UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ROBERT W. OTTO, PH.D. LMFT, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 9:18-cv-80771-
v.	)	ROSENBERG/REINHART
	)	
CITY OF BOCA RATON, FLORIDA, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR OBJECTIONS TO REPORT AND RECOMMENDATION ON MOTION FOR ATTORNEY'S FEES AND NON-TAXABLE EXPENSES AND COSTS

Pursuant to Local Magistrate Rule 4(a)(1) and 28 U.S.C. §636(b)(1)(A), Plaintiffs Robert W. Otto, Ph.D., LMFT and Julie H. Hamilton, Ph.D, LMFT ("Plaintiffs") hereby reply to Defendants' Responses to Plaintiffs' Objections to the Report and Recommendation on Plaintiffs' Motion for Attorney's Fees and Non-taxable Expenses and Costs (ECF Nos. 253, 254).[1] For the following reasons, Plaintiffs' objections are well taken and the Report and Recommendation should be set aside.

ARGUMENT

I. PLAINTIFFS DID NOT WAIVE ANY ARGUMENT CONCERNING FEES-ON-FEES, AND DEFENDANTS' CONTINUED VIGOROUS OPPOSITION DEMONSTRATES WHY FEES-ON-FEES ARE APPROPRIATE HERE.

A. Neither Defendants' Responses Nor The Report And Recommendation Are Correct That Plaintiffs Waived Argument To Fees-On-fees.

Defendants contend that Plaintiffs waived arguments concerning their entitlement to fees-on-fees. (ECF No. 253 at 2-3 & n.2.) This is incorrect. Beginning in their Motion and continuing throughout each pleading, Plaintiffs have argued—consistent with binding precedent in the Eleventh Circuit—that they are entitled to recover fees-on-fees. (*See* ECF No. 221 at 3 n.2

[1] Defendant County of Palm Beach "adopts the City of Boca Raton's position as outlined in Defendant, City of Boca Raton's Response to Plaintiffs' Objection to Report and Recommendation on Motion for Attorney's Fees and Non-Taxable Expenses and Costs [ECF No. 253]." (ECF No. 254 at 1.) Because the County has adopted in full the response of the City, Plaintiffs' reply will cite only to the City's arguments (ECF No. 253).

("Plaintiffs will supplement this motion with the additional amounts incurred litigating the amount of attorney's fees and nontaxable expenses and costs to which they are entitled.").) In a bold heading in their Reply, Plaintiffs declared: "**Plaintiffs are entitled to recover their post-offer fees to litigate their fees**." (ECF No. 235 at 19 (emphasis original).) And, continuing throughout their Reply, Plaintiffs constantly demonstrated that, regardless of their acceptance of an offer of judgment, they were nevertheless entitled to recover fees for litigating the amount of fees owed to them.

Defendants are also plainly wrong when they insist that Plaintiffs waived argument as to Defendants' own waiver of the right to contest fees-on-fees. Indeed, in addition to spelling out their pursuit of fees-on-fees, Plaintiffs clearly contended to the Magistrate that Defendants' post-judgment actions in contesting the amount of fees for which they are liable precluded them from avoiding the fees-on-fees occasioned by their own opposition. (ECF No. 235 at 19.) Indeed, Plaintiffs specifically raised this issue by explicitly arguing that fees-on-fees are recoverable because "Defendants did not purport to liquidate any specific amount of fees in their offers and are fighting Plaintiffs tooth and nail to reduce what they *did* offer." (*Id.* (emphasis original).)

B. Countenancing Defendants' Contentions That Plaintiffs Are Not Entitled To Fees-on-fees Would Undermine The Purpose Of Section 1988 And Permit Windfalls To Rule 68 Offerors In A Manner Not Contemplated By The Rules.

Crediting Defendants' contentions would have diminutive consequences on civil rights litigants. Defendants cannot decline to set a fixed amount of attorney's fees in their Offers of Judgment, attempt to cut off Plaintiffs' entitlement to fees-on-fees by inclusion of an "accrued to date" provision, then vigorously litigate the amount of attorney's fees to which Plaintiffs are entitled, and expect a windfall by requiring Plaintiffs to extensively litigate the amount of their attorney's fee award *for free*. This is not how prevailing party fee recovery works under §1988.

