

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-CV-80771-ROSENBERG/REINHART

ROBERT W. OTTO and JULIE H.
HAMILTON,

Plaintiff,

v.

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

Defendants.

**DEFENDANT, CITY OF BOCA RATON'S OBJECTION
TO REPORT AND RECOMMENDATION ON MOTION FOR ATTORNEYS' FEES
AND NON-TAXABLE EXPENSES AND COSTS**

Defendant, City of Boca Raton ("City"), files this Objection to Report and Recommendation on Motion for Attorneys' Fees and Non-Taxable Expenses and Costs [ECF No. 240], and states:

OVERVIEW

Magistrate Judge Reinhart has issued a well-reasoned and thorough Report and Recommendation [ECF No. 240] ("R&R"), addressing the unreasonably high demand for more than two million dollars for attorneys' fees and costs sought jointly and severally against the City and Defendant, Palm Beach County ("County"). Judge Reinhart was presented with over one hundred pages of billing entries and invoices, as well as numerous issues raised by the City, County, and Plaintiffs, Robert W. Otto and Julie H. Hamilton ("Plaintiffs"), and Judge Reinhart should be commended for his comprehensive analysis.

The City takes issue with only one, discrete aspect of Judge Reinhart’s R&R: his recommendation that three attorneys – who are not members of this District’s bar and never sought *pro hac vice* admission in this matter – be awarded the same hourly rates as those attorneys who were entitled to practice in this District. *See* ECF No. 240, at 30-31. Specifically, the City maintains (as it did before Judge Reinhart, ECF No. 229, at 7-8) that these three attorneys – Messrs. Mast and Schmid and Ms. McAlister¹ – should be awarded the hourly rates for paralegals recommended by Judge Reinhart (\$117.73), not an attorney hourly rate. Alternatively, if not the paralegal rate, the rates should be reduced to non-admitted attorney rates deemed reasonable in this District.²

The City maintains that the R&R should be adopted in all other respects. Accordingly, the City proposes the fee award be reduced as follows, based on the hours and blended hourly rates recommended by Judge Reinhart and adjusting the rates to the paralegal rate for Mr. Mast, Ms. McAlister, and Mr. Schmid:

Name	Hours Awarded in R&R	Hourly Rate Awarded in R&R	City’s Proposed Hourly Rate	Total
Richard Mast	11.5	\$325.00	\$117.73	\$1,353.89
Mary McAlister	20.4	\$375.00	\$117.73	\$2,401.69
Daniel Schmid	309.2	\$462.50	\$117.73	\$36,402.11

¹ Although the City did not previously object to Ms. McAlister’s compensation as an attorney (versus a paralegal rate) in its opposition [*see* ECF No. 229, 7-8], the County did raise this objection. ECF No. 228 at 3. The City also notes that Judge Reinhart’s R&R did not address the City’s objection to Mr. Mast’s proposed rate as an attorney rather than a paralegal; the R&R but only addressed this issue concerning Mr. Schmid and Ms. McAlister, not Mr. Mast. *See* ECF No. 240, at 30-32.

² Indeed, Judge Reinhart analyzed the reasonable rate for a law clerk (*see* ECF No. 240, at 35) and determined that \$150 should be the rate for an attorney who is not admitted to the bar. Plaintiffs proposed this “non-admitted attorney rate” [ECF No. 221, at 10], an amount to which the City did not and currently does not object for a lawyer, who has graduated law school but has not passed a bar exam (and thus, could not seek *pro hac vice* admission).

Horatio Mihet	473.4	\$562.50	\$562.50 (no objection)	\$266,287.50
Roger Gannam	435.4	\$562.50	\$562.50 (no objection)	\$244,912.50
Mathew Staver	79.4	\$552.00	\$552.00 (no objection)	\$43,828.80
Paralegal	32.5	\$117.73	\$117.73 (no objection)	\$3,826.23
Law Clerk	153.2	\$150.00	\$150.00 (no objection)	\$22,980.00
Total	1515			\$621,992.72

ARGUMENT

THE HOURLY RATES FOR ATTORNEYS NOT ADMITTED IN THE SOUTHERN DISTRICT OF FLORIDA AND WHO DID NOT SEEK *PRO HAC VICE* ADMISSION SHOULD BE REDUCED.

A. The Policy Concerns Requiring a Reduction.

Southern District of Florida Special Rule 4(a) provides that only members of the District Court's bar may appear as attorneys in court, unless the court permits them to appear *pro hac vice*. S.D. Fla. L.R. 4(a). A non-admitted attorney may, upon the submission of a written application by counsel admitted to practice in the District, obtain permission to appear *pro hac vice*, and participate in a particular case. S.D. Fla. L.R. 4(b)(1).

