UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHRISTIAN S. STRONG, *et al.*,	:	Case No. 1:03-cv-383
Plaintiffs,	:	Judge Timothy S. Black
vs.	:	
U-HAUL CO. OF MASSACHUSETTS AND OHIO, INC., *et al.*,	:	
Defendants.	:	

DECISION AND ENTRY IMPOSING SANCTIONS AGAINST ATTORNEYS FOR DEFENDANT, U-HAUL CO. OF MASSACHUSETTS AND OHIO, INC.

This matter is presently before the Court following the Opinion and Order of United States District Judge Michael H. Watson (Doc. 533), which adopted the Report and Recommendations of United States Magistrate Judge Timothy S. Hogan (Doc. 514). These Orders determined that attorneys for Defendant U-Haul Co. of Massachusetts and Ohio, Inc. ("Defense Attorneys") engaged in two instances of sanctionable conduct: (1) in provoking a mistrial after eleven days of trial by the pursuit of a defense unsupported by fact; and (2) in misrepresenting information to the Court in seeking the withdrawal of counsel. (Docs. 514, 533). The remaining issue before the Court is the amount of excess attorney fees and expenses to be imposed as sanctions for the Defense Attorneys' conduct.

To assist the Court in making this determination, the Court ordered Plaintiffs' Attorneys to submit itemized affidavits setting forth fees and expenses related to the following:

1. Attorneys' fees and expenses incurred for the eleven days of trial that resulted in a mistrial;

2. Attorneys' fees and expenses incurred in responding to Defendants' December 14, 2006 motions to withdraw (Doc. 379) and for leave to appear pro hac vice (Docs. 280 and 381);

3. Attorneys' fees and expenses incurred for preparing for and attending the portion of the December 21, 2006 Telephone Conference regarding Defendants' motions to withdraw and for leave to appear pro hac vice;

4. Attorneys' fees and expenses incurred in preparing the motion(s) for sanctions and participating in the August 24, 2007 hearing on the motion for sanctions.

(Doc. 533). Plaintiffs' Attorneys submitted the requested affidavits. (Docs. 549, 550). The Defense Attorneys filed objections to the affidavit submitted by Attorney Posey. (Doc. 550). Thereafter, this case was assigned to this Judge. (Doc. 547).

Following reassignment of this case, the Defense Attorneys sought leave to file supplemental memoranda asserting that the Sixth Circuit recently "clarified the standards for the imposition of sanctions under 28 U.S.C. § 1927 and the Court's inherent powers." (Doc. 533). The Court granted leave for the parties to file supplemental memoranda. (Doc. 554). The Defense Attorneys and Plaintiffs both submitted such memoranda. (Docs. 555, 557).

In their Supplemental Memorandum (Doc. 555), the Defense Attorneys contend that the Court should revisit Judge Watson's Order awarding sanctions. (Doc. 533). The Defense Attorneys argue that the Order improperly awards sanctions against the named

Defendant entities and the law firms representing them. (Doc. 555). The Defense Attorneys contend that sanctions imposed pursuant to 28 U.S.C. § 1927 must be imposed upon individual attorneys. (*Id.*) Further, the Defense Attorneys argue that the Court failed to find the requisite "bad faith" necessary to impose sanctions pursuant to the Court's inherent authority. (Doc. 555).

Beyond these objections to Judge Watson's Order, the Defense Attorneys also contend that the amounts of fees and expenses presented by Plaintiffs are excessive and outside the scope of the sanctions award. (*Id.*) Further, the Defense Attorneys argue that even if the submitted fee amounts are properly within the scope of the Court's Order, the amount must be reduced in order to effectuate the purpose of sanctions, *i.e.*, deterrence, not restitution. (*Id.*)

The Court has conducted a *de novo* review of the issues regarding sanctions and the authorities cited in the memoranda. Insofar as the Defense Attorneys may request this Court to revisit the conclusions that the Defense Attorneys engaged in sanctionable conduct, the Court finds it inappropriate to disturb Judge Watson's conclusions in that regard. Because the sanctionable conduct occurred before Judge Watson, Judge Watson is in the best position to determine whether such conduct is sanctionable.[1] Thus, the main focus of this Order is simply the amount of the sanctions to be imposed, upon whom such sanctions are imposed, and clarification of Judge Watson's Order where necessary.

---

[1] Indeed, as Judge Watson himself observed: "review [of] the cold, dry record" may not fully convey "the level of brazenness and arrogance on the part [of] Defendants' counsel in making the aforementioned misrepresentations to the Court." (Doc. 533). As Judge Watson further observed: the defense "parse[d] the Court's words in its previous orders and to say that they don't mean what was clearly intended at the time, I'll tell you, I have never run into a company like this. This is amazing to me." (Doc. 501-36).

Beyond the aforementioned issues, the parties also raise some concern over the transfer of this matter from Judge Watson to this Judge, analogizing the transfer to those situations contemplated by Federal Rule of Civil Procedure 63.[2] Here, the issues addressed by this Order involve no testimony from live witnesses or credibility concerns. Instead, a determination of the remaining issues before the Court involves only a review of the affidavits submitted by Plaintiffs' Attorneys, the written arguments of counsel, and a review of the record. A review of the affidavits, the written arguments of counsel, and the record is more than sufficient to determine this matter.

Further, as noted by the Defense Attorneys, "the ultimate goal of any sanction is deterrence and that the sanction awarded should be the minimum necessary to achieve deterrence." *Red Carpet Studios Division of Source Advantage, Ltd. v. Sater*, No. 1:03-cv-51, 2003 U.S. Dist. LEXIS 29069, at *5 (S.D. Ohio Oct. 21, 2004). Because the ultimate goal of imposing an appropriate amount of sanctions is the more detached goal of deterrence rather than case-specific restitution, the Court finds that the issues before it can be readily determined by this Judge without any prejudice to the parties. Therefore, insofar as Fed. R. Civ. P. 63 applies to this matter, if at all, the undersigned certifies "familiarity with the record" and the absence of prejudice to the parties.

---

[2] Fed. R. Civ. P. 63 concerns the inability of a judge to proceed in a particular proceeding, and provides that "[i]f a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness."(emphasis supplied).

I. STANDARDS FOR DETERMINING SANCTIONS AMOUNT UNDER 28 U.S.C. § 1927

Pursuant to 28 U.S.C. § 1927, an award of sanctions may be imposed to the extent of "excess costs, expenses, and attorneys' fees reasonably incurred because of . . . [sanctionable] conduct." In awarding sanctions and determining reasonable fees and expenses, courts typically "use the 'lodestar' approach" which "is established by multiplying a reasonable hourly rate by the number of hours expended by attorneys on the case." *Studio A Entm't, Inc. v. Action DVD*, 658 F. Supp. 2d 851, 856-857 (N.D. Ohio 2009) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). Here, there is no objection regarding the reasonableness of the rate billed by Plaintiffs' Attorneys. The Defense Attorneys do object to the reasonableness of the hours expended by Attorney Posey and others with his law firm.

The Defense Attorneys also present objections challenging the relatedness of the time billed and expenses incurred to the sanctionable conduct. In awarding sanctions pursuant to § 1927, the amount of monetary sanctions imposed "must be reasonably related to the misconduct." *Hrometz v. Local 550 Int'l Ass'n of Bridge, Constr. and Ornamental Iron Workers*, 135 Fed. Appx. 787, 792 (6th Cir. 2005). However, "[i]n isolating the costs and fees a party has incurred because of conduct that violated § 1927, 'precision is not required.'" *Tenkku v. Normandy Bank*, 348 F.3d 737, 744 (6th Cir. 2003) (citing *Lee v. First Lenders Ins. Serv., Inc.*, 236 F.3d 443, 446 (6th Cir. 2001) (stating that "a sanctioning court must make an effort to isolate the additional costs and

fees incurred by reason of conduct that violated § 1927. But the task is inherently difficult, and precision is not required").

