 1:08–cv–1167, 2011 U.S. Dist. LEXIS 20020, at *5, 2011 WL 811150 (W.D.Mich. Mar. 1, 2011). The *King* factors are:

> ***3** (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Sec'y of Dep't of Labor v. King, 775 F.2d 666, 669 (6th Cir.1985). In *Hardt*, the Supreme Court analyzed an identical five-factor test employed by the Fourth Circuit and held that the test "bear[s] no obvious relation to ERISA § 1132(g)(1)'s text" and thus was not required. *Hardt*, 130 S.Ct. at 2158. Although the Supreme Court found that the test was not required, the Court stated that it "do[es] not foreclose the possibility that once a claimant has satisfied [the threshold] requirement, and thus becomes eligible for a fees award under ERISA § 1132(g)(1), a court may consider the five factors." *Id.* at 2158 n. 8.

District courts within the Sixth Circuit have generally continued to apply the *King* factors as allowed in *Hardt*. Some have indicated that these factors are no longer mandatory but continue to apply them. *See, e.g., Moore*, 2011 U.S. Dist. LEXIS 20020, at *7, 2011 WL 811150 (stating that the *King* factors are no longer mandatory, but applying them because the court found them to be "a useful guide to exercising its discretion" and "both parties brief[ed] [the factors] extensively"). Others have applied the *King* factors without any mention of *Hardt*. *See, e.g., Reese v. CNH Global N.V.*, Case No. 04–70592, 2011 U.S. Dist. LEXIS 70607, at *9–*11, 2011 WL 2600988 (E.D. Mich. June 30, 2011); *Loan v. Prudential Ins. Co. of Am.*, Civil Action No. 5:08–cv–38–JMH, 2011 U.S. Dist. LEXIS 51205, at *6–*13, 2011 WL 1793389 (E.D.Ky. May 10, 2011). In addition, at least one district court within this Circuit has decided not to apply the *King* factors after *Hardt*. *Pemberton v.*

Reliance Standard Life Ins. Co., Civil Action No. 08–86–JBC, 2011 U.S. Dist. LEXIS 24939, at *8–*9, 2011 WL 1314888 (E.D.Ky. Mar. 10, 2011) (declining to apply the *King* factors because they would "add nothing to the analysis of eligibility or reasonableness").

However, a recent unpublished Sixth Circuit opinion, reviewing a district court decision that occurred well before *Hardt*, noted that this Circuit "requires" consideration of the *King* factors. *McKay v. Reliance Standard Life Ins. Co.*, Nos. 10–5154; 10–5155, 2011 U.S.App. LEXIS 13143, at *22, 2011 WL 2518728 (6th Cir. June 27, 2011). The Circuit Court found that the factors were evaluated properly in favor of the plaintiff, and then, also, that *Hardt* 's requirement of "some degree of success" was met. Although this Court perceives that there may be some limitations to*McKay*—particularly given that the appellate court appears not to have been asked about the continued relevance of *King*, and the factors were clearly controlling at the time of the district court's decision—the opinion suggests that the *King* factors should not be cast aside. In a case following (and citing) *McKay*, a court in the Eastern District of Kentucky addressed *Hardt* first, and then performed an extensive analysis of the *King* factors. *Bio–Med. Applications of Ky., Inc. v. Coal Exclusive Co., LLC*, Civil No. 08–80–ART, 2011 U.S. Dist. LEXIS 91187, at *5–*21, 2011 WL 3568249 (E.D.Ky. Aug. 15, 2011).

***4** As such, while this Court is of the view that *Hardt* controls its ability to grant an award of fees in this case, *King* has not lost its vitality in this jurisdiction and should also be considered to guide the Court's exercise of discretion in assessing Plaintiff's request.

III. ANALYSIS

As described above, Plaintiff argues in his Motion and subsequent filings that he succeeded on the merits so as to be eligible for reasonable fees and costs pursuant to the Supreme Court's interpretation of § 1132(g)(1) in *Hardt*, and that the *King* factors tip in favor of an award to Plaintiff, too. (*See* Doc. Nos. 38 & 47.) Plaintiff also rejects Defendant's assertion that he agreed to forego seeking fees and costs. (Doc. No. 45–1.) Although Defendant leads with the latter argument regarding an agreement between the parties, he focuses more heavily on Plaintiff's entitlement to any award under *Hardt* or *King*, and attacks the requested fees as unreasonable and insufficiently documented. (Doc. Nos. 44 & 48.)

The Court will first address the issue of an agreement between the parties, and then will reach the substance of Plaintiff's request for fees and expenses.

A. Agreement Between the Parties

Defendant claims in its Response that Plaintiff's request that this Court award him fees and expenses is in violation of the parties' agreement not to file objections to the Magistrate Judge's Report. (Doc. No 44 at 2–3.) Defendant asserts that, per the agreement, Plaintiff implicitly agreed to forego further action in this Court. (*Id.*) In his Reply, Plaintiff argues primarily that the written agreement, which was contained in their Joint Notice (Doc. No. 34), was limited on its face to an arrangement not to file objections to the Report, and that no implicit agreement exists beyond this. (Doc. No. 45–1 at 2.)

Indeed, the Joint Notice only states that "[the parties] do not intend to submit any objection to the Magistrate Judge's Report and Recommendation." (Doc. No. 34.) It does not reference any agreement concerning a motion for attorney's fees, nor is it suggestive of such an agreement. Defendant has provided the Court with no other evidence that indicates that the parties in fact intended or understood the Joint Notice to bar Plaintiff from requesting a fee award. Thus, this argument must fail.

B. Plaintiff's Eligibility to Receive An Award of Fees

Next, the Court turns to the threshold requirement of whether Plaintiff has had "some degree of success on the merits" so as to be entitled to a fee award under § 1132(e)(1). *Hardt*, 130 S.Ct. at 2158. Plaintiff argues that under *Hardt*, he has shown some degree of success on the merits, and, particularly, that his situation is similar to that of Ms. Hardt, whose claim was remanded by the district court due to the failure of the insurer to perform an adequate review and ultimately received the desired benefits on remand. (Doc. No. 47 at 2.) Defendant responds that the district court in *Hardt* found compelling evidence that the plaintiff was totally disabled and stated as much prior to remand; here, however, the Report adopted by this Court did not conclude that Plaintiff was disabled and that unresolved factual issues necessitated a remand. (Doc. No. 48 at 2–3.) The point of distinction Defendant seeks to highlight is that "unlike the plaintiff in *Hardt*, it was not at all clear prior to remand, based on the evidence before MetLife up to that point, that Plaintiff was entitled to any benefits." (*Id.* at 3.)

***5** The Court must note at this juncture that Defendant's effort to distinguish this case from *Hardt* is undermined by

its assertion in a previous filing that "the Plaintiff here is in the precise position as the *Hardt* plaintiff," such that *Hardt* would be binding in this case and the Court should disregard arguments in Plaintiff's Reply. (Doc. No. 46 at 2.) While it is obvious why Defendant has changed its position, Defendant's earlier claim that the plaintiff in *Hardt* and Mr. Heath are in the "precise position" as each other cannot be ignored.

While it is true that the Court's orders in this case lack the conclusiveness of the district court's in *Hardt* as to the plaintiff's entitlement to benefits, Plaintiff has still achieved some success on the merits. MetLife's decision was found to be arbitrary and capricious on several grounds, such as the use of a paper review without examination of Plaintiff's condition or credibility in person; the failure to consider evidence of Plaintiff's receipt of disability benefits from the Social Security Administration; the lack of reasoning for conclusions regarding Plaintiff's condition; and MetLife's failure to rely on video surveillance of Plaintiff in resolving to deny him benefits, which led Magistrate Judge Brown to question the strength of this evidence, despite the fact that it was cited as a reason for MetLife's initial termination of benefits. (Doc. No. 29 at 11–14.) The Magistrate Judge was also "troubled" by the way in which MetLife used one doctor's non-response to a letter stating that Plaintiff could perform work as reflecting an affirmative response in agreement with that statement, without even confirming that the doctor had received the letter. (*Id.* at 14–15.) MetLife was instructed to cure its clearly insufficient review on remand, and in doing so quickly reversed its denial of benefits.

Although this Court agrees Mr. Heath's case is not quite as similar to the plaintiff's in *Hardt* as he might like—the Magistrate Judge's findings stopped short of indicating that Plaintiff was entitled to benefits—his action was certainly somewhat successful on the merits in light of the Court's sound and overwhelming rejection of MetLife's decision. MetLife's subsequent reversal of the denial only emphasizes the magnitude and significance of the errors highlighted by the Magistrate Judge. The Court, thus, does not agree with Defendant's argument that it was "not at all clear, prior to remand ... that Plaintiff was entitled to benefits." Although MetLife considered further evidence in coming to its final decision that Plaintiff was entitled to benefits, the record before MetLife prior to that supplementation certainly did not support its finding that Plaintiff was not entitled to benefits, and it excluded facts that supported an opposite conclusion. Ultimately, it would be hard to consider Plaintiff's victory here to be "trivial success on the merits" or "purely procedural."

***6** Post-*Hardt* case law from within this Circuit contributes to this Court's conclusion that Plaintiff has achieved some success on the merits so as to be eligible for an award of attorney fees. In its unpublished *McKay* opinion, the Sixth Circuit upheld the determination of a court in the Eastern District of Tennessee that an ERISA plaintiff whose case was remanded for further consideration of his application for benefits—but whose claim ultimately failed on remand—had achieved adequate success to be eligible for attorney fees under *Hardt.* 2011 U.S.App. LEXIS 13143, at *24–25; 2011 WL 2518728 *see also Bio–Med. Applications of Ky.*, 2011 U.S. Dist. LEXIS 91187, at *6, 2011 WL 3568249 (following *McKay* to find that *Hardt* was satisfied where district court had vacated and remanded the defendant's decision on the plaintiff's claim for new review applying proper methodology).

In a case still more factually similar to the instant matter, a judge in the Eastern District of Kentucky recently held that a remand that resulted in an award of benefits to the plaintiff, who had "faced a complete denial of benefits at the beginning of the case," constituted some success on the merits. *Pemberton*, 2011 U.S. Dist. LEXIS 24939, at *4, 2011 WL 1314888. The court emphasized that even though the ultimate benefit award on remand included substantial deductions for an early-retirement offset, *Hardt* does not require a plaintiff to prevail but instead to achieve some success, and the reinstatement of benefits on remand could be "fairly characterize[d]" as such. *Id.* Although the defendant argued that the court's decision remanding the case was merely procedural and did not alter the parties' positions, the court emphasized that the plaintiff's eligibility for fees was based not simply on the fact of remand, but on the gain realized through the remand. *Id.* at *4–*5. Thus the open question of a "remand order, without more" set aside by Justice Thomas in *Hardt* was not before the court. *Id.* at *5.

Similarly, in the present case, the Magistrate Judge did not grant Plaintiff's request for reinstatement of LTD benefits, but instead remanded the case back to MetLife. This remand resulted in MetLife's decision to reinstate Plaintiff's LTD benefits retroactive to their termination date. (Doc. No. 45 at 1.) Like the result in *Pemberton*, the outcome of the remand was a gain realized by Plaintiff and thus can fairly be characterized as "some degree of success on the merits." Indeed, as explained above, this Court is of

the opinion that the remand in this case suggested that Defendant's evaluation of Plaintiff's condition was gravely flawed, not simply inconclusive. Plaintiff's success is at least as substantial as that in *McKay* or *Bio–Medical Applications of Kentucky*, which more closely tracked the "remand order alone" scenario that Justice Thomas left open for future determination (which courts in this Circuit have now begun to undertake). Indeed, this is not a situation where there was a remand order alone, and it is clear that the fact of remand and resulting proceedings conferred some degree of success to Plaintiff on the merits of his claim.

***7** In light of this analysis, Plaintiff has established that he is eligible for an award of attorney fees under *Hardt.*

C. Application of the King *Factors*

Having determined that Plaintiff is eligible for an award of attorney fees under *Hardt*, the Court now addresses the *King* factors, which provide guidance on how judicial discretion should be exercised with regard to attorney fees. This discussion is brief, as Plaintiff's eligibility for fees has already been established, and, pursuant to the facts and analysis in Part II.b, *supra*, it is fairly clear to the undersigned that a fee award is appropriate here. "These factors are not statutory and therefore not dispositive. Rather, they are simply considerations representing a flexible approach." *First Trust Corp. v. Bryant*, 410 F.3d 842, 851 (6th Cir.2008).

Regarding the first factor, MetLife's culpability or bad faith, the Magistrate Judge and this Court have taken note of the fact that MetLife's determination of Plaintiff's claim for benefits was largely an inadequate paper review that lacked an in-person assessment of Plaintiff's condition as well as reasoning to support medical conclusions. Additionally, MetLife engaged in questionable tactics in coming to its decision, such as the use of a doctor's non-response as an affirmative statement, and the shifting of emphasis on what would seem to be crucial evidence regarding Plaintiff's condition (namely, the surveillance video). Although Defendant emphasizes that the Court did not explicitly find it "culpable," and instead merely deemed its benefits decision arbitrary and capricious (Doc. No. 44 at 11–12), both the Report and the Court's analysis of it here indicate that this first *King* factor falls in Plaintiff's favor.

As to the second *King* factor, MetLife's ability to satisfy a fee award, there can be no question that this major corporation can do so; indeed, Defendant does not make such an argument. Instead, it emphasizes that this factor is of little consequence to the analysis of a fee award under § 1132(e)(1) because, as Judge Echols (formerly of this District) noted, ability to pay is "weighed more for exclusionary than for inclusionary purposes." (Doc. No. 44 at 12 (quoting *Platt v. Walgreen Income Protection Plan for Store Managers*, No. 3:05–0162, 2006 U.S. Dist. LEXIS 90496, at *6, 2006 WL 3694580 (M.D.Tenn. Dec. 14, 2006) (internal quotation omitted).) This Court agrees that in a case of this nature, the defendant's ability to pay is not particularly important as opposed to the other factors, but it is noted that Defendant does not contest the assertion that it will be able to satisfy a fee award. The factor leans at least somewhat in Plaintiff's favor, *see McKay v. Reliance Standard Life Ins. Co.*, 654 F.Supp.2d 741, 743 (E.D.Tenn.2008), *aff'd*, 2011 U.S.App. LEXIS 13143, 2011 WL 2518728 (6th Cir. June 27, 2011), though perhaps it does not carry the greatest weight.

