10-CV-6005(RWS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIAN SCHOOLCRAFT,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR RECONSDIERATION OF THE COURT'S FEE AWARD

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PRELIMINARY STATEMENT

The City of New York (the "City") submits this Memorandum of Law in opposition to plaintiff's two motions for reconsideration of the Court's September 6, 2016 Order awarding attorneys' fees and expenses to plaintiff (the "Order").[1] The motions should be denied for the following reasons.

First, the motions are procedurally improper because they are grounded upon new legal and factual arguments that could have been raised in the prior proceedings but were not, or restate arguments which were briefed by the parties and considered by the Court. The motions also rely on two declarations, in violation of Local Rule 6.3, and purported evidence of hourly rates submitted with those declarations which plaintiff had refused to produce in discovery and declined to submit in prior briefing. The motions should be denied for this reason alone.[2]

Second, the Court applied the correct standard in determining reasonable hourly rates. Contrary to plaintiff's new argument, relying primarily on Perdue v. Kenny A., 559 U.S. 542 (2010), the leading Second Circuit decision of Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany, 493 F.3d 110 (2d Cir. 2007) remains the governing authority in this Circuit and it is thoroughly consistent with Supreme Court precedent. See Millea v. Metro-N. R.R., 658 F.3d 154, 166-67 (2d Cir. 2011) (Arbor Hill and Perdue both apply the same "lodestar" approach). The court correctly followed Arbor Hill and other Second Circuit law in determining reasonable rates and reasonable hours, including the so-called Johnson factors cited

[1] A motion was filed by the Norinsberg team on September 14, 2016 and by the Smith team on September 16, 2016.

[2] Defendants demanded and plaintiffs' refused to produce, among other things: "Billing records since January 1, 2010 showing all hourly rates actually paid by a client or by an adverse party for the time of any timekeeper for whom fees are claimed in this case." January 28, 2016 Letter, Exhibit A (Email of January 14, 2016) (DE 576).

by Arbor Hill[3]; the expected reputational benefits to counsel of taking the representation; and the size of plaintiff's counsel's law firms.

Third, the plaintiff's belatedly submitted evidence of hourly rates, even if considered (which it should not be), do not dictate the hourly rates to be awarded in this case.

Fourth, the Smith team's belated attack on defendants' calculation of the hours expended in connection with depositions – made for the first time despite at least four prior submissions attacking defendants' calculations – is immaterial and incorrect.

Fifth, plaintiff presents no reason for the Court to increase its findings on the Smith team's reasonable rates and hours. As the Court held, the determination of reasonable hourly rates and reasonable hours is within the Court's discretion, and the Court may employ across-the-board reductions when justified, and apply them equivalently to all counsel. Nor is the Court, which has more comprehensive view of the case than any attorney appearing it, bound by any parties' position on specific elements of the award, including rates.

For these and other reasons presented below and in the City's prior submissions, the Court should deny the motions for reconsideration.

THE STANDARD FOR RECONSIDERATION

"It is well-settled that Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple' . . . ." Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (quoting Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998)). Rather, "the standard for granting [a Rule 59 motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court

[3] The Johnson factors are the factors originally set forth in Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), cited by the Second Circuit in Arbor Hill and incorporated as factors to consider in the determination of reasonable rates and reasonable hours. See Arbor Hill, 493 F.3d at 114 n.3.

overlooked." Id. (quoting Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)); accord Schoolcraft v. City of N.Y., 133 F. Supp. 3d 563, 567 (S.D.N.Y. 2015). Accordingly, the Court should "not consider facts not [already] in the record to be facts that the court overlooked." Schoolcraft v. City of N.Y., 2012 U.S. Dist. LEXIS 101317, at *8 (S.D.N.Y. July 18, 2012) (quoting Rafter v. Liddle, 288 Fed. Appx. 768, 769 (2d Cir. 2008)) .

When considering plaintiff's prior motions to reconsider, the Court has elaborated on this high standard:

> Pursuant to Local Civil Rule 6.3 the Court may reconsider a prior decision to "correct a clear error or prevent manifest injustice." Medisim Ltd. v. BestMed LLC, 2012 U.S. Dist. LEXIS 56800, at *2-3 (S.D.N.Y. Apr. 23, 2012) [citations omitted] . . . .
>
> Reconsideration of a court's prior order under Local Rule 6.3 "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." Ferring B.V. v. Allergan, Inc., No. 12 Civ. 2650(RWS), 2013 U.S. Dist. LEXIS 111374, 2013 WL 4082930, at *1 (S.D.N.Y. Aug. 7, 2013) (quoting Sikhs for Justice v. Nath, 893 F. Supp. 2d 598, 605 (S.D.N.Y. 2012)). Accordingly, the standard of review applicable to such a motion is "strict." CSX, 70 F.3d at 257 (2d Cir. 1995).
>
> The burden is on the movant to demonstrate that the Court overlooked controlling decisions or material facts that were before it on the original motion and that might "'materially have influenced its earlier decision.'" Anglo Am. Ins. Group v. CalFed, Inc., 940 F. Supp. 554, 557 (S.D.N.Y. 1996) (quoting Morser v. AT & T Info. Sys., 715 F. Supp. 516, 517 (S.D.N.Y. 1989)) [citation omitted] . . . . A party seeking reconsideration may neither repeat *"*arguments already briefed, considered and decided*"* nor *"*advance new facts, issues or arguments not previously presented to the Court.*"* Schonberger v. Serchuk, 742 F. Supp. 108, 119 (S.D.N.Y. 1990) (citations omitted).

Id. (emphasis added). Further:

> The reason for the rule confining reconsideration to matters that were "overlooked" is to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Polsby v. St. Martin*'*s Press, Inc., No. 97 Civ. 690(MBM), 2000 U.S. Dist. LEXIS 596, 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation and quotation marks omitted).

