

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PROSPECT CAPITAL CORPORATION,
PROSPECT CAPITAL MANAGEMENT :
LLC, JOHN F. BARRY, M. GRIER
ELIASEK, WALTER PARKER and :
BART DE BIE, :

Petitioners,

- against -

MICHAEL ENMON,

Respondent,
-----x

: 08 Civ. 03721 (LBS)

: (ECF Case)

: Electronically Filed

:

AFFIRMATION OF JUDITH BRONSTHER, ESQ.

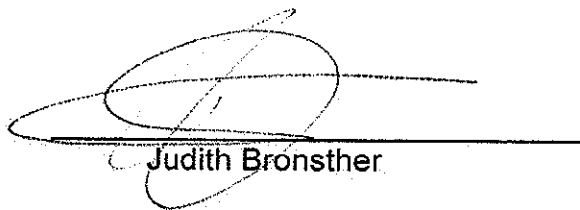
The undersigned, Judith A. Bronsther, Esq., hereby affirms under penalty of perjury:

BACKGROUND

- A. I am an attorney admitted to practice law in New York (since 1980) and I am the president of Accountability Services, Inc. Attached as Exhibit A is my resume.
- B. Since 1992, as President of Accountability Services, I have devoted all of my time to issues surrounding reasonable attorneys' fees. I have personally reviewed or overseen the review of over \$500 million of legal fees.
- C. I have written extensively on the issue of legal fees. Some of my publications are listed on my resume. I frequently speak at attorney Continuing Legal Education programs and corporate programs on the subject of legal cost control.

- D. Over the past ten (18) years, I have been retained by corporations, governmental institutions, individuals and law firms as a consultant and/or expert witness in connection with determining the reasonableness of legal fees.
- E. ASI has carefully reviewed Petitioners' Motion for Attorneys' Fees and Expenses together with supporting declarations and documents.
- F. I have various opinions with respect to Petitioners' Motion for Attorneys' Fees and Expenses, which are codified in ASI's Report, attached to this Affidavit as Exhibit B. The Report reflects the opinions that I have reached based on my own personal knowledge, unless otherwise stated.
- G. If sworn as a witness, I could competently testify as to the facts stated in this Affidavit and attached Report (Exhibit B).

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct, and that I executed this affirmation on this 7th day of May 2010, in New York, New York.


Judith Bronsther

Introduction

At the request of Arnold & Itkin, Accountability Services, Inc. ("ASI") reviewed, using the Audit Methodology set forth in Exhibit 1, the legal bills submitted by Skadden, Arps, Slate, Meager & Flom (the "Law Firm") in connection with Judge Sand's order dated March 9, 2010, pursuant to which Honorable Judge Sand ordered sanctions (the Sanctions Order") in connection with the matter entitled Prospect Capital Corporation, Prospect Capital Management LLC, John F. Barry, M. Grier Eliasek, Walter Parker and Bart De Bie ("Petitioners") v. Michael Enmon.

Background

On May 29, 2009, the Law Firm, on behalf of Petitioners, filed a Motion for Attorney's Fees and Expenses alleging among other things that Arnold & Itkin's conduct throughout the entire case improperly multiplied the proceedings and that its post-award litigation tactics were intended to avoid payment of the judgment (the "Sanction Motion"). The "Conclusion" to the 35 page Memorandum of Law in Support of the Sanction Motion requested that the Court:

"(1) impose sanctions on the firm of Arnold & Itkin equal to the attorneys' fees and costs incurred by Prospect in:

- a) compelling arbitration,
- b) responding to the Texas Action,
- c) responding to Enmon's baseless Rule 60 (b) Motion,
- d) confirming the AAA Awards,
- e) responding to Enmon's frivolous Motion for Protective order,
- f) deposing Enmon, and
- g) bringing this Motion;

2) and other relief the Court deems appropriate."

The Sanctions Order granted sanctions with respect to **only** three (3) of the seven (7) motions, i.e., "the Texas TRO and for the period beginning with the filing of the 60(b) motion through the confirmation of the arbitration award. Costs related to Arnold & Itkin's appeal of the confirmation of the arbitration awards are also awarded; however, these are the only costs awarded with regard to this period, as discovery and other post-judgment related costs are not imposed."

Petitioners have submitted \$354,559 in legal fees, which they are claiming they are entitled to pursuant to the Sanctions Order.

It is black letter law that the legal fees must be "reasonable." New York has adopted the federal lodestar approach for determining reasonable fees.¹ Under the

¹ The party seeking attorneys' fees has the burden to establish both (a) that the hourly rates sought "are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," see Polk v. New York State Dep't of Correctional Serv., 722 F.2d 23, 25 (2d. Cir.1983), and (b) that the number of hours expended was reasonable, see Stratton v. Department for the Aging, No. 91 Civ. 6623(SAS), 1996 WL 352909, at *3. ASI notes that the Law Firm has not submitted any proof on the reasonableness of its billing rates.



lodestar approach, the proven number of hours reasonably spent, multiplied by a reasonable hourly rate establish the lodestar. After determining the lodestar, a court may adjust the amount depending upon a number of factors, including the results obtained and the fees in relationship to the scale of the litigation. Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours a court deems excessive, redundant, or otherwise unnecessary.

