EXHIBIT F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JOSHUA MARSHALL,

Plaintiff,

- v -

P.O. SALIM RANDALL, Shield No. 15331 and
P.O. MICHAEL BURBRIDGE, Shield No. 15488,

Defendants.
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REPORT AND RECOMMENDATION

10-CV-2714 (JBW) (VVP)

POHORELSKY, Magistrate Judge:

After a three-day jury trial before the Honorable Jack B. Weinstein, the plaintiff secured a judgment against the defendants under 42 U.S.C. § 1983. At trial, the plaintiff sought to prove that the defendants New York City Police Officers Salim Randall and Michael Burbridge violated his federal constitutional rights when they arrested him without probable cause and then participated in his prosecution. The trial turned on the credibility of the defendant-officers' testimony regarding their basis for probable cause for the arrest and the plaintiff's opposing version of the events. The jury found in favor of the plaintiff and awarded him $190,000 in damages. Subsequently, Judge Weinstein referred the matter to the undersigned for preparation of a report and recommendation on the amount of attorneys' fees to be awarded to the plaintiff.

In the present fee application, the plaintiff requests $315,088.86 in attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and Federal Rule of Civil Procedure 54(d). The plaintiff seeks fees for the work of four attorneys, partner Jon L. Norinsberg and associate Alex Umansky of the Law Offices of Jon L. Norinsberg, and partners Joshua P. Fitch and Gerald M. Cohen of Cohen & Fitch, LLP. The defendants have objected to the plaintiff's fee application on various

grounds, including that the hourly rates requested are too high and the hours billed are excessive.[1]

For the reasons below, the court recommends granting the plaintiff's motion in part and denying it in part, providing counsel with an overall recovery of $207,939.50 in attorneys' fees and $3,846.36 in costs.

BACKGROUND AND PROCEDURAL HISTORY

The plaintiff's claims arose out of his arrest and subsequent incarceration in 2008. The Complaint alleged the following facts: On May 15, 2008, the plaintiff was arrested without probable cause and charged with Criminal Possession of Stolen Property in the Fourth Degree and Criminal Possession of a Weapon in the Second and Fourth Degree. The plaintiff was thereafter imprisoned for 135 days until the charges against him were dismissed in May of 2009. The plaintiff commenced this action against the City of New York and two of the arresting police officers, alleging deprivation of his federal civil rights under the First, Fourth, Fifth, Eighth and Fourteenth Amendments. *See* Complaint, Dkt. No. 1.

The parties engaged in paper discovery and took the depositions of the three individual parties to the case. After the close of discovery, the defendants filed a motion for summary judgment as to the entirety of the Complaint. Judge Weinstein granted the defendants' motion on the plaintiff's § 1983 claims alleging violations of his First, Fifth, and Eighth Amendment rights and on his malicious abuse of process claim. The court denied the motion as to the plaintiff's claims of false arrest, malicious prosecution, and denial of a constitutional right to a

[1] In support of the motion for fees, Dkt. No. 83, the plaintiff submitted a memorandum of law, Dkt. No. 84, the Declaration of Jon L. Norinsberg, Dkt. No. 85 ("Norinsberg Decl."), the Declaration of Gerald M. Cohen, Dkt. No. 87 ("Cohen Decl."), and the Declaration of Joshua P. Fitch, Dkt. No. 88 ("Fitch Decl."). Attached to these declarations, among other things, are contemporaneous time records specifying the work performed on the case. The defendants filed a memorandum of law in opposition, Dkt. No. 96, as well as a Declaration of Johana V. Castro with attachments, Dkt. No. 97 ("Castro Decl."). The plaintiff filed a reply by letter, Dkt. No. 98, and oral argument was held before this court, *see* Dkt. No. 102.

fair trial and these claims were tried before the jury. *See* Memorandum & Order, Dkt. No. 41.[2] At the trial, the jury heard testimony from six witnesses – the plaintiff, the defendant police officers, non-party police officers Joseph Sena and Kieran Fox, and criminalist Nana Lamouse-Smith. The jury found in favor of the plaintiff on each of his claims and awarded him $140,000 in compensatory damages and $50,000 in punitive damages. Included in the jury's verdict was a finding that the individual defendants violated the plaintiff's right to a fair trial by knowingly presenting false information to the prosecutor. *See* Dkt. No. 75; Norinsberg Decl., Ex. A (attaching verdict sheet). The defendants have filed a notice of appeal as to the judgment to the Second Circuit, Dkt. No. 100.

Although 42 U.S.C. § 1988 leaves it to the court's discretion whether to award attorneys' fees to a prevailing party in civil rights cases, there is a presumption in favor of awarding attorneys' fees to prevailing plaintiffs. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Raishevich v. Foster*, 247 F.3d 337, 344 (2d Cir. 2001). Accordingly, the defendants here do not oppose a fee award, but argue that the amounts requested by the plaintiff are excessive. "The amount of the fee, of course, must be determined on the facts of each case." *Hensley*, 461 U.S. at 430. As discussed below, the court agrees with the defendants and the fee award reflects reductions in both the number of hours and the hourly rates on which the award is based.

I. STANDARDS OF LAW

Where a party is entitled to fees, the district court calculates the "presumptively reasonable fee" by the "lodestar" method, which entails determining the "number of hours reasonably expended on the litigation [and] multipl[ying that figure] by a reasonable hourly rate." *Hensley*, 461 U.S. at 433; *see also Millea v. Metro-North Railroad Co.*, 658 F.3d 154, 166 (2d Cir. 2011) ("Both this Court and the Supreme Court have held that the lodestar—the product

[2] The Complaint included a claim for municipal liability against the City which was later withdrawn. *See* Dkt. No. 47, at 13.

of a reasonable hourly rate and the reasonable number of hours required by the case—creates a 'presumptively reasonable fee.'") (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 183 (2d Cir. 2008) and citing *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1673 (2010)). The reasonableness of hourly rates are guided by the market rate "[p]revailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984), and the relevant community is generally the "district in which the court sits," *Polk v. New York State Dep't of Corr. Servs.*, 722 F.2d 23, 25 (2d Cir. 1983).

