

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DR. RACHEL TUDOR,)
)
 Plaintiff,)
)
 v.) Case No. 5:15-CV-00324-C
)
 SOUTHEASTERN OKLAHOMA)
 STATE UNIVERSITY,)
)
 and)
)
 THE REGIONAL UNIVERSITY)
 SYSTEM OF OKLAHOMA,)
)
)
 Defendants.)

**PLAINTIFF DR. RACHEL TUDOR'S
MOTION AND INCORPORATED BRIEF
FOR RECOVERY OF ATTORNEYS' FEES, COSTS,
AND OTHER REASONABLE EXPENSES**

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INTRODUCTION

Given Dr. Tudor's substantial victory in this case, as well as the high degree of skill and experience her attorneys¹ brought to this matter to reach this successful conclusion, Tudor now moves this Court to grant lodestar attorney's fees of \$723,913.50, apply on top of that a multiplier of 1.5, bringing total fees to \$1,085,870.25, and expenses of \$21,453.00 not included in the separately filed bill of costs (ECF No. 299).

I. BACKGROUND

Discernment of the appropriate fees and expenses in this matter turns in large part on the unique circumstances of this case and the extraordinary hurdles Tudor and her counsel traversed on the way to a successful outcome. To that end, Tudor proffers the foregoing background:

Dr. Tudor is a transgender woman and citizen of the Chickasaw Nation. She began a tenure-track professorship at Southeastern Oklahoma State University ("Southeastern") in Fall 2004 with the intent to secure tenure and remain there for the rest of her career. Tudor had a special connection to

¹ For a brief period, Tudor was represented by the Law Office of Jillian Weiss, P.C. ("Weiss Firm") and the Transgender Legal Defense and Education Fund, Inc. ("TLDEF"). In or about July 2016 Tudor's case and all interests in it were transferred from the Weiss Firm to TLDEF. In late May 2017, Tudor's case was transferred from TLDEF to the Law Office of Ezra Young ("Young Firm") which continues to serve as lead counsel in this matter. Since transfer to the Young Firm, Tudor has repeatedly requested that TLDEF issue an itemized bill of fees and costs. Unfortunately, that request was repeatedly declined. On the evening of June 20, 2018, TLDEF reached out to the undersigned regarding TLDEF's purported interests in this case. Additional information is provided in Exhibit 1 at n.1.

Southeastern—as a citizen of the Chickasaw Nation, Tudor greatly valued working at Southeastern sits on (ECF No. 24 ¶ 127) and she was drawn to Southeastern’s sizable Chickasaw student population (ECF No. 268-1 ¶5(c)). Tudor also desired to work with Southeastern’s students, many of whom, like her, were among the first in their families to attend college (ECF No. 246 at 37:10–19).

Due to discrimination and retaliation at Southeastern, Tudor’s career was unjustly cut short. When Tudor applied for tenure in the 2009-10 cycle her application was approved by the faculty but denied by the administration for reasons that the jury ultimately deemed to be pretext for discrimination (ECF No. 262). When Tudor attempted to reapply for tenure in the 2010-11 cycle, the Southeastern administration refused her application for reasons the jury found to be pretext for both discrimination and retaliation (*id.*).

Though employment discrimination is a regrettably not too uncommon experience in American workplaces, Tudor’s case is exceptional due to whom she is, Defendants’ recalcitrant litigation tactics, the lengthy involvement of the U.S. Department of Justice (“DOJ”) in this matter, collateral attacks forged by the Oklahoma Attorney General’s Office (“OAG”) in an attempt to undermine favorable decisions secured by Tudor in this Court, and the extraordinary results obtained at Tudor’s first of its kind jury trial.

From the earliest stages of this case, Tudor faced an uphill battle to

redress what happened at Southeaster simply because she is a different kind of woman. Though Tenth Circuit precedent has long held that transgender persons can redress sex discrimination experienced in the workplace (“Title VII status question”), those protections have been illusory for most in Tudor’s shoes due to rampant misunderstanding and the risks involved in such cases.