As the Supreme Court stated in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983):

The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly. The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

Analysis

Fees Not Covered by the Sanctions Order

Sanctions Motions

In the Sanction Motion, the Law Firm specifically requested the Court to impose sanctions for among other things "bringing this Motion." Nonetheless, the Sanctions Order imposed sanctions for only the Texas TRO, the 60 (b) Motion, the confirmation of the Arbitration Award, and the Appeal of the Confirmation Award.

Accordingly, the Court did not impose sanctions in connection with the fees for bringing the Sanctions Motion, which were \$260,872² and were allocated as follows:

² ASI notes that the Law Firm claimed that the fees associated with the Sanctions Motion were \$261,678; however, using the Billing Methodolgy set forth on Exhibit 1, ASI has calculated that the fees associated with the Sanctions Motion were \$260,872. Among the problems that ASI noticed with regards to the Law Firm's allocations was that the Law Firm did not allocate any time for, among other things, discovery. See "Discovery," below.

Partners		
Grinalds	121.66	\$101,829
Lerner	4.50	\$4,252
Nelson	41.05	\$29,946
Associate		
Sussner	287	\$124,844
Total Hours	454.21	\$260,872

Even if the fees for this motion were imposed in connection with the Sanctions Order, in ASI's opinion, they are substantially excessive and unreasonable. In essence, the Law Firm is seeking over \$260,000 for the Sanctions Motion to potentially recover \$93,687.

Three (3) partners and one (1) associate worked on this motion. In ASI's opinion, it was not necessary to have three (3) partners working on this motion, any one of whom would have been eminently qualified to have handled the work on his or her own. Based on a review of the time journals, it appears as if they duplicated each other's efforts which artificially inflated the legal bills. For instance, two (2) partners attended the oral argument and four (4) attorneys spent over 100 hours preparing for the two (2) hour argument. Such preparation included a moot court presentation at which four (4) attorneys were present. In addition, ASI could not find a justification for the Law Firm spending 162 hours (\$82,743) on research that was performed by two (2) partners and an associate.

Recommended Reduction: \$260,872

Discovery

The Sanctions Order specifically states that sanctions for discovery are not imposed. Nonetheless, as set forth below, the Law Firm is seeking reimbursement for \$1,595 of time for discovery:

				TIME CLAIMED
11/10/08	GRINALDS	1.00	CONFERENCE CALL WITH TGN, JFB; ATTENTION TO DEPOSITION NOTICES; REVIEW 28 USC 1927 RESEARCH	1.00
11/11/08	GRINALDS	2.00	CONFERENCE CALL WITH JUL, JFB; ATTENTION TO DEPO NOTICE; 1927 MOTION; EDIT DOC REQUEST TO ENMON; START TO RESEARCH AND DRAFT FEE/SANCTION MOTION	2.00
11/13/08	GRINALDS	.75	EDIT 1927 BRIEF; REVIEW REVISED DOC REQUESTS AND SUPERVISE FILING	.75

Recommended Reduction: \$1,595

Vague Entries and Others that Do Not Relate to the Sanctions Order

The Law Firm is seeking compensation for \$2,310 of entries that do not relate to the Sanctions Order or are too vague to determine whether they relate to the Sanctions Order.

2/19/09	Lerner	.25	Review Letter from S. Bass and Disseminate	.25
8/28/09	Lerner	.25	T/Conf. M. Grinalds re: Conf Call ³	.25
11/17/09	Lerner	.50	Conf. M. Grinalds re: Agreement ⁴	.50

³ Ms. Grinalds does not record this conference.

11/19/09	Lerner	.50	T/Conf. M. Grinalds re: Agreement ^b	.50
5/22/2008	Grinalds	1.25	Emails with Client; Review & Edit & Finalize confirmation reply & review exhibits; emails re Nera	1.25
11/12/09	Grinalds	2.50	Update client; call Sand's clerk re scheduling; conference call with TGN; Conference call with John C re R.W. ; prep for argument	2.50
12/10/09	Nelson	.30	Discuss Enron Filing	.30

Recommended Reduction: \$2,310

Conclusion regarding Fees Not Covered by the Sanctions Order

As detailed above, the Law Firm is seeking reimbursement of \$264,777 for work that is not subject to the Sanctions Order.

Time Records Are Not Proven

When billed on an hourly basis, a client is entitled to an accurate accounting of the time spent on its matter. Contemporaneous time records should be kept by each attorney and paralegal and should specify the date the work was performed, the hours expended and the nature of the work done. The burden is on the law firm to keep and present records of contemporaneous journals prepared by each of the attorneys and paralegals.

If time records are not kept contemporaneously, the reliability of the time records is called into question. An individual, who reconstructs his or her schedule days or even weeks after the work is performed, cannot hope to achieve the accuracy that the client deserves. Courts have held that "the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance."⁶

Minimum Increments

Given the proper resources, equipment and effort, time can be measured with infinitesimal precision. As a practical matter, however, clients routinely require only sufficient precision in attorney billings to determine reasonableness and fairness, and this would not normally necessitate a level of precision in recording the time expended by an attorney that would require hair-splitting accuracy. Accordingly, it is the practice of most attorneys to bill on a time-expended basis, and to bill for time expended by rounding to standard units of 6 minutes. Nonetheless, in the instant situation, many of the Law Firm's timekeepers bill exclusively or primarily in 15 minute billing increments.

