UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ADRIAN SCHOOLCRAFT,

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPUTY CHIEF MICHAEL MARINO, Tax Id. 873220, Individually and in his Official Capacity, ASSISTANT CHIEF PATROL BOROUGH BROOKLYN NORTH GERALD NELSON, Tax Id. 912370, Individually and in his Official Capacity, DEPUTY INSPECTOR STEVEN MAURIELLO, Tax Id. 895117, Individually and in his Official Capacity, CAPTAIN THEODORE LAUTERBORN, Tax Id. 897840, Individually and in his Official Capacity, LIEUTENANT WILLIAM GOUGH, Tax Id. 919124, Individually and in his Official Capacity, SGT. FREDERICK SAWYER, Shield No. 2576, Individually and in his Official Capacity, SERGEANT KURT DUNCAN, Shield No. 2483, Individually and in his Official Capacity, LIEUTENANT CHRISTOPHER BROSCHART, Tax Id. 915354, Individually and in his Official Capacity, LIEUTENANT TIMOTHY CAUGHEY, Tax Id. 885374, Individually and in his Official Capacity, SERGEANT SHANTEL JAMES, Shield No. 3004, Individually and in her Official Capacity, , CAPTAIN TIMOTHY TRAINER, Tax Id. 899922, Individually and in his Official Capacity, and P.O.'s "JOHN DOE" #1-50, Individually and in their Official Capacity (the name John Doe being fictitious, as the true names are presently unknown), (collectively referred to as "NYPD defendants"), FDNY LIEUTENANT ELISE HANLON, individually and in her official capacity as a lieutenant with the New York City Fire Department, JAMAICA HOSPITAL MEDICAL CENTER, DR. ISAK ISAKOV, Individually and in his Official Capacity, DR. LILIAN ALDANA-BERNIER, Individually and in her Official Capacity and JAMAICA HOSPITAL MEDICAL CENTER EMPLOYEE'S "JOHN DOE" # 1-50, Individually and in their Official Capacity (the name John Doe being fictitious, as the true names are presently unknown),

Defendants.
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AFFIRMATION OF RICHARD GILBERT IN REPLY TO CITY OF NEW YORK'S OPPOSITION PLAINTIFF'S FEE APPLICATION

10 CV 6005 (RWS)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD A. GILBERT, an attorney, duly admitted to practice in the State of New York hereby declares under penalty of perjury the following to be true and correct.

1. I am a partner in the law firm of Levine and Gilbert and one of the submit this Reply Affirmation on behalf of myself, my partner Harvey Levine and Peter Gleason, an attorney who is of counsel to our firm. I am submitting this affirmation in reply to the City of New York's opposition to plaintiff's application for reasonable attorneys' fees, costs and expenses in connection with this action, pursuant to the Judgment, dated October 15, 2015 (Dkt.# 541).

2. By submitting wildly redundant opposition papers, unnecessarily numbering in the hundreds of pages and supported by an "billing efficiency expert" with a total of 7 years experience actually practicing law, none at the partner level, the City of New York provides this Court with the perfect example of why the number of hours billed by plaintiff's attorneys is so substantial. To further punctuate this as the perfect example of the City's over litigating, after petitioning the court for a waiver of the page limitation to file their blunderbuss opposition, the City opposed a similar application

by plaintiff's counsel, necessitated solely by the sheer volume of the City's submission, thus necessitating a further exchange of correspondence.

3. Because the legal issues raised by the City are uniformly applicable to all plaintiff's attorneys, your affirmant will respectfully rely upon the legal memorandum submitted by the other plaintiff's attorney groups. Instead this affirmation will focus on the City's attack upon the billing rates sought by your affirmant's attorney group, which when viewed through a lens not quite as myopic as the City's focus on other federal civil rights case filings, provides more than ample support for the hourly fees requested. Further, your affirmant will touch only briefly on the City's categorizations of alleged billing practices of your affirmant's attorney group, since even a cursory review of our groups' hourly records demonstrate that despite the City's assigning them to their denominated categories, the appellations simply to not apply. They will be addressed below in the order in which they are presented in the Executive Summary section of the City's "expert's" report.