The third factor pertains to the deterrent effect a fee award might have. Plaintiff argues that "overcoming ... the deferential arbitrary and capricious standard provides a general deterrence to other insurance companies because they will know that failure to provide a full and fair review could result in an award of attorney's fees." (Doc. No. 38 at 7–8 (citing *McKay v. Reliance Standard Life Ins. Co.*, 654 F.Supp.2d at 743).) Plaintiff thinks this is particularly so where there is evidence of bad faith or culpability. (Doc. No. 38 at 8.) In response, Defendant again emphasizes its opinion that no evidence of the latter exists, and points again to *Platt*, where Judge Echols found no evidence that defendant MetLife was culpable and ultimately denied the plaintiff's request for fees. (Doc. No. 44 at 13 (citing *Platt*, 2006 U.S. Dist. LEXIS 90496, at *6), 2006 WL 3694580.) "[G]iven that Defendant did not necessarily act in bad faith," the deterrence factor did not fall in the plaintiff's favor. *Platt*, 2006 U.S. Dist. LEXIS 90496, at *6, 2006 WL 3694580. Again, however, culpability on Defendant's part has been at least suggested in this case, apparently unlike in *Platt*. Further, this Court, like both the district and circuit courts that reviewed the claim for fees in *McKay*, is not of the view that culpability is necessary to serve the aim of deterrence—rather, an insurer such as MetLife might be deterred from performing unscrupulous reviews of LTD benefit claims in future by an award of fees. *See McKay*, 654 F.Supp.2d at 743; *McKay*, 2011 U.S.App. LEXIS 13143, at *23, 2011 WL 2518728. The third *King* factor, too, weighs in Plaintiff's favor.

***8** The fourth consideration contained in *King* is whether the plaintiff sought to confer a common legal benefit on all participants or beneficiaries of an ERISA plan, or to resolve

significant legal questions regarding ERISA. Plaintiff has conceded this point: he is an individual seeking benefits and did not intend to help others or address a particular legal question by bringing this action. (Doc. No. 38 at 8.) While Plaintiff argues that this factor falls in favor of neither party (*id.*), Defendant argues that the case raised routine issues and benefited Plaintiff alone, such that the fourth factor weighs in its favor and against a fee award (Doc. No. 44 at 14). The Court agrees that this factor must favor Defendant if it is to have any meaning, but, similar to the analysis of the second *King* factor, finds that it is of limited importance—this factor is surely meant to have greater weight when it is in favor of fees.

The final *King* factor, the relative merits of the parties' positions, is clearly to Plaintiff's favor in light of the previous *Hardt* analysis, in which the Court concluded that Plaintiff had achieved some success on the merits. Although this was not an unqualified win for Plaintiff, the merits of the case are in its favor, particularly in light of the reason that remand, and not judgment, was necessary—issues of fact were still unresolved after MetLife's review of the claim.

Ultimately, the Court finds that four out of the five *King* factors are in Plaintiff's favor, and that the fourth, which belongs to Defendant, carries only limited weight. Thus, not only is Plaintiff eligible for an award of attorney fees, but the Court also finds that he is entitled to and will be granted an award.

D. Amount of Fees to Which Plaintiff Is Entitled

Plaintiff seeks a total of $69,750.00 in fees and expenses, representing the lodestar (hourly rate multiplied by the number of hours worked) plus expenses (the filing fee and service of process fee). (Stranch Decl.[1] ¶¶ 5–7.) Plaintiff's fee request is supported by the memorandum of law cited repeatedly herein, and the Declaration of then-counsel Jane Stranch (now a Judge on the Sixth Circuit Court of Appeals), for whom attorney James Stranch, III, of her former law firm, has now been substituted (Doc. No. 50). An Exhibit, titled "Breakdown of Firm Time and Expenses," was included with Stranch's Declaration. (Doc. No. 39–1.) Further, Plaintiff submitted an Affidavit of Gareth S. Aden[2] and a Declaration of George Barrett[3], both of which documents contain statements of Nashville-area attorneys in support of the fee award requested.

Defendant has challenged the reasonableness of the fees requested based on the degree of Plaintiff's success, their allegedly excessive nature, and the lack of detail in Plaintiff's filings in support of the fees. (*See* Doc. No. 44 at 4–16; Doc. No. 48 at 2.) Overall, Defendant seeks a reduction in the total amount of fees sought "by at least 75%." (Doc. No. 44 at 11; Doc. No. 48 at 3.) Defendant has not contested the $365.00 in expenses that Plaintiff has requested.

i. Reasonableness of the Lodestar Figure

***9** In an action, such as this one, where Congress has authorized a fee award to a successful party, courts apply a lodestar approach in which "the number of hours reasonably expended on the litigation [is] multiplied by a reasonable hourly rate," *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir.1995) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Although the resulting fee "must be reasonable" and may be adjusted, "[t]here is a 'strong presumption' that this lodestar figure represents a reasonable fee." *Id.* (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)). "The party seeking attorneys fees bears the burden of documenting his entitlement to the award," including hours worked and rates claimed. *Reed v. Rhodes*, 179 F.3d 453, 472 (6th Cir.1999) (citing *Webb v. Dyer Cnty. Bd. of Educ.*, 471 U.S. 234, 242, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985)). Adjustments to the amount claimed can be made with consideration of factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), which were adopted by the Supreme Court in *Hensley*, 461 U.S. at 432, and include:

> (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional

> relationship with the client; and (12) awards in similar cases.

Reed, 179 F.3d at 472 n. 3.

In its Response, Defendant generally claimed that the fees requested were excessive, but did not specifically challenge the rates of pay charged by Plaintiffs attorneys, which were supported by the averments contained in counsel's Declaration, as well as the Aden Affidavit and Barrett Declaration [4]. Those rates were $350.00 per hour for attorney Stranch and $200.00 per hour for Denard Mickens, an associate with her firm, and the rates reflected what the attorneys charged to clients in cases of this sort in 2008 (although the parties continued to litigate in this court through 2010). (Stranch Decl. ¶ 4.) Because these rates are supported by counsel's own claims and competently verified by two members of the Nashville legal community who find them to be reasonable in light of the case's nature and the experience of Plaintiffs' attorneys (Aden Aff. ¶¶ 9–10; Barrett Decl. ¶¶ 5–6, 11–12), the Court considers them to be reasonable.

What Defendant does challenge is the number of hours Plaintiffs attorneys have submitted, claiming that these are unreasonable and excessive, and that improper "block billing" has occurred. (Doc. No. 44 at 4–6.) Defendant did not cite any authority for the proposition that "block billing"—the use of general time entries for multiple tasks—is improper. Indeed, the Sixth Circuit has scarcely commented on this practice, and where it has, the court has expressed some indifference. *See Pittsburgh & Conneaut Dock Co. v. Dir., Office of Workers' Compensation Programs*, 473 F.3d 253, 273 (6th Cir.2007). However, the Sixth Circuit has recognized that the documentation in support of an award of attorney fees must be "of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation." *Imwalle v. Reliance Med. Prods., Inc.* 515 F.3d 531, 553 (6th Cir.2008) (quoting *United Slate, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 502 n. 2 (6th Cir.1984)). If the documentation is inadequate, a court may reduce the award accordingly. *Id.* at 553 (citing *Hensley*, 461 U.S. at 433). However, the Sixth Circuit has stated that entries may be sufficient "even if the description for each entry is [not] explicitly detailed." *United States ex rel. Lefan v. Gen. Elec. Co.*, 397 F. App'x 144, 149 (6th Cir.2010) (quoting *McCombs v. Meijer, Inc.*, 395 F.3d 346, 360 (6th Cir.2005). Although each entry does not have to be detailed, "the general subject matter should be identified." *Hensley*, 461 U.S. at 437.

***10** As stated above, Plaintiff requests $69,385.00 in fees for 272.45 hours of work by two attorneys. Plaintiff divides the number of hours spent by each of his two attorneys into five entries: "Investigation, factual research and Complaint"; "Post Complaint investigation and work regarding Answer and Administrative Record"; "Benefit calculations and settlement efforts"; "Legal research and motion practice"; and "Court appearance and case management." (Doc. No. 39–1.) Defendant asserts these entries are too broad and make it impossible to determine how Plaintiff's counsel's time was spent. (Doc. No. 44 at 4–5.) Defendant also states that the number of hours Plaintiff's counsel is claiming is almost 100 hours more than MetLife's own counsel spent on this matter. (*Id.* at 5.)

These entries are not sufficient for the Court to determine with a high degree of certainty the reasonableness and accuracy of the hours billed, though a review of Plaintiff's Memorandum supporting his Motion and the Stranch Declaration fills in some of the holes left by entries such as "Benefit calculations and settlement efforts" (*compare* Doc. No. 39–1 *with* Doc. No. 38 at 11). The entries are examples of both block billing and vagueness that hinder Plaintiff's opponent and this Court from performing a review of the fee request. Although there is nothing suspicious or concerning about the total number of hours Plaintiffs' attorneys spent on this case—particularly in light of its legal and factual complexity, as well as the support for amounts billed in the Aden Affidavit and the Barrett Declaration—the descriptions provided are vague and fairly generic. The Court has no basis for assessing certain factors, such as whether any of the work the two attorneys performed was redundant (as the entries for each attorney are the same but for the hours spent by each).

At the same time, the Court has not been given a good reason to doubt these figures. The fact that Defendant's own attorneys spent less time on this case is not particularly compelling, as this could be due to any number of factors (for example, that MetLife and its attorneys have likely defended cases much like this one repeatedly), and, of course, they were also unsuccessful in this litigation. The fact that Defendant's counsel cannot account for the 15.1 Plaintiff's attorneys spent on "Court appearance and case management" in a case that involved one case management conference does not mean that these hours were not spent in reasonable pursuits to this effect.

Thus, while the Court will not reduce the fees requested by seventy-five percent as Defendant desires, a reduction is necessary to account for the fact that the undersigned is not able to ensure with a high degree of certainty that the hours allegedly expended were in fact expended in a reasonable, non-duplicative fashion. "The common practice in this circuit, and in others, when the court is confronted with a request for the award of attorney's fees in the face of inadequate billing records, is 'across-the-board fee reductions.' " *Helfman v. GE Group Life Assurance Co.*, Case Number 06–13528, 2011 U.S. Dist. LEXIS 41608, at *20, 2011 WL 1464678 (E.D. Mich. April 18, 2011) (quoting *Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F.Supp. 1017, 1021 n. 5 (N.D.Ohio 1997)). In *Helfman* itself, the district court granted a reduction of twenty percent across the board "in light of [the plaintiff's] burden of production and in light of the 'block billing' and vague entries included in the billing records." *Id.* at 21. The Court was troubled by entries similar to those in this case, such as "Internet and westlaw research" and "Telephone conference with client." *Id.* at 20. In another recent case, a district court in this Circuit reduced a fee amount by ten percent overall in light of concerns about redundancies in work performed by multiple attorneys and "brief descriptions of the work performed for each time entry." *E.E.O.C. v. Cintas Corp.*, Case Nos. 04–40132;06–12311, 2011 U.S. Dist. LEXIS 86228, at *22–*23, 2011 WL 3359622 (E.D.Mich. Aug. 4, 2011). The court in *Cintas* relied on *Gratz v. Bollinger*, 353 F.Supp.2d 929 (E.D.Mich.2005), where the court had determined that a ten percent across-the-board reduction was appropriate due to vagueness, reflected in entries like "office conference" on several occasions, and instances of block billing that lumped three or four tasks into one time entry, *id.* at *24–*25. Although there are numerous other cases within the Circuit addressing this issue, the court also finds helpful Judge Trauger's recent opinion in this District reducing a fee amount by twenty-five percent overall "[t]o account for any excessiveness, duplication, redundancy, and block billing." *Chad Youth Enhancement Ctr., Inc. v. Colony Nat'l Ins. Co.*, Case No. 3:09–9545, 2010 U.S. Dist. LEXIS 108769, at *7–*9, 2010 WL 4007300 (M.D.Tenn. Oct. 12, 2010). It should be noted, though, that the attorneys' records in the latter case contained evidence of duplication and excessiveness, while here there is simply not enough information to dispel concerns that such problems might have occurred.

***11** Having reviewed the records in this case, as well as relevant decisions within this circuit, this Court finds that an across-the-board reduction of twenty percent is appropriate.

ii. Reduction of Fees Due to Plaintiff's "Limited Success"

Defendant asserts that Plaintiff should not be awarded *any* of the fees that he seeks because he was unsuccessful in receiving a judgment in his favor from this Court, and instead only a remand. (Doc. No. 44 at 9–11.) Further, he argues that if any fees are granted, that they should at least be reduced due to the Court's adoption of the Magistrate Judge's recommendation that materials Plaintiff filed to supplement the administrative record should be stricken. (*Id.* at 6, 11.) Because Plaintiff's effort to expand the administrative record was unsuccessful, Defendant argues that to award fees for this work would be an abuse of discretion. (*Id.* at 11.)

