UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

DEFENDANTS' FEE APPLICATION

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DEFENDANTS' FEE APPLICATION

INTRODUCTION

On January 10, 2012, this Court found that Plaintiff Paul Ceglia contumaciously defied this Court's discovery orders and ordered him to pay the reasonable attorneys' fees and costs that Defendants incurred in attempting to secure his compliance. *See* Doc. No. 283 at 30 ("Plaintiff is ORDERED to pay . . . the expenses, including attorney's fees, Defendants have incurred in attempting to obtain Plaintiff's email account information as directed by ¶ 5 of the August 18, 2011 Order."). The Court also directed Defendants to file within ten days their affidavits of costs and attorneys' fees. *Id*.

As explained below and in the accompanying declaration of Alexander H. Southwell, Defendants incurred substantial legal fees in attempting to obtain Ceglia's compliance with the Court's orders related to his email account information. The work included preparing and prosecuting Defendants' Accelerated Motion to Compel (Doc. Nos. 129, 149-151), preparing the Opposition to Plaintiff's Motion to Set a Delayed Briefing Schedule (Doc. No. 137), preparing the reply to the Court's Order to Show Cause why Ceglia should not be sanctioned (Doc. No. 161), and preparing this Fee Application and supporting documentation.

Defendants, however, do not seek full reimbursement for all the fees they have incurred. Rather, to avoid any dispute as to the reasonableness of this fee request, Defendants have excluded certain work, declined to seek reimbursement for several timekeepers, and have made an across-the-board 25 percent cut to their standard hourly rates. By limiting their Fee Application in these ways, Defendants have substantially reduced their total request.

In light of the fact that Defendants have already discounted by a substantial amount the fees that were actually charged and paid, Defendants request that this Court approve the claimed amount in full. Defendants further request that they be awarded the fees they reasonably

incurred in preparing this application. Finally, this Court should order that Ceglia may not file any additional non-responsive papers or pleadings in the case or otherwise prosecute this action unless and until he satisfies the full award. Payment of a sanction is the cost a party must bear "for the privilege of continuing to litigate." *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1057 (7th Cir. 1998).

STATEMENT OF FACTS

Since this Court granted expedited discovery on July 1, 2011, Defendants have been forced to expend substantial time and resources to compel Ceglia's compliance with his court-ordered obligations. One such obligation was for Ceglia to provide his consent to the acquisition of email account information — an obligation imposed after Ceglia had failed to produce numerous documents and storage devices required by the July 1, 2011 Order. *See* Aug. 18, 2011 Order (Doc. No. 117) ¶ 5. After Ceglia obstructed this order by providing consent forms that violated the Court's order, Defendants were forced to file their Accelerated Motion to Compel on this time-sensitive issue. *See* Doc. No. 128. This Court granted Defendants' motion and ordered Ceglia to show cause as to why he should not be sanctioned.

Following additional briefing on the sanctions issue — briefing in which Ceglia's former counsel disclosed that Ceglia had instructed them to defy the Court's orders — on January 10, 2012, the Court granted Defendants' motion for sanctions, finding that Ceglia had "continually failed to comply with the August 18, 2011 Order," "chose to knowingly ignore the unambiguous orders of the court," and demonstrated "a plain lack of respect for the court's order which cannot be countenanced." Decision and Order ("D&O") (Doc. No. 283) at 22-23, 27. The Court imposed a $5,000 civil contempt fine and held that Ceglia must reimburse Defendants for the costs, including attorneys' fees, that they have incurred as a result of Ceglia's "unjustified refusal to fully comply with explicit court orders" — a refusal that "cannot be tolerated." D&O at 24,

28. Specifically, the Court ordered that Ceglia pay "the expenses, including attorney's fees, Defendants have incurred in attempting to obtain Plaintiff's email account information as directed by ¶5 of the August 18, 2011 Order," and directed Defendants to submit their affidavits of costs and attorneys' fees. *Id*. at 30.

The Court is fully familiar with this case, and many of the key facts bearing on the present Fee Application are ably described in the Court's D&O. This application therefore does not provide a full recitation of all of the relevant facts, but instead summarizes the legal work relevant to the fee award.

As the Court is aware, the August 18 Order — which was necessitated by Ceglia's failure to produce highly relevant emails that he had been directed to produce by the Court's July 1 Order — required Ceglia to produce, among other things, completed consent forms provided by Stroz Friedberg by August 29, 2011, which would permit Stroz Friedberg access to Ceglia's webmail accounts. *See* Aug. 18, 2011 Order (Doc. No. 117) ¶ 5. Ceglia then made four separate, duplicative, and baseless motions to stay the August 18 Order, each of which the Court denied. *See* Doc. Nos. 116, 119, 125, 127.

