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 RESPONSE TO PLAINTIFFS' OBJECTIONS TO REPORT AND RECOMMENDATION ON MOTION FOR ATTORNEYS' FEES AND NON-TAXABLE EXPENSES AND COSTS

Defendant, City of Boca Raton (the "City"), hereby responds to the Objections to Report and Recommendation on Motion for Attorneys' Fees and Non-Taxable Expenses and Costs (ECF No. 246) (the "Objection"), filed by Plaintiffs, Robert Otto and Julie Hamilton (collectively, "Plaintiffs"), and states that the well-reasoned Report and Recommendation (ECF No. 240) (the "Recommendation") authored by Magistrate Judge Bruce E. Reinhart ("Magistrate Judge Reinhart," or the "Magistrate Judge") should, as to each challenge contained in the Objection, be adopted by this Court.

ARGUMENT

I. THE MAGISTRATE JUDGE PROPERLY RECOMMENDED DENIAL OF PLAINTIFFS' REQUEST FOR FEES ON FEES.

A. The City Did Not "Waive" its Right to Object to Fees on Fees when it made a Recognized, Proper Offer of Judgment, or when it Objected to Plaintiffs' Motion that Sought Clearly Excessive Fees.

The Objection first argues[1] that Plaintiffs should recover their fees incurred in filing their Motion for Attorneys' Fees and Non-taxable Expenses and Costs (ECF No. 221) (the "Fee

[1] Confusingly, the Objection actually begins by contending that Magistrate Judge Reinhart's observation that the offers of judgment "called for a fixed payment plus reasonable attorneys fees and costs accrued to

Motion"), notwithstanding the clear language in the Offers of Judgment expressly limiting Plaintiffs' fees to those incurred up through the date of the offers, because the Palm Beach County (the "County") and the City (collectively, the "Defendants") "vigorously contested" the fee application. The contention finds no support in 11th Circuit jurisprudence but is instead based on the Seventh Circuit's opinion in *Morjal v. City of Chicago*, 774 F.3d. 419 (7th Cir. 2014). Even if Plaintiffs had not waived this argument,[2] the reliance on *Morjal* is misplaced. *Morjal* awarded a small percentage of the fees incurred in filing a fee motion[3] as a sanction for misconduct:

> To the extent that the defendants raised non-frivolous challenges to the amount of attorneys' fees in determining what was 'reasonable,' they would still be in compliance with that obligation. But here, the district court determined that the defendants' arguments went beyond legitimate challenges to reasonableness. The court held that the defendants' opposition to fees was 'overly aggressive' and 'arbitrary.'

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date" is "incorrect both factually and legally" because "Defendants did not offer a *fixed* total payment." Objection at p. 3 (emphasis in original). The criticism is hard to decipher. The offers of judgment did, in fact, call for a fixed payment plus attorneys' fees, and Magistrate Judge Reinhart never "implied" that the "total payment" was "fixed."

In any event, an offer of judgment offering a "fixed" payment to the plaintiff, plus costs and fees to be later determined by the Court, is a common and perfectly valid way to make an offer of judgment. *See, e.g., Sampiaio v. Client Servs. Inc.*, 306 F. App'x 496 (11th Cir. 2009); *accord Lilly v. City of New York*, 934 F.3d 222, 236 (2d Cir. 2019) ("[W]e conclude that when a settlement cuts off a plaintiff's entitlement to attorney's fees on a specific date, a district court may not award a party attorney's fees for work incurred after that cut-off date."); *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9th Cir. 1995) (stating offer "explicitly limit[ed] fees and costs to those 'incurred by this plaintiff *prior to the date of this offer* in an amount to be set by the court'") (emphasis added); *Jordan v. Equifax Info. Servs., LLC*, 549 F. Supp. 2d 1372, 1375 (N.D. Ga. 2008) (stating the offer entitled the plaintiff to "reasonable attorney's fees, *through the date of this offer*") (emphasis added); *Said v. Virginia Commonwealth Univ./Med. Coll. of Virginia*, 130 F.R.D. 60, 62 (E.D. Va. 1990) (limiting fees to those accrued as of the date of the offer) (emphasis added).

[2] The Recommendation properly found that "Plaintiffs, here, have not made this argument that the Offers waived fees-on-fees," and so Plaintiffs have waived any such contention. Recommendation at pp. 13-14, n. 3. While the Objection observes that Plaintiffs' reply memorandum in support of the Fee Motion (ECF No. 235) contended that Defendants "are fighting tooth and nail to reduce what they *did* offer" (Objection at p. 4), neither the fee petition nor the reply memorandum in support thereof contains the contention that Defendants' "fighting" with respect to the fee award invalidates the limitation of recoverable fees contained within the offers of judgments to those incurred "to date."

[3] As a result of the defendant's "arbitrary" objections to plaintiff's requested fee award, the *Morjal* court awarded $2,000 of the $16,773 fees incurred by plaintiff in litigating the fee petition.

