UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and FACEBOOK, INC.

Defendants.

Civil Action No. : 1:10-cv-00569-RJA

RESPONSE TO DEFENDANT'S APPLICATION FOR ATTORNEY'S FEES DOC. NO. 285

MEMORANDUM

BACKGROUND

The defendants' fee application arose out of a discovery dispute in this breach-of-contract action. As is well known to the court, the underlying dispute involves a two-page contract and a disagreement as to the authenticity of that document, thus bringing Rule 1008 of the Federal Rules of Evidence into play. In addition to the Rule 1008 issue, defendants have raised numerous affirmative defenses, including laches, estoppel, and statute of limitations.

Although the size of the damages sought is unusual, the issues presented by this case are garden-variety breach-of-contract issues that are litigated by hundreds of attorneys within the Western District of New York before this court every year. In the past five years alone, Nixon Peabody, LLP has litigated thirty-seven contract cases in the Western District and Hodgson Russ, LLP has litigated another thirty-

one. See Appendix.

Defendants' fee application is supported by the Southwell declaration. The declaration (and application) is fatally deficient in several critical respects. First, it does not even attempt to show—nor could it—that this action presents unique issues beyond the expertise of lawyers who practice in the Western District at firms such as Hodgson Russ, LLP; Nixon Peabody, LLP; Harter, Secrest & Emery, LLP; Harris Beach, PLLC; and Connors Vilardo, LLP.

The application is also fatally deficient because of the billing rates set forth in the Southwell affidavit. The Southwell affidavit contains the remarkable assumption that hourly rates of $955, $850 and $825 for partners and $670 and $450 for associates "are reasonable and aligned with the market." (Southwell declaration ¶ 3). Defendants then reduced those rates by 25% "to ensure reasonableness," but provide no evidentiary support, nor could they, that the reduced rates of $716, $637 and $618 for partners and $502 and $337 for associates are any more reasonable and "in line with the market."

In addition to making no showing regarding the reasonableness of such stratospheric rates for breach of contract litigations in the Western District of New York, the application is fatally deficient because it is not based on contemporaneous time records. (Southwell Decl. ¶ 16). According to the Southwell affidavit, the time records attached as Exhibit B consist of only those time entries related to the Sanctions Work; services rendered by a particular attorney on a particular day that were not related to the Sanctions Work were edited out of that attorney's Exhibit B

time entry. In order to account for the deletion of the non-Sanction Work services, Southwell purportedly adjusted the total amount of time that that particular attorney had billed on this matter for that day so that the time entries shown on Exhibit B purportedly only reflect services rendered in connection with the Sanctions Work.

That time adjustment is fatally deficient for at least three reasons:

Alexander Southwell admits that he personally made the adjustments for all of the attorneys whose time is contained on Exhibit B. In effect he had to guess how much time those attorneys spent on Sanctions Work services for that day and the allocations are not based on firsthand knowledge.

The court is not provided with the original contemporaneous billing records for any given day showing the total time spent and the total services rendered, so it is utterly impossible to determine to what extent Southwell's guestimates impacted the original contemporaneous billing records.

Most seriously, starting with a total hour number for a given lawyer per day and adjusting it downward based on another person's "guesstimate" (as was done here) is no different than starting at zero for a given day and guesstimating "upwards" to arrive at an amount of time purportedly spent on a given activity—a practice which courts universally reject in fee applications such as this one because the resulting guesstimates are not the required contemporaneous billing records.

II.

ARGUMENT

Defendants' Billing Rates Are Not Reasonable

Defendants billing rates are not reasonable because they apply Southern District of New York rates in the Western District. Although out-of-district rates are sometimes, albeit rarely, granted when a case requires a special expertise, defendants make no showing that this run-of-the-mine contract case falls into the exception. Moreover, defendants argue that their stratospheric rates should apply in this case as "a stiff sanction" against Paul Ceglia. Defs.' Fee. Appl. 15. But defendants fail to mention that a $5,000 punitive fine has already been awarded against him.