During this time, Ceglia's lawyers Jeffrey Lake and Nathan Shaman informed Ceglia of the August 18 Order and of his obligation to provide information related to his email accounts. But Ceglia repeatedly refused to comply with the August 18 Order and instructed his counsel not to comply. *See* Lake Decl. ¶ 2 (Doc. No. 153-1); Shaman Decl. ¶ 3 (Doc. No. 153-2). Ultimately, Ceglia instructed his attorneys to provide rewritten consent forms and imposed a contingent condition, even though the insertion of this language violated the Court's order. *See* Lake Decl. ¶ 4 (Doc. No. 153-1); Shaman Decl. ¶ 4 (Doc. No. 153-2). In the days following Ceglia's production of these deficient forms, in order to assess compliance with the Court's August 18 Order and to satisfy their meet-and-confer obligations under the Local Rules,

Defendants' counsel reviewed these forms, analyzed the significance of Ceglia's modification of the language, considered the appropriate response, and drafted and revised a letter to Ceglia's then-counsel regarding the deficient forms. January 20, 2012 Declaration of Alexander H. Southwell at ¶ 5; *see also* Sept. 1, 2011 Southwell Decl. Ex. C (Doc. No. 130-3) (letter from Southwell to Lake regarding the deficient consent forms).

The meet-and-confer did not resolve the issue; Lake failed to respond to the letter and did not provide compliant consent forms. Jan. 20 2012 Southwell Decl. ¶ 6. Defendants' counsel therefore drafted, revised, finalized, and filed on September 1, 2011 the Accelerated Motion to Compel Compliance with Paragraph 5 of the August 18, 2011 Order (Doc. No. 129) and the supporting declaration of Alexander H. Southwell (Doc. No. 130). *Id*. Because Ceglia was obstructing the acquisition of email from his live webmail accounts — an inherently time-sensitive issue due to the possibility of document loss or destruction — Defendants prepared and filed their motion on an accelerated basis after consulting with local counsel, Terrance P. Flynn.

The next day, September 2, 2011, Ceglia filed a Motion to Set A Delayed Briefing Schedule on Defendants' Accelerated Motion to Compel (Doc. No. 134). *Id*. ¶ 7. This motion, yet another delay tactic intended to obstruct, required Defendants to brief this meritless request while Ceglia continued to frustrate the time-sensitive acquisition of his webmail. Defendants' counsel reviewed this motion, considered a response to this motion, and discussed this motion with the client. *Id*. Over the next few days, Defendants' counsel drafted, revised, and finalized an opposition to this motion and supporting declarations of Alexander H. Southwell and Terrance P. Flynn, which they filed on September 6, 2011 (Doc. Nos. 137-140). *Id*. ¶ 8. On September 9 and 12, 2011, the Court issued text orders setting the schedule for the Motion for a Delayed Briefing Schedule (Doc. Nos. 141, 142). On September 20, this Court issued two additional text orders: the first of these orders denied Plaintiff's Motion for Extension of Time as

moot, and the second set a schedule for the response and reply to Defendants' Accelerated Motion to Compel (Doc. Nos. 146, 147).

On September 26, 2011, Ceglia filed his Response in Opposition to the Accelerated Motion to Compel (Doc. No. 148). Defendants' counsel reviewed this response, discussed the effects of the response, and considered the content of the reply to this response. *Id*. ¶ 10. On September 27, 2011, Defendants' counsel conducted targeted research and drafted and filed the reply and supporting declaration of Amanda M. Aycock (Doc. Nos. 149-150). *Id*. ¶ 11.

The next day, on September 28, 2011, the Court granted Defendants' Accelerated Motion to Compel and directed Ceglia "to show cause why Defendants' request for sanctions, pursuant to Fed.R.Civ.P. 37(a)(5), including costs and attorneys' fees, based on Plaintiff's failure to fully and promptly comply with the Order should not be granted" (Doc. No. 152). Ceglia responded on October 7, 2011, with a memorandum of law and declarations of Ceglia's (now former) lawyers Jeffrey Lake and Nathan Shaman, in which they disclosed that their client ordered them not to comply with the Court's orders (Doc. No. 153). Defendants' counsel reviewed this response, and drafted a reply to this response, which they filed on October 14, 2011 (Doc. No. 161). *Id*. ¶ 13.