Id. at 422. Here, however, far from being "frivolous," nearly all of Defendants' challenges to Plaintiffs' excessive fee request were found to be meritorious. As the Defendants argued, and as Magistrate Judge Reinhart found, Plaintiffs' fee request impermissibly sought "fees on fees" (Recommendation at pp. 8-18); wrongly sought compensation for travel time and expenses (Recommendation at pp. 19-20); sought compensation for excessive time incurred in drafting pleadings (*Id.* at 21-22); improperly sought reimbursement for having multiple lawyers defend depositions (*Id.* at 22-23), and for billing excessive time for preparing for oral argument (*Id.* at 23); was based upon time records that impermissibly contained block billing (*Id.* at 23-4), vague time entries (*Id.* at 24-25) and for performing clerical tasks (*Id.* at 25), and had several other defects that Plaintiffs did not even attempt to justify (*Id.* at 26). The Motion also sought excessive hourly rates for its attorneys (*Id.* at 29-35) and paralegal (*Id.* at 35-36), and sought a lodestar multiplier unjustified under the circumstances (*Id.* at 36-39). Magistrate Judge Reinhart recommended a fee award of $736,227.53, much closer to the $705,000-$710,000 urged by the County and the $497,275 advocated by the City than the $2,225,018 fee sought by Plaintiffs in the fee motion (ECF No. 221). Simply put, it would be more accurate to state that Plaintiffs made an "overly aggressive" and "arbitrary" fee request than that the Defendants made "frivolous" challenges to the requested award. Thus, even if applicable in this Circuit, *Morjal* provides Plaintiffs no support.

B. The Offers of Judgment Limitation of Fees to those Incurred "To Date" is Valid and Enforceable.

The Objection relies on several inapposite, out of Circuit cases to argue that the Defendants' "vigorously contesting" the requested fee award justifies ignoring the express limitation in the offers of judgment limiting fees to those incurred up through the dates of the offers. Those cases are easily distinguishable.

Most of the cases upon which the Objection relies interpreted offers of judgment that contained no temporal limit to recoverable fees. *See, e.g.*, *Lee v. Santiago*, 2013 WL 4830951, *1 (S.D. N.Y. 2013) (awarding "fees on fees" when the offer of judgment was for a set amount plus "reasonable attorneys' fees, expenses and costs"); *Lasswell v. City of Johnston City*, 436 F.Supp. 974, 976 (S.D. Ill. 2006) (offer of judgment "offered to allow judgment to be taken against them on all the [plaintiff's] state and federal claims"); *John v.* Demaio, 2016 WL 7410656 (E.D. N.Y. 2016) (no temporal limit on fees contained in the offer of judgment).

Another case relied upon in the Objection, *E.E.O.C. v. Hamilton Standard Division, United Technologies Corp.*, 637 F.Supp. 1155 (D. Ct. 1986), didn't involve the acceptance of an offer of judgment at all.

It is true that the 2012 New York district court case of *Rosado v. City of New York*, 2012 WL 955510, *6 (S.D. N.Y. 2012) did award "fees-on-fees," contrary to the terms of the offer of judgment, "as a matter of equity." That decision, however, is no longer good law because it has long since been disavowed in the Second Circuit:

> The district court is not alone in granting these fees on fees as a matter of equity despite the clear terms of the parties' agreements barring such awards [citing *Rosado*]. As noble as this practice may be, it violates the first rule of contract interpretation: 'where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms.' By awarding [plaintiff] fees beyond what the parties agreed to, the district court effectively rewrote the contract. This it cannot do.

Lilly v. City of New York, 934 F.3d 222, 236 (2d Cir. 2019). *See also Smith v. City of New York*, 2022 WL 939711, *8 (E.D. N.Y. 2022) ("[T]his Court does not have the authority to award" fees incurred in filing the fee petition after acceptance of a Rule 68 offer of judgment that offered fees "to the date of this offer").

C. The Offers of Judgment Were Not Ambiguous.

Plaintiffs' previously claimed the offers of judgment were ambiguous in that: (a) plaintiffs' recovery was limited to fees "accrued to date" but "date" is not defined; and (b) the use of the phrase "as determined by the Court" creates an ambiguity (ECF No. 235 at pp. 21-23). Both arguments were thoroughly examined and rejected by the Recommendation (at pp. 12-18) and are now abandoned in the Objection. The Objection's new contention—that the fees incurred after the offers of judgment "accrued" prior to the offers because the "claims" for relief predated the offers (Objection at p. 7)—borders on the incomprehensible. Fees incurred in filing the fee application had certainly not "accrued" when the offers were made, and the Objection offers no authority for a contrary interpretation.

II. The Magistrate Judge Properly Recommended that Travel Time and Expenses Should Not be Awarded.

The Objection misstates the burden of proof when it purports to criticize the Recommendation that travel expenses for Plaintiffs' Tampa-based attorneys should not be

awarded. Plaintiffs argue against the Recommendation asserting an inadequate basis for the Magistrate Judge to have "conclude[ed] that competent local counsel was available." Objection at p. 8. As expressly noted by Magistrate Judge Reinhart, "Plaintiffs are not addressing the correct issue" because it is Plaintiffs who "have not offered evidence that competent local counsel was unavailable." Recommendation at pp. 19-20. Thus, the burden was not on Magistrate Judge Reinhart to research the availability of local counsel; it was Plaintiffs' affirmative burden to prove that there no such counsel was available, a burden Plaintiffs clearly did not meet because they introduced "no evidence in the record that either Plaintiff unsuccessfully tried to hire local counsel." *Id.* at 20.