The Sixth Circuit has held that ' "[t]he most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.' " *Isabel v. City of Memphis*, 404 F.3d 404, 416 (6th Cir.2005) (citing *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)). Further, "[w]here a plaintiff has obtained excellent results, his attorney should recover a full compensatory fee; if a plaintiff obtains limited success, the district court should award only that amount of fees that is reasonable in relation to the success obtained." *Isabel*, 404 F.3d at 416. However, the Sixth Circuit has said that "a court should not reduce attorney fees based on a simple ratio of successful claims to claims raised." *Cummings Inc. v. BP Prods. N. Am.*, Case Nos. 3:06–0890 & 3:0700834, 2010 U.S. Dist. LEXIS 19037, at *28, 2010 WL 796825 (M.D.Tenn. Mar. 3, 2010) (quoting *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir.1996)). Furthermore, "a reduction in attorney fees is to be applied only in rare and exceptional cases where specific evidence in the record requires it." *Isabel*, 404 F.3d at 416 (citing *Adcock–Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349–50 (6th Cir.2000)).

First, the Court addresses Defendant's argument that because Plaintiff achieved a remand, rather than a reversal, before this Court, he should receive no fees at all. Although this Court did not grant Plaintiff's request for reinstatement of LTD benefits, it did find that MetLife's decision to terminate Plaintiff's LTD benefits was arbitrary and capricious, and cited several flaws and questionable practices that rendered MetLife's review inadequate. The claim was remanded back to MetLife for reconsideration, and reinstatement of benefits retroactive to the date of termination resulted. Although the decision to reinstate LTD benefits did not come directly from this Court, it was a result of the Court's decision to remand the claim back to MetLife.

If the Court had awarded benefits to Plaintiff based on the administrative record, this clearly could not be called "limited success." However, the Magistrate Judge declined to recommend a judgment for Plaintiff based on the administrative record because there were still factual issues to be resolved. (Doc. No. 29 at 16.) There were factual issues left unresolved, at least in part, because MetLife failed to adequately consider and analyze Plaintiff's medical record during its initial review. It would seem absurd to classify the a decision to remand the case back to Defendant for further review as "limited success" in this situation: this would allow Defendant to benefit from a reduction in attorney fees when it was Defendant's failure to consider and adequately analyze the Plaintiff's medical record that made judgment in Plaintiff's favor impossible. It cannot be that an inadequate review that produces an insufficient basis for a benefits decision by the insurer or the court can result in a fee reduction due to the plaintiff's limited success in court. Nor would "limited success" properly characterize what ultimately came of this case: proceedings in accordance with the remand ordered by this Court resulted in a full victory for Plaintiff.

***12** Defendant's argument regarding a reduction due to Plaintiff's billing for hours spent seeking to expand the administrative record has more merit. Defendant argues that all the time Plaintiff spent trying to expand the administrative record—"including but not limited to, time spent drafting and gathering information relative to the affidavits that were struck by this court"—should be eliminated from the fee request. (Doc. No. 44 at 6.) Indeed, in the Report recommending remand adopted by this Court, Magistrate Judge Brown also recommended striking three affidavits Plaintiff submitted regarding evidence outside the administrative record. (Doc. No. 29 at 15–16.) The Magistrate Judge found the inclusion of these affidavits in the record was not permissible, and also that they were not timely filed. (*Id.*) In Plaintiff's Reply, he argues not that these filings played some important role in the case before this Court, but that they were an important part of the record considered on remand, and that investigation leading up to the affidavits in question was necessary to the investigation of the case. (Doc. No. 45–1 at 6 n.2.) In response, quotes a Sixth Circuit case, *Anderson v. Procter & Gamble Co.*, 220 F.3d 449 (6th Cir.2000), which states that "Section 502 of ERISA does not permit parties to recover attorneys' fees for legal work performed during the administrative phase of a benefits proceeding," *id.* at 456. (Doc. No. 46 at 5.) Defendant also asserts that the Sixth Circuit has held that it would be "an abuse of discretion for the district court to award attorneys' fees to a losing party." (*Id* (quoting *Cattin v. Gen. Motors Corp.*, 955 F.2d 416, 427 (6th Cir.1992)).)

Defendant takes *Anderson* out of context (the court had stated only a paragraph earlier that it was addressing the administrative *exhaustion* phase of a benefits proceeding), and the section of *Cattin* cited reflects not the body of the opinion but instead a parenthetical quotation of a Seventh Circuit case, *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir.1987). Were the principles Defendant cites not common sense in this context, the Court would be troubled by these misleading references to authority—Defendant places no qualifiers on its citations, and the Court would be unaware that there should be had it not investigated further. Still, the Court must agree that Plaintiff's efforts were not timely or appropriate, as the affidavits submitted could not be used to supplement the administrative record in this forum, and their only use (by Plaintiff's admission) has been in subsequent proceedings. As such, they cannot be part of a reasonable fee award in this case.

The block billing of "Post Complaint investigation and work regarding Answer and Administrative Record" makes it difficult for the Court to ascertain precisely what work the accompanying hours (8 for attorney Stranch and 7.4 for attorney Mickens) reflect. However, the Court will not allow Plaintiff to benefit from his own error in submitting vague billing records. It seems reasonably certain that this entry is where any efforts to investigate and expand the administrative record occurred—a separate, more significant entry includes investigation that did not occur after the Complaint (presumably before), and no other entry references the administrative record. These hours (8 at $350.00 per hour and 7.4 at $200.00 per hour) will be reduced from the lodestar before the Court performs the overall reduction of twenty percent.

iii. Final Fee and Expense Calculation

***13** First, the Court reduces the requested award by the number of hours Plaintiff improperly billed to supplement the administrative record. Thus, attorney Stranch's total hours billed will be reduced by 8, from 99.3 to 91.3, and attorney Mickens' total hours billed will be reduced by 7.4, from 173.15 to 165.75. When these new amounts are multiplied by the reasonable rates established above, they come to $31,955.00 and $33,150.00, for a total of $65,105.00. With a twenty percent overall reduction of the fee amount, the fee award comes to $52,084.00. Once the uncontested expenses,

which total to $365.00, are added, the final amount of fees and expenses is $52,449.00.

IV. CONCLUSION

As set forth above, the Court **GRANTS** Plaintiff's Motion and **AWARDS** him attorney fees and expenses in the amount of $52,449.00.

It is so ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 4005409

Footnotes

1 Docketed at No. 39.

2 Docketed at No. 40.

3 Docketed at No. 41.

4 In a filing contesting Plaintiff's request for leave to file a Reply, Defendant improperly set forth additional arguments that were not contained in its Response to the attorney fees motion and completely unrelated to Plaintiff's desire to file the Reply (including argument attacking the substance of Plaintiff's then-proposed Reply). (Doc. No. 46.) The Court strongly disapproves of this attempt to supplement the Response past the filing deadline and to submit argument that might properly belong in a Sur–Reply, all without the Court's leave and in disguise as opposition to Plaintiff's request for leave to Reply. The Court notes, nonetheless, that in this filing Defendant asserted that the Barrett Declaration was insufficient to support the rates and hours of Plaintiff's attorneys. (Doc. No. 46 at 4–5.) Particularly, Defendant claimed that the Barrett Declaration was insufficient because it did not indicate that Mr. Barrett had reviewed Plaintiff's counsel's invoices or the specific time entries she submitted. (*Id.*) The Court sees an adequate foundation for Mr. Barrett's assessment of the rates sought, and notes that Mr. Barrett did opine on the total number of hours requested by each attorney in light of the nature and complexity of this specific case, as well as pleadings and other documents filed in the case. (Barrett Decl. ¶¶ 6, 9–10.) Although the Barrett Declaration is perhaps not as complete as it could be, the Court does not find it baseless as Defendant suggests, if Defendant's concerns are to be considered at all in light of the circumstances of this challenge. Further, Defendant has not in any way contested the adequacy of the Aden Affidavit, which serves the same purpose as (and is consistent with) the Barrett Declaration.

2011 WL 3321291
Only the Westlaw citation is currently available.
United States District Court,
M.D. Tennessee,
Nashville Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
Carlota Freeman, Intervenor Plaintiff,
v.
WHIRLPOOL CORPORATION, Defendant.

No. 3:06–cv–0593.
|
Aug. 2, 2011.

Attorneys and Law Firms

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Helen Sfikas Rogers, Siew–Ling Shea, Rogers & Associates, Nashville, TN, Andy L. Allman, Kelly, Kelly & Allman, Hendersonville, TN, for Intervenor Plaintiff.

Adam Carl Wit, Asilia S. Backus, David Christlieb, Keith C. Hult, Littler, Mendelson, P.C., Chicago, IL, Timothy K. Garrett, Bass, Berry & Sims, Nashville, TN, for Defendant.

ORDER

JOHN T. NIXON, Senior District Judge.

***1** Pending before the Court are Intervenor Plaintiff Carlota Freeman's ("Plaintiff") First Motion for Attorney Fees and Costs ("First Fee Motion") (Doc. No. 209), which was filed along with a Memorandum in Support (Doc. No. 210), and Second Motion for Attorney Fees and Costs ("Second Fee Motion") (Doc. No. 229) (collectively, "Plaintiff's Fee Motions"). Also pending before the Court is Plaintiff's Motion for Review of the Final Taxation of Costs ("Motion for Review"). (Doc. No. 223.) Defendant Whirlpool Corporation ("Defendant") has filed a Response in Opposition to Plaintiff's Fee Motions (Doc. No. 231), as well as a Response in Opposition to Plaintiff's Motion for Review (Doc. No. 224). For the reasons discussed herein, Plaintiff's Fee Motions and Plaintiff's Motion for Review are **GRANTED,** with the modifications discussed herein. Defendant is **ORDERED** to pay attorney's fees and costs consistent with this Order.

I. BACKGROUND

A. Factual Background

The Court adopts the Findings of Fact section of the Memorandum Order entering judgment in favor of Plaintiff (Doc. No. 194 at 2–6), unless otherwise noted.

B. Procedural Background

The Equal Employment Opportunity Commission (EEOC) initiated this suit against Defendant on June 6, 2006. (Doc. No. 1.) Plaintiff intervened in the action on July 24, 2006, and alleged causes of action for impermissible racial and sexual discrimination in violation of Title VII and 42 U.S.C. § 1981. (Doc. No. 9.) A bench trial was held from February 24 to 27, 2009, and this Court ruled in Plaintiff's favor on all claims. (Doc. No. 194.) The Court awarded total damages in the amount of $1,073,261.00 ($773,261.00 in front pay and back pay and $300,000.00 in compensatory damages). (*Id.*) Defendant filed a Motion to Alter or Amend the Judgment on January 15, 2010. (Doc. No. 196.)

Plaintiff's First Fee Motion (Doc. No. 209) and supporting Memorandum (Doc. No. 210) were filed on February 20, 2010. Defendant filed a Response in Opposition (Doc. No. 213) and a Memorandum in Support (Doc. No. 214) on March 1, 2010. The Clerk of Court entered a Taxation of Costs against Defendant in the amount of $4,570.95 on March 5, 2010. (Doc. No. 217.) The parties jointly filed a Motion to Stay Plaintiff's First Fee Motion (Doc. No. 220) on March 9, 2010, pending the outcome of Defendant's Motion to Alter or Amend the Judgment, which this Court granted (Doc. No. 222). While Defendant's Motion to Alter or Amend was pending, Plaintiff filed her Motion for Review on March 22, 2010. (Doc. No. 223.) This Court then denied Defendant's Motion to Alter or Amend the Judgment on March 31, 2011. (Doc. No. 226.) Plaintiff subsequently filed her Second Fee Motion on April 14, 2011. (Doc. No. 229.)

II. LEGAL STANDARD

District courts have discretion pursuant to 42 U.S.C. § 1988 to award reasonable attorney's fees to a prevailing party in

a civil rights suit. *Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304, 310 (6th Cir.1988). Although discretionary, a district court should award fees to a plaintiff if that plaintiff prevails. *Gregory v. Shelby Cnty., Tenn.*, 220 F.3d 433, 447 (6th Cir.2000) (*citing Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402–03, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)). The first step in calculating reasonable attorney fees "is the determination of the fee applicant's 'lodestar,' which is the proven number of hours reasonably expended on the case by an attorney, multiplied by a reasonable hourly rate." *Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir.2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The court should consider twelve factors when determining the reasonableness of the hours and rate:

> ***2** (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Hensley, 461 U.S. at 430 n. 3.

Generally, there is a "strong presumption" that a prevailing party is entitled to the lodestar amount. *Adcock–Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir.2000) (citing *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992)). However, a court may adjust the lodestar "to reflect relevant considerations" of the particular case, including the abovementioned twelve factors. *Adcock–Ladd*, 227 F.3d at 349. " 'Many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.' " *Geier v. Sundquist*, 372 F.3d 784, 792 (6th Cir.2004) (quoting *Hensley*, 461 U.S. at 434 n. 9). In most cases, "the most crucial factor is the degree of success obtained." *Hensley*, 461 U.S. at 436. Although district courts have discretion in determining the proper award, they must "consider the relationship between the extent of success and the amount of the fee award." *Id.* at 438. Ultimately, district courts should "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435.

III. ANALYSIS

Plaintiff seeks attorney's fees and costs pursuant to Federal Rule of Civil Procedure 54, 42 U.S.C. § 1981, and 42 U.S.C. § 2000e, for work completed over the course of almost five years of litigation. Throughout this action, Plaintiff has been represented by two attorneys: Helen Rogers of Nashville, Tennessee, and Andy L. Allman, of Hendersonville, Tennessee. (Doc. Nos.209, 229.) Plaintiff requests $187,342.90 for Ms. Rogers' services and $56,105.00 for Mr. Allman's services, for a total of $243,447.90. (Doc. Nos. 210–1, 210–2, 229–1, 229–2.) Additionally, Plaintiff requests $37,5141.97 in costs and expenses related to the litigation. (*Id.*) Thus, the full amount that Plaintiff seeks from Defendant is $280,959.87. Defendant raises several challenges to Plaintiff's request, which are addressed below.