Attorneys who purport to practice in this District despite being neither members of the District nor authorized to appear *pro hac vice* are not permitted to be compensated as if they were authorized practitioners. For instance, in *Herfield v. Saul*, Case No. 16-CIV-80077-RAR, 2020 WL 9460213 (S.D. Fla. Jan. 14, 2020), Judge Ruiz reduced the hourly rate of a prevailing attorney to the paralegal rate of \$125 per hour, adopting Magistrate Judge Seltzer's reasoning 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." *Id.* at *2. On appeal, the Eleventh Circuit affirmed

the rate reduction, emphasizing that non-admitted attorneys, who cannot submit or file documents, by definition, function more like paralegals. “Because [the non-admitted attorney] could not submit his work directly to the district court and was limited to contributing to the work product of [the admitted] attorneys, the district court committed no abuse of discretion by treating [the non-admitted attorney] as a non-attorney to determine his hourly rate of compensation.” *Herfield v. Comm’s, Soc. Sec. Admin.*, 839 F. App’x 322, 325 (11th Cir. 2020). *Herfield* provided further validation for the long-existing practice in this District of reducing fee requests made by non-members of the District who had not appeared *pro hac vice*. See, e.g., *Cunningham v. Berryhill*, No. 17-CIV-10022-KMM, 2018 WL 5098890, *2 (S.D. Fla. Aug. 30, 2018) (J., Moore) (accepting a Magistrate recommendation upon “find[ing] the reduction of fees is reasonable as an incentive to comply with the Local Rules at the time an attorney works on a case”).

B. The Rates Should Be Reduced to Prevailing Paralegal Rates.

None of the three lawyers at issue in this Objection – Mr. Mast, Ms. McAlister, or Mr. Schmid – are admitted to practice in the Southern District of Florida, and none sought *pro hac vice* admission in this case. Neither Mr. Mast nor Mr. Schmid are admitted to the Florida bar. Mr. Schmid billed over 300 hours in this matter, paralleling the facts in *Herfield* and making him the third-highest biller for Plaintiffs’ litigation team, despite not being admitted to practice law in Florida or in this District Court.³ See ECF No. 221-2.

Although Ms. McAlister is a member of the Florida bar, she (like Messrs. Mast and Schmid) is not a member of this District Court. The R&R noted that Ms. McAlister’s last billing

³ Mr. Schmid billed for drafting a *pro hac vice* motion, which, for reasons unknown to the City, he never filed (again, contrary to Mr. Mihet’s Declaration, ECF No. 221-1, ¶ 18(E)). ECF No. 221-2, at 6 (see entry dated June 15, 2018); see generally, Docket, Case No. 9:18-cv-80771-RLR (reflecting the absence of any *pro hac vice* motion for Mr. Schmid).

entry was February 2018, and the Complaint was not filed until June 2018. ECF No. 240, at 32. Judge Reinhart then speculated that there “was no vehicle for Ms. McAlister to seek *pro hac vice* admission before doing her work.” *Id.* This is not correct. Ms. McAlister, according to Mr. Mihet’s Declaration, was until “July 2019 [a] Senior Litigation Counsel for Liberty Counsel.” ECF No. 221-1, ¶ 18(c). Accordingly – and knowing Liberty Counsel’s intention to seek fees for all of their attorney’s hours on this case – Ms. McAlister, as well as Messrs. Mast and Schmid, could have sought *pro hac vice* admission during the pendency of this litigation and chose not to do so.

In other words, these lawyers “enjoy[ed] the benefits and privileges of practicing before the Court’ without complying with the local rules.” *Herfield*, 839 F. App’x, at 325. Judge Reinhart speculated – without citation to any authority, that “[l]aw firms frequently use non-admitted lawyers for drafting documents, research and other non-court activities.” ECF No. 240, at 31. However, even if this is an accurate observation by Judge Reinhart, the only logical conclusion that can be drawn from this statement is that some fees should be awarded for the services rendered by the non-admitted lawyers, not that they should be compensated at the same rates as admitted attorneys.

Various courts in this District have consistently applied the policy of reducing fee requests made by non-members since *Herfield*. Indeed, in *Friedel v. Sun Communities, Inc.*, No. 19-CIV-14394-RLR/Maynard, 2022 WL 17669933, *5 (S.D. Fla. Nov. 3, 2022), Magistrate Judge Maynard recommended reducing the requested rate of a non-member attorney who did not obtain *pro hac vice* admission because “[t]o recommend compensation in full of these hours would mean circumventing this Court’s Local Rules.” And this Court adopted that recommendation, finding Magistrate Judge Maynard’s recommendation to be “well reasoned and

correct.” *Friedel*, No. 19-CIV-14394-RLR, 2022 WL 17668290 (S.D. Fla. Dec. 14, 2022) (J., Rosenberg); *see also Ramones v. AR Resources, Inc.*, No. 19-CIV-62949-PAS, 2022 WL 1443062, *3 (S.D. Fla. May 6, 2022) (J., Seitz) (reducing the requested hourly rate for a non-admitted attorney who did not apply for *pro hac vice* admission, finding the attorney “is not entitled to be compensated as an admitted attorney in this action”).