Timekeeper	Aggregate Fees	# of Billing Days	# of times .25 increment used	# of times .50 increment used	# of times .75 increment used	# of times .00 increment used
Farrell	4541	5	1 (20%)	1 (20%)		1 (20%)
Friedman	1278	4		2 (50%)		2 (50%)

⁴ Ms. Grinalds does not record this conference.

⁵ Ms. Grinalds does not record this conference.

⁶ *Grendel's Den, Inc. v. Larkin*, 749 F. 2d 945 (1st Cir. 1984).

Grinalds	124063	94	22 (23%)	25 (22%)	6 (6%)	23 (24%)
Lerner	9391.25	16	6 (38%)	4 (25 %)	3 (18.75%)	2 (12.5%)
Lohman	647.5	2	1 (50%)			1 (50%)
Nelson	71164.8 \$211,085.55	76	19 (25%)	14 (18%)	2 (3%)	11 (14%)

As one court said, the practice of billing in quarter hour increments "inherently inflates and distorts the time actually expended, and hence is unacceptable." The use of minimum time charges is commonly understood to mean that if any part of the next time charge is consumed, then all of that time charge is billed. The use of 30-minute increments has an inherently inflationary effect on legal bills. It means that if a timekeeper spent 5 minutes on a casual assignment, the client was billed for 15 minutes of work. Likewise, if a timekeeper spent 20 minutes attending to the matter, the client was billed for 30 minutes. Courts routinely reduce an overall fee request by as much as 20 percent when 15 minute billing increments are used.⁷

Block Billing

All of Law Firm's entries suffer from the method of timekeeping known as "block billing", where time entries commingle activities and improperly group together several activities under one entry, without allocating the time spent on each task. Block billing necessarily impedes one's ability to evaluate the reasonableness of any of the listed activities. When time is not assigned to each discrete task, there is no accurate way to determine how much time was spent on any single activity, and thus no way to "audit" the activity or work product with the entry. Many courts have taken note of the fact that the primary problem with block billing is the obfuscation that results from the use of this technique.⁸

Many of the Law Firm's time journals contain descriptions of work that even the Law Firm acknowledges is not subject to the Sanctions award. Because these time journals are blocked, the Law Firm was forced to allocate time to potentially reimbursable time based on, at best, an estimate. For example:

Timekeeper	Date	Time	Task Description	Amount
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⁷ Cambridge Toxicology Group Inc., v. Val Exnicios, 495 F.3d 169, 181-82 (5th Cir. 2007) (affirming reduction of 12.5% for billing in quarter-hour increment); Welch v. Metropolitan Life Ins. Co., 480 F.3d 942, 948-49 (9th Cir. 2007) (affirming reduction of 20% for billing in quarter-hour increments); La Barbera v. Pass 1234 Trucking, Inc., 2007 WL 2908175, at *7 (E.D.N.Y.2007) (reducing hours billed by 15% where method of billing was "not entirely accurate since [attorneys'] time is divided into fifteen minute increments instead of the more traditional six minutes."); Swisher v. United States, 262 F. Supp. 2d 1203 (D. Kan. 2003).

⁸ F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1265 (2d Cir.1987); Ragin v. Harry Macklowe Real Estate Co., 870 F.Supp. 510, 520 (S.D.N.Y.1994); Skold v. American Intern. Group, Inc., 1999 WL 672546 (S.D.N.Y. Aug 25, 1999) (NO. 96 CIV. 7137 HB) (deducting 10% from amount awarded for entries that commingled activities where plaintiff's fee application improperly grouped together several activities under one entry, without allocating the time spent on each task; entries of this kind impede the court's efforts to evaluate the reasonableness of any of the listed activities. (Quoting Soler v. G. & U., Inc., Charles Gratz, et al., 801 F.Supp. 1056, 1061 (S.D.N.Y.1992)), aff'd 205 F.3d 1324 (2nd Cir.(N.Y.) Jan 27, 2000) (Table); Haungs v. Runyon, 2000 WL 1209381 (W.D.N.Y. Aug 18, 2000) (NO. 96-CV-0650E(SC)) (billing statement "contain[ed] sufficient errors to give rise to a substantial question as to the accuracy, necessity and contemporaneity of the claimed hours expended").