A. Identification of Timekeepers and Reasonableness of Fees

Plaintiff seeks a total of $77,849.90 for seven employees performing work for Ms. Rogers over the course of litigation. Defendant urges the Court to refuse Plaintiff's request for these employees' fees because Ms. Rogers "does not identify seven timekeepers or provide supporting documentation to justify the reasonableness of their fees." (Doc. No. 231 at 2.) Specifically, Defendant alleges that Plaintiff "has not met her burden of establishing that the rate or amount of time billed is reasonable with regard to the following timekeepers: Lawrence Kamm ($1,935.50), Katie Marcottee ($45.00), Robin Barry ($970.00), Alan Gentry ($13,155.65), Nancy Hardt ($61,072.75), Audrey Anderson ($150.00), and Charla Chumney ($521.00)." (*Id.* at 3.) Defendant argues that Plaintiff's failure to identify the positions and qualifications of each employee—whether they are lawyers, paralegals, or administrative staff—precludes recovery for these fees. (*Id.* at 4.)

***3** "The party seeking attorneys fees bears the burden of documenting [her] entitlement to the award." *Reed v. Rhodes*, 179 F.3d 453, 472 (6th Cir.1999) (citing *Webb v. Dyer Cnty. Bd. of Educ.*, 471 U.S. 234, 242, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985)). In order to enable the Court to make a

determination regarding the reasonableness of the hours and rates requested, "[t]he fee applicant 'should submit evidence supporting the hours worked and rates claimed.' " *Reed*, 179 F.3d at 472 (citing *Hensley*, 461 U.S. at 433). Where the documentation is inadequate, the court may reduce the award accordingly. *Hensley*, 461 U.S. at 433.

Defendant is correct in asserting that Plaintiff's documentation in support of the hourly rate charged to each of the seven employees listed above is insufficient. This Court is unable to determine with a high degree of certainty that some of the listed employees are entitled to the rate at which Plaintiff requests compensation. However, Ms. Rogers' affidavit in support of the fees provides some indication of the qualifications and positions of her employees, from which the Court can deduce that these employees are paralegals. After discussing the traditional hourly rates for attorneys in her practice, Ms. Rogers stated that she "charge[s] between Seventy–Five Dollars ($75) and One Hundred Dollars ($100) per hour for [her] paralegals' time." (Doc. No. 210–2 at 2.) Ms. Rogers further stated that her "paralegals are experienced in this field and assisted greatly in this case ... [and] have undergraduate degrees and paralegal certificates." (*Id.*) Plaintiff's First Fee Motion only identifies two attorneys from Ms. Rogers' office who worked on this case: Ms. Rogers and Siew–Ling Shea. (*Id.*) From this information, the Court finds that the remaining employees are paralegals, since they were not identified specifically as attorneys and were billed at rates consistent with the firm's standard paralegal range.

Fees for paralegal services are recoverable; the Supreme Court has found that the term "attorney fees" as used in 42 U.S.C. § 1988 embraces the fees of paralegals as well as attorneys. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 580, 128 S.Ct. 2007, 170 L.Ed.2d 960 (2008). In determining the reasonableness of paralegal fees, "the court should scrutinize the reported hours and suggested rates in the same manner it scrutinizes lawyer time and rates." *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir.1983). Although Plaintiff provides significant documentation on the hourly activities of each employee, counsel for Plaintiff failed to provide evidence to justify her request for these employees' hourly rates, nor does counsel provide evidence that these requested rates are the prevailing market rate for paralegal work. A judge in this District, when faced with the same lack of documentation or support for paralegal fees of upwards of $100.00 per hour, found that $75.00 per hour for paralegal time was the appropriate rate. *Baltimore v. City of Franklin*, No. 06–0578, 2008 WL 2437637, at *6 (M.D.Tenn. June 16, 2008). Accordingly, in light of *Baltimore* and the lack of documentation provided by Ms. Rogers justifying higher hourly rates, the Court will award those employees that it has determined to be paralegals a rate of $75.00 per hour for the hours reasonably expended on this litigation.

***4** Based on Ms. Rogers' affidavit and the requested rates, the Court assumes that the following employees are paralegals: Lawrence Kamm, Audrey Anderson, Robin Barry, Alan Gentry, Nancy Hardt, and Carla Chumney. Accordingly, the Court will award Plaintiff fees for these employees at the rate of $75.00 per hour for the hours that they reasonably expended on this litigation.

The Court cannot assume, however, that Ms. Marcottee is a paralegal. Plaintiff requests a total of $45.00 for her work at a rate of $45.00 per hour. This requested rate falls well below the standard range for paralegals at Helen Rogers & Associates. (Doc. No. 210–2 at 2.) The Court therefore assumes that Ms. Marcottee is neither a paralegal nor an attorney. Owing to the lack of sufficient detail regarding her position or qualifications, the Court finds the documentation inadequate to support an award of fees for Ms. Marcottee's work. Accordingly, the Court will reduce Plaintiff's request for fees as it pertains to work performed by Ms. Marcottee in the amount of $45.00.

B. Reasonableness of Attorney Helen Rogers' Hourly Rates

Plaintiff seeks an hourly rate for Ms. Rogers ranging from $150.00 to $350.00 per hour for 286.35 hours over the course of litigation, for a total of $92,165.00. Defendant urges the Court to reduce Plaintiff's requested fees for Ms. Rogers because "the hourly rates for work performed by [Plaintiff's] attorneys are unreasonable." (Doc. No. 231 at 2.) Specifically, Defendant argues that "Ms. Rogers' rate should be reduced to account for the drastic increase of her billing rate over the course of this litigation," because "[t]here is no explanation provided as to how the [hourly] rates were calculated or what system was used to determine the amount or timing of rate increases." (*Id.* at 5.) Defendant proposes that the Court award Ms. Rogers an hourly rate of $225.00 for all hours billed above that rate, for a total reduction of $29,323.75. (*Id.* at 5.)

Ms. Rogers' affidavit reveals that Ms. Rogers has practiced law since 1980 and is a senior member of her firm. (Doc. No. 210–2 at 1.) Additionally, she is certified as a Civil Trial Specialist by the Tennessee Commission of Continuing

Legal Education & Specialization and the National Board of Trial Advocacy, and she is a Rule 31 Mediator. (*Id.*) However, Plaintiff provides no supportive documentation justifying or explaining the multiple increases in Ms. Rogers' hourly billing rate from $150.00 to $350.00 during the course of this litigation. Ms. Rogers' affidavit only enumerates her professional qualifications and states that her "usual and customary rates for professional services since 2004 when [she] began representing [Plaintiff] ... has ranged from One Hundred Fifty Dollars ($150) per hour to Three Hundred Fifty Dollars ($350) per hour." (Doc. No. 210–2 at 2–3.) Plaintiff states in conclusory fashion that the "hourly rates billed for the attorneys involved in this case are in keeping with the market rates prevailing in the community for similar services by lawyers of reasonable skill, experience, and reputation" (Doc. No. 210 at 6), but provides no documentary support other than the affidavit of Plaintiff's counsel to substantiate such a claim.

***5** In 2008, a judge in this District awarded a rate of $250.00 to $275.00 per hour to three attorneys who provided documentary support indicating that their rates "were consistent with fee awards to other Nashville-based attorneys in other civil rights cases before courts in this district." *Ibarra v. Barrett*, No. 05–0971, 2008 WL 2414800, at *2 (M.D.Tenn. June 12, 2008). On another occasion, after ordering a decrease from a requested hourly rate of $350.00 per hour, a judge in this District granted an hourly rate of $275.00 per hour for an attorney who had been in private practice for fifteen years and focused his practice on civil rights. *Randolph v. Schubert*, No. 06–0050, 2007 WL 2220407, at *2–3 (M.D.Tenn. July 27, 2007). In both cases, the rates requested by the attorneys were supported by affidavits from outside counsel. Plaintiff has provided no such documentary support here, nor justification as to why or how she earned a more than a 100 percent increase in her hourly billing rate during the course of this litigation.

The Court is persuaded that Ms. Rogers' proposed hourly rates of $300.00 and $350.00 are excessive based on awards in recent cases involving lawyers with similar experience, and the lack of sufficient evidence provided to justify her rate as comporting with prevailing market values. However, based on Ms. Rogers' substantial experience and the rates awarded to similarly experienced attorneys in this District, the Court finds that Defendant's proposed reduction in Ms. Rogers' rate is too drastic. Further, this Court has acknowledged that in some instances it is appropriate to stagger an attorney's hourly rate over the course of litigation. *Harris v. Metro. Gov't of Nashville*, No. 04–0762, 2009 WL 2423306, at *4 (M.D.Tenn. Aug.6, 2009). Accordingly, in light of the prevailing market rates that judges within this District have acknowledged, the Court finds that a reduction to $275.00 per hour is warranted for Ms. Rogers' hours billed at or above $300.00. The Court will not otherwise reduce Ms. Rogers' rates for hours that were reasonably expended on this litigation.

C. Reasonable Relation of Time Spent to Litigation

Defendant further urges the Court to reduce Plaintiff's requested fees because "the time spent [by Plaintiff's attorneys] was not reasonably related to the litigation." (Doc. No. 231 at 2.) Specifically, Defendant alleges that Plaintiff's counsel seeks to recover "at least $6,595.50 in fees for time spent on work for other cases or unrelated matters," such as "time spent related to [Plaintiff's] claim for social security disability benefits, for workers' compensation benefits, and other matters unrelated to this case." (*Id.* at 6.) Defendant objects to a total of sixty-two individual entries for time spent by Ms. Rogers and her employees. (Doc. No. 231–1.)

The Supreme Court has held that a district court should exclude from the lodestar calculation hours that were not "reasonably expended" on pursuing the immediate litigation. *Hensley*, 461 U.S. at 434. As such, "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obliged to exclude such hours from his fee submission." *Id.* Where "[n]o information has been provided regarding the relevance or relationship of the other matters ... for which professional time was expended to the present case," fees requested for time spent on those matters will be rejected. *Tobin v. Gordon*, 614 F.Supp.2d 514, 526–27 (D.Del.2009). The Court therefore declines to award to Plaintiff any fees billed by her attorneys for time entries that are unrelated to her successful civil rights claims.

***6** Defendant claims that Ms. Rogers personally billed a total of $4,007.50 for time entries unrelated to this litigation. (Doc. No. 231–1.) The Court finds that the majority of the entries Defendant claims were unrelated were, in fact, reasonable expenditures of Ms. Rogers' time as they related directly to the litigation. For example, Defendant challenges multiple entries where Ms. Rogers' time entries dealt with Martin Holmes. A review of the case docket reveals that Mr. Holmes was a co-counsel for Plaintiff (Doc. No. 83) until January 27, 2009, at which point this Court permitted him

to withdraw his representation owing to a conflict of interest (Doc. No. 91), and Ms. Rogers stopped billing time entries relating to him.

Nevertheless, the Court does find that several of Ms. Rogers' time entries were not reasonably expended on this litigation. On several occasions, Ms. Rogers submitted time entries for work related to Plaintiff's Social Security Administration request, workers' compensation claims, and disability claims. [1] There is nothing in the record connecting these claims to the instant litigation. As such, the Court finds that these specific entries were not reasonably expended on this litigation. Accordingly, the Court will reduce Plaintiff's award by 3.40 hours for time spent by Ms. Rogers on matters not related to the litigation.

Similarly, the Court finds that Defendant is correct in challenging a time entry for Robin Barry on September 28, 2005, wherein Ms. Rogers billed 1.9 hours for Barry to "[d]raft response to Whirlpool position statement: letter to D. High enclosing proposed response and EEOC ltr" (Doc. No. 210–2 at 26). Defendant alleges that High was Plaintiff's workers' compensation attorney (Doc. No. 231 at 6), and the Court finds no record of High's direct involvement in this litigation. The Court therefore must assume that he is unrelated to this litigation. Because this billing entry consisted of two activities and one was unrelated to this litigation, the Court finds that a fifty percent reduction is warranted for this time entry. As such, the Court will reduce Plaintiff's award by 0.95 hours for the time spent by Robin Barry on this particular task.

Finally, the Court finds that Defendant is also correct in challenging a portion of the time entries for work performed by Nancy Hardt, which Defendant alleges is unrelated to the litigation. Ms. Hardt billed multiple entries relating to Plaintiff's workers' compensation claims, Social Security claims, and disability claims. [2] There is nothing in the record connecting these claims to the instant litigation. As such, the Court finds that these specific entries were not reasonably expended on this litigation. Where the documentation includes multiple activities per time entry and the Court can determine that the entry partially related to the litigation, the Court will only partially reduce the fees requested to account for unrelated activities. Accordingly, the Court will reduce Plaintiff's award by 10.60 hours for time spent by Ms. Hardt on matters not related to the litigation.

D. Unreasonableness or Duplication of Fees for Clerical Tasks

***7** Defendant further urges the Court to reduce Plaintiff's requested fees because Plaintiff's "fees sought include fees for clerical tasks not recoverable as attorneys fees or was otherwise excessive or duplicative." (Doc. No. 231 at 2.) Specifically, Defendant alleges that Plaintiff seeks compensation for clerical work and for fees resulting from "overstaffing or duplicative efforts, excessive overbilling, and unnecessary time spent on simplistic tasks." (*Id.* at 7, 9.)

