

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

Case No.: 9:18-cv-80771-RLR

ROBERT W. OTTO, PH.D., LMFT,
individually ,and on behalf of his patients,
JULIE H. HAMILTON, PH.D., LMFT,
individually and on behalf of her patients,

Plaintiffs,

v.

CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA,

Defendants.

**PALM BEACH COUNTY’S RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION
FOR ATTORNEY’S FEES AND NON-TAXABLE EXPENSES AND COSTS.**

Defendant, Palm Beach County (“the County”) by and through its undersigned counsel, and pursuant to S.D. Fla. Local R. 7.3, files its Response in Opposition to Plaintiffs’ Motion for Attorney’s Fees (the “Fee Motion”) (DE 221) and states as follows:

I. GENERAL LEGAL STANDARD – REASONABLE ATTORNEYS’ FEES.

When determining the reasonableness of attorney's fees, courts begin by multiplying a reasonable hourly rate by the number of hours reasonably expended. Norman v. Housing Auth. of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The result of that calculation is known as the lodestar, See id. at 1301-02, which is “strongly presumed to be reasonable.” Rodriguez v. Molina Healthcare Inc., 806 F. App'x 797, 804 (11th Cir. 2020) (citations omitted).

The party seeking an award of fees has the burden of documenting the hours incurred and the applicable hourly rates. Norman, 836 F.2d at 1303 (citing Hensley, 461 U.S. at 437). Fee

applicants are required to exercise billing judgment and to exclude entries that are excessive, redundant, or otherwise unnecessary. Am. Civil Liberties Union v. Barnes, 168 F.3d 423, 428 (11th Cir. 1999) (citing Hensley, 461 U.S. at 434).

If fee applicants fail to exercise billing judgment, courts must do it for them. Id. The level of specificity required by district courts is proportional to the specificity of the fee opponent’s objections. In re Home Depot Inc., 931 F.3d 1065, 1089 (11th Cir. 2019) (“[W]here specific objections are made a court's order should consist of more than conclusory statements The more specific the objections to a fee application are, the more specific the findings and reasons for rejecting those objections can be.”) (quoting Barnes, 168 F.3d at 428–29.) “Put differently, if a party objects to a subset of hours as unreasonable, the court should respond to that objection.” Id.

II. PLAINTIFFS’ COUNSEL’S HOURLY RATES DO NOT REFLECT REASONABLE RATES WITHIN THE SOUTH FLORIDA LEGAL COMMUNITY FOR ATTORNEYS OF SIMILAR EXPERIENCE.

Plaintiffs’ counsel seeks the following hourly rates: Matthew D. Staver (35 years of experience) - \$760; Mary E. McAlister (33 years) - \$700; Horatio G. Mihet (21 years) - \$700; Roger K. Gannam (23 years) - \$700; Richard L. Mast (13 years) - \$625; Daniel J. Schmid (11 years) - \$625; law clerk Daniel Piedra (7 years) - \$150; and paralegal Jill M. Schmid - \$150. With the exception of paralegal Ms. Schmid and law clerk Mr. Piedra, whose rates the County does not oppose, the rest of opposing counsel’s hourly rates are unreasonable—not only within this locality, but also compared to the rates they themselves have sought previously for litigating a nearly identical case.

As initial matter, neither Mr. Mast nor Mr. Schmid are entitled to the rates they seek because neither one was admitted to practice in this Court. Under Rule 4(a) of the Court’s Rules

Governing the Admission, Practice, Peer Review, and Discipline of Attorneys, “only members of the bar of this Court may appear as attorneys before this Court.” Alternatively, under Rule 4(b) an attorney can request admission *pro hac vice*. Mr. Mast and Mr. Schmid both failed to avail themselves to either form of admission. The County notes that Mr. Mihet, in his sworn declaration in support of the Plaintiffs’ Motion for Fees has misrepresented to this Court that Mr. Schmid is admitted to appear in this case *pro hac vice*. (DE 221-1, p. 8). A review of the docket, however, makes clear that Mr. Schmid never sought *pro hac vice* admission.

As non-admitted attorneys, Ms. McAlister and Mr. Schmid are properly awarded a paralegal’s hourly rate. Zech v. Comm’r of Soc. Sec., 680 F. App’x 858, 860-61 (11th Cir. 2017); Marcum v. Kijakazi, 3:19-CV-959-JRK, 2021 WL 3190545, at *2 (M.D. Fla. July 28, 2021); Herfield v. Saul, 16-CIV-80077-RAR, 2020 WL 9460213, at *3 (S.D. Fla. Jan. 14, 2020), aff’d sub nom. Herfield v. Comm’r, Soc. Sec. Admin., 839 Fed. Appx. 322 (11th Cir. 2020) (adopting magistrate’s finding that “non-admitted attorneys should not enjoy the benefits and privileges of practicing before this Court without putting forth the effort of becoming a member of the bar of this District, or at the very least, seeking *pro hac vice* admission”). Mr. Mast and Mr. Schmid should receive the same \$150-per-hour rate that Plaintiffs have deemed reasonable for paralegal Schmid.¹

As for the remaining attorneys who are admitted in this Court, their claimed rates greatly exceed those normally awarded to attorneys with similar experience. A reasonable hourly rate is based on the “prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation.” Norman, 836 F.2d at 1299. The “relevant market” for this purpose is “the place where the case is filed.” Barnes, 168 F.3d at

¹ Law clerk Piedra is also a non-admitted attorney, but as he is only seeking a paralegal’s rate to begin with the County does not need to oppose it.

437 (quoting Cullens v. Ga. Dep't of Transp., 29 F.3d 1489, 1494 (11th Cir. 1994)). The relevant market in this case is not the Southern District in general; this Court has found that Palm Beach County “comprises a distinct legal market” within the District. CityPlace Retail, L.L.C. v. Wells Fargo Bank, N.A., 18-CV-81689, 2021 WL 3361172, at *3 (S.D. Fla. Jan. 12, 2021).

This Court has further explained that:

In determining where a given rate falls within local ranges, fee awards are not designed to compensate a party for premium billing and premium level services. “Even if a party chooses to employ counsel of unusual skill and experience, the court awards only the fee necessary to secure reasonably competent counsel.”

HSBC Bank USA, Nat'l Ass'n as Tr. for Holders of Nomura Home Equity Loan, Inc., Home Equity Loan Tr., Series 2007-1 v. Siskind, 12-10055-CIV, 2013 WL 12383213, at *4 (S.D. Fla. Feb. 14, 2013) (internal citations omitted). As the Barnes Court stated, a “prevailing plaintiff is not entitled to have the losing party pay for an attorney with the most experience on a given legal issue, regardless of price, but only for one with reasonable expertise at the market rate.” 168 F.3d at 437. Nor is the reasonable hourly rate intended to “produce a windfall to that attorney.” Hermosilla v. Coca-Cola Co., 10-21418-CIV, 2011 WL 9364952, at *8 (S.D. Fla. July 15, 2011), aff'd, 492 Fed. Appx. 73 (11th Cir. 2012). The reasonable hourly rate is only “designed to provide adequate compensation that is reasonable to bill to one's adversary irrespective of the skill, reputation or experience of counsel.” Id. at *10.

