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Index No.: 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.

SURREPLY MEMORANDUM IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTIONS FOR RECONSIDERATION

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PRELIMINARY STATEMENT

The motion-respondent City of New York (the "City") respectfully submits this Surreply Memorandum in support of its Opposition to Plaintiff's Motions for Reconsideration of the Court's Fee Award.

POINT I

PLAINTIFF FAILS TO SHOW ANY REASON FOR THE COURT TO ALTER ITS AWARD IN LIGHT OF PLAINTIFFS' UNTIMELY ATTACK ON THE CITY'S HOURLY SUMMARIES AND CALCULATIONS

In Reply, the Smith team continues its belated attack on the City's summaries and calculations of hours prepared by ASI. Notably, even after seven months to scour ASI's Audit[1] of plaintiff's fee submissions, plaintiff has identified only a handful of purported errors, of an immaterial amount. Indeed, most of the purported errors relate to summaries submitted on the motion for reconsideration, not the original Audit. Plaintiff has offered no excuse or explanation for failing to submit his new critiques of the Audit upon the original fee application, and fails to show any material discrepancies that warrant altering the Court's decision.

A. Plaintiff's new critique of the Audit calculations is untimely sandbagging that should be disregarded by the Court.

The City been prejudiced by plaintiffs' sandbagging through factual arguments that could and should have been made while the City's consultant, ASI, was actively engaged on this matter and fully available, which is no longer the case. Plaintiff offers no explanation for why Smith's complaint that the City's deposition hours do not match the time that the Smith team expended on depositions – an argument based on the prior record which was well known to plaintiff's counsel while litigating the underlying motion – was not raised before. For the reasons stated in

[1] The "Audit" refers to the report of the Audit of the Reasonableness of the Hours Expended and Expenses submitted by plaintiff's counsel, filed with the Court at DE 598-4 and 600-7.

the City's Memorandum in Opposition to the Motion for Reconsideration ("City Opp. Recon."), under well settled law the Court should disregard plaintiffs' improper attempt at second and third bites at the apple with brand new factual matters. City Opp. Recon. 2-4, 8-9.

Plaintiff had ample opportunity to impeach ASI's summaries and calculations but failed to do so to any material extent. Plaintiff's counsel have had the ASI Audit since April 8, 2016, and have had ASI's coding worksheets since May 11, 2016, as the Court noted. *See* DE 635; Order[2] at 13-14 n. 2. As the City previously stated, the Audit's "calculations are based on the time charges submitted by plaintiff, and could be confirmed or disputed by the parties or the Court by reference to the material submitted by plaintiff. . . . . If the plaintiff believes that the calculations are in error, he can submit his own calculations." City Opp. 15. Yet plaintiff alleged only a handful of minor, alleged discrepancies when litigating the fee motion, which amounted to typographical errors. *See* Smith Reply Aff. ¶¶ 9-11 (DE 921); City Surreply Opposing Fee Application ("City Surreply Fee") (DE 632) at 13. [3] Most of what plaintiff asserts as errors are critiques of lawyers' briefing (not the audit), which just as easily could and should have been raised before. City Opp. Recon. 22 n. 20. Indeed, although Smith now claims the mistake in briefing was so obvious that it was deliberate, his own team did not see the issue even with their intimate knowledge *of their own time records* until after the Court's ruling.

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[2] "Order" refers to the Court's September 6, 2016 Order awarding attorneys' fees and expenses to plaintiff. DE 638. Unless otherwise stated, abbreviations in this memorandum have the same meanings as in the City Opp. Recon. or the City's Memorandum in Opposition to Plaintiff's Fee Application ("City Opp.") (DE 597).

[3] In one example, in Reply on the original motion the Smith team claimed that the city wrongly asserted that plaintiff's counsel sought reimbursement for a cash payments to a third person (in addition to reimbursement cash given to plaintiff himself). Smith Reply Dec. ¶ 11 (DE 621). But in fact the expense submissions by the Norinsberg team show a cash payment on April 10, 2012 of $300 to "Yudelka Cepeda," who has no known connection to this matter. Audit 17, 112; Norinsberg Fees and Expenses, DE 560-8, at 65; City Surreply Fee 13. The only error was the misattribution in briefing of this payment to "Yudelka Cepeda" to the Smith Team; the Audit attributed it properly to Norinsberg. City Surreply Fee 13; Audit 16-17; 111-112. While Smith sought to justify – wrongly – reimbursement for cash payments to the plaintiff, he did not even attempt to justify recovering cash payments to third parties, the inclusion of which reflects an extreme lapse of billing judgment.

