

**IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE**

SMILEDIRECTCLUB, INC.,)	
SDC FINANCIAL, LLC, and)	
SMILEDIRECTCLUB, LLC,)	
)	
Plaintiffs,)	
)	
v.)	No. 20-C-1054
)	Judge Brothers
NBCUNIVERSAL MEDIA, LLC and)	
VICKY NGUYEN,)	
)	
Defendants.)	

REQUEST FOR REASONABLE ATTORNEYS' FEES AND COSTS

INTRODUCTION

This Court's December 10, 2021 ruling granted NBC News's petition to strike Smile Direct's complaint pursuant to the Tennessee Public Participation Act ("TPPA"), Section 20-17-101, *et seq.* NBC News now respectfully moves for an award of its reasonable attorneys' fees and costs.

When a defendant successfully moves to strike a complaint under the TPPA, the TPPA requires the court to award the defendant its reasonable attorneys' fees and costs. *See* Tenn. Code Ann. § 20-17-107(a)(1). The mandatory fee award is fundamental to the TPPA's core objective of deterring strategic, free-speech-chilling lawsuits by making the plaintiff bear the defendant's costs. Awarding fees and costs is especially important to advancing the TPPA's objective in the context of this case: The proceedings here have lasted almost two years, forcing NBC News to bear many of the costs that the TPPA's quick-dismissal mechanism is designed to minimize.

NBC News is thus entitled to the fees and other legal costs it reasonably incurred in defending against Smile Direct's complaint. That complaint sought \$2.85 *billion* in compensatory and statutory damages, *in addition to* punitive damages, from NBC News. In response, NBC News—like Smile Direct itself—employed two law firms: a national firm with extensive First Amendment litigation experience, O'Melveny & Myers LLP ("O'Melveny"), and a Tennessee-based firm also with extensive First Amendment experience, Neal & Harwell, PLC ("Neal & Harwell"). NBC News now requests an award of \$2,026,201.20 reflecting \$1,792,618.00 in total fees and \$26,831.90 in expenses reasonably charged by O'Melveny, and \$203,433.25 in total fees and \$3,318.05 reasonably charged by Neal & Harwell. *See* Hacker Decl. ¶ 3; Sanders Decl. ¶ 6. The amount requested is based on a figure that combines reasonable hourly rates charged by the relevant attorneys who spent a reasonable number of hours defending against Smile Direct's claims. Smile Direct filed a 209-page complaint, plus 733 pages of substantive briefing, and the Court held four substantive oral arguments and one status conference. Responding to Smile Direct's extensive filings and preparing for hearings required significant time and skill, especially given the novelty of the TPPA, the complex issues presented by this case, and the large amount of damages at stake..

LEGAL STANDARD

Under the TPPA, a defendant that prevails on a motion to strike a complaint attacking the defendant's exercise of First Amendment rights is entitled to an award of the attorneys' fees and costs it incurred to strike the complaint. *See* Tenn. Code Ann. § 20-17-107(a)(1). The statute explicitly states that when a court grants an Anti-SLAPP petition, the court "shall" award the petitioning party its "[c]ourt costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition." *Id.* § 20-17-107(a).

This mandatory fee-shifting provision is essential to the statute’s fundamental objective, which “is largely intended to deter SLAPP lawsuits and prevent litigants from spending thousands of dollars defending themselves in frivolous litigation.” *Nandigam Neurology, PLC v. Beavers*, 2021 WL 2494935, at *14 (Tenn. Ct. App. June 18, 2021). Without fee-shifting, the SLAPP statute would not serve its purpose of deterring potential plaintiffs from filing lawsuits designed to “intimidate individuals and groups and deter them from speaking out on public issues.” Hearing on S.B. 1097 Before the S. Judiciary Comm., 111th Gen. Assemb. (Tenn. Mar. 12, 2019) (statement of Sen. Dickerson). “[T]he imposition of the attorney fees is a critical deterrent.” *Id.*; see also S. Floor Sess. on S.B. 1097 Before the S., 111th Gen. Assemb. (Tenn. Mar. 18, 2019) (statement of Sen. Dickerson).¹

While the court therefore must award the defendant the fees and costs it incurred to obtain dismissal of a complaint under the TPPA, the amount of the fees and costs also must be “reasonable” in the context of a given case. Tenn. Code Ann. § 20-17-107(a)(1). To determine what amount is reasonable in context, a court “must consider the factors provided in Tennessee Supreme Court Rule 8, RPC 1.5.” *Ellis v. Ellis*, 621 S.W.3d 700, 708 (Tenn. Ct. App. 2019) (citing *Wright ex. rel Wright v. Wright*, 337 S.W.3d 166, 185 (Tenn. 2011)). That rule identifies “factors to be considered in determining the reasonableness of a fee,” including the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;

¹ The floor hearings are available at <https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB1097 &ga=111>.

- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

Tenn. S. Ct. R. 8 (incorporating Tennessee Rule of Professional Conduct 1.5). These factors “may have less relevance” where, as here, “a party is seeking payment of his or her attorney’s fees from the opposing party rather than seeking to resist the attorney’s fees charged by his or her own counsel.” *Smith v. All Nations Church of God*, 2020 WL 6940703, at *6 (Tenn. Ct. App. Nov. 25, 2020). But courts still consider these factors in making a mandatory fee award. *See id.* Ultimately, what constitutes a reasonable fee “depend[s] upon the particular circumstances of the individual case.” *Wright*, 337 S.W.3d at 185-86 (citations omitted). And where the award vindicates rights conferred by a statute designed to protect the public good, courts generally will ensure that the award effectuates the purpose of the statute. *See, e.g., Adkinson v. Harpeth Ford-Mercury, Inc.*, 1991 WL 17177, at *9 (Tenn. Ct. App. Feb. 15, 1991) (Tennessee Consumer Protection Act); *Lowe v. Johnson County*, 1995 WL 306166, at *7-8 (Tenn. Ct. App. May 19, 1995) (Tennessee Human Rights Act). Here that purpose is to ensure that the defendant does not bear the litigation costs of a speech-chilling lawsuit, as just discussed.

ARGUMENT

For the reasons below and as set forth in the accompanying declarations of Jonathan D. Hacker and James F. Sanders, this Court should grant NBC News’s reasonable attorneys’ fees and

costs in the amount of \$2,026,201.20. *See* Hacker Decl. ¶ 3; Sanders Decl. ¶ 6. All of these fees and costs were incurred in conjunction with NBC News's Anti-SLAPP petition.

1. NBC News Is Entitled to All Fees and Costs in the Proceedings

NBC News is entitled to attorneys' fees and costs incurred in all aspects of the proceedings thus far, including discovery and supplemental briefing. *See* Tenn. Code Ann. § 20-17-107(a). As set forth in the declaration of Jonathan D. Hacker, counsel for NBC News not only filed an Anti-SLAPP petition and reply and responded to discovery requests, but also submitted seven *additional* briefs on supplemental issues raised by either Smile Direct or the Court, including the constitutionality of the TPPA, the standard for obtaining discovery in Anti-SLAPP proceedings, the applicability of Tennessee's Media Shield Law, and the third step of the Anti-SLAPP analysis, which requires the court to assess whether the petitioning party has established a valid defense. Each of these issues implicated matters of first impression in Tennessee. NBC News is entitled to the attorneys' fees and costs it incurred to address all of these matters.

The TPPA does not limit fee and cost awards to the simple act of preparing the petition itself. The statute expressly mandates an award of fees and costs "incurred in filing *and prevailing* upon the petition." Tenn. Code Ann. § 20-17-107(a) (emphasis added). That mandate on its face encompasses all the work the defendant performed in the course of prevailing upon the petition. Such work necessarily includes preparing responses to the plaintiff's briefs and motions opposing the petition—including challenging its constitutionality—as well as any discovery requests the plaintiff propounds in seeking to defeat the petition. It likewise includes work responding to orders the Court itself issues in the course of deciding whether to grant the petition, as well as preparing for and attending any hearings the Court convenes. All of this work is performed directly in

support of “prevailing upon the petition” and thus falls squarely within the plain terms of the mandatory fee award provision of the TPPA.

Even if the TPPA were not so clear on its face, the Tennessee Court of Appeals has held that “legislative provisions for an award of reasonable attorney’s fees need not make a specific reference” to the actual type of work “where the legislation has broad remedial aims.” *Killingsworth v. Ted Russell Ford*, 205 S.W.3d 406, 409 (Tenn. 2006) (citing *Forbes v. Wilson County Emergency Dist. 911 Bd.*, 966 S.W.2d 417 (Tenn. 1998)). That rationale plainly applies here given the TPPA’s broad compensatory and deterrent objectives. *See supra* pp. 2-3. Indeed, the Tennessee Court of Appeals has already applied the *Killingsworth* principle to award *appellate* fees in a TPPA case, even though the statute “does not expressly provide for attorney’s fees incurred at the appellate level.” *Nandigam*, 2021 WL 2494935, at *14. The appellate fees in *Nandigam* were sought under the TPPA’s *separate* remedial provision, *see id.* at *13, which allows a court to provide “[a]ny additional relief, including sanctions, that [it] determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.” Tenn. Code Ann. § 20-17-107(a)(2). Applying *Killingsworth*, the Court of Appeals held that appellate fees were necessary to effectuate the TPPA’s fundamental objective of “deter[ring] SLAPP lawsuits and prevent[ing] litigants from spending thousands of dollars defending themselves in frivolous litigation.” *Nandigam*, 2021 WL 2494935, at *14. It obviously would defeat the TPPA’s core objective if a plaintiff could file a SLAPP lawsuit, subject the defendant to motions, hundreds of pages of briefs, substantial discovery requests, and multiple hearings, yet be somehow insulated from compensating the defendant for the significant fees and costs the lawsuit forced it to incur.

Accordingly, the *Killingworth/Nandigam* rule justifying fees to effectuate a statute's broad remedial purpose plainly applies here. That is all the more true because the fees and costs at issue here all fall within the TPPA's "specific reference" to the fees and costs that *must* be awarded, i.e., those incurred for work performed in "prevailing upon the petition." As shown above, the fees and costs here were all incurred in the course of filing and supporting the petition to strike and defeating Smile Direct's asserted constitutional, statutory, and factual defenses. An award for all such work is thus compelled by the statutory text. As this Court itself observed in an October 30, 2020 hearing, if NBC News "ultimately succeeded in [its] motion to dismiss the lawsuit, wouldn't that – wouldn't the discovery expense be part of [NBC News's] recovery?" 10/30/2020 Tr. 76:1-5. The answer is yes.

2. The Amount Of Fees And Costs Requested Is Reasonable Under Tennessee Law

The amount of fees and costs NBC News seeks is reasonable under Tennessee law.

First, NBC News is entitled to the fees stated above given the time and labor expended to prevail on the Anti-SLAPP petition. Smile Direct's sprawling, 209-page complaint identified more than 40 allegedly false and misleading statements and 14 counts against NBC News. Given the far-reaching complaint, NBC News incurred significant costs to read the complaint closely, scrutinize its voluminous factual allegations, and research its legal claims, all in service of preparing its Anti-SLAPP petition. *See, e.g., Parker v. Brunswick Forest Homeowners Ass'n, Inc.*, 2019 WL 2482351, at *3 (Tenn. Ct. App. June 13, 2019) (quoting and affirming trial court ruling that protracted litigation supports award of attorneys' fees). NBC News also incurred significant costs because the TPPA was enacted just two years ago, and at the time Smile Direct filed suit, there were no Tennessee appellate decisions construing the statute.² As a result, NBC News's

² Since NBC News filed its Anti-SLAPP Petition, the Tennessee Court of Appeals has issued two opinions concerning Tennessee's Anti-SLAPP Act. *See Nandigam*, 2021 WL 2494935, at *6 ("[T]here is no Tennessee case

briefing required analysis of case law under analogous Anti-SLAPP statutes in other states. Preparing NBC News's Anti-SLAPP petition, as well as briefing the supplemental issues identified by Smile Direct, therefore took more time and skill to research, draft, and argue than a standard motion to dismiss. *See* Hacker Decl. ¶¶ 13-14, 20. The Court itself emphasized that the TPPA motion involved "a big topic," and that the work both performed was "thorough" and not "wasteful." 11/17/2021 Tr. 7:12-19. And Smile Direct's substantive briefing totaled 733 pages, whereas NBC News responded effectively in a mere 233 pages total over eight briefs.³ Rule 1.5(a)(1) therefore supports NBC News's requested fee.

Second, the reasonableness of NBC News's fee is strongly supported by the result obtained by NBC News's counsel. *See* Tenn. R. Pro. Conduct 1.5(a)(4). Courts often evaluate reasonableness of a fee award by considering the amount of damages at stake in the case. Thus, for example, a Tennessee federal court found it reasonable for a defendant to incur \$19.5 million in fees to defeat a complaint seeking "only" \$193.6 million. *Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, at *28 (M.D. Tenn. Aug. 11, 1999). Another court found it reasonable to incur \$9.4 million to defeat a \$111.2 million False Claims Act suit, *see Bagley v. United States*, 2011 WL 13128158, at *1 (C.D. Cal. June 30, 2011), and another found it reasonable to incur some \$3 million in fees for case involving approximately \$80 million, *see Themis Cap. v. Democratic Republic of Congo*, 2014 WL 4379100, at *13 (S.D.N.Y. Sept. 4, 2014). The same comparison here supports the fee request even more strongly than in the foregoing precedents. Smile Direct's complaint sought compensatory and punitive damages and other monetary relief

law construing the TPPA as of yet."); *Doe v. Roe*, 2021 WL 2588394, at *2 (Tenn. Ct. App. June 24, 2021) ("[T]he TPPA is a relatively new creature of the legislature, having only been codified in 2019. In fact, the first Tennessee appellate opinion providing guidance on interpretation of the TPPA was only recently decided." (citing *Nandigam Neurology*)).

³ These figures exclude tables of contents, certificates of service, declarations, and exhibits, but include Smile Direct's statement of facts and chart of allegations.

exceeding \$2.85 billion. Hacker Decl. ¶ 12. NBC News defeated that suit outright, and incurred \$2,026,201.20 to do it—less than 0.1% of the amount Smile Direct demanded. The costs NBC News incurred to achieve that efficient result was clearly well-spent. Rule 1.5(a)(4) therefore supports NBC News’s requested fee.

Third, NBC News’s staffing of the matter was efficient and economical, especially given the enormous damages sought, the novelty of the issues, and Smile Direct’s decisions to file extensive briefs and to seek briefing on additional issues. *See* Tenn. R. Pro. Conduct 1.5(a)(3). NBC News employed two law firms, one local firm with expertise in Tennessee law and procedure and First Amendment litigation in Tennessee, and one global firm with expertise in large-scale commercial litigation, First Amendment rights, and Anti-SLAPP proceedings. That allocation was entirely reasonable under the circumstances. *See Ne. Coal. for Homeless v. Brunner*, 2010 WL 4939946, at *6 (S.D. Ohio Nov. 30, 2010) (“Though attorneys from more than one firm collaborated on the same project, the evidence the parties have presented demonstrates an attempt at cost-efficient allocation of work[.]”), *aff’d*, 695 F.3d 563 (6th Cir. 2012); *Legacy Partners, Inc. v. Travelers Indem. Co. of Ill.*, 83 F. App’x 183, 187 (9th Cir. 2003) (“In a lawsuit threatening millions in damages, the use of five law firms is not per se unreasonable.”). Smile Direct cannot possibly disagree—it, too, employed both national and local counsel to litigate its multibillion-dollar claims against NBC News.

Both firms employed by NBC News worked diligently to control fees and costs and to avoid duplicative work across the firms. While the timekeepers’ fees ranged considerably, the majority of the hours spent on this matter were billed by associates and counsel, who were supervised by partners at each firm, at significantly lower hourly rates. *See Pilkinton v. Hartsfield*, 2013 WL 3353898, at *2 (M.D. Tenn. July 2, 2013) (staffing with multiple attorneys was

permissible given that billing records reflected attorneys with lowest hourly rate “accounted for the lion’s share of billable hours”). Counsel for NBC News also used non-attorney staff (both billable and non-billable) when possible to provide additional support at lower cost. Altogether, work by associates, counsel, and non-attorneys comprised roughly 80% of the total hours billed. *See* Hacker Decl. ¶ 20.

Fourth, the hourly rates charged by both O’Melveny and Neal & Harwell are also reasonable under Rule 1.5(a)(3). Courts look to national markets, areas of specialization, or any other market they believe is appropriate to determine the reasonableness of a fee request. *McHugh v. Olympia Entm’t, Inc.*, 37 F. App’x 730, 740 (6th Cir. 2002); *accord Louisville Black Police Officers Org. v. City of Louisville*, 700 F.2d 268, 278 (6th Cir. 1983) (courts are not required to base attorney fees on local rates and may look to national market or market rate for specialized area of law). O’Melveny’s hourly rates are consistent with the rates charged among its peers for similar services by attorneys of like experience in similar law firms. *See* Hacker Decl. ¶¶ 15-17. Other courts considering attorneys’ motions by similar large national firms have found comparable rates to be reasonable because they reflected market rates.⁴ Neal & Harwell’s fees were also reasonable in light of the market and the type of work performed by them. *See* Sanders Decl. ¶ 8. Indeed, courts across Tennessee also often find rates around those of Neal Harwell’s to be reasonable.⁵ Rule 1.5(a)(3) therefore supports NBC News’s requested fee.