4. ***Work Performed Exclusively in Connection with the Medical Defendants;*** The City's attempt to parse from each attorney's compensable time, billable hours the City characterizes as being spent exclusively in connection with the Medical Defendants ignores the fact that the City's

principle defense to the actions taken by their NYPD employees was the false assertion that plaintiff was in need of medical/mental health assistance. If there was medical/mental health justification for the actions of their NYPD employees, the City could have escaped liability for those actions. While it is true that the absence of a medical justification for plaintiff's confinement could prove to be a departure from good and acceptable medical practice sufficient to cast the medical defendants into damages for malpractice, the hours of attorneys' work devoted to fact finding with regard to the medical defendants cannot be separated on such a premise. The medical facts allegedly supporting plaintiff being taken from his home on the premise he was an "EDP" and his subsequent medical confinement at Jamaica Hospital are inextricably interwoven with the NYPD's alleged rationale for their actions. The City cannot, on the one hand, interpose the defense of "medical necessity" to their police department's actions depriving plaintiff of his liberty, then protest when plaintiff's counsel has to expend time to disprove their alleged defense.

5. That plaintiff's counsel incorporated, into his complaint, alternative claims of malpractice against the medical defendants, to protect plaintiff's interests, does not diminish the legal necessity of plaintiff's counsel thoroughly investigating and taking steps to negate this alleged defense.

6. ***Work Unnecessary or Inappropriate to Bill to a Defendant***;

The City contends that the lions share of your affirmant's attorney groups' hourly billings are duplicative of the time the Norinsberg group's attorneys spent prior to their October 2012 termination by plaintiff. They further argue that they should not be responsible for new attorneys' time spent "getting up to speed".

7. First, this argument is based upon a false premise. When your affirmant used the term "getting up to speed" in a prior submission to the Court, it was to characterize the work necessarily done to review, not only the prior pleadings reviewed during the month between our being retained and actually gaining possession of the files from the Norinsberg firm, but to review and gain an comprehensive understanding of the multitude of discovery documents exchanged by the City prior to and subsequent to the Norinsberg firm's termination. The City would have this Court discount the time spent by attorneys reviewing discovery materials which hadn't even been exchanged during the Norinsberg firm's initial tenure in this case.

8. It is through unsupported generalizations about the work completed by the Gilbert/Levine/Gleason group during its tenure at the head of plaintiff's representation that the City's expert attempts to exaggerate the percentage of time your affirmant's group devoted to work completed by the

Norinsberg group claiming our group billed more than 216 hours in connection with the Cost of Substitution. This is a patently false interpretation of the time expended by our group and relies upon supposition and conjecture engaged in by an attorney who, having a scant 7 years of actual work experience as an attorney, none of which has been documented to have been actually preparing for and conducting trials, is in no position to evaluate whether the work advanced plaintiff's claims or not.

9. This Court is respectfully reminded that the entry into this case by the Gilbert/Levine/Gleason group was occasioned by the "for cause" termination of the Norinsberg firm. How can attorneys' review of the litigation files which include not only pleadings and investigation but discovery materials not even exchanged at the time of substitution, in this matter in order to formulate a litigation strategy be characterized as anything other than time spent advancing plaintiff's claims? To the extent that any adjustment were to be made by the Court for the alleged duplication of effort occasioned by the substitution of counsel, it is respectfully submitted that the Gilbert/Levine/Gleason group should be credited with same, given that the entry of our group into the case was necessitated by a discharge for cause by plaintiff.

10. A review of the "cherry picked" examples cited at page 31 of the expert's submission to the Court provide more than ample proof that the City's expert's analysis of our group's billings are nothing more than an unsupported effort by the City to exclude otherwise compensable time.

11. Entries on November 16, 2012 relate to our introduction to plaintiff to discuss his case, this after having already reviewed some of the most essential ECF filings, (which was not billed, since it was in anticipation of interviewing and getting retained). The ensuing billed time in November was for conferences in which the merits and weaknesses of plaintiff's case were discussed with an eye toward formulating strategies to advance the case.