Schoolcraft v. City of N.Y., 2012 U.S. Dist. LEXIS 101317, at *5-8 (S.D.N.Y. July 18, 2012) (emphasis added). "A motion for reconsideration is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." In re Bear Stearns Cos., Inc. Sec., Derivative and ERISA Litig., 08 M.D.L. No. 1963, 2009 U.S. Dist. LEXIS 61588, 2009 WL 2168767, at *1 (S.D.N.Y. Jul. 16, 2009) . "A court must narrowly construe and strictly apply Local Civil Rule 6.3, so as to avoid duplicative rulings on previously considered issues, and to prevent the rule from being used as a substitute for appealing a final judgment." Schoolcraft, 2012 U.S. Dist. LEXIS 101317, at *7.

Despite the Court twice before reciting these standards, plaintiff nevertheless disregards the requirements and fails to set forth any basis for reconsideration.

POINT I

PLAINTIFF'S MOTIONS SHOULD BE DENIED BECAUSE THEY ARE BASED ON NEW FACTUAL AND LEGAL ARGUMENTS, OR MATTERS PREVIOUSLY CONSIDERED BY THE COURT

Plaintiff has previously sought reconsideration based on new arguments that could and should have been made earlier, and this motion is no exception. See Schoolcraft, 133 F. Supp. 3d at 572 (denying motion for reconsideration because plaintiff's arguments were not previously advanced); Schoolcraft v. City of N.Y., 2012 U.S. Dist. LEXIS 101317, at *14 (denying motion to reconsider in part because motion as based on new arguments).[4] "[A] party requesting [reconsideration] is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use Rule [6.3] to advance new facts and theories in response to the court's rulings." Church of Scientology Int'l v. Time Warner, Inc., No. 92 Civ. 3024 (PKL), 1997 U.S. Dist. LEXIS 12839, 1997 WL 538912, at *2 (S.D.N.Y. Aug. 27, 1997)); see also

[4] Indeed, this pattern of bootless motions to reconsider – previously noted by the City – provides further support for the Court's fee reductions. See City Mem. Law in Opposition to Fee Application ("City Opp.") at 16-17, n. 22 (DE 597). "DE" refers to the docket entry number associated with a particular previous filing.

Ferring B.V. v. Allergan, Inc., 2013 U.S. Dist. LEXIS 111374, *2-3 (S.D.N.Y. Aug. 5, 2013) ("A party seeking reconsideration may neither repeat "arguments already briefed, considered and decided," nor "advance new facts, issues or arguments not previously presented to the Court.").[5] Yet that is what precisely what plaintiff does in this motion.

A. Plaintiff's new argument that Arbor Hill and the Johnson factors do not apply was never before raised and should be rejected for that reason alone.

Plaintiff argues for the first time that the Court applied the wrong standard in determining reasonable fees; specifically that the Court should not have: (i) followed the leading Second Circuit decision of Arbor Hill; (ii) considered the Johnson factors; (iii) considered the size of the law firms; or (iv) considered the apparent reputational benefits to counsel from taking the case as called for by Arbor Hill. Norinsberg Team Reconsideration Memorandum ("Norinsberg Recon.") 2-5, 6-10 (DE 642); Smith Team Reconsideration Memorandum ("Smith Recon.") 14 (DE 645). For this plaintiff relies primarily on the Supreme Court opinions in Blum v. Stenson, 465 U.S. 886 (1984) and Perdue v. Kenny A., 559 U.S. 542 (2010), and four district court decisions never before cited.

Plaintiff had every opportunity to make its new arguments in nine submissions on fees from the Norinsberg and Smith teams alone, totaling hundreds of pages of argument, including two substantial Reply briefs, as well as oral argument. See DE 560, 561, 605, 610, 620, 621, 624, 625, 630. Arbor Hill, the Johnson factors, the size of the law firm, and the reputational benefits to counsel, were all set forth by the City in its Opposition. See, e.g., City Opp. 4-5. 48-51; 54-55. Plaintiff and the City both cited Blum and Perdue, but plaintiff never even intimated that those cases overruled Arbor Hill or any other authorities on which the City relied. See City

[5] Unsurprisingly, plaintiff's counsel omitted this key limitation when reciting the applicable standard. See Norinsberg Team's Mem. of Law in Support of Reconsideration ("Norinsberg Recon."), at 1-2 (Docket No. 642).

Opp. 4-5, 22, 47-48 (citing Arbor Hill, Johnson, Blum, and Perdue); Norinsberg Mem. in Support of Fees ("Norinsberg Mem.") 16, 19, 29 (DE 561) (citing Blum and Perdue); Smith Reply Mem. in Support of Fees ("Smith Reply") 30-31 (DE 620) (citing Blum and Perdue). In its prior papers, plaintiff cited none of the "many cases" (actually, just four) questioning whether Arbor Hill or the Johnson factors set forth there have been overruled. Norinsberg Recon. 8.

In fact, plaintiff's new argument impugning Arbor Hill's case specific approach to determining reasonable fees is contrary to plaintiff's prior submissions. The Smith team wrote: "As the Second Circuit has explained, this fact-finding 'contemplates a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel.'" Smith Reply 30 (quoting Farbotko v. Clinton Cnty., 433 F.3d 204, 209 (2d Cir. 2005)). The Norinsberg team cited Arbor Hill favorably in its moving brief, and only the lower court's decision in Arbor Hill in its Reply. See Norinsberg Mem. 20; Norinsberg Team Reply Memorandum ("Norinsberg Reply") 48 (DE 624).

The City also argued, citing substantial authority, that the Court should consider the size of plaintiffs' law firms and the reputational benefits to counsel from the representation. See City Mem. at 54-55, 57 n. 56. But in Reply plaintiff's counsel never argued– as it does now – that the Court was barred from following well settled precedent, and never cited the single district court case on which it now relies for the idea that the size of law firms is irrelevant. See infra at 16.

Plaintiff was right the first time in declining to contest these issues.[6] And he certainly cannot be heard now to argue that this Court should have disregarded the prevailing law in the Second Circuit that he did not previously contest. The argument is untimely in the extreme and should not be considered.