Indeed, the Title VII status question created extraordinary problems for Tudor’s retention of counsel. Tudor struggled to find private counsel to represent her given the nature of her case (Exhibit 1 ¶ 57(a)). Tudor also faced considerable hurdles obtaining additional counsel as the exigencies of the case shifted and the composition of parties changed (*id.* ¶57(b)).

Defendants’ untoward fixation on overturning the Title VII status question also created unnecessary work and delay in this case. Indeed, the lengths to which Defendants pursued the Title VII status question are far from normal (*id.* ¶ 47), evidencing a high degree of recalcitrance. For example, despite the fact that Tudor secured a cause finding at the EEOC stage (ECF No. 24 ¶ 8) and Defendants were aware of strong evidence in support of Tudor, Defendants refused to settle. Once this case was filed, Defendants continued a distasteful attempt to cast Tudor and all other transgender victims of sex discrimination out of the protective ambit of Title VII, filing a motion to dismiss (ECF No. 30), a motion for summary judgment (ECF No. 177), and even arguing after trial that the jury was “hoodwinked” in an effort to tee up an

appeal on this issue (ECF No. 270 at 2–3).

Most disturbing, in the middle of this litigation and on the eve of the originally scheduled November 2016 trial, the State of Oklahoma, of which Defendants are sub-divisions, lodged a collateral attack on this Court’s earlier issued decisions on the Title VII status question through *Texas v. US*, a case filed in the Northern District of Texas. In *Texas v. US*,² Defendants’ counsel in this matter, the OAG, and others urged a co-equal article III judge to review evidence in this case³ and temporarily enjoin it,⁴ ultimately inviting that same judge to issue orders that if granted would nullify this Court’s earlier issued orders. Due to OAG’s actions, which gave rise to a preliminary injunction this Court deemed to apply to this matter (ECF No. ECF No. 123; ECF No. 130), Tudor was forced to intervene in *Texas v. US*, ultimately appealing the injunction to the Fifth Circuit⁵. Seven months after the stay was issued in this case, the *Texas* Plaintiffs dropped their suit, dissolving the injunction, ultimately allowing Tudor and DOJ to return to this Court to resolve this case

² Throughout this Brief, Dr. Tudor points to filings in *Texas et al. v. United States et al.*, 7:16-cv-54-O (N.D.Tex.) and *Texas et al. v. United States et al.*, 16-11534 (5th Cir.). Fed. R. Ev. 201(b) allows this Court to take judicial notice of facts not subject to reasonable dispute where such facts are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Thus, this Court may take notice of these cited materials of public record.

³ *Texas*, 7:16-cv-54-O, ECF No. 64 at 4(inviting the Northern District of Texas to assess excerpts taken from the depositions in this matter and attaching excerpts as exhibits); ECF No. 64-1 (excerpts from deposition of Dr. Bryon Clark); ECF No. 64-2 (excerpts from deposition of Dr. Charles Weiner); ECF 64-3 (excerpts from deposition of Dr. Douglas McMillan); ECF No. 64-4 (excerpts from deposition of Ms. Cathy Conway); ECF No. 64-5 (excerpts from deposition of Dr. Claire Stubblefield).

⁴ *Texas*, 7:16-cv-54-O, ECF No. 64 at 3–4.

⁵ *Texas*, 7:16-cv-54-O, ECF No. 94 (Tudor’s protective notice of appeal); *Texas*, 16-11534, Tudor Open. Brief (Jan. 3, 2017).

on the merits (ECF No. 131). OAG's unprecedented collateral attack on this Court and this case through *Texas v. US*, though ultimately unsuccessful, reflects an untoward disregard for the rule of law, fair play, and, ultimately, created unnecessary work that required a high degree of skill by Tudor's counsel to counter-act.