On January 10, 2012, this Court granted Defendants' request for sanctions and directed Defendants to provide affidavits of costs and attorneys' fees incurred (Doc. No. 283). Defendants' counsel reviewed this order, discussed the effects of the order, considered the content of the affidavits requested by the Court, and reviewed and analyzed bills for the applicable entries. *Id*. ¶ 14. Defendants' counsel then drafted, discussed, conducted targeted research, revised, finalized, and filed the instant Fee Application and supporting declaration of Alexander H. Southwell. *Id*. ¶ 15.

DEFENDANTS' LAWYERS AND THEIR EFFORTS TO SECURE CEGLIA'S COMPLIANCE

Defendants' counsel from the law firm Gibson, Dunn & Crutcher LLP ("Gibson Dunn") who devoted substantial time providing legal services covered by the Court's sanctions award are Orin Snyder, Thomas H. Dupree, Alexander H. Southwell, Matthew J. Benjamin, and Amanda M. Aycock. Biographies are attached to the accompanying Southwell Declaration and briefly outlined below, along with an explanation of each attorney's role in the legal services for which fees should be awarded. *See* Jan. 20 2012 Southwell Decl. Ex. A.

Mr. Snyder, a senior partner in Gibson Dunn's New York office, is Co-Chair of the Media, Entertainment and Technology Practice Group and Vice-Chair of the Crisis Management Practice Group. A former Assistant United States Attorney in the Southern District of New York, Mr. Snyder has over 25 years of experience in litigating both civil and criminal matters, particularly high-profile and sensitive matters for prominent clients. Mr. Snyder has extensive experience in fraud cases and in media, entertainment, and technology law. Mr. Snyder is ranked as one of the best lawyers in the country by multiple organizations, including *Chambers USA: America's Leading Lawyers for Business*; *The US Legal 500*; *New York Super Lawyers 2011*; and *Law360's 2011 MVP's*. In 2010 and in 2012, Mr. Snyder was featured in The American Lawyer stories naming Gibson Dunn "The Litigation Department of the Year" for four consecutive years. Mr. Snyder earned his Juris Doctor, *cum laude*, at the University of Pennsylvania Law School in 1986. Mr. Snyder's standard billing rate in 2011 was $955. Mr. Snyder's role relevant to this Fee Application was primarily providing strategic counseling and review and editing of briefs and letters. Defendants claim 9.75 hours of Mr. Snyder's time in this Fee Application.

Mr. Dupree, a partner in Gibson Dunn's Washington, D.C. office, is an experienced trial and appellate advocate. Mr. Dupree served in the Civil Division at the U.S. Department of Justice from 2007 to 2009, ultimately becoming the Principal Deputy Assistant Attorney General. In that role, Mr. Dupree was responsible for managing many of the government's most significant cases involving regulatory, commercial, constitutional, and national security matters on behalf of virtually all of the federal agencies, the White House, and senior federal officials. He has argued more than 60 appeals in the federal courts, including in all thirteen circuits and before five *en banc* courts, and has represented clients throughout the country in a wide variety of trial and appellate matters. In 2010, Mr. Dupree was named one of the top ten appellate litigators in the United States under age 40 by *Law360*, and has been chosen as a national rising star by *Lawdragon* magazine. Mr. Dupree earned his Juris Doctor with Honors from the University of Chicago Law School in 1997. Mr. Dupree's standard hourly billing rate in 2011 was $850. Mr. Dupree's role relevant to this Fee Application was primarily drafting and editing the briefs. Defendants claim 21.75 hours of Mr. Dupree's time in this Fee Application.

Mr. Southwell, a partner in Gibson Dunn's New York office, is Co-Chair of the firm's Information Technology and Data Privacy practice group and specializes in complex civil litigation, white-collar criminal defense, and internal investigation matters, as well as information technology, theft of trade secrets and intellectual property, computer fraud, national security, and network and data security issues. From 2001 to 2007, Mr. Southwell served as an Assistant United States Attorney in the United States Attorney's Office for the Southern District of New York, where he focused on, among other things, investigating and prosecuting computer hacking and intrusion cases, intellectual property offenses, other high-technology offenses, securities fraud, wire and mail frauds, child exploitation, and immigration crimes. Mr. Southwell received his Juris Doctor, *magna cum laude*, from New York University School of Law in 1997.

Mr. Southwell's standard billing rate in 2011 was $825. Mr. Southwell's role relevant to this Fee Application was primarily identifying and leading the discussion on the critical compliance issue, developing strategy, corresponding with experts regarding webmail consents, communicating with the clients, corresponding with opposing counsel, reviewing and revising all briefs, and drafting his declarations. Defendants claim 24.50 hours of Mr. Southwell's time in this Fee Application.