Further, the Defense Attorneys argue that descriptions of work performed by Plaintiffs' Attorneys and expenses incurred are vague and/or block-billed, and, as a result, the Court cannot reasonably determine their relatedness to the sanctionable conduct. Sanctioning courts can strike vague entries and can also "reduce the proposed fee by a reasonable percentage." *Tillman v. New Line Cinema Corp.*, No. 05 C 910, 2008 U.S. Dist. LEXIS 105200, at *28 (N.D. Ill. Dec. 31, 2008). However, billing entries need not be "explicitly detailed" where the court can determine the relatedness of the time expended simply by viewing the time entries "in the context of the billing statement as a whole and in conjunction with the timeline of the litigation." *Imwalle v. Reliance Med. Products, Inc.*, 515 F.3d 531, 554 (6th Cir. 2008).

Finally, as pointed out by the Defense Attorneys, the Court must remain "cognizant that the ultimate goal of any sanction is deterrence and that the sanction awarded should be the minimum necessary to achieve deterrence." *Red Carpet Studios*, 2003 U.S. Dist. LEXIS 29069, at *5 (S.D. Ohio Oct. 21, 2004). Sanctions are "not intended to make the plaintiff whole[,]" and to that end, a sanctioning court "is not required to award the full amount of excess fees and costs." *Id.*

II. SANCTIONS MUST BE IMPOSED AGAINST ATTORNEYS, NOT PARTIES OR LAW FIRMS

In their Supplemental Memorandum (Doc. 555), the Defense Attorneys argue that Judge Watson's Sanctions Order (Doc. 533) improperly awards sanctions against

Defendants and the law firms that represented them. Recently, the Sixth Circuit confirmed that "28 U.S.C. § 1927 does not authorize the imposition of sanctions on law firms." *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 751 (6th Cir. 2010). Instead, such sanctions must be imposed upon an "attorney or other person admitted to conduct cases" in the Court. *Id.* Accordingly, the Court finds that the Sanctions Order (Doc. 533) shall be clarified so that sanctions are appropriately imposed against the individual attorneys who engaged in the sanctionable conduct.

The Court believes that the requirements of due process have been more than adequately satisfied prior to the imposition of sanctions against the individual defense attorneys. *See Parrott v. Corley*, 266 Fed.Appx. 412, 415 (6th Cir. 2008) (stating that "before the imposition of sanctions, the attorney must be given notice and an opportunity to be heard") (citing *Cook v. Am. Steamship Co.*, 134 F.3d 771, 775 (6th Cir.1998); *Roadway Express Inc. v. Piper*, 447 U.S. 752, 767 (1980)). The Defense Attorneys have been given proper notice of the potential imposition of sanctions against them individually. As some evidence of notice, the Court references Plaintiffs' Memorandum of Sanctions (Doc. 489), wherein Plaintiff specifically names Attorneys Eagen, Jones, and Adams as the attorneys involved in the pursuing of the distracted driver defense.

Further, the individual Defense Attorneys have had more than sufficient notice of the alleged sanctionable conduct and the authority upon which sanctions may be imposed, and they have been given ample opportunity to be heard on the matter. Notice and opportunity to be heard is shown by the numerous briefs submitted to the Court solely on

the issue of sanctions and the in-person hearing before the Magistrate Judge held in August 2007. (Doc. 509). The combined briefs on the issues of sanctions contain hundreds of pages of written argument, as well as hundreds of pages of exhibits in support. Thus, the requirements of due process have been met, and further hearing and/or oral argument on the matter is not required and is unnecessary given the record of this case and the voluminous briefing of the issues by the parties.

III. NECESSITY OF BAD FAITH CONDUCT TO SUPPORT IMPOSITION OF SANCTIONS PURSUANT TO THE COURT'S INHERENT POWER

The Defense Attorneys contend that the Sanctions Order improperly imposes sanctions pursuant to the Court's inherent power without finding bad faith conduct on the part of the Defense Attorneys. In support of their arguments, the Defense Attorneys again cite the recent Sixth Circuit case of *BDT Products*, *supra*, which clarified case law within the Circuit "on when a district court may assess attorney fees under its inherent powers[.]" *Id.* at 751-752.

In *BDT Products*, the Sixth Circuit reiterated the proposition that, in order to impose sanctions pursuant to the court's inherent power, there must be "a finding of bad faith or of conduct 'tantamount to bad faith.'" *Id.* (citing *Youn v. Track, Inc.*, 324 F.3d 409, 420 (6th Cir. 2003) (quoting *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 517 (6th Cir. 2002)); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767 (1980)). When imposing sanctions pursuant to a court's inherent power, a court must first find: "(1) that 'the claims advanced were meritless, (2) that counsel knew or should have

known this, and (3) that the motive for filing the suit was for an improper purpose such as harassment.'" *Id.* (citing *Big Yank Corp. v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 313 (6th Cir. 1997) (quoting *Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1375 (6th Cir. 1987))).

To satisfy the "improper purpose" prong, "the court must find something more than that a party knowingly pursued a meritless claim or action at any stage of the proceedings." *Id.* at 753. This "something more" requirement can be satisfied in a myriad of ways, including by "[h]arassing the opposing party, delaying or disrupting litigation, hampering the enforcement of a court order, or making improper use of the courts[.]" *Id.* at 754.

Here, it must first be noted that the Magistrate Judge recommended that sanctions for pursuit of the unsupported distracted driver defense be imposed pursuant to § 1927, not the Court's inherent authority. (Doc. 514). In adopting the Report and Recommendations of the Magistrate Judge in its entirety, however, Judge Watson stated that sanctions for pursuit of the unsupported distracted driver defense be imposed "pursuant to 28 U.S.C. § 1927 and this Court's inherent authority[.]" (Doc. 533).

Nevertheless, Judge Watson's analysis leading to that conclusion was grounded in the language of § 1927 and case law setting forth the standards for applying § 1927, not the Court's inherent authority. (*Id.*) (citing specifically the language in § 1927 and *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987), for quotations setting forth the "standard applicable to section 1927 determinations"). Further, the scope of the sanctions as

determined by Judge Watson for such conduct was only to the extent allowed by § 1927, *i.e.*, excess fees and expenses. In other words, Judge Watson's Order imposed no additional sanctions beyond the excess fees and expenses arising from the sanctionable conduct. (Doc. 533). Accordingly, the sanctions imposed for pursuit of the unsupported distracted driver defense is imposed only to the extent set forth in § 1927.

With regard to the imposition of sanctions arising from misrepresentations to the Court concerning the withdrawal of Fulbright & Jaworski, the Magistrate Judge did recommend that sanctions be imposed pursuant to § 1927 and the Court's inherent power. (Doc. 514). In determining that sanctions were proper pursuant to the Court's inherent power, the Magistrate Judge concluded that "defendants' attorneys' intentional misrepresentations to the Court amount to bad faith and warrant sanctions under the Court's inherent power." (*Id.*)

The Defense Attorneys also seek to apply *BDT Products* to their conduct in making intentional misrepresentations made the Court. However, the Court finds that case distinguishable from this case because the Sixth Circuit's discussion regarding a court's inherent power in *BDT Products* was limited to the pursuit of a meritless claim, not to intentional misrepresentations made directly to the court. *Id.* at 753-754. The Court does not believe that, where attorneys make intentional misrepresentations to the court, "something more" is necessary to find bad-faith.