In *Arbor Hill*, the Second Circuit noted that the somewhat "muddled" development of fee shifting jurisprudence in the federal courts had created a "general confusion" surrounding the lodestar calculation. *Arbor Hill*, 522 F.3d at 189-90. The court held that the meaning of the term lodestar had shifted so much that "its value as a metaphor has deteriorated to the point of unhelpfulness." *Id.* Relying on the development of Supreme Court jurisprudence on attorneys' fees, the Second Circuit therefore suggested abandoning the term "lodestar" in favor of the "presumptively reasonable fee." *See Arbor Hill*, 522 F.3d at 188-89; *McDaniel v. County of Schenectady*, 595 F.3d 411, 420 (2d Cir. 2010). In doing so, the court did not suggest abandoning the lodestar calculation as directed by the Supreme Court, but observed that the analysis had changed over time such that the term "lodestar" had lost its value. *See Arbor Hill*, 522 F.3d at 190; *McDaniel*, 595 F.3d at 417 n.2 (*Arbor Hill*'s approach is "derivative of the lodestar method"). That change occurred due to tension created by the Supreme Court's directive to lower courts to determine the "reasonable hourly rate" by using the factors set out by the Fifth Circuit in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) rather than simply using the rate normally charged by the attorney moving for fees and later adjusting the overall fee for case-specific factors. *Arbor Hill*, 522 F.3d at 188 (citing *Hensley*, 461 U.S. at 433 and *Blum*, 465 U.S. at 898–900). By incorporating the *Johnson* factors into the lodestar at

the outset, *Arbor Hill* noted, there was little room for later adjustment of the calculation of fees due to case-specific considerations. *Id.* at 188-89. Thus, in *Arbor Hill*, the Second Circuit held that, consistent with the Supreme Court's guidance, a "presumptively reasonable fee" would be determined by considering a multitude of case-specific factors[3] in order to establish a reasonable hourly rate that a "reasonable, paying client would be willing to pay," and then multiplying that rate by the number of hours reasonably spent on the case. *Arbor Hill*, 522 F.3d at 184, 190-91. District courts were to now "bear in mind *all* of the case-specific variables that [the Second Circuit] and other courts have identified as relevant to the reasonableness of attorneys' fees in setting a reasonable hourly rate." *Arbor Hill*, 522 F.3d at 190. (emphasis in original). This determination is undertaken consistent with the principle that a "reasonable paying client wishes to spend the minimum necessary to litigate the case effectively." *Id.* at 190.

The plaintiff's assertion that *Arbor Hill*'s approach – and specifically the reliance on the *Johnson* factors – is at odds with recent Supreme Court jurisprudence is wrong. To be sure, the Supreme Court has issued a strong endorsement of the traditional lodestar approach and the use of the "lodestar" terminology. *See Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672-74 (2010). In doing so, the Court stated that the method employed by the Fifth Circuit in *Johnson* gives too little guidance to judges by placing the emphasis on factors and considerations that are overly subjective. *See Kenny A.*, 130 S. Ct. at 1672 (quoting *Pennsylvania v. Delaware Valley*

[3] These factors include, but are not limited to, the "complexity and difficulty of the case, the available expertise and capacity of the client's other counsel (if any), the resources required to prosecute the case effectively[,] the timing demands of the case, [and] whether an attorney might have an interest in achieving the ends of the litigation or might initiate the representation himself," *Arbor Hill*, 522 F.2d at 184, 187-90 – as well as the twelve factors the Fifth Circuit employed in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The *Johnson* factors include (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to properly perform the relevant services; (4) the preclusion of other employment attendant to counsel's acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) fee awards in similar cases. *Johnson*, 488 F.2d at 717-19.

Citizens' Council for Clean Air, 478 U.S. 546, 563 (1986)). The Court found that the lodestar approach provided better limits on a judge's discretion by making the determination more objective, providing for fee awards that are more predictable and less disparate. *See Kenny A.*, 130 S. Ct. at 1672. However, the *Johnson factors*, as opposed to the *Johnson method*, are still relevant in informing the court's determination of a reasonable fee and a reasonable hourly rate. *Kenny A.* cautions against using a strict *Johnson* approach as the primary basis for determining reasonable attorneys' fees, but nowhere calls into question the idea of using relevant *Johnson* factors in helping to come to a reasonable fee. The Court held that "the lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Kenny A.*, 130 S. Ct. at 1672 (emphasis in original). Relying on its prior decision in *Delaware Valley*, the Court stated that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable attorney's fee.'" *Id.* at 1673 (quoting *Delaware Valley*, 478 U.S. at 566). In *Delaware Valley*, the court explicitly recognized that "many of the *Johnson* factors are 'subsumed within the initial calculation' of the lodestar." 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-90).

As the Second Circuit later explained, *Kenny A.* recognized that the lodestar is not "conclusive in all circumstances" and the "district court may adjust the lodestar when it 'does not adequately take into account a factor that may properly be considered in determining a reasonable fee.'" *Millea*, 658 F.3d at 167 (quoting *Kenny A.*, 130 S. Ct. at 1673). Such adjustments, however, are rare since the lodestar includes most of the relevant factors. *Id.* For instance, the Supreme Court stated that the "novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors" are already reflected in the number of billable hours and the "quality of an attorney's performance generally should not be

used to adjust the lodestar" because it is reflected in the reasonable hourly rate." *See Kenny A.*, 130 S. Ct. at 1673 (citing *Delaware Valley*, 478 U.S. at 566).