The City maintains that the R&R’s reliance on a Ninth Circuit case, *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 823-24 (9th Cir. 2009), which has never been applied by the Eleventh Circuit or any court in the Southern District of Florida, in support of the rates of Mr. Mast, Ms. McAlister, and Ms. Schmid was erroneous. ECF No. 240, 30-32. As discussed herein, the well-established authority in the Eleventh Circuit and in Florida district courts state that attorneys who are not admitted in the applicable, district court and who do not seek *pro hac vice* admission during the case should not be compensated at the same rates as attorneys who are admitted. *See, e.g., Zech v. Comm’r of Soc. Sec.*, 680 F. App’x 858, 860 (11th Cir. 2017); *Herfield*, 839 F. App’x at 325 (finding no abuse of discretion in limiting fee award for non-admitted attorney to paralegal rate). In other words, numerous courts within this Circuit have addressed the issue at hand and there is no need to look to another circuit’s decisions.

Moreover, *Winterrowd* addressed only the question of whether the plaintiffs could recover attorneys’ fees for a non-admitted attorney at all, not about what the appropriate rate should be (at a paralegal rate, a non-admitted attorney rate, or an admitted attorney rate). 556 F.3d 823-24. The City is not disputing that some compensation should be awarded for the time incurred by Mr. Mast, Ms. McAlister, and Mr. Schmid. The *Winterrowd* court did not address the issue before the Court here – namely, the appropriate rate to award for services rendered by a non-admitted attorney, who chose not to even apply to be admitted *pro hac vice*. Accordingly,

given the differences with the non-applicable Ninth Circuit’s non-binding opinion in *Winterrowd* – coupled with Eleventh Circuit, authority directly on point, the R&R erroneously relied on *Winterrowd* and should not have awarded attorney-level rates to non-members of this District who never sought *pro hac vice* admission.

Awarding the same rates to attorneys who are not admitted to this Court (and who never seek *pro hac vice* admission) as those who have invested the time, efforts, and fees to gain admission, either *pro hac vice* or fully, would incentivize lawyers not to seek such admission. Clearly, Mr. Schmid in particular took an active role in the representation of Plaintiffs in this case, despite never being admitted (or seeking admission) to practice before this Court. Accordingly, the City respectfully submits that the Court should decline to adopt Judge Reinhart’s recommendation that these three attorneys receive the same rates as those admitted to practice here and, instead, be compensated at the paralegal rate recommended by Judge Reinhart -- \$117.73.⁴

⁴ Even in those post-*Herfield* cases in the Southern District where rates of non-admitted, non-*pro hac vice* attorneys were not reduced to paralegal rates, they were nonetheless reduced to a lower category of “non-admitted attorney rates.” See, e.g., *Friedel*, 2022 WL 17669933 at *5, *report and recommendation adopted*, 2022 WL at 17668290 (reducing the time expended by a 39-year lawyer who did not obtain *pro hac vice* admission as an appropriate application of the “requirement that only attorneys who properly seek and obtain admission may litigate before this Court” from \$490 per hour to \$225 per hour); *Ramones*, 2022 WL 1443062, *4 (reducing the requested rate of an Ivy-League educated, 16 year attorney from \$435 per hour to \$200 per hour, finding “this rate to be the going market rate in this district for similar services provided by non-admitted attorneys:); *Hernandez v. Scottsdale Ins. Co.*, No. 21-CIV-602687-JLK/Becerra, 2023 WL 5939635, *3 (S.D. Fla. Aug. 28, 2023), *report and recommendation adopted*, 2023 WL 5932920 (finding the reasonable hourly rate for a non-member attorney who was not admitted *pro hac vice* to be \$150 per hour); *Bluestarexpo, Inc. v. Enis*, No. 21-CIV-20875-RNS/Goodman, 2022 WL 17583630, *5 (S.D. Fla. Nov. 23, 2022), *report and recommendation adopted*, 2023 WL 158292 (finding the reasonable hourly rate for a non-member attorney who was not admitted *pro hac vice* to be \$150 per hour); *Venus Concept USA, Inc. v. Smith High Inc.*, No. 21-CIV-21558-KMM/Louis, 2022 WL 7609495, *4 (S.D. Fla. Oct. 13, 2022), *report and recommendation adopted*, 2022 WL 7514591 (decreasing from \$360 per hour to \$150 per hour

WHEREFORE, Defendant, City of Boca Raton respectfully requests the Court decline to adopt the Report and Recommendation in part, reduce the hourly rates of Mr. Mast, Ms. McAlister, and Mr. Schmid to \$117.73 and, therefore, reduce the overall attorneys' fee award to \$621,992.72, and award any further relief the Court deems just and proper.

LOCAL RULE 7.1(a)(3) CERTIFICATION

The undersigned counsel has conferred with Counsel for Plaintiffs, as well as the County. Plaintiffs oppose this Objection, and the County does not oppose this Objection.

Dated: November 15, 2023

Respectfully submitted,

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the time expended by an attorney who "was not admitted to practice in this Court and did not enter a formal appearance as Plaintiff's counsel").