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

Plaintiff,

-against- **10 CV 6005 (RWS)**

THE CITY OF NEW YORK, et al.

Defendants.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF THE NORINSBERG TEAM'S MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S ORDER ON ATTORNEYS' FEES

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PRELIMINARY STATEMENT

The law firms of Jon L. Norinsberg, Esq. and Cohen & Fitch LLP (collectively, the "Norinsberg Team"), respectfully submit this Memorandum of Law in reply to defendants' opposition to Plaintiff's motion for partial reconsideration of the Court's September 6, 2016 Order ("the Order") on Plaintiff's attorney's fee award. As we set forth in our original motion, there are two central grounds for granting reconsideration: i) the Supreme Court has expressly rejected a cost-based approached for determining hourly rates. Blum v. Stenson, 465 U.S. 886, 894 (1984); and ii) the Supreme Court has expressly rejected the Johnson factors as a basis for determining a reasonable hourly rate. Perdue v. Kenny A., 130 S. Ct. 1662, 1669 (2010).

Rather than substantively address these arguments, defendants offer a hodgepodge of frivolous objections and erroneous claims to avoid discussing the merits of the motion. First, defendants attempt to distract the Court with a series of baseless procedural objections. Yet, the "new evidence" defendants complain about was offered for a very limited purpose, namely, to refute certain factual findings made by the Court that were unsupported by the record. And the "new arguments" that defendants complaint about were, in fact, raised in our original motion for attorneys' fees. Defendants play a game of semantics in claiming otherwise.

Defendants' arguments fail on the merits as well. The Supreme Court has made it clear that Section 1988 does not authorize a Court to reduce hourly rates based on the size of a law firm. Defendants have no answer for Blum and Jenkins. Instead, defendants engage in a game of "make believe" and ask the Court to find that the Supreme Court's holdings do not actually mean what they say. Yet, defendants' position is "flatly contradicted" by the legislative history of Section 1988, and should be rejected here as well. Blum, 465 U.S. at 894.

Defendants also have no answer for Plaintiff's arguments under Simmons v. New York City Transit Auth., 575 F.3d 170, 172 (2d Cir. 2009), which makes it clear that Eastern District rates are "substantially lower" than Southern District rates. Rather than acknowledge this fact, defendants falsely claim that there is no quantifiable difference between the billing rates in the two districts. Yet, the Second Circuit has expressly held otherwise. (Id.) So too have multiple district courts. Defendants' untenable legal position – which they attempt to hide by burying it in a footnote in the middle of the brief – fails as a matter of law.

Lastly, defendants construct an elaborate "straw man" to get around the Supreme Court's ruling in Perdue. Defendants exhaustively argue that Arbor Hill is still good law in this Circuit. Yet, this misses the mark. The issue here is not whether the entire Arbor Hill decision is still good law, but rather, whether that portion of the decision which relied on the Johnson factors is still good law. In light of the Supreme Court's criticism of Johnson as being "subjective," giving "very little actual guidance to district courts," placing "unlimited discretion in trial judges" and producing "disparate results," Perdue, 559 U.S. at 550-51, it would appear clear that Johnson – and by extension, that portion of Arbor Hill which relied on Johnson – is no longer good law, and is not an appropriate basis for reducing our billing rates by 35%.

ARGUMENT

I. THE COURT'S REDUCTION OF RATES BASED ON LAW FIRM SIZE IS INCONSISTENT WITH SUPREME COURT PRECEDENTS ON THIS ISSUE.

A. The Supreme Court Has Expressly Rejected a Cost-Based Analysis of Rates as Being Contrary to the Legislative Intent of Section 1988.

"The argument that small firms should be compensated at a lower rate is but a variant of positions already rejected by the Supreme Court." Irish v. City of New York, 2004 U.S. Dist. LEXIS 3770, *13 (S.D.N.Y. Mar. 8, 2004) (emphasis supplied). Indeed, both Blum v. Stenson, 465 U.S. 886 (1984) and Missouri v. Jenkins, 491 U.S. 274 (1989), expressly rejected a cost-based approach to determining market rates as contrary to the legislative history of Section 1988. In fact, the Supreme Court in Blum held that such an approach was "flatly contradicted" by the legislative history of Section 1988. Blum, 465 U.S. at 894. Thus, "there is nothing in the legislative history" of Section 1988 to support "the assumption that [because] larger law firms carry a larger overhead … [they] should command a higher rate." Irish, 2004 U.S. Dist. LEXIS 3770 at *12.