Mr. Benjamin is a sixth-year associate in Gibson Dunn's New York office whose practice focuses on white-collar criminal defense and complex commercial litigation. In 2011, Mr. Benjamin was recognized in *Super Lawyers New York* magazine as a Rising Star in litigation. Mr. Benjamin earned his Juris Doctor degree in 2006 from New York University School of Law. Mr. Benjamin's standard billing rate in 2011 was $670. Mr. Benjamin's role relevant to this Fee Application was primarily identifying the key issues raised by Ceglia's non-compliance, corresponding with experts regarding the webmail consent forms, developing strategy, drafting communications with the clients and with opposing counsel, reviewing and revising all briefs, coordinating filing, and drafting declarations. Defendants claim 44.65 hours of Mr. Benjamin's time in this Fee Application.

Ms. Aycock is a second-year associate in Gibson Dunn's New York office, focusing on litigation. Ms. Aycock received her Juris Doctor, *cum laude*, from the University of Pennsylvania Law School and a French Master of Global Business Law, *cum laude*, from the Sorbonne and Sciences Politiques in 2010. Ms. Aycock's standard billing rate in 2011 was $450. Ms. Aycock's role relevant to this Fee Application was primarily conducting research pertaining to factual and legal issues raised, providing summary and analysis of such research, drafting and finalizing accompanying documents (e.g., certificate of service, notice of motion) for filing, proofreading and cite-checking all papers for filing, finalizing and filing motions and other

briefs, drafting her declaration, and drafting some correspondence with the clients and opposing counsel. Defendants claim 76.30 hours of Ms. Aycock's time in this Fee Application.

Defendants' application includes legal services rendered in connection with Defendants' Accelerated Motion to Compel, Plaintiff's Motion to Set a Delayed Briefing Schedule, and the Order to Show Cause — only those filings most directly relevant to ensuring Ceglia's compliance with paragraph 5 of the August 18, 2011 Order. The application also requests fees for the time reasonably spent preparing this application and accompanying affidavit through January 18, 2012. Defendants also seek reimbursement of any additional fees that could not yet be detailed in this Fee Application or that will be incurred, including those incurred in connection with any reply memorandum, oral argument, or enforcement of a fee award. Information concerning those additional fees will be fully submitted once briefing and argument (at the Court's discretion) occur.

In summary, the time spent on legal services covered by the Court's sanction award that Defendants claim herein, totaling **$84,196.33**, which is fully detailed in the Southwell Declaration and accompanying narrative descriptions, is presented in the chart below:

Attorney	Total Hours	Claimed Rate	Total Fees
Orin Snyder	9.75	$716.25	$6,983.44
Thomas H. Dupree, Jr.	21.75	$637.50	$13,865.63
Alexander H. Southwell	24.50	$618.75	$15,159.38
Matthew J. Benjamin	44.65	$502.50	$22,436.63
Amanda M. Aycock	76.30	$337.50	$25,751.25
TOTAL	**176.95**		**$84,196.33**

ARGUMENT

Defendants' claimed attorneys' fees are reasonable and should be awarded pursuant to the lodestar formula. Traditionally, "in determining a fee award, the typical starting point is the so-called lodestar amount, that is 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Robbins & Myers, Inc. v. J.M. Huber Corp.*, 01-CV-00201S(F), 2011 U.S. Dist. LEXIS 45386, at *5 (W.D.N.Y. April 27, 2011) (Foschio, J.) (citing *Healey v. Leavitt*, 485 F.3d 63, 71 (2d Cir. 2007)). In *Perdue v. Kenny A.*, 130 S.Ct. 1662, 1672 (2010), the Supreme Court explained that there is a "strong" presumption in favor of the traditional lodestar method; that presumption may be overcome "in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." *Robbins & Myers, Inc.*, 2011 U.S. Dist. LEXIS 45386, at *6 (citing *Perdue*, 130 S.Ct. at 1673). In calculating the lodestar amount, the initial burden is on the requesting party to submit evidence supporting the number of hours worked and the hourly rate claimed. *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Ultimately, the determination of a reasonable award is within the sound discretion of the Court. *See McGuire v. Russell Miller, Inc.,* 1 F.3d 1306, 1313 (2d Cir. 1993) (holding that in a fee application, "the judge determines the amount of attorneys' fees owed . . . after the liability for such fees is decided"); *see also GMC v. Villa Marin Chevrolet, Inc*., 240 F. Supp. 2d. 182, 185 (E.D.N.Y. 2002) ("[T]he determination of what is a reasonable [attorneys' fee] award is within the sound discretion of the trial court.").