Therefore, whether the calculation is referred to as the lodestar or as the presumptively reasonable fee, courts will take into account case-specific factors to help determine the reasonableness of the hourly rates and the number of hours expended. *See Millea*, 658 F.3d at 167 ("while a district court may not adjust the lodestar based on these factors, it may use them to determine the reasonable number of hours the case requires"). *See also McDaniel*, 595 F.3d at 420 (citing *Arbor Hill* and assessing case-specific considerations at the "outset, [and] factoring them into [the court's] determination of a reasonable hourly rate for the attorneys' work."); *Brown v. Starrett City Assocs.*, No. 09-CV-3282, 2011 WL 5118438, at *4 n.5 (E.D.N.Y. Oct. 27, 2011) ("[w]hatever the terminology, both *Arbor Hill* and *Kenny A.* require the Court to consider case-specific factors in determining the reasonableness of the hourly rates and the number of hours expended.") (citing *Shim v. Millennium Grp.*, No. 08-CV-4022, 2010 WL 2772493, at *2 & n.3 (E.D.N.Y. June 21, 2010)), *report and recommendation adopted*, 2010 WL 2772342 (E.D.N.Y. July 12, 2010)).

II. HOURLY RATES

In weighing the various case-specific factors relating to determining reasonable hourly rates, the court looks first to fee rates generally charged in this district. The "range of 'reasonable' attorney fee rates varies in this district depending on the type of case, the nature of the litigation, the size of the firm, and the expertise of the attorneys." *Siracuse v. Program for the Development of Human Potential*, No. 07-CV-2205, 2012 WL 1624291, at *30 (E.D.N.Y. Apr. 30, 2012); *see also Hugee v. Kimso Apartments, LLC*, 852 F. Supp. 2d 281, 299-300 (E.D.N.Y. 2012). Courts in this district have generally approved partner rates between $300 and $450 per hour. *See Konits v. Karahalis*, 409 Fed. Appx. 418, 422-23 (2d Cir. 2011) (collecting cases and affirming holding that prevailing rates for experienced attorneys in this district range

from $300 to $400 per hour); *Hugee*, 852 F. Supp. 2d at 298-99 (citing hourly rates of $300 to $450 for partners in this district). This is in line with the rates awarded to solo practitioners in civil rights cases. *See Brown*, 2011 WL 5118438, at *5 (awarding $300 per hour to counsel with 12 years of litigation experience and recognizing that this was firmly within the range of hourly rates in civil rights actions); *Rodriguez v. Queens Convenience Deli Corp.*, No. 09-CV-1089, 2011 WL 4962397, at *6 (E.D.N.Y. Oct. 18, 2011) (awarding $300 per hour to solo practitioner with nine years of experience). Before turning to the analysis of the proper rates in this case, the court provides an overview of the attorneys' experience as reflected in the affidavits they submitted to the court, as well as the defendants' primary objections to their requested rates.

A. Norinsberg

Mr. Norinsberg requests an hourly rate of $450. He has been practicing for over twenty years and has an extensive background in litigating complex civil rights and constitutional law cases. He graduated *magna cum laude* from the Georgetown University Law Center. He was a litigation associate at Proskauer, Rose, Goetz and Mendelsohn for two years, after which he joined the New York City Law Department where he was a respected trial lawyer for five years. He started his own solo practice in 1998, where he focuses on civil rights litigation. He has tried over 150 cases in his career. He typically retains clients on a contingency basis and is compensated by a percentage of the recovery or through Section 1988 fee awards and settlements. Mr. Norinsberg was involved in all stages of the litigation from its inception through trial to the present submission. Norinsberg Decl. ¶¶ 4-12.

The defendants do not cite cases to dispute the reasonableness of Mr. Norinsberg's requested $450 hourly rate, but rather argue that the rate is inappropriate because of the straightforward nature of the case and because he had the assistance of two other attorneys who request a rate of $400 per hour. They also argue that the affidavits supporting his requested rate

are "self-serving" since they are presented by attorneys that regularly sue the City rather than plaintiffs attesting to their willingness to pay these rates.[4]

B. Cohen & Fitch

Mr. Cohen and Mr. Fitch each request an hourly rate of $400. Both attorneys have eight years of litigation experience. Mr. Cohen graduated from Benjamin N. Cardozo School of Law, *cum laude*, in 2004. Mr. Fitch graduated from New England School of Law, *magna cum laude*, also in 2004. After law school, both attorneys joined the Office of the District Attorney in Bronx County, where each was selected to join specialized Bureaus within the District Attorney's office. In those capacities, they handled hundreds of cases and between them tried over 15 cases to verdict. They consider their experience at the D.A.'s office working with detectives and police officers to give them a distinct advantage in their current civil rights practice. After about a year in private practice in 2007, Mr. Cohen and Mr. Fitch formed the law firm of Cohen & Fitch LLP in June 2008. Since that time, the firm has litigated approximately 265 Section 1983 cases, including 93 in the Eastern District of New York. The firm handles all of its civil rights cases on a contingency basis and are compensated based upon a percentage of any judgment or settlement, or through Section 1988 fee awards and settlements. Like Mr. Norinsberg's firm, they bear all costs while the case is pending. A review of the time records in this case demonstrates that Mr. Cohen contributed the majority of the firm's work on the case and that Mr. Fitch acted in more of a consultative role. Cohen Decl. ¶¶ 1-22; Fitch Decl. ¶¶ 1-21.

[4] In addition to these affidavits, the plaintiff's counsel has provided articles on nationwide billing rates from the National Law Journal as well as affidavits from other civil rights attorneys supporting the fee request. Norinsberg Decl., Exs. C-F. These submissions are of limited usefulness. The Law Journal's review spans the entire nation, rather than the relevant forum, the Eastern District of New York, and does not take into account the particular circumstances of this case or the attorneys involved. The affidavits support the rates requested by plaintiff's counsel as reasonable and the affiants lend their professional praise for the credentials of the plaintiff's attorneys. Counsel's reputations are not in dispute, however, and thus these affidavits are largely unnecessary to the court's recommendations.