⁴ *See, e.g., VR Optics, LLC v. Peloton Interactive, Inc.*, 2021 WL 1198930, at *5 (S.D.N.Y. Mar. 30, 2021) (rates ranging from \$845.00 to \$1,260.00 are not excessive for large, global law firms (citing *Vista Outdoor Inc. v. Reeves Fam. Tr.*, 2018 WL 3104631, at *6 (S.D.N.Y. May 24, 2018)), *appeal filed*, No. 21-1918 (Fed. Cir.); *MSC Mediterranean Shipping Co. Hldg. S.A. v. Forsyth Kownacki LLC*, 2017 WL 1194372, at *3 (S.D.N.Y. Mar. 30, 2017) (finding reasonable the rate of \$1,048.47 charged by partners of large, global law firm); *U.S. Bank Nat’l Ass’n v. Dexia Real Estate Capital Mkts.*, 2016 WL 6996176, at *8 (S.D.N.Y. Nov. 30, 2016) (approving rates of up to \$1,055 per hour and explaining that “partner billing rates in excess of \$1,000 an hour[] are by now not uncommon in the context of complex commercial litigation” (alteration in original)), *aff’d*, No. 17-127 (2d Cir. Jan. 3, 2018).

⁵ *See, e.g., Shoney’s N. Am., LLC v. Smith & Thaxton, Inc.*, 2015 WL 5139304, at *1 (M.D. Tenn. Sept. 1, 2015) (approving rates ranging from \$195/hour to \$360/hour as reasonable); *Savage v. City of Lewisburg, Tenn.*, 2015 WL 12791467, at *2 (M.D. Tenn. Feb. 24, 2015) (approving rate of \$225/hour as reasonable (citing supporting

Fifth, the nature and length of the professional relationship with NBC News also supports the attorneys' fees requested. *See* Tenn. R. Pro. Conduct 1.5(a)(6). Before its retention for this case in June 2020, O'Melveny had worked for NBCUniversal on numerous other matters. Their preexisting working relationship contributed to the efficiency of proceedings here because O'Melveny was already familiar with NBCUniversal, its litigation preferences, and its business priorities. Rule 1.5(a)(6) therefore also supports NBC News's requested fee.

Sixth, and finally, the experience, reputation, and ability of NBC News's lawyers support their request. *See* Tenn. R. Pro. Conduct 1.5(a)(7). NBC News's attorneys have extensive experience in Anti-SLAPP and defamation litigation, which contributed to their efficiency in handling this matter. *See* Hacker Decl. ¶¶ 5-9. O'Melveny has litigated numerous Anti-SLAPP cases over the years, leveraging that experience to NBC News's benefit and greatly reducing the time and expense of defending against Smile Direct's claims. *Id.* ¶ 6. The experience was especially valuable because Smile Direct's claims raised novel issues and required significant research in an area of law with little relevant precedent—and none in Tennessee, requiring broader-ranging research and analysis of analogous case law. O'Melveny's knowledge of and experience with analogous bodies of law enabled counsel to adeptly and efficiently defend against Smile Direct's multibillion-dollar claims, despite the novelty of the issues, the lack of controlling local precedent, the voluminous pleadings Smile Direct filed, and the substantial discovery it propounded. *See id.* ¶¶ 13-14. Again, this Court agreed, specifically emphasizing the quality and thoroughness of the briefs submitted by both sides in the case. *See* 11/17/2021 Tr. 7:12-18, 120:6-9. Rule 1.5(a)(7) therefore supports NBC News's requested fees and costs.

decisions)); *Nutt v. Smart*, 2021 WL 2561763, at *2 (E.D. Tenn. June 2, 2021), *report and recommendation adopted*, 2021 WL 2555575 (E.D. Tenn. June 22, 2021)

CONCLUSION

For the foregoing reasons, the motion for an award of fees and costs should be granted. NBC News should be awarded \$1,819,449.90 in fees and costs incurred by O'Melveny and \$206,751.30 in fees and costs incurred by Neal & Harwell.

Executed on January 10, 2022

Respectfully Submitted,

NEAL & HARWELL, PLC

/s/ James F. Sanders

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via e-mail and

U.S. Mail to the following on the 10th day of January 2022:

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**IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
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SMILEDIRECTCLUB, INC.,
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Plaintiffs,

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NBCUNIVERSAL MEDIA, LLC, and
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Defendants.

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No. 20-C-1054
Judge Brothers

DECLARATION OF JAMES F. SANDERS

The declarant, James F. Sanders, declares and states as follows:

1. My name is James F. Sanders. I am over eighteen (18) years of age and am competent to testify in all respects. I have personal knowledge regarding the matters stated in this declaration, which are true and correct.

2. I am a partner in the law firm Neal & Harwell, PLC (“Neal & Harwell”). My Neal & Harwell colleagues and I served as co-counsel for Defendants NBCUniversal Media, Inc. and Vicky Nguyen (collectively, “NBC News”) in the above-captioned action along with O’Melveny & Myers LLP. I respectfully submit this Declaration in support of NBC News’ petition for attorneys’ fees, out-of-pocket expenses, and costs under Tennessee Code Annotated Section 20-17-107.

3. I am an attorney, licensed to practice law in the State of Tennessee since 1970. I am admitted to practice before all federal courts in Tennessee as well as the Sixth Circuit Court of Appeals. I am a 1970 graduate of Vanderbilt Law School. I have been a partner at Neal & Harwell,

PLC, since 1978. Prior to entering private practice, I served as an assistant public defender in Seattle, Washington. Before that, I served as law clerk for Judge Frank Gray, Jr. of the United States District Court for the Middle District of Tennessee and Judge William E. Miller of the United States Court of Appeals for the Sixth Circuit. A copy of my biography is attached as **Exhibit A, p. 1.**

4. Several of my colleagues have assisted in this case:

- a. Ronald G. Harris, a partner at Neal & Harwell, provided significant and valuable assistance in this case, particularly in connection with the Anti-SLAPP Petition. Mr. Harris graduated from Vanderbilt Law School in 1977, has been licensed to practice law in the State of Tennessee since 1980, and is admitted to practice before all federal courts of Tennessee, including the United States Court of Appeals for the Sixth Circuit. Mr. Harris joined Neal & Harwell as an associate in 1980 and has been a partner since 1986. A copy of Mr. Harris' biography is attached as **Exhibit A, p. 2.**
- b. William J. Harbison II, a partner at Neal & Harwell, has also provided significant and valuable assistance in this case, particularly in connection with the Anti-SLAPP Petition. Mr. Harbison is a 2014 graduate (*magna cum laude*) of the University of Tennessee College of Law. Mr. Harbison has been licensed to practice law in the State of Tennessee since 2014 and is admitted to practice before all federal courts of Tennessee, including the United States Court of Appeals for the Sixth Circuit. Mr. Harbison joined Neal & Harwell as an associate in 2015 and became a partner in 2020. Prior to entering private practice, Mr. Harbison served as law clerk for Judge

Gilbert S. Merritt, Jr. of the United States Court of Appeals for the Sixth Circuit. A copy of Mr. Harbison's biography is attached as **Exhibit A**, p. 3.

5. As the responsible billing attorney and co-counsel for NBC News, I have personal knowledge of the fees and expenses Neal & Harwell incurred in connection with the above-styled action.

6. A true and correct description of the legal services rendered by Neal & Harwell and corresponding fees and expenses incurred in connection with the above-styled action is attached as **Exhibit B**. The total amount of Neal & Harwell's attorneys' fees and expenses incurred in this matter (and which are sought at this time) is \$206,751.30.¹ See Ex. B. at 16-17.

7. In my professional judgment and opinion, the attorneys' fees reflected in the attachments hereto are reasonable, were necessary for the proper representation of NBC News, and were incurred in connection with the above-styled action.

8. In my professional judgment and opinion, the hourly rates charged for the professional services provided by Neal & Harwell for NBC News are reasonable and consistent with the rates charged in this community for similar services by attorneys of like experience in similar law firms. The hourly fees reflected on the itemized statement and sought herein are as follows: James F. Sanders (JFS) – \$600/hour; Ronald G. Harris (RGH) – \$475/hour; and William J. Harbison II (WJH) – \$315/hour. See generally, Ex. B. The rates used in this statement are Neal & Harwell's standard hourly rates. Our hourly rates are based upon experience and expertise, including experience in bringing and defending complex civil litigation, both at the trial and

¹ This figure represents \$203,433.25 in attorney's fees and \$3,318.05 in costs. See Ex. B. at 16-17.

appellate levels. Additionally, both Mr. Harris and Mr. Harbison's practice has included substantial experience on First Amendment issues.

9. Neal & Harwell timekeepers worked across all matters on this case, including discovery, drafting the supplemental briefing requested by this Court, drafting the Anti-SLAPP briefs, and preparing for oral argument. Smile Direct's Complaint and litigation tactics made this an especially complicated matter, especially for an early stage of the case. The 209-page complaint included 551 paragraphs and 40 counts of allegedly unlawful statements and conduct, all of which implicated NBC News' rights under the First Amendment, the Anti-SLAPP Act, Tennessee's Media Shield Law, and the Tennessee Consumer Protection Act ("TCPA"). The process of vindicating NBC News' rights required multiple rounds of briefing, including preparation of substantive opening and reply briefs on an Anti-SLAPP Petition, as well as multiple supplemental briefs on issues raised by Smile Direct and ordered by the Court. Smile Direct itself filed nine briefs totaling fully 525 pages (*not* including attached declarations, exhibits, etc.), which required Neal & Harwell attorneys to invest significant time reviewing, reading Smile Direct's cited cases and record citations, and preparing responsive briefs. Separately, Smile Direct's discovery requests required additional significant time to investigate, gather relevant information, and prepare responsive materials. And multiple hearings conducted by the Court on different issues required yet more preparation by multiple attorneys.

10. I have also reviewed the Declaration of Jonathan D. Hacker (our co-counsel from O'Melveny and Myers) and agree with his description of the work necessary to prevail in this case.

11. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: January 10, 2020



JAMES F. SANDERS

EXHIBIT A



James F. Sanders

Member

✉ jsanders@nealharwell.com

☎ 615-238-3513

Jim Sanders joined Neal & Harwell in 1978 and is one of the Firm's most experienced Members. He serves on the Firm's Executive Committee. Jim is among a select group of lawyers nationwide to whom clients, both corporations and individuals, turn in significant investigations and trials. He has tried cases all over the country, many of which lasted months. This experience in these types of cases is rare in the legal profession and usually involves leading a team of lawyers from other firms and in-house counsel.

Jim has been recognized in a number of "best lawyers" lists, but the most significant recognition, in his opinion, is being inducted as a Fellow in the American College of Trial Lawyers in 1997. The College's Fellows are chosen by invitation only and Fellowship is limited to one percent of the total lawyer population of the state in which the lawyer practices. He has been a participant for the past few years in the Forum on Corporate Enforcement | Cambridge Forums.

Among Jim's notable trials are The Twilight Zone trial (representing Director John Landis) and the Exxon Valdez trial in Alaska. In both, Jim served as co-counsel with the late James F. Neal. Others include two trials in Baltimore County, Maryland, representing ExxonMobil in a gasoline line leak that involved hundreds of plaintiffs. In addition to the normal media coverage, Jim's role, examination of witnesses, and arguments in these cases are mentioned in the following books:

- C. Cosslett, *Lawyers at Work*
- D. Legedoff, *Cleaning Up*
- R. LaBrecque, *Special Effects*
- S. Coll, *Private Empire: ExxonMobil and American Power*

Representative Matters:

The Twilight Zone trial representing Director John Landis – Co-counsel with the late James F. Neal

Exxon Valdez trial in Alaska – Co-counsel with the late James F. Neal

ExxonMobil trial in Baltimore County, Maryland regarding a gasoline line leak that involved hundreds of plaintiffs

Southeastern Conference – Co-counsel in an antitrust, right to publicity case brought in the United States District Court for the Middle District of Tennessee

General Motors in various proceedings arising out of the GM ignition switch recalls involving the Chevrolet Cobalt, Saturn Ion and others

Jacobs Engineering Group, Inc. in cases filed in connection with the 2008 coal ash spill at the Kingston, Tennessee fossil fuel plant

Steward Health Care System, LLC in a case filed in Chancery Court in Nashville, Tennessee

NBCUniversal in a defamation case brought in State Court in Nashville, Tennessee

Legal Services

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[Environmental & Toxic Torts](#)

[White-Collar Criminal Defense](#)

Professional & Civic Affiliations

American College of Trial Lawyers – Fellow

American Bar Association – Member

Tennessee Bar Association – Member

Nashville Bar Association – Member

Vanderbilt Law School Board of Advisors

Education

Vanderbilt University Law School

Vanderbilt University



**Ronald G. Harris****Member**✉ rharris@nealharwell.com☎ [615-244-1713](tel:615-244-1713)

Ronald G. Harris is Chief Administrator at Neal & Harwell, PLC. His principal area of practice is civil litigation, with a substantial part of his practice devoted to commercial and business disputes.

Ron has over forty years of trial experience, having appeared in numerous federal and state courts. His litigation experience includes libel and defamation cases, product liability matters, bad faith and other insurance coverage cases, business torts, non-competition litigation, contractual disputes, construction disputes and employment issues. Ron is recognized by Best Lawyers® 2022 for First Amendment Law. Through his years of representing media members and private citizens, he has been a zealous advocate for First Amendment freedoms.

Legal Services

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[Complex Business Litigation](#)
[Corporate Compliance](#)
[Defamation, Slander & Libel](#)
[First Amendment & Communications Law](#)

Professional & Civic Affiliations

American Bar Association – Fellow
Tennessee Bar Association –
Communications Law Section, Chair
2019-2021
Nashville Bar Association – Fellow
Westminster Presbyterian Church –
Elder and Clerk of the Session
Westminster Home Connection – Board
of Directors
Habitat for Humanity – Volunteer
Room In The Inn – Volunteer

Education

Vanderbilt University Law School, 1977,
J.D.; Order of the Coif, Associate Editor
of the Vanderbilt Law Review
University of Arkansas, 1974, B.A.,
Political Science



William "Jay" J. Harbison II

Member

✉ jharbison@nealharwell.com

☎ [615-238-3650](tel:615-238-3650)

William "Jay" Harbison II is an attorney at Neal & Harwell and works primarily in the areas of business and civil litigation. He represents both plaintiffs and defendants and advises clients on a variety of complex legal issues. Representative cases involve contract disputes, defending a metropolitan television station against defamation claims, and defending a large pharmaceutical company in numerous mass tort cases. Jay is recognized by Best Lawyers: Ones to Watch 2022 for Civil Rights Law, Commercial Litigation and Mass Tort Litigation / Class Actions - Defendants.

Jay graduated magna cum laude from the University Of Tennessee College Of Law and received his undergraduate degree from Middlebury College. While in law school, he served as the Executive Editor for the Tennessee Law Review.

Prior to entering private practice, Jay served as a law clerk for the Honorable Gilbert S. Merritt, Jr. of the United States Court of Appeals for the Sixth Circuit.

Representative Matters:

American Baptist College v. National Baptist Convention USA, Inc., Davidson Co. Chancery Court No. 17-1140-BC

Dell'Aquila v. LaPierre et al., 2020 WL 5816222 at *1 (M.D. Tenn. Sept. 30, 2020) (dismissing purported class action complaint against non-profit client under Rule 12(b)(6)).

Funk v. Scripps Media, Inc., 570 S.W.3d 205 (Tenn. 2019).

SPE GO Holdings, Inc. v. W&O Construction, Inc., 759 F. App'x 359 (6th Cir. 2018).

Bell v. McLemore, 347 F. Supp. 3d 362 (M.D. Tenn. 2018).

Durham v. Martin, 905 F.3d 432 (6th Cir. 2018).

Seay v. Rowland, 2018 WL 6174692, at *1 (M.D. Tenn. Aug. 30, 2018), report and recommendation adopted, 2018 WL 5095456 (M.D. Tenn. Oct. 19, 2018).