B. None of the alleged discrepancies in the City's calculations warrant any change to the Court's decision.

Even with plaintiff's new arguments, none of the alleged discrepancies amount to systematic or material errors that could justify the Court disregarding *in toto* all of the City's summaries and calculations. Given the more than approximately 5,000 time entries for approximately 9,000 hours and over a dozen time-keepers, claimed in plaintiff's bloated application – many encompassing multiple tasks – some disputable judgment calls and even mistakes in attributing and calculating time are inevitable. That cannot undermine the overall reliability of the calculations. Indeed, the Smith team made exactly this argument when acknowledging errors in its own putative "contemporaneous time records," arguing that its errors were "insignificant" in the context of 600 time entries. Smith Fee Reply Dec. ¶ 40 (Doc. No. 621). The same must be said of the Audit, which concerned 5,000 entries.[4]

Moreover, plaintiff's counsel created the source material on which ASI based its Audit and therefore could have readily found inconsistencies in comparison to the source data. In opposing plaintiff's motion to strike the Audit, the City offered to have Judith Bronsther testify about her methods and processes, and thus be subjected to cross-examination, but plaintiffs never took up the offer. *See* City Surreply to Motion To Strike ("Surreply Strike"), at 11 n .4. Nor did plaintiff ever seek discovery from ASI or Bronsther, to which the City would have consented.[5]

[4] The City was denied discovery of plaintiff's counsel's original time records and therefore were severely hampered in their ability to discover errors in plaintiff's presentation; there well could have been many more than were discovered and acknowledged by plaintiff. But this is not so of the Audit, since plaintiff's counsel had created the source material used by the Audit – their own billing records – and thus were in a perfect position to find errors and discrepancies in the City's summaries and calculations.

[5] Plaintiff also rehashes, virtually verbatim, its argument against Bronsther made in briefing the original motion, citing the 15-year old decision in *Cohen v. Brown University*, 2001 U.S. Dist. LEXIS 22438 (D.R.I. Aug. 10, 2001). *Compare* Norinsberg Reply Memorandum of Law, April 29, 2016, at 9 (DE 624), *with* Smith Reply Mem. Recon. 7 (DE 664). This argument is no more persuasive now than then, since this Court's decision cannot be based on a fact-specific finding in another matter, especially when the relevant record in that matter is not before the Court. City Fee Surreply 12 n. 11. The *Brown* ruling does not even refer to ASI or Bronsther. *Id*.

Moreover, the Smith Team's new critique mainly reveals that Smith overlooked (or wants the Court to overlook) plain disclosures in the Audit and in the City's Opposition to the fee application, while shrilly accusing the City of "misrepresentation" of the record. Smith Reply 3-4. First, Smith continues to point to the time spent only on his team preparing for and taking depositions, while the Audit clearly indicates that it counted time spent by *all counsel* and time expended on post-deposition review of deposition transcripts by all counsel. Bronsther Declaration November 17, 2016 ("Bronsther Dec."), ¶ 3; City Opp. Recon. 22. Only by ignoring the content of the Audit can plaintiff claim there was large "inflation" of the hours expended. Smith Reply 3, 6. And the purported magnitude of the claimed "inflation" does not square with plaintiff's counsel's complete failure to mention it in briefing on the fee application before the Court's ruling, despite intimate knowledge of the underlying records.

In any event, counting the time spent reviewing depositions (and on deposition related motions), in addition to the time preparing for and attending depositions, is appropriate because it: (i) was conducted in addition to hundreds of hours of paralegal time spent digesting the depositions (Bronsther Dec. ¶ 3, Ex. A); (ii) was excessive in light of the length of most of the depositions and counsel's attendance at the depositions; and (iii) none of it was counted in ASI's summaries of other categories (e.g. trial preparation time or summary judgment) (*Id*., ¶ 9).