As to Cohen & Fitch's requested rate of $400 per hour, the defendants suggest that these attorneys' relative inexperience when compared to Mr. Norinsberg qualifies them for $325 per hour. They point out that a comparison of Cohen & Fitch's work with Mr. Norinsberg demonstrates that they are largely overlapping, resulting in unnecessary double-billing. The defendants also assert that although the two attorneys have been practicing for eight years, they have only been actively involved in civil rights litigation since the founding of their firm.[5]

C. Associate and Paralegal Hours

The plaintiff also seeks to recover 9.05 hours of work at the rate of $300 per hour for the work of Mr. Umansky, an associate in Mr. Norinsberg's firm. Mr. Umansky graduated from New York Law School, was admitted to the New York Bar in 2011, and at the time of submission of this motion, had been an associate in Mr. Norinsberg's firm for one and one-half years. Norinsberg Decl. ¶¶ 21, 26; Castro Decl. Ex. C. The defendants argue that the more appropriate hourly rate for a junior associate is within the $125 to $200 range and suggest a rate of $175 per hour for Mr. Umansky's work. The plaintiff also seeks to recover 5.3 hours of fees at the rate of $125 for the work of Nicole Burstyn, a paralegal in Mr. Norinsberg's firm. The defendants do not object to these fees or the hourly rate requested.

D. Recommended Rates

After consideration of the *Arbor Hill* factors, the court finds an hourly rate of $400 for Mr. Norinsberg, $325 for Mr. Cohen and Mr. Fitch, $200 for Mr. Umansky, and $125 for the work of the paralegal Ms. Burstyn is what a reasonable paying client would pay for their services. These rates are in line with those typically awarded to attorneys of similar experience and caliber in this district and account for other factors normally assessed in determining a

[5] Cohen and Fitch include statements in their affidavits that the hourly rates requested are those they normally charge in connection with Rule 68 Offers of Judgment and that the City has not objected to these rates in the past. *See* Cohen Decl. ¶ 21; Fitch Decl. ¶ 20. The defendants dispute that they ever conceded hourly rates for these attorneys, attesting rather that they make such offers with respect to the totality of the fees, expenses and costs. *See* Decl. of Muriel Goode-Trufant, Ex. B. to Castro Decl. ¶¶ 3-4.

reasonable hourly rate. This was not a complex Section 1983 case nor did it raise novel questions of law or fact. Neither the attorneys' time sheets nor their declarations indicate that they spent their time exclusively on this matter or forewent other work for it. Rather, the facts of this case were straightforward, and involved little paper discovery and the depositions of only three witnesses. The time sheets do not reflect a lot of time spent by the attorneys on outside factual investigation. Rather, the attorneys spent the majority of their time strategizing the best method of impeaching the defendants' testimony. Their success as to this issue and the significant monetary award reflects both their hard work and their expertise and level of skill, which is accounted for by compensating them at the high end of attorneys' rates with their level of experience. *See Hensley*, 461 U.S. at 435; *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 760 (2d Cir. 1998) (degree of success is certainly a critical factor in favor of the reasonableness of the plaintiff's fee request). At oral argument on this motion and in response to the court's assertion that this case was not particularly complex, the plaintiff's counsel asserted that proving to a jury that a police officer lied under oath is extraordinarily difficult. Although this is true, it is not a unique circumstance in a civil rights case. The fact that the plaintiff's counsel had to disprove the defendants' version of the events does not make this Section 1983 case novel or complex, but rather typical. *See, e.g.*, *Brown*, 2011 WL 5118438, at *5 n.6. Further, the necessity of spending many hours on this task does not factor into the reasonable hourly rate, but rather in the reasonable number of hours, which is discussed further below.

The plaintiff's counsel cites cases where higher rates were awarded, but these decisions are not directly comparable to the present one. In Judge Cogan's decision in *Blount v. City of New York*, No. 11-CV-124, 2011 WL 8174137 (E.D.N.Y. Aug. 12, 2011) the court approved a $425 hourly rate for 43.1 hours of work after the plaintiff accepted the City's Rule 68 offer of judgment in a civil rights case. Counsel there had over fifteen years of experience and had appeared in over 150 federal lawsuits. *Id.* at *1. In approving the fees, the court noted that the

"action was more complicated than the usual § 1983 case, with the allegations stemming from two separate incidents and with an unusual volume of underlying documents." *Id.* In *Thorsen v. County of Nassau*, No. 03-CV-1022, 2011 WL 1004862, (E.D.N.Y. Mar. 17, 2011), after a jury trial in which the plaintiff prevailed on her Title VII claim, the court found that an attorney with twenty-six years of experience in employment civil rights cases was entitled to $425 rather than the $450 per hour requested. *Id.* at *5. The court also noted that courts in this district have awarded rates as high as $450 per hour for partners in civil rights cases based on the number of years of experience. *Id.* (citing *GMG Transwest Corp v. PDK Labs, Inc.*, No. 07-CV-2548, 2010 U.S. Dist. LEXIS 108581, at *2-3 (E.D.N.Y. Oct. 12, 2010) (awarding partners $450 based on 40 years of experience and $400 based on seven years of experience where attorneys' fees were awarded in connection with sanctions); *Lochren v. County of Suffolk*, No. 01-3925, 2010 WL 1207418, at *3 (E.D.N.Y. Mar. 23, 2010) (after jury trial in Title VII case, awarding partner with 40 years of experience $450, partner with 20 years experience $425, and partner with 18 years experience $400); *Luca v. County of Nassau*, 698 F. Supp. 2d 296, 300 (E.D.N.Y. 2010) (after jury trial in Title VII case, awarding partner with 25 years experience $400, and partner with 14 years $375); *Morgenstern v. County of Nassau*, No. 04-CV-58, 2009 WL 5103158, at *9–11 (E.D.N.Y. Dec. 15, 2009) (after jury trial, awarding $400 per hour to partners in a § 1983 first amendment case)).[6] These decisions and the authority on which they rely demonstrate that the