Regardless, in imposing sanctions for making misrepresentations to the Court, Judge Watson awarded sanctions to the extent of excess fees and expenses associated

with responding to the offending motions and attending the hearing regarding the offending motions. Such a sanction is an appropriate sanction under § 1927 (and the Court's inherent powers). *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991) (stating that the 'less severe sanction' of an assessment of attorney's fees is undoubtedly within a court's inherent power"). Because the sanction actually being imposed here is wholly justified under § 1927 in and of itself, the Court's further finding that such conduct is also sanctionable pursuant to the Court's inherent power has no effect on the amount of the sanction.

In other words, while the Defense Counsels' conduct in making intentional misrepresentations to the Court can properly be sanctioned pursuant to the Court's inherent powers, the actual imposition of sanctions is hereby limited to those sanctions properly imposed pursuant to § 1927, *i.e.*, excess fees and expenses attributable to the sanctionable conduct. No additional monetary sanctions are imposed pursuant to the Court's inherent authority.

The foregoing is in accordance with Supreme Court and Sixth Circuit precedent stating that, generally, "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules [or applicable statutes], the court ordinarily should rely on the Rules [or statutes] rather than the inherent power." *Id.* at 50; *see also First Bank of Marietta,* 307 F.3d at 516-517 (citing the proposition of law that "[g]enerally, a court's inherent power should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists").

IV. AMOUNT OF SANCTIONS AWARDED FOR PURSUIT OF THE FACTUALLY UNSUPPORTED DISTRACTED DRIVER DEFENSE

The Defense Attorneys contend that Attorney Posey's affidavit (Doc. 550) presents fees beyond the scope of sanctions awarded by Judge Watson in the Sanctions Order. (Doc. 533). The Defense Attorneys contend that sanctions for pursuit of the factually unsupported distracted driver defense are limited solely to fees and expenses incurred during the eleven day trial, and that fees and expenses incurred in preparation for trial are outside the scope of the Sanctions Order.

In setting forth the extent of sanctions to be imposed for such conduct, the Court ordered "Defendants to pay all of Plaintiffs' attorneys fees and costs *associated with* the eleven day proceeding that resulted in a mistrial." (Doc. 533; emphasis supplied). Such language is consistent with the Court's earlier Order (Doc. 265), which was vacated at the request of the Defense Attorneys to avoid an alleged conflict of interest between them and Defendant. That earlier sanctions Order required "Defendants to pay all of Plaintiffs' attorney fees and costs leading up to trial, as well as those incurred for the duration of trial." (*Id.*)

The record is complicated, however, by the more restrictive language at the end of the Sanctions Order (Doc. 533), wherein Judge Watson directed Plaintiffs to file itemized affidavits showing "Attorneys' fees and expenses incurred for the eleven days of trial that resulted in a mistrial[.]" (Doc. 533). The Defense Attorneys seize upon this phrase in isolation in arguing that the Court intended to limit sanctions only to those excess fees

and expenses incurred during the actual eleven days of trial, and not for any trial preparation. (Doc. 539).

This limited reading, however, is inconsistent with the language of Judge Watson's earlier order awarding sanctions (Doc. 265), Judge Hogan's Report and Recommendation (Doc. 514), and the substantive provisions of Judge Watson's Sanctions Order now at issue (Doc. 533) (ordering the payment "of all Plaintiffs' attorneys fees and costs *associated with* the eleven day proceeding that resulted in a mistrial") (emphasis supplied). Therefore, the imposition of sanctions is not limited to excess fees and costs incurred only during the actual eleven days of trial.

Accordingly, the Court finds that the sanctions imposed for pursuit of the factually unsupported distracted driver defense include attorney fees and expenses "associated with the eleven day proceeding that resulted in a mistrial." (Doc. 533). Within the scope of that sanction are fees and expenses incurred in preparation for and incurred during the first trial that resulted in a mistrial. These efforts were wasted as a result of the Defense Attorneys' sanctionable conduct in pursuing the unsupported distracted driver defense.

V. SANCTIONS FOR PURSUIT OF FACTUALLY UNSUPPORTED DISTRACTED DRIVER DEFENSE

Attorney Posey's affidavit itemizes attorney fees and expenses in the amount of $405,425.77 ($268,986.69 in fees plus $136,439.08 in expenses) that he represents are related to the mistrial. (Doc. 550). Attorney Posey represents that such figure includes fees and expenses incurred outside the actual eleven day trial, but only to the extent that

such efforts and/or expense were "lost or necessarily duplicated due to the need for retrial." (*Id.*) Further, Attorney Posey includes fees and expenses incurred subsequent to the mistrial to the extent of fees and expenses incurred as "necessitated by the need for the retrial." (*Id.*) Nevertheless, the Defense Attorneys present numerous objections to the fees and expenses submitted by Attorney Posey.

Attorney Shirooni submitted an affidavit itemizing attorney fees and expenses in the amount of $41,977 associated with the mistrial. (Doc. 549). The Defense Attorneys assert no objection to Ms. Shirooni's affidavit.

A. Whether Fees Itemized Fall Within the Scope of the Sanctions Order

The Defense Attorneys' first objection argues that many of the fees and expenses itemized in Exhibit A to Attorney Posey's affidavit (Doc. 550) are outside the scope of the Court's Order. Specifically, the Defense Attorneys contend that Exhibit A includes fees and expenses dated before the actual eleven days of trial. Any objection to these entries simply because they fall outside of the actual eleven days of the first trial is without merit. A review of the entries predating the trial reveals billing entries beginning approximately one month before trial and describe work typically performed in preparation for trial. Thus, such fees fall within the scope of the Order.

Next, the Court considers the reasonableness of the time billed before trial. From October 6, 2005 until the start of trial on November 14, 2005, Exhibit A documents over 523 hours billed in preparation for trial, totaling fees in the amount of $84,226.07. This work was performed by four attorneys, three paralegals and three "staff." A closer look at

the entries reveals some duplication of work. Specifically, between October 6, 2005 and through October 21, 2005, three separate attorneys billed for preparation of jury instructions. Those entries total 24.4 hours, though several of the entries are block-billed entries vaguely describing work aside from the preparation of jury instructions. Regardless, because there is a likelihood of duplicative efforts, these entries are reduced by 50%.

Aside from those duplicative entries, there are no less than 29 vague entries involving significant blocks of time described only as "various trial preparation matters," or "trial preparation." The Court has little doubt that these entries are related to preparation for trial, and are, therefore, within the scope of the Court's Order. However, the vagueness of the entries deprives the Court of the opportunity to determine properly whether the time expended was reasonable for the task(s) performed, and further deprives the Court of the opportunity to determine properly whether, perhaps, the same tasks were being performed by multiple persons. Accordingly, for purposes of imposing sanctions, the Court reduces these entries by 50%.

The billing entries also include time spent following the eleven day mistrial. Attorney Posey characterizes this work as post-trial clean-up involving the reorganization of files and materials. Attorney Posey represents that such work would not have occurred but for the mistrial. These fees total $5,430. The Court finds that these expenses, while perhaps incurred solely as a result of the mistrial, are outside the scope of the Court's Order, and they are excluded.