Legal Services

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[False Claims Act & Qui Tam](#)

[Product Liability & Mass Torts](#)

[White-Collar Criminal Defense](#)

Professional & Civic Affiliations

American Bar Association – Member

Tennessee Bar Association – Member

Nashville Bar Association – Premier Member

Nashville Bar Foundation Leadership Forum 2022 Class

Best Lawyers: Ones to Watch 2022 – Civil Rights Law, Commercial Litigation, & Mass Tort Litigation / Class Actions – Defendants

Education

University of Tennessee College of Law, 2014, J. D., magna cum laude; Executive Editor for the Tennessee Law Review
Middlebury College, 2005, B.A., English and Theater, Minor in Classical Studies

EXHIBIT B

Time Report - NBCUniversal Media, LLC / SmileDirectClub, Inc. et al. v. (00005248-00020616)

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
05/26/2020	0016	Sanders, James F.	Partner	1.30	780.00	600.00	Telephone conferences and correspondence with Dan Petrocelli re: lawsuit;	5/2020
05/27/2020	0016	Sanders, James F.	Partner	1.30	780.00	600.00	Conferences with Aubrey Harwell, Ron Harris and Jay Harbison;	5/2020
05/27/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Work on Neal & Harwell summary/profile to provide to Dan Petrocelli's presentation to client;	5/2020
05/28/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Correspondence and telephone conference with Dan Petrocelli re: his presentation to NBCUniversal;	5/2020
05/29/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review Complaint by Smile Direct Club;	5/2020
05/29/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Telephone conferences with Charles Babcock (Jackson Walker) re: being local counsel with his firm;	5/2020
05/29/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Telephone conference with Dan Petrocelli (O'Melveny) re: his meeting with NBCUniversal;	5/2020
06/02/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review for conference call; research re: SmileDirectClub; review OMM memorandum;	6/2020
06/02/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Telephone conference with Dan Petrocelli re: setting up call with NBCUniversal in-house counsel;	6/2020
06/02/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Telephone conferences and correspondence re: call with NBCUniversal in-house counsel;	6/2020
06/02/2020	0040	Harbison, William J.	Associate	3.00	945.00	315.00	Read SmileDirect Club Complaint as well as legal research re: same;	6/2020
06/03/2020	0035	Harris, Ronald G.	Partner	6.00	2,850.00	475.00	Research re: other SmileDirect lawsuits; office conferences with Jim Sanders re: conference with NBC; prepare for and participate in conference call;	6/2020
06/03/2020	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Review Dan Petrocelli's summary provided to NBC, as well as conferences with Ron Harris re: same;	6/2020
06/03/2020	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Review Complaint and summary from Dan Petrocelli in preparation for call with NBCUniversal in-house counsel, as well as participate in call with in-house counsel;	6/2020
06/03/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence with Dan Petrocelli re: telephone conference with NBCUniversal in-house counsel;	6/2020
06/03/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Research and review previous SmileDirect Club lawsuits and e-mails re: same;	6/2020
06/03/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conference with Ron Harris re: SmileDirect Club lawsuit;	6/2020
06/09/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Respond to emails re: procedural questions;	6/2020
06/09/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Telephone conference with Dan Petrocelli;	6/2020
06/09/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Legal research and e-mail to Jim Sanders re: Answer and SLAPP motion timing;	6/2020
06/11/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Review memorandum and email to Dan Petrocelli re: motions practice in Davidson County;	6/2020
06/16/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Legal research and drafting re: pro hac vice motions;	6/2020
06/17/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Call with Jim Sanders re: discovery in SmileDirect case;	6/2020



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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
06/17/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Call with John Jacobson re: initial case planning discussions for SmileDirect case;	8/2020
06/18/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mail with Jim Sanders re: discovery in SmileDirect case;	6/2020
06/22/2020	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Telephone conference with John Jacobson and related correspondence;	6/2020
06/22/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Telephone conference with Dan Petrocelli re: pro hac vice motions and setting up call with plaintiffs' counsel;	6/2020
06/22/2020	0035	Harris, Ronald G.	Partner	0.25	118.75	475.00	Review re: possible deadlines;	6/2020
06/22/2020	0040	Harbison, William J.	Associate	0.40	126.00	315.00	Call with Jim Sanders and John Jacobson re: SmileDirect v. NBC initial issues;	6/2020
06/23/2020	0035	Harris, Ronald G.	Partner	0.75	356.25	475.00	Research re: other SLAPP cases;	6/2020
06/23/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Draft PHV Motions for O'Melveny counsel in SmileDirect case;	6/2020
06/23/2020	0040	Harbison, William J.	Associate	2.00	630.00	315.00	Legal research re: Anti-SLAPP legislative history;	6/2020
06/25/2020	0016	Sanders, James F.	Partner	0.10	60.00	600.00	Correspondence re: pro hac vice admissions;	6/2020
06/29/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Telephone conferences with Dan Petrocelli and Jay Harbison re: motions pro hac vice and response to Plaintiffs' counsel re: scheduling conference call, as well as draft correspondence to John Jacobson re: telephone conference:	6/2020
06/29/2020	0040	Harbison, William J.	Associate	1.20	378.00	315.00	Drafted Pro Hac Vice Motions for O'Melveny council in SmileDirect case;	8/2020
06/30/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Edited Pro Hac Vice Motions for O'Melveny council in SmileDirect case;	8/2020
06/30/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	E-mails with Jim Sanders and Dan Petrocelli re: timing for anti-SLAPP petition;	8/2020
07/01/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with Dan Petrocelli re: responsive pleadings and pro hac motions;	7/2020
07/02/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Edit/file PHV Motions for SmileDirectClub v. NBC;	7/2020
07/02/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with John Jacobson re: SmileDirect PHV Motions;	7/2020
07/07/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Telephone conference with Dan Petrocelli re: motion;	7/2020
07/07/2020	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Correspondence re: Pro Hac Vice admissions;	7/2020
07/07/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with Dan Petrocelli re: questions for anti-SLAPP Motion;	7/2020
07/07/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conf. with Jeffrey Zager re: Judge Brothers; e-mail to Dan Petrocelli re: same;	7/2020
07/07/2020	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call with John Jacobson and Court re: PHV Motions; draft/serv agreed order re: same;	7/2020
07/07/2020	0040	Harbison, William J.	Associate	1.20	378.00	315.00	Legal research re: anti-SLAPP Motion;	7/2020
07/10/2020	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Telephone conference with Jay Harbison re: shield law issues;	7/2020
07/10/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review Funk opinion on shield law issue;	7/2020
07/10/2020	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call with Dan Petrocelli and Jon Hacker re: TN media shield law issues;	7/2020
07/10/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with RGH re: TN media shield law issues;	7/2020

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
07/13/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Legal research re: TN media shield law; e-mail to Dan Petrocelli re: same;	7/2020
07/13/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: motion and declarations;	7/2020
07/13/2020	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Prepare for counsel meeting;	7/2020
07/14/2020	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Draft suggestions for tomorrow's meeting;	7/2020
07/14/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review Anti-Slapp filings and office conference with Jeffrey Zager, Jim Sanders, and Jay Harbison re: same;	7/2020
07/14/2020	0040	Harbison, William J.	Associate	3.00	945.00	315.00	Receipt/review of draft anti-SLAPP Motion;	7/2020
07/14/2020	0040	Harbison, William J.	Associate	1.40	441.00	315.00	Meeting with Jim Sanders and Ron Harris re: anti-SLAPP Motion and strategy;	7/2020
07/14/2020	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Review memorandum of law, declaration and exhibits in preparation for filing;	7/2020
07/14/2020	0016	Sanders, James F.	Partner	1.30	780.00	600.00	Meeting with Jay Harbison and Ron Harris re: brief, as well as follow-up calls re: same;	7/2020
07/15/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Meeting with Jim Sanders and Ron Harris re: anti-SLAPP Motion and strategy	7/2020
07/15/2020	0040	Harbison, William J.	Associate	2.00	630.00	315.00	Reviewed anti-SLAPP Motion;	7/2020
07/15/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Prepare for and participate in conference call for co-counsel;	7/2020
07/15/2020	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Review summary notes, prepare for conference call with co-counsel;	7/2020
07/16/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence re: motion to strike complaint;	7/2020
07/17/2020	0016	Sanders, James F.	Partner	1.90	1,140.00	600.00	Review correspondence re: motion to strike complaint, as well as file motions and declarations and related work;	7/2020
07/17/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review new version of brief; office conference with Jay Harbison;	7/2020
07/17/2020	0040	Harbison, William J.	Associate	3.50	1,102.50	315.00	Edited/filed Anti-SLAPP Motion; numerous communications re: same;	7/2020
07/21/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Conference with Jay Harbison and correspondence re: filing and call with John Jacobson;	7/2020
07/21/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with John Jacobson re: anti-SLAPP response; e-mails and conf. with Jim Sanders re: same;	7/2020
07/22/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review emails re: scheduling; participate in conference call with co-counsel;	7/2020
07/22/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Telephone conference with Ed Yarbrough;	7/2020
07/22/2020	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call with Dan Petrocelli re: anti-SLAPP response timing;	7/2020
07/24/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Conference with Jay Harbison re: call with John Jacobson, as well as correspondence re: same;	7/2020
07/24/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
07/24/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review emails; office conference with Jay Harbison;	7/2020
07/27/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails w/ John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
07/28/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Telephone conference with Dan Petrocelli re: next steps and correspondence re: same;	7/2020

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
07/28/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: discovery, etc.;	7/2020
07/28/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
07/29/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence with Dan Petrocelli re: call with SmileDirect local counsel;	7/2020
07/29/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: discovery and anti-SLAPP Response;	7/2020
07/30/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence with Jay Harbison re: call with John Jacobson;	7/2020
07/30/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
07/31/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
08/04/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	Call with Dan Petrocelli re: response to anti-SLAPP motion and e-mails re: same;	8/2020
08/05/2020	0035	Harris, Ronald G.	Partner	0.75	356.25	475.00	Review other Anti-Slapp motion; office conference with Jay Harbison; review emails re: scheduling/deadlines;	8/2020
08/05/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	E-mails with John Jacobson re: discovery pending outcome of anti-SLAPP petition;	8/2020
08/06/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	E-mails with Dan Petrocelli re: discovery pending outcome of anti-SLAPP petition;	8/2020
08/07/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review proposed discovery and emails re: same;	8/2020
08/07/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	E-mails with Dan Petrocelli re: discovery requests from NBC;	8/2020
08/10/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Review proposed discovery and correspondence re: scheduling call to discuss proposed discovery;	8/2020
08/10/2020	0016	Sanders, James F.	Partner	0.90	540.00	600.00	Team conference call re: next steps;	8/2020
08/10/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with Dan Petrocelli and Jim Sanders re: NBC's discovery requests;	8/2020
08/10/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review emails; review in preparation for conference call; participate in conference call;	8/2020
08/14/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Call with Dan Petrocelli and Jim Sanders re: NBC's discovery requests;	8/2020
08/17/2020	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review proposed letter; send email re: changes;	8/2020
08/17/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Review of letter from Dan Petrocelli re: NBC's discovery requests	8/2020
08/18/2020	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Review letter and correspondence re: same;	8/2020
08/18/2020	0040	Harbison, William J.	Associate	0.10	31.50	315.00	Transmitted letter from Dan Petrocelli re: NBC's discovery requests;	8/2020
08/21/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Receipt/review of letter from SDC re: discovery requests;	8/2020
08/25/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Prepare for and participate in conference call, including pre-meeting conference with Jim Sanders and Jay Harbison;	8/2020
08/25/2020	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Review Plaintiff's letter and conference with Ron Harris and Jay Harbison re: same;	8/2020
08/25/2020	0016	Sanders, James F.	Partner	0.60	360.00	600.00	Conference call with O'Melveny & Myers re: next steps;	8/2020

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
08/25/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conference with Ron Harris, and Jim Sanders re: response to Smile Direct Club's discovery requests;	8/2020
08/25/2020	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call with Dan Petrocelli, Ron Harris, and Jim Sanders re: response to Smile Direct Club's discovery requests;	8/2020
08/27/2020	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review proposed letter to opposing counsel; emails re: other slapp motions; email to co-counsel;	8/2020
09/04/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/08/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review proposed motion and briefing schedule; emails to and from co-counsel; pull court dockets;	9/2020
09/08/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/08/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: letter response to Plaintiffs;	9/2020
09/09/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/10/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/11/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review and respond to emails re: stipulation;	9/2020
09/11/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/24/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review new Court of Appeals opinion; telephone conference with Jay Harbison; review for expected motion;	9/2020
09/24/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Review recent TN COA defamation case; conf. w/ RGH and e-mails re: same;	9/2020
09/25/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review email re: pleadings filed;	9/2020
09/28/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review Smile Direct's motion and memorandum; participate in conference call with OMM counsel;	9/2020
09/28/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Reviewed SDC's Motion for Limited Discovery; conf. call w/ team re: same;	9/2020
10/05/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review proposed opposition to SmileDirect's motion;	10/2020
10/06/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Further review for opposition; email re: proposed changes; review Jay Harbison's email draft;	10/2020
10/06/2020	0040	Harbison, William J.	Associate	1.10	346.50	315.00	Review Response to Motion to Compel Discovery; e-mails re: same;	10/2020
10/07/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review draft of opposition with our corrections;	10/2020
10/09/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Review Response to Motion to Compel Discovery; e-mails re: same;	10/2020
10/09/2020	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Conference with Jay Harbison re: strategy;	10/2020
10/09/2020	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Review brief on discovery and related correspondence;	10/2020
10/09/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review final draft of opposition;	10/2020
10/13/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review Anti-Slapp statute and our response;	10/2020
10/14/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: status of hearing on Discovery Motion;	10/2020
10/16/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Emails re: virtual hearing;	10/2020
10/19/2020	0035	Harris, Ronald G.	Partner	4.00	1,900.00	475.00	Review Reply Brief filed by SmileDirect; outline responses; emails re: scheduling;	10/2020
10/20/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Reviewed Reply Brief on SDC's Limited Discovery Motion; e-mails re: same;	10/2020

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
10/21/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review emails re: scheduling; review Judge Brothers' opinion in other case;	10/2020
10/22/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review scheduling emails; prepare for conference call; participate in conference call; notes after call;	10/2020
10/22/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Reviewed Reply Brief on SDC's Limited Discovery Motion; calls re: same;	10/2020
10/26/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Calls and e-mails re: logistics for limited discovery motion hearing;	10/2020
10/26/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Prepare for hearings on discovery motion;	10/2020
10/28/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Calls and e-mails re: logistics for limited discovery motion hearing;	10/2020
10/28/2020	0035	Harris, Ronald G.	Partner	3.00	1,425.00	475.00	Review for hearing; review scheduling emails; review our motion and Complaint;	10/2020
10/29/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Calls and e-mails re: logistics for limited discovery motion hearing;	10/2020
10/29/2020	0040	Harbison, William J.	Associate	3.50	1,102.50	315.00	Prepare for hearing on Motion for limited discovery;	10/2020
10/29/2020	0035	Harris, Ronald G.	Partner	4.50	2,137.50	475.00	Prepare for hearing; participate in conference call; emails re: privilege;	10/2020
10/30/2020	0040	Harbison, William J.	Associate	4.50	1,417.50	315.00	Prepare for/attend hearing on Motion for Limited Discovery;	10/2020
10/30/2020	0016	Sanders, James F.	Partner	4.50	2,700.00	600.00	Prepare for hearing, as well as attend hearing and participate in follow-up calls after hearing;	10/2020
10/30/2020	0035	Harris, Ronald G.	Partner	6.00	2,850.00	475.00	Prepare for and participate in motion hearing; telephone conference after hearing with counsel;; notes to file;	10/2020
10/31/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review Court's order; emails to co-counsel re: appeal issues; email to court reporter; review notes from hearing;	10/2020
11/02/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review appeal issue with Jay Harbison;	11/2020
11/03/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with team re: strategy and next steps; conf. with Ron Harris re: same;	11/2020
11/03/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Telephone conference with co-counsel; review privilege issues; scheduling issues;	11/2020
11/04/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with team re: strategy and next steps; conf. with Ron Harris re: same;	11/2020
11/04/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for and participate in case management conference; review proposed order and email revision;	11/2020
11/05/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review/research re: privilege issue;	11/2020
11/09/2020	0035	Harris, Ronald G.	Partner	4.00	1,900.00	475.00	Review discovery responses and legal research;	11/2020
11/09/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Receipt/review of discovery requests; conf. with Ron Harris re: same	11/2020
11/10/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Further research and review re: privilege issues;	11/2020
11/12/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conf. with Ron Harris re: discovery requests; e-mails with Kendall Turner re: hearing DVD;	11/2020
11/17/2020	0035	Harris, Ronald G.	Partner	3.50	1,662.50	475.00	Review proposed Shield Law Supplemental Brief; office conferences with Jay Harbison; participate in conference call; notes for argument;	11/2020

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
11/17/2020	0040	Harbison, William J.	Associate	2.00	630.00	315.00	Receipt/review of draft brief re: Media Shield Law; call with team re: same;	11/2020
11/20/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Review/file brief re: Media Shield Law;	11/2020
11/20/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Receipt/review of NBC's brief re: Media Shield Law;	11/2020
11/23/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review SmileDirect's motion and filings re: Shield law;	11/2020
12/01/2020	0035	Harris, Ronald G.	Partner	3.50	1,662.50	475.00	Review prior briefs re: SmileDirect's discovery requests; review proposed Reply Brief; email to co-counsel; review subsequent email;	12/2020
12/02/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review order for next filing requirements; review brief;	12/2020
12/03/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Review reply brief re: Media Shield Law;	12/2020
12/03/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review objections to discovery; telephone conference with Dan Petrocelli and Kendall; office conference with Jeffrey Zager;	12/2020
12/04/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	Conf. with Ron Harris re: reply brief re: Media Shield Law;	12/2020
12/04/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Office conference with Jay Harbison re: today's filings; review for filing;	12/2020
12/04/2020	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Correspondence re: filing;	12/2020
12/07/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review of SmileDirect's Supplemental Brief;	12/2020
12/14/2020	0035	Harris, Ronald G.	Partner	1.25	593.75	475.00	Review Plaintiff's response to NBC's objections; review our objections;	12/2020
12/14/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Review filing re: discovery responses;	12/2020
12/15/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for conference call and status conference; conference call with co-counsel;	12/2020
12/15/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Call w/ team re: case management conference;	12/2020
12/16/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Follow-up from conference call/organize for hearing;	12/2020
12/17/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review memo from Ron Harris re: Case Management Conference;	12/2020
12/17/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for and participate in case management conference; draft order; email to co-counsel; review for hearing;	12/2020
12/17/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Attended telephonic case management conference;	12/2020
12/18/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Revisions to Order; emails to and from opposing counsel;	12/2020
01/04/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review court order; prepare for next week's hearing;	1/2021
01/05/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Calls/emails re: logistics for next week's hearing;	1/2021
01/05/2021	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Office conference with Jay Harbison re: next week's hearing;	1/2021
01/08/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review in preparation for Media Shield Law and discovery hearing;	1/2021
01/11/2021	0040	Harbison, William J.	Associate	3.50	1,102.50	315.00	Prepare for hearing on discovery/Media Shield Law;	1/2021
01/11/2021	0035	Harris, Ronald G.	Partner	4.50	2,137.50	475.00	Prepare for hearing on Media Shield Law, including conferences with Jim Sanders and Isaac Sanders; telephone conference with Daniel Petrocelli; research re: statutory issue; review prior pleadings;	1/2021