12. The time actually billed for efforts directly related to substitution, as reflected on pages 31-32 of the expert's report were actually only .5 hours and .5 hours again, and that time also involved time spent on emails and investigation.

13. The time entries found on page 32 of the expert's report that the City's expert would attribute to the substitution of counsel were billed well after the substitution had been accomplished, the files exchanged, and include the beginning of Nat Smith's assimilation into the litigation team had begun.

14. It should be noted at this point, that contrary to the characterizations by the City, Nat Smith's entry into this case, as well as Mr. Lenoir's, was contemplated and implemented by our attorney group for the express purpose of supporting our efforts and providing much needed expertise in federal practice and procedure.

15. As is explained later in this affirmation, our group's experience and expertise, gained in some 80+ years of practice by my partner, Harvey Levine and I, along with Mr. Gleason's experience, first as our associate and later on his own, is in litigating against the City on behalf of NYPD and FDNY members who have been injured or otherwise wronged by the City and/or its employees. Examples of our firms success in battling the City and others on behalf of members of the uniformed services appears later in this affirmation.

16. It was anticipated that Mr. Smith would assist our group in navigating the nuances of federal practice and contribute his expertise in civil rights litigation, along with Mr. Lenoir. Our February 2012 meetings with Mr. Smith and Mr. Lenoir were collaborative efforts to review the facts of the case and devise strategies moving forward. They were not for the purpose of effectuating a substitution of counsel, or as the City characterized it, for the purpose of our firm being relieved from further duties.

17. Levine & Gilbert's representation of plaintiff was never terminated by plaintiff. Our active participation curtailed when personality conflicts arose that required Mr. Smith and Mr. Gleason to move to the forefront of the representation and later required Mr. Smith to take on the dominant role as lead counsel. To characterize anything more than approximately an hour of billable time cited by the City's expert as being devoted to the substitution of counsel is egregiously misleading and completely inaccurate.

18. ***Ancillary Services***; In yet another example of the City trying to parse away attorneys billable time necessarily expended to address litigation strategies by the City of New York, the City's expert recommends the Court deny compensation for time spent on matters they define as ancillary. Specifically cited as ancillary are matters involving disciplinary charges brought against plaintiff in the NYPD trial room, matters involving the Queens District Attorney's investigation of criminality in plaintiff's confinement and what they describe as media relations.

19. As this Court well knows, having issued an Order staying the City from prosecuting plaintiff on departmental disciplinary charges, the time plaintiff's attorneys spent on this matter did in fact have the potential of adversely impacting plaintiff's claims. The City instigated this legal work by having its police department push forward with prosecuting the case after

years of it being in limbo, this in response to plaintiff's efforts get reinstated into active police duty in a safe and secure environment. The City also cites as ancillary actions taken by plaintiff's attorneys to address the Patrolman's Benevolent Association's refusal to act on plaintiff's behalf. Ironically, the City seeks to have this Court deny plaintiff fees for their legitimate efforts to avoid additional legal costs for the City. Hours spent by your affirmant and the other attorneys in our group directed at compelling the PBA to provide plaintiff with representation in accordance with their contractual obligations as his union, were not intended and cannot reasonably be described as being for public relations purposes.

20. Similarly, plaintiff's counsel efforts to subpoena the Queens D.A. for the fruits of an investigation he alleged was the basis for his press release conluding there was a lack of criminality on the part of the City's employees in detaining plaintiff were clearly related to securing information that was important and relevant to prosecuting plaintiff's claim and in no way related to public relations. Simply stated, the City's effort here is designed to punish plaintiff's counsel for its successful effort to blunt two of the City's defense strategies.