The Objection attempts in vain to find evidence in the record to show that local counsel was not available. First, while it may be true, as the Objection asserts, that no Palm Beach County attorneys have ever represented a counselor challenging a SOCE regulation (Objection at pp. 8-9), there is no evidence of record that local counsel can only qualify as competent if they previously represented a plaintiff in an identical claim.[4]

Challenges to government regulation of speech are as old as the Bill of Rights, and a suggestion that judicial notice should be exercised to conclude that no South Florida attorney is qualified to serve as local counsel for such a claim would have been entirely unwarranted. Palm Beach County boasts a robust legal community with attorneys skilled in various areas, including constitutional law. The nature of the legal issues in this case did not rise to a level of specialization that was unattainable within the local legal market.

Requests for attorney travel time compensation are routinely rejected when supported with similar, limited evidence. "[A] fee applicant seeking to recover expenses incurred for retaining non-local counsel generally must show a lack of attorneys practicing in that place who are willing and able to handle his claims." *Martinez v. Hernando Cty. Sheriff's Office*, 579 F. App'x 710, 714 (11th Cir. 2014) (excluding out-of-town counsel's travel time to court proceedings). "[Al]though certainly appropriate for the clients' benefit, [travel time compensation] is not appropriate to include in the fee application against the non-prevailing

[4] The same rationale Plaintiffs employ to speculate that local attorneys who filed amicus briefs in support of the Defendants would have been unwilling to serve as local counsel for Plaintiffs suggests that the 35-year practicing attorney who filed an amicus brief in support of the Plaintiffs and whose office is in the Southern District would have been more than willing. ECF No. 115.

party because local counsel would have made extended travel time unnecessary." *Comercio Y Servicios De Transporte Privado PBA S.A. De C.V. v. RDI, LLC*, 2020 WL 364784, at *6 (M.D. Fla. Jan. 22, 2020) (declining to award fees for Miami counsel's travel time to Tampa due to failure to show a lack of qualified counsel capable of handling the case); *see also Ranize v. Town of Lady Lake, Fla.*, 2015 WL 1037047, at *6 (M.D. Fla. Mar. 10, 2015) ("Absent a showing of a lack of qualified counsel, travel time is not properly visited on one's adversary."); *Brother Int'l Beach Club Condo. Ass'n, Inc.*, 2005 WL 1027240, at *5 (M.D. Fla. Apr. 28, 2005) *report and recommendation adopted sub nom. Brother v. Int'l Beach Club Condo. Ass'n, Inc.*, 2005 WL 1139927 (M.D. Fla. May 13, 2005) (declining to award travel time after party failed to show a lack of qualified local counsel); *St. Fleur v. City of Fort Lauderdale,* 149 F. App'x 849, 853 (11th Cir. 2005) (finding no abuse of discretion in reduction of hours spent on "billing at full rates for non-legal tasks like travel ..."); *Ass'n for Disabled Americans, Inc. v. Integra Resort Mgmt., Inc.*, 385 F.Supp.2d 1272, 1301 (M.D. Fla. 2005) (deducting travel time from attorney's fees); *Demers v. Adams Homes of NW. Florida, Inc.*, 2008 WL 2413934, at *2 (M.D. Fla. June 11, 2008) *aff'd*, 321 F. App'x 847 (11th Cir. 2009) (reducing time entries for travel time where lawyers traveled 72 miles from Melbourne to Orlando).

III. THE MAGISTRATE JUDGE PROPERLY RECOMMENDED AN ACROSS-THE-BOARD REDUCTION OF COMPENSABLE HOURS IN LIGHT OF VARIOUS BILLING IRREGULARITIES.[5]

A. The Magistrate Judge Properly Recommended a Reduction Based, In Part, on Plaintiffs' Block Billing Practices.

As noted in the Recommendation, the County contended that 592.5 hours for which Plaintiffs seek fees were block billed. ECF No. 240 at p. 23. The City contended that no fewer than 86 separate entries contain block billing. ECF No. 229-3 at pp. 1-110.

The Objection purports to defend exactly three (3) of these 86 time entries as not being block billed, even though the Magistrate Judge did not reference any of those three as a basis for his Recommendation. Accordingly, although Plaintiffs "cite to specific examples where it may

[5] The Objection does not challenge the Magistrate Judge's decision to impose an across-the-board cut, rather than by an hour-by-hour analysis. Recommendation at p. 27. Indeed, an hour-by-hour analysis would have been exceedingly difficult in light of Plaintiff's failure to include in the "a summary, grouping the time entries by the nature of the activity or stage of the case," hallmarks of "[a] well-prepared fee petition." *Norman v. Hous. Auth. Of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988).

be true that the specific activities listed in the block entry are closely related and described in detail, those are just a few cherry-picked examples." *CityPlace Retail, L.L.C. v. Wells Fargo Bank, N.A.*, 2021 WL 3361172, *9 (S.D. Fla. 2021).

But even this is affording the Objection more credit than it is due. For instance, even in its "cherry-picked example," Plaintiffs purport to defend Mr. Schmid's June 12, 2018[6] entry of 7.1 hours for:

> Attention to finalizing pleadings re complaint and PI motion, including attention to HGM questions regarding factual claim and cited cases in complaint and PI motion, and discussion same (sic) with HGM; review HGM edits and revisions to pleadings; prepare initial pleadings for filing.