As such, the Court must “step[] into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to ligate the case effectively.” Id. See also Cruz v. Arnold, 10-23048-CIV, 2012 WL 13075614, at *6 (S.D. Fla. Feb. 13, 2012) (courts must reduce hourly rates so they are “reflective of what would be appropriate to secure competent legal counsel in the relevant South Florida legal community”). Put another way, “Courts are not authorized to be generous with the money of others, and it is as much the duty of courts to see that excessive fees

and expenses are not awarded as it is to see that an adequate amount is awarded.” Barnes, 168 F.3d at 428. See also Marchisio v. Carrington Mtg. Servs., LLC, 14-14011-CIV, 2020 WL 4350725, at *6 (S.D. Fla. July 29, 2020) (“The Plaintiffs were free to litigate their lawsuit how they saw fit. Their litigation strategy ultimately proved fruitful. . . . That does not mean, however, that they may bill the Defendant carte blanche for their attorney fees”).

In undertaking this analysis in the present case, it should be noted that opposing counsel’s firm, Liberty Counsel, does not charge its clients. (D.E. 221-1 at 2.) See also Liberty Counsel - Partner with a Financially Responsible Ministry, <https://lc.org/Financial> (Liberty Counsel “does not charge clients for representation”). As such, the rates they seek here are not based on any contract, but are simply their own estimate of what they believe is reasonable in this market—an estimation that is significantly excessive. Mr. Staver’s requested hourly rate of \$760 based on 35 years of experience; Mr. Gannam’s rate of \$700 based on 23 years; Mr. Mihet’s rate of \$700 based on 21 years; Mr. Mast’s rate of \$625 based on 13 years; and Mr. Schmid’s rate of \$625 based on 11 years are all well outside the rates normally awarded by this Court to attorneys of similar experience both in Palm Beach County and the rest of the District. As examples:

- Richardson v. Fla. Drawbridges Inc., 21-CV-80803, 2023 WL 2251397, at *9 (S.D. Fla. Feb. 27, 2023) (reducing hourly rates of attorneys with 11 years’ experience from \$400 to \$350);
- Maraist Law Firm, P.A. v. Coates, 21-CV-81467, 2022 WL 18495554, at *9 (S.D. Fla. Nov. 30, 2022), report and recommendation adopted sub nom., Maraist Law Firm v. Rose, 21-81467-CIV, 2023 WL 1100768 (S.D. Fla. Jan. 30, 2023) (finding hourly rate of \$595 for attorney with 31 years of experience to be reasonable);
- Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 15-60185-CIV, 2022 WL 18356156, at *3 (S.D. Fla. Oct. 21, 2022), report and recommendation adopted, 15-60185-CIV, 2022 WL 17728980 (S.D. Fla. Dec. 16, 2022) (reducing rates of attorneys with 36 years’ experience from \$785 to \$500; rate of attorney 28 years’ experience from \$675 to \$450; and rate of attorney with 22 years’ experience from \$610 to \$375);
- O’Laughlin v. Palm Beach Cty., 19-80701-CIV, 2022 WL 16924182, at *8 (S.D. Fla. Oct. 26, 2022), report and recommendation adopted, 19-80701-CIV, 2022 WL 16921843

(S.D. Fla. Nov. 14, 2022) (reducing rate of attorney with more than 37 years' experience from \$600 to \$575);

- Walker v. Grampa's Real Estate Inc., 20-CV-61557, 2022 WL 2789967, at *3 (S.D. Fla. June 29, 2022), report and recommendation adopted, 0:20-CV-61557-WPD, 2022 WL 2788498 (S.D. Fla. July 15, 2022) (reducing rate of attorney with 12 years' experience from \$400 to \$375).
- Valle v. AA & K Restoration Grp., LLC, 119CV20873KMMBECERRA, 2022 WL 2307078, at *3 (S.D. Fla. Feb. 3, 2022) (finding \$400 hourly rate for attorney with 31 years' experience, much of in federal civil rights cases, to be reasonable);
- Pierre-Louis v. Baggage Airline Guest Servs., Inc., 19-CV-61306-RAR, 2021 WL 3710139, at *13 (S.D. Fla. Aug. 4, 2021), report and recommendation adopted, 19-CV-61306-RAR, 2021 WL 3709265 (S.D. Fla. Aug. 20, 2021) (reducing hourly rates of attorney with 22 years' experience from \$500 to \$425; attorney with 21 years' experience from \$600 to \$425; and attorney with 20 years of experience from \$550 to \$350);
- Ramirez v. Supersonic of Fla., Inc., 20-21592-CIV, 2021 WL 2953628, at *2-3 (S.D. Fla. June 7, 2021), report and recommendation adopted, 20-21592-CIV, 2021 WL 2953194 (S.D. Fla. July 14, 2021) (reducing rate of attorney with over 30 years' experience from \$450 to \$400);
- Filippova v. Mogilevsky, No. 18-80044-CIV, 2019 WL 1216150, at *5 (S.D. Fla. Feb. 14, 2019) (finding \$500 rate for named partner with almost 40 years' experience to be reasonable);
- H.C. v. Bradshaw, 426 F. Supp. 3d 1266, 1277 (S.D. Fla. 2019) (finding \$500 rate for attorney with over 30 years' experience to be reasonable);
- Tillman v. Advanced Pub. Safety, Inc., 15-CV-81782, 2018 WL 5768570, at *4 (S.D. Fla. Nov. 2, 2018), report and recommendation adopted, 15-81782-CIV, 2018 WL 6424899 (S.D. Fla. Nov. 21, 2018) (finding \$500 hourly rate for attorney with 34 years' experience and \$375 for attorney with 13 years' experience to be reasonable).

To support their unreasonable rates, Plaintiff rely on a single case: DJ Lincoln Enterprises, Inc. v. Google, LLC, 20-CV-14159, 2022 WL 4287640, at *1 (S.D. Fla. July 28, 2022), report and recommendation adopted, 2:20-CV-14159, 2022 WL 3754182 (S.D. Fla. Aug. 30, 2022). First, it is unknown what hourly rates the Court may have awarded Google had the plaintiff made more than a perfunctory effort to actually contest them. Instead, the entirety of

plaintiff's minimal opposition to the hourly rates consisted of three sentences, a total of 80 words, and not a single legal citation or alternate rate for the Court to consider. (DJ Lincoln Enters., Inc. DE. 57 at 9.) Furthermore, the highest of the rates awarded in that case were for two New York attorneys, one of whom was an “accomplished litigator in the technology industry working with some of the largest technology companies in the world,” and the other who “[s]erved as lead counsel for both Google and YouTube on a number of high stakes matters.” 2022 WL 4287640, at *7.

The facts of this case do not justify the excessive hourly rates opposing counsel seeks. It was not, for example, a highly technical or complex case involving “sophisticated commercial litigation issues.” Marjam Supply Co. of Fla., LLC v. Pliteq, Inc., 1:15-CV-24363, 2021 WL 1200422, at *19 (S.D. Fla. Mar. 5, 2021), report and recommendation adopted, 15-CV-24363, 2021 WL 1198322 (S.D. Fla. Mar. 30, 2021). Nor was it “high-stakes ‘bet the company’ litigation.” Kleinman v. Wright, 18-80176-CV, 2020 WL 1980601, at *3 (S.D. Fla. Mar. 17, 2020).