As Plaintiffs demonstrated in their Objections (ECF No. 246 at 5-6), Defendants' vigorous opposition to the amount of fees due to Plaintiffs has required extensive time, expense, and argument. In its Response in Opposition to Plaintiffs' Motion for Attorney's Fees and Non-taxable Expenses and Costs (ECF No. 228), the County challenged essentially every component of Plaintiffs' requested fees and expenses. (ECF No. 228 at 1-31.) All told, the County submitted 248 pages of materials in its robust efforts to deny Plaintiffs the attorney's fees and costs to which they were entitled. (*See* ECF No. 228 to 228-15.) The City, for its part, likewise challenged Plaintiffs on just about every issue raised in the fee motion. (ECF No. 229.) And, like the County, the City's

challenge to Plaintiffs' fee award consists of an additional 139 pages of materials. Now, Defendants submit an additional 21 pages of contestations (ECF Nos. 253, 254), bringing the combined total to over 400 pages. Defendants are entitled to contest every aspect of Plaintiffs' fee and costs claim, but Defendants are not entitled to do so at no cost (or entirely at the expense of Plaintiffs).

Plaintiffs' "entitlement to fees is a creature of legislative fiat and includes compensation for … reasonable efforts to pursue those statutory fees." *Thompson v. Pharm. Corp. of Am., Inc.*, 334 F.3d 1242, 1245 (11th Cir. 2003). The reason for that is simple, "[t]he effect of completely denying compensation to [a prevailing party] for time spent on the fee issue is to diminish the proper net award of attorney's fees for the successful civil rights claim: an outcome that frustrates the intent of Congress." *Id.* "Lawyers should not be compensated for turning the litigation about attorney's fees into a 'second major litigation,'" *Thompson v. Pharm. Corp. of Am., Inc.*, 334 F.3d 1242, 1245 (11th Cir. 2003) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)), and that is equally true of Defendants' efforts to avoid payment of fees. Defendants cannot refuse to settle a fee award, vigorously defend against the award of fees, put Plaintiffs to the extraordinary burden of responding to second major litigation, and expect to be "compensated" with a substantial discount. "[I]f an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased." *Johnson v. State of Mississippi*, 606 F.2d 635, 638 (5th Cir. 1979) (quoting *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978)). Defendants' contentions are essentially a request that they receive a substantial discount for Plaintiffs' work on the case as a whole, and that their Offers of Judgment should act as a *de facto* "buy one, get one free." As the Seventh Circuit held in *Morjal v. City of Chicago*, that is "fail[ing] to comply with their obligation to allow judgment to be taken against them," and undermines the purpose of Rule 68. 774 F.3d 419, 423 (7th Cir. 2014) (cleaned up).

II. PLAINTIFFS' SUBMISSIONS PLAINLY DEMONSTRATE THE UNAVAILABILITY OF LOCAL COUNSEL TO REPRESENT THEM IN THIS CONTENTIOUS AND UNPOPULAR MATTER, AND THE REASONABLENESS OF HIRING OUT-OF-TOWN LEGAL EXPERTS IN THE COMPLEX SUBJECT MATTER OF THIS LITIGATION.

Defendants confusingly contend that Plaintiffs "misstate the burden of proof" on whether they are entitled to compensation for travel time and expenses in this case. (ECF No. 253 at 4.) Plaintiffs did no such thing. First, what Plaintiffs did contend—and what is unquestionably true—

is that there are few attorneys in the entire nation who represent clients in cases of this nature (ECF No. 246 at 9-10) and that Plaintiffs adequately demonstrated—through record evidence—that no other counsel was available to represent Plaintiffs in this matter. (ECF No. 235 at 2-5; 19; ECF No. 221-1 at 8-10, ¶¶21-24.) Indeed, as Plaintiffs' sworn testimony demonstrates, because of the undesirability of this case, a contention explicitly recognized by the Eleventh Circuit, *Otto v. City of Boca Raton*, 41 F.4th 1271, 1272 (11th Cir. 2022) (Grant, K., concurring), there are few attorneys that will take such a case *in the entire country*, and Liberty Counsel is the primary option among less than a handful. (ECF No. 221-1 at 9, ¶23.) The submissions to the Court plainly showed that local counsel was not available.