ECF No. 221-2 at 5. But this is classic block billing. No allocation of time is made between revisions to the Complaint and those to the Motion for Preliminary Injunction, two entirely distinct documents. *See, e.g., Houston Specialty Ins. Co. v. Fontecilla*, 2023 WL 3570169, * 8 (S.D. Fla. 2023) (a single entry of 4.70 hours for "drafting/revising and finalizing MSJ and statement of facts" was improperly block-billed because "the summary judgment motion and the statement of undisputed facts were two separate documents"). And the referenced entry makes no allocation between the time spent (a) drafting the two documents; (b) reviewing Mr. Mihet's questions; (c) discussing the cases cited in the Complaint with Mr. Mihet, and (d) reviewing Mr. Mihet's edits. This, too, constitutes block billing. *See, e.g., M & M Sisters, LLC v. Scottsdale Insurance Co.*, 2022 WL 18717403, *19 (S.D. Fla. 2022) (a 2.30 hour time entry for (a) reviewing an order compelling discovery, and (b) communicating with opposing counsel regarding his failure comply with the order compelling discovery were improperly block billed); *DJ Lincoln Enterprises, Inc. v. Google, LLC*, 2022 WL 4287640, * 9 (S.D. Fla. 2022) (a 3.9 hour time entry for analysis of a filed complaint, drafting an analysis of the complaint for the client, and discussing defense strategy with members of the defense attorney "team" improperly constituted block billing for "three tasks"); *CityPlace*, 2021 WL 3361172 at * 8 (preparing for a hearing, drafting an argument outline for the hearing, conferring with co-counsel in preparation for the hearing, discussing another issue and drafting an email deemed "six distinct tasks lumped together in one entry").

With this applicable standard in mind, the two other cherry-picked entries relied upon in the Objection fare no better. *See* Mr. Mihet's July 2, 2018 time entry (discussed in the Objection

at pp. 12-13) (two separate phone calls with opposing counsel, review of a draft motion, review of an as-filed motion and review of an Order entered on the motion all contained in a single time entry without time allocation); Mr. Mihet's entry of July 5, 2018 (discussed in the Objection at p. 13) (reviewing an Order, formulating a discovery strategy, discussing depositions and discovery with his co-counsel and his clients "in multiple phone and email communications," formulating written proposals for a briefing schedule and discovery schedule and communications with defense counsel all contained, without time allocation, in a single time entry).

83 of the 86 examples of block billing contained in the City's Opposition are simply ignored in the Objection. They include: (1) Mr. Mihet's block entry on July 2, 2018 (ECF No. 221-2 at p. 8) (a single time entry for (a) reviewing local rules; (b) reviewing administrative orders; (c) drafting a proposed scheduling report; (d) drafting a proposed scheduling order; (e) considering strategy "for same," and (f) discussing "same" with counsel for the defendants); (2) Mr. Schmid's entry of September 12, 2018 (ECF No. 221-2 at p. 30) (a single 7.2 hour time entry for (a) reviewing an email from his co-counsel; (b) reviewing the County's opposition to Plaintiffs' motion for preliminary injunction; (c) reviewing statutes and caselaw, and (d) drafting and sending an email memorandum to his co-counsel); (3) Mr. Mihet's entry of August 9, 2022 (ECF No. 221-2 at p. 67) (a single 4.20 hour time entry for (a) reviewing the City's response in opposition to the motion to enter preliminary injunction; (b) considering strategy for a reply; (c) assigning research assignments; (d) reviewing research results; (e) drafting a reply; (f) revising the draft reply; (g) finalizing the reply and (h) filing the reply).

Finally, as noted by the Magistrate Judge, while the Defendants argued that many of the block billing entries include non-compensable clerical activity, the Plaintiffs ignored these arguments in their reply. ECF No. 240 at p. 24. Plaintiffs again ignore this independent basis for the Recommendation in the Opposition.

B. The Magistrate Judge Properly Recommended a Reduction Based, In Part, on Plaintiffs' Failure to Respond to Claims of Vague Time Entries.

The Objection mistakenly contends that the Magistrate Judge was "incorrect as a factual matter" when he "suggest[ed]" that certain time entries are "vague." Objection at p. 13. Not so. Instead, Magistrate Judge Reinhart noted that the County had made such a contention, and that the Plaintiffs, in their Reply, did not rebut the contention by "offer[ing] evidence to explain why

[6] The date is misidentified in the Objection as being July 12, 2018. Objection at p. 12.

all this work was necessary". Recommendation at p. 25. Similarly, the Objection misstates the proceedings before the Magistrate Judge when it argues "[t]he Report and Recommendation also contends that there were 'excessive' entries that '*include* discuss with the LC team or discuss with legal team.'" Objection at p. 14 (emphasis in original). Once again, however, the Recommendation notes that the County made such an argument (and referenced 50 specific, distinct instances of same), but that "Plaintiffs d[id] not reply to these specific examples", and that, therefore, "Plaintiffs have not justified all of the time". Recommendation at p. 24. Thus, Plaintiffs here defend (for the first time) against challenges they chose to ignore in the briefing before the Magistrate Judge. Such a belated appeal should be rejected. As expressly noted in the Recommendation, "Plaintiffs' Reply does not respond to [an] argument, so it is conceded." ECF No. 240 at p. 20 (citations omitted). Moreover, Plaintiffs' waiver of the objection below should preclude this Court from considering the belated defense here. *See Williams v. McDonough*, 2008 WL 623033, *2 (S.D. Fla. 2008) (the District Court "may decline to consider arguments raised for the first time in Petitioner's Objections"), *aff'd., Williams v. McNeil*, 557 F.3d 1287 (11th Cir. 2009). *See also Borden v. Secretary of Health and Human Services*, 836 F.2d 4, 6 (1st Cir. 1987) ("Parties must take before the magistrate, not just their 'best shots,' but all of their shots") (internal citation omitted).