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01/11/2021	0016	Sanders, James F.	Partner	3.00	1,800.00	600.00	Telephone conference with Dan Petrocelli, as well as review briefing on Order and Shield Law, and meeting with Ron Harris and Jay Harbison in preparation for hearing;	1/2021
01/12/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for and participate in Zoom hearing and conference call; review federal case after hearing;	1/2021
01/12/2021	0016	Sanders, James F.	Partner	2.30	1,380.00	600.00	Prepare for and attend telephonic hearing on Plaintiffs' discovery motion;	1/2021
01/12/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Prepare for/attend hearing on discovery/Media Shield Law;	1/2021
01/12/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Drafted Proposed Agreed Protective Order; legal research re: Lampo case;	1/2021
01/14/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review Judge Brothers' Order; review transcript of hearing;	1/2021
01/14/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Receipt/review of Order on discovery requests; e-mails re: same;	1/2021
01/14/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Conferences and correspondence re: representation letter and Judge's Order;	1/2021
01/20/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence with Daniel Kummer re: billing agreement;	1/2021
01/25/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Review and revise engagement letter pursuant to client request, as well as review guidelines;	1/2021
01/29/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review latest order and transcript of hearing; email and telephone call with co-counsel;	1/2021
02/02/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Telephone conference with John Jackson re: status conference; review and respond to email from co-counsel; prepare for status conference;	2/2021
02/02/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with Kendall Turner re: production format of text messages;	2/2021
02/03/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Prepare for and participate in conference call with Special Master; email to co-counsel;	2/2021
02/03/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Reviewed proposed protective order;	2/2021
02/03/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Conf. with Ron Harris re: case management conference and next steps;	2/2021
02/06/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Email to and from Daniel Petrocelli; review notes from Special Master conference;	2/2021
02/08/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with Kendall Turner re: discovery and production issues;	2/2021
02/08/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with Marsh Nichols (magistrate) re: scope of order;	2/2021
02/08/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Prepare for and participate in case management conference; email report to co-counsel; draft order from conference;	2/2021
02/09/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Emails re: proposed order and submit to opposing counsel;	2/2021
02/10/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Emails re: proposed Order and review proposed Protective Order;	2/2021
02/11/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review Protective Order; emails with Kendall Turner re: proposed orders; emails to opposing counsel;	2/2021
02/12/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	E-mails with team re: SDC lawsuit against landlord;	2/2021
02/12/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review and send revised proposed Order to opposing counsel; emails re: Order;	2/2021

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02/12/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Review correspondence re: protective order;	2/2021
02/12/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: SmileDirect countersuit against their landlord;	2/2021
02/15/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review emails from opposing counsel; email Special Master re: proposed order;	2/2021
02/16/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review response from Special Master re: briefing schedule;	2/2021
02/18/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review new proposed Protective Order;	2/2021
02/19/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails and call with Kendall Turner re: Proposed Protective Order;	2/2021
02/19/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Reviewed TN AG's brief re: constitutionality of Anti-SLAPP Act;	2/2021
02/19/2021	0035	Harris, Ronald G.	Partner	1.30	617.50	475.00	Email to opposing counsel re: schedule; review email; telephone conference with co-counsel re: protective order	2/2021
02/20/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Email to co-counsel re: proposed Scheduling Order changes; review Attorney General brief in other case;	2/2021
02/22/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Telephone conference with opposing local counsel re: Protective Order; telephone conference with Kendall Turner and Chicago counsel; emails re: proposed Scheduling Order;	2/2021
02/23/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review and email new scheduling proposal from opposing counsel; review document production letter; email opposing counsel re: scheduling response;	2/2021
02/25/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Revisions to Order from Case Management conference;	2/2021
02/26/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Telephone conference with opposing counsel re: Scheduling Order; review emails from Special Master; send email to counsel;	2/2021
03/01/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Emails re: proposed changes to Scheduling Order;	3/2021
03/01/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review briefs and ruling in Chattanooga case;	3/2021
03/02/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Receipt/review of Order upholding constitutionality of Anti-SLAPP Act;	3/2021
03/02/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Emailing pleadings from other Tennessee case; review prior pleadings;	3/2021
03/16/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review discovery dispute letter; prepare for conference call;	3/2021
03/16/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review scheduling order requirements and dates;	3/2021
03/16/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Receipt/review of discovery deficiency letter; communications with team re: same;	3/2021
03/17/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review discovery dispute letter;	3/2021
03/23/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review response to discovery dispute letter;	3/2021
03/24/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review Dan Petrocelli's letter to Plaintiffs;	3/2021
04/01/2021	0035	Harris, Ronald G.	Partner	0.70	332.50	475.00	Begin review of Smile Direct's Brief; review of co-counsel emails;	4/2021
04/02/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Conference call re: cybersecurity issues;	4/2021
04/02/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review Smile Direct Brief on constitutionality;	4/2021
04/05/2021	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Telephone conferences and conferences re: Ciccio v. SmileDirect matter and how it may relate to this matter;	4/2021

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04/05/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Research re: Motion for Sanctions in Ciccio v. SDC case (M.D. Tenn.)	4/2021
04/05/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review cases for constitutionality response; review sanctions motion in other cases;	4/2021
04/06/2021	0016	Sanders, James F.	Partner	0.80	480.00	600.00	Review redacted brief and notes re: Cicci matter and how it relates to this matter;	4/2021
04/06/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Telephone conference with Dan Petrocelli re: Cicci v. SmileDirect matter and how it relates to this case, as well as next steps;	4/2021
04/09/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Conference with Jay Harbison re: Deputy Attorney General Kleinfelter's request and prepare memorandum re: same;	4/2021
04/09/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Telephone conference with Dan Petrocelli re: request from Deputy Attorney General Kleinfelter;	4/2021
04/09/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Call w/ Janet Kleinfelter re: AG's intervention;	4/2021
04/09/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Memo to file re: conversations w/ Janet Kleinfelter; e-mails re: same;	4/2021
04/09/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Reviewed Anti-SLAPP briefing from Chattanooga re: constitutional;	4/2021
04/14/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence re: depositions;	4/2021
04/14/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Drafted remote deposition protocol; call w/ Kendall Turner re: same;	4/2021
04/15/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: deposition;	4/2021
04/21/2021	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: deposition scheduling and witness preparation.	4/2021
04/22/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Call w/ Kendall Turner re: Vicky Nguyen deposition prep.	4/2021
04/23/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Telephone call with opposing counsel re: status conference; emails re: status conference;	4/2021
04/24/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Telephone call with Dan Petrocelli re: discovery issues and status conference;	4/2021
04/26/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Correspondence re: Order and re: status conference;	4/2021
04/26/2021	0035	Harris, Ronald G.	Partner	1.20	570.00	475.00	Emails with opposing counsel re: status conference; participate in status conference; telephone call with co-counsel;	4/2021
04/27/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review privilege issues for conference call with co-counsel;	4/2021
04/28/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Prepare for co-counsel conference call (review Shield law issues); participate in conference call; review constitutionality brief;	4/2021
04/28/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Strategy meeting w/ OMM and NBC counsel.	4/2021
04/28/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Reviewed supplemental brief re: constitutionality issues.	4/2021
04/28/2021	0040	Harbison, William J.	Associate	2.00	630.00	315.00	Attended Lauren Dunn deposition prep.	4/2021
04/29/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review correspondence from Jay Harbison and conference re: same;	4/2021
04/30/2021	0016	Sanders, James F.	Partner	0.60	360.00	600.00	Conferences re: upcoming deposition and brief to be filed;	4/2021

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04/30/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Office conference with Jim Sanders and Jay Harbison re: deposition preparation of NBCU witnesses; review latest amount;	4/2021
04/30/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Strategy meeting re: upcoming depositions.	4/2021
05/02/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review latest revision of constitutionallity brief;	5/2021
05/03/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review latest version of NBC's brief; email suggestions to co-counsel;	5/2021
05/03/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Review supplemental brief for filing;	5/2021
05/03/2021	0016	Sanders, James F.	Partner	0.10	60.00	600.00	Conference with Jay Harbison re: deposition preparation of Vicki Nguyen;	5/2021
05/03/2021	0040	Harbison, William J.	Associate	3.00	945.00	315.00	Prepare for/attend Vicky Nguyen Deposition Prep.	5/2021
05/05/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: May 25, 2021 hearing;	5/2021
05/05/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Telephone call with Katherine Klein - local counsel for plaintiff;	6/2021
05/05/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Draft order from status conference;	6/2021
05/05/2021	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Emails to counsel re: hearing mechanics;	6/2021
05/10/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Prepare for Vicky Nguyen Deposition Prep	5/2021
05/11/2021	0040	Harbison, William J.	Associate	4.00	1,260.00	315.00	Prepare for/attend Vicky Nguyen Deposition Prep	5/2021
05/12/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review Smile Direct's Reply Brief and emails to and from Attorney General and to counsel;	5/2021
05/12/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: deposition and hearing;	5/2021
05/12/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Attend Vicky Nguyen deposition	5/2021
05/14/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review plaintiff's last brief on statutory procedure and constitutions;	5/2021
05/16/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review Sur-Reply Brief;	5/2021
05/17/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Prepare for/attend Lauren Dunn Deposition Pre	5/2021
05/17/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review latest Sur-Reply Brief;	5/2021
05/19/2021	0016	Sanders, James F.	Partner	0.80	480.00	600.00	Review pleading from State and correspondence re: next steps;	5/2021
05/20/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review State of Tennessee intervention memorandum;	5/2021
05/20/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: consent re: State of Tennessee intervention memorandum;	5/2021
05/20/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: deposition of Vicky Nguyen, as well as conference with Jay Harbison re: same;	5/2021
05/20/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review brief of Attorney General emails re: consent and outline for hearing;	5/2021
05/21/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Prepare for/attend Lauren Dunn Deposition	5/2021
05/21/2021	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Correspondence re: Sunday call and prepare for telephone conference in preparation for hearing;	5/2021
05/23/2021	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Prepare for conference call on Constitutionality Argument and review relevant briefs;	5/2021
05/23/2021	0016	Sanders, James F.	Partner	1.20	720.00	600.00	Conference call with co-counsel re: upcoming argument re: Constitutionality;	5/2021

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
05/24/2021	0016	Sanders, James F.	Partner	0.80	480.00	600.00	Research and correspondence re: hearing regarding constitutionality;	5/2021
05/24/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Prepare for telephonic argument re: constitutionality;	5/2021
05/25/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Prepare for telephonic hearing re: constitutionality;	5/2021
05/25/2021	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Attend telephonic hearing re: constitutionality;	5/2021
05/25/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conference re: three-judge panel legislation and strategy going forward;	5/2021
05/25/2021	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Follow-up research re: scheduling and new statute re: three-judge panel with respect to constitutionality issue;	5/2021
05/25/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for and attend hearing on constitutional issues and conferences with co-counsel after hearing;	5/2021
05/25/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Emails and telephone calls with opposing counsel, Special Master and co-counsel re: scheduling hearings and briefing;	5/2021
05/25/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Research re: new Tennessee law on constitutional challenges;	5/2021
05/26/2021	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Review correspondence re: scheduling, as well as review Tennessee Statute regarding three-judge panel issue;	5/2021
05/26/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conference with Ron Harris re: Tennessee Statute regarding three judge panel and next steps with regard to this issue;	5/2021
05/26/2021	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Conferences re: strategy regarding new statute and regarding argument with respect to new statute;	5/2021
05/26/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review court order re: May 26, 2021 case management conference;	5/2021
05/26/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Participate in case management conference and discussions re: scheduling;	5/2021
05/26/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Legal research and discussion re: three judge panel and office conference with Jim Sanders and Jeffrey Zager re: possible approach to Judge Brothers email to co-counsel re: legal research;	5/2021
05/26/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review and transmit Order from Lease Management;	5/2021
05/27/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review issue re: new Tenn law on 3 judge panel;	5/2021
06/01/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review transcript from hearing and additional legal research re: new law;	6/2021
06/04/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Correspondence and response to motion to strike;	6/2021
06/04/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review Plaintiff's Response to Defendants' Motion on Constitutional Grounds, review plaintiff's Motion Pro Hac Vice, as well as emails to opposing counsel re: Agreed Order;	6/2021
06/07/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Research re: final version of new lease and outline proposed addition to Reply Brief;	6/2021
06/08/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review and conference re: email regarding security protocols;	6/2021
06/08/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review proposed Reply Brief and send email re: statutory reference;	6/2021
06/08/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Telephone call with Court Clerk re: live-streaming issue and email to co-counsel re: same;	6/2021

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
06/08/2021	0016	Sanders, James F.	Partner	-0.30	-180.00	600.00		6/2021
06/11/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review final draft of brief and email to Jay Harbison re: filing;	6/2021
06/14/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Review Orders re: pro hac vice admission of counsel;	6/2021
06/16/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Legal research; new Supreme Court rule on constitutionality and three judge panel;	6/2021
06/18/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Review Appellate decision in Nandigam v. Beavers;	6/2021
06/21/2021	0016	Sanders, James F.	Partner	0.10	60.00	600.00	Correspondence re: June 25 hearing;	6/2021
06/21/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review Scheduling Order;	6/2021
06/22/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Discussions re: arrangements for Friday's hearing; review prior orders;	6/2021
06/23/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review Supplemental Authority from Attorney General;	6/2021
06/24/2021	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Prepare for hearing, as well as conferences with Jon Hacker re: same;	6/2021
06/24/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review in preparation for hearing on constitutionality of Anti-SLAPP petition; office conferences with Jim Sanders and Jonathan Hecker;	6/2021
06/25/2021	0016	Sanders, James F.	Partner	3.00	1,800.00	600.00	Prepare for hearing on constitutionality;	6/2021
06/25/2021	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Attend hearing on constitutionality;	6/2021
06/25/2021	0035	Harris, Ronald G.	Partner	3.00	1,425.00	475.00	Prepare for and attend hearing on constitutional issues;	6/2021
06/28/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Conference with Ron Harris re: last week's hearing	6/2021
07/06/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: obtaining transcript of recent hearing	7/2021
07/13/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: NBC Motion to file exhibits under seal	7/2021
07/13/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review Motion to file under seal and order and emails to co-counsel;	7/2021
07/14/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: request for extension to file response brief	7/2021
07/15/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	E-mails and telephone conference with Kathy Klein re: request for extension to file response brief;	7/2021
07/19/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review of SmileDirect's Response and email to co-counsel transmitting same;	7/2021
07/20/2021	0040	Harbison, William J.	Associate	4.70	1,480.50	315.00	Receipt/review of Anti-SLAPP Response and lengthy associated filings	7/2021
07/20/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Office discussion with Jay Harbison re: Brief of SmileDirect and review of Brief and filings;	7/2021
07/21/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review of SmileDirect's Brief and Statement of Facts new flash drive videos from plaintiff and review opinion re: constitutionality and further review of pleadings;	7/2021
07/22/2021	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Begin review of Plaintiffs' Brief in Opposition to Motion to Strike, as well as Statement of Facts;	7/2021
07/22/2021	0040	Harbison, William J.	Associate	1.40	441.00	315.00	Receipt/review of Anti-SLAPP Response and lengthy associated filings	7/2021
07/23/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conference with Jim Sanders re: Anti-SLAPP Response and strategy;	7/2021

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
07/23/2021	0040	Harbison, William J.	Associate	1.60	504.00	315.00	Receipt/review of Anti-SLAPP Response and lengthy associated filings	7/2021
07/23/2021	0016	Sanders, James F.	Partner	5.00	3,000.00	600.00	Review Plaintiffs' filed response to NBCUniversal's Motion to Dismiss, as well as draft summary of response, and conference with Jay Harbison re: same;	7/2021
07/26/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Continue review of Smile Direct briefing;	7/2021
07/26/2021	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Call w/ Erik Benton re: Anti-SLAPP hearing	8/2021
07/27/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review SmileDirect's lengthy pleadings;	7/2021
07/28/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review NBCU's prior Memorandum re: Motion to Dismiss to Compare to SmileDirect's claims;	8/2021
08/12/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Reviewed/edited draft of Anti-SLAPP Reply Brief	8/2021
08/12/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review draft of Reply and send e-mail with comments re: brief;	8/2021
08/17/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review latest draft of Reply Brief;	8/2021
08/18/2021	0016	Sanders, James F.	Partner	0.10	60.00	600.00	Correspondence re: draft reply brief;	8/2021
08/18/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Reviewed/edited draft of Anti-SLAPP Reply Brief	8/2021
08/18/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review Reply Brief with Jay Harbison;	8/2021
08/19/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Edited/filed Anti-SLAPP Reply Brief	8/2021
08/19/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review Reply Brief for filing, as well as follow-up on filing;	8/2021
09/01/2021	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Email with opposing counsel re: copies of authorities cited in briefs;	9/2021
09/16/2021	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Review of Anti-SLAPP Sur-reply brief;	9/2021
09/16/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review Sur-reply of SmileDirect;	9/2021
09/17/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review SmileDirect Sur-reply and research re: cases cited therein;	9/2021
09/20/2021	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Review of Anti-SLAPP Sur-reply brief;	9/2021
09/21/2021	0040	Harbison, William J.	Associate	4.50	1,417.50	315.00	Review of Anti-SLAPP Sur-reply brief, as well as email to team re: same;	9/2021
09/21/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Further review of SmileDirect Sur-reply and prior pleadings;	9/2021
09/22/2021	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Further review of Anti-SLAPP Sur-reply brief and additional emails to team re: same;	9/2021
09/22/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Strategy call with team re: Anti-SLAPP hearing;	9/2021
09/22/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: hearing schedule;	9/2021
09/22/2021	0035	Harris, Ronald G.	Partner	1.30	617.50	475.00	Prepare for and participate in conference call with co-counsel, as well as office conferences with Jay Harbison;	9/2021
09/23/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: upcoming hearing date;	9/2021
09/23/2021	0040	Harbison, William J.	Associate	0.70	220.50	315.00	Various communications re: rescheduling Anti-SLAPP hearing date;	9/2021
09/24/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: rescheduling Anti-SLAPP hearing;	9/2021
09/24/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Drafted/submitted agreed order re: rescheduling Anti-SLAPP hearing'	9/2021