1. The Hours Expended Ensuring Compliance with The Court's Orders Are Reasonable

Defendants' claimed hours of legal services expended in connection with Defendants' Accelerated Motion to Compel and ensuring compliance with the August 18 Order related to Ceglia's webmail, as directed by this Court, are reasonable. D&O at 27-28.

In calculating whether hours expended are reasonable, "district courts look to the facts and complexity of the case and take into account their own experience with the case." *Amerisource Corp. v. Rx USA In'l, Inc.*, 02-CV-2514 (JMA), 2010 U.S. Dist. LEXIS 52424 (E.D.N.Y. May 26, 2010), 2010 U.S. Dist. LEXIS 52424, at *32-33 (citation omitted). While the fee applicant bears the burden of proving that the hours are reasonable, the hours should be based not on what appears necessary in hindsight, but on whether "at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Id.* at *34; *see also id.* at *35 ("[T]he substantial majority of the billing entries are adequately detailed and do not appear duplicative or inconsistent with the particular task performed. Accordingly, the hours shall not be reduced for vagueness, excess, or inefficiency."); *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994) (affirming district court's decision that "this court declines to second guess experienced counsel in deciding whether the hours devoted to research [and] drafting . . . were necessary. To engage in such detailed hour by hour review is to demean counsel's stature as officers of the court and I have no intention of substituting my after-the-fact judgment for that of counsel who engaged in whatever research and other activities they felt necessary.").

As detailed above and in the accompanying Southwell Declaration, the work covered by the Court's sanctions award includes the review of Ceglia's deficient consent forms; meet-and-confer correspondence; the drafting and filing of the Accelerated Motion to Compel; review of Plaintiff's Response; the drafting and filing of Defendants' Reply; and the processing of Ceglia's

completed consent forms. Defendants have also included work related to the Plaintiff's Motion for a Delayed Briefing Schedule (Doc. No. 134), which sought a meritless "delayed briefing schedule" on Defendants' Accelerated Motion to Compel, and work related to this Court's Order to Show Cause as to why Defendants' request for sanctions should not be granted (Doc. No. 152).

Defendants seek reimbursement for 177.60 hours of legal services for this work over a five month period. *See* Jan. 20 2012 Southwell Decl. ¶ 17. The time was plainly warranted by the multiple briefs needed, under tight timetables, to pursue Ceglia's compliance with the Court's orders. During a three-day period, from August 29 to September 1, Defendants assessed Ceglia's non-compliance and obstruction of the time-sensitive acquisition of his webmail account, attempted to meet-and-confer with opposing counsel, developed a strategy to move to compel on that urgent issue, and drafted and filed a nine-page brief and accompanying declaration. Defendants' Accelerated Motion to Compel was met the next day, on September 2, with an attempt by Ceglia to further obstruct compliance efforts through his motion to set a delayed briefing schedule. During the next three weeks, Defendants were forced to file an eight-page opposition and two supporting declarations to this meritless motion, as well as a reply memorandum and the supporting declaration on Defendants' Accelerated Motion to Compel. Within one day after Defendants filed their reply, on September 28, 2011, the Court granted Defendants' Accelerated Motion — recognizing the baseless grounds on which Ceglia had attempted to excuse his month-long obstruction. In October 2011, Defendants prepared another ten-page brief in response to the Court's Order to Show Cause. During that same period, Defendants sought to acquire the live webmail content that Ceglia had concealed access to for over a month. The hours incurred were therefore reasonable to expend — indeed, necessary to expend — to obtain Ceglia's compliance with the Court's orders.

The hours claimed are also reasonable because Defendants excluded certain categories of legal services that might otherwise be included, in order to conservatively estimate the hours incurred. The categories excluded from this Fee Application include the legal services:

- Associated with the multiple stays Ceglia filed in August 2011 following the August 18 Order, even though those meritless stay requests further obstructed the acquisition of Ceglia's webmail;
- Associated with attempting to obtain access to Ceglia's webmail following Ceglia's belated production of those forms, including defense counsel's ongoing communications with Ceglia's counsel regarding the improperly completed consent forms and with various Internet Service Providers;
- Provided by other junior associates and paralegals who served in a support role (the legal services provided by Amanda Aycock, as the lead junior associate, are included in Defendants' claim);
- Provided by local counsel former United States Attorney Terrance Flynn and Jim Nonkes of Harris Beach PLLC, including strategizing about addressing and responding to multiple text orders by the Court and the briefing on three different motions (Accelerated Motion to Compel, Motion for Delayed Briefing, and the Order to Show Cause), as well as logistical advice concerning the motions; and
- Provided by in-house counsel.