C. The Objection Ignores Most of the Bases for the Magistrate Judge's Recommended Across-the-Board Reduction.

While the Objection clearly demonstrates that Plaintiffs read the Recommendation and understood that "block billing" and "vague entries" constituted only a few of the bases for the Recommendation, *see* Objection at p. 11 (noting that the above two issues "*inter alia"* formed the basis of the Recommendation), the Objection makes no effort to address the other, well-supported bases for the across-the-board hourly reductions. Thus, by their silence, Plaintiffs concede that (a) the fee request included time that they previously represented had been withdrawn in an "exercise of billing judgment" (Recommendation at pp. 20-21); (b) the fee request includes an excessive amount of time for drafting pleadings (Recommendation at pp. 21-22); (c) the fee request improperly includes duplicative time for multiple attorneys to defend depositions (Recommendation at pp. 22-23); (d) the fee request includes excessive time for oral argument presentation (Recommendation at p. 23); (e) the fee request improperly seeks compensation for the performance of clerical tasks (Recommendation at p. 25); (f) the fee

request improperly seeks compensation for identifying potential plaintiffs (Recommendation at p. 26); (g) the fee request improperly seeks compensation for counsel to become familiar with the Local Rules and for the performance of clerical tasks (Recommendation at p. 26); and (h) the fee request improperly seeks compensation for interacting with *amici* (Recommendation at p. 26).

D. The Recommended 25% Across-the-Board Reduction Is More than Reasonable.

The Objection relies upon *Zendejas v. Redman*, 2019 WL 1429403 (S.D. Fla. 2019) and *Lockwood v. CIS Services, LLC*, 2019 WL 3383628 (M.D. Fla. 2019) to contend that the recommended 25% reduction is "excessive." Objection at p. 15. The Objection, however, contains no analysis to support a contention that the billing issues in those cases were comparable to the issues identified herein. A review of the cases suggests that they were selected for inclusion in the Objection simply because they applied across-the-board reductions of less than 25 percent.

In *Zendejas*, for instance, a 10% reduction was ordered based on the fee applicant's block billing, even though the District Judge affirmatively found "that the work [reflected in the challenged time entries] was related and reasonably necessary to prepare for trial, and the amount of time expended overall was reasonable." *Id.* at *1. A 10% reduction "to remedy any lack of specificity" was deemed "sufficient" for that minor issue. *Id.* Unlike here, there was no challenge to (let alone a finding of impropriety regarding) the fee as requested in *Zendejas* based upon: (a) the fee request including time that had purportedly been withdrawn in an "exercise of billing judgment"; (b) the fee request including an excessive amount of time for drafting pleadings; (c) the fee request improperly including duplicative time for multiple attorneys to defend depositions; (d) the fee request including excessive time for oral argument presentation; (e) the fee request improperly seeking compensation for the performance of clerical tasks; (f) the fee request improperly seeking compensation for identifying potential plaintiffs; (g) the fee request improperly seeking compensation for counsel to become familiar with the Local Rules and for the performance of clerical tasks; (h) the fee request improperly seeking compensation for interacting with *amici*, or (i) that the billing records contained various "vague" time entries. *Id. See also Lockwood* (a 12% reduction was deemed appropriate where there was no finding of a failure to exercise billing judgment, no finding of expending an excessive amount of time for

any legal task, no instances of multiple lawyers billing for defending the same deposition, and no contention that any time entry was unduly vague).

A review of more relevant authority shows that the Magistrate Judge's recommendation of a mere 25% reduction was generous to the Plaintiffs. For instance, in October of this year, the Eleventh Circuit considered and upheld a 40% across-the-board reduction in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2023 WL 6563864 (11th Cir. 2023). In that case, the Magistrate Judge found that, like here, billing records reflected an excessive amount of time in accomplishing certain tasks, multiple attorneys attending depositions, and an excessive amount of time for multiple attorneys to prepare for an oral argument. *Id.* at *3. Unlike here, however, there were no findings of (a) block billing; (b) vague time entries; (c) billing for time that was represented to have been excised as a result of "billing judgment; (d) purported attorney billing for clerical tasks; (e) billing for time incurred in the attempt to identify and obtain plaintiffs; (f) fees incurred in becoming familiar with the Local Rules; or (g) fees incurred in identifying and contacting potential *amici*. Even in light of lesser findings of billing improprieties in that case, the 11th Circuit found "the approximately 40% reduction from the requested number of hours is amply supported by the record." *Id.* at *4. *See also Century Surety Company v. All American Lube of Boca, Inc.*, 2023 WL 4972923 (S.D. Fla. 2023) (Magistrate Judge Reinhart's Recommendation of a 25% across-the-board reduction); *Houston Specialty Insurance Co. v. Fontecilla*, 2023 WL 3570169, *8 (S.D. Fla. 2023) (Magistrate recommendation of a 30% across-the-board reduction of a fee application based on an excessive amount of time expended to perform certain tasks, for block billing, and time billed for clerical tasks), *Recommendation adopted*, 2023 WL 3568162 (S.D. Fla. 2023); *NorthStar Moving Holding Co., Inc. v. Van Lines*, 2022 WL 4228616, *3 (Magistrate recommendation of a 33% across-the-board reduction based on duplicative, excessive and block billed time entries), *Recommendation adopted*, 2022 WL 4182461 (S.D. Fla. 2022); *Static Media, LLC v. Ojcommerce, LLC*, 2021 WL 829420 (S.D. Fla. 2021) (Magistrate recommendation), *Recommendation adopted*, 2021 WL 827126 (S.D. Fla. 2021).