B. Whether Certain Expense Descriptions Are Too Vague

Next, the Defense Attorneys object to a number of expenses for photocopying, telephone, messenger services, and legal research contained in Plaintiff's Exhibit A (Doc. 550), arguing that they are vague descriptions. However, a review of the expenses shows that they were incurred in the days and weeks leading up to the first trial and the days upon which trial actually took place. Further, the expense entries correspond with billing entries on or about the same dates and fall with the time frame of typical trial preparation. *See Imwalle*, 515 F.3d at 554 (stating that "explicitly detailed [billing] descriptions are not required" where a determination of relatedness can be seen "in the context of the billing statement as a whole and in conjunction with the timeline of the litigation").

Only two of the allegedly vague expense entries occurred after the time of the first trial, on December 13, 2005, and those two expenses total $150. These two expense entries are excluded because they are vague and do not correspond with billing entries around that date. Further, the Court excludes the $752.15 itemized for food services as outside the scope of the Order.

C. Whether Block-Billed Expense Entries Must Be Reduced

The Defense Attorneys also argue that several of the expense entries are vague block-billed entries that must be reduced by at least 50%. Among these allegedly block-billed expenses are expert witness fees for trial testimony, trial preparation, and travel expenses. Along with the expense descriptions, Plaintiff provides invoices evidencing these expenses.

A review of the expense descriptions and the invoices show some work associated with trial. Attorney Posey represents undertaking a good-faith effort to adjust the expense "to reflect the time spent on the items covered by the Court's Order" (Docs. 550, 544), and the expense total actually presented, in many cases, is lower than the total amount of the invoice. Accordingly, based upon a review of the expenses billed, the invoices provided, and Attorney Posey's affidavit asserting a good-faith effort to accurately itemize expenses within the Court's Sanctions Order, the Court finds that these expenses reflect work associated with the mistrial. Thus, the Defense Attorneys' objections in this regard are not well-taken.

D. Whether Certain Exhibits Were Reusable

Finally, the Defense Attorneys argue that some of the expenses in Exhibit A include substantial expenses for trial exhibits that could have been reused in the second trial. They argue, therefore, that these substantial expenses should not be included.

These claimed expenses for exhibits total approximately $53,636.39. Plaintiffs contend that the expenses for exhibits included in response to the Sanctions Order (Doc. 533) "could not be reused, as they had been marked on or otherwise altered during the first trial." (Doc. 544). Plaintiffs contend that the expenses for trial exhibits submitted along with Attorney Posey's affidavit were "expenses associated with only those exhibits [that could not be reused], not all of the exhibits prepared for trial." (*Id.*)

Absent any argument from the Defense Attorneys specifically rebutting the contention that these specific exhibits could not be reused in the second trial, their objections in this regard are not well-taken.

E. Conclusion Regarding Objections to Fees and Expenses Itemized Associated with the Mistrial

Accordingly, the Court finds that Attorney Posey has properly presented an itemization of fees and expenses associated with the eleven days of the mistrial in the amount of $372,673.62 that are within the scope of the Court's Order. Attorney Shirooni has properly submitted an affidavit itemizing attorney fees and expenses associated with the eleven days of the mistrial in the amount of $41,977. Accordingly, the total excess fees and expenses attributable to the sanctionable conduct associated with the mistrial is $414,650.62.

The Court will address below the Defense Attorneys' arguments regarding a reduction based on the authority of *Red Carpet Studios*, 2004 U.S. Dist. LEXIS 29069.

F. Attorneys Sanctioned for Pursuit of Unsupported Distracted Driver Defense

Because, as argued by the Defense Attorneys, and as set forth above, sanction awards pursuant to § 1927 must be imposed against individual attorneys, and not law firms or represented defendants, the next issue to be addressed is upon whom the sanctions should be imposed.

Attorney Frank G. Jones posed the question during trial while gesturing in a manner suggesting without any evidentiary basis that the driver reached around to grab a soda in the moments preceding the incident in this case. Accordingly, Attorney Jones is among the sanctioned attorneys.

However, while the question itself led to the mistrial, the sanctionable conduct, as found by Judge Watson, was the pursuit of the defense as a defense theory at trial, not

simply the question asked. Thus, sanctions are not limited solely to Mr. Jones' conduct in asking the question and making the "reaching" gesture. Sanctions are extended to the overall "pursuit" of the unsupported, reach-around-the-seat, distracted driver defense as a defense theory of the case during trial.[3] Transcripts from trial show that Attorneys Jones, Edward B. Adams, Jr., and Michael D. Eagen were present as defense counsel at the first trial and actively represented Defendants throughout the first trial. Accordingly, the Court determines that these attorneys are the attorneys sanctionable for this conduct.

VI. MISREPRESENTATIONS TO THE COURT REGARDING WITHDRAWAL AS COUNSEL AND CONTINUING REPRESENTATION AFTER WITHDRAWAL AS COUNSEL WAS GRANTED

Next, Plaintiffs' Attorneys were asked to itemize fees and expenses incurred in responding to the Motion to Withdraw of Fulbright & Jaworski (Doc. 379), filed December 14, 2006, and the Motions for Leave to Appear *Pro Hace Vice* by Attorneys LoCoco and Schmidt (Docs. 380, 381). Plaintiffs filed responses on December 17, 2006. (Docs. 385, 386). Plaintiffs' Attorneys were also asked to itemize fees and expenses incurred in preparing for and attending the telephone conference with the Court regarding these Motions.

Exhibit B attached to Attorney Posey's affidavit (Doc. 550) represents that fees in the amount of $6,855 were incurred in responding to Defendants Motions, and fees in the

---

[3] The pursuit of such a defense at trial as a theory of the case is evidenced not only by the question at trial, but from the Joint Final Pretrial Order submitted to the Court by the parties. (Doc. 149). That submission to the Court unequivocally states that "[t]he evidence shows that the accident occurred when Swegles reached for a soft drink or otherwise became distracted while driving." (*Id.*). That submission to the Court was signed by attorneys Jones and Eagen. (*Id.*)

amount of $1,305 were incurred preparing for and attending the telephone conference on December 21, 2006. Again, the Defense Attorneys object to the itemizations provided by Attorney Posey, but submit no objections to the itemization presented by Attorney Shirooni.

A. Whether Entries for Preparation and Filing of Response to Defendants' Motions are Vague

The Defense Attorneys object to several entries on the grounds that the time descriptions are vague. These time entries are for work performed on December 15, 2006 through December 17, 2006. The description of the work performed indicates that the work was performed in researching and preparing responses. The entries correspond with the filing of Plaintiffs' Responses to Defendants' Motion to Withdraw and Motions to Admit *Pro Hac Vice* filed December 14, 2006. *See Imwalle*, 515 F.3d at 554 (stating that "explicitly detailed [billing] descriptions are not required" where relatedness to a sanction award can be seen "in the context of the billing statement as a whole and in conjunction with the timeline of the litigation"). Accordingly, the Defense Attorneys' objection in this regard is without merit.

B. Whether Block-Billed Time Should be Reduced

Next, the Defense Attorneys object to vague block-billed time entries and argue that they require a reduction. Again, Attorney Posey represents in his affidavit that in instances where work was block-billed, he used his "judgment to reduce the amount of time billed with the intent of including . . . only matters included by the Order, as directed

by the Court." (Doc. 550). The Court does not question Attorney Posey's good-faith reduction of the time submitted.

A review of the docket shows multiple filings between December 15, 2006 and December 20, 2006. (Docs. 383, 385, 286, 387, 388). Further, the Response in Opposition to the Motion to Withdraw (Doc. 385) is a 17 page memorandum. The Response in Opposition to the *Pro Hac Vice* Motion (Doc. 386), in substance, is approximately a page and a half. Given the length of these memoranda, the Court does not find the 20.35 hours expended between December 15, 2006 and December 18, 2006 excessive for work on these two memoranda.