Moreover, even if local counsel might have been available and wiling to represent Plaintiffs in this case, which has not been established, Plaintiffs would *still* be entitled to retain the services of out-of-town counsel with experience in litigating their complex claims, and to have those services (including travel time and expenses) properly compensated upon prevailing. As the Eleventh Circuit has made clear, "[s]ince plaintiffs had the right to retain more than one attorney, the exclusion of out-of-town counsel's travel time is proper only if it was unreasonable not to hire qualified local counsel." *Johnson v. Univ. Coll. of Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983). And, compensating prevailing parties for travel expenses is "not unusual" where, as here, "the litigators were civil rights specialists." *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983). Indeed, "civil rights litigants may not be charged with selecting the *nearest* and cheapest attorney." *Id.* (emphasis added). Here, Liberty Counsel has demonstrated a unique and extensive experience in handling the complex and controversial subject matter of this case (ECF No. 221-1, ¶¶19-21), and Magistrate Judge Reinhart expressly acknowledged that Liberty Counsel attorneys demonstrated the "sophisticated skills in both trial and appellate advocacy" that were "required" to handle the "complex and unique issues of constitutional law" presented in this case. (ECF No. 240 at 33-34.) Therefore, Plaintiffs cannot be faulted for trusting their novel and complex claims to out-of-town counsel with the requisite experience and skill to handle them competently and successfully, and to do so *pro bono* no less, as opposed to paying a hypothetical local lawyer that hypothetically might have agreed to handle those claims *despite having no experience*. And yet, this is *exactly* what the Magistrate Judge erroneously did here. (ECF No. 240 at 19 ("The proper and relevant question is whether local lawyers would have taken on the case and litigated it effectively, *despite not having prior experience*.") (emphasis added).)

Where it was reasonable (and, in this case, necessary) to hire out-of-town counsel, the travel time and expenses are compensable. *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, No. 09-80918-CIV-MARRA/JOHNSON, 2011 WL 13108095, *6 (S.D. Fla. Apr. 7, 2011).

When faced with a similar objection to awarding travel expenses, this Court held that "plaintiffs have provided sufficient reasons for hiring out-of-town counsel" when they demonstrated that the "chosen counsel" had "extensive, complementary expertise litigating First Amendment . . . cases" and "were willing to represent plaintiffs pro bono." *League of Women Voters of Fla. v. Browning*, No. 06-21265-CIV, 2008 WL 5733166, *14 (S.D. Fla. Dec. 4, 2008). Plaintiffs provided the exact same justifications for hiring out-of-town counsel here. (ECF No. 221-1 at 6-8, ¶¶19-21 (demonstrating that Plaintiffs' counsel are experts in First Amendment litigation); *id.* at 9, ¶23 (demonstrating that Plaintiffs' counsel agreed to represent them *pro bono*).) The same outcome should obtain here, and the Report and Recommendation should be set aside.

III. NEITHER THE REPORT AND RECOMMENDATION NOR DEFENDANTS' RESPONSES JUSTIFY SUCH A SUBSTANTIAL ACROSS-THE-BOARD REDUCTION IN PLAINTIFFS' REQUESTED FEES.

A. Plaintiffs Obtained Excellent, First-Of-A-Kind Victorious Results In This Case And Are Entitled To A Fully Compensatory Fee.