IV. THE MAGISTRATE JUDGE PROPERLY DETERMINED PLAINTIFFS' HOURLY RATES.

Starting from a misunderstanding of the legal criteria for hourly fee rate enhancement, the Objection continues with a misreading of the Recommendation, and concludes by ignoring

relevant precedent in criticizing the generous recommended hourly rates proposed by the Magistrate Judge. None of these claims have merit.

A. The Magistrate Judge Properly Did Not Recommend an Award Based Upon Counsels' Current Hourly Rates for Work Performed Long Ago Because such an Award would Constitute an Unjustified Fee Enhancement.

The Objection is simply mistaken when it relies upon the outdated case of *Norman v. Housing Auth. Of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988) to contend that "delay in payment for civil rights counsel in Section 1988 litigation should be awarded by awarding current rates, rather than historic rates." Objection at p. 16. As the Eleventh Circuit has subsequently, unambiguously held, "[o]ur existing circuit law on this subject must be read in light of, and modified to fit, the holdings in *Perdue* [*v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010)] about enhancements for the delay in payment of expenses and fees." *Gray v. Bostic*, 613 F.3d 1035, 1044 (11th Cir. 2010).

Perdue held that

> There may be extraordinary circumstances in which an attorney's performance involves 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 (citation omitted). Compensation for this delay is generally made 'either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value' (citation omitted). But we do not rule out the possibility that an enhancement may be appropriate where the attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense.

Perdue, 559 U.S. at 556. Crucially, the Objection (at p. 16) omits both the first sentence of the above quote (limiting an "award on current rates" to cases with "extraordinary circumstances"), and the last sentence (limiting claims of "delay" in payment to "*unanticipated* delay, particularly where the delay is *unjustifiably caused by the defense*"). Only by omitting these limitations can the Objection baselessly contend that "the delay in payment for civil rights counsel in Section 1988 litigation should be compensated by awarding current market rates". *Id.*

Thus, as expressly held in *Gray*, awarding the "enhancement" of the entirety of the fee at the then-current attorney hourly rates "must be reserved for unusual cases." *Gray*, 613 F.3d at 1044 (quoting *Perdue*). Specifically, such an enhancement is only available

> if this is one of those unusual cases in which an extraordinary outlay of expenses combined with exceptionally protracted litigation permits an enhancement of the payment for expenses. Likewise, the court should determine if extraordinary circumstances, such as unjustifiable conduct by the defense, caused exceptional delay in payment of fees justifying an enhancement on that ground.

Gray, 613 F.3d at 1045.

Here, the Objection now claims[7] that "the delay [was] unjustifiably caused by the defense" because (a) the Defendants sought *en banc* review of the Eleventh Circuit's reversal of this Court's denial of Plaintiff's motion for preliminary injunction, and (b) the Defendants "resisted the entry of preliminary injunction" after the mandate was issued. The claim is without merit, as neither of these actions were "unjustifiable." Not only is timely application for *en banc* review of a panel decision an available, routine, and proper motion, but, in this case, the denial of the motion contained two lengthy and vigorous dissents in a 110-page opinion. USCA11 Case 19-10604 (07/20/2022).[8] Similarly, the Defendants' contention that the requested preliminary injunction to prevent enforcement of the Ordinances was moot because the Ordinances had been repealed was well-supported by citations to relevant legal authority. *See, e.g.*, ECF No. 151, 153. Under these circumstances, even if there has been "delay" in providing Plaintiffs' counsel with fees and costs, that delay was not caused by "unjustifiable" actions of the Defendants. "The fact that the Court delayed in ruling on a motion filed by Defendants certainly cannot result in a finding that there was unjustifiable delay caused by the Defendants." *Leon v. M.I. Quality Lawn Maintenance, Inc.*, 2020 WL 13614904, *4 (S.D. Fla. 2020).

B. The Magistrate Judge Did Not Base the Recommendation on the Wrong Legal Market.

The Objection (at pp. 17-18) badly misreads the portion of Recommendation that provides

[7] Significantly, Plaintiffs made no contention before the Magistrate Judge that they should be awarded an enhancement up to counsel's current hourly rates, based upon unjustifiable conduct by the Defendants or otherwise.

[8] The fact that there is a Circuit split on the merits of the underlying claim, a split that the Supreme Court has recently elected to keep unresolved, *Tingley v. Ferguson*, 601 U.S. __ (2023), further undermines Plaintiffs' belated contention that the City attempts to defend the validity of the Ordinance was unjustifiable.

> Based on my personal knowledge of the Palm Beach County legal market, those rates [requested by Plaintiffs' counsel in their *Vazzo* fee request] are commensurate with rates charges in that market in 2017-2019 for lawyers of similar experience

as referring to the "market rates" in Tampa. Both grammar and context clearly indicate that the phrase "that market" refers back to the "market" described earlier in the sentence: the "Palm Beach County legal market."