				Claimed
Lerner	1/12/07	2.50	REVIEW LETTERS TO JUDGES; CONFS M. GRINALDS AND C. SCHWARTZ; REVIEW AFFIDAVITS; T/CONF TEXAS COUNSEL	1.25
Grinalds	10/16/07	1.25	REVIEW CASES RE REDACTED C/C WITH ER; C/C WITH EF & GE RE STIPULATION & DISMISSAL OF APPEAL & EMAIL CLIENT	0.50
Grinalds	5/19/08	.50	CONFERENCE CALL WITH TNG; CALL SECOND CIRCUIT CLERK RE SCHEDULING CALL WITH JFB; ATTENTION TO OPPOSITION TO MOTION TO VACATE	.25
Grinalds	5/20/08	1.75	CALL TO KURT A; DRAFT/EDIT AND SERVE LETTER TO JUDGE SAND; JUDGE MCMAHAN; CONFERENCE CALL WITH JJL & DS; ATTN TO PETITION TO CONFIRM; EMAILS S.M. RE UPDATE	1.00
Grinalds	12/2/08	.60	ATTENTION TO EMAIL TO ITKINS; REVIEW & EDIT SANCTIONS BRIEF	.50
Grinalds	7/7/09	1.50	REVIEW WORKING DOCS IN RESPONSE TO SUBPOENA; FOLLOW-UP WITH DAN S.; FOLLOW-UP WITH MLC; REVIEW ITKIN RESPONSE TO SANCTIONS MOTION & CIRCULATE	.50

In ASI's opinion these allocations are an unreliable after-the-fact allocation of time. In addressing a sanctions motion, one Second Circuit court reduced the requested total by 25% because the firm's use of block billing made it impossible to identify the work specifically related to the motion, and separate it from unrelated work.⁹

Standardized Work Descriptions

In the instant situation, Mr. Sussner used standardized work descriptions day after day. The State Bar of California issued an arbitration advisory that explores how an arbitrator should determine a reasonable fee. With regards to Standardized Work Descriptions, the advisory states: "If one sees the exact same phrases used again and again in the bills, it is likely that some routine has set in and this allows some "down time" to find its way into the bills."¹⁰

Date	Description	Hours	Amount
1/20/2009	Research and drafting re: sanctions memorandum	6.8	2964.8
1/27/2009	Research and drafting re: sanctions memorandum	4.7	2049.2
1/28/2009	Research and drafting re: sanctions memorandum	8.1	3531.6
1/29/2009	Research and drafting re: sanctions memorandum	6.4	2790.4
1/30/2009	Research and drafting re: sanctions memorandum	8.2	3575.2
7/9/2009	Research re: sanctions reply; drafting outline.	10	4360
7/10/2009	Research re: sanctions reply; drafting outline.	8	3488
7/13/2009	... Research re: sanctions reply; drafting outline.	10.3	4490.8
7/14/2009	Research re: sanctions reply; drafting outline.	10.6	4621.6
7/15/2009	Research re: sanctions reply; drafting outline.	9.7	4229.2
7/17/2009	Research re: sanctions reply brief; drafting brief.	8.2	3575.2
7/18/2009	Research re: sanctions reply brief; drafting brief.	6.7	2921.2
7/19/2009	Research re: sanctions reply brief; drafting brief.	8.5	3706
7/20/2009	Research re: sanctions reply brief; drafting brief.	9.9	4316.4
7/21/2009	Research re: sanctions reply brief; drafting brief. Cite and Record cite- checking.	12.4	5406.4
7/22/2009	Research re: sanctions reply brief; drafting and reviewing brief. Collecting exhibits. Emails.	6.7	2921.2
11/12/2009	Preparation for oral arguments (Reviewing case law, preparing chars and spreadsheets and logistics.)	4.7	2049.2
11/13/2009	Preparation for oral arguments (Reviewing case law,	5.3	2310.8

⁹ Phoenix Four, Inc. v. Strategic Res. Corp., 2006 WL 2135798 (S.D.N.Y. Aug. 1, 2006).

¹⁰ "Detecting Attorney Bill Padding" (January 29, 2003).

9	preparing chrs and spreadsheets and logistics.)		
11/16/2009	Preparation for oral arguments (Reviewing case law, preparing chrs and spreadsheets and logistics.)	9	3924
11/17/2009	Preparation for oral arguments (Moot court, reviewing case law, editing visual aids and logistics.)	9.3	4054.8
11/18/2009	Preparation for oral arguments (Moot court, reviewing case law, editing visual aids and logistics.)	12.8	5580.8
11/20/2009	Preparation for oral arguments (Moot court, reviewing case law, editing visual aids and logistics.)	0.7	305.2
12/11/2009	Researching and drafting supplemental brief on A&I's misrepresentations.	7.3	3182.8
12/16/2009	Researching and drafting supplemental brief on A&I's misrepresentations.	8.1	3531.6
12/17/2009	Researching and drafting supplemental brief on A&I's misrepresentations.	4.9	2136.4
12/18/2009	Researching and drafting supplemental brief on A&I's misrepresentations.	8.2	3575.2
12/20/2009	Reviewing, cite and record-cite checking supplemental sanctions memorandum.	3.9	1700.4
12/21/2009	Reviewing, cite and record-cite checking supplemental sanctions memorandum...	12	5232
	TOTAL	221.4 0	96,530.40

Conclusion regarding Billing Methodology

In light of the deviations from acceptable billing practices in ASI's opinion, an across the board reduction of 20%¹¹ of all fees billed or \$70,912 would be reasonable, if not conservative to address just the issues raised by the Law Firm's billing methodology.