Accordingly, the objections in this regard are without merit.

C. Whether Time Billed for Preparation and Attendance of the Telephone Conference is Excessive

The Defense Attorneys also object to the time billed by Attorneys Posey and Sefton in preparing for and attending the telephone conference regarding Defendants' Motions on December 21, 2006. The Defense Attorneys argue that the 2.25 hours billed by Attorneys Posey and Sefton are excessive. In so arguing, the Defense Attorneys point to Attorney Shirooni's 0.3 hour time entry for attending the same telephone conference. Attorney Shirooni itemized no time for preparing for the conference, only time attending the conference.

The key difference between the time billed by Attorney Shirooni and the time billed by Attorneys Posey and Sefton is evident in the descriptions. Attorney Shirooni's

time entry was simply for attendance at the telephone conference. The time billed by Attorneys Posey and Sefton was for preparing for the telephone conference and attending the telephone conference. The Court's Order clearly directed Plaintiffs' Attorneys to itemize "fees and expenses incurred for *preparing for and attending* the portion of the December 21, 2006 Telephone Conference regarding Defendants' motions to withdraw and for leave to appear pro hac vice." (Doc. 533) (emphasis added). Thus, there is a reasonable explanation for the discrepancy in time billed.

However, the Court does find that the preparation time was necessarily duplicated, and, therefore, reduces the total fee by 50%. Accordingly, the fees of Attorneys Posey and Sefton attributable to preparing for and attending the conference properly total $652.50.

D. Amount of Sanctions for Misrepresentations to the Court Regarding Withdrawal of Jaworski & Fulbright

In total, Attorney Posey presents $7,160 in fees and expenses associated with responding to the Motions to Withdraw and for Admission *Pro Hac Vice*, and that number is now reduced by $652.50, for a total of $6,507.50. Attorney Shirooni presents only $60 in fees in this regard. Accordingly, the total of excess fees and costs attributable to this sanctionable conduct is $6,567.50.

E. Attorneys Sanctioned

Again, because sanctions pursuant to § 1927 must be imposed upon attorneys, the Court determines, after a review of the record, that such sanction is imposed upon Frank

G. Jones, Edward B. Adams, Jr., and Michael D. Eagen. Attorneys Jones and Adams were the Fulbright & Jaworski attorneys seeking to withdraw as attorneys from the case based on false representations of a conflict between them and Defendant. (Doc. 379). Further, Attorney Jones signed the Motion to Withdraw. (*Id.*)

Attorney Eagen signed the Amended Motions to Appear *Pro Hac Vice*. (Docs. 380, 381). These Motions also misrepresented the existence of a conflict between Defendant and Fulbright & Jaworski. (*Id.*)

VII. FEES AND EXPENSES INCURRED IN PREPARATION OF MOTION(S) FOR SANCTIONS AND IN PREPARATION FOR AND ATTENDANCE AT SANCTIONS HEARING

In response to the Court's Order to submit itemized fees and expenses "incurred in preparing the motion(s) for sanctions and participating in the August 24, 2007 hearing on the motion for sanctions," Attorney Posey itemized fees and expenses incurred as a result of seeking sanctions in multiple filings with the Court. Without delving into the extensive and tortuous history of all sanctions proceedings in this case, suffice it to say that Plaintiffs obtained, during the course of this litigation, two separate orders finding *monetary* sanctions were warranted, namely: (1) the Court's January 5, 2006 Order imposing sanctions of attorney fees and costs associated with this matter up to and including the mistrial (the "First Sanctions Order") (Doc. 265); and (2) the Court's Opinion and Order Adopting the Report and Recommendations of the Magistrate Judge (Doc. 514) and Imposing Sanctions ("the Sanctions Order") (Doc. 533).

Judge Watson's most recent Sanctions Order (Doc. 533) does not specifically define which "motion(s) for sanctions" Plaintiffs are entitled to recover fees and expenses incurred in preparing. The Court takes this opportunity to clarify the previous interlocutory order and finds that Plaintiffs are entitled to recover fees and expenses incurred: (1) in preparing Docs. 248 and 264 submitted in furtherance of the First Sanctions Order (Doc. 265); and (2) following the Court's Order referring the issue of sanctions to the United States Magistrate Judge (Doc. 477).[4]

In itemizing fees and expenses incurred in preparing the sanctions motions, Plaintiffs created the following two exhibits: (1) Exhibit D, which purportedly details "the fees and expenses incurred relating to the sanctions pleadings and related matters occurring during and subsequent to the first (mis)trial through the beginning of the second trial[;]" and (2) Exhibit E, which purportedly details "the fees and expenses incurred relating to sanctions matters occurring during and subsequent to the second trial[.]" The Court will address each Exhibit and objections thereto separately.

A. Exhibit D

In Exhibit D, Plaintiffs itemize fees and expenses incurred between November 30, 2005, the date the oral motion for mistrial was made, and December 17, 2006. The First Sanctions Order (Doc. 265) was granted January 5, 2006, and, therefore, Exhibit D

---

[4] As further set forth below, the Court also sanctioned Defendants as a result of spoliation of evidence. (Doc. 396). However, that sanction was limited to the exclusion of "any assertion or implication, either directly or indirectly, that the tire abrasion on the accident trailer found by Dr. Allen Eberhardt was present around the entire circumference of the tire or any portion beyond that found by Dr. Eberhardt." (*Id.*) No monetary sanctions, *i.e.*, excess fees or expenses, were imposed as a result of spoliation. (Doc. 533) (concluding that "non monetary sanctions are appropriate for the spoliation of the tire evidence").

necessarily includes fees and expenses for work performed for motions other than the motion resulting in the First Sanctions Order.

A review of the Court's docket and the time entries on Exhibit D reveals time entries for work performed in preparing Plaintiffs' Second Sanctions Motion, filed on March 23, 2006. (Doc. 299). Attorney Posey's Affidavit states as much, representing that Exhibit D details "fees and expenses incurred relating to sanctions pleadings and related matters occurring during and subsequent to the first (mis)trial through the beginning of the second trial[.]" (Doc. 550).

Plaintiffs' Second Sanctions Motion (Doc. 299) was denied without prejudice by the Court in July 2006. (Doc. 317). Thereafter, sanctions were imposed with regard to one ground asserted in the Second Motion for Sanctions, *i.e.*, spoliation. (Doc. 396). In the most recent Sanctions Order, the Court concluded that "no monetary sanctions are appropriate for the spoliation of the tire evidence." (Doc. 533). As a result, Plaintiffs' Second Motion for Sanctions (Doc. 299), while ultimately successful in part, did not result in the imposition of monetary sanctions. Accordingly, the Court finds that fees and expenses incurred in furtherance of the Second Sanctions Motion are outside the scope of the Sanctions Order (Doc. 533), and are not included as excess fees and costs under § 1927.

With regard to the First Sanctions Order (Doc. 299), the Defense Attorneys argue that Plaintiffs should not be permitted to recover attorney fees and costs incurred in seeking the First Sanctions Order because that order was ultimately vacated. The Defense

Attorneys frame their argument as if such request was essentially denied by the Court. However, such is not the case.

The First Sanctions Order (Doc. 265) was vacated only at the insistence of the Defense Attorneys who sought withdrawal from representation of Defendant in this case representing to the Court, falsely as it turns out, that the First Sanctions Award created a severe conflict between them and Defendants and that Defendants no longer wanted Fulbright & Jaworski representing them in this matter. (Doc. 317). As such, the Defense Attorneys' argument in this regard has no merit, and Plaintiffs are entitled to recover fees and expenses in seeking the First Sanctions Order (Doc. 265).