Nevertheless, the Court need not rely just on its own case law or the Defendants’ arguments to find opposing counsel’s hourly rates unreasonable: it can also take the word of opposing counsel themselves. Ms. McAlister and Messrs. Gannam, Staver, Mihet and Schmid were all counsel for the plaintiffs in the Middle District of Florida case Vazzo v. City of Tampa, Florida, 415 F. Supp. 3d 1087 (M.D. Fla. 2019). Just like the present case, Vazzo was a challenge to an ordinance prohibiting conversion therapy. Plaintiffs were the prevailing parties in Vazzo and filed their Motion for Attorney’s Fees and Nontaxable Expenses (“the Vazzo Motion”) on November 1, 2019—while the present case was pending. (Vazzo D.E. 221). A copy of the Vazzo Motion has been filed as Exhibit 1.

The hourly rates Plaintiffs' counsel sought in Vazzo were as follows: **Mr. Staver - \$500; Mr. Gannam - \$425; Mr. Mihet - \$425; Ms. McAlister - \$375; and Mr. Schmid - \$300.** Those rates were attested to as reasonable in separate declarations filed by Mr. Mihet and another attorney, Daniel Woodring. (Vazzo D.E. 221 at 12; 223-1; 223-6) The Vazzo Motion was settled without court adjudication, so it is unknown if those rates would have been reduced. But what is known is that the rates opposing counsel claims here are *hundreds of dollars* more than those same attorneys' rates in Vazzo. In fact, Mr. Schmid's rate has more than doubled. A comparison of the hourly rates in these two cases is presented in the table below²:

Attorney	<u>Vazzo Hourly Rate</u>	<u>Otto Hourly Rate</u>	<u>Increase</u>
Matthew Staver	\$500	\$760	\$260 (52%)
Mary McAlister	\$375	\$700	\$325 (87%)
Horatio Mihet	\$425	\$700	\$275 (65%)
Roger Gannam	\$425	\$700	\$275 (65%)
Daniel Schmid	\$300	\$625	\$325 (108%)

Hillsborough County is similar enough to Palm Beach County as a major metropolitan area that the locality could not possibly account for the gross inflation of opposing counsel's hourly rates between the two cases.³ Nor would the passage of time allow for such a drastic difference. The Vazzo Motion was filed only three and a half years ago. It would be absurd for Plaintiffs' counsel to claim that every local attorney's rate has increased hundreds of dollars per hour in that short period of time.

² Although Mr. Mast and Mr. Schmidt should only be entitled to a paralegal's rate as discussed above, they are included in this table to further illustrate the wildly inappropriate fee hike Plaintiffs' counsel seeks to obtain across the board.²

³ Indeed, Palm Beach and Hillsborough are the third- and fourth-most populous counties in the State, respectively, both with populations exceeding 1.5 million. U.S. Census Quick Facts – Palm Beach County Florida, <https://www.census.gov/quickfacts/palmbeachcountyflorida>; U.S. Census Quick Facts – Hillsborough County Florida, <https://www.census.gov/quickfacts/hillsboroughcountyflorida>.

Another recent example of Plaintiff's counsel attesting to rates far below what they seek here, albeit out of the District, is Maryville Baptist Church, Inc. v. Beshear, No. 3:20-cv-00278-DJH-RSE, a Western District of Kentucky (Louisville) case. In the plaintiffs' fee petition filed on December 14, 2021—even more recently than Vazzo—Mr. Staver sought a rate of \$525, Messrs. Mihet and Gannam sought \$450, and Messrs. Mast and Schmid sought \$375. (Marvyille Baptist Church, Inc. D.E. 74, 74-1, 74-2.)

While attorneys' rates may increase over time, “the amount by which rates increase should be proportional and reasonable compared to the passage of time.” Pike v. Cty. Of San Bernardino, 2020 WL 1049912, at *5 (C.D. Cal. Jan. 27, 2020). Plaintiffs' counsel has provided no evidence that would support such an extreme increase in their rates in such a short period of time, nor would it even be feasible for them to do so. It is not as though the reasonable rates awarded by the Court have similarly spiked during the same brief time period.

In his declaration, Mr. Mihet attempts to justify the rates through a vague reference to “hav[ing] experience in determining the prevailing market rates” because he has handled “numerous litigated and non-litigated legal matters in South Florida, including in Palm Beach County, in both federal and state courts.” (DE 221-1 at 4-5.) Yet he provides no information as to how many cases he has actually litigated in Palm Beach County (or the District in general); when or how recently those cases were pending; how many were in state versus federal court; what the nature of those cases were; whether he obtained any fee awards; or how he knows what the market rates are. To the contrary, a CM/ECF search shows Mr. Mihet has only been counsel of record in just *four* other cases in this District: one filed in 2008, one in 2010, one in 2013 and one in 2015. A search of his Bar number on the Fifteenth Judicial Circuit's website shows that he has been counsel of record in just *three* cases, one filed in 2003, one in 2012 and one in 2014.

eCaseView, <https://appsgp.mypalmbeachclerk.com/eCaseView/>. Every one of the aforementioned cases terminated in 2016 or earlier, with the exception of a foreclosure that terminated in 2019.

These few and scattered cases, all of which terminated years before Mr. Mihet's declaration in this case, fail to establish his purported familiarity with the current prevailing market rate. Mackey v. Cal. High Patrol, CV 11-3560 DMG (JCX), 2018 WL 6137166, at *4 (C.D. Cal. Jan. 23, 2018) (finding that despite Mr. Mihet's attestations, he failed "to demonstrate that he has sufficient experience to competently render an opinion on the prevailing market rates relevant to the instant action"). Mr. Mihet cannot support Plaintiffs' substantially unreasonable rates through his experience, and he cannot support them through bare attestations that those rates are in fact reasonable. Valley v. Ocean Sky Limo, 82 F. Supp. 3d 1321, 1327 (S.D. Fla. 2015) ("Satisfactory evidence of the market rate requires more than the mere affidavit of the attorney performing the work." Evidence of reasonableness "may be adduced from charges of lawyers under similar circumstances or by opinion evidence.") (internal citations omitted). See also Mackey, 2018 WL 6137166, at *4 (reducing Liberty Counsel's rates where timekeeping attorneys' declarations "assert[ed] in conclusory fashion that their respective hourly rates are reasonable," which was of "limited weight ... because it does not explain why these proposed rates are commensurate with the prevailing market rates ... nor do they point to any cases in which they have been awarded comparable hourly rates."); E.E.O.C. v. Whirlpool Corp., 3:06-CV-0593, 2011 WL 3321291, at *4-5 (M.D. Tenn. Aug. 2, 2011) (Plaintiff's conclusory statement that hourly rates were in keeping with local market rate was insufficient where it "provide[d] no document support other than the affidavit of Plaintiff's counsel to substantial such a claim.").

Courts have disallowed rate-hikes far less substantial than what Plaintiffs are attempting here. See, e.g., Pike, 2020 WL 1049912, at *5 (finding three attorneys’ rate increases of 33%, 20% and 14% over two years unreasonable where no evidence established the increases “were due to changes in the prevailing market rates” and where “an additional two years of experience does not provide sufficient justification for raising rates so sharply in such a short time”) (internal citation omitted); O’Brien v. City of Benton Harbor, No. 1:14-CV-598, 2017 WL 700214, at *2 (W.D. Mich. Feb. 22, 2017) (finding rate increase of nearly 40% during two-and-a-half-year pendency of case unreasonable); Whirlpool Corp., 2011 WL 3321291, at *4-5 (reducing rate where, in part, attorney failed to justify “why or how she earned more than a 100 percent increase in her hourly billing rate during this litigation”); Dixon-Rollins v. Experian Info. Sols., Inc., No. CIV.A. 09-0646, 2010 WL 3734547, at *2 (E.D. Pa. Sept. 23, 2010) (“Even considering his increased experience, we find it unreasonable that his hourly rate grew 17 percent in one year.”); Elliott v. Metro. Life Ins. Co., No. CIV.A. 04-174-DLB, 2007 WL 4192001, at *5 (E.D. Ky. Nov. 13, 2007) (“[T]he plaintiff has offered no basis for the unexplained increase in hourly rates of most of her attorneys over the span of 8 months between the original and supplemental [fee] motion. Absent some proof to support the increase, the court declines to assume that the rates of those attorneys actually increased over such a short period.”)