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
10/18/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with Dan Petrocelli re: logistics for upcoming Anti-SLAPP Hearing	10/2021
11/08/2021	0016	Sanders, James F.	Partner	4.00	2,400.00	600.00	Review briefs on motion to strike, as well as conference with Jay Harbison re: argument;	11/2021
11/08/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Conference with Jim Sanders re: strategy for November 17 Anti-SLAPP Hearing	11/2021
11/10/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review pleadings in preparation for hearing;	11/2021
11/12/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conference with Jay Harbison in preparation for argument;	11/2021
11/12/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Conference with Jay Harbison and Jeffrey Zager re: upcoming argument;	11/2021
11/12/2021	0040	Harbison, William J.	Associate	0.80	252.00	315.00	Conference with Jim Sanders re: strategy for November 17 Anti-SLAPP Hearing	11/2021
11/15/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conference call re: argument;	11/2021
11/15/2021	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Strategy call with Dan Petrocelli re: upcoming hearing on Anti-SLAPP Petition;	11/2021
11/15/2021	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Review filings in advance of hearing on Anti-SLAPP Petition;	11/2021
11/15/2021	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Prepare for argument;	11/2021
11/15/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Prepare for hearing by conferences with Jim Sanders and Jay Harbison and participate in conference call with OMM counsel and review prior pleadings;	11/2021
11/16/2021	0016	Sanders, James F.	Partner	4.00	2,400.00	600.00	Prepare for hearing;	11/2021
11/16/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Prepare for hearing logistics re: counsel meetings and hearing;	11/2021
11/17/2021	0040	Harbison, William J.	Associate	7.50	2,362.50	315.00	Prepare for and attend hearing on Anti-SLAPP Petition	11/2021
11/17/2021	0016	Sanders, James F.	Partner	4.00	2,400.00	600.00	Attend hearing;	11/2021
11/17/2021	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Prepare for hearing;	11/2021
11/17/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Correspondence re: Order from hearing, as well as correspondence re: hearing transcript;	11/2021
11/17/2021	0035	Harris, Ronald G.	Partner	4.50	2,137.50	475.00	Prepare for hearing and meetings with co-counsel and attend hearing and discussions with counsel re: appellate issues;	11/2021
11/18/2021	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Correspondence re: transcript and Order, as well as conferences with Ron Harris and Jay Harbison re: same;	11/2021
11/18/2021	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Review transcript of Court's decision, as well as correspondence with counsel re: same;	11/2021
11/18/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	E-mails with Kendall Turner re: examples of fee petitions and orders;	11/2021
11/18/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conference with Jim Sanders and Ron Harris re: drafting of Order on Anti-SLAPP Petition;	11/2021
11/18/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review proposed order and make comments;	11/2021
11/22/2021	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Review and comment on proposed Order from hearing;	11/2021
11/23/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: submission of proposed Anti-SLAPP Order	11/2021
11/23/2021	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Review final version of Order and emails re: submission;	11/2021

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
11/24/2021	0016	Sanders, James F.	Partner	0.60	360.00	600.00	Review draft Order and correspondence;	11/2021
11/24/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: submission of proposed Anti-SLAPP Order;	11/2021
11/29/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: submission of proposed Anti-SLAPP Order	11/2021
11/30/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conferences re: fee application;	11/2021
11/30/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Discussions re: attorney fee petition and review email re: same;	11/2021
11/30/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Meeting with Jim Sanders re: fee petition;	11/2021
11/30/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Telephone conference with Dan Petrocelli re: fee petition issues	11/2021
11/30/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Legal research and e-mail to team re: fee petition issues	11/2021
12/01/2021	0040	Harbison, William J.	Associate	0.40	126.00	315.00	Various communications re: fee petition issues	12/2021
12/10/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence re: order of dismissal;	12/2021
12/13/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review filings;	12/2021
12/13/2021	0035	Harris, Ronald G.	Partner	0.10	47.50	475.00	Review emails re: Notice of Appeal;	12/2021
12/20/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Review and correspondence re: Court Order;	12/2021
12/21/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review, request for stipulation and email to co-counsel;	12/2021
12/21/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: Appellate Record;	12/2021
12/22/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review issue re: appellate record; email to co-counsel re: same;	12/2021
12/22/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: Appellate Record;	12/2021
12/22/2021	0040	Harbison, William J.	Associate	0.40	126.00	315.00	Various communications re: appellate record issues	12/2021
12/23/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Correspondence re: Appellate Record;	12/2021
12/23/2021	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call w/ Kathy Klein re: agreed order for appellate record; e-mails re: same	12/2021
12/27/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review requests of Appellate Court and send emails to co-counsel;	12/2021
12/27/2021	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Receipt/review of lead counsel designation forms.	12/2021
12/28/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review for appellate forms and Motion pro hac vice;	12/2021
				450.05	203,433.25			

Service Code Summary Report

Billed and Unbilled

NBCUniversal Media, LLC / SmileDirectClub, Inc et al. v. (00005248-00020616)

01/06/2022

Service Code	Description	Orig Amt	Rev Amt	First	Last
00103	Court Reporter	1,946.66	1,946.66	11/03/2020	06/01/2021
00104	Court Costs	576.25	576.25	11/03/2020	11/12/2020
00140	Filing Fees	340.00	340.00	07/06/2020	07/06/2020
00142	Food	445.52	445.52	06/24/2021	06/24/2021
00155	A+ Conferencing	9.62	9.62	11/30/2020	11/30/2020
Report Totals:		3,318.05	3,318.05		

**IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE**

SMILEDIRECTCLUB, INC.,)	
SDC FINANCIAL, LLC, and)	
SMILEDIRECTCLUB, LLC,)	
)	
Plaintiffs,)	
)	
v.)	No. 20-C-1054
)	Judge Brothers
NBCUNIVERSAL MEDIA, LLC and)	
VICKY NGUYEN,)	
)	
Defendants.)	

REQUEST FOR REASONABLE ATTORNEYS' FEES AND COSTS

INTRODUCTION

This Court's December 10, 2021 ruling granted NBC News's petition to strike Smile Direct's complaint pursuant to the Tennessee Public Participation Act ("TPPA"), Section 20-17-101, *et seq.* NBC News now respectfully moves for an award of its reasonable attorneys' fees and costs.

When a defendant successfully moves to strike a complaint under the TPPA, the TPPA requires the court to award the defendant its reasonable attorneys' fees and costs. *See* Tenn. Code Ann. § 20-17-107(a)(1). The mandatory fee award is fundamental to the TPPA's core objective of deterring strategic, free-speech-chilling lawsuits by making the plaintiff bear the defendant's costs. Awarding fees and costs is especially important to advancing the TPPA's objective in the context of this case: The proceedings here have lasted almost two years, forcing NBC News to bear many of the costs that the TPPA's quick-dismissal mechanism is designed to minimize.

NBC News is thus entitled to the fees and other legal costs it reasonably incurred in defending against Smile Direct's complaint. That complaint sought \$2.85 *billion* in compensatory and statutory damages, *in addition to* punitive damages, from NBC News. In response, NBC News—like Smile Direct itself—employed two law firms: a national firm with extensive First Amendment litigation experience, O'Melveny & Myers LLP ("O'Melveny"), and a Tennessee-based firm also with extensive First Amendment experience, Neal & Harwell, PLC ("Neal & Harwell"). NBC News now requests an award of \$2,026,201.20 reflecting \$1,792,618.00 in total fees and \$26,831.90 in expenses reasonably charged by O'Melveny, and \$203,433.25 in total fees and \$3,318.05 reasonably charged by Neal & Harwell. *See* Hacker Decl. ¶ 3; Sanders Decl. ¶ 6. The amount requested is based on a figure that combines reasonable hourly rates charged by the relevant attorneys who spent a reasonable number of hours defending against Smile Direct's claims. Smile Direct filed a 209-page complaint, plus 733 pages of substantive briefing, and the Court held four substantive oral arguments and one status conference. Responding to Smile Direct's extensive filings and preparing for hearings required significant time and skill, especially given the novelty of the TPPA, the complex issues presented by this case, and the large amount of damages at stake..

LEGAL STANDARD

Under the TPPA, a defendant that prevails on a motion to strike a complaint attacking the defendant's exercise of First Amendment rights is entitled to an award of the attorneys' fees and costs it incurred to strike the complaint. *See* Tenn. Code Ann. § 20-17-107(a)(1). The statute explicitly states that when a court grants an Anti-SLAPP petition, the court "shall" award the petitioning party its "[c]ourt costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition." *Id.* § 20-17-107(a).

This mandatory fee-shifting provision is essential to the statute’s fundamental objective, which “is largely intended to deter SLAPP lawsuits and prevent litigants from spending thousands of dollars defending themselves in frivolous litigation.” *Nandigam Neurology, PLC v. Beavers*, 2021 WL 2494935, at *14 (Tenn. Ct. App. June 18, 2021). Without fee-shifting, the SLAPP statute would not serve its purpose of deterring potential plaintiffs from filing lawsuits designed to “intimidate individuals and groups and deter them from speaking out on public issues.” Hearing on S.B. 1097 Before the S. Judiciary Comm., 111th Gen. Assemb. (Tenn. Mar. 12, 2019) (statement of Sen. Dickerson). “[T]he imposition of the attorney fees is a critical deterrent.” *Id.*; see also S. Floor Sess. on S.B. 1097 Before the S., 111th Gen. Assemb. (Tenn. Mar. 18, 2019) (statement of Sen. Dickerson).¹

While the court therefore must award the defendant the fees and costs it incurred to obtain dismissal of a complaint under the TPPA, the amount of the fees and costs also must be “reasonable” in the context of a given case. Tenn. Code Ann. § 20-17-107(a)(1). To determine what amount is reasonable in context, a court “must consider the factors provided in Tennessee Supreme Court Rule 8, RPC 1.5.” *Ellis v. Ellis*, 621 S.W.3d 700, 708 (Tenn. Ct. App. 2019) (citing *Wright ex. rel Wright v. Wright*, 337 S.W.3d 166, 185 (Tenn. 2011)). That rule identifies “factors to be considered in determining the reasonableness of a fee,” including the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;

¹ The floor hearings are available at <https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB1097 &ga=111>.

- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

Tenn. S. Ct. R. 8 (incorporating Tennessee Rule of Professional Conduct 1.5). These factors “may have less relevance” where, as here, “a party is seeking payment of his or her attorney’s fees from the opposing party rather than seeking to resist the attorney’s fees charged by his or her own counsel.” *Smith v. All Nations Church of God*, 2020 WL 6940703, at *6 (Tenn. Ct. App. Nov. 25, 2020). But courts still consider these factors in making a mandatory fee award. *See id.* Ultimately, what constitutes a reasonable fee “depend[s] upon the particular circumstances of the individual case.” *Wright*, 337 S.W.3d at 185-86 (citations omitted). And where the award vindicates rights conferred by a statute designed to protect the public good, courts generally will ensure that the award effectuates the purpose of the statute. *See, e.g., Adkinson v. Harpeth Ford-Mercury, Inc.*, 1991 WL 17177, at *9 (Tenn. Ct. App. Feb. 15, 1991) (Tennessee Consumer Protection Act); *Lowe v. Johnson County*, 1995 WL 306166, at *7-8 (Tenn. Ct. App. May 19, 1995) (Tennessee Human Rights Act). Here that purpose is to ensure that the defendant does not bear the litigation costs of a speech-chilling lawsuit, as just discussed.

ARGUMENT

For the reasons below and as set forth in the accompanying declarations of Jonathan D. Hacker and James F. Sanders, this Court should grant NBC News’s reasonable attorneys’ fees and

costs in the amount of \$2,026,201.20. *See* Hacker Decl. ¶ 3; Sanders Decl. ¶ 6. All of these fees and costs were incurred in conjunction with NBC News's Anti-SLAPP petition.

1. NBC News Is Entitled to All Fees and Costs in the Proceedings

NBC News is entitled to attorneys' fees and costs incurred in all aspects of the proceedings thus far, including discovery and supplemental briefing. *See* Tenn. Code Ann. § 20-17-107(a). As set forth in the declaration of Jonathan D. Hacker, counsel for NBC News not only filed an Anti-SLAPP petition and reply and responded to discovery requests, but also submitted seven *additional* briefs on supplemental issues raised by either Smile Direct or the Court, including the constitutionality of the TPPA, the standard for obtaining discovery in Anti-SLAPP proceedings, the applicability of Tennessee's Media Shield Law, and the third step of the Anti-SLAPP analysis, which requires the court to assess whether the petitioning party has established a valid defense. Each of these issues implicated matters of first impression in Tennessee. NBC News is entitled to the attorneys' fees and costs it incurred to address all of these matters.

The TPPA does not limit fee and cost awards to the simple act of preparing the petition itself. The statute expressly mandates an award of fees and costs "incurred in filing *and prevailing* upon the petition." Tenn. Code Ann. § 20-17-107(a) (emphasis added). That mandate on its face encompasses all the work the defendant performed in the course of prevailing upon the petition. Such work necessarily includes preparing responses to the plaintiff's briefs and motions opposing the petition—including challenging its constitutionality—as well as any discovery requests the plaintiff propounds in seeking to defeat the petition. It likewise includes work responding to orders the Court itself issues in the course of deciding whether to grant the petition, as well as preparing for and attending any hearings the Court convenes. All of this work is performed directly in

support of “prevailing upon the petition” and thus falls squarely within the plain terms of the mandatory fee award provision of the TPPA.

Even if the TPPA were not so clear on its face, the Tennessee Court of Appeals has held that “legislative provisions for an award of reasonable attorney’s fees need not make a specific reference” to the actual type of work “where the legislation has broad remedial aims.” *Killingsworth v. Ted Russell Ford*, 205 S.W.3d 406, 409 (Tenn. 2006) (citing *Forbes v. Wilson County Emergency Dist. 911 Bd.*, 966 S.W.2d 417 (Tenn. 1998)). That rationale plainly applies here given the TPPA’s broad compensatory and deterrent objectives. *See supra* pp. 2-3. Indeed, the Tennessee Court of Appeals has already applied the *Killingsworth* principle to award *appellate* fees in a TPPA case, even though the statute “does not expressly provide for attorney’s fees incurred at the appellate level.” *Nandigam*, 2021 WL 2494935, at *14. The appellate fees in *Nandigam* were sought under the TPPA’s *separate* remedial provision, *see id.* at *13, which allows a court to provide “[a]ny additional relief, including sanctions, that [it] determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.” Tenn. Code Ann. § 20-17-107(a)(2). Applying *Killingsworth*, the Court of Appeals held that appellate fees were necessary to effectuate the TPPA’s fundamental objective of “deter[ring] SLAPP lawsuits and prevent[ing] litigants from spending thousands of dollars defending themselves in frivolous litigation.” *Nandigam*, 2021 WL 2494935, at *14. It obviously would defeat the TPPA’s core objective if a plaintiff could file a SLAPP lawsuit, subject the defendant to motions, hundreds of pages of briefs, substantial discovery requests, and multiple hearings, yet be somehow insulated from compensating the defendant for the significant fees and costs the lawsuit forced it to incur.

Accordingly, the *Killingworth/Nandigam* rule justifying fees to effectuate a statute's broad remedial purpose plainly applies here. That is all the more true because the fees and costs at issue here all fall within the TPPA's "specific reference" to the fees and costs that *must* be awarded, i.e., those incurred for work performed in "prevailing upon the petition." As shown above, the fees and costs here were all incurred in the course of filing and supporting the petition to strike and defeating Smile Direct's asserted constitutional, statutory, and factual defenses. An award for all such work is thus compelled by the statutory text. As this Court itself observed in an October 30, 2020 hearing, if NBC News "ultimately succeeded in [its] motion to dismiss the lawsuit, wouldn't that – wouldn't the discovery expense be part of [NBC News's] recovery?" 10/30/2020 Tr. 76:1-5. The answer is yes.

2. The Amount Of Fees And Costs Requested Is Reasonable Under Tennessee Law

The amount of fees and costs NBC News seeks is reasonable under Tennessee law.

First, NBC News is entitled to the fees stated above given the time and labor expended to prevail on the Anti-SLAPP petition. Smile Direct's sprawling, 209-page complaint identified more than 40 allegedly false and misleading statements and 14 counts against NBC News. Given the far-reaching complaint, NBC News incurred significant costs to read the complaint closely, scrutinize its voluminous factual allegations, and research its legal claims, all in service of preparing its Anti-SLAPP petition. *See, e.g., Parker v. Brunswick Forest Homeowners Ass'n, Inc.*, 2019 WL 2482351, at *3 (Tenn. Ct. App. June 13, 2019) (quoting and affirming trial court ruling that protracted litigation supports award of attorneys' fees). NBC News also incurred significant costs because the TPPA was enacted just two years ago, and at the time Smile Direct filed suit, there were no Tennessee appellate decisions construing the statute.² As a result, NBC News's

² Since NBC News filed its Anti-SLAPP Petition, the Tennessee Court of Appeals has issued two opinions concerning Tennessee's Anti-SLAPP Act. *See Nandigam*, 2021 WL 2494935, at *6 ("[T]here is no Tennessee case

briefing required analysis of case law under analogous Anti-SLAPP statutes in other states. Preparing NBC News's Anti-SLAPP petition, as well as briefing the supplemental issues identified by Smile Direct, therefore took more time and skill to research, draft, and argue than a standard motion to dismiss. *See* Hacker Decl. ¶¶ 13-14, 20. The Court itself emphasized that the TPPA motion involved "a big topic," and that the work both performed was "thorough" and not "wasteful." 11/17/2021 Tr. 7:12-19. And Smile Direct's substantive briefing totaled 733 pages, whereas NBC News responded effectively in a mere 233 pages total over eight briefs.³ Rule 1.5(a)(1) therefore supports NBC News's requested fee.