New York City Rates Do Not Apply in Buffalo

Defendants should not be awarded Southern District rates when the case is the Western District. The Second Circuit has consistently held time that when awarding attorney's fees to out-of-district counsel courts should use the hourly rates that are used in the district where the reviewing court sits, otherwise known as the forum rule. See *Simmons v. New York City Trans. Auth.*, 575 F.3d 170, 174 (2d Cir. 2009). The forum rule acts a presumption that the party seeking out-of-district rates has to overcome. A very difficult presumption to overcome it is:

To overcome that presumption, a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result. Simmons, 575 F. 3d at 175; accord *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 191 (2d Cir. 2007) ("This presumption may be rebutted—

albeit only in the unusual case—[by] the party wishing the district court to use a higher rate . . . .") (emphasis added); *In re "Agent Orange" Prod. Liability Litig.*, 818 F.2d 226, 232 (2d Cir. 1987) ("We and other circuits have strayed from [the forum] rule only in the rare case where the "special expertise" of non-local counsel was essential to the case, it was clearly shown that local counsel was unwilling to take the case, or other special circumstances existed.") (emphasis added).

No Exception to the Forum Rule Applies Here

To establish an exception to the forum rule more than conclusory allegations about Gibson, Dunn & Crutcher, LLP ("Gibson Dunn") and its purported expertise are needed. See *Simmons*, 575 F.3d 170 at 176 ("[N]or can a litigant overcome the presumption by relying on the prestige or 'brand name' of her selected counsel[, which] do not necessarily translate into better results."); accord *Disabled Patriots of America v. Niagara Hotel Grp.*, 688 F. Supp. 2d 216, 224 (W.D.N.Y. 2010) ("[V]ague assertions fail to establish an exception to the forum rule . . . ."). Rather, "[t]he party seeking the award must make a particularized showing, not only that the selection of out-of-district counsel was predicated on experience-based objective factors, but also of the likelihood that the use of in-district counsel would produce a substantially inferior result." *Simmons*, 575 F.3d 170 at 176 (emphasis added). Furthermore, a particularized showing can be made "where litigants can 'show[] . . . that the case required special expertise beyond the competence of [forum district] law firms.'" *Simmons*, 575 F.3d 170 at 175 (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 369 F.3d 91, 96–97 (2d Cir. 2004)).

Exceptions to the forum rule are predicated on a firm's special expertise. So courts grant out-of-district fees when the case requires specialized knowledge that cannot be found in the district. In *Davis v. Eastman Kodak Co.*, No. 04-6098, slip op. (W.D.N.Y. 2010), this Court had occasion to visit the application of the forum rule. The case involved a class of over three-thousand former and current African-American Kodak employees, who alleged systemic discrimination in pay and promotions. The President of Employees Concerned for Justice contacted a Washington, D.C. firm, the Chavers Law Firm, P.C. ("Chavers"), to represent the class; she had not only searched within the Western District but across the United States and could not find a firm to take the case. Once Chavers took the case, it became quickly apparent that Chavers did not have staff, resources, or experience to handle it. Chavers contacted Berger & Montague, P.C., Philadelphia firm. Although Berger & Monatgue, P.C. is a 60-attorney firm and has handled major cases like this before, it partnered with Garwin, Gerstein & Fisher, LLP, a New York City firm specializing in complex class-action cases, to share the costs and risks. These firms retained local counsel, Blitman & King, LLP. After the court approved the class settlement, the issue of attorney's fees arose. This Court held that for out-of-district counsel to be entitled to out-of-district fees, counsel needs to "establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result." Id. at 10 (quoting Simmons, 575 F.3d at 174). This Court held that class counsel had met this standard because class counsel had "submitted affidavits from

employment discrimination lawyers within the Western District explaining why the magnitude, complexity, and risks of this litigation made it likely that use of in-district counsel would produce a substantially inferior result." Pg 15. This rebutted the presumption, and this Court accordingly held that "at the time plaintiffs were seeking counsel there were no lawyers or law firms within the Western District possessing requisite expertise and resources who could have prosecuted a nationwide employment discrimination case as complex and demanding as this." Id. at 15.

This is a breach-of-contract case. Defendants have not made "a particularized showing" that their expertise is not in the Western District. Defendants spend a few sentences on this topic and note that their teams is made up of "experienced litigators . . . with backgrounds in criminal fraud." Defs.' Fee Appl. 15. This matter does not involve any allegations of criminal fraud in the complaint nor in Defendants' answer. In addition, such conclusory language is what the Second Circuit specifically said was not a particularized showing. See *Simmons*, 575 F.3d 170 at 176 ("[N]or can a litigant overcome the presumption by relying on the prestige or 'brand name' of her selected counsel[, which] do not necessarily translate into better results."). Moreover, defendants make no showing that a firm in the Western District could not handle this case. In fact, no court has held that a firm capable of handling a mutli-million-dollar contract dispute case is incapable of handling a contract dispute if the amount in dispute is in the billions. Within this district, there are many firms that routinely handle large contract

dispute cases. For example, in the last five years, the 700-attorney firm Nixon Peabody, LLP has handled 37 contract disputes in the Western District alone. See App.