Recommended Reduction: \$70,912

Recommended Reduction after Prior Reductions: \$17,958¹²

Staffing

As set forth below, the Law Firm is seeking compensation for nine (9) people who billed an aggregate of 615 hours (\$354,807), for work that is ostensibly covered by the Sanctions Order:

	Office		Billing Rate ¹³	Hours	Fees
Partners					
M. Grinalds	New York	1991	760-930	153.20	\$124,063

¹¹ *Ragin v. Harry Macklowe Real Estate Co.*, 870 F.Supp. 510, 520-521 (S.D.N.Y. 1994) (Sweet, J.) (in light of numerous entries which contain insufficient descriptions of the work done, a lack of contemporaneous records for a significant number of hours, duplicative billing and other errors found throughout the record, lodestar reduced 30%).

¹² ASI previously recommended a reduction of \$264,777 for work that is not subject to the Sanctions Order, leaving a potential balance of \$89,782 for work that is subject to the Sanctions Order, if reasonable. This reduction represents a 20% reduction of \$89,792.

¹³ Does not take into account discounts.

T. Nelson	New York	1990	655-755-795	106	\$71,165
Lerner	New York	1973	950-1050	10.65	\$9,391
Schwartz	Houston	1977	930	3.70	\$2,923
				273.55	\$207,542.00
Associates					
Lohman	Houston	2000	760	1.25	\$647.50
Sussner	New York	2007	440-485	328.10	\$140,798
Freidman			485	3.00	\$1,278
Farrell			520	8.75	\$4,541
				341.1	\$147,264.50

As set forth below, it was not unusual to see four or five senior attorneys drafting/ reviewing the same document or working on the same issue, which resulted in duplication in efforts and other inefficiencies.

Texas TRO

As set forth below, the Law Firm is seeking compensation for over 18 hours (\$12,380) relating to the Texas TRO and Itkin's Letter to the Judges:

Attorney	Texas TRO	Letters to Judge
Grinalds	1.85	6.25
Lerner	1	2
Lohman	1	.25
Nelson	.25	1.83
Schwartz	1.50	2.2
Total Hours	5.6	12.53
Amount	3844.10	8536.48

Itkin's letter to the judges was a four (4) page letter with attachments. ASI could not find a justification or need for four (4) partners and one senior associate, billing at a "discounted" blended rate of \$684 an hour, reviewing this letter. As the following time journals suggest, there was a great deal of duplication in effort and other inefficiency:

Lerner	1/12/07	Review letters to Judges; Confs M. Grinalds and C. Schwartz...
Schwartz	1/12/07	Review and comment on Letter from Itkin to Courts
Grinalds	1/12/07	Review letter from Itkin to Judge Patterson Carter & Sanderson; call for missing paper; C/C's re letter with TX & EP
Nelson	1/12/07	Review letter from Itkin
Lohman	1/12/07	Review letter from Itkin to Judges
Nelson	1/13/07	Memorandum regarding Itkin letter
Grinalds	1/14/07	Research draft & edit Letter to Judges Carter & Peterson opposing Enmon's request for mutual dissolution of TX and NY TROS
Lerner	1/15/07	Work on Papers, including letters to judges...
Grinalds	1/15/07	C/C's with HL; incorporate comments from TX counsel into letter to Judge Patterson
Nelson	1/15/07	Review draft letters to court, email Maura Grinalds re comments on letter to Carter
Schwartz	1/16/07	Multiple revisions to draft letter to federal court re; effect of TRO
Grinalds	1/16/07	Finish proofing & editing letter to SDNY and Send to Beaumont counsel
Nelson	1/16/07	Review final letter to court

Rule 60 (b) Motion and Appeal

The Law Firm is seeking compensation for over 42 hours (\$23,512) in connection with the Rule 60 (B) Motion and the Appeal, with the time allocated as follows:

Attorney	Rule 60B	Appeal 60 (B)
Farrell	.25	8.50
Grinalds	8.25	3.85
Lerner	1.40	0
Nelson	12.75	4.10
Friedman		3.00
Total Hours	22.65	19.45
Amount	12,890.00	10,622

As the following time journals suggest, there was a great deal of duplication in effort and other inefficiency:

FARRELL BA	7/12/2007	7.90	... REVIEW SDNY BY ITKIN...	0.25
GRINALDS M	7/12/2007	9.50	... REVIEW ENMON'S EMERGENCY MOTION UNDER 60 (b) TO JUDGE SAND & C/C'S & EMAILS RE SAME; REVIEW DRAFT LETTER TO WILKINSON RE EMERGENCY MOTION...	2.00
LERNER JJ	7/12/2007	0.50	NEW MOTION ON CREDIT AGREEMENT	0.50
NELSON T	7/12/2007	9.75	... RESPOND TO 7/12/07 MOTION FOR RELIEF FROM ARBITRATION...	2.00
GRINALDS M	7/13/2007	8.75	REVIEW & EDIT AND FINALIZE LETTER TO WILKINSON RE ENMON'S RULE 60(B) ... EDIT LETTER CC JUDGE SAND; C/C'S WITH TON & JJE.	2.00
LERNER JJ	7/13/2007	0.90	REVIEW AND REVISE LETTER; EMAIL; CONFS	0.90
NELSON T	7/13/2007	7.35	LETTERS TO SAND...	2.00
GRINALDS M	7/16/2007	9.50	... C/C WITH TGN RE LETTER TO JUDGE SAND...	0.25
GRINALDS M	7/17/2007	11.00	... REVIEW ITKIN'S LETTER TO JUDGE SAND; ... DRAFT & EDIT LETTER TO SAND;....	2.00
NELSON T	7/17/2007	12.75	... RESPOND BY LETTER TO JUDGE SAND TO EXPEDITION REQUEST...	1.00
GRINALDS M	7/18/2007	14.00	... REVIEW ITKIN'S LATEST LETTER TO JUDGE SAND FOR RECONSIDERATION;...	1.00
NELSON T	7/18/2007	13.75	... RESPOND RE SAND LETTER; CIRCULATE AND RESPOND TO RECONSIDERATION MOTION;	3.00
NELSON T	7/19/2007	10.50	... DRAFT AND SUBMIT REQUEST FOR RECONSIDERATION...	1.00
NELSON T	7/20/2007	14.25	... ORGANIZE RESEARCH RE RULE 60 (B);	1.00
NELSON T	7/21/2007	15.50	DRAFT SUBMISSION TO JUDGE SAND...	2.00
GRINALDS M	7/22/2007	14.00	... EDIT LETTER TO JUDGE SAND...	0.50
NELSON T	7/23/2007	13.75	... SUBMIT LETTER TO SAND...	0.25
GRINALDS M	7/24/2007	14.00	...; HEARING BEFORE JUDGE SAND	0.50
NELSON T	7/24/2007	15.00	PARTICIPATE IN ARGUMENT BEFORE JUDGE SAND...	0.50
				22.65

Motion to Confirm/Vacate and Appeal of the Confirmation Award

The Law Firm is seeking compensation for over 93 hours (\$53,062)¹⁴ in

¹⁴ ASI notes that the Law Firm claimed that the fees associated with the Motion to Confirm/Vacate and the Appeal of the Confirmation Award were \$56,989; however, using the Billing Methodolgy set forth on Exhibit 1, ASI has calculated that the fees associated with these motions were \$53,062. Among the problems that ASI noticed with regards to the Law Firm's allocations was that the Law Firm did not allocate any time for the Sanctions Motion on the September 12, 2008 invoice even though there were explicit references to the Sanctions Motion. Such entries include:

Nelson	5/15/08	Discussions w/M. Grinalds re possible sanction, outline for brief, jurisdiction, GCF deadlines
Nelson	5/20/08	...discuss sanctions...
Nelson	5/21/08	...discussions re potential sanctions motion

connection with the Motion to Confirm/Vacate and Appeal of the Confirmation Award, with the time allocated as follows:

Attorney	Opposition to Motion to Confirm
Grinalds	8.50
Lerner	.25
Nelson	44.50
Sussner	40.60
Total Hours	93.3
Amount	53,062

Again, the time journals confirm there was duplication in effort, including two partners preparing for and attending the hearing, and other inefficiencies:

Attorney	Date	Initial Hours	Description	Billed Hours
GRINALDS M	5/12/2008	0.50	ATTENTION TO SECOND CIRCUIT NOTICE ARGUMENT; REVIEW OPPOSITION TO CONFIRMATION PETITION & EMAILS.	0.25
SUSSNER DM	5/14/2008	2.80	RESEARCH FOR REPLY BRIEF RE: PROCEDURAL FLAWS IN ENMON'S OPPOSITION AND STANDARD OF REVIEW FOR CONFIRMATION OF AN ARBITRATION AWARD.	2.80
SUSSNER DM	5/15/2008	7.90	RESEARCH AND DRAFTING REPLY BRIEF FOR PETITION TO CONFIRM ARBITRATION AWARD.	7.90
NELSON T	5/19/2008	1.5	FURTHER DISCUSSIONS RESEARCH RE MOTION TO CONFIRM; REPORT ON STATUS.	1.50
SUSSNER DM	5/19/2008	5.70	RESEARCH, EDITING AND DRAFTING REPLY BRIEF FOR PETITION TO CONFIRM ARBITRATION AWARD RE: ARBITRATOR'S DISCRETION WITH RESPECT TO DISCOVERY AND PRIOR DETERMINATIONS OF ARBITRABILITY; COLLECTING EXHIBITS.	5.70
GRINALDS M	5/20/2008	1.75	CALL KURT A; DRAFT/EDIT AND SERVE LETTER TO JUDGE SAND; JUDGE MCMAHAN; CONFERENCE CALLS WITH J.J.L. & DS; ATTN TO PETITION TO CONFIRM; EMAIL S.M. RE UPDATE.	1.00
NELSON T	5/20/2008	7.25	FURTHER DRAFT REPLY MOTION TO CONFIRM; DISCUSS SANCTIONS; ASSIST RE DRAFT LETTER; COMPILE EXHIBITS.	7.25
SUSSNER DM	5/20/2008	5.80	RESEARCH, EDITING AND DRAFTING REPLY BRIEF FOR PETITION TO CONFIRM ARBITRATION AWARD RE: ARBITRATOR'S DISCRETION WITH RESPECT TO DISCOVERY AND PRIOR DETERMINATIONS OF ARBITRABILITY; COLLECTING EXHIBITS; EDITED LETTER TO JUDGE SAND AND JUDGE MCMAHAN.	5.80
GRINALDS M	5/21/2008	1.25	REVIEW & EDIT REPLY BRIEF IN SUPPORT OF CONFIRMATION OF ARBITRATION AWARD & TEAM COMMENTS; EMAIL CLIENTS RE LETTER TO SAND/MCM.	1.25
SUSSNER DM	5/21/2008	5.10	CITECHECKING, EDITING AND RESEARCH FOR REPLY BRIEF FOR PETITION TO CONFIRM ARBITRATION AWARD RE: ARBITRATOR'S DISCRETION WITH RESPECT TO DISCOVERY AND PRIOR DETERMINATIONS OF ARBITRABILITY; COLLECTING EXHIBITS.	5.10
NELSON T	5/21/2008	5.25	FURTHER DRAFT RESEARCH REPLY BRIEF; DISCUSSIONS WITH PROSPECT, MBG RE SAME; DISCUSSIONS RE POTENTIAL SANCTIONS MOTION.	5.25
GRINALDS M	5/22/2008	1.25	EMAILS WITH CLIENT; REVIEW & EDIT & FINALIZE CONFIRMATION REPLY & REVIEW EXHIBITS; EMAILS RE NERA.	1.25
NELSON T	5/22/2008	4.75	FURTHER DRAFT; FINALIZE REPLY PAPERS.	4.75
SUSSNER DM	5/22/2008	9.50	REVISIONS TO REPLY BRIEF; FINALIZING EXHIBITS AND DECLARATION AS WELL AS FILING MATERIALS AND COURTESY COPY.	9.50
SUSSNER DM	5/27/2008	1.10	SENT COURTESY COPY AND EXHIBITS TO J. SAND; PREPARED COVER LETTER.	1.10
NELSON T	8/30/2008	0.70	DRAFT NEW MOTION TO CONFIRM.	0.70
SUSSNER DM	8/31/2008	1.20	REVISING AND PROOFREADING FINAL AWARD CONFIRMATION PAPERS.	1.20
NELSON T	9/2/2008	0.25	DISCUSSIONS WITH M. GRINALDS RE FURTHER ACTION REQUIRED TO CONFIRM AWARD.	0.25
GRINALDS M	10/2/2008	0.30	CONFERENCE CALL WITH TGN RE HEARING & CONFERENCE CALL WITH DAN S. & COLLECT MATERIALS.	0.30
NELSON T	10/2/2008	2.75	COMMENCE DRAFTING OUTLINE FOR HEARING; DISCUSS W/ MBG	2.75
SUSSNER DM	10/2/2008	1.50	PREPARING ORAL ARGUMENT MATERIALS.	1.50
GRINALDS M	10/3/2008	0.25	CONFERENCE CALL WITH MLC RE FILING; REVIEW ENMON'S ANSWER TO SUPP. PETITION AND RELATED EMAILS.	0.25

Attorney	Date	Initial Hours	Description	Billed Hours
NELSON T	10/5/2008	1.75	FURTHER PREPARE FOR SDNY HEARING	1.75
LERNER JJ	10/6/2008	0.25	ATTENTION TO HEARING	0.25
NELSON T	10/6/2008	4.50	PREPARE FOR ORAL ARGUMENT	4.50
GRINALDS M	10/7/2008	2.50	REVIEW PAPERS; MEET WITH TGN; ATTEND SDNY ARGUMENT ON MOTION TO CONFIRM; CONFERENCE CALLS WITH JJJ & JFB; REVIEW JUDGEMENT	2.50
GRINALDS M	10/7/2008	2.50	REVIEW PAPERS; MEET WITH TGN; ATTEND SDNY ARGUMENT ON MOTION TO CONFIRM; CONFERENCE CALLS WITH JJJ & JFB; REVIEW JUDGEMENT	2.50
NELSON T	10/7/2008	4.75	ATTEND COURT, ARGUE MOTION, REPORT TO JB, DRAFT AND SUBMIT JUDGMENT AND ORDER FOR ENDORSEMENT	4.75
NELSON T	10/8/2008	0.75	REVIEW TRANSCRIPT ORDER, MEMO TO JB RE SAME	0.75

Conclusion regarding Staffing

In ASI's opinion, the Law Firm inappropriately staffed this matter with too many senior lawyers who duplicated each other's work. None of them seemed to take on responsibility for any discrete aspect of the matter. Rather they reviewed, revised, and edited each other's work, which artificially increased the legal fees. In ASI's opinion, an across the board reduction of 25% of all fees relating to the Texas TRO, the Rule 60 (B) Motion and Appeal and the Motion to Confirm would be reasonable, if not conservative.

Recommended Reduction: \$22,239

Recommended Reduction after Prior Reductions: \$17,791¹⁵

Reasonableness of Hourly Rates

In determining whether an hourly rate is reasonable, courts examine the market rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."¹⁶

In assessing market rates, courts have been known to rely on The National Law Journal's Survey of Billing Rates.¹⁷ According to *The National Law Journal's 2009 Survey of Billing Rates*, law firms increased their average annual firm wide billing rate by 2.5 percent over the last year, one of the lowest increases in recent memory.¹⁸ The small 2009 boost compares to a 4.3 percent increase reported in 2008 and a 7.7 percent rate climb in 2007. Nationwide, the average hourly billing rate for partners was \$457 in 2009, up from \$451 in 2008. For associates, the average rate was \$287, an increase from \$282 last year.