On the eve of trial, Tudor and her counsel also faced and deftly navigated other exceptional hurdles erected by Defendants and forces outside of Tudor's control. For example, in the twilight of discovery, DOJ settled its claims, leaving Tudor to quickly staff up a trial team and attempt to negotiate exit terms so as to prevent prejudice. Rather than agree to reasonable terms, Defendants insisted in filing an unsound motion for protective order which, after lengthy briefing, this Court rejected (ECF No. 206) and resisted Tudor's requests for basic accommodations which this Court later ruled were necessary (*id.*).

Tudor also faced staggering odds at trial. Among other things, Tudor was in the unenviable position of going up against a well-staffed OAG trial team with her private counsel whom, though skilled, had not planned on going to trial without DOJ. Additionally, Tudor's trial team also faced the inordinate burden of creating a winning strategy for a first-of-its-kind trial, requiring both intensive research, collaboration with experts and scholars, and extra work beyond what is typically needed in a run-of-the-mill employment case (see, e.g.,

Exhibit 1 ¶ 56). Of course, Tudor beat the odds, and resoundingly prevailed at trial on three of her four claims and securing a jury award of \$1,165,000 in damages—an extraordinary outcome that drew the attention of local and national media.

At this juncture, it is beyond dispute that Dr. Tudor has secured much of the relief she requested through Defendants' voluntary adoption of a non-discriminatory health plan in Fall 2016 (ECF No. 268-4), the terms of the United States' settlement with Defendants which was achieved only after a protracted period of co-litigation (ECF No. 268-3), the jury verdict (ECF No. 262) and other relief ordered by this Court (ECF No. 292)⁶. Additionally, Tudor has otherwise obtained extraordinary results and furthered important civil rights goals.

II. STATUTORY BASIS FOR ATTORNEYS' FEES AND EXPENSES

A. ATTORNEYS' FEES

1. Presumption of fees.

Title VII allows attorneys' fees for prevailing plaintiffs pursuant to 42 U.S.C. § 2000e-5(k). A prevailing plaintiff should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust. *Dahlem v. Bd. of Educ. of Denver Pub. Schs.*, 901 F.2d 1508, 1510 (10th Cir. 1980). The

⁶ Though Tudor intends to appeal some of this Court's orders on equitable relief, those efforts do not undercut the extraordinary results Tudor has otherwise obtained.

district court's discretion to deny attorneys' fees is quite narrow. *Id.* at 1514 (citing *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 129 (10th Cir. 1980)).

2. Traditional Calculation of Fees

In a Title VII fee request, a claimant must prove two elements: (1) that she was the "prevailing party" in the proceeding; and (2) that the claimant's fee request is "reasonable."

Prevailing party. A plaintiff should be considered the prevailing party even if she does not win all claims. This is especially so where, as is the situation here, the only claim lost is a hostile work environment claim which is substantially subsumed within other successful claims and the overall "results obtained are excellent." *Roberts v. Roadway Exp., Inc.*, 149 F.3d 1098, 1111 (10th Cir. 1998) (citing *Ramos v. Lamm*, 713 F.2d 546, 556 (10th Cir. 1983)).

Traditional means of ascertaining reasonableness. Typically, fees are calculated by taking the reasonable hours expended multiplied by the hourly rate in the community. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The product of that computation is the "lodestar amount" of a fee. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482,

1493 (10th Cir. 1994). Once an applicant for a fee has carried the burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be a reasonable fee as contemplated by Title VII. *Roberts*, 149 F.3d at 1111.

Factors to be considered in the “reasonableness” inquiry are (1) whether the tasks being billed “would normally be billed to a paying client,” (2) the number of hours spent on each task; (3) “the complexity of the case,” (4) the “number of reasonable strategies pursued,” (5) “the responses necessitated by the maneuvering of the other side,” and (6) “potential duplication of services” by multiple lawyers. *Robison v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998) (*citing Ramos*, 713 F.2d at 555).