[6] Moreover, as set forth below and in the City's prior submissions, hundreds of Second Circuit decisions, including from the Circuit Court, follow the Arbor Hill method since Perdue and have found it wholly consistent in substance with Supreme Court precedent. See infra at 9-13.

B. Plaintiff's new evidence of billing rates in other matters and alleged preclusion of other employment should be disregarded because they are based on improper additions to the record, and use evidence that plaintiff withheld from discovery and disclosure under Rule 26(a)(1).

At the outset of the fee application process defendants demanded and plaintiffs' refused to produce, among other things: "Billing records since January 1, 2010 showing all hourly rates actually paid by a client or by an adverse party for the time of any timekeeper for whom fees are claimed in this case." City's Letter of January 28, 2016, Exhibit A (Email of January 14, 2016) (DE 576). Plaintiff's counsel refused to provide that information. Id. Neither the Smith nor Norinsberg teams ever produced or submitted their retainer agreements with Schoolcraft.[7] The City defendants challenged plaintiffs to submit evidence of their claimed hourly rates in civil rights cases, yet plaintiff's counsel declined to do so even after the issue was raised in the defendants' opposition. City Opp. 59-60, 66 n. 70.

Only now, after hundreds of pages of briefing and exhibits, plaintiff's counsel ask the Court to consider a redacted email and three retainer letters, all from other cases, which were previously withheld from defendants and the Court. All of the retainer agreements could have been submitted in support of the plaintiff's fee petition before the Court's decision. Except for one, all of the retainer agreements are dated before the plaintiff's Reply submission on fees on April 29, 2016; one letter is dated less than two-weeks after that submission and was executed before the oral argument on this motion on May 13, 2016; the email is dated less than a week later. See DE 643-1 to 643-4.

[7] Nat Smith previously asserted that plaintiff agreed to a particular hourly rate in this case, should a quantum meruit claim be brought against the plaintiff, but plaintiff's counsel refused, even in Reply, to back up that assertion with a retainer agreement. See Smith Dec., 8 (DE 560-2). Smith also made claims about retainer agreements in other matters. Smith Reply Aff. (DE 621) ¶¶ 12-14. But as defendants argued previously, it would be fundamentally unfair to allow Smith to rely on these bare assertions without presenting the retainer agreements themselves for examination by the Court and the City. City Opp. 66-67. Accordingly, the Court should disregard counsel's assertions about the alleged retainer agreements, which are in any event not controlling. See infra at 16-18.

In addition the Norinsberg team offers brand new factual matter in averments about a case that they allegedly did not take in light of Schoolcraft, despite the hundreds of other new matters initiated by the Norinsberg team during the pendency of Schoolcraft in the Southern and Eastern Districts and elsewhere. Norinsberg Recon. 11, Norinsberg Dec. ¶¶ 5-6. This issue was also previously briefed, with no prior mention of the allegedly forgone case.

These factual submissions flatly violate Local Rule 6.3, which prohibits declarations from being submitted absent prior court order in support of a motion for reconsideration. The well settled standards for motions to reconsider also expressly preclude supplementing the factual record. Supra at 3-4. In addition, because plaintiff refused to produce the evidence of hourly rates in response to defendants' discovery request, plaintiff is estopped from relying on it.

Finally, throughout this fee proceeding plaintiff has sandbagged defendants with evidence that was never identified or disclosed at any stage pursuant to Fed. R. Civ. P. 26(a)(1). The mandatory disclosure provisions of the federal rules contain no exception for the attorneys' fee phase of a litigation, and no such exception exists. Yet plaintiff has showered the Court with witnesses and evidence never before identified or produced. The Court should put a stop to that now, and hold that plaintiff's new factual submissions are disregarded.[8]

C. The Court should not consider plaintiff's belated attacks on defendants' calculations of hours relating to depositions.

Plaintiff had ample opportunity to find fault with defendants' calculations and characterizations of the counsel's hours, and did so in no less than four filings – two Reply briefs on fees, and a separate motion to strike and a reply on the motion to strike[9] – yet plaintiff never

[8] This failure to disclose is prejudicial to defendants because defendants had no opportunity to move to compel additional discovery called for by the new evidence. For example, the Norinsberg team retainer agreements raise the obvious question whether Schoolcraft's retainer agreement – which was never provided – is different, and whether any of these civil rights plaintiffs ever actually paid the hourly rates reflected in the retainer agreements.

[9] See DE 601, 620, 624, 630.

before raised the new errors to which the Smith team now devotes four pages of its memorandum. Smith Recon. 5-9. In fact, the Smith team in Reply discussed the deposition time and acknowledged that it warranted some reduction in rates, but never mentioned its new attacks on the same subject. Smith Reply 25-28, 32-33. It is too late now.[10]

Accordingly, plaintiff has failed to identify any matter before the Court on this heavily briefed matter that the Court overlooked, and puts forward only new evidence and arguments. In other respects plaintiff merely restates arguments that it made before and which were considered by the Court. Therefore, plaintiff fails to meet the standard for a motion for reconsideration and the motion should be denied for that reason alone.

POINT II

THE COURT APPLIED THE CORRECT STANDARD UNDER ARBOR HILL AND PROPERLY APPLIED THE JOHNSON FACTORS AND OTHER CASE SPECIFIC CONSIDERATIONS IN ITS FEE AWARD

A. Arbor Hill and the Johnson factors remain fully applicable to fee determinations in the Second Circuit and the Court applied the correct standard.

Plaintiff belatedly argues that the standard set forth in Arbor Hill and its case specific factors – including the Johnson factors; the size of plaintiff's law firms; and the anticipated reputational benefits of the case – should not have been considered by the Court in determining reasonable rates and reasonable hours. Norinsberg Recon. Mem. at 6-11; Smith Recon. Mem. at 14. Specifically plaintiff asserts that Arbor Hill, which incorporates the Johnson factors and other case specific considerations, was overruled by the Supreme Court's decision in 2011 in Perdue. Plaintiff is flat wrong.

