

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.

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

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

**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. A Rate Reduction Is Warranted Based on the Policy Rationale Articulated in Eleventh Circuit Case Law and this District's Local Rules.***

In their Response, Plaintiffs have overlooked a critical aspect of the City's Objection to the Report and Recommendations. They focus primarily on the fact that Mr. Mast, Mr. Schmid, and Ms. McAlister did not formally *appear* in this action and, therefore, purportedly had no need to seek *pro hac vice* admission. Yet, this line of reasoning sidesteps the crux of the City's argument for a rate reduction for these attorneys – namely, that attorneys who are not admitted to

practice in the Southern District of Florida and who choose not to seek *pro hac vice* admission should not be compensated at rates comparable to those attorneys who are properly admitted. Specifically, awarding the same admitted attorney rates to non-admitted attorneys encourages the circumvention of the Local Rules' admission requirements. *Cunningham v. Berryhill*, No. 17-CV-10022-KMM, 2018 WL 5098890, at \*2 (S.D. Fla. Aug. 30, 2018) (stating a "reduction in fees is reasonable as an incentive to comply with the Local Rules at the time an attorney works on a case rather than allowing the attorney to apply a wait-and-see approach for a favorable judgment[]"); *Wood v. Comm'r of Soc. Sec.*, No. 15-cv-437, 2017 WL 2298190, at \*1 (M.D. Fla. May 26, 2017) (holding that denying fees incentivizes attorneys to comply with the local rules at the time they work on a case).

Notably, Plaintiffs' argument conveniently focuses on only half of the Local Rule governing *pro hac vice* admission, namely, the "appearance" aspect. *See* ECF No. 248. The City does not dispute that Mr. Mast, Ms. McAlister, and Mr. Schmid did not appear in this action, attend court proceedings, or sign filings (nor would they have been permitted to do so in the absence of *pro hac vice* admission). However, the Local Rules also provide for *pro hac vice* admission for non-admitted attorneys to "participate in a particular case." S.D. Fla. L.R. 4(b)(1) (emphasis added); *see also* S.D. Fla. L.R. 4(a) ("Attorneys residing within this District and practicing before this Court are expected to be members of the bar of this Court."). This broader interpretation of participation includes more than mere courtroom presence; it encompasses any substantial involvement in the case. Plaintiffs do not dispute that these three attorneys clearly "participated" in this action (and seek payment of their fees for their participation as if admitted) despite their clear non-compliance with the prerequisites to participate in a legal action pending before this Court. This participation, while not fitting the narrow definition of "appearance," still

constitutes a significant legal involvement that cannot be disregarded (and rewarded) when considering the appropriate compensation for their services.

Courts have repeatedly held that the “practice” of law is not limited to appearing in court. *In re Loveless Babies*, 315 B.R. 785, 792 (N.D. Ga. 2004) (holding that Chicago attorneys who never made an appearance in Georgia court were nevertheless “practic[ing] law in Georgia”); *In re Peterson*, 163 B.R. 665, 672 (D. Conn. 1994) (recognizing that the practice of law “includes giving legal advice and drafting documents regardless of whether it occurs in a ‘court of record’”); *Ramirez v. England*, 320 F. Supp. 2d 368, 377 (D. Md. 2004) (stating that “the very acts of interview, analysis and explanation of legal rights constitute practicing law”). This recognition underlines how non-courtroom legal activities constitute participation in the prosecution of lawsuit pending before this Court.

District courts throughout the Eleventh Circuit, in addition to the Southern District of Florida, have consistently recognized the importance of compliance with the local rules by lowering rates for non-admitted attorneys.<sup>1</sup> For example, in *Rabco Corp. v. Steele Plaza, LLC*, the district court adopted the magistrate judge’s recommendation to reduce an attorney’s rate to that of a paralegal, where that attorney never applied for *pro hac vice* admission, never paid the attendant admission fees, “yet she amassed 151.9 hours of billable time in this case for which

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<sup>1</sup> See also *Friedel v. Sun Communities, Inc.*, 2022 WL 17669933 at \*5, *report and recommendation adopted*, 2022 WL at 17668290 (S.D. Fla. Dec. 14, 2022) (J., Rosenberg) (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 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”). These decisions illustrate the Southern District’s commitment to upholding the Local Rules regarding *pro hac vice* admission.

[the prevailing party] now seeks compensation.” *Rabco Corp. v. Steele Plaza, LLC*, No. 616CV1858ORL40LRH, 2019 WL 5188601, at \*5 (M.D. Fla. July 29, 2019), *report and recommendation adopted*, No. 616CV1858ORL40LRH, 2019 WL 5176284 (M.D. Fla. Aug. 13, 2019). The magistrate judge aptly noted, “If the undersigned were to recommend compensation in full of these hours at the rates [the prevailing party] lists in its motion, the undersigned would be circumventing the Local Rules of this Court.” *Id.* Like the three attorneys at issue here, the non-admitted lawyer “could have easily moved for *pro hac vice* admission – at least two of her co-counsel at the same law firm were able to accomplish this task – yet she chose to remain silent.” *Id.*; *see also Goodman v. Comm’r of Soc. Sec.*, Case No. 3:17-cv-1127-J-PDB, 2019 WL 1763205, at \* 2 (M.D. Fla. Apr. 22, 2019) (“If an attorney is not admitted in a court as required by a local rule, a court does not abuse its discretion by compensating the attorney at a paralegal hourly rate.”).

