IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, et al.

Plaintiffs,

and

DIAMOND OFFSHORE COMPANY,

Plaintiff-Intervenors,

v.

THE CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Defendant-Intervenors,

and

KENNETH LEE "KEN" SALAZAR, et al,

Defendants.

CIVIL ACTION No. 10-1663(F)(2)

SECTION F

JUDGE FELDMAN

MAGISTRATE 2
MAGISTRATE WILKINSON

DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION ON QUANTUM OF ATTORNEY'S FEES AND DEFENDANTS' OPPOSITION TO PLAINTIFFS' OBJECTIONS

INTRODUCTION

Plaintiffs request $191,891.25 in additional fees to correct what they characterize as "inadvertent omissions" from the Magistrate's well-reasoned and thorough Report and Recommendation, Dkt. #265 ("R&R"). What Plaintiffs describe as inadvertent omissions are not omissions at all but rather reflect the Magistrate's well-reasoned conclusion that Plaintiffs may not recover fees for hours that were not reasonably expended or for which Plaintiffs have failed to carry their burden of substantiating their petition for fees. If Plaintiffs had wanted to challenge the Magistrate's findings as to the appropriate level of recovery, they could have done so on its merits rather than alleging unsupportable and implied inadvertent omissions. Indeed, the only mathematical error the Magistrate made is in awarding Plaintiffs an extra $71,588.70 in fees for hours that are not reflected in their billing statements. For this reason, Federal Defendants request that the Magistrate's recommended award of $440,596.68 be adjusted downward to $369,007.98 to reflect this mathematical error.

ARGUMENT

I. THE MAGISTRATE MADE NO INADVERTENT OMISSIONS WARRANTING AN UPWARD ADJUSTMENT OF THE LODESTAR

The Magistrate Judge's Report and Recommendation recommended that Plaintiffs recover $440,596.68 in reasonable attorney's fees and $444.33 in costs. While claiming not to disagree with the Magistrate's analysis, Plaintiffs nonetheless contend that the Magistrate accidentally omitted (1) $89,845.25 in fees for hours expended on their motion to set attorney's fees and costs; and (2) $101,974 in fees for the hours of Venable partner John Cooney. Pls' Br. (Dkt. #270), at 2-3. By Plaintiffs' estimation, the Magistrate's calculation of quantum omitted $191,891.35 — which amounts to 44% of the total quantum the Magistrate awarded. Pls' Br. at 2. Plaintiffs' theory that Magistrate made not one— but two — substantial "inadvertent

omissions," however, cannot be reconciled with the Magistrate's thoughtful 58-page opinion. The Magistrate did not abuse his discretion and, accordingly, there is no basis for increasing Plaintiffs' recovery. *Hollowell v. Orleans Reg'l Hosp. LLC*, 217 F.3d 379, 391-392 (5th Cir. 2000) (reviewing factual findings for clear error, and the district court's award of attorneys' fees for abuse of discretion). For the reasons discussed below, Plaintiffs' request for an upward adjustment to the Magistrate's award of $440,596.68 should be rejected out of hand as another attempt at overreaching for fees and costs from the public fisc.

First, nowhere in the Report and Recommendation did the Magistrate find that Plaintiffs were entitled to $89,845.25 to compensate them for hours expended on their fee-related motions. To the contrary, the Magistrate made clear that Plaintiffs are only entitled to fees incurred after the entry of the preliminary injunction and before the Fifth Circuit found the case to be moot. R&R, at 30-31. While the Magistrate did acknowledge that Plaintiffs could be entitled to reasonable fees for the hours expended on their fees motion, it also found that Plaintiffs had exercised no billing judgment:

> These conclusory assertions do not constitute billing judgment. In short, the billing records contain no indication of the hours the attorneys wrote off as redundant, unproductive, or excessive during this lengthy litigation…. plaintiffs cannot recover for all of the hours expended in this entire litigation. Their failure to pare down the hours they claim to the concretely identifiable time period during which the preliminary injunction was in effect and defendants were actually in contempt, is one example of a broader failure to demonstrate the exercise of billing judgment.
>
> R&R 37.

The Magistrate, therefore, found that Plaintiffs had "made the court's evaluation of their submissions more difficult and time consuming that it might otherwise have been." *Id.* at 8 n.3. Under such circumstances, it was within the Magistrate's discretion to deny compensation for the time spent in litigating those fees. *See Trichilo v. Sec'y of Health and Human Serv.*, 823 F.2d

702, 708 (2nd Cir. 1987) (noting "[i]f counsel makes inflated or outrageous fee demands, the court could readily deny compensation for the time spent in pressing them, since that time would not have been 'reasonably spent'").[1] This is particularly true here given that Plaintiffs spent untold hours redacting their billing records, a practice that the Magistrate deemed unacceptable in light of the fact that Plaintiffs filed their billing records under seal. R&R, at 46-47. The law is clear that plaintiffs who fail to exercise a modicum of billing judgment in briefing the issue of fees and preparing any attendant billing records cannot later claim that they are entitled to fees for those hours. The Magistrate therefore reasonably concluded that Plaintiffs were not entitled to recover full compensation for the time spent litigating their claim for fees.

