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

10–cv-6005 (RWS)

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.
----------x

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE SMITH TEAM'S RECONSIDERATION MOTION

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Dated: October 28, 2016

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ADRIAN SCHOOLCRAFT, 10-cv-6005 (RWS)

Plaintiff,

REPLY MEMORANDUM OF LAW IN SUPPORT OF RECONSIDERATION ON BEHALF OF THE SMITH TEAM

-v-

CITY OF NEW YORK, et al.,

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Preliminary Statement

Nothing in the City's opposition detracts from the key points in the Smith Team's reconsideration motion:

- There was no overlap between the Smith Team's work and the Norinsberg Team's work for the two year period from February 1, 2013 through January 31, 2015; and there was not and could not have been any duplication of effort between these groups during that period of time. (Motion Exhibit 1; Chart of Hours).
- The City misrepresented to the Court that 1,443 hours were spent in preparing for and taking depositions, *see* City Mem. at p. 21 n. 20 (Dkt. # 661), and the Court mistakenly accepted that representation. Decision at p. 27.
- The Bronsther schedules, which the City now provides, confirm that the conclusory claims by the City and Bronsther about deposition hours are based on gross exaggerations, errors and manipulations of the truth. *See* Scheiner Exhibit B & C; *see also supra* at pp. 3-6. Indeed, examination of the schedules shows that the schedules are unreliable – we have found 43 examples where Bronsther physically altered our actual time records, a fact never disclosed to the Court.
- The Smith Team did not engage in any kind of media or web site conduct and did not attempt to exploit any "representational advantage" through its association with this case.
- Lumping together the attorneys in the Smith Team with the Norinsberg Team is fundamentally unfair, and the Court should review and make determinations about the reasonable value provided by each attorney.
- Prevailing market rates are the standard under Section 1988.

Argument

1. *The 35% reduction of compensable hours across the board.*

In the Smith Team's reconsideration motion, we showed that 78% of the Smith Team's billing time (3,854.85 hours) was incurred while the Smith Team was working exclusively on the case from February 1, 2013 through January 31, 2015. (Motion Exh. A; Chart.) Thus, we argued that a modification of the Court's Decision is appropriate because during this two-year period there was no "amount of time extended to keep Primary Counsel [the Norinsberg Team and the Smith Team] apprised of one another [or] mange such a large litigation team." Decision at p. 29.

In its opposition papers, the City does not dispute these facts. Instead, the City argues that the Court properly cut the Smith Team's billings for this period of time because "the Smith team rehash[ed] the Norinsberg team's work." City Opp. Mem at p. 23; Dkt. # 661. Yet the City fails to note that the Smith Team agreed to reduce our fee request by the 79.25 hours that the City claimed was the cost of substitution of counsel. Smith Reply Dec. ¶ ¶ 30 & 43; Dkt. # 621. Thus, an appropriate adjustment was already made to account for the fact that we became new counsel in February of 2013. Under these circumstances, an across-the-board reduction for 35% of all the hours billed over a two-year period (what amounts to 1,349 billed hours) is not justified by the fact that the Smith Team billed and accounted for 79 hours getting up to speed on the case.

The City also tries to defend its representation to the Court that the plaintiff spent 1,443 hours preparing for and taking depositions. The City now submits to the Court as Scheiner Exhibit B and C two schedules that purport to be the basis for the City's 1,443 deposition number. Yet those exhibits confirm our point – that the City's claim about deposition hours was

based on a manipulation of data and word games about "in connection with" or "regarding" a deposition.

A cursory glance at the exhibits shows that the 316 hours for "general" or "vague" entries (Scheiner Exhibit B) had nothing to do with the work associated with preparing for and taking a deposition. Thus, the City inflated its 1,443 number by at least 316 hours, a 21% inflation rate.

And a review of the "specific" hours for identified deponents (Scheiner Exhibit C) shows that this list contains multiple entries for reviewing or summarizing a deposition transcript after it was prepared; for preparing motions relating to the conduct at, or continuation of, a deposition; for litigating the scope of several Rule 30(b)(6) depositions; for preparing further discovery based on the information obtained at depositions; for reviewing the deposition transcripts for summary judgment motions; and for reviewing the deposition transcripts for trial preparation. In short, the City collected every possible billing entry that *referred* to a deposition transcript and pawned that off to the Court as work relating to the preparing for and taking a specific deposition.