The “reasonable hourly rate” rate should also take into account evidence of what the attorneys would be able to charge working in the civil rights field. *Gragert v. Lake*, 2014 WL 3828705 at *1 (W.D.Okla. Aug. 4, 2014) (Cauthron, J.) (*citing Case v. Unified Sch. Dist. No. 233, Johnson Cnty., Kan.*, 157 F.3d 1243, 1257 (10th Cir. 1998)). The Court may also draw upon its own “experience and knowledge regarding an appropriate hourly rate.” *Gragert*, at *1 (*citing Lucero v. City of Trinidad*, 815 F.2d 1384, 1385 (10th Cir. 1987)).

3. Special considerations when calculating fees.

Out-of-town counsel. Where counsel is from out of town and the exigencies of the case require out of town counsel, courts award a rate

comparable to that of the attorneys' home market. *Malloy v. Monahan*, 73 F.3d 1012, 1018 (10th Cir. 1996) (citing *Blum v. Stinson*, 465 U.S. 886, 895 n.11 (1984)) ("reasonable hourly rate" used should be comparable to rates in the prevailing community charged by attorneys with relatively similar skill, experience, and reputation); *Mathur v. Bd. of Trustees of S. Ill. Univ.*, 317 F.3d 738, 744 (7th Cir. 2003) (out-of-town attorneys may be compensated at their home rate; out-of-town attorneys' home rate is appropriate in civil rights case where professor in employment discrimination case could not find local attorneys to represent him). Compensating out-of-town attorneys according to their home rates is especially important in civil rights cases given that "[f]ee-shifting statutes in civil rights legislation are intended to allow litigants access to attorneys who would otherwise be inaccessible, given the low retainers many plaintiffs can afford." *Mathur*, 317 F.3d at 743 (citing *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986); *Eckerhart*, 461 U.S. 424).

Degree of success obtained. The most critical factor in determining the reasonableness of the fee is "the degree of success obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (citing *Eckerhart*, 461 U.S. at 436). The lodestar figure may be "an excessive amount" for parties who achieve only limited success. *Id.* On the other hand, a party who achieves "excellent results" is entitled to "a fully compensatory fee." *Eckerhart*, 461 U.S. at 435.

4. Burdens and Limited Defenses to Fees Requests

The prevailing party has the burden of submitting evidence showing the claimed rates and hours expended on the litigation are reasonable. *Blum v. Stenson*, 465 U.S. 886, 897 (1984). “The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397–98 (9th Cir. 1992).

Awards of Title VII attorneys’ fees against a state or state subdivisions are not barred by the Eleventh Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976) (“given the express congressional authority for such an award in a case brought under Title VII, it follows necessarily [] that Congress’ exercise of power in this respect is also not barred by the Eleventh Amendment”).

B. EXPENSES

Federal Rule of Civil Procedure 54 creates a presumption that the district court will award costs to the prevailing party. *Zearan v. Diamond Broadcasting*, 203 F.3d 714, 722 (10th Cir. 2000). Further, 42 U.S.C. § 2000e-5(k), 28 U.S.C. § 1821, 28 U.S.C. § 1920, and 42 U.S.C. § 1988 create presumptions that taxable costs and reasonable expenses shall be awarded to the prevailing party. *See, e.g., Barrett v. Salt Lake Cnty.*, 754 F.3d 864, 870 (10th Cir. 2014) (observing standard for compensable fees and expenses under

Title VII's 42 U.S.C. § 2000e-5(k) is roughly the same as those under 42 U.S.C. § 1988); *Ramos*, 713 F.2d at 559 (itemized expenses not normally absorbed as part of law firm overhead may be reimbursed under 42 U.S.C. § 1988).

III. LOADSTAR ATTORNEYS' FEES

Tudor has expended diligent efforts identifying timekeepers who have worked on this matter, their backgrounds, and their hourly rates. The hourly rates charged are reasonable. In support thereof, Tudor proffers declarations from Ezra Young (Exhibit 1), Brittany Novotny (Exhibit 2), and Marie E. Galindo (Exhibit 3). In applying those rates to the hours worked, the total fees claimed are \$723,913.50. By firm, the fees are broken down as follows:

FIRM	HOURS	FEES
Law Firm of Ezra Young	1,054.6	\$569,740.00
Law Office of Marie E. Galindo	102	\$30,600.00
National Litigation Law Group	129.7	\$38,910.00
Lewis, Feinberg, Lee, and Jackson	227.20	\$84,663.50
Total:		\$723,913.50

In further support, Tudor proffers detailed, itemized bills of fees. *See* Exhibit 1 at ex. A (Young Firm); Exhibit 1 at ex. B (LFLJ Firm); Exhibit 2 at ex. A (National Litigation Law Group); Exhibit 3 at ex. A (Galindo Firm).