The Second Circuit has reaffirmed Arbor Hill since Perdue, citing the two cases together in one breath and equating their methodologies:

[10] Moreover, the delay is prejudicial to defendants because the professional who prepared defendants' calculations, Judith Bronsther, has moved on to other matters and has only limited availability now to assist defendants.

> Both this Court and the Supreme Court have held that the lodestar--the product of a reasonable hourly rate and the reasonable number of hours required by the case--creates a "presumptively reasonable fee." Arbor Hill Concerned Citizens Neighborhood Assoc. v. Cnty. of Albany, 522 F.3d 182, 183 (2d Cir. 2008); see also Perdue v. Kenny A. ex rel. Winn, 130 S. Ct. 1662, 1673, 176 L. Ed. 2d 494 (2010)..

Millea v. Metro-N. R.R., 658 F.3d 154, 166-67 (2d Cir. 2011); see also Dunda v. Aetna Life Ins. Co., No. 6:15-cv-6232-MAT, 2016 U.S. Dist. LEXIS 125946, at *9 (W.D.N.Y. Sep. 15, 2016) ("Both [the Second Circuit] and the Supreme Court have held that the lodestar—the product of a reasonable hourly rate and the reasonable number of hours required by the case—creates a 'presumptively reasonable fee.'")(citing Millea)). In other words, whether the methodology is called the "presumptively reasonable fee" as in Arbor Hill or the "lodestar" as in Perdue, the method is the same: calculation of reasonable hours times reasonable rates to arrive at a presumptively reasonable fee.

The Johnson *"method"* criticized by the Supreme Court, in comparison to the lodestar "method," was a gestalt approach where the Court determined reasonable fee based on numerous factors, without separate consideration of hours and rates. The Supreme Court never said that the Johnson factors should not be considered in determining the lodestar amount. Indeed it is just the opposite. The Supreme Court stated that the Johnson factors are generally incorporated within the lodestar analysis:

> Expanding on our earlier finding in Hensley that many of the Johnson factors "are subsumed within the initial calculation" of the lodestar, we specifically held in Blum that the "novelty [and] complexity of the issues,"" "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award.

Pa. v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986); see also Perdue v. Kenny A., 559 U.S. at 554 . Perdue held only that the lodestar amount should not be enhanced

based on specific factors (in that case attorney performance), unless it could be shown the factor was not fully accounted for in the lodestar analysis. 559 U.S. at 553-54.

As one district court explained, although the "Supreme Court has []expressed skepticism with the propriety of the Johnson approach," nevertheless "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." Mng Shu Jin v. Pac. Buffet House, Inc., No. 06-CV-579 (VVP), 2010 U.S. Dist. LEXIS 63608, at *6-8 n.2 (E.D.N.Y. June 25, 2010) (emphasis added) (citation omitted). As another district court explained:

> [Perdue] 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. Indeed, the Court's fears of unrestrained discretion in applying a pure Johnson approach are largely absent from the more cabined methods of calculating a presumptively reasonable fee in this Circuit.

Id.; see also Trs. of the Empire State Carpenters Welfare v. M.R. Drywall Servs., No. CV-11-1842 (JS) (WDW), 2012 U.S. Dist. LEXIS 123937, at *9 (E.D.N.Y. Aug. 6, 2012) ("It would appear that although use of the Johnson 'method' is now proscribed, reference to the Johnson 'factors' is still useful in calculating a presumptively reasonable fee in this Circuit."); Shim v. Millennium Group, 2010 U.S. Dist. LEXIS 68922, *6 n. 3 (E.D.N.Y. June 21, 2010) ("the Johnson factors, as opposed to the Johnson method, are still relevant in informing the court's determination of a reasonable fee").[11] "'Whatever the terminology,' both Arbor Hill and Perdue 'require the Court to consider case-specific factors in determining the reasonableness of the hourly rate and the number of hours expended.'" Trs. of the Empire State Carpenters Welfare v.

[11] Indeed, it would be contrary to the legislative intent behind Section 1988 if the Johnson factors were irrelevant to the determination of reasonable hours and reasonable rates since Johnson was cited favorably in the legislative history of Section 1988, the statute under which fees are awarded. Blum v. Stenson, 465 U.S. at 902 (Brennan, J., concurring) ("Congress referred to Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (CA5 1974), for the appropriate standards to be applied by courts awarding attorney's fees under § 1988.").

M.R. Drywall Servs., No. CV-11-1842 (JS) (WDW), 2012 U.S. Dist. LEXIS 123937, at *9 (E.D.N.Y. Aug. 6, 2012) (quoting Brown v. Starrett City Assocs., Inc., 2011 U.S. Dist. LEXIS 124480, 2011 WL 5118438, *4, n.5 (E.D.N.Y. Oct. 27, 2011)(citing Shim)). "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." Id.

The Supreme Court pronouncements demand this case specific approach. "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." Perdue, 559 U.S. at 541 (emphasis added). To determine what a "paying client" would pay in a "comparable case," case specific factors must be considered within the lodestar analysis. Id., at 553. Blum also requires an estimate for what a client would pay "for similar services by lawyers of comparable skill, experience and reputation." 465 U.S. at 894 (emphasis added).