Second, the reasonableness of NBC News's fee is strongly supported by the result obtained by NBC News's counsel. *See* Tenn. R. Pro. Conduct 1.5(a)(4). Courts often evaluate reasonableness of a fee award by considering the amount of damages at stake in the case. Thus, for example, a Tennessee federal court found it reasonable for a defendant to incur \$19.5 million in fees to defeat a complaint seeking "only" \$193.6 million. *Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, at *28 (M.D. Tenn. Aug. 11, 1999). Another court found it reasonable to incur \$9.4 million to defeat a \$111.2 million False Claims Act suit, *see Bagley v. United States*, 2011 WL 13128158, at *1 (C.D. Cal. June 30, 2011), and another found it reasonable to incur some \$3 million in fees for case involving approximately \$80 million, *see Themis Cap. v. Democratic Republic of Congo*, 2014 WL 4379100, at *13 (S.D.N.Y. Sept. 4, 2014). The same comparison here supports the fee request even more strongly than in the foregoing precedents. Smile Direct's complaint sought compensatory and punitive damages and other monetary relief

law construing the TPPA as of yet."); *Doe v. Roe*, 2021 WL 2588394, at *2 (Tenn. Ct. App. June 24, 2021) ("[T]he TPPA is a relatively new creature of the legislature, having only been codified in 2019. In fact, the first Tennessee appellate opinion providing guidance on interpretation of the TPPA was only recently decided." (citing *Nandigam Neurology*)).

³ These figures exclude tables of contents, certificates of service, declarations, and exhibits, but include Smile Direct's statement of facts and chart of allegations.

exceeding \$2.85 billion. Hacker Decl. ¶ 12. NBC News defeated that suit outright, and incurred \$2,026,201.20 to do it—less than 0.1% of the amount Smile Direct demanded. The costs NBC News incurred to achieve that efficient result was clearly well-spent. Rule 1.5(a)(4) therefore supports NBC News’s requested fee.

Third, NBC News’s staffing of the matter was efficient and economical, especially given the enormous damages sought, the novelty of the issues, and Smile Direct’s decisions to file extensive briefs and to seek briefing on additional issues. *See* Tenn. R. Pro. Conduct 1.5(a)(3). NBC News employed two law firms, one local firm with expertise in Tennessee law and procedure and First Amendment litigation in Tennessee, and one global firm with expertise in large-scale commercial litigation, First Amendment rights, and Anti-SLAPP proceedings. That allocation was entirely reasonable under the circumstances. *See Ne. Coal. for Homeless v. Brunner*, 2010 WL 4939946, at *6 (S.D. Ohio Nov. 30, 2010) (“Though attorneys from more than one firm collaborated on the same project, the evidence the parties have presented demonstrates an attempt at cost-efficient allocation of work[.]”), *aff’d*, 695 F.3d 563 (6th Cir. 2012); *Legacy Partners, Inc. v. Travelers Indem. Co. of Ill.*, 83 F. App’x 183, 187 (9th Cir. 2003) (“In a lawsuit threatening millions in damages, the use of five law firms is not per se unreasonable.”). Smile Direct cannot possibly disagree—it, too, employed both national and local counsel to litigate its multibillion-dollar claims against NBC News.

Both firms employed by NBC News worked diligently to control fees and costs and to avoid duplicative work across the firms. While the timekeepers’ fees ranged considerably, the majority of the hours spent on this matter were billed by associates and counsel, who were supervised by partners at each firm, at significantly lower hourly rates. *See Pilkinton v. Hartsfield*, 2013 WL 3353898, at *2 (M.D. Tenn. July 2, 2013) (staffing with multiple attorneys was

permissible given that billing records reflected attorneys with lowest hourly rate “accounted for the lion’s share of billable hours”). Counsel for NBC News also used non-attorney staff (both billable and non-billable) when possible to provide additional support at lower cost. Altogether, work by associates, counsel, and non-attorneys comprised roughly 80% of the total hours billed. *See* Hacker Decl. ¶ 20.

Fourth, the hourly rates charged by both O’Melveny and Neal & Harwell are also reasonable under Rule 1.5(a)(3). Courts look to national markets, areas of specialization, or any other market they believe is appropriate to determine the reasonableness of a fee request. *McHugh v. Olympia Entm’t, Inc.*, 37 F. App’x 730, 740 (6th Cir. 2002); *accord Louisville Black Police Officers Org. v. City of Louisville*, 700 F.2d 268, 278 (6th Cir. 1983) (courts are not required to base attorney fees on local rates and may look to national market or market rate for specialized area of law). O’Melveny’s hourly rates are consistent with the rates charged among its peers for similar services by attorneys of like experience in similar law firms. *See* Hacker Decl. ¶¶ 15-17. Other courts considering attorneys’ motions by similar large national firms have found comparable rates to be reasonable because they reflected market rates.⁴ Neal & Harwell’s fees were also reasonable in light of the market and the type of work performed by them. *See* Sanders Decl. ¶ 8. Indeed, courts across Tennessee also often find rates around those of Neal Harwell’s to be reasonable.⁵ Rule 1.5(a)(3) therefore supports NBC News’s requested fee.

⁴ *See, e.g., VR Optics, LLC v. Peloton Interactive, Inc.*, 2021 WL 1198930, at *5 (S.D.N.Y. Mar. 30, 2021) (rates ranging from \$845.00 to \$1,260.00 are not excessive for large, global law firms (citing *Vista Outdoor Inc. v. Reeves Fam. Tr.*, 2018 WL 3104631, at *6 (S.D.N.Y. May 24, 2018)), *appeal filed*, No. 21-1918 (Fed. Cir.); *MSC Mediterranean Shipping Co. Hldg. S.A. v. Forsyth Kownacki LLC*, 2017 WL 1194372, at *3 (S.D.N.Y. Mar. 30, 2017) (finding reasonable the rate of \$1,048.47 charged by partners of large, global law firm); *U.S. Bank Nat’l Ass’n v. Dexia Real Estate Capital Mkts.*, 2016 WL 6996176, at *8 (S.D.N.Y. Nov. 30, 2016) (approving rates of up to \$1,055 per hour and explaining that “partner billing rates in excess of \$1,000 an hour[] are by now not uncommon in the context of complex commercial litigation” (alteration in original)), *aff’d*, No. 17-127 (2d Cir. Jan. 3, 2018).

⁵ *See, e.g., Shoney’s N. Am., LLC v. Smith & Thaxton, Inc.*, 2015 WL 5139304, at *1 (M.D. Tenn. Sept. 1, 2015) (approving rates ranging from \$195/hour to \$360/hour as reasonable); *Savage v. City of Lewisburg, Tenn.*, 2015 WL 12791467, at *2 (M.D. Tenn. Feb. 24, 2015) (approving rate of \$225/hour as reasonable (citing supporting

Fifth, the nature and length of the professional relationship with NBC News also supports the attorneys' fees requested. *See* Tenn. R. Pro. Conduct 1.5(a)(6). Before its retention for this case in June 2020, O'Melveny had worked for NBCUniversal on numerous other matters. Their preexisting working relationship contributed to the efficiency of proceedings here because O'Melveny was already familiar with NBCUniversal, its litigation preferences, and its business priorities. Rule 1.5(a)(6) therefore also supports NBC News's requested fee.

Sixth, and finally, the experience, reputation, and ability of NBC News's lawyers support their request. *See* Tenn. R. Pro. Conduct 1.5(a)(7). NBC News's attorneys have extensive experience in Anti-SLAPP and defamation litigation, which contributed to their efficiency in handling this matter. *See* Hacker Decl. ¶¶ 5-9. O'Melveny has litigated numerous Anti-SLAPP cases over the years, leveraging that experience to NBC News's benefit and greatly reducing the time and expense of defending against Smile Direct's claims. *Id.* ¶ 6. The experience was especially valuable because Smile Direct's claims raised novel issues and required significant research in an area of law with little relevant precedent—and none in Tennessee, requiring broader-ranging research and analysis of analogous case law. O'Melveny's knowledge of and experience with analogous bodies of law enabled counsel to adeptly and efficiently defend against Smile Direct's multibillion-dollar claims, despite the novelty of the issues, the lack of controlling local precedent, the voluminous pleadings Smile Direct filed, and the substantial discovery it propounded. *See id.* ¶¶ 13-14. Again, this Court agreed, specifically emphasizing the quality and thoroughness of the briefs submitted by both sides in the case. *See* 11/17/2021 Tr. 7:12-18, 120:6-9. Rule 1.5(a)(7) therefore supports NBC News's requested fees and costs.

decisions)); *Nutt v. Smart*, 2021 WL 2561763, at *2 (E.D. Tenn. June 2, 2021), *report and recommendation adopted*, 2021 WL 2555575 (E.D. Tenn. June 22, 2021)

CONCLUSION

For the foregoing reasons, the motion for an award of fees and costs should be granted. NBC News should be awarded \$1,819,449.90 in fees and costs incurred by O'Melveny and \$206,751.30 in fees and costs incurred by Neal & Harwell.

Executed on January 10, 2022

Respectfully Submitted,

NEAL & HARWELL, PLC

/s/ James F. Sanders

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via e-mail and

U.S. Mail to the following on the 10th day of January 2022:

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/s/ James F. Sanders

James F. Sanders

No. 20-C-1054
Judge Brothers

3. I am an attorney, licensed to practice law in the State of Tennessee since 1970. I am admitted to practice before all federal courts in Tennessee as well as the Sixth Circuit Court of Appeals. I am a 1970 graduate of Vanderbilt Law School. I have been a partner at Neal & Harwell,

PLC, since 1978. Prior to entering private practice, I served as an assistant public defender in Seattle, Washington. Before that, I served as law clerk for Judge Frank Gray, Jr. of the United States District Court for the Middle District of Tennessee and Judge William E. Miller of the United States Court of Appeals for the Sixth Circuit. A copy of my biography is attached as **Exhibit A, p. 1.**

4. Several of my colleagues have assisted in this case:

- a. Ronald G. Harris, a partner at Neal & Harwell, provided significant and valuable assistance in this case, particularly in connection with the Anti-SLAPP Petition. Mr. Harris graduated from Vanderbilt Law School in 1977, has been licensed to practice law in the State of Tennessee since 1980, and is admitted to practice before all federal courts of Tennessee, including the United States Court of Appeals for the Sixth Circuit. Mr. Harris joined Neal & Harwell as an associate in 1980 and has been a partner since 1986. A copy of Mr. Harris' biography is attached as **Exhibit A, p. 2.**
- b. William J. Harbison II, a partner at Neal & Harwell, has also provided significant and valuable assistance in this case, particularly in connection with the Anti-SLAPP Petition. Mr. Harbison is a 2014 graduate (*magna cum laude*) of the University of Tennessee College of Law. Mr. Harbison has been licensed to practice law in the State of Tennessee since 2014 and is admitted to practice before all federal courts of Tennessee, including the United States Court of Appeals for the Sixth Circuit. Mr. Harbison joined Neal & Harwell as an associate in 2015 and became a partner in 2020. Prior to entering private practice, Mr. Harbison served as law clerk for Judge

Gilbert S. Merritt, Jr. of the United States Court of Appeals for the Sixth Circuit. A copy of Mr. Harbison's biography is attached as **Exhibit A**, p. 3.

5. As the responsible billing attorney and co-counsel for NBC News, I have personal knowledge of the fees and expenses Neal & Harwell incurred in connection with the above-styled action.

6. A true and correct description of the legal services rendered by Neal & Harwell and corresponding fees and expenses incurred in connection with the above-styled action is attached as **Exhibit B**. The total amount of Neal & Harwell's attorneys' fees and expenses incurred in this matter (and which are sought at this time) is \$206,751.30.¹ See Ex. B. at 16-17.

7. In my professional judgment and opinion, the attorneys' fees reflected in the attachments hereto are reasonable, were necessary for the proper representation of NBC News, and were incurred in connection with the above-styled action.

8. In my professional judgment and opinion, the hourly rates charged for the professional services provided by Neal & Harwell for NBC News are reasonable and consistent with the rates charged in this community for similar services by attorneys of like experience in similar law firms. The hourly fees reflected on the itemized statement and sought herein are as follows: James F. Sanders (JFS) – \$600/hour; Ronald G. Harris (RGH) – \$475/hour; and William J. Harbison II (WJH) – \$315/hour. See generally, Ex. B. The rates used in this statement are Neal & Harwell's standard hourly rates. Our hourly rates are based upon experience and expertise, including experience in bringing and defending complex civil litigation, both at the trial and

¹ This figure represents \$203,433.25 in attorney's fees and \$3,318.05 in costs. See Ex. B. at 16-17.

appellate levels. Additionally, both Mr. Harris and Mr. Harbison's practice has included substantial experience on First Amendment issues.

9. Neal & Harwell timekeepers worked across all matters on this case, including discovery, drafting the supplemental briefing requested by this Court, drafting the Anti-SLAPP briefs, and preparing for oral argument. Smile Direct's Complaint and litigation tactics made this an especially complicated matter, especially for an early stage of the case. The 209-page complaint included 551 paragraphs and 40 counts of allegedly unlawful statements and conduct, all of which implicated NBC News' rights under the First Amendment, the Anti-SLAPP Act, Tennessee's Media Shield Law, and the Tennessee Consumer Protection Act ("TCPA"). The process of vindicating NBC News' rights required multiple rounds of briefing, including preparation of substantive opening and reply briefs on an Anti-SLAPP Petition, as well as multiple supplemental briefs on issues raised by Smile Direct and ordered by the Court. Smile Direct itself filed nine briefs totaling fully 525 pages (*not* including attached declarations, exhibits, etc.), which required Neal & Harwell attorneys to invest significant time reviewing, reading Smile Direct's cited cases and record citations, and preparing responsive briefs. Separately, Smile Direct's discovery requests required additional significant time to investigate, gather relevant information, and prepare responsive materials. And multiple hearings conducted by the Court on different issues required yet more preparation by multiple attorneys.

10. I have also reviewed the Declaration of Jonathan D. Hacker (our co-counsel from O'Melveny and Myers) and agree with his description of the work necessary to prevail in this case.

11. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: January 10, 2020



JAMES F. SANDERS

EXHIBIT A



James F. Sanders

Member

✉ jsanders@nealharwell.com

☎ 615-238-3513

Jim Sanders joined Neal & Harwell in 1978 and is one of the Firm's most experienced Members. He serves on the Firm's Executive Committee. Jim is among a select group of lawyers nationwide to whom clients, both corporations and individuals, turn in significant investigations and trials. He has tried cases all over the country, many of which lasted months. This experience in these types of cases is rare in the legal profession and usually involves leading a team of lawyers from other firms and in-house counsel.

Jim has been recognized in a number of "best lawyers" lists, but the most significant recognition, in his opinion, is being inducted as a Fellow in the American College of Trial Lawyers in 1997. The College's Fellows are chosen by invitation only and Fellowship is limited to one percent of the total lawyer population of the state in which the lawyer practices. He has been a participant for the past few years in the Forum on Corporate Enforcement | Cambridge Forums.

Among Jim's notable trials are The Twilight Zone trial (representing Director John Landis) and the Exxon Valdez trial in Alaska. In both, Jim served as co-counsel with the late James F. Neal. Others include two trials in Baltimore County, Maryland, representing ExxonMobil in a gasoline line leak that involved hundreds of plaintiffs. In addition to the normal media coverage, Jim's role, examination of witnesses, and arguments in these cases are mentioned in the following books:

- C. Cosslett, *Lawyers at Work*
- D. Legedoff, *Cleaning Up*
- R. LaBrecque, *Special Effects*
- S. Coll, *Private Empire: ExxonMobil and American Power*

Representative Matters:

The Twilight Zone trial representing Director John Landis – Co-counsel with the late James F. Neal

Exxon Valdez trial in Alaska – Co-counsel with the late James F. Neal

ExxonMobil trial in Baltimore County, Maryland regarding a gasoline line leak that involved hundreds of plaintiffs

Southeastern Conference – Co-counsel in an antitrust, right to publicity case brought in the United States District Court for the Middle District of Tennessee

General Motors in various proceedings arising out of the GM ignition switch recalls involving the Chevrolet Cobalt, Saturn Ion and others

Jacobs Engineering Group, Inc. in cases filed in connection with the 2008 coal ash spill at the Kingston, Tennessee fossil fuel plant

Steward Health Care System, LLC in a case filed in Chancery Court in Nashville, Tennessee

NBCUniversal in a defamation case brought in State Court in Nashville, Tennessee

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American Bar Association – Member

Tennessee Bar Association – Member

Nashville Bar Association – Member

Vanderbilt Law School Board of Advisors

Education

Vanderbilt University Law School

Vanderbilt University



**Ronald G. Harris****Member**✉ rharris@nealharwell.com☎ [615-244-1713](tel:615-244-1713)

Ronald G. Harris is Chief Administrator at Neal & Harwell, PLC. His principal area of practice is civil litigation, with a substantial part of his practice devoted to commercial and business disputes.

Ron has over forty years of trial experience, having appeared in numerous federal and state courts. His litigation experience includes libel and defamation cases, product liability matters, bad faith and other insurance coverage cases, business torts, non-competition litigation, contractual disputes, construction disputes and employment issues. Ron is recognized by Best Lawyers® 2022 for First Amendment Law. Through his years of representing media members and private citizens, he has been a zealous advocate for First Amendment freedoms.

Legal Services

[Appellate Practice](#)
[Complex Business Litigation](#)
[Corporate Compliance](#)
[Defamation, Slander & Libel](#)
[First Amendment & Communications Law](#)

Professional & Civic Affiliations

American Bar Association – Fellow
Tennessee Bar Association –
Communications Law Section, Chair
2019-2021
Nashville Bar Association – Fellow
Westminster Presbyterian Church –
Elder and Clerk of the Session
Westminster Home Connection – Board
of Directors
Habitat for Humanity – Volunteer
Room In The Inn – Volunteer

Education

Vanderbilt University Law School, 1977,
J.D.; Order of the Coif, Associate Editor
of the Vanderbilt Law Review
University of Arkansas, 1974, B.A.,
Political Science



William "Jay" J. Harbison II

Member

✉ jharbison@nealharwell.com

☎ [615-238-3650](tel:615-238-3650)

William "Jay" Harbison II is an attorney at Neal & Harwell and works primarily in the areas of business and civil litigation. He represents both plaintiffs and defendants and advises clients on a variety of complex legal issues. Representative cases involve contract disputes, defending a metropolitan television station against defamation claims, and defending a large pharmaceutical company in numerous mass tort cases. Jay is recognized by Best Lawyers: Ones to Watch 2022 for Civil Rights Law, Commercial Litigation and Mass Tort Litigation / Class Actions - Defendants.