Second, Smith ignores the disclosure in the Audit of the methodology that ASI used to allocate hours to specific tasks in instances where block billing was used, which is set forth clearly in Exhibit 2 to the Audit. Where block billing was used billing (which was common in the Smith team's time), the time entries in ASI's calculations show the allocated hours, and such allocated hours are always less than the total hours billed for a given time entry. Bronsther Dec. ¶ 4. Therefore, this supposed discrepancy works in the plaintiff's favor. *Id*.

Third, Smith ignores the disclosed fact that Magdalena Bauza's time, in part, had to be converted from elapsed or "real-time" to decimal form in order to be incorporated into the analysis. Bronsther Dec. ¶ 5. This was apparent from the Bauza entries listed in the Audit and in Exhibit A and Exhibit A-1 and A-2 submitted by the City. Docket Nos. 600-2, 600-3, 600-4. This was also stated in City Opp. 2, n. 5 ("the time entered by Magdalena Bauza was converted to decimal format where it was in purported 'elapsed time' format (hours:minutes:seconds").

Fourth, Smith identified only one actual error in the materials that ASI prepared in connection with the Motion for Reconsideration, *but not the Audit*. That supplemental submission was prepared on an expedited basis – on a matter on which ASI is no longer actively engaged – and unfortunately under those circumstances errors arose, specifically the unintentional double-listing of time relating to the Purpi deposition in both the General Deposition Time and Specific Deposition Time. Bronsther Dec. ¶ 6. But after correction of this double-listing and other small discrepancies from the original calculations (which Smith did not identify), the corrected totals are nearly exactly the same as the original calculations: Specific Deposition Time: 1,106.31 hours (Exhibit B); General Deposition Time: 316.40 hours (Exhibit C). Bronsther Dec. ¶ 7 (Exhibit B and Exhibit C). ASI's review also revealed additional entries that were not categorized as deposition time in the Audit, but which should have been, totaling 33.30 deposition-related hours reflected in Exhibit E to the Bronsther Declaration. *Id*. ¶ 8.

Here, plaintiff chose to submit fee information in numerous different forms and formats, without any logical coherency or organization, and in non-electronic form that is not amendable to analysis. Plaintiff even refused the City's request for production of the electronic files containing the data, requiring the City to manually convert the data to electronic format for analysis. *See* DE 576 (motion to compel fee discovery). Given plaintiff's obstructionist effort to

make its own data immune to sorting, coding and calculation, plaintiff cannot now insist (*see* Smith Reply Recon. 7) that the Court look only to plaintiff's disjointed hardcopy summaries, some of which were not even in chronological order. *See* DE 560-10.

For these reasons, plaintiff has failed to establish any basis to alter the Court's ruling or to disregard the City's fee summaries reflected in the Audit.

POINT II

THE COURT NEED NOT MAKE FINE DISTINCTIONS AMONG INDIVIDUAL COUNSEL OR LAW FIRMS IN EVALUATING PLAINTIFF'S FEE APPLICATION

The Smith team's insistence that the Court look only at the Smith team's time when evaluating its work bespeaks plaintiff's counsels insistence that it is their rights that are at stake, when by settled law they are not parties and only the plaintiff's rights ought to be considered here. The fee application is *the plaintiff's claim*, and the Court must weigh the reasonableness of *the entire fee*, not each team or attorneys' individual fee. Duplication of effort by multiple attorneys is one of the classic examples of "fat" that is routinely "trimm[ed]." *Maldonado v. La Nueva Rampa, Inc.*, 2012 U.S. Dist. LEXIS 67058, at *47-50 (S.D.N.Y. May 14, 2012) (quotations and citations omitted). While plaintiff relies on *Maldonado* to argue that multiple attorney time can be reimbursed, *Maldonado* makes clear that is only so when "the moving party . . . demonstrate[s] the need for each attorney's expertise" and "that the work reflects the distinct contributions of each lawyer." *Id.*, at *47-58 (quoting *Nike, Inc. v. Top Brand Co.*, No. 00 Civ. 8179 (KMW) (RLE), 2006 U.S. Dist. LEXIS 76543, *20 (S.D.N.Y. Feb. 27, 2006)). As the Court correctly found, this is precisely what plaintiff *failed to demonstrate here*: there was no reasonable need for the multiplication of senior level attorneys working on this matter. *See* Order at 28-29. Smith protests that his team did not overlap with other attorneys for some of his