1. *Time Spent on Clerical Work*

Defendant seeks to reduce the fees sought by two of Ms. Rogers' employees, Nancy Hardt and Alan Gentry, by seventy-five percent, arguing that approximately seventy percent of their entries "are for purely clerical tasks and the remaining entries include a reference to a clerical task with an unknown amount of time expended on said task." (*Id.* at 8.) Defendant argues that clerical activities, such as indexing documents, reviewing and organizing correspondence and pleadings, managing calendars, printing documents, making copies and preparing poster exhibits, should not be compensated as legal work. (*Id.*)

A district court within the Sixth Circuit has found that "[t]ime spent by a lawyer on purely clerical matters not calling for the exercise of legal expertise or judgment, and which could be equally well performed by clerical staff, should not be recoverable under § 1988." *Tierney v. City of Toledo*, No.83–430, 1989 WL 161543, at *12 (N.D.Ohio Aug.28, 1989). Other district courts within this Circuit have arrived at a similar conclusion, albeit for clerical fees relating to non-civil rights claims. *See Richards v. Johnson & Johnson*, No. 08–279, 2010 WL 3219138, at *7 (E.D.Tenn. May 12, 2010) (finding that clerical tasks "are part of the overhead cost necessary to operate any law firm, and should not be compensated by a fee award"); *Ferrero v. Henderson*, No.00–00462, 2005 WL 1802134, at *3 (S.D.Ohio July 28, 2005). Additionally, the Sixth Circuit declined to find abuse of discretion where a district court reduced a fee award by striking clerical tasks, finding that "[w]hile reviewing correspondence can constitute legal work, receiving and filing correspondence presumably constitutes clerical work." *B & G Mining, Inc. v. Dir., Office of Workers' Comp. Programs*, 522 F.3d 657, 666 (6th Cir.2008).

In light of the foregoing, the Court will decline to award fees to Plaintiff for hours billed by her attorneys that amount

to clerical tasks and constitute the overhead cost normally expected in legal practice. The Court finds no evidence for Defendant's allegation that Ms. Hardt or Mr. Gentry billed in excess of seventy percent of their time to clerical tasks. However, after reviewing their time entries, the Court finds that each billed approximately seven percent of their total billed hours to items that are classifiable as clerical. In particular, both employees repeatedly billed time for entries such as copying files, organizing documents, and mailing correspondence. As such, the Court will reduce the final hours calculated for both Mr. Gentry and Ms. Hardt by seven percent.

2. *Duplicative, Excessive, or Unnecessary Billing*

***8** Defendant further seeks to reduce the fees sought by Ms. Rogers and her employees by five percent for duplicative efforts, overstaffing and overbilling, and unnecessary time spent on simplistic tasks. Defendant argues that Ms. Rogers' "fee submission is replete with entries for intra-office conferences, emails between counsel and paralegals in the same office, and multiple entries by many individuals to 'review' the file." (*Id.* at 9.) Defendant argues that the "duplicative and excessive time spent on this matter is without explanation and [Defendant] should not be forced to compensate counsel for [Plaintiff] for their own inefficiency." (*Id.*)

The Sixth Circuit has recognized "the propriety of across-the-board reductions based upon excessive or unnecessary hours." *Hisel v. City of Clarksville*, No. 04–0924, 2007 WL 2822031, at *4 (M.D.Tenn. Sept.26, 2007) (citing *Auto Alliance Intern., Inc. v. U.S. Customs Serv.*, 155 F. App'x 226, 228 (6th Cir.2005)). However, the Sixth Circuit has also held that "time spent by counsel discussing the case is properly compensable, and the mere fact that attorneys confer with one another does not automatically constitute duplication of efforts." *Sigley v. Kuhn*, No. 98–3977, 2000 WL 145187, at *8 (6th Cir. Jan.31, 2000) (quoting *Glover v. Johnson*, 138 F.3d 229, 252 (6th Cir.1998)). Only in certain specific instances will the Sixth Circuit rely on "the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services." *Northcross v. Bd. of Ed. of Memphis City Schs.*, 611 F.2d 624, 636–37 (6th Cir.1979).

After reviewing a number of cases in which a percentage reduction was found to be warranted, the Court finds that the extent of the alleged duplicative or excessive billing in this case does not rise to the requisite level. Defendant's conclusory allegations that Plaintiff repeatedly overbilled or engaged in duplicative billing are insufficient to warrant an across-the-board reduction of Plaintiff's remaining requested fees, where the requested reduction is not proportional to the instances that Defendant cites as indicative of the overall trend of duplication or excess. Although another judge in this District has found such reductions warranted in the past, the reductions were imposed for significantly more egregious infractions that were identified at a much higher rate of occurrence. *See Hisel*, 2007 WL 2822031, at *5–6 (reducing the attorney fee award by twenty five percent for excessive billing for simplistic tasks where the issues in the case were "hardly new or novel to Plaintiff's counsel"). As such, Defendant's request to reduce Plaintiff's fee award on these grounds is denied.

E. Block Billing

Defendant further urges the Court to reduce Plaintiff's requested fees by fifteen percent because Plaintiff's "block billing and vague time records prevent meaningful review." (Doc. No. 231 at 2.) Specifically, Defendant alleges that Plaintiff's "billing records contain vague entries and excessive block billing, without any means of apportioning the total time billed to individual tasks, making a detailed segregation of fees virtually impossible." (*Id.* at 12.)

***9** Where a party provides "detailed, itemized billing records that specify, for each entry, the date that the time was billed, the individual who billed the time, the fractional hours billed (in tenths of an hour), and the specific task completed," the Sixth Circuit has held that "explicitly detailed descriptions are not required," even where "some of the time entries in counsel's billing statement provide only the briefest description of the task completed." *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 554 (6th Cir.2008). An across-the-board reduction of fifteen percent is unwarranted where, as here, "[c]ounsel's billing entries, when read in the context of the billing statement as a whole and in conjunction with the timeline of the litigation, support the district court's determination that the hours charged were actually and reasonably expended in the prosecution of the litigation." *Id.* (citing *United Slate, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 502 (6th Cir.1984)). Counsel for Plaintiff satisfied that standard by enumerating in detail each activity for which she seeks recovery, as well as the increments of time spent on each item. To the extent previously discussed, the Court is able to identify distinct claims and determine with a high degree of certainty that the requested hours were actually and reasonably expended in the

prosecution of the litigation. Again, Defendant's conclusory allegations that Plaintiff's documentation is insufficient to allow adequate judicial review will not suffice in securing such a significant reduction in Plaintiff's requested fees. As such, Defendant's request to reduce Plaintiff's fee award on these grounds is denied.

F. Lodestar Amount for Each Timekeeper

After making the foregoing reductions, the Court establishes the following lodestar amounts for each timekeeper for which Plaintiff requests fees. The Court awards Plaintiff 160.3 hours billed by Mr. Allman at a rate of $350.00 per hour[3] for a total of $56,105.00. For the hours billed by Ms. Rogers, the Court awards Plaintiff 2.6 hours at $150.00 per hour, 4.0 hours at $160.00 per hour, 13.9 hours at $175.00 per hour, and 265.95 hours at $275 per hour, for a total of $76,598.75, accounting for the foregoing reductions made to her rate and hours reasonably spent on the litigation. For the hours billed by Siew–Ling Shea, the Court awards Plaintiff 4.8 hours at $100.00 per hour, 92.1 hours at $150.00 per hour, and 11.3 hours at $160.00 per hour,[4] for a total of $16,103.00. For the six employees whom the Court identified as paralegals, the Court awards Plaintiff a total of 816.43 hours at a rate of $75.00 per hour for a total of $61,232.25, accounting for the foregoing reductions made to rates and hours reasonably spent on the litigation.

G. Request for Lodestar Multiplier

Plaintiff seeks an upward adjustment of the lodestar amount to compensate for the expertise of her counsel and the success obtained, as well as the undesirability of the case. (Doc. No. 210 at 10–11.) It is unclear to the Court what multiplier Plaintiff requests, because Plaintiff's First Fee Motion alternately requests a lodestar multiplier of 2.0 times (*id.* at 9) or 0.75 times (*id.* at 12). Defendant objects to the imposition of any multiplier, arguing that an "upward adjustment to an attorney's lodestar hourly rate is permissible in certain rare and exceptional cases, supported by both specific evidence on the record and detailed findings." (Doc. No. 231 at 10.) Plaintiff acknowledges this same "exceptional and rare" language and appears to argue that her case satisfies such a standard. (Doc. No. 210 at 10.)

***10** The Supreme Court recently recognized that there exist limited circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation for an award of reasonable attorney fees in a civil rights case under § 1988. *Perdue v. Kenny A. ex rel. Winn*, —— U.S. ——, ——, 130 S.Ct. 1662, 1674, 176 L.Ed.2d 494 (2010). However, the Supreme Court qualified this observation by stating that such "circumstances are rare and exceptional, and require specific evidence that the lodestar fee would not have been adequate to attract competent counsel." *Id.* (citing *Blum v. Stenson*, 465 U.S. 886, 899, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). As such, an upward adjustment based on the quality of representation may be justified "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " *Blum*, 465 U.S. at 899. Plaintiff has provided no such evidence here, other than stating that the quality of her representation was exceptional. Additionally, Plaintiff does not claim that the representation was *superior* to what was expected, or that the success obtained was exceedingly unusual or extraordinary for a comparable civil rights claim.

When faced with a Title VII racial discrimination case that dealt with a city's repeated failure to promote a minority employee, a judge in this District found that a multiplier of 0.10 to be warranted based on the difficulty of proving the employee's claim, which had developed over a span of many years, and the exceptional success obtained by the employee's counsel in securing a settlement for his client. *Baltimore*, 2008 WL 2437637, at *6. However, *Baltimore* is distinguishable from the present case. Although the length and difficulty of this litigation is not disputed, Plaintiff's claims of racial and sexual harassment focused on a relatively short period of time and a few isolated incidents witnessed by multiple employees of Defendant, providing a stronger evidentiary basis from which counsel could prove Plaintiff's case. While counsel for Plaintiff was ultimately successful in securing a judgment for Plaintiff, the Court finds that the evaluation of this success has already been subsumed by the calculation of the attorneys' reasonable hourly rate. *See Geier*, 372 F.3d at 792 (quoting *Hensley*, 461 U.S. at 434 n. 9) (finding that " '[m]any of [the twelve factors discussed in *Hensley*] usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate' ").

Additionally, although Plaintiff secondarily requests the enhancement owing to the undesirability of the case, the Court finds the evidentiary basis for such a claim to be lacking. In *Baltimore*, the court found that "[m]any lawyers would not consider this case to be particularly 'desireable' [sic] to accept on a contingent fee basis where

multiple current employees wished to sue their employer for what they considered to be a lengthy and pervasive policy or practice of racial discrimination." 2008 WL 2437637, at *5. Here, however, counsel for Plaintiff has not presented any support regarding the contingent nature of their fees nor the rationale for determining the case to be desirable short of claiming that Plaintiff would be "looked upon by the public as playing the race card to receive benefits [she is] not otherwise entitled to." (Doc. No. 210 at 12.) Furthermore, Plaintiff's attorneys only represented one party, not multiple parties, significantly lessening the complexity and burden of the litigation. Accordingly, despite the success obtained by Plaintiff's counsel, the Court finds that a lodestar multiplier, reserved for cases in which exceptional success is obtained, is not warranted in this case.

H. Costs Already Taxed

***11** Plaintiff also seeks review of the Clerk of Court's Final Taxation of Costs. Defendant urges the Court to deny Plaintiff's request in its entirety because Plaintiff "cannot recover for costs already taxed on March 15th, 2010." (Doc. No. 231 at 2.) Specifically, Defendant argues that "[t]he costs sought in [Plaintiff's] Motion, are the same costs sought in the Bill of Costs," and "should be denied because the Clerk already taxed these costs and because they are not recoverable as part of the Motion for Fees." (*Id.* at 12.)

Upon receiving a Motion for Review of the Clerk of Court's Final Taxation of Costs, the Court reviews the Clerk's determination *de novo*. *Reed v. Cracker Barrel Old Country Store, Inc.*, 171 F.Supp.2d 751, 755 (M.D.Tenn.2001). In seeking an alteration of the Clerk's taxation of costs, " '[t]he party objecting to the clerk's taxation has the burden of persuading the court that it was improper.' " *BDT Prods., Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 420 (6th Cir.2005) (quoting 10 Charles Alan Wright et al., *Federal Practice and Procedure* § 2679 (3d ed.1998)). Accordingly, the burden rests on Plaintiff to persuade the Court that the amount taxed by the Clerk of $4,570.95 is insufficient or inaccurate.

In making the determination of costs, the Clerk relied by incorporation on the arguments laid out in Defendant's Objections to Plaintiff's Amended Bill of Costs, and made the reduction as requested by Defendant for the reasons stated in Defendant's Objections. (Doc. No. 212 (referencing Doc. No. 208)). Therefore, in order to seek sufficient review of the Clerk's Taxation of Costs, Plaintiff must respond to Defendant's Objections in order to persuade the Court that the Taxation was improper. Plaintiff has largely failed to do so. In her Motion for Review, Plaintiff provides only a reference to her Memorandum in Support as providing the rationale for her request for review. (Doc. No. 223.) Upon examination, Plaintiff's Memorandum fails to address the majority of the costs denied by the Clerk, and provides rationales only for her requests for costs for court reporters' transcripts and costs for exemplification and copies. As such, the Court finds that Plaintiff has not carried her burden in challenging the Clerk's taxation of costs for a majority of the costs taxed. Therefore, requests for costs that were not granted by the Clerk are denied, apart from the requests for costs for court reporters' transcripts and copies, which will be addressed below.

1. *Costs for Court Reporters' Transcripts*

Plaintiff seeks an award of costs of $7,839.72 for fees for printed or electronically recorded transcripts necessarily obtained for use in this case. (Doc. No. 204 at 1.) Plaintiff's Memorandum asks the Court to award costs for deposition transcripts where the Court determines "it was 'necessarily obtained for use in the case.' " (Doc. No. 210 at 12) (quoting *LeVay Corp. v. Dominion Fed. Savings & Loan Assoc.*, 930 F.R.D. 522, 528 (4th Cir.1987)). Defendant challenged $3,804.47 of that request on the grounds that the costs were not recoverable as costs under 28 U.S.C. § 1920, or, in the alternative, were not reasonable or necessary for use in this case. (Doc. No. 208 at 2–12.)

i. Not Recoverable as Costs

***12** Defendant challenged $1,687.25 in costs billed as printed or electronically recorded transcripts as non-recoverable fees. Upon examination, these costs appear to be fees for legal services performed by Netwon, Becker, Bouwkamp and Pendoski, PC, Attorneys at Law. The itemized receipt billed Plaintiff for such activities as "review voicemail," "prepare letter," "examine law re: service of out of state witness subpoena," and "file pleading in district court." (Doc. No. 204–2 at 18–21.) The Court finds that these fees are for legal services are not recoverable as costs, especially not as costs billed as printed or electronically recorded transcripts. As such, the Clerk's denial of such costs to Plaintiff is affirmed.