The fees are particularly appropriate as Tudor was unable to find a local law firm to handle her case alone (Exhibit 1 ¶ 57(a)); this case was taken on a contingency and Tudor lacked the means to compensate counsel for the work

required out-of-pocket (*id.*); the legal work necessitated special expertise (*id.* ¶¶ 32–35, 39(c), 57(b)); and some of the firms involved had to travel a significant distance to meet with Tudor and attend depositions, settlement conferences, court hearings, and trial (*id.* ¶ 51). *See, e.g., Ramos*, 713 F.2d at 555 (where there are unusual circumstances or specialized skills are need in a civil rights case, hourly rates of out-of-town counsel’s home market may be used).

IV. REQUEST FOR MULTIPLIER

Tudor also respectfully requests that the Court apply an appropriate multiplier to the attorneys’ fees sought. Given the unique circumstances of this case, the outcome, and pertinent case law, Tudor requests that the fees be multiplied by a factor of 1.5, with total fees after the multiplier is applied broken down as follows:

FIRM	FEES
Law Firm of Ezra Young	\$854,610.00
Law Office of Marie E. Galindo	\$45,900.00
National Litigation Law Group	\$58,365.00
Lewis, Feinberg, Lee, and Jackson	\$126,995.25
Total:	\$1,085,870.25

A multiplier of 1.5 is appropriate in this case for several reasons.

A. Extraordinary Results

This case falls squarely in line with precedents recognizing that application of a multiplier is appropriate where attorneys obtain “excellent

results” in civil rights cases. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010) (“superior attorney performance” merits multiplier); *Eckerhart*, 461 U.S. at 435 (“Where a plaintiff has obtained excellent results, [her] attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.”); *Ramos*, 713 F.2d at 557 (exceptional success justifies an enhanced fee may be based upon the performance of counsel, total victory, or establishment of significant new law).

Tudor secured extraordinary results in this case. Among other things, Tudor deftly navigated an ever-shifting and precarious litigation landscape, fending off novel disputes, survived multiple dispositive motions which garnered national attention, collaterally attacked a nationwide injunction to preserve her interests in this case which ultimately freed up the United States to secure substantial systemic injunctive relief, prevailed at a first of its kind jury trial with a historic damages award, and in large part secured much of the substantive relief she sought. No similar case has overcome similar obstacles let alone secured such a successful result. Application of a multiplier is appropriate.

B. Defendants’ Recalcitrance

Defendants’ aggressive defense of this case also merits application of a multiplier. Though a party to a lawsuit is entitled to defend itself, “unremitting

recalcitrance,” especially in defense of a civil rights action, is fertile grounds for enhancing a fee award. *See, e.g., Wells v. Hutchinson*, 499 F.Supp. 174, 211–212 (E.D.Tex. 1980) (“The unremitting recalcitrance of defendants in this lawsuit and the prospect of receiving no fee at all for handling the lawsuit also makes appropriate an enhanced award to plaintiff’s attorney”; granting multiplier by a factor of two); *Martino v. Carey*, 568 F.Supp. 848, 852 (D.Or. 1983) (applying a multiplier of 1.6 in light of Defendants’ repeated refusals to compromise, confer, and “[t]ime [] needlessly consumed in petitioning the court for assistance” due to Defendants’ tactics).

As detailed at length in the declarations of counsel (Exhibits 1, 2, and 3)—and as otherwise reflected in the record—Defendants displayed a high degree of recalcitrance throughout these proceedings going both far beyond the norms of defense practice and creating otherwise unnecessary work for Tudor’s counsel and erecting unreasonable barriers to continued prosecution.