Next, the Court turns its attention to determining which fees detailed on Exhibit D are within the scope of Judge Watson's most recent Sanctions Order. (Doc. 533). The First Sanctions Order (Doc. 265) was a product of Plaintiffs' First Sanctions Motion (Doc. 248) and the Reply in Support of the First Sanctions Motion (Doc. 264), filed December 21, 2005. As of the filing of the Reply in Support on December 21, 2005, the First Sanctions Motion was deemed submitted to the Court. Therefore, fees and expenses itemized on Exhibit D incurred after December 21, 2005 are outside the scope of the Sanctions Order (Doc. 533).

To this end, the Court finds that the following fees detailed in Exhibit D are within the Sanction Order because they concern preparation of the First Motion for Sanctions (Docs. 248, 264) that lead to the Court's First Sanctions Order (Doc. 265):

DATE	ATTORNEY/STAFF	TIME	DESCRIPTION	AMOUNT
11/30/2005	DMD	5.00	Research Federal case law and statutes on the Federal Court's inherent power to impose sanctions; draft legal sections of motion for Default Judgment and Sanctions; scan exhibit to Motion.	$775.00
12/7/2005	WJS	7.90	Continue researching and drafting memoranda; review Defendants responses; trial cleanup; conference regarding case.	$1,343.00
12/8/2005	DMD	2.00	Read and analyze Defendants' Opposition in memorandum to Plaintiff's Motion for Sanctions; investigation regarding other UHaul misconduct.	$310.00
12/20/2005	WJS	6.90	Begin drafting additional reply brief; review transcript; conduct research	$1,173.00
12/21/2005	WJS	13.90	Continue reviewing additional sanctions materials; continue research; analyze and file reply brief	$2,363.00
			TOTAL:	**$5,964.00**

Other fees set forth in Exhibit D incurred before December 21, 2005, but not included above, are excluded because the descriptions are vague, and the Court cannot adequately determine whether the work was performed in furtherance of the First Sanctions Motion (Docs. 248, 264) or in furtherance of the Second Sanctions Motion (Doc. 299).

Further, the time entry for December 8, 2005, included above, is a block-billed entry that includes work performed in furtherance of the Second Sanctions Motion (Doc. 299), namely the "investigation regarding other UHaul misconduct." Accordingly the $310 time-entry on that date should be reduced by 50%, to $155, to appropriately reflect only the time expended analyzing Defendants' Memorandum in Opposition (Doc. 262), filed on December 7, 2005.

The time entry for December 21, 2005 is also a block-billed time entry that is excessive in time and likely includes efforts expended on matters beyond merely preparing the referenced reply brief. Accordingly, it too is reduced by 50%, to $1,181.50.

The proper total of itemized fees in Exhibit D (Doc. 550) equals $4,627.50. Of the expenses set forth in Exhibit D, only the first two entries were conceivably in furtherance of Plaintiffs' First Sanctions Motion (Docs. 248, 264), because those are the only two expenses incurred before December 21, 2005. These expenses total $1,381.39.

Accordingly, the total sanctionable amount listed on Exhibit D equals $6,008.89.

Attorneys Jones, Adams, and Eagen are the individual attorneys upon whom this sanction is imposed because it was their sanctionable conduct that multiplied the litigation to this extent.

B. Exhibit E

Exhibit E attached to Attorney Posey's Affidavit (Doc. 550) itemizes fees and expenses associated with the sanctions proceedings following the second trial, *i.e.*, post-February 12, 2007, the date all sanctions issues were referred to United States Magistrate Judge Hogan. (Doc. 477). Exhibit E itemizes billing entries from February 12, 2007 until March 31, 2009, *i.e.*, the date the Court adopted the Report and Recommendation of the Magistrate Judge. (Doc. 533). The Court's Sanctions Order determined that Plaintiffs "should be compensated for the fees and costs associated with seeking the sanctions in this case," and, to that end, specifically determined that Plaintiffs were "entitled to their attorneys' fees and costs incurred in preparing the motions for sanctions and participating in the August 24, 2007 hearing on the motions for sanctions." (*Id.*)

While such a determination could be interpreted in an overly broad fashion, the Court now clarifies the scope of the Court's Order with regard to the imposition of sanctions for the post-trial sanctions proceedings. Because the Court's Sanctions Order (Doc. 533) contemplates the award of only those fees and costs incurred in preparing *motions* and in participating in the hearing on August 27, 2007, the Court determines that all fees and costs incurred following issuance of the Magistrate Judge's Report and Recommendations (Doc. 514) on October 18, 2007 are outside the scope of the Court's Sanctions Order. By the time the Report and Recommendations was filed, all *motions* requesting sanctions were before the Court and the August 24, 2007 hearing before the Magistrate Judge had already concluded.

Determining the reasonableness of the time billed before submission of the Magistrate Judge's Report and Recommendations presents some issues. The first issue concerns determining the date upon which work actually began toward submitting the post-trial application for sanctions. A review of the billing descriptions listed first on Exhibit E reveals vague entries describing work such as reviewing transcripts, reviewing previously filed motions, and "continued work on post-trial matters." (Doc. 550). These vague billing descriptions do not assist the Court in determining exactly what work was performed in furtherance of Plaintiffs' post-trial motion for sanctions.

A closer review of the Court's docket reveals that Plaintiffs' Brief regarding sanctions (Doc. 489) was filed May 11, 2007, and a review of the submitted billing entries reveals that Attorney Sefton began "drafting [Plaintiffs'] memorandum regarding

sanctions" on May 7, 2007. Therefore, the Court determines that preparation of the post-trial motion for sanctions began with Attorney Sefton's time entry on May 7, 2007, and time entries submitted before that date are excluded.

Accordingly, fees incurred between the entry of Attorney Sefton's time on May 7, 2007 through May 11, 2007 are fees incurred in preparation of the post-trial motion for sanctions and are, therefore, within the scope of the Court's Order. The itemized fees between these dates total $12,295.

Thereafter, Exhibit E contains entries from May 15, 2007 through June 6, 2007 which describe continued research on "issues" and "post trial briefing and drafting filings." Again, these billing entries are vague and fail to describe adequately the work being performed. A review of the Court's docket reveals that Defendants did not file a Brief in response to Plaintiffs' Brief until June 11, 2007 (Doc. 490), and Plaintiffs' billing entries on that date accurately describe reviewing Defendants' Brief.

Time entries also reveal that work began on drafting a Reply on July 13, 2007. The Reply was filed on July 2, 2007. (Doc. 496). Thus, the Court finds that only time billed between July 11, 2007 through July 2, 2007 could possibly fall within the scope of the Sanctions Order. Accordingly, the time billed between May 15, 2007 through June 6, 2007 is not within the scope of the Order, and these entries are excluded.

With regard to those fees incurred between June 11, 2007 through July 2, 2007, only the time spent in furtherance of drafting Plaintiff's Reply (Doc. 496) is within the scope of the Court's Order. Time spent seeking an extension of time to file the Reply

(Doc. 491), and in responding to Defendants objections thereto (Docs. 493, 494), are not within the scope of the Order.

Therefore, the time entries for June 25, 2007 are reduced by 50% because those block-billed entries include work performed in furtherance of the requested extension. Further, Attorney Posey's time for June 26 and 27, 2007 is not within the scope of the Order, and it is excluded. Attorney Sefton's time for June 26 and 27, 2007 is reduced by 50%. Accordingly, excess fees incurred between June 11, 2007 through July 2, 2007 total $12,081.50.