Defendants' Response suggests that the Report and Recommendation was reasonable to impose a 25% across-the-board reduction to Plaintiffs' requested fees. (ECF No. 253 at 10.) This is incorrect. For well over a decade, counselors similar to Plaintiffs here have been scratching and clawing for judicial relief from the unconstitutional prohibition on sexual orientation change efforts counseling. And, in every case that was litigated prior to the instant matter, those plaintiffs received no relief whatsoever and had their First Amendment claims rejected and sometimes scoffed at by every circuit court to consider the issue. *See, e.g.*, *Pickup v. Brown*, 740 F.3d 1208, 1213 (9th Cir. 2014); *King v. Governor of the State of New Jersey*, 767 F.3d 216, 220 (3d Cir. 2014); *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 151 (3d Cir. 2015); *Doyle v. Hogan*, 1 F.4th 249 (4th Cir. 2021); *Tingley v. Ferguson*, 57 F.4th 1072 (9th Cir. 2023); *Welch v. Brown*, 834 F.4th 1041 (9th Cir. 2016). And, the district courts preceding these appeals likewise rejected the counselors' First Amendment claims. *See, e.g.*, *Pickup v. Brown*, 42 F. Supp. 3d 1347 (E.D. Cal. 2012); *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013); *Doe v. Christie*, 33 F. Supp. 3d 518 (D.N.J. 2014); *Doyle v. Hogan*, 411 F. Supp. 3d 337 (D. Md. 2019); *Tingley v. Ferguson*,

557 F. Supp. 3d 1131 (W.D. Wash. 2021). Even this Court initially rejected Plaintiffs' First Amendment claims. (ECF No. 141.)

Then, on appeal in this matter, *Plaintiffs became the first ever counselors to succeed*. *See Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020). That was a first of its kind decision, plainly holding that "the First Amendment does not allow communities to determine how their neighbors may be counseled." *Id.* at 871. The Eleventh Circuit ordered entry of an injunction against the enforcement of the challenged prohibitions, *id.*, and refused to reconsider it upon Defendants' request. 41 F.4th 1271 (11th Cir. 2022). Plaintiffs' first-of-its-kind constitutional victory could be no better, represents an excellent result, and entitles Plaintiffs to a fully compensatory fee. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass *all hours reasonably expended on the litigation*." (emphasis added)).

B. Plaintiffs' Counsel Did Not Engage in Impermissible Block Billing.

Defendants contend that Plaintiffs' fee award should be significantly reduced because of allegedly impermissible block billing. (ECF No. 253 at 7-8). This assertion ignores binding precedent and Plaintiffs' billing records. First, even if Plaintiffs engaged in block billing—which, as shown *infra* and in their Objections (ECF No. 246 at 11-12), they did not—such a practice is not prohibited in the Eleventh Circuit. "As a general proposition block billing is not prohibited so long as the Court can determine from the time entry the services that were performed." *Home Design Servs., Inc. v. Turner Heritage Homes, Inc.*, No. 4:08-CV-355-MCR-GRJ, 2018 WL 4381294, *6 (N.D. Fla. May 29, 2018), and "verify the need or relatedness" of those entries. *DJ Lincoln Enter., Inc. v. Google, LLC*, No. 20-CV-14159-Rosenberg/Reinhart, 2022 WL 4287640, *9 (S.D. Fla. July 28, 2022). Indeed, "the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity." *ACLU of Ga. v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999). Thus, even if there were *some* entries in Plaintiffs' billing records that appear block billed, a reduction is not warranted. Further, as to the alleged practice of block billing, Plaintiffs' billing records adequately detail the task performed, demonstrate the relatedness of the tasks performed together, and reveal that Plaintiffs are entitled to compensation for each time entry. (*See, e.g.*, ECF No. 246 at 12-13.)

Defendants chastise Plaintiffs for their failure to address each and every one of Defendants' challenges to 86 purported block-billed entries and contend that Plaintiffs "cherry-picked" the best

of those entries to refute. (ECF No. 253 at 7-8.) First, Plaintiffs were space-restricted in objecting to the Report and Recommendation, whereas Defendants' objections are presented in a 110-page document signified solely by "BB." (*See* ECF No. 253 at 6 (citing ECF No. 229-3 at 1-110).) Second, the use of "representative examples" in refuting numerous meritless objections concerning the same issue is perfectly permissible by this Court. *See, e.g.*, *CityPlace Retail, LLC v. Wells Fargo Bank, N.A.*, No. 18-CV-81689-Rosenberg/Reinhart, 2021 WL 3361172, *8 (S.D. Fla. Jan. 12, 2021). And third, Defendants themselves ironically provide a sampling of only three allegedly offending entries. (ECF No. 253 at 8.)