Jay graduated magna cum laude from the University Of Tennessee College Of Law and received his undergraduate degree from Middlebury College. While in law school, he served as the Executive Editor for the Tennessee Law Review.

Prior to entering private practice, Jay served as a law clerk for the Honorable Gilbert S. Merritt, Jr. of the United States Court of Appeals for the Sixth Circuit.

Representative Matters:

American Baptist College v. National Baptist Convention USA, Inc., Davidson Co. Chancery Court No. 17-1140-BC

Dell'Aquila v. LaPierre et al., 2020 WL 5816222 at *1 (M.D. Tenn. Sept. 30, 2020) (dismissing purported class action complaint against non-profit client under Rule 12(b)(6)).

Funk v. Scripps Media, Inc., 570 S.W.3d 205 (Tenn. 2019).

SPE GO Holdings, Inc. v. W&O Construction, Inc., 759 F. App'x 359 (6th Cir. 2018).

Bell v. McLemore, 347 F. Supp. 3d 362 (M.D. Tenn. 2018).

Durham v. Martin, 905 F.3d 432 (6th Cir. 2018).

Seay v. Rowland, 2018 WL 6174692, at *1 (M.D. Tenn. Aug. 30, 2018), report and recommendation adopted, 2018 WL 5095456 (M.D. Tenn. Oct. 19, 2018).

Legal Services

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[Defamation, Slander & Libel](#)

[False Claims Act & Qui Tam](#)

[Product Liability & Mass Torts](#)

[White-Collar Criminal Defense](#)

Professional & Civic Affiliations

American Bar Association – Member

Tennessee Bar Association – Member

Nashville Bar Association – Premier Member

Nashville Bar Foundation Leadership Forum 2022 Class

Best Lawyers: Ones to Watch 2022 – Civil Rights Law, Commercial Litigation, & Mass Tort Litigation / Class Actions – Defendants

Education

University of Tennessee College of Law, 2014, J. D., magna cum laude; Executive Editor for the Tennessee Law Review
Middlebury College, 2005, B.A., English and Theater, Minor in Classical Studies

EXHIBIT B

Time Report - NBCUniversal Media, LLC / SmileDirectClub, Inc. et al. v. (00005248-00020616)

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
05/26/2020	0016	Sanders, James F.	Partner	1.30	780.00	600.00	Telephone conferences and correspondence with Dan Petrocelli re: lawsuit;	5/2020
05/27/2020	0016	Sanders, James F.	Partner	1.30	780.00	600.00	Conferences with Aubrey Harwell, Ron Harris and Jay Harbison;	5/2020
05/27/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Work on Neal & Harwell summary/profile to provide to Dan Petrocelli's presentation to client;	5/2020
05/28/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Correspondence and telephone conference with Dan Petrocelli re: his presentation to NBCUniversal;	5/2020
05/29/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review Complaint by Smile Direct Club;	5/2020
05/29/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Telephone conferences with Charles Babcock (Jackson Walker) re: being local counsel with his firm;	5/2020
05/29/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Telephone conference with Dan Petrocelli (O'Melveny) re: his meeting with NBCUniversal;	5/2020
06/02/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review for conference call; research re: SmileDirectClub; review OMM memorandum;	6/2020
06/02/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Telephone conference with Dan Petrocelli re: setting up call with NBCUniversal in-house counsel;	6/2020
06/02/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Telephone conferences and correspondence re: call with NBCUniversal in-house counsel;	6/2020
06/02/2020	0040	Harbison, William J.	Associate	3.00	945.00	315.00	Read SmileDirect Club Complaint as well as legal research re: same;	6/2020
06/03/2020	0035	Harris, Ronald G.	Partner	6.00	2,850.00	475.00	Research re: other SmileDirect lawsuits; office conferences with Jim Sanders re: conference with NBC; prepare for and participate in conference call;	6/2020
06/03/2020	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Review Dan Petrocelli's summary provided to NBC, as well as conferences with Ron Harris re: same;	6/2020
06/03/2020	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Review Complaint and summary from Dan Petrocelli in preparation for call with NBCUniversal in-house counsel, as well as participate in call with in-house counsel;	6/2020
06/03/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence with Dan Petrocelli re: telephone conference with NBCUniversal in-house counsel;	6/2020
06/03/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Research and review previous SmileDirect Club lawsuits and e-mails re: same;	6/2020
06/03/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conference with Ron Harris re: SmileDirect Club lawsuit;	6/2020
06/09/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Respond to emails re: procedural questions;	6/2020
06/09/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Telephone conference with Dan Petrocelli;	6/2020
06/09/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Legal research and e-mail to Jim Sanders re: Answer and SLAPP motion timing;	6/2020
06/11/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Review memorandum and email to Dan Petrocelli re: motions practice in Davidson County;	6/2020
06/16/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Legal research and drafting re: pro hac vice motions;	6/2020
06/17/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Call with Jim Sanders re: discovery in SmileDirect case;	6/2020



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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
06/17/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Call with John Jacobson re: initial case planning discussions for SmileDirect case;	8/2020
06/18/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mail with Jim Sanders re: discovery in SmileDirect case;	6/2020
06/22/2020	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Telephone conference with John Jacobson and related correspondence;	6/2020
06/22/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Telephone conference with Dan Petrocelli re: pro hac vice motions and setting up call with plaintiffs' counsel;	6/2020
06/22/2020	0035	Harris, Ronald G.	Partner	0.25	118.75	475.00	Review re: possible deadlines;	6/2020
06/22/2020	0040	Harbison, William J.	Associate	0.40	126.00	315.00	Call with Jim Sanders and John Jacobson re: SmileDirect v. NBC initial issues;	6/2020
06/23/2020	0035	Harris, Ronald G.	Partner	0.75	356.25	475.00	Research re: other SLAPP cases;	6/2020
06/23/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Draft PHV Motions for O'Melveny counsel in SmileDirect case;	6/2020
06/23/2020	0040	Harbison, William J.	Associate	2.00	630.00	315.00	Legal research re: Anti-SLAPP legislative history;	6/2020
06/25/2020	0016	Sanders, James F.	Partner	0.10	60.00	600.00	Correspondence re: pro hac vice admissions;	6/2020
06/29/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Telephone conferences with Dan Petrocelli and Jay Harbison re: motions pro hac vice and response to Plaintiffs' counsel re: scheduling conference call, as well as draft correspondence to John Jacobson re: telephone conference:	6/2020
06/29/2020	0040	Harbison, William J.	Associate	1.20	378.00	315.00	Drafted Pro Hac Vice Motions for O'Melveny council in SmileDirect case;	8/2020
06/30/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Edited Pro Hac Vice Motions for O'Melveny council in SmileDirect case;	8/2020
06/30/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	E-mails with Jim Sanders and Dan Petrocelli re: timing for anti-SLAPP petition;	8/2020
07/01/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with Dan Petrocelli re: responsive pleadings and pro hac motions;	7/2020
07/02/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Edit/file PHV Motions for SmileDirectClub v. NBC;	7/2020
07/02/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with John Jacobson re: SmileDirect PHV Motions;	7/2020
07/07/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Telephone conference with Dan Petrocelli re: motion;	7/2020
07/07/2020	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Correspondence re: Pro Hac Vice admissions;	7/2020
07/07/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with Dan Petrocelli re: questions for anti-SLAPP Motion;	7/2020
07/07/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conf. with Jeffrey Zager re: Judge Brothers; e-mail to Dan Petrocelli re: same;	7/2020
07/07/2020	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call with John Jacobson and Court re: PHV Motions; draft/serv agreed order re: same;	7/2020
07/07/2020	0040	Harbison, William J.	Associate	1.20	378.00	315.00	Legal research re: anti-SLAPP Motion;	7/2020
07/10/2020	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Telephone conference with Jay Harbison re: shield law issues;	7/2020
07/10/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review Funk opinion on shield law issue;	7/2020
07/10/2020	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call with Dan Petrocelli and Jon Hacker re: TN media shield law issues;	7/2020
07/10/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with RGH re: TN media shield law issues;	7/2020

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
07/13/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Legal research re: TN media shield law; e-mail to Dan Petrocelli re: same;	7/2020
07/13/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: motion and declarations;	7/2020
07/13/2020	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Prepare for counsel meeting;	7/2020
07/14/2020	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Draft suggestions for tomorrow's meeting;	7/2020
07/14/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review Anti-Slapp filings and office conference with Jeffrey Zager, Jim Sanders, and Jay Harbison re: same;	7/2020
07/14/2020	0040	Harbison, William J.	Associate	3.00	945.00	315.00	Receipt/review of draft anti-SLAPP Motion;	7/2020
07/14/2020	0040	Harbison, William J.	Associate	1.40	441.00	315.00	Meeting with Jim Sanders and Ron Harris re: anti-SLAPP Motion and strategy;	7/2020
07/14/2020	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Review memorandum of law, declaration and exhibits in preparation for filing;	7/2020
07/14/2020	0016	Sanders, James F.	Partner	1.30	780.00	600.00	Meeting with Jay Harbison and Ron Harris re: brief, as well as follow-up calls re: same;	7/2020
07/15/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Meeting with Jim Sanders and Ron Harris re: anti-SLAPP Motion and strategy	7/2020
07/15/2020	0040	Harbison, William J.	Associate	2.00	630.00	315.00	Reviewed anti-SLAPP Motion;	7/2020
07/15/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Prepare for and participate in conference call for co-counsel;	7/2020
07/15/2020	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Review summary notes, prepare for conference call with co-counsel;	7/2020
07/16/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence re: motion to strike complaint;	7/2020
07/17/2020	0016	Sanders, James F.	Partner	1.90	1,140.00	600.00	Review correspondence re: motion to strike complaint, as well as file motions and declarations and related work;	7/2020
07/17/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review new version of brief; office conference with Jay Harbison;	7/2020
07/17/2020	0040	Harbison, William J.	Associate	3.50	1,102.50	315.00	Edited/filed Anti-SLAPP Motion; numerous communications re: same;	7/2020
07/21/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Conference with Jay Harbison and correspondence re: filing and call with John Jacobson;	7/2020
07/21/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with John Jacobson re: anti-SLAPP response; e-mails and conf. with Jim Sanders re: same;	7/2020
07/22/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review emails re: scheduling; participate in conference call with co-counsel;	7/2020
07/22/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Telephone conference with Ed Yarbrough;	7/2020
07/22/2020	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call with Dan Petrocelli re: anti-SLAPP response timing;	7/2020
07/24/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Conference with Jay Harbison re: call with John Jacobson, as well as correspondence re: same;	7/2020
07/24/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
07/24/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review emails; office conference with Jay Harbison;	7/2020
07/27/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails w/ John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
07/28/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Telephone conference with Dan Petrocelli re: next steps and correspondence re: same;	7/2020

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
07/28/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: discovery, etc.;	7/2020
07/28/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
07/29/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence with Dan Petrocelli re: call with SmileDirect local counsel;	7/2020
07/29/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: discovery and anti-SLAPP Response;	7/2020
07/30/2020	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence with Jay Harbison re: call with John Jacobson;	7/2020
07/30/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
07/31/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with John Jacobson re: response to anti-SLAPP motion and e-mails re: same;	7/2020
08/04/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	Call with Dan Petrocelli re: response to anti-SLAPP motion and e-mails re: same;	8/2020
08/05/2020	0035	Harris, Ronald G.	Partner	0.75	356.25	475.00	Review other Anti-Slapp motion; office conference with Jay Harbison; review emails re: scheduling/deadlines;	8/2020
08/05/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	E-mails with John Jacobson re: discovery pending outcome of anti-SLAPP petition;	8/2020
08/06/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	E-mails with Dan Petrocelli re: discovery pending outcome of anti-SLAPP petition;	8/2020
08/07/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review proposed discovery and emails re: same;	8/2020
08/07/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	E-mails with Dan Petrocelli re: discovery requests from NBC;	8/2020
08/10/2020	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Review proposed discovery and correspondence re: scheduling call to discuss proposed discovery;	8/2020
08/10/2020	0016	Sanders, James F.	Partner	0.90	540.00	600.00	Team conference call re: next steps;	8/2020
08/10/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with Dan Petrocelli and Jim Sanders re: NBC's discovery requests;	8/2020
08/10/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review emails; review in preparation for conference call; participate in conference call;	8/2020
08/14/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Call with Dan Petrocelli and Jim Sanders re: NBC's discovery requests;	8/2020
08/17/2020	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review proposed letter; send email re: changes;	8/2020
08/17/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Review of letter from Dan Petrocelli re: NBC's discovery requests	8/2020
08/18/2020	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Review letter and correspondence re: same;	8/2020
08/18/2020	0040	Harbison, William J.	Associate	0.10	31.50	315.00	Transmitted letter from Dan Petrocelli re: NBC's discovery requests;	8/2020
08/21/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Receipt/review of letter from SDC re: discovery requests;	8/2020
08/25/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Prepare for and participate in conference call, including pre-meeting conference with Jim Sanders and Jay Harbison;	8/2020
08/25/2020	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Review Plaintiff's letter and conference with Ron Harris and Jay Harbison re: same;	8/2020
08/25/2020	0016	Sanders, James F.	Partner	0.60	360.00	600.00	Conference call with O'Melveny & Myers re: next steps;	8/2020

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
08/25/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conference with Ron Harris, and Jim Sanders re: response to Smile Direct Club's discovery requests;	8/2020
08/25/2020	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call with Dan Petrocelli, Ron Harris, and Jim Sanders re: response to Smile Direct Club's discovery requests;	8/2020
08/27/2020	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review proposed letter to opposing counsel; emails re: other slapp motions; email to co-counsel;	8/2020
09/04/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/08/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review proposed motion and briefing schedule; emails to and from co-counsel; pull court dockets;	9/2020
09/08/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/08/2020	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: letter response to Plaintiffs;	9/2020
09/09/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/10/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/11/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review and respond to emails re: stipulation;	9/2020
09/11/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: SDC's Motion for Limited Discovery scheduling;	9/2020
09/24/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review new Court of Appeals opinion; telephone conference with Jay Harbison; review for expected motion;	9/2020
09/24/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Review recent TN COA defamation case; conf. w/ RGH and e-mails re: same;	9/2020
09/25/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review email re: pleadings filed;	9/2020
09/28/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review Smile Direct's motion and memorandum; participate in conference call with OMM counsel;	9/2020
09/28/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Reviewed SDC's Motion for Limited Discovery; conf. call w/ team re: same;	9/2020
10/05/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review proposed opposition to SmileDirect's motion;	10/2020
10/06/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Further review for opposition; email re: proposed changes; review Jay Harbison's email draft;	10/2020
10/06/2020	0040	Harbison, William J.	Associate	1.10	346.50	315.00	Review Response to Motion to Compel Discovery; e-mails re: same;	10/2020
10/07/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review draft of opposition with our corrections;	10/2020
10/09/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Review Response to Motion to Compel Discovery; e-mails re: same;	10/2020
10/09/2020	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Conference with Jay Harbison re: strategy;	10/2020
10/09/2020	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Review brief on discovery and related correspondence;	10/2020
10/09/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review final draft of opposition;	10/2020
10/13/2020	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review Anti-Slapp statute and our response;	10/2020
10/14/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: status of hearing on Discovery Motion;	10/2020
10/16/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Emails re: virtual hearing;	10/2020
10/19/2020	0035	Harris, Ronald G.	Partner	4.00	1,900.00	475.00	Review Reply Brief filed by SmileDirect; outline responses; emails re: scheduling;	10/2020
10/20/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Reviewed Reply Brief on SDC's Limited Discovery Motion; e-mails re: same;	10/2020

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
10/21/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review emails re: scheduling; review Judge Brothers' opinion in other case;	10/2020
10/22/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review scheduling emails; prepare for conference call; participate in conference call; notes after call;	10/2020
10/22/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Reviewed Reply Brief on SDC's Limited Discovery Motion; calls re: same;	10/2020
10/26/2020	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Calls and e-mails re: logistics for limited discovery motion hearing;	10/2020
10/26/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Prepare for hearings on discovery motion;	10/2020
10/28/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Calls and e-mails re: logistics for limited discovery motion hearing;	10/2020
10/28/2020	0035	Harris, Ronald G.	Partner	3.00	1,425.00	475.00	Review for hearing; review scheduling emails; review our motion and Complaint;	10/2020
10/29/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Calls and e-mails re: logistics for limited discovery motion hearing;	10/2020
10/29/2020	0040	Harbison, William J.	Associate	3.50	1,102.50	315.00	Prepare for hearing on Motion for limited discovery;	10/2020
10/29/2020	0035	Harris, Ronald G.	Partner	4.50	2,137.50	475.00	Prepare for hearing; participate in conference call; emails re: privilege;	10/2020
10/30/2020	0040	Harbison, William J.	Associate	4.50	1,417.50	315.00	Prepare for/attend hearing on Motion for Limited Discovery;	10/2020
10/30/2020	0016	Sanders, James F.	Partner	4.50	2,700.00	600.00	Prepare for hearing, as well as attend hearing and participate in follow-up calls after hearing;	10/2020
10/30/2020	0035	Harris, Ronald G.	Partner	6.00	2,850.00	475.00	Prepare for and participate in motion hearing; telephone conference after hearing with counsel;; notes to file;	10/2020
10/31/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review Court's order; emails to co-counsel re: appeal issues; email to court reporter; review notes from hearing;	10/2020
11/02/2020	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review appeal issue with Jay Harbison;	11/2020
11/03/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with team re: strategy and next steps; conf. with Ron Harris re: same;	11/2020
11/03/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Telephone conference with co-counsel; review privilege issues; scheduling issues;	11/2020
11/04/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Call with team re: strategy and next steps; conf. with Ron Harris re: same;	11/2020
11/04/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for and participate in case management conference; review proposed order and email revision;	11/2020
11/05/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review/research re: privilege issue;	11/2020
11/09/2020	0035	Harris, Ronald G.	Partner	4.00	1,900.00	475.00	Review discovery responses and legal research;	11/2020
11/09/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Receipt/review of discovery requests; conf. with Ron Harris re: same	11/2020
11/10/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Further research and review re: privilege issues;	11/2020
11/12/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conf. with Ron Harris re: discovery requests; e-mails with Kendall Turner re: hearing DVD;	11/2020
11/17/2020	0035	Harris, Ronald G.	Partner	3.50	1,662.50	475.00	Review proposed Shield Law Supplemental Brief; office conferences with Jay Harbison; participate in conference call; notes for argument;	11/2020