Chronologically, the next billing entries within the scope of the Court's Order include the fees incurred for attendance at the sanctions hearing on August 24, 2007. With regard to attendance at the hearing on August 24, 2007, Plaintiffs itemized a total of $5,408.50 on that date. Accordingly, the excess fees incurred in Exhibit E for attendance at the August 24, 2007 hearing total $5,408.50.

On August 25, 2007, a billing entry by Attorney Posey represents the commencement of work on a Brief in response to Defendants' Brief regarding sanctions. (Doc. 501). The Plaintiffs' Brief (Doc. 510), filed September 12, 2007, totaled over 170 pages in length and was accompanied by over 760 pages in exhibits. (Doc. 511). After reviewing the time entries billed between August 25, 2007, through September 12, 2007, the Court determines that the following entries are within the scope of the Court's order:

DATE	ATTORNEY/STAFF	TIME	DESCRIPTION	AMOUNT
8/25/2007	WAP	3.75	Begin work on sanction's brief in response to Defendants' briefing issues on same.	$1,425.00
8/26/2007	WJS	5.2	Dictate/compile notes regarding oral argument; continue researching and finalizing post-trial briefing.	$1,040.00
8/27/2007	WAP	4.5	Various work on sanctions issues preparation of sanctions brief; post-hearing before Judge Hogan.	$1,710.00
8/28/2007	WAP	3.75	Continued work on sanctions briefing.	$1,425.00
8/30/2007	WAP	7.25	Continue work on sanctions briefing and related matters.	$2,755.00
8/30/2007	JAR	2.9	Follow up regarding post-sanction hearing matters; prepare memo regarding status of documents to obtain for sanction filing.	$420.50
8/31/2007	WAP	6.5	Continued work on sanctions matters.	$2,470.00
8/31/2007	WJS	3.1	Review hearing transcript; dictate notes regarding hearing; continue researching and preparing post-trial briefing.	$620.00
9/3/2007	WJS	2.1	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions response; continue reviewing pleadings and filings and composing response.	$462.00
9/4/2007	MTC	1.8	Research and draft memo on discovery abuses and sanctions	$306.00
9/4/2007	WAP	7.5	Continued work on all matters relating to sanctions brief.	$3,000.00
9/4/2007	WJS	4.2	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions response; continue reviewing pleadings and filings and composing response.	$924.00
9/5/2007	WAP	5.75	Continued work on sanctions briefing.	$2,300.00
9/5/2007	WJS	6.1	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions response; continue reviewing pleadings and filings and composing response.	$1,342.00
9/6/2007	WAP	8.25	Continued to work on sanctions brief.	$3,300.00
9/6/2007	TJR	5.25	Convert all documents for filing into digital files.	$315.00
9/6/2007	WJS	9	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions response; continue reviewing pleadings and filings and composing response.	$1,980.00
9/7/2007	WAP	4.5	Continued work on and review and revisions to briefing materials	$1,800.00
9/7/2007	TJR	9	Digitize documents for filings.	$540.00
9/7/2007	WJS	8	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions response; continue reviewing pleadings and filings and composing response.	$1,760.00

9/8/2007	WAP	3.5	Continued work on sanctions briefing.	$1,400.00
9/8/2007	WJS	10.2	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions response; continue reviewing pleadings and filings and composing response.	$2,244.00
9/9/2007	WAP	2	Continued work on review and revisions to sanctions briefing.	$800.00
9/9/2007	WJS	11	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions, response; continue reviewing pleadings and filings and composing response.	$2,420.00
9/10/2007	AMC	2	Researched the standard for granting a mistrial and for awarding appropriate sanctions within the 6th Circuit with the ground for the mistrial being unsupported facts presented to the jury and repeated violations of court orders.	$300.00
9/10/2007	WAP	9.5	Continued work on sanctions briefing.	$3,800.00
9/10/2007	JAR	1.4	Review trial testimony for references of scuff marks	$217.00
9/10/2007	WJS	12	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions response; continue reviewing pleadings and filings and composing response.	$2,640.00
9/11/2007	WAP	14.5	Continued work on sanctions briefing.	$5,800.00
9/11/2007	TJR	4	Digitize documents for filings. Organize exhibits for filings.	$240.00
9/11/2007	JAR	14	Continue preparation of response to sanctions hearing	$2,170.00
9/11/2007	WJS	15	Continue reviewing documents relevant to sanctions response; continue research regarding sanctions response; continue reviewing pleadings and filings and composing response; finalize and file brief.	$3,300.00
9/12/2007	WAP	1.5	Follow-up regarding filings of exhibits with the Court; other matters relating to same.	$600.00
9/12/2007	TJR	4.3	Organize exhibits for filings; add exhibit numbers in Acrobat; combine exhibits into 6 PDF's.	$258.00
9/12/2007	JAR	0.1	Telephone call regarding docket sheet in U.Haul Arizona case.	$15.50
9/12/2007	WJS	1	Contact Court regarding filing issues; Resolve electronic documents; arrange for hard copy production.	$220.00
9/20/2007	WAP	2	Review of Defendants' reply brief regarding sanctions.	$800.00
9/20/2007	WJS	3.2	Review reply; review research and citation in reply; review record cited in reply; begin notation for objections; continue researching and drafting post trial motions.	$704.00
9/21/2007	JAR	0.4	Review Defendants' Reply Brief regarding Sanctions Hearing.	$62.00
			TOTAL	$57,885.00

With regard to the itemized expenses set forth in Exhibit E, the Court determines that the two expenses incurred on June 29, 2007, and expenses incurred on August 29, 2007, August 31, 2007, September 6, 2007, and September 19, 2007, are within the scope of the Order. The Court cannot determine whether expenses for legal research incurred on September 17, 20, and 25, 2007 are within the scope of the Order because the descriptions for those expenses are vague and are listed on dates following the filing of Plaintiffs' Reply Brief (Doc. 510) on September 12, 2007. Therefore, the total expenses itemized on Exhibit E that fall within the scope of the Court's Order equal $3,647.14.

To summarize the foregoing, the Court finds that a total of $12,295 in fees incurred in May 2007 generally falls within the scope of the Court's Order. A total of $12,081.50 in fees incurred in responding to Defendants' initial sanctions brief (Doc. 490) generally falls within the scope of the Court's Order. Finally, a total of $57,885 in fees incurred in submitting the post-hearing brief on sanctions generally falls within the scope of the Court's Order. (Doc. 510). Therefore, in total, $82,261 in excess fees were incurred in presenting written argument on the issues of sanctions post-trial, and $3,647.17 in excess expenses were incurred, equaling $85,908.14 in total excess fees and expenses listed on Exhibit E that generally fall within the scope of the Court's Order.

The Court further determines that the 220 hours expended in presenting written argument in the post-trial sanction proceedings is overly excessive, and, therefore, the $85,908.14 figure is overly excessive. As a result, the total sanctions imposed for written submissions regarding sanctions post-trial must be reduced for several reasons.

First, Plaintiffs prevailed in seeking monetary sanctions on only two of the multiple grounds extensively briefed. "If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Granzeier v. Middleton*, 173 F.3d 568, 577 (6th Cir. 1999) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). Even if the unsuccessful grounds argued are nonfrivolous, made in good faith, or interrelated to successful arguments, the proposition remains true. *Id.* Thus, because Plaintiffs' requests for sanctions were only partially successful, and the unsuccessful arguments presented were extensively briefed, fees and expenses incurred in presenting the entirety of the sanctions arguments must be reduced accordingly.