This is a gross misrepresentation -- any experienced litigator knows that depositions are used throughout the litigation process and that preparing for and attending a deposition is a discrete and specific task. In a footnote the City admits its error but now tries to make light of its representation to the Court by saying that its use of the phrase "preparing and taking" was "imprecise." City Mem. at p. 21. Yet the **emphasis** it placed on this very point in its memorandum (City Opp. Mem. at p. 21; Dkt # 597) proves that the misrepresentation was not a mere lack of editorial precision. Here is an image (emphasis in original) of the relevant part of its misrepresentation to the Court:

***Depositions: Plaintiff's claim to have expended 1,443 hours (excluding deposition digesting) in preparation or attendance of the depositions of 34 deponents* (on average over a 40-hour weeks' work for each witness, although many were no more than 1-2 hours long).**

A more detailed review of the schedules upon which this representation was made yields further proof that the City presented the Court with bogus information. Scheiner Exhibit B contains four billing entries (Nos. 5041, 2253, 4661, & 4662) that are placed in the category of "general" or "vague" deposition billings. (Scheiner Exhibit B; ECF Dkt. # 662-2 at ECF page 9 of 11.) Those *same four entries* also appear in Scheiner Exhibit C, which purports to reflect specific deposition billing entries. (Scheiner Exhibit C; ECF Dkt. # 662-3 at page 22 of 25). Thus, by putting the same entry in more than one "schedule" the City has manipulated the data to double count the actual billing records.

The City also *altered* our time records without bothering to mention that the schedules are not in fact replications of actual time records but contain undisclosed and subjective allocations and changes in the time records. For example, Scheiner Exhibit C contains a Bauza entry that has been numbered by the City as No. 5015 and purports to reflect her time preparing for or taking the Weiss deposition. Scheiner Exhibit C; ECF Dkt. # 662-3 at page 20 of 25. Here is the image from the City's schedule:

5015	5/29/2014	MB	Draft summary of Weiss deposition send to counsel; prepare for JHMC 30(b)6 depositions on policy; review Beiner's depo transcript; draft questions.	3.35

Yet the actual billing entry by Bauza shows that the number of hours in Scheiner Exhibit C (3.35 hours) has been *altered* to reflect an undisclosed (and incorrect) allocation of 3.35 hours

"for" the Weiss deposition. The actual billing entry by the timekeeper (for 6.42 hours) is as follows:

05-29	**Draft summary of Weiss deposition send to counsel; prepare for JHMC 30(b)6 depositions on policy; review Beiner's depo transcript; draft questions.**	**6:42:00**	Magdalena Bauza
	Schoolcraft - Schoolcraft case	11:15-17:57	1005 USD

Fitch Master Dec., Exh. N; ECF Dkt. # 560-14, entry dated 5-29-14.

Thus, some unknown person working for the City or Bronsther made an arbitrary, erroneous, and subjective determination about the number of hours that should be allocated to the Weiss deposition and physically altered the time entry in the schedule to reflect that undisclosed change in the actual billing record. Indeed, a comparison of our actual time records with the lists set forth as Scheiner Exhibit B and C shows forty-two other examples where Bronsther or the City has altered the recorded time for specific time entries.[1] No disclosure about the alteration of our time records was made by the City. Significantly, the schedules that the City now tenders to the Court are not properly authenticated by a witness who purported to state that the documents are what they purport to be.[2]

A review of the hours presented by the City for specific depositions provides further proof that the representations the City and Bronsther made to the Court are not reliable and should be rejected *in toto*. In Scheiner Exhibit C, the City claims, for example, that the Smith