The national average is not the correct standard for a large New York City firm. Even if ASI assumes that the Law Firm's 2007 billing rates were reasonable and commensurate with those prevailing in the community for similar services, the

¹⁵ ASI previously recommended a 20% reduction, for billing methodology that deviated from acceptable billing practices, in connection with the Law Firm's billing for the Texas TRO (\$12,380), Rule 60(b) Motion and Appeal (\$23,512) and the Motion to Confirm/Vacate (\$53,062).

¹⁶ *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (quoting *Blum v. Stenson*, 465 U.S. at 896 n.11).

¹⁷ See *Banco Central De Paraguay et al. v. Paraguay Humanitarian Foundation* 01 Civ. 9649 (JFK), 2007 (S.D.N.Y. March 2, 2007) and *See Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837, 2006 U.S. Dist. LEXIS 52402, at *6-7 (S.D.N.Y. Aug. 1, 2006).

¹⁸ The small 2009 boost compares to a 4.3 percent increase reported in 2008 and a 7.7 percent rate climb in 2007.

2008 and 2009 billing rate increases were unreasonable. As set forth below, when many large New York City firms were holding rates steady or even reducing their rates, the Law Firm raised rates between 2007 and 2009 by as much as 22%.

Attorney	2007 Rates	2008 Rates	2009 Rates	Increase in Billing Rate
Grinalds	\$760	\$930	\$930	22%
Lerner	\$950	\$950	\$1050	11%
Nelson	\$655	\$755	\$795	22%

Using the National Average for rate increases just for partners, the rates should have been as follows:

Attorney	2007 Rates	2008 Rates	2009 Rates
Grinalds	\$760	\$792	\$813
Lerner	\$950	\$950	\$974
Nelson	\$655	\$683	\$700

ASI notes that the Law Firm gave "Discounted Rates" between 12-20% in 2007, 10-12% in 2008 and 10% in 2009; however, in ASI's opinion, these discounts should have applied to more reasonable base rates. Had this been the case the legal bills would and should have been reduced by over \$22,000.

Conclusion regarding Billing Rates

In light of the fact that the major motion that was affected by the unreasonable billing rates was the Sanctions Motion, which is not covered by the Sanctions Order, ASI is not recommending reductions due to the unreasonable billing rates.

Conclusion

Based on our analysis, ASI has concluded that fees charged by the Law Firm are excessive and unreasonable for the reasons detailed in this report. In ASI's opinion, the maximum amount of legal fees that is potentially subject to the Sanctions Order is \$54,033.

Audit Methodology

A. Methodology for Addressing Issues Raised By the Billing Entries

1. Coding Structure

In order to determine the time and fees associated with a particular matter and specific tasks and projects performed in connection with the matter, ASI reviews the Invoices and creates a three-tier coding structure tailored to the matters underlying the Invoices. The three tiers are as follows:

a. Categories

A specific code is assigned to each major aspect of a matter, e.g., Case Assessment, Pleadings, Discovery, Deposition, Trial.

b. Subcategories

To further refine the division of time and fees within each category, subcategory codes are assigned to individual witnesses or deponents, to specific research topics or other key issues or projects mentioned in the billing descriptions contained in the Invoices.

c. Tasks

Each entry is also assigned a particular task code, representing the activity in which the timekeeper engaged, e.g. document review (RV), drafting (DR), internal meeting or conference (IM).

d. Coding Procedure

Each time entry for each timekeeper is then assigned a code from each of these three tiers. For example, the following billing entry would be coded as shown below:

"Preparation for oral argument of summary judgment motion"

CATEGORY	SUBCATEGORY	TASK
SJ (Summary Judgment)	OA (Oral Argument)	PR (Prepare)

2. Coding for Vague Entries

If the nature of the work (at any tier of coding) could not be determined from the entry or from the context, the entry would be coded as "Unknown" for that tier.

An entry stating "Legal Research" would be coded: UN/UN/RS

However, if the above entry appeared at a point in time or in a context that

clearly indicated the issue in question, the pertinent category and/or subcategory code would be assigned.

3. Time Allocations for Multi-Task Entries

If a timekeeper's daily activities lump together multiple tasks into one block of time (typically referred to as "block billing"), ASI allocates the time for multi-task billing entries to individual tasks in accordance with the following methodology:

Absent any contextual guidance, certain tasks were assigned particular periods of time:

1. Routine or unspecified correspondence: .2 to .5 hrs.
2. Internal meetings/office conferences: .2 to .5 hours,
3. External/client phone calls: .2 to .5 hours

The above assumptions may have been modified under the following circumstances:

1. A review of surrounding time entries or corresponding entries of other timekeepers indicated a greater or lesser time commitment to the activity, e.g. reference to a team meeting might result in a larger allocation of time where the co-conferee's records provided evidence of a more precise time allocation.
2. If the billing records contain specific descriptions of the topics discussed, a greater allocation of time may have been warranted.

After time is assigned to communications, the rest of the time, in a given entry, is divided equally among the remaining tasks.