Coupled with opposing counsel’s e-mailed threat to inflate their billing as retribution (discussed *infra*), these inflated rates unmoored from their past rates strongly suggests a punitive component to their fee request—or at the very least, an attempt to earn an improper windfall by billing rates and time in a manner that a paying client would never tolerate. Such abuse of the prevailing-party fee mechanism should not be rewarded or condoned. Plaintiffs’ counsel should receive hourly rates no higher than the following: Mr. Staver - \$525; Mr. Mihet - \$450; Ms.

McAlister - \$525; Mr. Gannam - \$450; Mr. Mast - \$150; Mr. Schmid - \$150; Mr. Piedra - \$150;
Ms. Schmid - \$150.

II. THE NUMBER OF REASONABLY COMPENSABLE HOURS IS SIGNIFICANTLY OVER-INFLATED.

A. Failure to Exercise Billing Judgment.

A party seeking attorney's fees is charged with proving that they exercised billing judgment in the computation of their hours. Counsel must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. . . . Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." Hensley 461 U.S. at 434 (emphasis in original).

Plaintiffs' counsel claim they exercised billing judgment, such as by not including the hours expended by two of their team of attorneys, or by purportedly excluding hours they determined to be duplicative, excessive, redundant or non-compensable. (DE 221 at 11.) However, at the same time they claim to have exercised billing judgment, they also argue they are entitled to compensation for *all* hours expended because they achieved "excellent results." (Id.) If these two contradictory positions do not raise suspicion about whether Plaintiff's counsel did in fact exercise the type of billing judgment required by Hensley, the Court need only look at their timesheets to have those suspicions confirmed. Due to Plaintiff's counsel's *lack* of billing judgment, the County in this Response has been forced to detail at length the copious instances of overstaffing, duplication of efforts, excessive hours spent, and indisputably non-compensable activities.

A proper showing of billing judgment requires more than a party stating they exercised billing judgment. "Billing judgment requires documentation of the hours charged and of the

hours written off as unproductive, excessive, or redundant.” Machado v. Da Vittorio, LLC, 09-23069-CIV, 2010 WL 2949618, at *5 (S.D. Fla. July 26, 2010) (quoting Saizan v. Delta Concrete Prods. Co., 448 F.3d 795, 799 (5th Cir.2006)). See also Nat’l Ass’n of Concerned Veterans v. Secy’ of Def., 675 F.2d 1319, 1334 (D.C. Cir. 1982) (vacating and remanding fee award where, in part, “[a]lthough the applicants state by affidavit that they exercised billing judgment in calculating the number of hours expended on the case there is no indication of how many hours were excluded”). There is no way to tell from Plaintiffs’ Motion how many hours were originally billed or excluded through their counsel’s purported exercise of billing judgment.

Moreover, while Plaintiffs’ counsel may have excluded two of their team’s hours from the fee request, there is likewise no way to tell how many hours those attorneys actually billed. Plaintiffs are already seeking compensation for *six attorneys*, so omitting what may only be a few hours spent by the seventh and eighth attorneys on the case is arguably just a fig leaf distracting from the excessive, redundant and non-compensable time billed by the rest of the team. Ultimately, though, there is no way to tell how many hours the seventh and eighth attorneys account for because Plaintiffs’ counsel has not provided sufficient proof of their reduction of hours.

Regardless of whatever effort Plaintiffs’ counsel claims to have made in keeping their hours down during the case, that does not allow them to bill clearly excessive, redundant, unnecessary or non-compensable hours in the records they *did* submit. Veasey v. Abbott, 2:13-CV-193, 2020 WL 9888360, at *19 (S.D. Tex. May 27, 2020), aff’d, 13 F.4th 362 (5th Cir. 2021) (“The Court credits Plaintiffs with having voluntarily engaged in copious deductions from their fee applications [But] it declines to consider their generosity as entitling them to an automatic ‘free pass’ regarding complaints directed to the remaining individual time entries.”).

At the same time Plaintiffs’ counsel claims to have exercised billing judgment (as they are required to do), they also seek to actually *charge* the County for doing so. In Mr. Mihet’s timesheets, he seeks compensation for a total of **11.6 hours** for “*exercising billing judgment.*” It of course defeats the purpose of exercising billing judgment to then bill for removing hours that cannot be billed in the first place.⁴ Plaintiffs’ counsel’s attempt to backdoor otherwise non-billable hours in this manner further demonstrates their *lack* of billing judgment as well as the questionable intent of their fee petition. A court should avoid awarding fees for time that shows “a lack of ‘billing judgment,’ and a hint that hours are being billed simply because it was assumed that the defendant would have to pay them.” Paramount Indus. Cos., Inc. v. Furniture & Carpetland, 885 F.2d 865, at *2 (4th Cir. 1989).

Finally, and perhaps as one of the most telling insights into the absolute lack of billing judgment exercised by the Plaintiffs’ counsel, the County would direct this Court’s attention to correspondence sent by Mr. Mihet to Defendants’ counsel on August 17, 2022. See Exhibit 2. Mr. Mihet, after informing the Defendants of an upward adjustment in the Plaintiff’s settlement demand to \$2,942,193.53, threatens the Defendants that “*any additional references to our clients as ‘conversion therapists’ (whether in court filings or in county meetings or resolutions) will have to be separately atoned for and compensated*” and adding that the Plaintiffs “remain eager to continue the litigation—in whatever form—until the City and the County see the Light.” He explains the upward adjustment as being based on the “\$10,000 ‘stubbornness’ or ‘we told you so’ or ‘you made us work on the weekend premium’ and \$10,000 ‘you just don’t get it’ premium

⁴ Esparza v. Kostmayer Constr., LLC, No. CV 15-4644, 2017 WL 4621107, at *4 (E.D. La. Sept. 26, 2017), report and recommendation adopted, 2017 WL 4574416 (E.D. La. Oct. 13, 2017) (“Plaintiffs cannot recover for the time their counsel spent compiling and reviewing bills for the purposes of exercising billing judgment.”); N.M. Turn Around v. City of Albuquerque, No. CV 11-00536 MV/RHS, 2013 WL 12330140, at *6 (D.N.M. May 22, 2013) (fee movant “should not reasonably bill its adversary for time spent eliminating excessive, redundant, or unnecessary fees”).

for each of the five times your clients have called our clients ‘conversion therapists’ in the last week.” See Exhibit 2.