C. Risk of Delay in Payment

Application of a multiplier is also appropriate given that Tudor’s private counsel risked and stand to risk far into the future significant delay in payment due to Defendants’ litigation tactics.

All of Tudor’s private attorneys took on this matter on a contingency fee basis and all faced the real risk of not prevailing due to the novel nature of this case. *See, e.g., Exhibit 1 ¶¶ 56, 57(a)* (explaining risk of not prevailing in this

case). Due to that arrangement, private counsel's entitlement to fees depended on their success and delayed by several years. Delay and risk of nonpayment attendant to a contingency arrangement merits application of a multiplier. *See, e.g., Missouri v. Jenkins by Agyei*, 491 U.S. 274, 282 (1989). Moreover, the "real risk of not prevailing" given the difficult legal landscape coupled with the contingency arrangement of this case warrants a multiplier. *See, e.g., Homeward Bound, Inc. v. Hissom Memorial Center*, 963 F.2d 1352, 1360 (10th Cir. 1992).

The Supreme Court has recognized that though most cases taken on a contingency basis entail a delay in payment to attorneys, there are rare cases where delay in resolution is unjustifiably caused by defendants thereby supporting an enhancement of the attorneys' fees award. *Perdue*, 559 U.S. at 556 ("an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense").

There is abundant evidence in the record, in addition to other evidence of which this Court may take judicial notice, supporting a finding of needless delay caused by Defendants. As one notable example, Defendants' foray into *Texas v. US* unreasonably unjustifiably caused a delay in this case of nearly seven months, pushing back the scheduled trial one-calendar year. Additionally, Defendants' plans to appeal the jury verdict to the Tenth Circuit

(see, e.g., ECF No. 270 at 25), will sow further delay in payment of fees to Tudor's counsel.

IV. AMOUNT OF EXPENSES

Concurrent to filing the instant motion, Tudor submitted a Bill of Costs seeking payment of costs properly taxable (see ECF No. 299). In addition to those costs, Tudor further requests reimbursement of expenses related to the prosecution of this case totaling \$21,453.00. An itemized summary of expenses sought is appended hereto. *See* Exhibit 1 at Ex.A (Young Firm costs); Exhibit 1 at Ex.B (LFLJ costs); Exhibit 3 at Ex.B (Galindo Firm costs). A summary of expenses broken down by firm is as follows:

FIRM	EXPENSES
Law Firm of Ezra Young	\$12,650.64
Law Office of Marie E. Galindo	\$5,085.78
National Litigation Law Group	\$0
Lewis, Feinberg, Lee, and Jackson	\$3,716.58
Total:	\$21,453.00

The costs for which Tudor seeks reimbursement are wholly reasonable and were necessary for the prosecution of this case.

A. Availability of Reasonable Expenses

Tenth Circuit precedent recognizes that Tudor, as the prevailing party, may be awarded out-of-pocket expenses that are otherwise not taxable as costs. Reasonable out-of-pocket expenses are compensable because they are conceived "being included in the concept of attorney's fees as 'incidental and

necessary expenses incurred in furnishing effective and competent representation’.” *Brown v. Gray*, 227 F.3d 1278, 1297 (10th Cir. 2000) (*quoting* 122 Cong. Rec. H12160 (daily ed. Oct. 1, 1976) (statement of Rep. Drinan). Thus, “[i]tems that are normally itemized and billed in addition to the hourly rate should be included in fee allowances in civil rights cases if reasonable in amount.” *Ramos*, 713 F.2d at 559.

B. Expenses Sought Are Reasonable

Tudor seeks reasonable out-of-pocket expenses for items that her attorneys typically bill to paying clients and which were necessarily incurred in the prosecution of this case.

1. LFLJ Firm Expenses

Tudor seeks reasonable expenses of \$3,716.58 incurred by the LFLJ Firm in the course of its representation of Tudor during the EEOC proceedings. The expenses incurred by the LFLJ Firm are itemized and appended hereto (see Exhibit 1 at Ex.D).