tenure on the case, but there was ample duplication of effort within the Smith team. Audit 88, 93, 97-105. This was exacerbated over time when the Norinsberg team did work that had already been done, or could have been done more efficiently, by Smith. Contrary to Smith's contention, the small reduction for time that was *directly attributable* to the replacement of counsel by no means accounts for the true waste resulting from plaintiff's cycling between counsel over time, which is properly reflected in a percentage reduction. *See* City Opp. 30.

Of course in some cases courts may evaluate each attorneys' time individually, especially if the total fee submission is relatively small, but there is no requirement that the Court do so. It is especially unreasonable to insist, as Smith does, that the Court must evaluate each lawyer and law firm separately when the plaintiff has submitted time for over a dozen time keepers, in varying forms and formats, representing over 5,000 individual entries. Practical, "rough justice" is all that is required. City Opp. Recon. 24.

Smith points to defects in time-keeping that he claims other time-keepers showed that his team did not. But the Smith team's submission had infirmities not equally shared by others: frequent block billing and a suspicious frequency of large, apparently rounded-up billing increments of 30 minutes or more.[6] Audit 30; City Opp. 38.

Plaintiff makes one fee application and is responsible for the application as a whole. Therefore, the Court may apply across the board discounts justified by defects in the submission as broadly as is convenient. Moreover, plaintiff's counsel chose to work with other attorneys on this matter, linking their fee to the Court's fee award to plaintiff. Counsel thereby accepted the risk that their fee will be discounted in light of the entire submission, including the submissions

[6] The Smith team's use of large billing increments is an additional basis for reduction of their fee that was not mentioned by the Order.

of other counsel.[7] Smith also claims that his team exercised "billing judgment" in reducing its own portion of the fee claim in his Reply brief. But plaintiff may not treat its fee application as the opening of a negotiation and bargain down from there. *See* City Opp. 17-19; Order 18. Plaintiff's counsel should trim their application in good faith before it is submitted.

Smith also argues that reducing rates as well as hours for duplication and redundancy is "double counting." Smith Reply 11. But this is not so. Redundancy and duplication is relevant to both hours and rates, because, as the Court held, a lawyer with more experience and expertise requires fewer hours and less support or supervision to complete the same task than a less experiences lawyer. Order 28. Accordingly, the Court may trim both hours and rates of all counsel where they appear to charge rates excessive for the time, supervision and support they claim to have required, to achieve a net reasonable fee. If rates are increased for any reason, a corresponding decrease in hours would be warranted to adjust the total to a reasonable outcome.

POINT III

PLAINTIFF PROVIDES NO REASON FOR THIS COURT TO DEPART FROM ITS FEE METHODOLOGY

Although plaintiff for the first time argues on reconsideration that the Court should have disregarded prior Second Circuit law in several respects – not applied the *Johnso*n factors; not considered law firm size; and not considered reputational benefits – on Reply plaintiff's counsel asserts that it needed only to cite *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010) and

[7] Smith continues to rely on his description of his purported fee agreement with the plaintiff, despite having refused to produce that agreement in discovery or even in litigation of the fee application. *See* Smith Reply Dec. ¶ 5; City Opp. Recon 7 & n.7. Smith does not justify withholding the agreement from the City and the Court, and in any event Smith is not a party and his rights under the fee agreement are not at issue.

intone the magic word "lodestar" to make this argument. Norinsberg Reply Recon. 7-8. That is nonsense:[8] the City put these issues front and center in its Opposition, by for example:

- Setting forth the holdings of *Arbor Hill Concerned Citizens Neighborhood Assoc. v. Cnty. of Albany*, 522 F.3d 182 (2d Cir. 2008) and the *Johnson* factors cited therein (City Opp. 4-5, 22, 45, 48)

- Arguing that the Court should consider the reputational benefits to counsel from this particular case in considering rates, citing Arbor Hill (City Opp 50-52)[9]