Moreover, Defendants do not include costs associated with work within the scope of this Fee Application, which were sizeable and include, but are not limited to, expert fees incurred reviewing and discussing Ceglia's deficient consent forms, legal research costs, long-distance telephone call costs, and duplication, messenger, and courier expenses.

Defendants thus endeavored both to narrowly tailor the hours claimed in order to ensure that the hours requested are not "excessive, redundant, or otherwise unnecessary," *Robbins & Myers, Inc.*, 2011 U.S. Dist. LEXIS 45386, at *6, and also to reduce the overall claim by excluding costs. Therefore, the requested hours should be found to be reasonable.

2. The Hourly Rates Claimed by Defendants' Counsel Are Reasonable within the Relevant Market

The rates claimed by Gibson Dunn are also reasonable. Gibson Dunn typically charges standard hourly rates, detailed in the supporting Southwell Declaration, that are comparable to other peer law firms with attorneys located in New York City. However, as mentioned above, Defendants do not seek reimbursement at Gibson Dunn's standard hourly rates. Rather, Defendants have voluntarily discounted their standard hourly rates by 25% for this Fee Application. Thus, Defendants' requested hourly rates are significantly less than Gibson Dunn's standard hourly rates, which are reasonable relative to other leading law firms.

A. New York City Rates Should Apply

New York City market rates should apply to this Court's determination of the reasonableness of Defendants' requested fees. This Court has ample discretion to determine that the forum rule — which prefers the district in which an action is venued for determining market rate under "prevailing party" statutes — does not apply in cases awarding attorneys' fees as sanctions for discovery violations under Fed. R. Civ. P. 37. *See Robbins & Myers, Inc.*, 2010 U.S. Dist. LEXIS 108562 (rejecting plaintiff's argument that the forum rule should apply in the discovery sanction context and awarding defendants the New York metropolitan area rates of its national law firm, located in New Jersey); *see also Wash. Mut. Bank v. Forgue*, 07-MC-6027-CJS, 2008 U.S. Dist. LEXIS 6753, at *2 (W.D.N.Y. Jan. 30, 2008) (finding the forum rule inapplicable and holding that "even if the rate were unreasonable for Rochester, New York where this Court sits, the Court would find that the out-of-district hourly rate was reasonable"). Instead, when calculating the costs imposed by discovery non-compliance, the Court has discretion to grant the prevailing party its out-of-district rates to reimburse the prevailing party for its actual costs in litigating the discovery dispute and to sanction the non-compliant party.

See Robbins & Myers, 2011 U.S. Dist. LEXIS 45386, at *10 ("Because the court is calculating the attorneys' fees to be awarded as a sanction, the court is not required to apply the forum rule . . . rather, the court has discretion to use out-of-district rates in fixing the amount of an attorneys' fee awarded as a sanction and to deter similar conduct in the future.") (citing *On Time Aviation, Inc. v. Bombardier Capital, Inc*., 354 Fed.Appx. 448, 452 (2d Cir. 2009), and *Southern New England Telephone Company v. Global NAPS Inc.*, 624 F.3d 123, 149 (2d Cir. 2010) (reiterating that sanctions awarded pursuant to Rule 37 are intended as a deterrent to misbehavior in litigation)). Having directed his former lawyers to defy this Court's orders, Ceglia stands guilty of a particularly brazen form of discovery misconduct. And, of course, Ceglia's obstruction was designed to conceal evidence of his larger litigation fraud. In this circumstance, application of out-of-district rates — as both an appropriate means of reimbursement and a stiff sanction for discovery misconduct — is warranted.

Out-of-district rates are also appropriate given the type of defense this fraudulent lawsuit requires. *See Ebbert v. Nassau County*, No. CV 05-5445 (AKT), 2011 U.S. Dist. LEXIS 150080, at *49 (E.D.N.Y. Dec. 22, 2011) (granting out-of-district rates based in part on the attorneys' "special expertise" they brought to the case). Ceglia's lawsuit is based on a forged contract and involves a purported, but baseless, multi-billion-dollar claim against one of the best known companies in the world. The defense of that lawsuit is appropriately led by a team of experienced litigators, local and out-of-district, with backgrounds and expertise in prosecuting criminal fraud issues. Gibson Dunn litigators were also able to identify and engage, based on prior experience and relationships, the world's leading document examiners and experts in computer forensics, who have been instrumental in uncovering Ceglia's fraud.