Not only does this e-mail reveal a conscious intent to weaponize Plaintiffs’ billing—the very opposite of billing judgment—but Mr. Mihet also billed **.6** hours for drafting it, styling the description as “draft and send revised settlement demand to County and City,” and Mr. Schmid billed an additional **.7** for reviewing it. While the foregoing is perhaps the most flagrant example of Plaintiffs’ counsel’s abuse of the fee-shifting process, it is not the only one. This weaponization of attorney’s fees makes clear that this is a case where the Court must exercise billing judgment for Plaintiffs’ counsel. See Barnes, 168 F. 3d at 428.

B. Reduction for Excessive Time Spent Drafting “Cookie-Cutter” Documents.

Counsel’s pattern of overbilling is evident as early as the first pleading filed in this case. Plaintiffs’ attorneys claim to have spent over **105 hours** drafting the Complaint and the Motion for Preliminary Injunction (PI Motion). Ms. McAlister, Mr. Schmid and Mr. Mihet collectively billed 55.9 hours for drafting the Complaint. See Exhibit 3 (Time Drafting Complaint Chart). They billed 49.5 hours for drafting the PI Motion. See Exhibit 4 (Motion for PI Chart). However, such an expenditure of time was grossly excessive, and is highly suspect, in light of the fact that both documents are virtually identical to the Complaint and Motion for Preliminary Injunction filed in Vazzo, the case Plaintiffs’ counsel were already litigating in the Middle District.⁵

The Vazzo Complaint and PI Motion were filed on December 4, 2017, only 2 months before Plaintiffs’ counsel started drafting their Complaint and PI motion here. See Exhibit 5 (Vazzo Complaint, without Exhibits) and Exhibit 6 (Vazzo Motion without Exhibits). A side-by-side comparison reveals that large portions of the Otto documents were copied in their entirety

⁵ In fact, Mr. Mihet refers to the Vazzo case in his declaration as “related litigation challenging an almost identical ordinance in the City of Tampa, Florida.” (DE 221-1 at 9).

from the Vazzo documents. The County is including as Exhibit 7 and Exhibit 8 marked-up copies of the Otto Complaint and PI Motion. Language that is identical to the corresponding Vazzo documents is highlighted. As one can see, within the two Complaints, the introduction, general allegations, 7 out of the 8 counts, and the requested relief are largely identical all the way to the headings and bolded characters. The two Complaints even start with the same “[f]rom time immemorial, the relationship between clients and their licensed mental health professionals represented a sacred trust” preamble. See Exhibits 5 and 7. The similarities are even more stark within the PI Motion. Other than the inclusion of a table of contents, and an original paragraph here and there, it appears that most of the Otto PI motion was a cut and pasted from the Vazzo PI Motion. See Exhibits 6 and 8.

In light of the foregoing, the number of hours claimed by Plaintiffs’ counsel related to the preparation of the Complaint and PI Motion should be drastically reduced. Courts presented with the same challenge have frequently reduced claimed fees. See, e.g. Brother v. Miami Hotel Invs., Ltd., 341 F. Supp. 2d 1230, 1236 (S.D. Fla. 2004) (Where plaintiff’s counsel drafted a “cookie-cutter complaint” that was “virtually identical” to the “numerous other complaints filed by these attorneys,” as well as motions and stipulations that contained essentially boilerplate language, court reduced hours sought in fee application); Fox v. Cohen Ventures, LLC, Case No.: 08-81052-CIV, 2009 WL 1393348 (S.D. Fla. May 15, 2009) (reducing hours for drafting complaint and finding that “time spent drafting the Complaint should be extremely minimal given that Plaintiff’s counsel filed nearly identical complaints”).

It is certainly not uncommon for attorneys to re-use prior work product, however, unlike here the reduction in work is typically reflected in the amount of time billed to one’s clients. It is

difficult to imagine how three self-proclaimed constitutional law experts managed to spend 105 hours on documents that should have taken no more than 10-15 hours total to draft.

C. Reduction for Duplicative Time Entries: Depositions and Other Miscellaneous Tasks.

A reduction of fees is warranted if multiple attorneys “are unreasonably doing the same work.” Johnson v. Univ. Coll., 706 F.2d 1205, 1208 (11th Cir. 1983). Hours must be reduced when a court finds the case to have been unnecessarily overstaffed. Tiara Condo. Ass’n v. Marsh USA, Inc., 697 F. Supp. 2d 1349, 1366-67 (S.D. Fla. 2012).

Based on the foregoing principles, it is within this Court’s discretion to eliminate the hours billed when an attorney attended a deposition he did not take. See, e.g., Duckworth v. Whisenant, 97 F.3d 1393, 1398 (11th Cir. 1996) (subtracting half of attorneys’ hours spent for “mere attendance of depositions” without actually taking them); Oravec v. Sunny Isles Luxury Ventures, L.C., No. 04-22780-CIV, 2009 WL 6337121, at *21 (S.D. Fla. Jan. 12, 2009) (“When two attorneys . . . prepare for and attend the same deposition or mediation, the only time properly awardable is for the attorney who actively took or defended the deposition on behalf of the client or actively participated in the mediation.”).

Here, Mr. Gannam and Mr. Mihet both billed for preparation, travel, and attendance at depositions of Helene Hzvid, Shayna Ginsburg, Michael Woika, Robert Otto, and Julie Hamilton for a total of **152.9** hours. See Exhibit 9 (Duplicate Billing, Depositions). However, it was only Mr. Mihet who took and defended those depositions. Mr. Gannam did not utter a single word beyond putting his name on the record. Accordingly, the **152.9** total hours should be reduced in half, or in the alternative, be reduced only to reflect time billed by Mr. Mihet.

D. Reduction for Excessive Oral Argument Preparation.

Plaintiffs’ attorneys billed a total of **130 hours** preparing for oral argument at the Eleventh Circuit. See Exhibit 10 (Oral Argument Preparation). To be clear, these 130 hours do not include

research and writing of the actual briefs, nor did they include travel or attendance at oral argument. Instead, the 130 hours were additional hours spent on moot court, reviewing briefs and other materials, research, and outlining arguments. Spending such an extraordinary amount of time on preparation for an hour-long proceeding is more than excessive, especially in light of Plaintiffs' counsel's claimed expertise.

Courts presented with similar scenarios have reduced the hours billed. See, e.g., Planned Parenthood of Cent. N.J. v. Attorney Gen. of State of N.J., 297 F.3d 253, 269 (3d Cir. 2002); Diamond Shamrock Expl. Co. v. Hodel, No. CIV. A. 86-537, 1991 WL 148745, at *6 (E.D. La. July 24, 1991) (reducing hours for oral argument preparation, including rehearsal, because with the issues have been "briefed and re-briefed" already," plaintiff's counsel "must have been fully conversant with the issues to be addressed at oral argument prior to beginning these tasks").

A reasonable fee for hours spent preparing for a legal argument should be limited to hours reasonably necessary for a lawyer to become familiarized with the facts and the law pertaining to the issue to be argued, an analysis of the opponent's argument, and questions anticipated to be posed by the court. "Under the fee-shifting statute, the losing party is expected to pay for hours reasonably spent in the argument and its preparation, but not for excessive hours, or hours spent in learning or excessively rehearsing appellate advocacy." Maldonado v. Houstoun, 256 F.3d 181, 187 (3d Cir. 2001). See also Hash v. United States, No. 1:99-CV-00324-MHW, 2012 WL 1252624, at *15 (D. Idaho Apr. 13, 2012). Accordingly, the County would ask that the Court reduce these hours by 75% (to a total of 26 hours).