Defendant further challenged $28.00 in costs for postage relating to copies of transcripts, arguing that such costs are not enumerated in 28 U.S.C § 1920 and are therefore not recoverable. Plaintiff does not provide support for her claim that 28 U.S.C $ 1920 allows for recovery for postage costs, and the Court finds that she has not carried her burden in

establishing that they are recoverable despite the fact that they are not specifically enumerated in the statute as recoverable costs. As such, the Clerk's denial of such costs to Plaintiff is affirmed.

ii. Not Reasonable or Necessary

Defendant challenged $405.35 in costs for the depositions of Karen Carey and Donald Payne, arguing that the subpoenas *duces tecum* and subsequent depositions were used to obtain several documents and testimony as to the authenticity of those documents which was never used in trial. "Ordinarily, the cost of taking and transcribing depositions reasonably necessary for the litigation are allowed to the prevailing party. Necessity is determined as of the time of taking, and the fact that a deposition is not actually used at trial is not controlling." *Sales v. Marshall,* 873 F.2d 115, 120 (6th Cir.1989). As such, the Court finds Defendant's argument without merit, and awards Plaintiff the requested costs of $405.35 for the depositions.

Defendant further challenged $50.00 in costs for the appearance fee for Alan Bouwkamp, a court reporter from Connor and Associates, where Plaintiff canceled the deposition after the reporter had already arrived. Defendant argued that the appearance was unnecessary because Plaintiff knew the day prior that the deposition had been rescheduled and therefore could have prevented the costs from being incurred. (Doc. No. 208 at 8.) The Court finds that this cost was indeed unnecessary, as evidenced by the letter from Plaintiff's attorney attached as an exhibit to Defendant's Response in Opposition, confirming the rescheduled deposition the day prior to the date the cost was incurred. (Doc. No. 208–4). As such, the Clerk's denial of such costs to Plaintiff is affirmed.

Finally, Defendant challenged three cost requests on the grounds that Plaintiff failed to specify the purpose of these costs and to what end they were used. Defendant challenged $1,155.99 in costs for work of a court reporter named LaVonne Cleeton for an unspecified deposition; $460.00 in costs for copies of transcripts and DVDs of video depositions which Defendant argued were unnecessary and solely for Plaintiff's counsels' convenience; and $17.88 for fees for printed and electronically recorded transcripts where the invoices in that category totaled less than the amount requested on Plaintiff's Bill of Costs. Because there is no documentation provided to identify the nature of these costs, the Court is unable to determine whether these costs were reasonably necessary for use in this case. As such, the Clerk's denial of such costs to Plaintiff is affirmed.

2. *Costs for Exemplification and Making Copies*

***13** Plaintiff seeks an award of costs of $4,925.20 for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case. (Doc. No. 204 at 1.) Defendant objects to the entire request for these costs, arguing that "because of the limited documentation provided by [Plaintiff] to support her purported copying and exemplification costs, it cannot be said that these costs were incurred for copies 'necessarily obtained for use in the case.' " (Doc. No. 208 at 11.) Plaintiff's Memorandum provides no indication of the purpose or use of these copies, and only cites law standing for the proposition that such copies may be taxable as costs *if* the Court finds they were necessarily obtained for use in the case. (Doc. No. 210 at 13.) Without any supportive documentation or declarations as to the nature of the documents copied or their use, the Court is unable to determine whether these costs were reasonably necessary for use in this case. As such, the Clerk's denial of such costs to Plaintiff is affirmed.

3. *Final Costs Taxed*

After review of the Clerk's Final Taxation of Costs, the Court awards Plaintiff the original taxation of costs in the amount of $4,570.95, and further awards Plaintiff the additional costs of $405.35 for the depositions of Karen Carey and Donald Payne. In total, the Court awards Plaintiff costs in the amount of $4,976.30.

IV. CONCLUSION

Plaintiff's Fee Motions and Motion for Review are **GRANTED** with the foregoing adjustments. The Court finds that Plaintiff is entitled to an award of **$56,105.00** for Mr. Allman's work, **$153,934.00** for Ms. Rogers' work, and **$4,976.30** in costs.

It is so ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 3321291

Footnotes

1 The Court finds that Ms. Rogers' time entries on the following dates were not reasonably expended in relation to the immediate litigation: November 8, 2007; November 11, 2007; December 12, 2007; April 24, 2008; January 18, 2009. (*See* Doc. No. 210–2 at 10, 12, 14.)

2 The Court finds that Ms. Hardt's time entries on the following dates were not reasonably expended in relation to the immediate litigation: November 1, 2006; August 8, 2007; August 13, 2007; August 15, 2007; October 31, 2007; November 15, 2007 (one-half reduction); April 18, 2008 (one-half reduction); April 23, 2008; April 30, 2008; June 17, 2008; July 16, 2009; July 22, 2009; January 4, 2010 (one-third reduction); January 6, 2010; January 7, 2010; February 11, 2010, March 10, 2010 (one-half reduction); March 22, 2010; July 28, 2010 (one-half reduction); February 14, 2011 (one-half reduction). (*See* Doc. No. 210–2 at 30, 36, 41, 48–49, 59, 60–61; Doc. No. 22902 at 4–5.)

3 Defendant has not objected to this rate, and the Court finds it reasonable based on Mr. Allman's significant experience in the area of civil rights employement discrimination litigation, and the fact that his rates remained consistent throughout the course of this litigation.

4 Defendant has not objected to these rates, and the Court finds them reasonable based on Ms. Shea's level of experience.

United States v. GE

United States Court of Appeals for the Sixth Circuit

September 3, 2010, Filed

File Name: 10a0590n.06

Nos. 08-5216, 08-5296, 08-5390, 08-5510

Reporter
397 Fed. Appx. 144; 2010 U.S. App. LEXIS 18638; 2010 FED App. 0590N (6th Cir.)

UNITED STATES OF AMERICA, ex rel, Bringing This Action on Behalf of The United States of America; DENNIS LEFAN, Bringing This Action on Behalf of The United States of America; JASON GIBSON, Bringing This Action on Behalf of The United States of America; HAROLD DILBACK; J. KEITH LAX; L. ELSWORTH CRANOR; JEFF ASHBY; CONNIE SUE ORTEN, Plaintiffs and Relators-Appellees Cross-Appellants, HELMER, MARTINS, RICE & POPHAM CO., L.P.A., Appellant, v. GENERAL ELECTRIC COMPANY; PRECISION CASTPARTS CORPORATION; ALCOA, INC., Defendants-Appellants Cross-Appellees.

Prior History: **[**1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.
United States ex rel. Lefan v. GE, 2008 U.S. Dist. LEXIS 25191 (W.D. Ky., Mar. 27, 2008)
United States ex rel. LeFan v. GE, 2008 U.S. Dist. LEXIS 3020 (W.D. Ky., Jan. 14, 2008)

Core Terms

Relators, district court, attorneys', calculated, rates, parties, first-to-file, supersedeas bond, firms, attorney's fees, instant case, entitlement, settlement, per hour, qui tam, litigating, prevailing, notice, spent, fee award, fee-related, proceedings, awarding, entries, reasonable fee, law firm, expenses, applies, contest, partial

Case Summary

Procedural Posture
Appellant manufacturers challenged a decision of the United States District Court for the Western District of Kentucky, which awarded nearly $2.2 million in attorney fees and expenses following settlement of a suit under the False Claims Act (FCA), *31 U.S.C.S. § 3729 et seq.* Cross-appellants, relators and a law firm, also challenged the judgment in part. Relators amended their appeal to include the district court's approval of a supersedeas bond.

Overview
With four exceptions, the 2007 hourly billing rates charged by a Kentucky firm were used to calculate reasonable fees for work performed on the case. The law firm asserted three cross-claims--the district court erred in awarding prevailing Kentucky rates, rather than prevailing rates for qui tam specialists; improperly failed to award it attorneys' fees for all work performed; and incorrectly calculated interest on the award when it set the amount of the supersedeas bond. Viewing the order as a whole, the court concluded that the district court considered the parties' detailed submissions and crafted what it felt was a reasonably compensatory rate, giving due consideration to, although not specifically identifying, the factors identified in Hadix v. Johnson. Affirming in part, the court ruled that the district court had not abused its discretion in making this determination. As to the hourly rates, the district court considered the parties' positions, stated its reason for choosing an appropriate rate, and quoted the proper standard for a reasonable fee award. On remand, additional hours of fee-related litigation billed by the law firm were to be considered by the district court.

Outcome
The court affirmed the judgment in part--as to the order awarding attorneys' fees, except for calculation of the

fee-related litigation award--and reversed in part and remanded for the district court to calculate hours spent by the law firm on the underlying FCA claim alone and to determine a reasonable fee-related litigation award. The court vacated the order approving a supersedeas bond and remanded with instructions as to interest calculation.

LexisNexis® Headnotes

Civil Procedure > Appeals > Notice of Appeal

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN1 Fed. R. App. P. 4(a)(1)(A) requires a party to file a notice of appeal in a civil action within 30 days after the judgment or order appealed from is entered. However, when the United States is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B).

Civil Procedure > Appeals > Notice of Appeal

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN2 When the United States is a party to underlying litigation, the 60-day limit prescribed in Fed. R. App. P. 4(a)(1)(B) for filing a notice of appeal applies to all subsequent proceedings, not simply to those in which the United States actively participates.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

HN3 While it is true that, for the purpose of finality, an award of attorneys' fees is considered collateral to the underlying claim, this does not render fee proceedings independent of the underlying claim.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN4 The United States Court of Appeals for the Sixth Circuit reviews a district court's award of attorneys' fees for abuse of discretion. The district court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact. In reviewing an award of attorneys' fees, the primary concern is that the fee awarded be reasonable. A reasonable fee is one that is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN5 In determining the appropriate fees for an "out-of-town specialist," a district court must determine (1) whether hiring the out-of-town specialist was reasonable in the first instance, and (2) whether the rates sought by the out-of-town specialist are reasonable for an attorney of his or her degree of skill, experience, and reputation.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN6 A district court has the discretion to choose either current or historical rates so long as it explains how the decision comports with the ultimate goals of awarding reasonable attorney fees.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

HN7 The key requirement for an award of attorney fees is that the documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation. However, entries may be sufficient even if the description for each entry is not explicitly detailed. Counsel is not required to record in great detail how each minute of time was expended but should identify the general subject matter of time expenditures.

Governments > Federal Government > Claims By & Against

Governments > Legislation > Statutory Remedies & Rights

HN8 The False Claims Act (FCA), 31 U.S.C.S. § 3729 et seq., provides that when a person brings an action under 31 U.S.C.S. § 3730(b)(5), no person other than the Government may intervene or bring a related action based on the facts underlying the pending action. This has been applied to create a "first-to-file" bar, preventing

successive FCA suits based on the same underlying facts.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Governments > Federal Government > Claims By & Against

Governments > Legislation > Statutory Remedies & Rights

HN9 Precedent of the United States Court of Appeals for the Sixth Circuit precludes recovery of litigation expenses related to a first-to-file issue under the False Claims Act, *31 U.S.C.S. § 3729 et seq.*, if the action did not directly involve the qui tam defendants.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN10 Time spent in preparing, presenting, and trying attorney fee applications is compensable as part of the reasonable fee, but recovery is limited. When a case is settled without a trial, in the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee case should not exceed 3% of the hours in the main case.

Civil Procedure > ... > Stays of Judgments > Appellate Stays > Supersedeas Bonds

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN11 The decision to grant or deny a supersedeas bond is reviewed for abuse of discretion.

Civil Procedure > ... > Stays of Judgments > Appellate Stays > Supersedeas Bonds

HN12 Fed. R. Civ. P. 62(d) allows a party to stay the execution of a judgment pending appeal by providing a supersedeas bond. The stay is effective upon approval of the bond by the court. Fed. R. Civ. P. 62(d). Commentators have noted that although the amount of the bond usually will be set in an amount that will permit satisfaction of the judgment in full, together with costs, interest, and damages for delay, the courts have inherent power to provide for a bond in a lesser amount or to permit security other than the bond.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Governments > Federal Government > Claims By & Against

HN13 In light of the mandatory fee-shifting provision of the False Claims Act (FCA), *31 U.S.C.S. § 3729 et seq.*, a final order issued in a case under the FCA that entitles a relator to a share of the Government's recovery also entitles the relator to attorneys' fees.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

HN14 For the purposes of finality and appeal, an award of attorneys' fees is collateral to the judgment on the merits in the underlying case.

Governments > Federal Government > Claims By & Against

HN15 When a judgment issues on the merits of relators' underlying claim under the False Claims Act, *31 U.S.C.S. § 3729 et seq.*, the relators become conclusively entitled to at least 15 percent but not more than 25 percent of the settlement of the claim. *31 U.S.C.S. § 3730(d)(1)*.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Governments > Federal Government > Claims By & Against

HN16 The False Claims Act, *31 U.S.C.S. § 3729 et seq.*, states that a successful relator "shall" receive reasonable attorneys' fees. *31 U.S.C.S. § 3730(d)(1)*. While the district court retains discretion to determine what amount of attorneys' fees would be reasonable, successful relators have an entitlement to a reasonable amount.