Instead of addressing the merits of Plaintiff's position, defendants attempt to distract the Court with a series of baseless objections. First, defendants contend, falsely, that Plaintiff never addressed this issue in his original motion. In fact, the opposite is true. Not only did Plaintiff make this argument, but he expressly argued that counsel's billing rates should be comparable to the rates of partners in large law firms. See Pl. Mem. at 24 ("[A] review of the average billing rates for partners in New York law firms lends further support for the requested rates for Plaintiff's Counsel."). In support of this argument, Plaintiff's counsel cited the 2013-2014 National Law Journal Billing Survey (Master Decl., Ex. Z), and noted that this "survey is often used by federal courts to determine appropriate hourly rates."

(Pl. Mem. at 24, n.7) (collecting cases). Thus, Defendants' suggestion that this is a newly raised argument is patently false.

Second, defendants attempt to distort the plain meaning of Blum and Jenkins by suggesting, falsely, that these cases do not answer the question of "whether the court may consider the size of a law firm with respect to market rates." (Def. Recon. Opp. at 15). Yet, in both cases, the Supreme Court emphatically rejected the notion that the costs of providing legal services – whether by a large firm, small firm or not-for-profit firm – is a relevant factor in determining reasonable hourly rates in a given market. See Blum, 465 U.S. at 895 (The "statute and 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 Plaintiff is represented by private or nonprofit counsel.") (emphasis supplied). It follows, a fortiori, that the costs of running a large law firm cannot be used as a basis for reducing the hourly rates of smaller firms. Indeed, such a position is "flatly contradicted" by Section 1988's legislative history. (Id. at 894)

Here, the Court found that the small size of Plaintiff's firms warranted a reduction in their hourly billing rates. Schoolcraft, 2016 WL 4626568, at * 7 (S.D.N.Y. Sept. 6, 2016) ("Primary Counsel are all solo or small-firm practitioners whose practices are incomparable to large law-firms employing thousands of attorneys, where rates factor in massive overhead."); Ibid. (noting that counsel's "comparison[] to the rates of large law firms …. works equally to [their] detriment."). In so holding, we respectfully submit that the Court overlooked the Supreme Court's decisions in Blum and Jenkins [1] – and we respectfully request that the Court reconsider its ruling in light of these two decisions.

[1] Both Blum and Jenkins were cited in Plaintiff's original fee application. (Docket No. 561, at 16, 19, and 20)

II. THE COURT'S RELIANCE ON EASTERN DISTRICT RATES FROM FOUR YEARS AGO TO SET CURRENT SOUTHERN DISTRICT RATES IS CONTRARY TO THE LAW IN THIS CIRCUIT.

A. The Second Circuit Has Expressly Held that Hourly Rates in the Eastern District Are "Substantially Lower" Than Rates in the Southern District.

In reducing Plaintiff's counsel's billing rate by 35%, the Court noted that such rates were "consistent with the awards Primary Counsel received in the past from contested fee applications" (Schoolcraft, 2016 WL 4626568 at *7). However, such prior awards were in the Eastern District, not the Southern District. The Second Circuit has held that rates in the Eastern District are "substantially lower" than rates in the Southern District. Simmons v. New York City Transit Auth., 575 F.3d 170, 172 (2d Cir. 2009). It follows, then, that the Norinsberg Team's awards in the Eastern District in 2012 were "substantially lower" than what their comparable rates would have been in the Southern District in 2012, much less in 2016. Since the Court relied upon Eastern District rates from four years ago to establish a current billing rate in the Southern District, we respectfully submit that the Court overlooked the Second Circuit's decision in Simmons.

In opposing this argument, the City once again plays it "fast and loose" with the truth, suggesting, falsely, that there are no cases which "quantify" the difference in rates between the Eastern and Southern Districts. (Def. Recon. Opp. at 18, n.15). In fact, the Second Circuit did exactly that in Simmons. It reduced an award by 21% to quantify the "substantially lower" rates found in the Eastern District. Other courts have reached a similar conclusion. See, e.g., Siracuse v. Program for the Dev. of Human Potential, No. 07 CV 2205 CLP, 2012 WL 1624291, at *27 (E.D.N.Y. Apr. 30, 2012) (reducing counsel's rates by 21%, "[to] account[] for the difference between the prevailing rates in the Southern and Eastern Districts."); Concrete Flotation Sys., Inc. v. Tadco Const. Corp., 2010 WL 2539771, at *3 (E.D.N.Y. Mar. 15, 2010), report and recommendation adopted, 2010 WL 2539661 (E.D.N.Y. June 17,

2010) (recognizing a "a sharp distinction in rates for attorneys' fees between these two districts") (emphasis supplied). Based on Simmons, the Court should reconsider the rates assessed to Cohen & Fitch LLP and Jon Norinsberg in this case, and make an upward adjustment that accounts for the higher billing rates in the Southern District.