Since Perdue, hundreds of district courts have followed Arbor Hill in applying its case specific factors, up to the present day. See Shephard's Printout for Arbor Hill, Ex. A to the Declaration of Alan H. Scheiner, ¶ 2; see, e.g., Rodriguez v. Obam Mgmt., No. 13cv00463 (PGG) (DF), 2016 U.S. Dist. LEXIS 34154, at *70-71 (S.D.N.Y. Mar. 14, 2016) (Freeman, M.J.) (Report and Recommendation) ("In Arbor Hill, the Second Circuit emphasized that the "reasonable hourly rate is the rate a paying client would be willing to pay." Arbor Hill, 522 F.3d at 190. In assessing whether an hourly rate is reasonable, the Court should "bear in mind that a

reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." Id.).[12]

While plaintiff contends that "many courts" have questioned whether Arbor Hill and the Johnson factors incorporated therein are still good law, plaintiff in fact cites for the first time only four district court cases out of hundreds that have applied Arbor Hill since 2011. See Norinsberg Recon. 7-8. In Allende v. Unitech Design, Inc., cited by plaintiff, the district court, writing soon after the Perdue decision, speculated that Perdue may "cast doubt" on Arbor Hill, but "the result would not differ here even if the Court used the Arbor Hill approach." 783 F. Supp. 2d 509, 514 n.4 (S.D.N.Y. 2011). Notably, Allende was written several months before the Second Circuit's controlling decision in Millea equating Arbor Hill and Perdue. In Anthony v. Franklin First Fin., Ltd., 844 F. Supp. 2d 504, 506-07 (S.D.N.Y. 2012), cited by plaintiff, the district court acknowledged that when "considering the hourly rate from which to derive the lodestar calculation, the Second Circuit has looked to case-specific considerations, including those outlined by the 5th Circuit in Johnson." The court then cited Allende, without considering Millea, solely to note "some question" about whether Perdue affected Arbor Hill, but like Allende found that the distinction would make no difference. 844 F. Supp. 2d at 507 n. 3.

In Flores v. Mamma Lombardi's of Holbrook, Inc., 104 F. Supp. 3d 290, 309 (E.D.N.Y. 2015), cited by plaintiff, the district court adopted the case specific approach used in Arbor Hill: "The presumptively reasonable fee boils down to what a reasonable, paying client would be willing to pay, given that such a party wishes to spend the minimum necessary to litigate the case effectively." Flores v. Mamma Lombardi's of Holbrook, Inc., 104 F. Supp. 3d 290, 309

[12] See also LG Capital Funding, LLC v. Volt Solar Sys., 2016 U.S. Dist. LEXIS 108779, at *27-28 (E.D.N.Y. Aug. 15, 2016) (citing and quoting Arbor Hill); DirecTV, LLC v. Borbon, No. 14-CV-3468 (KAM)(LB), 2015 U.S. Dist. LEXIS 98828, at *15 (E.D.N.Y. July 29, 2015) (same); Easterly v. Tri-Star Transp. Corp., 2014 U.S. Dist. LEXIS 180999, at *7 (S.D.N.Y. Nov. 19, 2014) (same); Leser v. U.S. Bank N.A., No. 09-CV-2362 (KAM)(MDG), 2013 U.S. Dist. LEXIS 67468, at *21-23 (E.D.N.Y. May 10, 2013) (same).

(E.D.N.Y. 2015) (quotations and citations omitted). Flores noted in dicta that the Johnson "test" had been rejected by the Supreme Court, not that the Johnson factors were irrelevant. Id., 104 F. Supp. 3d at 307, n. 7. In Brig v. Port Auth. Trans Hudson, 2014 U.S. Dist. LEXIS 42538, at *4-5 (S.D.N.Y. Mar. 28, 2014), the court said that the Supreme Court had rejected the "subjective" Johnson "approach," but the district court never explained the factors that it used to determine the lodestar amount, or whether they differed at all from the Arbor Hill factors.

To the extent these cases (or any others) hold that Arbor Hill, including the Johnson factors, are bad law, the cases are incorrectly decided. In any event, none of these district court decisions are binding upon this Court, and none were cited by plaintiff in the prior and so should be disregarded for that reason alone.

B. The Court was correct to consider case specific factors such as the apparent reputational value of the case to counsel and the size of the law firms involved.

Plaintiff incorrectly argues that the Supreme Court's opinions in Blum, Perdue and other cases, bar this Court form considering the apparent reputational value of the case to prospective counsel and the size of the law firms involved. Norinsberg Recon. 2-4, 9-10; Smith Recon. 13-14. Plaintiff misconstrues Supreme Court precedent and ignores the governing law of this Circuit.

Courts in this Circuit – including the Second Circuit itself – have continued to explicitly apply the factors that plaintiff claims have been ruled improper, well after the Supreme Court decisions relied on by plaintiff. For example, in Townsend v. Benjamin Enters., 679 F.3d 41, 59-60 (2d Cir. 2012), the Second Circuit affirmed the district court's hourly rate decision based on the size of the law firm. In Finch v. N.Y. State Office of Children & Family Servs., 861 F. Supp. 2d 145, 153 n.50 (S.D.N.Y. 2012) (Scheindlin, J.), the district court in the Southern District, applied Blum, Perdue and Second Circuit law, concluded that a lower rate applied because

plaintiff's counsel was a sole practitioner, noting that "[t]he size of the law firm is a significant factor in determining the relevant market rates." (citing Reiter v. Metropolitan Transp. Auth. of State of New York, No. 01 Civ. 2762, 2007 WL 2775144 (S.D.N.Y. Sept. 25, 2007) ("[T]he fact is that the large firms listed on the [National Law Journal] survey have acquired a reputation that allows them to command high rates in the market. Many other firms, in particular smaller firms that may be providing equally capable services, simply do not command anywhere near such rates . . . .")). In the recent decision in Garcia v. Chirping Chicken NYC, Inc., No. 15 CV 2335 (JBW) (CLP), 2016 U.S. Dist. LEXIS 32750, at *57-58 (E.D.N.Y. Mar. 11, 2016) (Pollak, J.), the Court applied the Arbor Hill method, including the Johnson factors and noting the factor of potential reputational benefits to the attorney.

The Supreme Court decisions on which plaintiff relies concern different issues. Blum v. Stenson, held that courts may not distinguish between non-profit organizations such as the Legal Aid Society and law firms when awarding rates. 465 U.S. at 894. Missouri v. Jenkins, 491 U.S. 274, 286-87 (1989) held that paralegal rates may exceed the hourly wages paid to paralegals by law firms. These holdings do not say whether the court may consider the size of a law firm with respect to market rates.