E. Reduction for Deficient Time Records: Block-Billing.

The County objects to **592.5 hours** on the ground that they are block-billed time entries. Exhibit 11 (Block billing). The party seeking attorney's fees must produce "meticulous,

contemporaneous time records that reveal for each lawyer whose fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks.” Simon v. Leaderscape, LLC, 565 F. Supp. 2d 1332, 1335 (S.D. Fla. 2008). A movant fails to meet that burden when it submits “block-billing”—i.e., the practice of “lumping together multiple tasks into a single entry of time,” Cardena v. Pacesetter Corp., 224 F.3d 1203, 1214 (10th Cir. 2000), “without separating the tasks into individual blocks or elaborating on the amount of time each task took.” Capone v. Aetna Life Ins. Co., 2010 WL 6029242, at *5 (N.D. Ga. 2010). The practice of block-billing is “inconsistent with an attorney’s obligation to ‘explain in discrete entries the nature of the work that they want a client or opposing party to pay them hundreds of dollars to perform.’” BJCC, LLC v. LeFevre, No. 8:09–CV–551–T–17EAJ, 2011 WL 5597305, at *4 (M.D. Fla. 2011) (quoting Kearney v. Auto-Owners Inc. Co., 713 F. Supp. 2d 1369, 1377-78 (M.D. Fla. 2010)).

Further, when non-compensable matters are lumped with compensable ones, as was often done in this case, it is difficult to determine how much time to exclude. See Kearney, 713 F. Supp. 2d at 1378 (“The Court cannot cleanly divide time, either, where one block of time contains compensable and non-compensable tasks.”). Block-billing also impedes the analysis of whether there was unreasonable duplication of work by attorneys—another significant problem in this case. Galvez v. Cuevas, No. 08-80378-CIV, 2009 WL 1024632 at *4 (S.D. Fla. 2009).

Here, there are 68 entries that are block-billed with a non-compensable clerical activity such as filing documents or preparing exhibits. See Exhibit 11. Other block-billed entries are coupled with vague descriptions such as “attention to” (21 entries) and “consider strategy” (29 entries). Id. An even larger number of block-billed entries include time associated with excessive strategy sessions, and are indicative of duplication of work. Specifically, 121 block-billed entries include “discuss with LC team” or “discuss with legal team.” Id.

It is the movant's burden to establish the reasonableness of their fees, and the use of block-billing in this case fails to carry that burden. Some courts presented with the issue of block-billing have disallowed entire amounts. See e.g., Brother v. Miami Hotel Inv., Ltd., 341 F. Supp. 2d 1230, 1237 (S.D. Fla. 2004). ("This mass burial system which effectively masks the ability to ascertain how much time was spent on the disparate tasks, and which makes it impossible to remove improperly billed items from the billing entry, puts a burden on the Court which it need not shoulder; thus Plaintiff has failed to carry its burden of showing the reasonableness of those items which are not properly delineated. Under such circumstances, the Court may disallow the entire amount.") See also PNC Bank, N.A. v. Starlight Properties & Holdings, LLC, No. 6:13-cv-408-Orl-36KRS, 2014 WL 2574040, at *12 (M.D. Fla. 2014) (disallowing block-billed entries). Other courts have applied an across-the-board reduction of block-billed entries. See e.g., Rubenstein v. Fla. Bar, No. 14-cv-20786, 2015 WL 1470633, at *4 (S.D. Fla. 2015) (reducing block-billed hours by 30%); Anish v. Nat'l Sec. Corp., No. 10-80330-Civ, 2014 WL 5034720, at *3 (S.D. Fla. 2014) (reducing hours by 75% for reasons including "plethora of block billing"); Bujanowski v. Kocontes, No. 8:08-CV-0390-T-33EAJ, 2009 WL 1564263, at *4 (M.D. Fla. 2009) (reducing block-billed hours by 30%).

Due to the frequent use of block-billing, Plaintiffs have not met their burden of showing the reasonableness of those hours. The Court is without proper evidence to support an award of fees for them. Indeed, the block-billing is so persistent that the Court should disallow those hours entirely or at least drastically reduce them. This is especially appropriate given that opposing counsel's level of experience imputes the knowledge of how to properly bill.

F. Reduction for Deficient Time Records: Vague Time Entries.

A substantial number of Plaintiffs' counsel's billing entries do not sufficiently describe the nature of the work performed. Attorneys are required to "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." Hensley, 461 U.S. at 437. Time sheets must be sufficiently detailed to allow the court to assess whether hours were reasonably expended and necessary. Id. at 433; Mannings v. Sch. Bd. of Hillsborough Cty., 851 F. Supp. 436, 443-444 (M.D. Fla. 1994). Where hours are not documented sufficiently, awards may be reduced by the district court accordingly. Hensley at 433.

As already discussed in the context of block-billing, there are many instances where Plaintiffs' counsel were billing for "considering strategy" or "attention to" without much more detail of what that means in terms of actual activity. See Exhibit 11. Moreover, hundreds of hours were spent on "research" and "drafting" and "preparation" without any additional details that would allow this Court to ascertain what counsel are researching or what "preparation" entails. Because many of the vague entries are also objectionable on other grounds, in an effort to avoid confusion the County did not prepare a separate chart. Notwithstanding, the vagueness problem should not be ignored by this Court in its overall determination of the appropriate fee award.

G. Reductions for Other Categorically Non-Compensable Activities.

Plaintiffs' counsel's billing must be reduced further because they include activities that are plainly non-compensable. Prevailing in a case does not give carte blanche to bill for any and all activity that occurred during the proceedings. "Not every activity of counsel is compensable" under § 1988. Meredith v. Jefferson County Bd. of Educ., No. 3:02CV-620-H, 2007 WL 3342282, at *2 (W.D. Ky. 2007). This is true no matter if the time spent on that activity may otherwise appear reasonable or minimal.

1. Time Accrued after the County's Offers of Judgment.

First and foremost, Plaintiffs impermissibly seek to be compensated for **105 hours** billed after the County's February 22, 2023, Offers of Judgment. See Exhibit 12, (Time Billed After Offers of Judgment). The plain language of the County's Offers, which the Plaintiffs accepted on March 3, 2023, (D.E. 203), states that the County would allow "the entry of judgment against it . . . in the amount of \$50,000.00 plus the County's pro rata share of Plaintiffs' costs (**including reasonable attorney's fees** when deemed to be a component of costs such as under 42 U.S.C. §1988 as determined by the court) **accrued to date for all** of [each Plaintiffs'] claims for relief." (D.E. 203 at Exhibits A and B) (emphasis added).

The interpretation of offers of judgment under Fed. R. Civ. P. 68 is guided by the application of traditional contract law principles, with the plain language of the offer being the determining factor. "Courts apply traditional principles of contract law to interpret offers of judgment made under Rule 68." Pope v. Lil Abner's Corp., 92 F. Supp. 2d 1327, 1327–28 (S.D. Fla. 2000) (quoting Johnson v. Univ. College of Univ. of Ala., 706 F.2d 1205, 1209 (11th Cir. 1983) (requiring a "meeting of the minds" for acceptance of an offer of judgment)). "The plain language of the offer dictates the result." Le v. Univ. of Pa., 321 F.3d 403, 409 (3d Cir. 2003). Here, the plain language of the Offers dictates that the Plaintiffs' overall claimed hours must be reduced by the 105 hours that accrued after February 22, 2023.