III. THE COURT'S RELIANCE ON THE JOHNSON FACTORS IS CONTRARY TO THE SUPREME COURT'S HOLDING IN PERDUE.

A. The Supreme Court Expressly Rejected the Use of the Johnson Factors in Determining a Reasonable Hourly Rate.

In deciding that a 35% reduction in hourly rates was warranted, the Court relied upon the "Johnson factors" to support its conclusion. Schoolcraft, 2016 WL 4626568 at *5. However, the Supreme Court has expressly rejected the Johnson method as a basis for determining a reasonable hourly rate. Perdue v. Kenny A., 130 S. Ct. 1662, 1669 (2010). The Supreme Court concluded that the Johnson approach was flawed because it set "attorneys' fees by reference to a series of sometimes subjective factors [that] placed unlimited discretion in trial judges and produced disparate results." Perdue, 130 S. Ct. at 1672 (citation omitted).

In light of the Supreme Court's criticism of Johnson as being "subjective," giving "very little actual guidance to district courts," placing "unlimited discretion in trial judges" and producing "disparate results," Perdue, 559 U.S. at 550-51, we respectfully submit that Johnson – and by extension, that portion of Arbor Hill which relied on Johnson -- was not an appropriate basis for reducing our billing rates by 35%. In particular, the Court's consideration of the "reputational benefits that might accrue from being associated with the case" (Schoolcraft, 2016 WL 4626568 at *5) would appear to be directly at odds with Perdue, which prohibits the evaluation of fees "on an impressionistic basis" because the "major purpose of the lodestar method—providing an objective and reviewable basis for

fees, is undermined." Perdue, 559 U.S. at 558. Since defendants offered no evidence of these alleged "reputational benefits" -- and since there was no "specific proof" of such benefits in the record – the Court's reliance on this factor was not proper under Perdue. Id. at 555 ("[T]he trial judge should [only] adjust the attorney's hourly rate in accordance with specific proof") (emphasis supplied) (alteration added).

B. The Second Circuit Has Never Addressed the Question of Whether or Not Arbor Hill is Still Good Law After Perdue.

Defendants falsely claim that "the Second Circuit has reaffirmed Arbor Hill since Perdue." (Def. Recon. Opp. at 9) (citing Millea v. Metro-N.R.R, 658 F.3d 154, 166-7 (2d Cir. 2011)). In fact, the Second Circuit has done no such thing. The Millea court merely stated that both the Supreme Court and Second Circuit have held that the lodestar creates a "presumptively reasonable fee." (Id. at 166-7). There was no discussion of the Johnson factors in Millea. Nor, for that matter, was there any discussion of the impact of Perdue on Arbor Hill. In fact, the Second Circuit has never addressed the question of whether Arbor Hill – or more specifically, that portion which relies on the Johnson factors – remains good law after Perdue. See Study Logic, LLC v. Clear Net Plus, Inc., 2012 U.S. Dist. LEXIS 135847, *49 (E.D.N.Y. Sept. 21, 2012) ("Arbor Hill has not yet ben revisited by the Circuit in light of Perdue."). To the extent that defendants suggest otherwise (Def. Recon. Opp. at 9), this is simply false and should be rejected.

C. Plaintiff Argued for the Perdue Methodology in his Original Motion.

Defendants claim that Plaintiff "never before raised" any arguments regarding the proper methodology for determining reasonable hourly rates. (Def. Recon. Opp. at 5). This is false. In fact, in Plaintiff's original motion for attorney's fees, Plaintiff expressly cited Perdue as the proper legal standard for determining hourly rates. (Docket No. 561, at 19). Further, Plaintiff wrote that "the only

method for determining the fee award in this case is 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,' otherwise known as the lodestar method." (Ibid.) (emphasis supplied) (citations omitted). It is absurd to suggest that Plaintiff also needed to address the flawed Johnson methodology – which had been rejected by the Supreme Court in Perdue – in order to properly raise this argument on reconsideration.