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[1] *See, e.g.* Scheiner Exhibit B (Billing Number 2104 at page 3 (cited as "2104 at p. 3"); 4967 at p. 4; 4969 at p. 4; 2142 at p. 4; 2146 at p. 4; 2148 at p. 4; 4539 at p. 5; 2156 at p. 5; 2158 at p. 6; 4573 at p. 6; 4615 at p. 6; 4617 at p.6; 2210 at p. 6; 4619 at p. 7; 2224 at p. 7; 2229 at p. 7; 4639 at p. 8; 4682 at p. 9; 4695 at p. 9; 2307 at p. 9; 2310 at p. 9; 2342 at p. 9; 2342 at p. 10; 2347 at p. 10); *accord* Scheiner Exhibit C (4886 at p. 3; 2103 at p. 7; 2107 at p. 7; 2088 at p. 8; 4925 at p. 9; 2215 at p. 10; 4125 at p. 11; 1406 at p. 11; 4495 at p. 11; 1061 at p. 11; 2120 at p. 11; 2121 at p. 12; 4496 at p. 12; 2342 at p. 13; 4968 at p. 15; 4969 at p. 15; 2165 at p. 16; & 5019 at p. 20.). *Cf.* Fitch Master Dec. Exhibits I, L & N; ECF Dkt. # 560-9 (Smith billings); # 560-12 (Lenoir billings); # 560-14 (Bauza billings).

[2] Scheiner Exhibit B and C have not been properly authenticated by a person with knowledge. The City attorney simply submits the documents without any representation as to who prepared them, when they were prepared or whether they are what they purport to be. As such, the documents are not admissible. FRE 901.

Team spent 21.55 hours preparing for or taking the Weiss deposition. (ECF Dkt. # 662-3 at page 20 of 25.) In fact, however, the last two entries in that list, for 3.35 hours and 4.1 hours, have nothing to do with the preparation for or taking of that deposition. Those entries reflect the preparation of a summary of the testimony, the preparation for other depositions, and the review of the Weiss deposition for trial. After accounting for these entries, the real number for the preparing for and taking the Weiss deposition is 14.1 hours and yet the City misrepresented the number of hours for the Weiss deposition to be 21.55 hours, an increase of 8.45 hours or a 65% inflation rate.

Regarding the deposition of Larry Schoolcraft, the City also represented that the plaintiff spend 39.7 hours for that deposition, which was taken in Albany at the City's request. Yet a review of Scheiner Exhibit C shows that the actual time spent preparing for and attending that deposition was only 18 hours for the day-long deposition and that the City's representation of 39.7 hours includes the time one attorney and one law graduate spend traveling to and from Albany to attend the City's noticed deposition and the time spent reviewing that testimony of a witness that the City had listed as a witness for purposes of trial preparation. Thus, the inflation rate for his witness was 45%.

A final example ought to be sufficient to convince the Court that the deposition hours represented to the Court are bogus. The City represents that 34.7 hours were spend preparing for and defending the deposition of our police practices expert, Professor John Eterno. (ECF Dkt. # 662-3 at page 24 or 25.) Yet the last four entries in Scheiner Exhibit C for the Eterno deposition, which total 13.2 hours, *all* pertain to work related to preparing this expert witness to testify at *trial*. Thus, the City has improperly increased the number of hours from 21.5 hours to 34.7 hours, a 61% inflation rate.

As we noted in our opening memorandum of law, the City inflated the numbers for the Boston, Huffman, and Lamstein by inflation rates ranging from 45% to 50%. (ECF Dkt. # 645 at page 11-12 of 19.) These additional examples regarding Weiss, Larry Schoolcraft, and Professor Eterno, which had similar inflation rates, ought to be a sufficient basis to reject *in toto* the City's and Bronsther's claims about hours because they are predicated on unreliable, manipulated and altered records.

This is not the first time that Bronsther's alteration of time records has been criticized. In *Cohen v. Brown University*, Bronsther was hired to review the time records for plaintiffs' counsel, and her review was submitted as Appendix B to the defendant's opposition to plaintiffs' motion for an award of attorneys' fees. Magistrate Judge David L. Martin of the District of Rhode Island found Bronsther's review unreliable:

> Plaintiffs assert that their exhibits demonstrate that "Brown's Appendix B is completely unreliable and full of errors. The errors range from apparent transcription and coding errors to wholesale rewriting of plaintiffs' actual records. The labeling and categorization by Brown also exhibited a lack of familiarity with the record, the witnesses and the proceedings."
>
> After comparing Brown's App. B, Ex. B-1 with [plaintiffs' counsel's] time records, the court agrees that Plaintiffs' criticism of Brown's App. B, Ex. B-1 is valid.