Blum states that "the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorneys' own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience and reputation." 465 U.S. at 894. In other words, the court should look to what a reasonable client would pay for a similar lawyer, in a similar case, to do similar work.[13] Plaintiff thus argues

[13] Blum acknowledged that overhead plays a role in the market rates for some firms, but held that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." Blum v. Stenson, 465 U.S. at 894. Just because a non-profit which charges no market rates (in Blum, the Legal Aid Society) need not be penalized for that choice, it does not follow that the

against the Blum standard in contending that this Court should ignore law firm size even if it affects the market rates for a "similar lawyer." Id.

Plaintiff's reliance on Missouri v. Jenkins is even more strained. In Jenkins the court observed that where paralegal time was not separately charged by the firm, the cost of paralegal time would typically be built into the market rates charged by attorneys (i.e., because of higher overhead), but where it is charged separately, it should be awarded separately. 491 U.S. at 286-88. Jenkins embodies the common sense notion that a law firm is entitled to earn a profit to the extent that the market will pay for it. Id. It does not mean that law firm size is irrelevant even if it affects the rate that the market will pay for the lawyer in the case.[14]

Accordingly, the Court applied the appropriate standards to determine a reasonable rate and reasonable hours and the rates and hours awarded are well within the Court's discretion.

C. Plaintiff's belated evidence of rates in purported retainer agreements in other cases does not establish reasonable rates for this case.

Even were the Court to consider plaintiff's new evidence of retainer agreements – and it should not for the reasons set forth above – the evidence does not warrant a change in the Court's ruling for several reasons. Retainer agreements – even for the specific case in question, which Smith and Norinsberg refused to provide – are only some evidence that may be considered and are in no way dispositive of reasonable rates. S.A. v. N.Y. City Dep't of Educ., No. 12-CV-435 (RMM) (MDG), 2015 U.S. Dist. LEXIS 126874, at *9 (E.D.N.Y. Sep. 22, 2015) (A "court may

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market rate commanded by a solo practitioner is the same market rate commanded by the largest law firms, when that is manifestly not the case.

[14] The 2004 district court decision in Irish v. City of New York, 2004 U.S. Dist. LEXIS 3770 (S.D.N.Y. 2004), the only case cited by plaintiff on this point (and from which plaintiff's counsel apparently drew this argument), should not be considered by the Court. Irish was never cited in prior briefing (nor was this argument ever made). In any event, the interpretation of Blum and Jenkins adopted in Irish is incorrect as a matter of law, not binding on this Court, and does not appear to have been followed by other courts in the nearly 12 years since Irish.

consider the parties' retainer agreement as guidance in determining the reasonable value of the services provided, but is not bound by such an agreement.") (citation omitted); see City Opp. 67.

The evidence submitted is not probative of the appropriate rates for this case. First, plaintiff nowhere asserts that the rates in the correspondence were actually paid by any clients. See Norinsberg Recon. Dec. ¶ 2. The only evidence of payment is a single $10,000 retainer check; it is unstated what if anything was ever charged against that retainer. Second, the evidence cannot be representative of plaintiff's hourly rates because the Norinsberg team lawyers have handled hundreds of cases during the pendency of the Schoolcraft case. City Opp. 47. Yet plaintiff now produces only two writings for Norinsberg and two for Cohen & Fitch, suggesting that the vast majority of these counsel's clients have not agreed to pay any rate, or that the rates submitted now are the very highest to which any have agreed.

Third, the rates are not from the relevant time-period, which would be the midpoint of the counsel's litigation to settlement, from August 2010 through November 2015. City Opp. 48-49. Even if Norinsberg could get two unusual plaintiffs to agree to $600 in May 2016, that does not mean that such a rate was typical for Norinsberg in 2012-2013, the midpoint of his handling of this case. The Cohen & Fitch retainers, although not quite so new, also date from well after the mid-point of this litigation.

Fourth, the email submitted by Norinsberg from May 19, 2016, refers only to the rate he would charge for a meeting, not an entire litigation. DE 643-2. The retainer agreement of May 10, 2016 is the only example submitted where a client agreed to pay Norinsberg an hourly rate for a civil rights litigation. A single agreement from one out of hundreds of cases does not establish a market rate.

Fifth, since plaintiff does not submit his own retainer agreement with these counsel, the Court may presume that it states a lower hourly rate or none at all.[15]

Accordingly, the additional evidence submitted by the Norinsberg team provides no reason for the Court to reconsider its award.

POINT III

THE COURT PROPERLY EXCERCISED ITS DISCRETION IN REDUCING THE SMITH TEAM'S RATES AND HOURS

The Smith team makes a hodgepodge of arguments – some new and some old – why the Court should have awarded higher rates and hours to that team. None of these arguments call for altering the Court's award, whether under the high standard's for a motion for reconsideration or on their own merits.

A. The Court has discretion to set reasonable attorney rates based on numerous factors and is not bound by the parties' contentions.

The Smith team contends that they are entitled to higher hourly rates –specifically for Nat Smith – on the basis of the rate for Smith set forth in defendants' submission. Smith Recon. 15.[16] That is not so.

"District courts have broad discretion to determine a fee award." Easterly v. Tri-Star Transp. Corp., 2014 U.S. Dist. LEXIS 180999, at *7 (S.D.N.Y. Nov. 19, 2014) (citing Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)); see, e.g., DirecTV, LLC v. Borbon, No. 14-CV-3468 (KAM)(LB), 2015 U.S. Dist. LEXIS 98828, at *15 (E.D.N.Y. July 29, 2015) (district courts have

[15] The Norinsberg team also rehashes their prior argument that their rates should be higher because the Southern District has higher market rates than the Eastern District. Norinsberg Recon. 5-6. As the City previously argued, the case law does not reflect or quantify whatever quantum of difference is perceived to exist, and if there were a difference then deterrence of forum shopping to collect higher rates would call for the use Eastern District rates here. See City Opp. 56-57 & n 57. But this is beside the point, because the Court properly reduced the hourly rates requested based on case specific factors that it was appropriate to consider, regardless of which forum's rates applied.

[16] Plaintiff submitted an incorrect version of the City's chart of proposed rates and hours (City Opp. Ex DD); a later version correcting the hourly rate for Magdalena Bauza appears at Docket No. 608. But the difference is not material to the motion.