[6] The plaintiff also cites other cases involving higher hourly rates, but these cases either did not involve claims similar to the ones before the court or further demonstrate that the rates sought here are of the highest awarded for attorneys with their level of experience. *See e.g.*, *Rodriguez v. Pressler & Pressler, LLP*, No. 06-CV-5103, 2009 WL 689056 (E.D.N.Y. Mar. 16, 2009), (adopting in part and modifying in part report and recommendation in 2008 WL 5731854 (E.D.N.Y. Sept. 11, 2008)) (approving $450 hourly rate in FDCPA case to counsel with seventeen years of experience); *Manzo v. Sovereign Motor Cars. Ltd.*, No. 08-CV-1229, 2010 WL 1930237, at *8 (E.D.N.Y. May 11, 2010), *aff'd*, 419 Appx. 102 (2d Cir. 2011) (in Title VII sexual harassment case approving $480 per hour for attorney with 30 years of experience who was brought in to try the case, $360 per hour for attorney with 19 years of experience); *Blue Moon Media Group, Inc. v. Field*, No. 08-CV-1000, 2011 WL 4056068, at *13 (E.D.N.Y. Apr. 11, 2011) (after default in breach of contract and copyright case, approving $400 per hour for partner), *report and recommendation adopted*, 2011 WL 4056088 (E.D.N.Y. Sep 12, 2011).

rates recommended herein are firmly within those regularly awarded to attorneys with comparable experience in this district.

III. REASONABLE NUMBER OF HOURS

In addition to objecting to the hourly rates, the defendants also argue that the number of hours requested by the plaintiff's counsel is unreasonable and must be substantially reduced for various reasons, such as hours billed for unnecessary tasks, as well as excessive, duplicative and vague billing in the fee application. The court agrees that the hours billed are excessive and recommends reducing the hours as discussed further below.

A. STANDARDS OF LAW

Determining reasonable attorneys' fees still requires a review of reasonably detailed contemporaneous time records, as contemplated by *New York Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983). *See Scott v. City of New York*, 626 F.3d 130, 132 (2d Cir. 2010). Courts are given broad discretion to evaluate the reasonableness of the number of hours expended. *See Anderson v. Sotheby's, Inc.*, No. 04-CV-8180, 2006 WL 2637535, at *1 (S.D.N.Y. Sept. 11, 2006); *see also Hensley*, 461 U.S. at 434; *Luciano v. Olsten Corp.*, 109 F.3d 111, 115-16 (2d Cir. 1997); *Duke v. County of Nassau*, No. 97-CV-1495, 2003 WL 23315463, at *1 (E.D.N.Y. Apr. 14, 2003). In considering what is reasonable, courts "should exclude excessive, redundant or otherwise unnecessary hours." *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1999) (citing *Hensley*, 461 U.S. at 433-35). Courts should consider "whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992). It is the attorney's burden to maintain contemporaneous records and where fees are not adequately documented, fee applications may be denied or reduced. *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir. 1992). A court has broad discretion to "trim the fat" in an application for attorneys' fees, and to eliminate excessive or duplicative hours. *See Kirsch v. Fleet Street, Ltd.*, 148 F.3d

149, 173 (2d. Cir. 1988); *Carey*, 711 F.2d at 1146-47; *Quaratino*, 166 F.3d at 425 (When reviewing a fee application, the court "should exclude excessive, redundant or otherwise unnecessary hours.").

"In evaluating time sheets and expense records, some courts have dealt with the problem posed by excessive or redundant billing by simply subtracting the redundant hours from the amount of hours used to calculate the lodestar." *Siracuse*, 2012 WL 1624291, at *34 (citing cases). A district court is not, however, required to "set forth item-by-item findings concerning what may be countless objections to individual billing items." *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994). Thus, courts have also commonly used "percentage reductions 'as a practical means of trimming fat from a fee application.'" *Siracuse*, 2012 WL 1624291, at *35 (quoting *Carey*, 711 F.2d at 1146). As discussed below, the court finds that it is necessary to reduce the number of hours requested here and recommends denial of hours for certain discrete tasks and percentage reductions for certain groups of tasks.

B. OVER-LAWYERING

The court has considerable concern that two sets of law firms and four attorneys were involved in the litigation of the plaintiff's case. This was not a complex or unique case, and yet, four attorneys spent time on it, three of whom billed at a partner rate. The billing records reflect that this led to considerable duplication of effort and over-lawyering in the litigation. The record demonstrates that Mr. Norinsberg took the lead on the case and that much of Cohen & Fitch's time was spent reviewing the same documents reviewed by Mr. Norinsberg as well as conferring with Mr. Norinsberg on the case. For instance, there are 58.65 hours billed for time spent conferring among the three main attorneys in this case – reflecting at times tripling of conferral time. In addition, although Mr. Fitch is listed as co-counsel in the case, the record reflects that he played a minimal role in the majority of the litigation beyond attending meetings and conferring with Mr. Cohen and Norinsberg on strategy – of the 58.85 hours he billed 38 of them

were spent on meetings and review of other attorneys' work. Although conferences between attorneys can be an important part of the litigation process and enhance trial strategy, the number of conferences and the number of attorneys present led to unreasonable billing. The same can be said for review of documents – almost every time a document is filed or a transcript prepared, all three of the principal attorneys in this case billed for reviewing it. As an initial starting point, therefore, the court recommends the following reduction of hours spent by Cohen & Fitch: (1) the elimination of any hours spent by Mr. Fitch at conferences or reviewing work that he did not contribute to. The court recommends limiting Fitch's recovery to work gathering facts, doing research, and drafting and editing documents to which he did make contributions (including conference time related to those submissions, but not including time spent on the fee application, which is addressed separately below); and (2) an overall reduction of Mr. Cohen's compensable hours (also except for those hours spent on the fee application) by 25%.