In any event, the implicit (but completely unsupported) assumption of the Objection -- that Tampa and West Palm Beach have vastly different "markets" for attorney hourly rates, such that rates sought and awarded in the Middle District have no bearing on prevailing rates in the Southern District -- has been directly rejected by an Eleventh Circuit decision from two months ago. *See Fort Lauderdale Food Not Bombs*, 2023 WL 6563864 at *2 (11th Cir. 2023) (rejecting fee recipient's appeal claiming inadequate hourly rate where "[t]he findings are supported by ample evidence, including the hourly rates either awarded to, or requested by, the Appellant's attorney in recent prior cases either in the Southern District of Florida itself or the analogous Middle District of Florida").

C. The Rates Recommended to be Awarded Were In Line with the Palm Beach County Market.

The Objection does not recognize that the Recommendation recommends acceptance of Plaintiffs' full requested rates for work performed after February, 2020, even though those rates are "at the high end of the spectrum." Recommendation at p. 33. Similarly omitted is the fact that the Recommendation suggests rates for Plaintiffs' primary litigators of between $550 and $600 per hour. *Id.* The Objection's sole criticism is the recommended award of rates for the period between June, 2018 and February, 2020 of exactly the same rates Plaintiffs' counsel requested and were awarded for work performed on a nearly identical case during the nearly identical timeframe in the *Vazzo* case.

The Objection should be rejected out of hand based upon *Fort Lauderdale Food Not Bombs*, 2023 WL 6563864. In that case, recipients of a fee award challenged the awarded hourly rate, which the District Court based, *inter alia*, upon rates recently requested and awarded to the applicant's counsel in the Middle District of Florida. The Eleventh Circuit rejected the challenge, noting that the hourly rates were "supported by ample evidence, including the hourly rates either awarded to, or requested by, the Appellants' attorneys in recent cases either in the Southern

District of Florida itself or the analogous Middle District of Florida". *Id.* at *2. In short, the Objection has already been rejected by the Eleventh Circuit and need not be revisited here.

In the event the Court is inclined to evaluate additional justification for the recommended hourly rates, the Objection's cherry-picked inclusion of exactly one case where generous rates were awarded (*Kleiman v. Wright*, 2020 WL 1980601 (S.D. Fla. 2020)), does not support Plaintiffs' position. *Kleiman* held that, in 2020, "the top civil litigators in Palm Beach County … range between $600 and $700 per hour." *Id.* at *3. Magistrate Judge Reinhart awarded some lawyers similar rates in *CityPlace Retail*, 2021 WL 3361172 at *6, but the implicit assumption of the Objection that $600-$700 per hour became the new hourly rate floor (especially for time spent 2 years earlier) is mistaken. As Magistrate Judge Reinhart noted in *DJ Lincoln Enterprises, Inc.*, 2022 WL 4287640, *8, his recommended rates in *Kleiman* and *CityPlace* of rates as high as $675 per hour were reserved for top "litigators from … a nationally-recognized firm." Consistent with that reasoning, Magistrate Judge Reinhart, in *Illoominate Media, Inc. v. CAIR Florida, Inc.*, 2021 WL 4030008, *6-7 (S.D. Fla. 2021) recommended an hourly rate of only $480 per hour for a 13-year attorney who served as CAIR's National Civil Litigation and Civil Rights Director.

Indeed, other Southern District awards confirm that the rates proposed in the Recommendation are completely consistent with recognized prevailing rates in this area. For instance, in *Davis v. Nationwide Insurance Co.*, 2022 WL 2341238, *3 (S.D. Fla. 2022), Magistrate Judge Matthewman described the Palm Beach County legal market as having "a large percentage in the $200-$300 range, a second tier of $450- to $500-an-hour attorneys and a handful in the $600 range." *See also Drone Nerds Franchising LLC v. Childress*, 2020 WL 6264701, *3 (S.D. Fla. 2020) (Magistrate Judge Strauss, after collecting cases, determined that recent awards of hourly rates for "lawyers experienced in complex areas of law" range from $275 per hour to $475 per hour). The recommended rate for Plaintiffs' most senior attorneys of between $550 and $600 is more than adequate.

V. THE MAGISTRATE JUDGE PROPERLY RECOMMENDED AGAINST AWARDING A MULTIPLIER.

An increase in the fee lodestar is only "permitted in extraordinary circumstances". *Perdue*, 559 U.S. 542 at 546. In *Perdue*, the Supreme Court stressed that the lodestar calculation is generally deemed sufficient, preventing factors considered in the lodestar from also being used

to justify an increase in the award, and placing the burden on the party seeking fees to identify and substantiate a specific factor that warrants an enhanced fee. As the Supreme Court stated:

> There is a strong presumption that the lodestar is sufficient; factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar; and a party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified.

Perdue, 559 U.S. at 546. Moreover, "the burden of proving that an enhancement is necessary must be borne by the fee applicant[,]" and the "applicant seeking an enhancement must produce 'specific evidence' that supports the award." *Id.*, at 553 (citing *Blum v. Stenson*, 465 U.S. 886, 899, 901 (2010) (stating an enhancement must be based on "evidence that enhancement was necessary to provide fair and reasonable compensation"). The *Perdue* Court specifically identified three circumstances that may justify a deviation from the lodestar amount: 1) "where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation"; 2) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted"; and 3) when there are "extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees." *Id.* at 554–56; *see also Anzardo v. Aqua Holdings Ltd., LLC*, 2021 WL 2118181, at *3 (S.D. Fla. May 6, 2021), *report and recommendation adopted*, 2021 WL 2110369 (S.D. Fla. May 25, 2021) (applying the *Perdue* analysis and declining to adjust the lodestar in a Fair Labor Standards Act case); *Dental Fix Rx, LLC v. Moore*, 2022 WL 358349, at *3 (S.D. Fla. Jan. 21, 2022), *report and recommendation adopted*, 2022 WL 356463 (S.D. Fla. Feb. 7, 2022) (declining to adjust lodestar calculation upward in breach of contract action). However, none of those circumstances are present here.