2001 U.S. Dist. LEXIS 22438, at *32-*33 (D.R.I. Aug. 10, 2001).

Magistrate Judge Martin proceeded to identify inaccuracies in Bronsther's review and reiterated "that, as an analysis of Plaintiffs' time records, Brown App. B [i.e., Bronsther's review] is unreliable." *Id*. at *36-37. Magistrate Judge Martin also noted that "parties who wish to challenge fee applications should utilize the *actual time records* in presenting their objections and not some *rewritten or reformulated version* of those records." *Id.* at *37 n.15 (emphasis added).

As demonstrated above, Bronsther obviously refused to abide by Magistrate Judge Martin's suggestion. To make matters worse, in this case she simply concealed her alterations by not attaching them to her original report and failed to disclose that her conclusions in her report were based on altered time records. This Court should, as Magistrate Judge Martin did, reject *in toto* Bronsther's conclusions, summaries and schedules as "a mountain of unreliable detail." *Id*. at *38.

2. *The grouping of counsel together for the purpose of the reductions in the number of reasonable hours and the reasonable hourly rate.*

The City argues that the Court properly reduced the requested hours and requested hourly rates across the board for both the Smith Team and the Norinsberg Team because the fee award belongs to the plaintiff and "fairness to an individual attorney" is not the goal of the fee application process. (City Mem. at p. 24.) The City is wrong.

"[T]he purpose of § 1988 was to make sure that competent counsel was available to civil rights plaintiffs." *Blanchard v. Bergerson*, 489 U. S. 87, 93 (1989). "In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate *lawyers* for all time reasonably expended on a case." *City of Riverside v. Rivera*, 477 U. S. 561, 578 (1986) (emphasis added). Fee awards, therefore, should "represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim. *Blanchard, supra,* at 96. Indeed, this Court has stated that fee-shifting provisions are specifically designed "to attract effective legal representation and thereby encourage private enforcement of civil rights statutes," even when "the anticipated recovery may otherwise be too small to create an incentive for representation." *A.R. v. NYC Dept. of Education,* 12-cv-2014, Dkt. # 63 (S.D.N.Y. Oct. 28, 2014) (citing *Hensley v Eckerhart*, 461 U. S. 424, 445 (1983)). Thus, the purpose of an award of attorney's fees under Section 1988 is to

encourage attorneys to take on meritorious civil rights case by providing them with the ability to recover their reasonable fees from a losing defendant.

The City is also wrong in suggesting that there is no authority supporting the proposition that each attorney's fee application ought to be evaluated on its own merit. For example, in a leading fee case in this Circuit, *New York State Assn. v Carey*, 711 F. 2d 1136 (2d Cir. 1983), the Second Circuit affirmed in relevant part the lower court's fee decision which provided *separate* adjustments for each of the five lead attorneys who billed substantial hours on the case. *Id.* at 1146 ("the District Court dealt with plaintiffs' five lead attorneys principally through individual percentage cuts ranging from five percent to twenty percent."); *see also New York State Assn. v Carey,* 544 F. Supp. 330, 339-40 (E.D.N.Y. 1982) (setting forth separate and different percentage reductions for each of the plaintiff's five lead counsel, with individual discounts of 5%, 8%, 10%, 15% and 20%), *aff'd in relevant part, rev'd on other grounds*, 711 F. 2d 1136, 1146 (2d Cir. 1983).

In making a fee determination, the relevant issue "is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F. 2d 96, 99 (2d Cir. 1992). In reviewing a fee request, the "Court should examine contemporaneous time records that identify, for each attorney, the hours expended on a task, 'with a view to the value of the work product of the specific expenditures to the client's case.' " *Maldonado v. La Nueva Rampa, Inc.,* 2012 U. S. Dist. Lexis 67058 at * 48-49 (S.D.N.Y. May 12, 2012) (quoting *Luciano v. Olsten Corp.,* 109 F. 3d 111, 116 (2d Cir. 1997)). The use of multiple attorneys is not *per se* unreasonable; the question is not simply how many attorneys worked on a case but whether their time was reasonably spent. *Catanzano v. Doar*, 378 F. Supp. 2d 309, 322 (W.D.N.Y. 2005).

Hence, multiple attorneys are permitted to recover "if they show that the work reflects the distinct contributions of each lawyer." *Maldonado, supra,* at * 49.