Be that as it may, a cursory look at Defendants' selected ("cherry picked") entries shows that Plaintiffs' billing records adequately identify the related tasks with requisite specificity to determine whether the hours expended were reasonable. Defendants cite Mr. Mihet's 3.6-hour "single entry" on July 2, 2018, as evidence of purportedly impermissible block billing. (ECF No. 253 at 8.) And yet, Mr. Mihet's entry involved tasks performed for a single issue—the proposed discovery schedule—and the preparation of a report and proposed order that are required by this Court and demand consultation with opposing counsel. *See* Local Rule 16.1(b). This was also just *one* of Mr. Mihet's time entries for the selected day (ECF No. 221-2 at 8), and thus hardly constitutes the "imprecise billing" practice of "lumping together all tasks performed on a given day" that the Eleventh Circuit has suggested is problematic. *Dial HD, Inc. v. ClearOne Comm.*, 536 F. App'x 927, 931 (11th Cir. 2013). Indeed, *Mr. Mihet did separately bill other tasks on the same day*, which were not related to the proposed discovery schedule—this is the exact opposite of block billing. If this is the "worst" example of block billing that Defendants can muster, the Court can be assured that their block billing complaints lack merit.

Defendants' citation to Mr. Schmid's September 12, 2018, time entry is also disingenuously incomplete. (ECF No. 253 at 8.) The relevant entry reads in its entirety: "Receive and review email correspondence from HGM re preemption argument in County's PI opposition; review County's argument re same; review statutes and caselaw re responding to same argument; draft and send email memorandum to HGM re addressing issues re same." (ECF No. 221-2 at 30.) All of Mr. Schmid's tasks in this entry relate to a single issue—Defendants' preemption argument—and plainly state that the research and email memorandum relate to that same issue. (*Id.*) Defendants intentionally and misleadingly omit that level of specificity in their response, claiming only that Mr. Schmid's entry related to the broad "reviewing the County's opposition to

Plaintiff's motion for preliminary injunction." (ECF No. 253 at 8.) Mr. Schmid's allegedly offending entry provides a level of detail that—though ignored by Defendants—verifies the need for the task and the relatedness of the tasks performed. *DJ Lincoln*, 2022 WL 4287640, at *9. Once again, if this is among the "worst" examples of block billing that Defendants can show, their challenge is an obvious stretch.

Finally, Defendants' challenge to Mr. Mihet's entry of August 9, 2022, fares no better. (ECF No. 253 at 8.) Defendants contend that Mr. Mihet's 4.2 hours working on a reply brief and filing it is somehow impermissibly block billed. But, Mr. Mihet's time entry demonstrates beyond cavil that every one of the subtasks performed during that efficient 4.2-hour period was related to a single task—preparing a brief required to be filed with this Court. (*See* ECF No. 221-2 at 67.) Defendants' block billing argument lacks merit and cannot be squared with the law of this Circuit.

C. Plaintiffs' Billing Practices Are Not Vague.

1. Defendants' contentions concerning waiver relating to allegedly vague time entries are hypocritical and factually incorrect.

Defendants contend that Plaintiffs waived any argument concerning allegedly vague entries in their billing records. (ECF No. 253 at 9.) Defendants' contentions concerning waiver are not only hypocritical but factually incorrect. In their original opposition to Plaintiffs' fee motion, Defendants stated: "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." (ECF No. 228 at 21.) Thus, in their vagueness challenge before the Magistrate Judge, *Defendants did not identify a single entry upon which the Court should base any reductions for purported vagueness*. Thus, it is *Defendants* who waived any argument as to purportedly vague time entries which Defendants never specifically identified. *See In re De Carvalho*, No. 19-22577-CV-Scola, 2019 WL 6130534, * n.1 (S.D. Fla. Nov. 19, 2019) (holding that "argument in passing" and without elaborat[ing] on it in any further detail" waives the argument (quoting *Mock v. Bell Helicopter Textron, Inc.*, 373 F. App'x 989, 992 (11th Cir. 2010)). Despite Defendants' haphazard objection, Plaintiffs nevertheless responded to it with the vigor to which it was entitled (ECF No. 235 at 18) and did not waive arguments against it.

2. The Report and Recommendation's slapdash treatment of the allegedly vague entries is erroneous and cannot justify substantially reducing Plaintiffs' fees.