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For DENNIS LEFAN, Bringing This Action on Behalf of The United States of America, JASON GIBSON, Bringing This Action on Behalf of The United States of America, HAROLD DILBACK, J. KEITH LAX, JEFF ASHBY, CONNIE SUE ORTEN, Plaintiff - Appellee Cross-Appellants: James B. Helmer, Jr., Helmer, Martins, Rice & Popham, Cincinnati, OH; Frederick Mason Morgan, Jr., Morgan Verkamp, Cincinnati, OH; Alton D. Priddy, Priddy, Cutler, Miller & Meade, Louisville, KY.

For L. ELSWORTH CRANOR, Plaintiff - Appellee Cross-Appellant: James B. Helmer, Jr., Helmer, Martins, Rice & Popham, Cincinnati, OH; Frederick Mason Morgan, Jr., Morgan Verkamp, Cincinnati, OH.

For GENERAL ELECTRIC **[**3]** COMPANY, Defendant - Appellant Cross-Appellee: Allen W. Holbrook, Sullivan, Mountjoy, Stainback & Miller, Owensboro, KY; Robert J. Conlan, Jr., Sidley Austin, Washington, DC; Joseph D. Heyd, General Electric Aircraft Engines, Legal Operations, Cincinnati, OH.

For PRECISION CASTPARTS CORP., Precision Castparts Corporation, Defendant - Appellant Cross-Appellee: Patrick Michael McLaughlin, McLaughlin & McCaffrey, Cleveland, OH; Rebecca Grady Jennings, Middleton Reutlinger, Louisville, KY.

For ALCOA, INCORPORATED, Defendant - Appellant Cross-Appellee: Marvin P. Nunley, McCarroll, Nunley, Hartz & Lee, Owensboro, KY; Kent Morrison, Crowell & Moring, Washington, DC.

For UNITED STATES OF AMERICA, ex rel, Bringing This Action on Behalf of The United States of America (08-5390), Plaintiff - Appellee Cross-Appellant: Alton D. Priddy, Priddy, Cutler, Miller & Meade, Louisville, KY.

For DENNIS LEFAN, Bringing This Action on Behalf of The United States of America, JASON GIBSON, Bringing This Action on Behalf of The United States of America, HAROLD DILBACK, J. KEITH LAX, JEFF ASHBY, CONNIE SUE ORTEN, Plaintiff - Appellee Cross-Appellants: James B. Helmer, Jr., Robert M. Rice, Helmer, Martins, Rice & **[**4]** Popham, Cincinnati, OH; Frederick Mason Morgan, Jr., Morgan Verkamp, Cincinnati, OH; Alton D. Priddy, Priddy, Cutler, Miller & Meade, Louisville, KY.

For L. ELSWORTH CRANOR, Plaintiff - Appellee Cross-Appellant: James B. Helmer, Jr., Robert M. Rice, Helmer, Martins, Rice & Popham, Cincinnati, OH; Frederick Mason Morgan, Jr., Morgan Verkamp, Cincinnati, OH.

For HELMER, MARTINS, RICE & POPHAM CO., L.P.A., Appellant: James B. Helmer, Jr., Helmer, Martins, Rice & Popham, Cincinnati, OH.

For GENERAL ELECTRIC COMPANY, Defendant - Appellant Cross-Appellee: Robert J. Conlan, Jr., Sidley Austin, Washington, DC; Joseph D. Heyd, General Electric Aircraft Engines, Legal Operations, Cincinnati, OH; Allen W. Holbrook, Sullivan, Mountjoy, Stainback & Miller, Owensboro, KY.

For PRECISION CASTPARTS CORP., Precision Castparts Corporation, Defendant - Appellant Cross-Appellee: Rebecca Grady Jennings, Middleton Reutlinger, Louisville, KY; Patrick Michael McLaughlin, McLaughlin & McCaffrey, Cleveland, OH.

For ALCOA, INCORPORATED, Defendant - Appellant Cross-Appellee: Kent Morrison, Crowell & Moring, Washington, DC; Marvin P. Nunley, McCarroll, Nunley, Hartz & Lee, Owensboro, KY.

For DENNIS LEFAN, Bringing This **[**5]** Action on Behalf of The United States of America, JASON GIBSON, Bringing This Action on Behalf of The United States of America, HAROLD DILBACK, J. KEITH LAX, L. ELSWORTH CRANOR, JEFF ASHBY, CONNIE SUE ORTEN (08-5510), Plaintiff - Appellants: James B. Helmer, Jr., Robert M. Rice, Helmer, Helmer, Martins, Rice & Popham, Cincinnati, OH.

For HELMER, MARTINS, RICE & POPHAM CO., L.P.A., Appellant: James B. Helmer, Jr., Helmer, Martins, Rice & Popham, Cincinnati, OH.

For GENERAL ELECTRIC COMPANY, Defendant - Appellant Cross-Appellee: Robert J. Conlan, Jr., Sidley Austin, Washington, DC; Joseph D. Heyd, General Electric Aircraft Engines, Legal Operations, Cincinnati, OH; Allen W. Holbrook, Sullivan, Mountjoy, Stainback & Miller, Owensboro, KY.

For PRECISION CASTPARTS CORP., Precision Castparts Corporation, Defendant - Appellee: Rebecca Grady Jennings, Middleton Reutlinger, Louisville, KY; Patrick Michael McLaughlin, McLaughlin & McCaffrey, Cleveland, OH.

For ALCOA, INCORPORATED, Defendant - Appellee: Kent Morrison, Crowell & Moring, Washington, DC; Marvin P. Nunley, McCarroll, Nunley, Hartz & Lee, Owensboro, KY.

Judges: Before: RYAN, COOK and WHITE, Circuit Judges.

Opinion by: HELENE N. WHITE

Opinion

[*145] **HELENE N. WHITE, Circuit** **[**6]** **Judge.** Defendants General Electric Co., Precision Castparts Corp., and Alcoa, Inc. (collectively "GE"), appeal from the decision of the district court awarding attorneys' fees following the settlement of a False Claims Act (FCA) suit. The law firm of Helmer, Martins, Rice & Popham (HMRP) cross-appeals. [1] We affirm in part and reverse in part.

I

GE had multiple contracts to manufacture jet engines for use in military aircraft. In 2000, a *qui tam* action was filed under seal by two relators [2] pursuant to the False Claims Act (FCA), *31 U.S.C. § 3729 et seq.* The action alleged that flight-critical engine blades and vanes were improperly manufactured, tested, and inspected at GE's Madisonville, Kentucky, plant, and that GE falsely certified to the Government that the parts met contract specifications. Relators initially hired the Louisville-based firm of Priddy, Cutler, Miller and Meade (PCMM) to represent them. Alton Priddy (Priddy), a labor attorney, was lead counsel.

The Department of Justice obtained a partial unsealing of the case in 2001, at which point GE received a copy of the action. GE retained counsel and began preparing its defense. In 2002, Priddy determined that Relators' interests would be best served by associating co-counsel with FCA expertise. After a brief search, he contacted Frederick Morgan, Jr. (Morgan), a partner at Cincinnati-based Helmer, Martins & Morgan (HMM), and the two firms undertook joint representation of Relators. In 2005, Morgan and Mary Jones (Jones), a paralegal working on the matter, moved to another Ohio firm, Volkema Thomas (VT). Subsequently, HMM became HMRP. Morgan and Priddy remained primary counsel for Relators, with Morgan performing the majority of work in the case. In 2006, the Government formally intervened as co-plaintiff and a settlement was reached.

Under the settlement, GE admitted no wrongdoing but agreed to pay $11.5 million dollars, of which Relators received nearly $2.4 million. On July 20, 2006, the district court dismissed with prejudice "all . . . claims concerning the Covered Conduct . . . asserted in prior complaints herein **[**8]** on behalf of the United States under the *qui tam* provisions of the False Claims Act." Only the three individual retaliation claims as well as

[1] Two other firms shared in the representation in the instant case. Those firms entered into a settlement agreement with GE following oral argument and have been dismissed from the appeal.

[2] Several other individuals were later **[**7]** added to the action; we refer to the group collectively as "Relators."

claims for attorneys' fees remained active before the court. [3]

[*146] The parties engaged in negotiations over the fees but were unable to reach an agreement. Ultimately, HMRP and PCMM/VT filed separate motions for attorney fees. After limited discovery, GE filed motions in opposition, contesting various methods used by the firms to calculate the appropriate fees. In particular, GE and the firms disagreed on whether prevailing Kentucky rates should apply to the attorneys of the Ohio-based firms, and whether the firms adequately documented their claimed hours and expenses.

The district court entered its order on the motions on January 15, 2008. The court ruled that the 2007 hourly billing rates charged by the Kentucky firm PCMM—$250 per hour for partners and $200 per hour for associates—would be used to calculate reasonable fees for work performed on the case. The order made four exceptions: 1) Morgan's billing rate was set **[**9]** at $400 per hour, "based on his expertise and national practice" in FCA cases; 2) Priddy's rate was set at $325 per hour; 3) HMRP partner James Helmer's rate was set at $325 per hour; and 4) Jones' rate was set at $200 per hour.

The court accepted nearly all of the hours claimed by the firms, reducing fees by only 0.2 hours billed for the reservation of a conference room. The court denied the firms' requests for fee enhancements for "exceptional success," but allowed fees for fee-related litigation and almost all of the firms' costs and expenses.

In total, the court awarded Relators nearly $2.2 million in fees and expenses for the work of the three law firms. GE filed a notice of appeal on February 14, 2008. Relators filed a notice of cross-appeal on March 3, and an amended notice on March 14. [4]

GE also moved to stay the enforcement of the fee award while it appealed the order to this court, and for approval of a supersedeas bond in the amount of $2.4 million. Relators **[**10]** opposed the bond, claiming that it was insufficient to cover interest on the award, which they claimed should be calculated from the time of the settlement in July 2006. Relators asked for a bond of nearly $2.75 million. In addition, Relators filed a motion for clarification seeking an order from the district court that interest on attorneys' fees would be calculated from the July 2006 partial dismissal rather than the actual order granting attorneys' fees. On March 28, the district court granted GE's motion and approved a bond in the amount of $2.4 million. The court denied Relators' motion for clarification for lack of jurisdiction. On April 15, 2008, Relators amended their appeal to include the district court's approval of the supersedeas bond.

II

HMRP asserts three cross-claims on appeal: 1) that the district court erred in awarding rates to many of its attorneys based on prevailing Kentucky rates, rather than prevailing rates for *qui tam* specialists; 2) that the district court improperly failed to award it attorneys' fees for all work performed; and 3) that the district court incorrectly calculated interest on the award when it set the amount of the supersedeas bond.

GE contests **[**11]** the timeliness of HMRP's two claims relating to the district court's calculation of attorneys' fees. The district court entered its order awarding attorneys' **[*147]** fees on January 15, 2008. GE filed its appeal on February 14, 2008. Relators filed a notice of cross appeal on March 3, 2008, and an amended notice containing HMRP's cross-claims on March 14, 2008.

HN1 Federal Rule of Appellate Procedure 4(a)(1)(A) requires a party to file a notice of appeal in a civil action "within 30 days after the judgment or order appealed from is entered." However, "[w]hen the United States . . . is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(B). HMRP's cross-appeal of the district court's January 15 order, therefore, is only timely if the longer, 60-day period applies. In the instant case, the United States was unquestionably a party to the underlying FCA claim. *See* United States ex rel. Eisenstein v. City of New York, 129 S. Ct. 2230, 2234, 173 L. Ed. 2d 1255 (2009) ("The United States, therefore, is a "party" **[**12]** to a privately filed FCA action . . . if it intervenes in accordance with the procedures established by federal law.").

While the United States was not involved in the attorneys' fee litigation, the litigation was spawned by

[3] Three Relators claimed that GE had retaliated against them for their whistleblowing activities. Those cases have also been settled.

[4] Subsequent to hearing oral argument, this panel requested that the parties return to mediation. PCMM and VT resolved their differences with GE, and those two firms have been dismissed from the appeal and cross-appeals.

Relators' prevailing in the underlying FCA claim. The award of attorneys' fees is mandated by the same section of the FCA as Relators' entitlement to a share of the proceeds. *See* 31 U.S.C. § 3730(d)(1). Thus the statute treats the award of attorneys fees as another phase of the same litigation. ***HN2*** As the United States was a party to the underlying litigation, the 60-day limit prescribed in *Rule 4(a)(1)(B)* applies to all subsequent proceedings, not simply to those in which the United States actively participates. [5]

III

The **[**13]** parties contest various aspects of the district court's determination of the attorneys' fee award. ***HN4*** We review a district court's award of attorneys' fees for abuse of discretion. *Gonter v. Hunt Valve Co., 510 F.3d 610, 616 (6th Cir. 2007)*. "The district court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423, 435 (6th Cir. 2008)* (internal quotation marks omitted). In reviewing the award of attorneys' fees, "the primary concern is that the fee awarded be reasonable." *Gonter, 510 F.3d at 616* (internal quotation marks omitted). A reasonable fee is "one that is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers." *Geier v. Sundquist, 372 F.3d 784, 791 (6th Cir. 2004)* (quoting *Reed v. Rhodes, 179 F.3d 453, 471 (6th Cir. 1999)*).

A

Both parties claim that the district court abused its discretion when it calculated the hourly rates awarded to Relators' Ohio-based counsel. GE asserts that the district court erred in awarding rates exceeding prevailing Kentucky rates to HMRP attorney Morgan and paralegal **[**14]** Jones. HMRP contends that all of its attorneys should have received their normal billing rates, not the lower rates found by the court. We have held that ***HN5*** in determining **[*148]** the appropriate fees for an "out-of-town specialist," a district court "must determine (1) whether hiring the out-of-town specialist was reasonable in the first instance, and (2) whether the rates sought by the out-of-town specialist are reasonable for an attorney of his or her degree of skill, experience, and reputation." *Hadix v. Johnson, 65 F.3d 532, 535 (6th Cir.1995)*.