The defendants also point out that counsel's practice of block billing in certain instances makes it difficult to determine the reasonableness of the time spent on certain tasks. For instance, the attorneys often list the review of several different types of documents or of the entire file in one entry. Or in other instances, they list the review of documents and a subsequent meeting based on that review in the same entry. Although "[t]here is no flat prohibition on block billing . . . the practice can justify a reduction in the fee award if it leaves the court unable to determine whether the time expended by counsel was reasonable." *Gutman v. Klein*, No. 03-CV-1570, 2009 WL 3296072, at *8 (E.D.N.Y. Oct. 13, 2009). The practice of block billing in this case is directly related to the excessiveness of the hours billed generally. Rather than reduce the overall award for this practice, however, the court recommends reducing Cohen & Fitch's overall hours as set forth above and addresses specific instances of excessive billing on certain groups of tasks below.

C. UNSEALING GRAND JURY MINUTES

The defendant asserts that the plaintiff's counsel's bill of 14.7 hours on its motion to unseal the grand jury minutes is excessive given the attorneys' stated experience in civil rights cases. The number of hours requested reflects 1.9 hours billed by Mr. Norinsberg, .6 hours for Mr. Cohen, 4.35 hours for Mr. Fitch and 7.8 hours for Mr. Umansky. The court agrees that the number of hours seems excessive for attorneys with experience in this area, but also notes that the majority of the time spent preparing and arguing the motion was by Mr. Norinsberg's associate, who bills at a lower rate. The remaining work involved conferences with Mr. Norinsberg and some research by Mr. Fitch. Since Mr. Cohen did not appear to contribute to this effort beyond attending a meeting, the court should disallow fees for .6 hours spent by Mr. Cohen on this aspect of the case. Further, there appears to be an erroneous entry for .4 hours by Mr. Norinsberg on 12/30/1999, which predates this case and should also not be awarded.

D. DEPOSITION PREPARATION

The defendants assert that Mr. Norinsberg billed an excessive number of hours for time spent preparing for the depositions of the defendants in this case. Mr. Norinsberg billed 17.5 hours of time preparing for the deposition of Burbridge and 20.35 hours for that of Randall. He thus spent almost a week preparing for depositions that took a total of approximately five hours to conduct (approximately two for Burbridge and three for Randall). The court agrees with the defendants that this was excessive and thus reduces Mr. Norinsberg's compensable time on the deposition preparation for these officers to a total of 20 hours, reflecting eight hours of preparation for Burbridge and twelve hours of preparation for Randall.

E. TRIAL PREPARATION

The defendants also rightly point out that the over 300 hours billed to trial preparation in this case, reflecting approximately 170 hours by Mr. Norinsberg and 170 hours by Cohen & Fitch, was excessive. Much of this time was spent reviewing documents and transcripts in

preparation for cross-examination of the defendants' witnesses. The volume of documents, however, does not justify the amount of hours billed. The plaintiff's deposition transcript was 184 pages, Burbridge's deposition transcript was 114 pages, Randall's deposition transcript totaled 123 pages, and the Grand Jury testimony consisted of 31 pages. In addition, as noted above, the defendants produced 138 pages of documents total. The court agrees that the 33 hours spent by Mr. Norinsberg reviewing deposition and grand jury testimony and the 32 hours spent by Cohen and Fitch on the same task is excessive. Moreover, the overall number of hours billed by Mr. Norinsberg to prepare for a three-day trial is excessive and includes multiple instances of block billing. The court recommends that Mr. Norinsberg's hours for trial preparation be reduced by 20%. Should the court adopt the recommendation above to reduce Mr. Cohen and Fitch's overall hours in the case, the court does not see any need to further reduce their hours spent on trial preparation.

The defendants also assert that over nine hours spent by Mr. Norinsberg reviewing the docket of a case that involved defendant Burbridge was excessive. They argue that this material was not admissible at trial and that the plaintiff should not be compensated for this time. The court does not find this time to be unrecoverable. By reviewing transcripts of Burbridge's testimony in a prior case, plaintiff's counsel appears to have been following up on information learned at a deposition and gathering potentially useful information about this defendant. Although counsel may not have been permitted to ask questions about this prior case, it may have affected the way counsel approached the defendant at trial. Also, plaintiff was not able to depose Officer Fox, who did testify at trial and whose testimony also appeared in this prior case. The review of those transcripts allowed counsel a chance to review that officer's history and may have been useful in preparing for his testimony.

F. UNSUCCESSFUL MOTIONS

1. DISCOVERY MOTION THAT WAS DENIED

The defendants argue that hours billed in connection with a motion to extend discovery that was denied should not be awarded. "With respect to unsuccessful discovery applications, fee awards are not typically reduced because a party has failed to prevail on every contention," but rather the inquiry turns on whether "'a reasonable attorney would have engaged in similar time expenditures.'" *Thorsen*, 2011 WL 1004862 at *5 (quoting *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992)). As stated by one court, "[r]easonable paying clients may reject bills for time spent on entirely fruitless strategies while at the same time paying their lawyers for advancing plausible though ultimately unsuccessful arguments." *Rozell v. Ross-Holst*, 576 F. Supp. 2d 527, 539 (S.D.N.Y. 2008); *see also Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Star Mark Management, Inc.*, No. 04-CV-2293, 2009 WL 5185808, at *7 (E.D.N.Y. Dec. 23, 2009), *aff'd*, 409 Fed. Appx. 389 (2nd Cir. 2010).