Second, the fees incurred in preparing the post-hearing brief are excessive considering the fact that all of the sanctions issues were extensively briefed in full before the hearing (most issues were extensively and fully briefed well in advance of the second trial, and some issues were actually fully briefed within the months following the mistrial). *See Red Carpet Studios*, 2004 U.S. Dist. LEXIS 29069 at *4-5 (stating that "[t]he Court should not award excessive costs incurred in preparing an application for sanctions" and that a reduction on that basis need not be exact). Further, time entries for the work performed reflect multiple attorneys/staff performing the same or similar tasks, therefore likely duplicating work. *See Amedisys Inc. v. Nat. Century Fin. Enterpr., Inc.*, No. 2:04-cv-493, 2006 U.S. Dist. LEXIS 25849, at *9 (stating that the sanctioning court

"may take . . . duplication into account by making a simple across-the-board reduction by a certain percentage").

Third, Plaintiffs' final, post-hearing Brief (Doc. 510), which accounts for a vast majority of the subject fees incurred, was overly excessive in length (170+ pages), and efforts undertaken in filing the 760-plus pages of exhibits in support thereof was wholly unnecessary. This is so especially in light of the Court's previous Orders chastising the parties for submitting voluminous filings. (Doc. 317). Also, Local Rule 7.2 provides that "[m]emoranda in support of or in opposition to any motion or application to the Court should not exceed twenty (20) pages."

With regard to exhibits, those exhibits in support of a motion or application must be attached thereto "[u]nless already of record[.]" *Id.* Here, most, if not all, of the 760-plus pages of exhibits were already part of the record in this case, and resubmitting them to the Court was unnecessary when citations to parts of the record and Court's docket would have been sufficient. Thus, fees and expenses must be reduced as a result of this excess.

Fourth, the approximately 220 hours expended by Attorneys and staff in preparing the Brief is overly excessive. Again, matters relating to pursuit of the distracted driver defense were fully briefed within months of the mistrial, and extensively briefed again before the hearing. All of the other grounds for which Plaintiffs sought sanctions were also already fully and excessively briefed for the Court by that time. Accordingly, fees associated with this excessive time expended must be reduced.

As a result, the Court reduces the total fees and expenses incurred in submitting written arguments post-trial to 20% of the $85,908.14 figure that generally falls within the scope of the Court's Order. In other words, of the fees and expenses itemized on Exhibit E, the sanction imposed for written argument regarding the post-trial sanctions proceedings is $17,181.63. The Court will not reduce the $5,408.50 in fees incurred in attending the sanctions hearing on August 24, 2007. Thus, the total sanctions imposed out of the fees and expenses presented on Exhibit E total **$22,590.13**.

Attorneys Jones, Adams, and Eagen are the individual attorneys upon whom this sanction is imposed because their conduct led to these extended sanctions proceedings.

VIII. WHETHER A REDUCTION OF EXCESS FEES AND COSTS IS REQUIRED AND/OR NECESSARY TO ACHIEVE THE MINIMUM AMOUNT NECESSARY TO DETER FUTURE SANCTIONABLE CONDUCT

Finally, the Defense Attorneys argue that any amount representing excess fees and expenses incurred because of the sanctionable conduct should be reduced in accordance with the purpose behind the imposition of sanctions, *i.e.*, to deter sanctionable conduct, not to provide restitution of fees and expenses to the opposing party. To support their contention that the actual fees and expenses incurred by Plaintiffs must be reduced to the minimum amount necessary to punish the attorneys, the Defense Attorneys cite *Red Carpet Studios*, 2004 U.S. Dist. LEXIS 29069.

In that case, Judge Beckwith determined that an attorney engaged in vexatious and harassing conduct that multiplied proceedings in violation of § 1927. *See Red Carpet*

Studios, 2004 U.S. Dist. LEXIS 29070. After reviewing fees and expenses submitted in support of the sanctions award, Judge Beckwith determined that "the net amount of sanctions is $42,294.10." *Id.* at *5.

However, Judge Beckwith did not impose the full extent of the $42,294.10 as a sanction. *Id.* Instead, recognizing that "the ultimate goal of any sanction is deterrence and that the sanction awarded should be the minimum necessary to achieve deterrence[,]" Judge Beckwith imposed $10,000 in sanctions upon the offending attorney, stating that such amount was "sufficient to deter future vexatious conduct on the part of" the offending attorney. *Id.* at *6. This reduction was later upheld on appeal. *Red Carpet Studios Division of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 647 (6th Cir. 2007).

Here, the bulk of the excess fees and expenses attributable to sanctionable conduct arises from an improper question at trial asked in furtherance of a factually unsupported defense. Because that sanctionable conduct occurred after eleven days of trial, and after over a month of time was devoted solely to preparation for such trial, the "excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct" are great. The question remains whether imposition of only a fraction of those excess fees and expenses will adequately punish the offending attorneys and deter future conduct.

Certainly, the Court does not take lightly the fact that "[t]he individual defense attorneys in this case are all distinguished members of their respective bars, with long histories of trying cases around the country[,]" that "[n]one of them has ever been sanctioned before[,]" and especially that "[a]ny sanction . . . will profoundly affect them

personally and professionally." (Doc. 555). However, the Court also does not take lightly the fact that the sanctionable conduct engaged in by the Defense Attorneys resulted in approximately $450,000 worth of excess fees and expenses incurred by Plaintiffs and their attorneys.

Accordingly, the Court declines to arbitrarily reduce the amount of excess fees by some certain percentage. While the Court acknowledges that the total of excess fees imposed as a sanction is considerable, this sanction is not being imposed on a single attorney. Instead, it is divided equally among the three offending attorneys for their roles in engaging in sanctionable conduct that lead to an extensive multiplication of proceedings in this matter.

Section 1927 itself provides that the extent of "excess costs, expenses, and attorneys' fees reasonably incurred because of . . . [sanctionable] conduct" is the standard measure of such sanctions, and, here, that amount, divided equally among the three offending attorneys, adequately ensures that each sanctioned attorney, individually, is sufficiently punished for his conduct and sufficiently deterred from engaging in sanctionable conduct in the future. Such a sanction further acts to deter other attorneys from engaging in similar conduct.

VIII. CONCLUSION

Based on the foregoing, the Court imposes the following sanctions pursuant to 28 U.S.C. § 1927:

A. **$414,650.62** against Attorneys Frank G. Jones, Edward B. Adams, Jr., and Michael D. Eagen for excess fees and expenses incurred as a result of the pursuit of the unsupported distracted driver defense, for which each attorney is individually responsible for one-third;

B. **$7,220.00** against Attorneys Frank G. Jones, Edward B. Adams, Jr., and Michael D. Eagen for excess fees and expenses incurred as a result of the motions for the withdrawal of counsel and admission *pro hac vice*, for which each attorney is individually responsible for one-third;

C. **$6,008.89** against Attorneys Frank G. Jones, Edward B. Adams, Jr., and Michael D. Eagen as excess fees incurred by Plaintiffs in preparing and supporting the First Sanctions Motion (Doc. 248), for which each attorney is individually responsible for one-third; and

D. **$22,590.13** against Attorneys Frank G. Jones, Edward B. Adams, Jr., and Michael D. Eagen for excess fees and expenses incurred by Plaintiffs in the post-trial sanctions proceedings, for which each attorney is individually responsible for one-third.

Thus, the sanction assessed against each of the three offending attorneys is **$150,156.55**.

IT IS SO ORDERED.

Date: 10/1/10

Timothy S. Black

Timothy S. Black
United States District Judge