Perhaps owing to Defendants' four sentence drive-by objections to allegedly vague entries (ECF No. 228 at 21), the Report and Recommendation addressed these contentions in a mere three sentences, two of which were a restatement of Defendants' purported objections. (ECF No. 240 at 24-25.) The Report and Recommendation's one-sentence explanation for reducing Plaintiffs' requested fees on this issue was plainly in error and should be overruled. Indeed, the one-sentence treatment of this issue hardly suffices to "articulate the decisions … made" or "give principled reasons for those decisions." *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1304 (11th Cir. 1988). In any event, as demonstrated in Plaintiffs' Objections (ECF No. 246 at 13-14), Plaintiffs' time entries are not vague and provide adequate descriptions of the work performed by each timekeeper. The Report and Recommendation should be set aside.

IV. DEFENDANTS' CONTENTION THAT THE TYPICAL PRACTICE OF AWARDING CURRENT RATES TO PREVAILING PARTIES CONSTITUTES AN IMPERMISSIBLE ENHANCEMENT IS WRONG.

Defendants suggest that Plaintiffs omit "crucial" portions of Supreme Court precedent to contend that the Magistrate Judge erred by failing to award current rates. (ECF No. 253 at 12.) Defendants recognize, as they must, that the Supreme Court has made clear that civil rights litigants are often required to wait for compensation until the end of litigation, and that "[c]ompensation 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." *Perdue v. Kenny A ex rel. Winn*, 559 U.S. 542, 556 (1989) (emphasis added). Contrary to Defendants' suggestion, *Perdue* did not blaze new territory but merely recognized the decades-old historical practice of awarding Section 1988 prevailing parties their legal fees at current rates. *See, e.g.*, *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 282 (1989) ("In setting fees for prevailing counsel, the courts have *regularly* recognized the delay factor, either basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." (emphasis added)). What Defendants contend is an "extraordinary" occurrence, is actually common and routine, and it is *Defendants* who strain *Perdue* beyond its holding to suggest it means something entirely different.

Defendants erroneously suggest that awarding current rates is an "enhancement" that is reserved only for extraordinary matters. (ECF No. 253 at 12.) And, Defendants suggest that what was "expressly held in *Gray*" prohibits an award of current rates as an enhancement. (*Id.* (citing

Gray ex rel Alexander v. Bostic, 613 F.3d 1035 (11th Cir. 2010)).) Defendants badly misread *Gray*. The Eleventh Circuit's holding in *Gray* in no way diminishes the historical practice to which Plaintiffs are entitled here. In *Gray*, the Eleventh Circuit held that *Perdue* prohibits awarding current rates *and applying an enhancement* without adequate justification. 613 F.3d at 1044 ("the district court used current hourly rates to calculate the lodestar amount [and] it *also* added to the resulting amount *another fifteen percent to account for the delay*" (emphasis added)). The Eleventh Circuit held that the district court's "enhancement to compensate for the delayed payment" was an abuse of discretion, *because the district court had already used current rates*. *Id.* It was not the use of current rates *itself* that was the abuse of discretion, but the additional application of further enhancement without adequate justification. *Id.* at 1046. Here, in sharp contrast, the Magistrate Judge declined to use current rates for much of Plaintiffs' work, and also declined any enhancement for the delay in payment. This was plainly erroneous.

In sum, the award of current rates simply is not an "enhancement." *See Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 478 F. App'x 54, 60 (4th Cir. 2012) ("we first note that the use of the current rates was not an enhancement of the fee award of the type discussed in the Supreme Court's opinion in *Perdue*."). Indeed, "in the *typical* case, an appropriate way to compensate for delay in payment for attorney's fees is . . . to use current hourly rates instead of historical ones." *Id.* (emphasis added). The Report and Recommendation erred by refusing to award Plaintiffs their current rates, and it should be overruled.

CONCLUSION

For the foregoing reasons, and for all those detailed in Plaintiffs' Objections (ECF No. 246), the Report and Recommendation should be overruled, and Plaintiffs should be awarded the attorney's fees and nontaxable expenses and costs as requested.

Respectfully submitted,

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