The district court's order does not specifically mention *Hadix*, but does comport with its dictates. The district court stated that Relators were required to "establish the necessity of retaining outside, non-local counsel" and discussed in detail the parties' arguments concerning the need to hire non-local *qui tam* specialists. [6] The court also referred to Relators' argument concerning the "reputation and credentials of the attorneys and law firms involved in this matter." In the section of the order announcing the court's rate determination, the court again referred to the parties' positions. It awarded Morgan a higher rate due to his "expertise and **[**15]** national practice in [FCA] cases," but set the general rate for HMRP attorneys at the rates charged by PCMM because the attorneys "chose to practice within this Court's jurisdiction" of western Kentucky. The court did not explain its decision to award Jones a rate of $200 per hour, but referred generally to the parties submissions on rates, which included documentation that Jones had worked on FCA and complex litigation matters for nearly a decade and was HMRP's "most experienced paralegal." It is clear that the court found Jones' experience and expertise merited the higher rate. Viewing the order as a whole, we conclude that the district court considered the parties' detailed submissions and crafted what it felt was a reasonably compensatory rate, giving due consideration to, although not specifically identifying, the factors identified in *Hadix*. Given the broad deference we accord to such decisions, we cannot say that the district court abused its discretion in making this determination.

B

GE also challenges the district court's **[**16]** decision to award fees for the remaining attorneys based on the 2007 hourly rates charged by PCMM. We have held

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[5] ***HN3*** While it is true that, for the purpose of finality, an award of attorneys' fees is considered collateral to the underlying claim, *see e.g.,* *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988), this does not render the proceedings independent of the underlying claim. *Cf.* *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 170, 59 S. Ct. 777, 83 L. Ed. 1184 (1939) ("[W]e view the petition for [attorney's fees] as an independent proceeding supplemental to the original proceeding . . .").

[6] The district court noted that Relators had presented evidence regarding "the lack of experienced False Claims Act litigators within the Court's jurisdiction."

that ***HN6*** "the district court has the discretion to choose either current or historical rates so long as it explains how the decision comports with the ultimate goals of awarding reasonable fees." *Gonter, 510 F.3d at 617*. In the instant case, the district court noted the parties' arguments and determined that the 2007 rates were necessary to "compensate the law firms for their delay in receiving payment." It then stated that this would "produce hourly rates that are '*adequately compensatory to attract competent counsel yet which avoid producing a windfall for attorneys.*'" (emphasis in original). The court thus considered the parties' positions, stated its reason for choosing an appropriate rate, and quoted the standard for a reasonable fee award that we have long applied. We conclude that this reasoning sufficiently indicates how the district court's discretion was exercised, and affirm its finding.

C

GE's final claim is that the district court abused its discretion by failing to exclude from its calculation of attorneys' fees "vague time entries." [7] ***HN7*** The "key requirement **[*149]** for an **[**17]** award of attorney fees is that '[t]he documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation.'" *Imwalle v. Reliance Med. Prods., Inc., 515 F.3d 531, 553 (6th Cir. 2008)* (quoting *United State, Local 307 v. G & M Roofing & Sheet Metal Co., 732 F.2d 495, 502 n.2 (6th Cir.1984))*. However, entries may be sufficient "even if the description for each entry [is] not explicitly detailed." *McCombs v. Meijer, Inc., 395 F.3d 346, 360 (6th Cir. 2005)*. The Supreme Court has held that "counsel . . . is not required to record in great detail how each minute of [] time was expended . . . [but] should identify the general subject matter of [] time expenditures." *Hensley v. Eckerhart, 461 U.S. 424, 437 n.12, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*.

GE contends that "hundreds" of entries submitted by Relators' counsel should have been disregarded as too vague. GE points to time entries marked, for example, **[**18]** "Email," "Telephone Conference w/REL," and "Travel to Owensboro" as examples of such entries. However, the district court could determine from the billing statements submitted and the context of the trial timeline that these entries adequately described the work performed. *See Imwalle, 515 F.3d at 554*. Relators' counsel submitted extensive lists of activities, accounting for time spent to the fraction of the hour. Many of the descriptions, while brief, referred to frequent events. For example, "travel to Owensboro," the Kentucky city in which Relators were located, is sufficiently detailed within the context of the litigation for the court to determine that such time was expended on matters related to the case. It was not an abuse of discretion for the court to accept such hours in the calculation of HMRP's fees.

D

HMRP challenges the decision of the district court not to award it fees for work performed on a related first-to-file challenge. ***HN8*** The FCA provides that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." *31 U.S.C. § 3730(b)(5)*. This has been applied **[**19]** to create a "first-to-file" bar, preventing successive FCA suits based on the same underlying facts. *See, e.g., United States ex rel. Poteet v. Medtronic Inc., 552 F.3d 503, 515-17 (6th Cir. 2009)* (analyzing first-to-file issues and collecting cases).

In the instant case, Relators, at the request of the district court, [8] litigated, and ultimately prevailed in, a first-to-file dispute with a third-party relator. GE argued that the first-to-file issue "had nothing to do with advancing the matter relating to GE" and should not factor into the fee award. The district court accepted GE's argument and subtracted $10,967.75 from HMRP's total fee award, because it found that HMRP "does not appear to dispute [GE's] contention." HMRP did, in fact, dispute GE's contention in both its Reply Memorandum and Second Reply Memorandum before the district court. *See* R. 88 at 12 (under the heading "Our First-to-File Litigation Was Related To General Electric"); R. 135 at 12 n.27.

[*150] Nevertheless, **[**20]** ***HN9*** our precedent precludes HMRP's recovery of litigation expenses

[7] The district court accepted nearly all of the claimed hours. It did deduct .20 hours of Priddy's time spent reserving a conference room.

[8] The district court's order is not included in the record before this court. However, the parties do not dispute that the court requested the Relators settle the first-to-file issue before proceeding with the instant case.

related to the first-to-file issue because the action "did not directly involve the *qui tam* defendants." *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1046 (6th Cir. 1994)*. In *Taxpayers*, this court determined that the relators were not entitled to attorneys' fees for litigation against the Government regarding their share of a *qui tam* recovery. [9] The court held that the defendant in that case, also General Electric Co., was not responsible for the fees because

> [a]lthough GE eagerly assisted in the government's efforts to reduce the relators' bounty, GE's role was comparatively peripheral. It had no legal standing or right to participate in the proceedings. Nothing in the record suggests that the government initiated its contest against the relators because of GE, and nothing suggests that GE prolonged the litigation process or could have hastened its conclusion.

Id. This reasoning applies to the instant case. GE had no participation in, or apparently knowledge of, the first-to-file dispute. It neither initiated the contest nor had any control over its resolution. As GE had no role or interest **[**21]** in the first-to-file proceedings, we affirm the district court's denial of HMRP's request for attorneys' fees for the time it spent litigating the first-to-file issue.

E

HMRP further claims that the district court abused its discretion by failing to appropriately compensate the firm for fees incurred litigating the attorneys' fee issue. ***HN10*** "'Time spent in preparing, presenting, and trying attorney fee applications is compensable' as part of the reasonable fee," but recovery is "limited." *Gonter, 510 F.3d at 620* (quoting *Coulter v. Tennessee, 805 F.2d 146, 151 (6th Cir. 1986))* (emphasis omitted). We have held that when a case is settled without a trial, "in the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee case should not exceed 3% of the hours in the main case." *Coulter, 805 F.2d at 151* (noting that a five-percent limit applies if the case goes to trial).

In the instant case, the district court stated its intention to "award the Relators attorneys' fees for fee-related litigation based upon the reasonable **[**22]** rates set forth . . . above." The order did not specify an amount representing three percent of fees incurred in the main case. Rather, the court stated "[t]he Court accepts that the Relators' attorney's fees for the fee-related litigation do not exceed the 3% hourly limit since the Defendants do not argue to the contrary."

Ultimately, the court awarded HMRP $1,000,091.50 in fees, based on the hours HMRP submitted in its initial fee application on February 9, 2007, which apparently included some hours spent in litigating the fee issue. The court did not include 176.4 additional hours claimed to have been spent on fee-related litigation, submitted to the court by HMRP on March 13, 2007, nor were the later-submitted hours mentioned in the court's order. HMRP correctly asserts that those hours also should have been considered by the district court.

We therefore remand for the district court to make a calculation of the hours spent by HMRP on the underlying FCA claim alone. The district court should then exercise its discretion to determine a **[*151]** reasonable fee-related litigation award based upon all of the hours submitted by HMRP, subject to the three-percent cap. [10]

IV

Finally, HMRP claims that the district court improperly calculated the interest owed on the attorneys' fee award in setting a supersedeas bond amount. ***HN11*** The decision to grant or deny a supersedeas bond is reviewed for abuse of discretion. *Arban v. W. Pub. Corp, 345 F.3d 390, 409 (6th Cir. 2003)* (applying abuse of discretion standard where the district court granted a stay without requiring a supersedeas bond).

The underlying *qui tam* action was settled on July 21, 2006. The parties continued to litigate the whistleblower actions. Relators filed requests for attorneys' fees for HMRP on March 15, 2007. The district court issued its order granting in part and denying in part the fee motions on January 15, 2008. The order awarded Relators nearly $2.2 million in fees and expenses for the work of the three law firms. GE moved to stay the enforcement

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[9] We note that HMRP cites no legal authority before this court to support its contention that the first-to-file hours are compensable.

[10] HMRP argues that on remand, **[**23]** the district court "should not be constrained by the 3% . . . guideline[] . . . because there are 'unusual circumstances.'" However, HMRP did not make this argument before the district court and our review of the record finds no circumstances warranting deviation from the default rule.

of the fee award while it appealed the order to this court, **[**24]** and for approval of a supersedeas bond in the amount of $2.4 million. Relators opposed the bond, claiming that it was insufficient to cover interest on the award, which they claimed should be calculated from the time of the settlement, in July 2006. Relators sought a bond of nearly $2.75 million. In addition, Relators filed a motion for clarification seeking an order from the district court that interest on attorneys' fees would be calculated from the July 2006 partial dismissal rather than the actual order granting attorneys' fees.

On March 28, 2008, the district court granted GE's motion and approved a bond in the amount of $2.4 million, stating that Relators became "entitled" to attorneys' fees on January 15, 2008, when the court entered its order quantifying the fees, and calculated interest on the award accordingly. The court stated that the January 15 order "constitutes the one and only 'judgment' from which post-judgment interest can accrue. Accordingly, the Court accepts the Defendants' calculation of post-judgment interest for the purposes of the supersedeas bond and finds that the amount of the bond is sufficient." ***HN12*** Federal Rule of Civil Procedure 62(d) allows a party to stay **[**25]** the execution of a judgment pending appeal by providing a supersedeas bond. The stay is effective upon approval of the bond by the court. Fed. R. Civ. P. 62(d). Commentators have noted that "[a]lthough the amount of the bond usually will be set in an amount that will permit satisfaction of the judgment in full, together with costs, interest, and damages for delay, the courts have inherent power . . . to provide for a bond in a lesser amount or to permit security other than the bond." 11 CHARLES WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2905, at 522 (4th ed. 2008).

In the instant case, the district court's approval of the supersedeas bond purported to include enough interest to satisfy the judgment in full. To determine the date from which interest should be awarded, the court cited this court's holding in *Associated General Contractors of Ohio, Inc. v. Drabik* that post-judgment interest begins "to run on an [*sic*] fee award from the time of entry of the judgment which unconditionally **[*152]** entitles the prevailing party to reasonable attorney fees." *250 F.3d 482, 495 (6th Cir. 2001)* (citation omitted). The court determined that the July 21, 2006 partial dismissal was not a "judgment on **[**26]** the merits" entitling Relators to attorneys' fees, and that such an entitlement did not occur until the January 2008 order quantifying those fees.

The parties dispute the point at which Relators became "unconditionally entitled" to reasonable attorneys' fees. This court has not addressed whether a relator is unconditionally entitled to attorneys' fees upon the court's consent to a partial settlement agreement, or whether the court must issue a final judgment indicating the entitlement to attorneys' fees. ***HN13*** In light of the FCA's mandatory fee-shifting provision, we hold that a final order issued in an FCA case that entitles a relator to a share of the Government's recovery also entitles the relator to attorneys' fees.

The Supreme Court has held that, ***HN14*** for the purposes of finality and appeal, an award of attorneys' fees is collateral to the judgment on the merits in the underlying case. *Budinich, 486 U.S. at 200*. Thus, a judgment on the merits of Relators' underlying claim was issued on July 21, 2006. ***HN15*** At that point, Relators became conclusively entitled to "at least 15 percent but not more than 25 percent of the . . . settlement of the claim." *31 U.S.C. § 3730(d)(1)*. ***HN16*** The FCA states that a **[**27]** successful relator "*shall*" receive reasonable attorneys' fees. *Id.* (emphasis added). While the district court retained discretion to determine what amount of attorneys' fees would be reasonable, Relators had an entitlement to a reasonable amount. The district court's finding that Relators did not become entitled to an award until that award was quantified was in error. While the amount of the eventual award was not certain when the FCA claims were settled, the existence of the award was. Therefore the district court misapplied the legal standard we set out in *Associated Gen. Contractors, 250 F.3d at 495*, constituting an abuse of discretion. *See Cherry Hill Vineyards, LLC, 553 F.3d at 435*.

V

We **AFFIRM** the district court's January 15, 2008 order awarding attorneys' fees, except for its calculation of the appropriate fee-related litigation award. On that issue, we **REMAND** for further proceedings consistent with this opinion. Further, we **VACATE** the March 28, 2008 order of the district court approving a supersedeas bond in the amount of $2.4 million and **REMAND** with instructions to calculate interest owed in all further proceedings from July 21, 2006.