2. Time Spent on Clerical Work.

Plaintiffs' counsel's time entries are riddled with non-compensable clerical activities.⁶ See Exhibit 13 (Clerical Activities). However, attorneys may not bill for activities normally

⁶ Clerical tasks in Plaintiffs records include preparation of exhibits, filing documents, scheduling, reviewing their own time records, and contacting the court for status updates. However, none of these categories of clerical work are compensable:

- Filing documents. It is not attorney work to file documents. Squire v. Geico Gen. Ins. Co., No. 12–23315–CIV, 2013 WL 474705, at *6 (S.D. Fla. 2013) (disallowing hours for

handled by support staff. Tasks “of a clerical nature are not compensable as attorney’s fees.” Mobley v. Apfel, 104 F. Supp. 2d 1357, 1360 (M.D. Fla. 2000). Rather, they are “properly considered overhead costs.” Id. See also Machado v. Da Vittorio, LLC, NO. 09-23069-CIV, 2010 WL 2949618, at *3 (S.D. Fla. 2010); Caplan v. All Am. Auto Collision, Inc., No. 18-61120-CIV, 2019 WL 13084767, at *4 (S.D. Fla. Sept. 16, 2019), aff’d, 36 F.4th 1083 (11th Cir. 2022). Not even paralegals can recover fees for clerical work. Ortega v. Berryhill, No. 16-24697-CIV, 2017 WL 6026701, at *2 (S.D. Fla. Dec. 5, 2017) (“Purely clerical or secretarial tasks that require no legal skill or training . . . should not be billed at a paralegal rate regardless of who performs them.”). Accordingly, these non-compensable hours must be excluded from any fee award.

3. Time Spent Screening and Soliciting Potential Clients

It would appear from Plaintiffs’ counsel’s billing records that this was not a case where the named Plaintiffs reached out to counsel. Rather, it seems that counsel sought out and researched potential clients to serve as plaintiffs. Plaintiffs’ counsel seek **4.1 hours** for researching and screening potential plaintiffs. A spreadsheet of these activities is attached as Exhibit 14 (Solicitation of Clients). However, time entries that predate the start of counsel’s representation of

filing papers because it “is the work of paralegals or secretaries, not work that requires a license to practice law”)

- Preparing exhibits. See, e.g., Grigoli v. Scott Cohcrane, Inc., No. 8:14-cv-844-T-23EA, 2015 WL 4529032, at *7-8 (M.D. Fla. 2015) (disallowing time spent on clerical activities such as preparing exhibits).
- Reviewing own time records to include with their motion for attorney’s fees. See, e.g., Beta Upsilon Chi v. Machen, No. 1:07cv135-MW/GRJ, 2014 WL 4928902, at *6 (N.D. Fla. 2014) (deducting hours spent reviewing and preparing time records as they do not “relate to the merits of the case”).
- Contact with court clerks for status update. Routine requests to the judicial assistant for status updates are non-compensable clerical work. See, e.g., Hithon v. Tyson Foods, Inc., 151 F. Supp. 3d 1252, (N.D. Ala. 2015) (a “call about the ‘status’ of the motion” gives no indication it was “a call requiring legal expertise and will not be awarded as fees”).

the named Plaintiffs must be excluded. “[H]ours spent looking for and soliciting potential plaintiffs should not [be] included in the time billed.” Barnes, 168 F.3d at 430. “Time spent procuring potential plaintiffs is obviously not expended on the litigation because until the attorney has a client, there is no case to litigate.” Id. See also Yamada v. Weaver, No. 10–00497 JMS–RLP, 2012 WL 6019363, at *8 (D. Haw. 2012) (excluding all time entries referencing “potential clients”); Gratz v. Bollinger, 353 F. Supp. 2d 929, 945 (E.D. Mich. 2005) (§1988 does not contemplate fees “related to an attorneys’ search for clients who will serve as model plaintiffs”).

4. Time Spent on Familiarization with Local Rules

Plaintiffs’ counsel billed **12.2 hours** familiarizing themselves with Local Rules. Their paralegal and law clerk spent another **5.7 hours** doing the same. See Exhibit 15 (Familiarization with Local Rules). However, familiarization with local rules is non-compensable. See The Fidelity Land Trust Co., LLC v. Mortg. Elec. Registration Sys., Inc., No. 6:12-CV-1367-ORL37TBS, 2013 WL 12164707, at *3 (M.D. Fla. 2013), report and rec. adopted, 2013 WL 12161889 (M.D. Fla. 2013); Paxton v. Great Am. Ins. Co., 08-81431-CIV, 2009 WL 10667079, at *2 (S.D. Fla. June 8, 2009) (non-movant “should not have to pay for [fee movant] to learn the local rules of this district”).

5. Reduction for Time Spent in Connection with Supporting Amici

Finally, included within Plaintiffs’ fee request are **5.2 hours** for work related to amici supporting their position. This includes strategizing about the amici, communicating with amicus counsel, and reviewing amicus briefs. See Exhibit 16 (Work with Supporting Amici). None of this time is compensable. The Eleventh Circuit forbids any award of attorney’s fees for time spent “in connection with amicus briefs supporting their position.” Glassroth v. Moore, 347 F.3d 916, 919 (11th Cir. 2003). “An organization or group that files an amicus brief on the winning

side is not entitled to attorney's fees and expenses as a prevailing party, because it is not a party. We will not allow that result to be changed by the simple expedient of having counsel for a party do some or all of the amicus work." Id. See also E.E.O.C. v. Freeman, 126 F. Supp. 3d 560, 577 (D. Md. 2015) (The Eleventh Circuit "has explicitly held that it is abuse of discretion to allow attorney's fees for work connected with amici").

III. MULTIPLIER INAPPLICABLE.

Plaintiffs ask that this Court apply a "modest multiplier of 1.5" to the lodestar calculation, asserting that here, the lodestar does not adequately take into account the "undesirability" of the case, one of the 12 "Johnson factors." However, the Eleventh Circuit has provided a comprehensive explanation of the Johnson factors' redundancy under the lodestar methods in cases of fee-shifting statutes (such as § 1988):

In Hensley, the Supreme Court opted to use the lodestar method instead of the Johnson factors to calculate a reasonable attorney's fee under fee-shifting statutes . . . Nonetheless, the Court said that the Johnson factors could be used to determine whether an upward (or downward) adjustment, i.e., a multiplier, was warranted. . . . Since then, the Court has explained that "most, if not all," of the Johnson factors are **subsumed in the lodestar**. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 566, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986). As a result, **the Johnson factors are largely redundant, and an enhancement will be warranted only in the rare and exceptional case where the fee applicant provides specific evidence showing that the lodestar does not adequately reflect the true market value of the attorney's performance.**

...

The crucial point [. . .] is that the Johnson factors are largely redundant to the lodestar analysis because they are almost always subsumed in the lodestar. Consequently, it would be inefficient, to say the least, to require district courts to slog through the Johnson factors when those factors have little independent bearing on the analysis.

In re Home Depot Inc., 931 F.3d at 1090-91 (11th Cir. 2019) (emphasis added).

To warrant a multiplier under the lodestar method, “the fee applicant must produce ‘specific evidence’ that an enhancement is necessary to provide a reasonable fee.” Id. at 1082. That specific evidence must show the rare and few circumstances permitting a lodestar multiplier are present, namely that: (1) “the method used in determining the hourly rate ... does not adequately measure the attorney’s true market value”; (2) “counsel incurs an ‘extraordinary outlay of expenses’ in the case”; or (3) “there is an ‘exceptional delay in the payment of fees.” Id. at 1083 (quoting Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 554-56) (emphasis added).