- Arguing that the Court should consider one of the Johnson factors – "the nature and length of the professional relationship with the client" with plaintiff – where all counsel except for the Smith team had been terminated by plaintiff at some point, possible for cause. (City Opp. 28-29, 62, 70-71) [10]

- Arguing that the Court should consider the size of plaintiff's law firm in determining rates and specifically that large law firm rates are not applicable (City Opp. 54-55)

If there were any substance to plaintiff's argument that all of these points depended on 'bad law'– and there is not – surely plaintiff's experienced counsel would have said so.[11]

Plaintiff relies heavily upon the single district court case holding that law firm size is not relevant when determining rates. Norinsberg Reply Mem. 3 (citing *Irish v. City of New York*, 2004 U.S. Dist. LEXIS 3770, *13 (S.D.N.Y. Mar. 8, 2004)). The City already explained why *Irish* should not be followed and cited ample contrary authority, to which plaintiff does not respond. City Opp. Recon. 14-16 & n. 14. Plaintiff's argument is untenable because plaintiff

[8] Plaintiff also argues that there was no reason for it to offer its own fee agreements until the Court's application, but that is likewise nonsense. Plaintiff fails to respond in Reply to the fact that the City cited the absence of any such fee agreements in its Opposition, noting that such agreements were demanded in discovery and neither produced nor filed. City Opp. Recon. 7. Clearly the point was squarely in issue, and it is too late now for plaintiff to obtain reconsideration based on its belated, cherry-picked evidence, never subjected to discovery.

[9] Plaintiff now argues that there is no evidence of reputational benefits, but the evidence was cited by the City and the Court: extensive press coverage and counsel's own Schoolcraft website. Order 20, 36; City Opp. 51-52.

[10] This factor was not mentioned in the Court's ruling, but provides further support for the Court's reduction of both hours and rates.

[11] Plaintiff says defendants "miss[] the mark" on *Arbor Hill* because it was only the inclusion of the *Johnson* factors that were overruled by *Perdue*, not the whole case. Norinsberg Reply Recon. 2. But it is plaintiff who misses the mark by not responding to the ample authority cited by the City showing that it was the *Johnson* method, not the *Johnson* factors, that was rejected in *Perdue*. City Opp. Recon. 10-12.

nowhere denies that market rates are higher on average for large law firms. There are a host of reasons why that would be so: higher perceived quality; better academic credentials; better in-firm training; law firm culture; academic and professional background; greater depth of resources; in-firm support services; and more. None of these reasons are displaced by plaintiff's argument, which is simply that "overhead" should not be considered. *Id.*[12]

* * *

As to plaintiff's other contentions the City relies on its prior briefing.

CONCLUSION

For the foregoing reasons and those stated previously on the record, plaintiff's motions for reconsideration should be denied.

Dated: New York, New York
November 17, 2016

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[12] Counsel's repetitive appeal to a putative enhancement of rates for bringing their case in the S.D.N.Y., rather than in the E.D.N.Y. where it actually arose, fails for the same reason. The Second Circuit did not explain how it calculated the fee increase in *Simmons v. New York City Transit Auth.*, 575 F.3d 170 (2d Cir. 2009), and there is no formula for an exchange rate between eastern and southern district rates. As the City previously demonstrated, the rates awarded here are well within S.D.N.Y. rates for similar counsel, and case specific variables could place the fee even lower than in a different case in the E.D.N.Y., even with the same counsel. City Opp. 56-57. Moreover, as the City previously demonstrated, the Court could even forego any S.D.N.Y. enhancement to discourage plaintiffs' counsel from forum shopping in Manhattan for higher legal fees. *See* City Opp. Recon. 18 n. 15; *Cf. Dunston v. N.Y.C. Police Dep't*, 2010 U.S. Dist. LEXIS 130461, at *7-8 (S.D.N.Y. Dec. 7, 2010) (transferring venue with little deference to plaintiff's choice of forum, where plaintiff's counsel seemed to be forum shopping for higher attorney-fee rates); *Legrand v. City of N.Y.*, 2010 U.S. Dist. LEXIS 19011, at *8-9 (S.D.N.Y. Mar. 3, 2010) (same).