The Forum Rule Should Apply in This Rule 37 Sanction

Contrary to defendants' assertions, the forum rule should apply here because the punitive aspect of the Court's sanctions was largely satisfied by the fine it imposed on Paul Ceglia. Defendants cite to this Court's decisions in *Robbins & Myers, Inc. v. J.M. Huber Corp*., 2010 U.S. Dist. LEXIS 1085620 (W.D.N.Y.); 2011 U.S. Dist. LEXIS 45386 (W.D.N.Y.). In these decisions, this Court did not impose a fine. Moreover, this Court did not apply the forum rule because it intended the attorney's fees to have the punitive effect. On this point, this Court wrote, "attorney's fees are awarded as a sanction are not intended only as compensation of reimbursement for legal services, but also serve as a deterrent to abusive litigation practices . . . ." Id. 2010 U.S. Dist. LEXIS 1085620, at *9. Here, however, a punitive fine of $5,000 dollars has already been imposed. When a fine has been imposed, the attorney's fees cease being punitive and become compensatory, bringing them back within the purpose of the forum rule. See *Miltope Corp. v. Hartford Casualty Ins. Co*., 163 F.R.D. 191, 195 (S.D.N.Y 1995) (quoting *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 352 n.11 (D. Conn. 1981) (Cabranes, J.)) ("The typical discovery sanction under Rule 37 is an assessment of costs and fees payable to the victimized party. The purpose of such sanction is largely compensatory. In contrast, a fine imposed upon an offending attorney [or party] is payable to the Court. Its

purpose is essentially punitive and deterrent.").

Furthermore every district court in New York has used the forum rule in determining attorney's fees pursuant to Rule 37. See, e.g., *Carovski v. Jordan*, 2008 WL 3540372 (W.D.N.Y.); *Disabled Patriots of America, Inc. v. Niagra Grp. Hotels*, 2008 WL 1867968 (W.D.N.Y.); *Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 2011 WL 1322520 (E.D.N.Y.); *Morin v. Tormey*, 2010 WL 2771826 (N.D.N.Y.); *Woodley v. Bryant*, 2008 WL 1968736 (S.D.N.Y.); *Monaghan v. SZS 22 Assocs. L.P.*,, 154 F.R.D. 78, 82–85 (S.D.N.Y. 1994).

Defendants' Billing Rates Themselves Are Unreasonably High

Defendants discounted rates are still nearly three times the highest rate that this Court has awarded to out-of-district attorneys. In *Ghadersohi v. Health Research, Inc.*, 2011 U.S. Dist. LEXIS 107285 (W.D.N.Y.), a "firm partner with twenty years of legal experience" was awarded an hourly rate of $250. Id. at *14. In *Disabled Patriots of America, Inc. v. Niagra Grp. Hotels*, 688 F. Supp 2d. 216 (W.D.N.Y. 2010), an out-of-district attorney who has been practicing since 1974 sought $425 as his hourly rate. Id. at 224. This Court held that requested fee "d[id] not come close to the fees" otherwise awarded in this district. Id. at 225. This Court instead noted that it "is unaware of any decision issued . . . in any substantive area in which fees of more than $240 per hour were awarded." Id. This Court then awarded the attorney $240 as his hourly fee. Here, partners at Gibson Dunn are asking for as high as $716 as an hourly fee.

Defendants' Did Not Adequately Record Their Time

To be awarded attorney's fees in the Second Circuit, the party must keep contemporaneous billing records. See *N.Y. State. Ass's for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983). In Carey, attorney's fees were sought. Although "they submitted substantial documentation, contemporaneous time records were included for only a small fraction of the total hours claimed." Id. at 1141. Rather, the attorneys used contemporaneous records to help them reconstruct the hours they had spent. The Second Circuit held that this was not enough: "contemporaneous time records are a prerequisite for attorney's fees in this Circuit." Id. at 1147.