Among other things, the LFLJ Firm incurred expenses for attorney travel to and within Oklahoma to conduct pre-litigation interviews in 2014, meals and lodging during the same, as well as printing, postage, and research costs incurred during the representation. *See* Exhibit 1 at Ex.D. Such expenses are reasonable. *See, e.g., Sussman v. Patterson*, 108 F.3d 1206, 1213 (10th Cir. 1997) (imposition of cost items such as photocopying, mileage, meals, and

postage proper expenses so long as typically charged to clients in the relevant community).

2. Young Firm and Galindo Firm Expenses

Tudor also seeks reasonable expenses of \$12,650.64 incurred by the Young Firm and \$5,085.78 incurred by the Galindo Firm in the course of their representation. The expenses incurred by the Young Firm are itemized and appended hereto (see Exhibit 1 at Ex.B). The expenses incurred by the Galindo Firm are itemized and appended hereto (see Exhibit 3 at Ex.B).

Collectively, the Young Firm and Galindo Firm incurred reasonable expenses including: shipping of discovery production and trial exhibits to other parties; office supplies purchased for out-of-office work; attorney travel to and within Oklahoma and Texas for depositions, hearings, trial preparation, witness preparation, and trial; attorney per diems in connection with travel within Oklahoma and Texas for depositions, hearings, and trial; attorney lodging in connection to depositions, hearings, trial preparation, witness preparation, and trial; expert witness fees and expenses; and fact witness lodging and parking in connection with trial.

Shipping. Shipping expenses were also necessarily incurred in this matter and thus are reasonable. For example, Tudor's counsel shipped hard copies of discovery production to the parties in September 2017—hard copy service was a condition demanded by Defendants at an earlier stage of this

litigation (Exhibit 1 ¶ 50(a)). Additionally, on the eve of trial, Tudor's counsel shipped Defendants a USB drive containing her marked trial exhibits in response to Defendants' representation that they desired electronic copies but could not otherwise access them through alternative virtual share mechanisms (Exhibit 1 ¶ 50(b)). Because shipping of the aforementioned items was done at Defendants request and was otherwise necessary to the prosecution of this case, they are reasonable expenses. *See, e.g., Wirtz v. Kans. Farm Bureau Servs., Inc.*, 355 F.Supp.2d 1190, 1207 (D.Kans. 2005) (deeming postage and delivery charges as properly compensable in Title VII action).

Attorney travel, lodging, and per diems. Travel and lodging was necessary for Tudor's out-of-town counsel to conduct to attend necessary depositions, hearings, multiple settlement conferences, conduct in person trial preparations, meet with witnesses, and to attend the trial (Exhibit 1 ¶ 51). Because Tudor's out-of-town counsel possess special expertise in the unique issues involved in this case (see, e.g., Exhibit 1 ¶¶ 32–35, 39) and Tudor was unable to secure all local trial counsel (see, e.g., Exhibit 1 ¶ 57(b)), these expenses should be recoverable as part of the attorney fee award. *See, e.g., Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1180 (10th Cir. 2005) (*citing Bee v. Greaves*, 910 F.2d 686, 690 (10th Cir. 1990) (recognizing that counsel's travel and lodging expenses may be recovered as part of attorney fee award where, in a civil rights case, those expenses would normally be billed to private client));

D.H. v. Ponca City Indep't Sch. Dist. No. 71, 2007 WL 2670105 at *3 (N.D.Okla. Sept. 7, 2007) (out-of-town counsel's high level of expertise in substantive issue area supports award of travel expenses).

Expert witness fees and expenses. Dr. Tudor privately retained two experts in September 2017—Dr. Robert Parker and Dr. George Brown—whom were formerly retained by the United States. Private retention was necessary due to the United States settling its own claims immediately prior to Tudor fending off Defendants' motion for summary judgment and the subsequent trial. Under the contract with Dr. Parker, no fees were paid but Tudor was obliged to cover the costs of his travel and expenses for deposition and trial testimony. Under the contract with Dr. Brown, a retainer of \$1,000 was paid and Tudor was obliged to pay a per hour rate fee as well as expenses for deposition and trial testimony (Exhibit 1 ¶ 52(b)).