Plaintiffs further claim that the Magistrate accidentally did not include 236 hours that Venable partner, John Cooney, billed during the relevant time period. Pls' Br. at 5. Not so. The Magistrate's conclusion that Mr. Cooney had reasonably expended only 30.6 hours within the relevant time period accurately reflects Mr. Cooney's limited advisory role in the litigation during that period. R&R, at 50. It strains credulity that the Magistrate, in his 58-page opinion, accidentally omitted over one hundred thousand dollars in billable hours for Mr. Cooney. Despite Plaintiffs' suggestions to the contrary, nowhere did the Magistrate find that it "intended to include all hours of Mr. Cooney between June 22, 2010 and September 29, 2010." *Id.* Indeed,

[1] Despite Plaintiffs' emphasis that Defendants did not contest a reasonable fee award to Plaintiffs for their fee-related motions, Defendants vigorously opposed Plaintiffs' fee request for their quantum motion as unreasonable:

> Plaintiffs' claimed hours is particularly incongruous given that Plaintiffs simply submitted to the Court 200 pages of block-billed entries without even attempting to identify which charges arose from the Court's finding of contempt (and which did not). Plaintiffs cannot plausibly request 78 hours in billable time when they did not even attempt to make the threshold showing of causation required by law in order to collect attorneys' fees and costs. *See Norman Bridge*, 529 F.2d at 827 ("Compensatory civil contempt reimburses the injured party for the losses and expenses incurred *because of* his adversary's non-compliance."). Dkt. #256 at 4.

in the pages from the Report & Recommendation that Plaintiffs cite for this proposition, the Magistrate reduces Mr. Cooney's hourly rate from $725 to $450 and no more. R&R, 17-19. Elsewhere, the Magistrate finds that Mr. Cooney's practice of relying on "vague descriptions" in his billing entries such as "office conferences with Jones Walker attorneys" rendered it difficult to ascertain how much time he "spent on compensable and noncompensable tasks and whether the amount of time spent on compensable tasks was reasonable." R&R, at 39. The Magistrate reasonably refused to credit Mr. Cooney's vague billing entries given Mr. Cooney's failure to substantiate his portion of the petition with sufficiently detailed billing entries. Finally, the R&R makes plain that the Magistrate did not number Mr. Cooney among the attorneys doing most of the work in the case as Plaintiffs' demand for an additional 230 hours would suggest. R&R, at 38 ("The bulk of the work was done by the two Jones Walker lead partner, Rosenblum and Hainkel, along with one associate and one paralegal. . ."). [2] In sum, the Magistrate reasonably determined that Mr. Cooney had billed more hours than was reasonably necessary, and that he was not entitled to full compensation for those hours. If Plaintiffs had wanted to challenge the Magistrate's recommendation on this score, they should have done so on its merits rather than claiming there was an error in calculation.

[2] If this Court were to find that Mr. Cooney is entitled to an extra 236 hours as Plaintiffs now claim, Federal Defendants request leave to file objections to the Magistrate's Report and Recommendation for the limited purpose of seeking an additional reduction for duplicative and excessive time and for overstaffing of this matter. The Magistrate's findings on these issues were predicated on only 30.6 hours of billable time for Mr. Cooney. Federal Defendants believe that the reasonableness of the Magistrate's conclusions on these points would be undermined if this Court were to grant the additional hours for Mr. Cooney that Plaintiffs request from the Court, which Defendants assert would not be appropriate.

II. A DOWNWARD ADJUSTMENT OF THE LODESTAR OF $71,588.70 IS APPROPRIATE TO REFLECT A MATHEMATICAL ERROR

Federal Defendants object to the Report and Recommendation in connection with a mathematical error made in calculating the hours of two Jones Walker partners. Specifically, Federal Defendants request that the Court revise the Magistrate's quantum decision to reduce Ms. Hainkel's and Mr. Rosenblum's respective hours so as to make them consistent with the billing statements submitted to this Court.

The Magistrate calculated Ms. Hainkel as incurring 501.330 hours after the 15% reduction during the relevant time period. As illustrated by Ex. A, Ms. Hainkel actually billed 393.9 hours during the relevant time period. The appropriate calculation for Ms. Hainkel's hours should be: 393.9 x .85 (reflecting the 15% across-the-board reduction) = 334.82 x $300, which would amount to $100,444.50. The Magistrate awarded Ms. Hainkel $150,399 in fees, which means that a $49,954.50 downward adjustment of the lodestar is appropriate on this basis.

The Magistrate calculated Mr. Rosenblum as incurring 262.99 hours after the 15% reduction during the relevant time period. As illustrated by Ex. B, Mr. Rosenblum actually billed 248.8 hours during the relevant time period. The appropriate calculation for Mr. Rosenblum's hours should be: 248.8 x .85 (reflecting the 15% across-the-board reduction) = 211.48 x $420= $88,821.6. The Magistrate awarded Mr. Rosenblum $110,455.8 in fees, which means that a $21,634.2 downward adjustment of the lodestar is appropriate on this basis. In sum, the Magistrate awarded Plaintiffs an extra $71,588.70 in fees for hours that are not reflected in their billing statements. Based on this technical mistake, Defendants respectfully request a downward adjustment of the lodestar amount recommended by the Magistrate Judge from $440,596.68 to $369,007.98.

III. CONCLUSION

Defendants respectfully request that Plaintiffs' objections to the Report and Recommendation be rejected and no upward adjustment be applied to the Magistrate's finding that the appropriate fee award is $440,596.68. Defendants further seek a downward adjustment to the quantum award from $440,596.68 to $369,007.98, reflecting $71,588.70 for hours that are not recorded in Plaintiffs' billing statements. As noted in Defendants briefing before the Magistrate, any award of fees and costs to Plaintiffs will be interlocutory. Federal Defendants respectfully request that such award be placed in escrow until such time as there is a final non-appealable order.

Respectfully submitted, June 15, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2011, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

/s/ *Marissa A. Piropato*
Marissa A. Piropato