In the case at hand, the plaintiffs do not and cannot dispute that Mr. Mast, Ms. McAlister, and Mr. Schmid actively *participated* in this action and now seek compensation for 512.1 hours of work. *See* ECF No. 240, at 36 (discussing Plaintiffs’ breakdown of requested hours). Their failure to seek *pro hac vice* admission, especially when intending to charge rates equivalent to those of admitted attorneys, cannot be overlooked or ignored. Accordingly, in line with the precedent set within this Circuit, these attorneys should have sought *pro hac vice* admission, particularly if they intended to seek fees at the same rates as admitted attorneys in this District, and, because they chose not to do so, a lower hourly rate of \$117.73 is warranted.

***b. The Underlying Rationale Behind the Rate Reductions in Equal Access to Justice Act Cases Is Equally Relevant and Applicable to Section 1988 Fee Awards.***

The City recognizes that many of the cases it relies on address fee awards decided under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (“EAJA”), not 42 U.S.C. § 1988, the

statute applicable here. Nonetheless, Plaintiffs' attempt to distinguish EAJA fee awards from Section 1988 fee awards is not persuasive. Although the EAJA does provide a statutory rate of \$125, it also allows the court the discretion to increase that rate to account for the "cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved" – like the factors considered in the lodestar method applied in this case. 28 U.S.C. § 2412(d)(1)(2)(A); see *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). Importantly here, attorney fee awards under both Section 1988 and the EAJA are united in a fundamental principle: they are not intended to produce windfalls to attorneys. See *Farrah v. Hobby*, 506 U.S. 103, 115 (1992); *Astrue v. Ratliff*, 560 U.S. 586, 595 (2010). These cases underscore that attorney fee awards under these statutes are intended to be reasonable and just, not avenues for unwarranted financial gain. Therefore, applying the rationale behind rate reductions in EAJA cases to Section 1988 fee awards is entirely appropriate.

Plaintiffs do not explain in their response why the rationale applied for reducing non-admitted attorneys' rates in EAJA cases should not be equally applicable here. In EAJA cases, similar to the situation at hand, non-admitted attorneys cannot sign or file documents and, therefore, their role is 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). This precedent underscores the necessity of aligning compensation with the actual scope of legal practice permitted under the Court's rules, reinforcing the City's position that a similar approach should be adopted in the current case.

Far from being excessive or undermining Section 1988, the City's proposed reduction to paralegal rates is a measured response that upholds the integrity of the judicial system and ensures fair compensation without impeding access to justice for civil rights litigants. Plaintiffs' legal team consists of eight individuals – six attorneys, one law clerk, and one paralegal. Plaintiffs are certainly entitled to make the business decision to compose a legal team of that size. However, Plaintiffs are not entitled to ignore the letter and spirit of the Local Rules and then cry foul if their own staffing decisions result in a reduced fee award. Choosing a team of this size and composition should not serve as a pretext to sidestep the fundamental principles governing legal practice in this jurisdiction. Accordingly, this Court should look to the persuasive authority within this Circuit and apply the more appropriate and justified lower, paralegal rate of \$117.73 for Mr. Mast, Ms. McAlister, and Mr. Schmid.

***c. The Ninth Circuit Case Law Relied on by the Magistrate Judge Is Distinguishable and Should Not Be Applied Over Persuasive Case Law from This Circuit.***

Finally, Plaintiffs argue the Magistrate Judge's reliance on *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815 (9th Cir. 2009) – a Ninth Circuit case never applied before in this Circuit and with distinguishable facts – should stand. Once again, and as stated in the City's Objection, *Winterrowd* addressed only the question of whether the plaintiffs could recover attorneys' fees for a non-admitted attorney at all, not about the matter before the Court, namely, 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 Ninth Circuit's decision focused on California law and the Central District of California's local rules, none of which are not applicable here. 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* – a question squarely addressed by both the Eleventh Circuit and the Southern District of Florida.

Authoritative rulings from our own Circuit provide a clear and consistent framework for this Court's consideration. *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); *Friedel v. Sun Communities, Inc.*, No. 19-CIV-14394-RLR/Maynard, 2022 WL 17668290 (S.D. Fla. Dec. 14, 2022) (J., Rosenberg) (adopting Magistrate Judge Maynard's "well reasoned and correct" recommendation 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"); *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"). These cases not only address the issue directly but also firmly establish the practice of reducing the compensation for non-admitted attorneys.

Accordingly, the R&R should not have relied upon the Ninth Circuit's non-binding and contextually inapposite opinion in *Winterrowd* over Eleventh Circuit case law directly on point. The R&R should not have awarded attorney-level rates to lawyers who were not admitted to practice in this District and who never sought *pro hac vice* admission in this case. Clearly, Mr. Mast, Ms. McAlister, and Mr. Schmid were active participants 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 on this point. Instead of granting these three attorneys the same rates as those admitted to practice in this District, it is both just and appropriate that they be compensated at the paralegal rate recommended by Judge Reinhart -- \$117.73. By adopting this approach, the Court will reinforce the principle that adherence to local admission requirements is not just an optional matter of procedural formality, but a reflection of the substantive issue that legal practice must align with the standards set by the Local Rules.

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.

Dated: December 6, 2023

Respectfully submitted,

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