Moreover, awarding a party fees based on out-of-district rates is particularly warranted in cases such as this one where the prevailing party that brings the fee application did not originally

choose the venue and was instead forced to litigate where the other party resides. *See Disabled Patriots of America, Inc. v. Niagara Group Hotels, LLC*, No. 07CV284S, 2008 U.S. Dist. LEXIS 33780, at *12 (W.D.N.Y April 24, 2008) (finding Miami rates in a fee application reasonable because the Florida plaintiff was forced to litigate in defendant's home forum). Ceglia chose to prosecute his lawsuit in Allegany County, New York; Defendants then removed to the federal court in the Western District of New York.

Given the particularly egregious discovery misconduct for which this Court has sanctioned Ceglia, the type of defense Ceglia's fraudulent lawsuit requires, and Ceglia's original selection of venue, this Court should utilize out-of-district rates to determine the reasonableness of Defendants' requested, discounted hourly rates.

B. Defendants' Rates Are Reasonable New York City Rates

Gibson Dunn's rates are reasonable relative to other peer global law firms with attorneys located in New York, as confirmed by both judicial decisions and empirical data.

In 2011, bankruptcy judges regularly granted fee applications with hourly rates of over $1,000 for some partners and of nearly $500 for first-year associates from New York City law firms similarly situated to Gibson Dunn. *See* Jan. 20 2012 Southwell Decl. Ex. C (New York Regional Report in Westlaw CourtExpress, Legal Billing Report, Vol. 13, No.3, Dec. 2011). For instance, the international, 1,100-plus attorney firm of Cleary Gottlieb Steen & Hamilton LLP was recently awarded fees with an hourly rate of $1,040 for certain partners and $470 for first-year associates. *See In re Nortel Networks, Inc., et al.*, No. 09-10138(KG) (Bankr. Del. Dec. 14, 2011) (Doc. No. 6979) (order granting fee application at stated rates). Additionally, Kirkland & Ellis LLP, an international law firm with over 1,500 lawyers, was recently awarded fees billed at an hourly rate of $995 for certain partners and $610 for third-year associates. *See Innkeepers USA Trust, et al.*, No. 10-13800 (SCC) (Bankr. S.D.N.Y. Dec. 6, 2011) (Doc. No. 2252) (order

granting fee application at stated rates); *see also In re Telik, Inc. Securities Litig.*, 576 F. Supp.2d 570, 589 (S.D.N.Y. 2008) (granting fee application in 2008 and finding that partner rates in 2005 as high as $830 per hour in New York City were within the "norm").[1]

Moreover, a 2011 *National Law Journal* self-reported survey of billing rates at various law firms confirms that New York City firms billed at rates comparable to or higher than those being sought by Defendants here. *See* Southwell Decl. Ex. D (*2011 NLJ Billing Survey*). Specifically, that survey demonstrates that the market for partner hourly rates is between $600 and $1,100. *See id.* Specifically, the partner billing rates last year at DLA Piper, Ceglia's own former counsel, were between $530 and $1,120; at Hughes Hubbard & Reed, partner billing rates ranged from $625 through $990; and at Kaye Scholer, partner billing rates were between $685 and $1,080. *Id*.

Defendants' claimed rates (as discounted in this Fee Application) are $716.25 for senior partner Orin Snyder, $637.50 for partner Thomas J. Dupree, Jr., $618.75 for partner Alexander H. Southwell, $502.50 for senior associate Matthew J. Benjamin, and $337.50 for junior associate Amanda Aycock. These claimed rates are within the range of reasonableness established by judicial decisions and survey data and are therefore reasonable in relation to market rates in New York City.

C. Defendants Paid More Than The Claimed Rates

The Second Circuit has held that district courts must consider "what a reasonable, paying client would be willing to pay" when analyzing the rate contained in a fee application. *Arbor*

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[1] Indeed, this Court's finding that an hourly rate of $530 was reasonable for a partner at a mid-sized national firm located in New Jersey in *Robbins & Myers,* 2010 U.S. Dist. LEXIS 108562, further supports the conclusion that partner hourly rates between $600 and $1,000 for a global firm based in Manhattan are reasonable for the relevant market.

Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 184 (2d Cir. 2010). A reasonable, paying client would of course be willing to pay higher rates to obtain able and experienced counsel when the stakes are high or there is significant media attention on the case. *Id.* ("[T]he district court should, in determining what a reasonable, paying client would be willing to pay, consider factors including, but not limited to, the complexity and difficulty of the case . . . ."). An attorney's customary rate is a significant factor in determining a reasonable rate. *See, e.g., Reiter v. Metropolitan Transp. Authority of New York*, No. 01-CV-2762 (GWG), 2004 U.S. Dist. LEXIS 18167, at *13-14 (S.D.N.Y. 2004) (citing cases). "[A]s a logical matter, the amount actually paid to counsel by paying clients is compelling evidence of a reasonable market rate." *Id*. (citing cases).