Tudor prepared both Dr. Brown and Dr. Parker for scheduled depositions (which Defendants later cancelled) as well as prepared both for the trial, at which Dr. Parker testified and for which he incurred travel, lodging, and meal expenses. Dr. Parker's expenses are thus properly coverable. *See, e.g., Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908, 911 (7th Cir. 1986) (observing expert witness fees taxable where expert was important to prevailing party's case); *Czarniak v. 20/20 Institute, L.L.C.*, 2013 WL 3728805 at *3 (D.Colo. July 15, 2013) (holding that monies paid to witnesses

to cover private vehicle travel are taxable pursuant to 28 U.S.C. § 1821(c)(2); holding common carrier travel expenses taxable pursuant to 28 U.S.C. § 1821(c)(1)).

Though Dr. Brown did not testify at trial, Tudor paid Dr. Brown for his services and expenses incurred up through the eve of trial, at which point Defendants conceded the points regarding the meaning of “sex” Brown was retained to testify about. *See* ECF No. 225 at 7:22–23; ECF No. 224 (related order). Retention of Dr. Brown was thus a necessary part of Tudor’s trial strategy and is recoverable. *See, e.g., Wehr v. Burroughs Corp.*, 477 F.Supp. 1012 (E.D.Pa. 1979), *aff’d on other grounds*, 619 F.2d 276 (3d Cir. 1980) (non-testifying witness fees taxable where testimony rendered unnecessary by occurrence of extrinsic circumstances, such as when stipulation of counsel makes testimony unnecessary). Reimbursement of Brown’s nonrefundable airfare to Oklahoma City, which was purchased on the assumption that he would testify at trial, is also appropriate because Defendants’ strategy of electing at the last minute to no longer challenge the issues on which Brown was set to testify obviated his testimony. Due to these unique circumstances, Brown’s airfare is recoverable. *Vorburger v. Central Ga. Ry. Co.*, 47 F.R.D. 571, 572 (M.D.Ala. 1969) (taxing as costs non-testifying witnesses attendance fees where opposing side’s testimony at trial obviated need for non-testifying witnesses).

Fact witness lodging and parking in connection with trial. Expenses were also incurred in connection with the lodging and lodging and overnight parking for two fact witnesses slated to testify at trial—Ms. Mindy House and Dr. William Fridley. As to Ms. House, she requested lodging from counsel so that she could safely make it to court on time the day she testified (Exhibit 1 ¶ 53(a)). This is a proper expense insofar as the Court deems it one typically billed to private clients in non-contingency matters. *Cf. Bee*, 910 F.2d at 690.

As to Dr. Fridley, a rebuttal witness, his lodging and overnight parking are reasonable because Tudor's counsel anticipated calling him if any one of several defense witnesses had been called at trial (Exhibit 1 ¶53(b)). Because Defendants elected to not disclose to Tudor's counsel which witnesses they would call and threatened to call others at the last minute, Fridley spent two days in the courthouse (and one overnight in Oklahoma City) waiting to be called to testify as a rebuttal witness (*id.*). Ultimately, the potential defense witnesses whose testimony Fridley was prepared to rebut were not called by Defendants, obviating his testimony. Under these circumstances, Fridley's expenses are reasonable. *See, e.g., Vorburger*, 47 F.R.D. at 572 (non-testifying witnesses attendance fees proper where opposing side's testimony at trial obviated need for non-testifying witnesses).

CONCLUSION

Based on the foregoing, Dr. Tudor respectfully requests recovery of lode start attorneys' fees in the amount of \$723,913.50, application of a multiplier of 1.5 bringing total fees to \$1,085,870.25, and expenses in the amount of \$21,453.00.

Dated: June 20, 2018

/s/ Ezra Young
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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)