"considerable discretion" in determining reasonable fees). As the Court held and plaintiff argued, the Court is the best judge of the reasonableness of plaintiff's counsel's hours and rates. Order at 11; Plaintiff's Letter Motion to Strike, at 4 (DE 601). The Court has observed counsel's work throughout this case – from inception to completion – a breadth of experience with the matter that no counsel for either party can claim.[17] Therefore the Court's views on the reasonableness of fees and rates must govern.

One weighty factor in determining reasonable rates is the role played by counsel and their efficiency in performing tasks. Order 21, 28. Here, there was duplication of work by attorneys, both simultaneously and over time, with more than one experienced attorney attending to the same matters, and duplication of effort by attorneys reviewing or redoing the work of prior counsel. City Opp. 17-25, 29-30. There was also excessive consultation among attorneys, as if all counsel needed the advice of the others to take any step. Order at 28. In addition, there was excessive paralegal and law clerk work charged, often overlapping with attorney tasks such as reviewing deposition transcripts and preparing jury instructions. City Opp. 20-21, 25.

The Court awarded plaintiff's counsel more hours overall than the City deemed reasonable and on which the City based its proposed rates. For example, in the City's view experienced counsel ought to have required far less paralegal and law clerk time that the Court allowed: 447 hours awarded for Bauza vs. 377 recommended by the City; 155 hours awarded for the Smith paralegals vs. 23 hours recommended by the City. Order at 41; City Opp. Ex. DD (DE 608. Attorneys who require so much support from a law clerk and paralegals – in tasks

[17] The Smith team's argument that the defendants' litigation position is dispositive of the meaning of the parties' contract is disingenuous. As this Court held, "reasonable" fees under the contract means reasonable under the law (Order at 31-32, 35), not reasonable in the eyes of the parties. Moreover, even were the statements of the parties outside of the Offer of Judgment relevant to the meaning of "reasonable fees," it would be their statements during the negotiation of a contract, not after-the-fact litigation positions. Plaintiff's post hoc argument is all too convenient and inconsistent with plaintiff's prior position that the Court should reject the City's views on the reasonableness of fees.

duplicating the attorneys own work such as deposition review, jury instructions and legal research – are functioning at a less valuable level than might be expected based on experience alone and therefore would warrant a lower rate.[18]

There are additional factors that would warrant a lower rate than that which might be reasonable for Smith in another matter. For example, plaintiff's counsel's lack of the ethically required billing judgment in their fee application justifies reducing either hours or rates even below what might be justified as "reasonable" elsewhere. City Opp. 18-19. In addition, Smith took a back-seat role with respect to trial, preparing the JPTO at the Norinsberg team's direction, with only limited witness preparation. This approach not only wasted Smith's knowledge about the documents and witnesses learned during discovery – requiring the Norinsberg team to learn things that the Smith team already knew – but also reflects an associate or "Of Counsel" role, justifying a lower rate than would be reasonable were Smith lead trial counsel. Order at 28; see Leser v. U.S. Bank N.A., No. 09-CV-2362 (KAM)(MDG), 2013 U.S. Dist. LEXIS 67468, at *32 (E.D.N.Y. May 10, 2013) (reviewing motion papers and advising on "trial strategy" warranted lower rate for experienced attorney); Luca v. Cnty. of Nassau, 698 F. Supp. 2d 296, 305-06 (E.D.N.Y. 2010) (finding $275 hourly rate reasonable for partner with 20 years of experience but who functioned in "of-counsel role" by providing advice to fellow partner).

[18] Neither do the Smith counsel's assertions about retainer agreements that were never produced require this Court to reconsider its ruling on rates, for reasons set forth above and others. Without knowledge of the exact terms of plaintiff's agreement it is impossible to know if plaintiff bore any appreciable risk of paying the rate quoted. Agreements in other cases are even less significant, because it is impossible to know exactly what was agreed to, if those other matters are comparable, or whether counsel played a similar role in those matters. Counsel's prior award, also noted previously, was in an entirely different field of law – ERISA – and is therefore distinguishable for these and other reasons. See City Opp. 67.

B. The City's summary of deposition hours did not overstate the amount of duplication of effort in counsel's deposition work.

Despite having extensively attacked the City's summaries of hours embodied in the audit report of Accountability Services, Inc. (the "Audit"), and specifically addressing counsel's duplication of effort expended on depositions (Smith Reply Mem. 7), the Smith team launches a new and unfounded attack, claiming that the City's summary of deposition hours are inaccurate. In fact, they are accurate, as demonstrated by the summary of deposition-related time entries submitted as Exhibits B and C, where the totals equal the totals set forth in the Audit: 1,423 hours.[19] See Exhibits B at 24 and C at 10, to the Scheiner Dec. ¶¶ 3-4. Audit at 86 & nn. 45-48 (1,182.51 hours for the Smith team and 240.50 hours for the Norinsberg team, including 316 hours of non-specific or general deposition entries). This number is 20 hours less than the number stated in City Opp. 19 due to an arithmetic or typographic error of counsel, which is not material to the Court's correct conclusion that the total hours expended is excessive.

Smith misconstrues the Audit in several respects: (1) he counts only hours relating to specific depositions (Ex. C), but the Audit expressly includes hours "relating to depositions that was vague or related to general deposition issues," which could not be tied to specific deposition. Audit 86 nn. 45, 56. (2) Smith counts only on time preparing for and attending depositions, but the Audit expressly counted time reviewing deposition transcripts and other work relating to depositions. Audit 86-89 (detailing time spent reviewing deposition transcripts).[20]

[19] The City's memorandum mistakenly reported this total as 1,443 due to an arithmetic or typographical error. We apologize to the Court for the error.