In subsequent decisions, the Second Circuit has repeatedly emphasized the strictness of the rule, "from which attorneys may deviate only in the rarest of cases." *Scott v. City of New York*, 626 F.3d 130, 133 (2d Cir. 2010). In *Scott*, the Second Circuit held that exceptions are so rare that even "a district court's 'personal observation' of an attorney's work is not by itself a sufficient basis for permitting a deviation and awarding fees in the absence of contemporaneous records." 643 F.3d 56, 57 (2d Cir. 2011). Likewise, courts have found that "block-billing, the practice of aggregating multiple tasks into one billing entry" merits reduction of legal fees. *L.V. v. New York City Dep't of Educ.*, 700 F. Supp. 510, 526 (S.D.N.Y. 2010) (internal quotations omitted). This is because block-billing makes it "exceedingly difficult for courts to assess the reasonableness of the hours billed." *Wise v. Kelly*, 620 F. Supp. 2d 435, 450 (S.D.N.Y. 2008) (internal quotation omitted); accord *Aiello v. Town of Brookhaven*, 2005 U.S. Dist. LEXIS 11462, at *10–11 (E.D.N.Y.) ("[B]lock-billing

'renders it difficult to determine whether, and/or the extent to which, the work done by . . . attorneys is duplicative or unnecessary . . . .'") (citation omitted). Accordingly, courts reduce fee awards for block-billing. See, e.g., *Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 2011 WL 1322520, at *6 (E.D.N.Y.) (A 25% deduction for block-billing); *L.V.*, 700 F. Supp. at 526 (A 12% cut for block-billing); *Aiello*, 2005 U.S. Dist. LEXIS 11462, at *12 (A 15% reduction for block-billing).

Here, there are both after-the-fact approximations of time and block-billing. Records were kept, the entries of which contained both work related to sanctions and work note related to sanctions. Southwell Decl. 5. When defendants were preparing this fee application, Mr. Southwell went back to those records and "allocated" some time to the non-sanction-related work and allocated the remaining time to sanction-related work, for which defendants are seeking attorney's fees. Id. This allocation was merely "based . . . upon [Mr. Southwell's] personal experience with the case." Id. This after-the-fact reconstruction is exactly the type of conduct that the Second Circuit prohibited in *Carey*.

Defendant's Fee Application Involves work on three court filings

"Defendants' application includes legal services rendered in connection with [1] Defendants' Accelerated Motion to Compel [Doc. No. 128], [2] Plaintiff's Motion to Set a Delayed Briefing Schedule [Doc. No. 134], and the [3] Order to Show Cause [Doc. No. 152]." Doc. No. 285 at 13.

These three items total 7 pages of substantive facts and law in Doc. No. 128, 13 total pages (exhibits, affidavits included) contained in Doc. No. 134 and 1½ pages

comprising the court's order, Doc. No. 152. That is a grand total of 22 pages, rounded up. No doubt, some phone calls and discussions accompanied Defendants preparation of their 7 page motion to compel and their review of plaintiff's 13 pages of response. Defendants seek more than $84,000 in attorney's fees in connection with those 20 pages of filed pleadings.

Defendants are not entitled to an order prohibiting Ceglia from filing pleadings until any attorney fee sanction is satisfied

Defendant's urge this court to deny Mr. Ceglia's right to continue litigating this matter until any attorney fee award is satisfied. Doc. No. 285 at 6. In support of this request, they cite *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1057 (7th Cir. 1998).

The controversy in *Corley* related to the payment of a court-imposed $200 sanction, not an attorney fee award. The court in *Corley* regarded the payment of this sanction as a "cost the [the sanctioned party must bear] for the privilege of continuing to litigate." Id. Ceglia timely paid the court's $5,000 sanction in this matter. Therefore, reference to *Corley* relating to the payment of an attorney fee award is misplaced. There is no 2nd Circuit case law, nor any federal case law that the undersigned could locate holding that a party ordered to pay attorney's fees related to a discovery sanction is prohibited from further litigation until that attorney fee award is paid. The absence of such authority seems logical given that mid-litigation attorney fee awards could well be mooted by later resolution of civil matters via means other than a verdict adverse to the party due to pay the award.

A verdict in this matter against Defendants will result in a judgment that would undoubtedly consider the allocation of any mid-discovery attorney fee award.

CONCLUSION

For the foregoing reasons, Mr. Ceglia respectfully requests this court deny Defendant's application for attorney's fees and grant them an amount, based upon Buffalo, New York area hourly rates, consistent with the work required to deal with less than 25 pages spread across three pleadings.

Respectfully submitted,

/s/Dean Boland

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APPENDIX

Breach of Contract Actions in

U.S.D.C. Western District of New York

By Law Firm

(Collected via PACER)

Firm	**2011**	**2010**	**2009**	**2008**	**2007**	**Total**
Nixon Peabody, LLP	6	4	6	12	9	37
Hodgson Russ, LLP	1	11	9	6	4	31
Connors Vilardo, LLP	0	1	2	0	1	4
Harter, Secrest & Emery, LLP	4	2	4	8	3	21
Harris Beach, PLLC	4	8	5	3	7	27