The Supreme has stated that enhancement of the lodestar is only permissible in “rare” and “exceptional” cases. Perdue, 559 U.S. at 554. Plaintiff has not provided “specific evidence” that any of the Perdue exceptions apply, but they would not apply regardless. First, the “method used in determining the hourly rate” may not “adequately measure the attorney’s true market value” if “the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar).” Id. at 555. This Court does not set rates based on a sole factor; as shown in the cases cited on pages 7-8, *infra*, it may consider the nature of the litigation, or whether the attorney performed substantive or ministerial tasks. See, e.g., Fed. Trade Comm’n v. Nationwide Connections, Inc., 06-80180-CIV, 2009 WL 10669554, at *11 (S.D. Fla. Apr. 24, 2009), report and recommendation adopted, 06-80180-CIV, 2009 WL 10668727 (S.D. Fla. May 19, 2009).

Second, as far as the “extraordinary outlay of expenses,” when an attorneys such as Plaintiffs’ counsel agrees to represent a civil rights plaintiff without up-front payment, “the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case, and therefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases.” Perdue at 555. The present case is not unusual in that sense.

Likewise, regarding “exceptional delay in the payment of fees,” an attorney “who expects to be compensated under § 1988 presumably understands that payment of fees will generally not come until the end of the case, if at all.” *Id.* at 556. “[T]herefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases.” *Id.* at 555. A prevailing attorney is *already* compensated for the delayed payment by being able to seek current market rates for their past time expenditures, as Plaintiffs do here. *Id.* at 556. They are not entitled to a windfall enhancement on top of that. As “undesirability” is not a basis for a multiplier and as there is no evidence that the rare and limited exceptions to the lodestar apply, no multiplier is permitted.

IV. COSTS AND EXPENSES.

A prevailing party is only entitled to reasonable and necessary expenses “that are normally itemized and billed in addition to the hourly rate” if these expenses are “reasonable in amount” and of the type ordinarily billed to a private client. Bee v. Graves, 910 F.2d 686, 690 (10th Cir. 1990).

“[W]ith the exception of routine office overhead, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988.” Dowdell v. City of Apopka, 698 F.2d 1181, 1191(11th Cir. 1983). As with the award of fees, § 1988 “may not be subverted into a ruse for producing ‘windfalls’ for attorneys” in cost reimbursement. *Id.* Costs must be reasonable in amount and necessary for maintenance of the action. Fells v. Va. Dep’t of Transp., 605 F. Supp. 2d 740, 742 (E.D. Va. 2009). Only reasonable identifiable out of pocket expenses are recoverable. Luessenhop v. Clinton Cty., N.Y., 558 F. Supp. 2d 247, 271 (N.D.N.Y. 2008).

Here Plaintiffs' counsel seek compensation for expenses related to travel, electronic research, and shipping. With respect to travel, they seek compensation for travel associated with multiple attorneys traveling to and from depositions, moot court preparation, and hearings in the total amount of \$7,441.58. Mr. Gannam and Mr. Mihet spent a total of \$2,317.79 for traveling to and from depositions. They should only recover for half of these expenses (\$1,158.90) because as already discussed in the context of fees, Mr. Gannam did not participate in any of the depositions and could not have considering he was not admitted to this Court.

Plaintiffs seek compensation for the \$1,299.28 associated with Mr. Mihet and Mr. Gannam's travel to West Palm Beach to attend a discovery hearing, an arguably run-of-the-mill event that could have been handled by a single attorney. In any case, there is no explanation as to why two attorneys were necessary. Accordingly, these expenses should be reduced by half, for a total of \$649.64.

Mr. Mihet should not be compensated for the \$659.92 bill associated with "moot court session with LC team in Orlando." As discussed in the context of reasonable hours, Plaintiffs' preparation for oral argument, which included moot court, was beyond excessive.

As for attendance at oral argument, it was excessive for three attorneys to all travel to attend where only one of those attorneys actually argued. Barnes, 168 F.3d at 432 (Having multiple attorneys attend a hearing merely to observe it fails to "reflect the distinct contribution of each lawyer to the case."). See also McKenzie v. Kennickell, 645 F. Supp. 437, 450 (D.D.C. 1986) (If a party chooses "to send two or three lawyers to sit silently in court beside the lead attorney, the defendant should not be charged for that time."). Accordingly, the \$2,415.92 sought should be reduced by two thirds, and Plaintiffs' counsel should only recover \$805.30. In total, Plaintiffs should recover \$3,362.51 of their non-taxable expenses related to travel.

With respect to the \$4,879.93 in Westlaw Charges and other electronic research expenses, Plaintiffs do not include sufficient detail in their request to allow one to ascertain the nature of the research and whether it was related to the instant litigation. Without additional detail, these expenses should not be recoverable. Further, considering the excessive number of hours Plaintiffs' counsel spent on research, drafting and hearing activities, they should not be reimbursed in full for Westlaw expenses associated with those hours. Plaintiffs' request for \$542.79 in shipping expenses similarly lacks sufficient detail to determine their nature and applicability.

V. DIVISION OF FEES AND EXPENSES BETWEEN DEFENDANTS.

To the extent that the County needs to address the issue of the division of awarded fees and expenses between it and the City of Boca Raton at this juncture, in the interest of judicial economy, the County incorporates its argument as outlined in Palm Beach County's Response to Plaintiff's Motion for Costs (DE 220), as if fully argued herein.

CONCLUSION

When a district court finds that a fee movant is seeking an unreasonably high number of hours, it "has two choices: it may conduct an hour-by-hour analysis or it may reduce the requested hours with an across-the-board cut." Bivins v. Wrap It Up, Inc., 548 F.3d 1348, 1350 (11th Cir. 2008). While in many cases the Court may apply an across-the-board cut to block-billed, excessive, vague and other improperly documented hours, this is case is not a normal one. The County has shown how before ever submitting their Fee Motion Plaintiffs' counsel stated they had added arbitrary amounts to their time records to punish the Defendants for "stubbornness"; because "we told you so" and "you just don't get it"; because they had to work on the weekend; and because their clients were referred to as "conversion therapists." At the same time, they threatened

to continue inflating their billing for any future reference to “conversion therapists,” and were “eager” to continue litigating “in whatever form” until Defendants “see the Light.”

Their Fee Motion reflects this ill intent in practice. Without factual or legal justification Plaintiffs’ counsel now claims hourly rates hundreds of dollars higher than those in the fairly recent fee petition they filed in the substantively identical Vazzo case. They also seek highly excessive, duplicative and non-compensable hours that their own clients would not be expected to pay. There is little reason to believe this is just garden-variety imprecision in a fee request. By their own statements and actions, Plaintiffs’ counsel has shown that their Fee Motion is a weaponized approach meant to inflict as much punitive financial harm as possible regardless of the well-settled case law that fee-shifting statutes are not meant for such purposes.

In reducing the excessive rates and improper hours, a 50% reduction in the total \$1,410,012.00 fees sought is appropriate. Therefore, a fee award in range of \$705,000.00 - \$710,000.00 is reasonable. As for costs, they should be reduced to \$3,362.51.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 26, 2023, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the authorized CM/ECF filers.