[20] Excluded, however, was the time spent by paralegals digesting the same depositions (Audit 86), which the Court chose to award over defendants' objection, but in reduced amounts. Audit 108 (222.09 hours spent by paralegals on digesting depositions). The City's memorandum had referred to the Audit's total deposition hours imprecisely as "in preparation or attendance of the depositions" (City Opp. 19), but should have stated that the hours were "in connection with the depositions." The City regrets the error, but it is not material: the time claimed, no matter how it is parsed or characterized, remains excessive.

In addition, plaintiff falsely contends that the Audit overstates the hours expended by the Smith team on plaintiff's deposition. Rather, the Audit clearly reflects the total hours expended in connection with plaintiff's depositions by all teams, and not just for preparation and attendance. See Ex. C; Audit 86-89. Moreover, as the Audit stated, even the total deposition hours set forth in the Audit are less than the total hours expended on depositions because four depositions were excluded from the total as relating solely to the medical defendants (and therefore were separately deducted from the total fees). Audit 86 n 47. In addition, the Smith team's brief reveals that the preparation hours for that deposition are higher than the Audit stated, because the Smith team coded preparation as a "client meeting," and some of the time had been excluded as medical-related (see Smith Recon. 8):

2059	9/21/2013	NBS	Meeting with client.	3.50
4455	09/27/13	JL	Co-counsel with Smith in representation of client at deposition of client by defendant Mauriello and Jamaica Hospital defendants - Callan, Koster, Brady & Brennan, LLP - One Whitehall Street, 10th Floor New York, NY 10004.	9.00
2064	9/27/2013	NBS	Appearance for examination before trial of defendant and prepare for same.	9.00

See also Audit 86 n. 48 (noting an additional 112.25 hours spent preparing for depositions billed as "client meetings," but not included in the deposition-related hours in the Audit chart). Including these additional entries noted but Smith, the total time for all teams for the Schoolcraft depositions would be 159.25.

C. Smith is not entitled to a higher hourly rate because of the results obtained.

Smith continues to appeal to a supposedly "exceptional result" in asking that his hourly rate be increased by the Court (Smith Recon. 12), but the Supreme Court has held that results per

se are never a reason to enhance a fee, while exceptional attorney performance, in very rare cases (but not in Perdue or any Second Circuit or Supreme Court case) might be. Perdue v. Kenny A., 559 U.S. 542, 554 (2010). This is because the fee is intended to reflect the parties' reasonable expectations at the outset of a case, not after it is over as a sort of incentive bonus. See Pa. v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565-66 (1986) (rates should account for the abilities of the attorney in the hourly rate or the hours expended, without regard to outcome); cf. Perdue v. Kenny A., 559 U.S. at 552 ("Section 1988's aim is to enforce the covered civil rights statutes, not to provide a form of economic relief to improve the financial lot of attorneys.") (quotation omitted).[21]

D. Smith is not entitled to a higher award because of differences between the conduct of individual counsel.

Smith argues incorrectly, and without authority, that it is unfair for the Court to apply the same across-the-board reductions to different teams if their work on the matter (i) occurred at different times, or (ii) differed in content. Smith Recons. 10-12. As to the first point,, duplication of effort occurs not only at the same time, but over time, which was obviously the case here, with the Smith team rehashing the Norinsberg team's work, and vice-versa when the Norinsberg team returned to the case. Order at 25-28; City Opp. 26-30. Therefore there is no reason to limit reductions for duplication to the periods when counsel worked simultaneously.

As to the second point, Smith misperceives the nature of the fee application and the Court's obligations. As is well settled, and as this Court held, the fee application belongs to the plaintiff, not counsel. See Order of Feb. 25, 2016, DE 586. The Court is authorized in its

[21] Moreover, as defendants previously set forth, the results obtained are not so "exceptional" as plaintiff asserts, and as the Supreme Court has noted not all good results are the product of good lawyering. See City Opp. 13-14; Perdue v. Kenny A., 559 U.S. at 554.

discretion to do "rough justice" in awarding a fee that approximates reasonable hours and rates, using across-the-board percentage deductions. Marion S. Mishkin Law Office v. Lopalo, 767 F.3d 144, 150 (2d Cir. 2014) (citing cases); see, e.g., Days Inn Worldwide, Inc. v. Amar Hotels, Inc., No. 05 Civ. 10100 (KMW) (KNF), 2008 U.S. Dist. LEXIS 37328, at *23-24 (S.D.N.Y. June 18, 2008) (reducing attorneys' fees by seventy-five percent because "a substantial amount of work performed . . . was redundant and unnecessarily duplicative"); see also Perdue, 559 U.S. at 551 ("[T]he lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received . . . .") (emphasis added); City Opp. 3-9.[22]

The goal of the fee application process is a reasonable fee to be awarded to the plaintiff, not fairness to an individual attorney or a law firm, who are not parties. Where, as here, a plaintiff chooses to hire a multi-attorney, multi-firm team – and plaintiff's counsel agree to work together knowing that only a reasonable fee may be awarded – neither plaintiff nor counsel can be heard to complain when the reasonableness of counsel's work is evaluated as a whole.[23] The allocation of fees among counsel are a matter between the various counsel and their client, not the Court on a fee application under Section 1988.

* * *

Any remaining contentions by plaintiff were asserted in prior briefing and fully considered by the Court, and are otherwise without merit.

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[22] Obviously the Court cannot look only to the reasonableness of an individual attorneys' or law firm's charges standing alone. If that were the case, the Court could not consider duplication of effort if plaintiff hired five law firms to do exactly the same thing, one at a time.

[23] In addition, there are factors not noted by the Court that the City had set forth which provide additional justification for the reduction to Smith (and other counsel's) fees, such as wasteful litigation practices involving frivolous motions for reconsideration, groundless discovery positions, and multiple motions to amend, for which all counsel must be jointly responsible. City Opp. 16-17 & nn. 19-22. An additional discount is also justified by significant doubts about the contemporaneousness and accuracy of the plaintiff's billing records. City Opp.42-45; Smith Reply Aff. ¶¶ 37-39 (admitting errors in billing records).

CONCLUSION

For the reasons stated above, the motions for reconsideration should be denied.

Dated: New York, New York
October 21, 2016

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