The parties here were given six months to conduct discovery and during that time the plaintiff failed to take any depositions. After the court warned the parties midway through the discovery process that extensions would not be given, the plaintiff moved to extend the discovery deadline after the close of discovery. The court granted the motion for the limited purpose of allowing the plaintiff to take the depositions of the named defendants. *See* Minute Entry of 2/10/2011, Dkt No. 11; Minute Entry of 5/5/2011, Dkt. No. 15. The plaintiff later sought to take further depositions and subpoena documents based on information learned during the depositions – this motion was denied as untimely and thus not made in good faith. The court noted that the identity of the witness the plaintiff wished to depose was provided to the plaintiff in initial disclosures and normal discovery efforts would have yielded the existence of the documents the plaintiff was seeking to obtain. *See* Order, dated June 29, 2011, at 1-2, Dkt. No.

21. The plaintiff's second motion to extend discovery was therefore without a proper basis and the court recommends denial of fees for the nine hours billed by Mr. Norinsberg on this task.[7]

2. CLAIMS DISMISSED ON SUMMARY JUDGMENT

The defendants also oppose the plaintiff's recovery of fees on claims that were dismissed on summary judgment and also argue that the overall number of hours billed are excessive. As to the former contention, a successful plaintiff's fee application should not be reduced as long as the unsuccessful claims were not wholly unrelated to the successful ones. The Second Circuit has set forth a two-step inquiry when faced with a challenge to hours billed to unsuccessful claims:

> At step one of this analysis, the district court examines whether the plaintiff failed to succeed on any claims wholly unrelated to the claims on which the plaintiff succeeded. The hours spent on such unsuccessful claims should be excluded from the calculation. At step two, the district court determines whether there are any unsuccessful claims interrelated with the successful claims. If such unsuccessful claims exist, the court must determine whether the plaintiff's level of success warrants a reduction in the fee award. If a plaintiff has obtained excellent results, however, the attorneys should be fully compensated.

Grant, 973 F.2d at 101 (citing *Hensley*, 461 U.S. at 434-36, 2 Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation 276–78 (2d ed. 1991)) (internal citations omitted); *see also Thorsen*, 2011 WL 1004862, at *5 n.4 (hours spent on claims dismissed on summary judgment are compensable if they involved a "common core of facts and related legal theories.") (citing *Hensley*, 461 U.S. at 435). *See, e.g.*, *Brown*, 2011 WL 5118438, at *6 ("In this case, the excessive force and false arrest claims arose during a single encounter and are so intertwined that division of counsel's hours between the claims would be particularly difficult.") (citing *Le-Blanc-Sternberg v. Fletcher*, 143 F.3d 748, 762 (2d Cir. 1998)). The Second Circuit has noted that "in many civil rights cases the plaintiff's claims for relief will involve a common core of

[7] This includes 6.75 hours spent by counsel pursuing the motion and 2.25 hours reviewing the court's order and researching a motion for reconsideration.

facts or will be based on related legal theories" and thus in assessing the reasonable amount of hours "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended." *Konits*, 409 Fed. Appx. at 421.

The court granted the defendants' motion for summary judgment in part, dismissing the plaintiff's § 1983 claims alleging violations of his First, Fifth, and Eighth Amendment rights and his malicious abuse of process claim. The plaintiff's malicious abuse of process claim was based on the same facts as his successful claims, *i.e.*, that the officers arrested him without probable cause and provided false testimony to the prosecutor. *See* Complaint, Dkt. No. 1, ¶¶ 48-52; Pl. Mem. in Opp. to Defs. Mot. for Summary Judgment, Dkt. No. 34, at 23-24. The plaintiff can therefore recover hours spent litigating this claim. The plaintiff did not address his First, Fifth, and Eighth Amendment claims in the opposition to the motion for summary judgment or how they were based on the same set of facts as his false arrest, malicious prosecution, and Fourteenth Amendment fair-trial claims. Therefore, the plaintiff should not recover hours spent litigating these claims. Counsel's billing records provide no indication as to the time spent in litigating these claims, however, making a precise reduction of hours for the time spent on these claims impossible.

As to the defendants' second basis for reducing these hours, the court also finds that the time the defendants spent opposing the motion for summary judgment excessive. Mr. Norinsberg billed over 100 hours to opposing the summary judgment motion and Mr. Cohen and Mr. Fitch collectively billed approximately 24 hours. The defendants also point out that Mr. Norinsberg has filed opposition papers with similar language in the past and thus would not need to have engaged in such a large amount of work, nor his colleagues in such significant time on research. At oral argument, the plaintiff's counsel indicated that they spent this time because the defendants raised new and relevant authority that required significant research on their part in order to oppose the motion. *See* Dkt. No. 102, at 8-9. Nonetheless, having reviewed the parties'

submissions on the motion, the court agrees that the hours spent on this task was excessive and involved some duplication of effort. For instance, Mr. Norinsberg spent 48.05 hours reviewing testimony and documents for the purpose of developing an opposition to the defendants' version of the facts. The majority of Cohen & Fitch's contribution, on the other hand, consisted of conferring with Mr. Norinsberg on the opposition. A reasonable paying client would not pay almost $50,000 to oppose a summary judgment motion that required the analysis of three depositions and less than 200 pages of documents. In order to account for the excessive hours and the work on the dismissed claims from the inception of the case to their dismissal, therefore, the court will reduce the requested hours for Mr. Norinsberg's time spent opposing the defendants' motion for summary judgment by 25% (as Mr. Cohen and Fitch's time should already been reduced overall, it is not necessary to reduce it further).