IV. DEFENDANTS' OBJECTIONS TO THE "NEW EVIDENCE" OFFERED BY PLAINTIFF, SUBMITTED FOR THE LIMITED PURPOSE OF CORRECTING CERTAIN UNSUPPORTED FACTUAL FINDINGS, ARE BASELESS.

A. The Retainer Agreements Were Offered to Show that Counsel's Rates Were Not Merely "Theoretical" or "Opening Bids in a Negotiation."

Defendants object to counsel's submission of retainer agreements on the ground that such agreements "could have been submitted in support of the Plaintiff's fee petition." (Def. Recon. Opp. at 7). This argument is flawed on several grounds. First, defendants ignore the limited purpose for which such retainers were offered, namely, to show that the rates requested by Jon Norinsberg ($600.00 per hour) and Cohen & Fitch LLP ($500.00 per hour) were not merely "opening bid[s] in a negotiation," Schoolcraft, 2016 WL 4626568 at *7, as the Court surmised, but in fact, were actual rates charged to real-life clients. In particular, such evidence was intended to refute the Court's suggestion that the requested rates were merely "theoretical" and "the highest number one might suggest to frame the conversation before the first counter-offer." Schoolcraft, 2016 WL 4626568 at *7.

Second, defendants never raised the argument that counsel's requested rates were merely "opening bid[s]" in a negotiation process, or that a "keen client would have negotiated these rates down." Schoolcraft, 2016 WL 4626568 at *7. The Court raised these arguments sua sponte. Having been presented with a new factual finding that was "outside the adversarial issues presented to the Court by the parties," (Moog, Inc. v. United States, No. MISC. CIV-90-215E, 1991 WL 255371, at *1

(W.D.N.Y. Nov. 21, 1991)), Plaintiff's counsel was compelled to submit these retainers to "correct a manifest error of … fact," which is clearly a proper basis for reconsideration. MCI Telecommunications Corp. v. Mr. K's Foods, Inc., No. CIV-88-776E, 1990 WL 159065, at *2 (W.D.N.Y. Oct. 16, 1990) (citation omitted).

B. The Bonelli Evidence was Offered to Show that Plaintiff's Counsel Did, In Fact, Forego Other Work As a Result of the Schoolcraft Case.

Defendants further argue that Plaintiff's reference to the lucrative $1.1 million dollar settlement in Bonelli – a case that the Norinsberg Team was forced to turn down as a direct result of the workload in Schoolcraft – is improper because it "offers brand new factual matter" on an "issue [that] was also previously briefed." (Def. Recon. Opp. at 8). This assertion, however, is a complete distortion of the record and the reconsideration standard. In particular, while a party may not normally advance new evidence in connection with a motion for reconsideration, it is "appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties..." Moog, 1991 WL 255371, at *1.

Here, all three of the Declarations submitted in support of our motion for attorney's fees specifically referenced having to forego other matters given the extensive work required in connection with Schoolcraft's case. (See Fitch Decl. at ¶ 30, Cohen Decl. at ¶ 44, Norinsberg Decl. at ¶ 22). Further, defendants never once argued – in their opposition brief or sur-reply – that Plaintiff's counsel had failed to show that other business opportunities were lost as a result of the Schoolcraft case. Instead, the Court sua sponte determined that the time and labor on this case was "not preclusive of other employment,"[2] which was allegedly confirmed by "the appearance of Plaintiff's counsel on other matters before this Court during the course of this litigation." (Schoolcraft, 2016 WL 4626568 at *6). In fact, Plaintiff's counsel did not appear on any "other matters" before this Court in the past six years,

[2] Johnson factor No. 4

except for Stinson v. City of New York, 10 Civ. 4228 (RWS), which was filed prior to Schoolcraft. Since these factual findings were not based on any evidence in the record, and appear to have been made "outside the adversarial issues presented to the Court by the parties," reconsideration of this issue based on actual evidence is warranted. Johnson v. Diamond State Port Corp., 50 F. App'x 554, 560 (3d Cir. 2002).

CONCLUSION

For the reasons stated above, the Norinsberg Team's motion for reconsideration should be granted.[3]

Dated: New York, New York
October 28, 2016

Respectfully Submitted

/s

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[3] Since this Reply brief is being submitted solely on behalf of the Norinsberg Team, we do not address any of defendants' arguments relating to the Smith Team. (Def. Recon. Opp. at 8-9, 18-25).