21. ***Billing Patterns***; Simply stated, the hourly billing statement of your affirmant's group of attorneys are neither orchestrated as a group nor the

product of minimum time increments. The City complains that 42 hours out of the total of just under 500 hours of billable time was devoted to communications entries. Assuming for the purposes of discussion only, that the City is correct, they are actually complaining that our group spent over 90% of its time doing substantive work rather than discussing it with collegues and others. The characterization of plaintiff's billing entries as being block billing is simply not an accurate description of our group's billing practices which were contemporaneous and descriptive of the work done as it was occurring. When an attorney spends hours at a time working on a single matter, he doesn't stop every time he transitions from reviewing a document to sending an email relating to the document to discussing the ramifications of the information found in the document with a colleague. Instead, he concentrates on furthering his client's interests and noting his work when he actually interupts the work to move onto another matter.

22. ***Expenses***; It is beyond dispute that Levine & Gilbert reimbursed the Norinsberg firm for $4,3630 of expenses they laid out during their initial representation of plaintiff. Documentation for these expenses are included in the Norinsberg expenses. Mr. Gleason's expenses and the back up documentation for same were included as an exhibit to his submission in support of the fee application. The City attempts to characterize as gifts

communication devices (phone and computer) furnished to plaintiff so he could participate and assist in the preparation of this case via the phone and internet.

The City's Unwarranted Emphasis On Prior

Federal Civil Rights Litigation Experience

in Establishing Appropriate Attorney Billing Rates

23. The City attacks our group's billing rates citing the lack of entries on the Federal Court dockets as indicating a lack extensive federal civil rights claim experience. It cannot be denied that our group's practice is a state court based practice with few federal cases actively being litigated in our office. However, our group was brought into this litigation because of our 80+ years of experience and expertise litigating on behalf of NYPD and FDNY personnel for injuries and injustices visited upon them, primarily by the City of New York. Our success in prosecuting these cases provide a far more accurate measure of the value of our hourly services than the biased opinion of a so called expert whose practical experience actually preparing and trying cases in her 7 years of actually practicing law cannot be reasonably reviewed here. Some examples of cases prosecuted against the City of New York are;

a. Brocato v. City of New York, et.al, Supreme Court, New York County; Jury award $1.5 million affirmed on appeal,

b. Senft v. City of New York, Supreme Court, New York County: Jury verdict $3 million, vacated on appeal on public policy grounds.

c. McCormack v. City of New Yor, Supreme Court Bronx County Jury verdict $1.5 million, vacated on appeal on public policy grounds.

d. Harris v. City of New York, Supreme Court, Queens County Jury verdict $3 million, reduced on appeal.

e. Gallagher v. City of New York, Supreme Court New York County, Jury verdict $950, 000.

f. Miller v. City of New York, Supreme Court, Kings County, Jury verdicts $850,000

g. Ali v City of New York, Supreme Court, Kings County, Jury verdict $508,000, improper jury charge requires new trial.

Other verdicts and settlements on behalf of NYPD personnel;

a. Canini v. Nebraskaland, Supreme Court, Richmond County, settled $1.4 million.

b. Kehoe v. Lumber Laminates, Supreme Court Rockland County, settled after liability verdict $2.75 million

c. Petrovich v. Mets Development LLC et. al., settled $1.1 million

24. The foregoing verdicts and settlements represent a small sample of the results achieved by Levine & Gilbert. Among the cases listed above are a case in which the jury found the police had violated Patrol Guide standards while shooting a fellow officer, the NYPD violated their own protocols for the use of deadly physical force in a hostage/barricade situation leading to the death of a police officer and the NYPD failed to adequately train its bomb squad personnel, police had wrongfully arrested and detained a man. These cases underscore the value your affirmant's group of attorneys brought to the Schoolcraft litigation. The complexity of the Schoolcraft litigation required all that experience and expertise and more, hence the addition of Nat Smith and John Lenoir to the team we intended to employ to prosecute this matter. Circumstances limited our involvement, but do not serve to minimize our work.

Conclusion

25. For all the foregoing reasons it is respectfully submitted the application for fees for the work performed by the Gilbert/Levine/Gleason group be granted.

Dated: New York, New York
April 29, 2016

RICHARD A. GILBERT (7475)