The sole basis for Plaintiffs' request for a 1.5 fee multiplier is Plaintiffs' claim that this case was "undesirable." However, Plaintiffs' argument is simply not supported by the applicable law. Not only does the Liberty Counsel specialize in religious rights-based civil rights actions (*see e.g.*, Mihet Declaration), the case is the sixth litigation it has handled regarding SOCE bans. Objection at p. 9. Any claim of "undesirability" is undercut and contradicted by the Liberty Counsel's repeated engagement in (and, in fact, focus on) religious rights-based civil rights cases. *See, e.g., Hazleton v. City of Orlando*, No. 6:10-cv-342-Orl-36DAB, 2013 WL 595247, at

*4 (M.D. Fla. Nov. 4, 2013) (lowering attorney's requested rate and noting that "civil rights cases, while maybe not the most desirable, are certainly not *undesirable*, as evidenced by [counsel's] repeated engagement in such cases") (emphasis in original).

Plaintiffs' claim that the desirability of the case should be considered in determining whether to apply a fee multiplier contradicts clear rulings from the Eleventh Circuit and Supreme Court; both courts have *expressly held otherwise*. *Perdue*, 559 U.S. 553 (stating "an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation"); *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1352 (11th Cir. 2008) (same). The desirability of a case is one of the twelve *Johnson* factors. *See Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (referencing "the 'undesirability' of the case" as the 10th "Johnson factor"). As held by the Eleventh Circuit, "[t]he *Johnson* factors are to be considered in determining the lodestar figure; *they should not be reconsidered in making either an upward or downward adjustment to the lodestar—doing so amounts to double-counting.*" *Bivins*, 548 F.3d a1352 (emphasis added) (holding the district court's adjustment based on a reason that was also a *Johnson* factor was error) (citing *City of Burlington v. Dague*, 505 U.S. 557, 562-563 (1992)); *see also In re: Home Depot, Inc.*, 931 F.3d 1065, 1090 (11th Cir. 2019) ("[A]n 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").

Moreover, the cases upon which Plaintiffs rely to support an upward adjustment are not applicable to the present case. All but two of the cases upon which the Objection (at p. 21) relies pre-date the 2010 *Perdue* decision, which expressly held that a *Johnson* factor such as "undesirability" cannot form the basis of a multiplier. The remaining two cases do not support Plaintiffs' position at all. *Holman v. Student Loan Xpress, Inc.*, 778 F.Supp. 2d 1306 (M.D. Fla. 2011) did not discuss "undesirability" at all. *Ryder v. Diversified Ambulance Billing, LLC.*, 2011 WL 13323560, *3 (M.D. Fla. 2011), on the other hand, expressly noted that "undesirability of the case" could not form the basis of a multiplier because it was amongst "the factors … reflected in the lodestar calculation". *Id.* (citing *Perdue).* Accordingly, no fee multiplier is merited in this action.

VI. THE MAGISTRATE JUDGE PROPERLY RECOMMENDED AGAINST AWARDING ADDITIONAL CLAIMED EXPENSES.

A. Requested Reimbursement for "Research Expenses" Was Properly Excluded.

The Recommendation recommends that the $4,879.93 allegedly incurred for electronic research be excluded because, while "it may have been reasonable for Plaintiffs to incur some research costs," Plaintiffs did not fulfill their burden to "show that the expense was reasonable" by (a) a mere conclusory statement that research was necessary, or (b) showing that Plaintiffs' counsel internally billed the research time to this case. Recommendation at pp. 40-41.

The Objection ignores all of the Magistrate Judge's analysis, choosing instead to argue that research is sometimes reasonable and compensable (a proposition recognized by the Magistrate Judge), and that the reasonableness was supported by the conclusory statement and the internal billing number (evidence clearly insufficient to demonstrate that each research session was, indeed, "reasonable"). Objection at pp. 21-22. No citations to authority are included, and no analysis contrary to that described in the Recommendation is offered. The Objection is meritless.

B. Requested Reimbursement for "Shipping Expenses" Was Properly Excluded.

The Recommendation recommends that the $542.79 allegedly incurred for "shipping expenses" should not be awarded because "Mr. Mihet['s] declaration and the shipping receipts are inadequate to justify why the shipping charges were necessary to the representation." Recommendation at p. 41. Once again, the Objection simply misses the issue when it contends that shipping expenses, when proven to be reasonable and necessary for the representation, are awardable. Objection at p. 22. With no substantive evidence even as to (a) what was "shipped," or (b) why, the Recommendation finding that Plaintiffs have not fulfilled their burden was appropriate.

CONCLUSION

For the above-described reasons, the Objections should be overruled, and the Magistrate Judge's Recommendation, as to the challenged findings, should be adopted.

Dated: December 15, 2023 Respectfully submitted,

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