In keeping with this authority and the underlying purpose of Section 1988, we request that the Court make separate determinations as to the distinct contributions that the Smith Team provided to the case. In addition and for the same reasons, we further request that the Court remove the 3% reduction in our total hours for media-related and Internet-related conduct because none of the attorneys on the Smith Team engaged in that conduct.

3. The hourly rates for the Smith Team should not have been cut.

In its Decision, the Court reduced hourly rates across the board by 35% to align the rates requested with the market and what a reasonable client would be willing to pay for the attorneys' services. The Court's determination was based in part on a finding that Primary Counsel actively sought and leveraged media coverage for themselves and in part because of the Court's determination that a keen client would have negotiated a lower rate. Decision at pp. 15-22.

To the extent that media-related or Internet-related conduct played a role in the Court's determination about hourly rates, the Smith Team requests reconsideration. As noted above, the Smith Team did not engage in any of that kind of conduct.

To the extent that the Court determined that the reasonable hourly rates for similar services are 35% less than what the Smith Team requested, we respectfully submit that the Court overlooked controlling authority, which requires that a reasonable hourly rate be set by objective facts, such as the market rates prevailing in the District and the rates achieved by counsel in similar circumstances. *See* Smith Team Reconsideration Mem. at pp. 12-15; Dkt. # 645 (citing *Perdue v. Kenny A*., 559 U. S. 542, 551-52 & 558 (2010)).

The theoretical possibility that a client might have been able to negotiate a lower rate is not a proper basis for determining a reasonable hourly rate. The Supreme Court has specifically

held that a reasonable hourly rate should *not* be reduced merely because the plaintiff's counsel was a not-for-profit organization. *Blum v. Stenson,* 465 U. S. 886, 895 (1984) ("The statute and the legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether the plaintiff is represented by private or non-profit counsel."). Similarly, the Supreme Court has held that a reasonable fee should *not* to be reduced to the lower fee provided for in a contingency agreement between the prevailing plaintiff and plaintiff's counsel. *Blanchard v. Bergeron*, 489 U. S. 87, 93 (1989) ("Should a fee arrangement provide less that a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount.") As stated by the Supreme Court in *Missouri v. Jenkins,* 491 U. S. 274, 283 (1989): "Our cases have repeatedly stressed that attorney's fees awarded under this statute are to be based on market rates for the services rendered."

The City's position on this point is difficult to determine, at least insofar as it seeks to address the Smith Team's motion. The City does not dispute our assertion that the Smith Team did not engage in media-related conduct. The City also does not dispute that the market rate is the presumptively proper rate. Instead, the City argues that there was inefficient duplication of work and "excessive" consultation. (City Mem. at p. 19.) The Court should reject this argument because considerations about duplicative work or excessive consultations should be accounted for in terms of the number of hours the Court finds to be reasonable. To discount hours and reduce rates because of duplicative work simply amount to double counting the same factor twice.

The City also argues that a lower hourly rate is proper because Smith took a "back-seat" or "of counsel" role with "limited witness preparation" for trial after the Norinsberg Team returned to the case. There is no support for this assertion by the City's attorney in the record

and the claim is simply false. (*See* Smith Dec. ¶ 25 at pp. 15-16 (ECF # 560-2), Smith Dec. ¶¶ 29-35 (ECF # 621) & Smith Reply Dec., dated October 28, 2016, at ¶ 3.) And even if the Court where inclined to reduce the Smith Team's hour rates to reflect the re-appearance of the Norinsberg Team in February of 2015, no such "adjustment" could rationally or logically be applied retroactively to the two-year period, noted above, where the Smith Team was exclusively representing the plaintiff.

Conclusion

For these reasons, this motion should be granted. The purpose of Section 1988 is to encourage attorneys to take on meritorious civil rights cases by awarding them a fee based on market rates for work that the attorney reasonable performed, with an analysis that must focus on the work at the time it was conducted. In keeping with that purpose, the Court's across-the-board reasonable hour determinations should be reconsidered in the light of the separate fee applications and the separate work done by the two teams. In addition, the Court's hourly rate determination should be adjusted to reflect the objective facts in the record about prevailing market rates. Finally, the Court should reject *in toto* all the conclusory assertions by Bronsther and the City about the Smith Team's hours.

Dated: October 28, 2016
New York, New York

s/NBS

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