IV. FEES FOR THE FEE APPLICATION

The defendants argue that the approximately $14,210.00 requested for fees incurred with the fee application should be denied in its entirety or reduced significantly. They assert that the plaintiff's application is based on an excessive hourly rate and is virtually identical to an application submitted in the case of *Malik Fryar v. City of New York et al*, No. 10-CV-5879 (TLM) (MDG) (E.D.N.Y.). *See* Castro Decl., Ex. F (attaching application). Since plaintiff's counsel appears to have adapted the fee application from this other case, the defendants argue, the 33 hours they assert to have spent on the fee application is excessive. A comparison of the memoranda of law in support of fees in the two cases does demonstrate that the instant fee application was modeled on the application in *Fryar*, which should have reduced the number of hours spent preparing it. There, the attorneys requested 64 hours in fees for the application, constituting 11.6% of the total fees requested. The court found that the hours requested in preparing the fee application excessive, particularly in light of the time spent on gathering evidence of minimal value like affidavits of other attorneys and various charts. The court thus

awarded 25 hours of fees to be pro-rated between the two attorneys. *See* Report & Recommendation, *Fryar v. City of New York*, No. 10-CV-5879, Dkt. No. 55 (Aug. 22, 2012), *adopted by* Order, Dkt. No. 57 (E.D.N.Y. Oct. 19, 2012).

The plaintiffs seek to recover 13.8 hours by Mr. Norinsberg and 20.35 hours by Cohen & Fitch preparing the fee application. They assert that a request for 4.7% of the total time claimed for work on the case is reasonable as a matter of law since courts have approved fee applications as high as 24% of the total time claimed. *See Natural Resources Defense Counsel, Inc. v. Fox*, 129 F. Supp. 2d 666, 675 (S.D.N.Y. 2001). No court has endorsed any particular percentage calculation for determining what a prevailing party may recover for preparing the fee application. Although a prevailing party may recover time spent preparing a fee application, the hours requested must be reasonable. *See Weyant v. Okst*, 198 F.3d 311, 316 (2d Cir. 1999); *Donovan v. CSEA Local Union 1000, American Federation of State, County and Municipal Employees, AFL–CIO*, 784 F.2d 98, 106 (2d Cir.1986). Courts in this Circuit have awarded five to fifteen hours for fee applications in routine cases, and awarded more hours in complex cases. *See Brown*, 2011 WL 5118438 at *6 (citing *Murray ex rel. Murray v. Mills*, 354 F. Supp. 2d 231, 241 (E.D.N.Y. 2005)).

Although the plaintiff's requested numbers of hours for preparing the instant application are not excessive as a percentage of their total fee request, the court does not find that all of the hours are reasonable. Although the work in putting together the personal declarations in support of the application had to be done by each individual attorney, there is much overlap between the attorneys on the straightforward aspects of the application. It was not necessary for each attorney to do research, confer on, and prepare the application, which essentially tripled most tasks involved in presenting the application. *See Cruceta v. City of New York*, No. 10–CV–5059, 2012 WL 2885113, at *8 (E.D.N.Y. Feb. 7, 2012) (reducing fees for the application by 50% to account for unnecessary duplicative work by two sets of attorneys), *report and recommendation*

adopted, 2012 WL 2884985 (E.D.N.Y. Jul 13, 2012). For instance, all three attorneys billed for research on attorneys' fees in the Eastern District, reflecting 1.1 hours by Mr. Cohen on this task, 3.7 hours by Mr. Fitch, and 2.3 hours by Mr. Norinsberg. The attorneys again triple-billed for time spent reviewing the submissions, reflecting 1.6 hours by Mr. Fitch, 2.2 hours by Mr. Cohen, and 4.55 hours by Mr. Norinsberg. The court thus finds it necessary to reduce the number of hours spent on the fee application. In light of the case law and because this application appears to be adapted from an application where the court awarded 25 hours, the court finds that 20 hours is more than a reasonable award for counsel here.

V. COSTS

The plaintiff requests $3,846.36 in costs pursuant to 42 U.S.C. § 1988 and Federal Rule of Civil Procedure 54(d). The defendants have not objected to this request and the court finds that the plaintiff's counsel has provided adequate documentation for these costs. *See* Norinsberg Decl. Ex. G. The court therefore recommends that plaintiff be permitted recovery of his costs.

VI. HOLDING FEES IN ABEYANCE

Finally, because the defendants are pursuing an appeal of the jury's verdict in this case, they have requested that the court hold the payment of any attorney's fees, costs and expenses in abeyance until the appeal is decided. The court does not find this request to be unreasonable. Although the plaintiff's counsel asserts in his reply brief that they contest all of the arguments asserted in the defendants' opposition, it is not clear whether they in fact oppose this request, which as a practical matter makes sense. The court therefore recommends holding the payment of fees in abeyance pending the Second Circuit's decision on appeal.

CONCLUSION

In accordance with the above considerations, the undersigned recommends that plaintiff be awarded $211,785.86 in attorney's fees and costs in the following amounts:

- Attorney's fees to Mr. Jon L. Norinsberg at the rate of $400 per hour for 342.88 hours spent on this litigation for a total of $137,152.

- Attorney's fees to Cohen & Fitch at the rate of $325 per hour for 210.20 hours spent on this litigation for a total of $68,315.

- Attorney's fees to Mr. Alex Umansky at the rate of $200 per hour for 9.05 hours spent on this litigation for a total of $1,810.

- Paralegal fees to Ms. Nicole Burstyn at the rate of $125 per hour for 5.3 hours spent on this litigation for a total of $662.50.

- Costs and expenses in the amount of $3,846.36.

The court also recommends that payment of these fees be held in abeyance until the Second Circuit issues a ruling on the defendants' pending appeal.

* * * * *

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court within 14 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see, e.g.*, *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 299 (2d Cir. 1992); *Small v. Secretary of Health and Human Serv.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

Respectfully Recommended,

Viktor V. Pohorelsky

VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
January 24, 2013