In his lawsuit, Ceglia alleges that he owns a substantial share of Facebook based on a purported contract with Mark Zuckerberg and purported emails concerning that contract. Although his claims have now been exposed as fraudulent, they were obviously potentially significant as pled. Given the nature of the claims, as well as the public attention to the case, it is reasonable to pay rates similar to those requested for experienced counsel with the resources of a national firm. Indeed, in this case Defendants have in fact actually paid more than Defendants' claimed rates, Jan. 20 2012 Southwell Decl. ¶ 3, further supporting the reasonableness of those rates.

D. The Requested Rates Should Not Be Discounted

Defendants have already taken care to carefully circumscribe the hours included in their request, and have proactively discounted the claimed hourly rates; any further discounts, therefore, are not warranted. The non-compliance by Plaintiff in this case is particularly egregious — Ceglia outright refused to comply with this Court's order — and is underscored by the declarations of his own former attorneys, Lake and Shaman, that Ceglia directed them to

ignore the Court's orders. This contumacious defiance comes in the context of Ceglia's massive attempted extortion and litigation fraud, as well as his attempted cover-up.

Under these circumstances it is appropriate for the Court to grant Defendants' Fee Application in its entirety. Anything less than a full award cannot be deemed either adequate recompense to Defendants or an appropriate penalty for Ceglia. This is an award of sanctions for clearly reprehensible conduct that goes to the very ability of the judicial process to function in a just manner, and the Court should therefore not further discount the fee request but grant Defendants' narrowly-tailored and reasonable Fee Application in full.

3. Defendants Should Also Be Awarded Their Attorneys' Fees in Preparing the Instant Fee Application

It is well established that the costs, including attorneys' fees and reasonable expenses, associated with the Defendants' preparation of the instant Fee Application are recoverable, as are any additional fees involved in the preparation of a reply brief and any hearing on the application. As this Court held in *Robbins & Myers, Inc.,* a "party awarded attorneys' fees . . . is also entitled to compensation 'for time reasonably spent in preparing and defending' the fee application." 2011 U.S. Dist. LEXIS 45386 at *20-21 (citing *Weyant v. Okst,* 198 F.3d 311, 316 (2d Cir. 1999)); *see also Donovan v. CSEA Local Union 1000,* 784 F.2d 98, 106 (2d Cir. 1986) ("The fee application is a necessary part of the award of attorney's fees. If the original award is warranted, we think that a reasonable amount should be granted for time spent in applying for the award."). Thus, Defendants are entitled to recover attorneys' fees and costs incurred in connection with the preparation and defense of this attorneys' fee award application. Defendants have submitted evidence of these fees through January 18, 2012 with the instant application and respectfully request the opportunity to supplement this Fee Application with any additional Fee

Application-related fees, which can be fully submitted once briefing is concluded and argument (if any) occur.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court order Ceglia to pay Defendants' attorneys' fees in the total amount of $84,196.33, which will be augmented when the instant application is fully briefed and heard, and that such amount be ordered paid within fourteen days of this Court's Order.[2] Given Plaintiff's extensive record of discovery misconduct and recent blizzard of meritless and premature motions — all of which were denied or withdrawn after Defendants were forced to expend significant resources in responding, *see* Doc. Nos. 272 and 284 — the Court should also order that Ceglia may not file any additional non-responsive papers or pleadings in the case and may not otherwise prosecute this action unless and until he satisfies the award in full. Immediate payment of a sanction is the cost a party must bear "for the privilege of continuing to litigate." *Corley*, 142 F.3d at 1057.

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[2] *See, e.g.*, *Sheehy v. Wehlage*, 02CV592A, 2007 U.S. Dist. LEXIS 11722, at *27 (W.D.N.Y. Feb. 20, 2007) (requiring plaintiff to pay defendant's attorneys' fees for discovery abuse within fourteen days); *Ng v. HSBC Mortg. Corp.*, 07-CV-5434 (RRM) (VVP), 2010 U.S. Dist. LEXIS 33486, at *6 (E.D.N.Y. April 5, 2010) (same); *Citizens State Bank v. Dixie County*, 1:10-cv-224-SPM-GRJ, 2011 U.S. Dist. LEXIS 113752, at *9 (N.D. Fla. Oct. 3, 2011) (requiring plaintiff to pay defendant's attorneys' fees for discovery abuse within ten days).

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Respectfully submitted,

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