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
11/17/2020	0040	Harbison, William J.	Associate	2.00	630.00	315.00	Receipt/review of draft brief re: Media Shield Law; call with team re: same;	11/2020
11/20/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Review/file brief re: Media Shield Law;	11/2020
11/20/2020	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Receipt/review of NBC's brief re: Media Shield Law;	11/2020
11/23/2020	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review SmileDirect's motion and filings re: Shield law;	11/2020
12/01/2020	0035	Harris, Ronald G.	Partner	3.50	1,662.50	475.00	Review prior briefs re: SmileDirect's discovery requests; review proposed Reply Brief; email to co-counsel; review subsequent email;	12/2020
12/02/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review order for next filing requirements; review brief;	12/2020
12/03/2020	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Review reply brief re: Media Shield Law;	12/2020
12/03/2020	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review objections to discovery; telephone conference with Dan Petrocelli and Kendall; office conference with Jeffrey Zager;	12/2020
12/04/2020	0040	Harbison, William J.	Associate	0.25	78.75	315.00	Conf. with Ron Harris re: reply brief re: Media Shield Law;	12/2020
12/04/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Office conference with Jay Harbison re: today's filings; review for filing;	12/2020
12/04/2020	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Correspondence re: filing;	12/2020
12/07/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review of SmileDirect's Supplemental Brief;	12/2020
12/14/2020	0035	Harris, Ronald G.	Partner	1.25	593.75	475.00	Review Plaintiff's response to NBC's objections; review our objections;	12/2020
12/14/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Review filing re: discovery responses;	12/2020
12/15/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for conference call and status conference; conference call with co-counsel;	12/2020
12/15/2020	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Call w/ team re: case management conference;	12/2020
12/16/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Follow-up from conference call/organize for hearing;	12/2020
12/17/2020	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review memo from Ron Harris re: Case Management Conference;	12/2020
12/17/2020	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for and participate in case management conference; draft order; email to co-counsel; review for hearing;	12/2020
12/17/2020	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Attended telephonic case management conference;	12/2020
12/18/2020	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Revisions to Order; emails to and from opposing counsel;	12/2020
01/04/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review court order; prepare for next week's hearing;	1/2021
01/05/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Calls/emails re: logistics for next week's hearing;	1/2021
01/05/2021	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Office conference with Jay Harbison re: next week's hearing;	1/2021
01/08/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review in preparation for Media Shield Law and discovery hearing;	1/2021
01/11/2021	0040	Harbison, William J.	Associate	3.50	1,102.50	315.00	Prepare for hearing on discovery/Media Shield Law;	1/2021
01/11/2021	0035	Harris, Ronald G.	Partner	4.50	2,137.50	475.00	Prepare for hearing on Media Shield Law, including conferences with Jim Sanders and Isaac Sanders; telephone conference with Daniel Petrocelli; research re: statutory issue; review prior pleadings;	1/2021

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01/11/2021	0016	Sanders, James F.	Partner	3.00	1,800.00	600.00	Telephone conference with Dan Petrocelli, as well as review briefing on Order and Shield Law, and meeting with Ron Harris and Jay Harbison in preparation for hearing;	1/2021
01/12/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for and participate in Zoom hearing and conference call; review federal case after hearing;	1/2021
01/12/2021	0016	Sanders, James F.	Partner	2.30	1,380.00	600.00	Prepare for and attend telephonic hearing on Plaintiffs' discovery motion;	1/2021
01/12/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Prepare for/attend hearing on discovery/Media Shield Law;	1/2021
01/12/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Drafted Proposed Agreed Protective Order; legal research re: Lampo case;	1/2021
01/14/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review Judge Brothers' Order; review transcript of hearing;	1/2021
01/14/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Receipt/review of Order on discovery requests; e-mails re: same;	1/2021
01/14/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Conferences and correspondence re: representation letter and Judge's Order;	1/2021
01/20/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence with Daniel Kummer re: billing agreement;	1/2021
01/25/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Review and revise engagement letter pursuant to client request, as well as review guidelines;	1/2021
01/29/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review latest order and transcript of hearing; email and telephone call with co-counsel;	1/2021
02/02/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Telephone conference with John Jackson re: status conference; review and respond to email from co-counsel; prepare for status conference;	2/2021
02/02/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with Kendall Turner re: production format of text messages;	2/2021
02/03/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Prepare for and participate in conference call with Special Master; email to co-counsel;	2/2021
02/03/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Reviewed proposed protective order;	2/2021
02/03/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Conf. with Ron Harris re: case management conference and next steps;	2/2021
02/06/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Email to and from Daniel Petrocelli; review notes from Special Master conference;	2/2021
02/08/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with Kendall Turner re: discovery and production issues;	2/2021
02/08/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Call with Marsh Nichols (magistrate) re: scope of order;	2/2021
02/08/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Prepare for and participate in case management conference; email report to co-counsel; draft order from conference;	2/2021
02/09/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Emails re: proposed order and submit to opposing counsel;	2/2021
02/10/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Emails re: proposed Order and review proposed Protective Order;	2/2021
02/11/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review Protective Order; emails with Kendall Turner re: proposed orders; emails to opposing counsel;	2/2021
02/12/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	E-mails with team re: SDC lawsuit against landlord;	2/2021
02/12/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review and send revised proposed Order to opposing counsel; emails re: Order;	2/2021

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02/12/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Review correspondence re: protective order;	2/2021
02/12/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: SmileDirect countersuit against their landlord;	2/2021
02/15/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review emails from opposing counsel; email Special Master re: proposed order;	2/2021
02/16/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review response from Special Master re: briefing schedule;	2/2021
02/18/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review new proposed Protective Order;	2/2021
02/19/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails and call with Kendall Turner re: Proposed Protective Order;	2/2021
02/19/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Reviewed TN AG's brief re: constitutionality of Anti-SLAPP Act;	2/2021
02/19/2021	0035	Harris, Ronald G.	Partner	1.30	617.50	475.00	Email to opposing counsel re: schedule; review email; telephone conference with co-counsel re: protective order	2/2021
02/20/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Email to co-counsel re: proposed Scheduling Order changes; review Attorney General brief in other case;	2/2021
02/22/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Telephone conference with opposing local counsel re: Protective Order; telephone conference with Kendall Turner and Chicago counsel; emails re: proposed Scheduling Order;	2/2021
02/23/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review and email new scheduling proposal from opposing counsel; review document production letter; email opposing counsel re: scheduling response;	2/2021
02/25/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Revisions to Order from Case Management conference;	2/2021
02/26/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Telephone conference with opposing counsel re: Scheduling Order; review emails from Special Master; send email to counsel;	2/2021
03/01/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Emails re: proposed changes to Scheduling Order;	3/2021
03/01/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review briefs and ruling in Chattanooga case;	3/2021
03/02/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Receipt/review of Order upholding constitutionality of Anti-SLAPP Act;	3/2021
03/02/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Emailing pleadings from other Tennessee case; review prior pleadings;	3/2021
03/16/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review discovery dispute letter; prepare for conference call;	3/2021
03/16/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review scheduling order requirements and dates;	3/2021
03/16/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Receipt/review of discovery deficiency letter; communications with team re: same;	3/2021
03/17/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review discovery dispute letter;	3/2021
03/23/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review response to discovery dispute letter;	3/2021
03/24/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review Dan Petrocelli's letter to Plaintiffs;	3/2021
04/01/2021	0035	Harris, Ronald G.	Partner	0.70	332.50	475.00	Begin review of Smile Direct's Brief; review of co-counsel emails;	4/2021
04/02/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Conference call re: cybersecurity issues;	4/2021
04/02/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review Smile Direct Brief on constitutionality;	4/2021
04/05/2021	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Telephone conferences and conferences re: Ciccio v. SmileDirect matter and how it may relate to this matter;	4/2021

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04/05/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Research re: Motion for Sanctions in Ciccio v. SDC case (M.D. Tenn.)	4/2021
04/05/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review cases for constitutionality response; review sanctions motion in other cases;	4/2021
04/06/2021	0016	Sanders, James F.	Partner	0.80	480.00	600.00	Review redacted brief and notes re: Cicci matter and how it relates to this matter;	4/2021
04/06/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Telephone conference with Dan Petrocelli re: Cicci v. SmileDirect matter and how it relates to this case, as well as next steps;	4/2021
04/09/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Conference with Jay Harbison re: Deputy Attorney General Kleinfelter's request and prepare memorandum re: same;	4/2021
04/09/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Telephone conference with Dan Petrocelli re: request from Deputy Attorney General Kleinfelter;	4/2021
04/09/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Call w/ Janet Kleinfelter re: AG's intervention;	4/2021
04/09/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Memo to file re: conversations w/ Janet Kleinfelter; e-mails re: same;	4/2021
04/09/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Reviewed Anti-SLAPP briefing from Chattanooga re: constitutional;	4/2021
04/14/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence re: depositions;	4/2021
04/14/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Drafted remote deposition protocol; call w/ Kendall Turner re: same;	4/2021
04/15/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: deposition;	4/2021
04/21/2021	0040	Harbison, William J.	Associate	0.20	63.00	315.00	E-mails re: deposition scheduling and witness preparation.	4/2021
04/22/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Call w/ Kendall Turner re: Vicky Nguyen deposition prep.	4/2021
04/23/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Telephone call with opposing counsel re: status conference; emails re: status conference;	4/2021
04/24/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Telephone call with Dan Petrocelli re: discovery issues and status conference;	4/2021
04/26/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Correspondence re: Order and re: status conference;	4/2021
04/26/2021	0035	Harris, Ronald G.	Partner	1.20	570.00	475.00	Emails with opposing counsel re: status conference; participate in status conference; telephone call with co-counsel;	4/2021
04/27/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review privilege issues for conference call with co-counsel;	4/2021
04/28/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Prepare for co-counsel conference call (review Shield law issues); participate in conference call; review constitutionality brief;	4/2021
04/28/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Strategy meeting w/ OMM and NBC counsel.	4/2021
04/28/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Reviewed supplemental brief re: constitutionality issues.	4/2021
04/28/2021	0040	Harbison, William J.	Associate	2.00	630.00	315.00	Attended Lauren Dunn deposition prep.	4/2021
04/29/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review correspondence from Jay Harbison and conference re: same;	4/2021
04/30/2021	0016	Sanders, James F.	Partner	0.60	360.00	600.00	Conferences re: upcoming deposition and brief to be filed;	4/2021

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04/30/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Office conference with Jim Sanders and Jay Harbison re: deposition preparation of NBCU witnesses; review latest amount;	4/2021
04/30/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Strategy meeting re: upcoming depositions.	4/2021
05/02/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review latest revision of constitutionallity brief;	5/2021
05/03/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review latest version of NBC's brief; email suggestions to co-counsel;	5/2021
05/03/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Review supplemental brief for filing;	5/2021
05/03/2021	0016	Sanders, James F.	Partner	0.10	60.00	600.00	Conference with Jay Harbison re: deposition preparation of Vicki Nguyen;	5/2021
05/03/2021	0040	Harbison, William J.	Associate	3.00	945.00	315.00	Prepare for/attend Vicky Nguyen Deposition Prep.	5/2021
05/05/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: May 25, 2021 hearing;	5/2021
05/05/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Telephone call with Katherine Klein - local counsel for plaintiff;	6/2021
05/05/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Draft order from status conference;	6/2021
05/05/2021	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Emails to counsel re: hearing mechanics;	6/2021
05/10/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Prepare for Vicky Nguyen Deposition Prep	5/2021
05/11/2021	0040	Harbison, William J.	Associate	4.00	1,260.00	315.00	Prepare for/attend Vicky Nguyen Deposition Prep	5/2021
05/12/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review Smile Direct's Reply Brief and emails to and from Attorney General and to counsel;	5/2021
05/12/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: deposition and hearing;	5/2021
05/12/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Attend Vicky Nguyen deposition	5/2021
05/14/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review plaintiff's last brief on statutory procedure and constitutions;	5/2021
05/16/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review Sur-Reply Brief;	5/2021
05/17/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Prepare for/attend Lauren Dunn Deposition Pre	5/2021
05/17/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review latest Sur-Reply Brief;	5/2021
05/19/2021	0016	Sanders, James F.	Partner	0.80	480.00	600.00	Review pleading from State and correspondence re: next steps;	5/2021
05/20/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review State of Tennessee intervention memorandum;	5/2021
05/20/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: consent re: State of Tennessee intervention memorandum;	5/2021
05/20/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Correspondence re: deposition of Vicky Nguyen, as well as conference with Jay Harbison re: same;	5/2021
05/20/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Review brief of Attorney General emails re: consent and outline for hearing;	5/2021
05/21/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Prepare for/attend Lauren Dunn Deposition	5/2021
05/21/2021	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Correspondence re: Sunday call and prepare for telephone conference in preparation for hearing;	5/2021
05/23/2021	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Prepare for conference call on Constitutionality Argument and review relevant briefs;	5/2021
05/23/2021	0016	Sanders, James F.	Partner	1.20	720.00	600.00	Conference call with co-counsel re: upcoming argument re: Constitutionality;	5/2021

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
05/24/2021	0016	Sanders, James F.	Partner	0.80	480.00	600.00	Research and correspondence re: hearing regarding constitutionality;	5/2021
05/24/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Prepare for telephonic argument re: constitutionality;	5/2021
05/25/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Prepare for telephonic hearing re: constitutionality;	5/2021
05/25/2021	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Attend telephonic hearing re: constitutionality;	5/2021
05/25/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conference re: three-judge panel legislation and strategy going forward;	5/2021
05/25/2021	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Follow-up research re: scheduling and new statute re: three-judge panel with respect to constitutionality issue;	5/2021
05/25/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Prepare for and attend hearing on constitutional issues and conferences with co-counsel after hearing;	5/2021
05/25/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Emails and telephone calls with opposing counsel, Special Master and co-counsel re: scheduling hearings and briefing;	5/2021
05/25/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Research re: new Tennessee law on constitutional challenges;	5/2021
05/26/2021	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Review correspondence re: scheduling, as well as review Tennessee Statute regarding three-judge panel issue;	5/2021
05/26/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conference with Ron Harris re: Tennessee Statute regarding three judge panel and next steps with regard to this issue;	5/2021
05/26/2021	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Conferences re: strategy regarding new statute and regarding argument with respect to new statute;	5/2021
05/26/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review court order re: May 26, 2021 case management conference;	5/2021
05/26/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Participate in case management conference and discussions re: scheduling;	5/2021
05/26/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Legal research and discussion re: three judge panel and office conference with Jim Sanders and Jeffrey Zager re: possible approach to Judge Brothers email to co-counsel re: legal research;	5/2021
05/26/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review and transmit Order from Lease Management;	5/2021
05/27/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review issue re: new Tenn law on 3 judge panel;	5/2021
06/01/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review transcript from hearing and additional legal research re: new law;	6/2021
06/04/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Correspondence and response to motion to strike;	6/2021
06/04/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review Plaintiff's Response to Defendants' Motion on Constitutional Grounds, review plaintiff's Motion Pro Hac Vice, as well as emails to opposing counsel re: Agreed Order;	6/2021
06/07/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Research re: final version of new lease and outline proposed addition to Reply Brief;	6/2021
06/08/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review and conference re: email regarding security protocols;	6/2021
06/08/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review proposed Reply Brief and send email re: statutory reference;	6/2021
06/08/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Telephone call with Court Clerk re: live-streaming issue and email to co-counsel re: same;	6/2021

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
06/08/2021	0016	Sanders, James F.	Partner	-0.30	-180.00	600.00		6/2021
06/11/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review final draft of brief and email to Jay Harbison re: filing;	6/2021
06/14/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Review Orders re: pro hac vice admission of counsel;	6/2021
06/16/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Legal research; new Supreme Court rule on constitutionality and three judge panel;	6/2021
06/18/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Review Appellate decision in Nandigam v. Beavers;	6/2021
06/21/2021	0016	Sanders, James F.	Partner	0.10	60.00	600.00	Correspondence re: June 25 hearing;	6/2021
06/21/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review Scheduling Order;	6/2021
06/22/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Discussions re: arrangements for Friday's hearing; review prior orders;	6/2021
06/23/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review Supplemental Authority from Attorney General;	6/2021
06/24/2021	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Prepare for hearing, as well as conferences with Jon Hacker re: same;	6/2021
06/24/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review in preparation for hearing on constitutionality of Anti-SLAPP petition; office conferences with Jim Sanders and Jonathan Hecker;	6/2021
06/25/2021	0016	Sanders, James F.	Partner	3.00	1,800.00	600.00	Prepare for hearing on constitutionality;	6/2021
06/25/2021	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Attend hearing on constitutionality;	6/2021
06/25/2021	0035	Harris, Ronald G.	Partner	3.00	1,425.00	475.00	Prepare for and attend hearing on constitutional issues;	6/2021
06/28/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Conference with Ron Harris re: last week's hearing	6/2021
07/06/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: obtaining transcript of recent hearing	7/2021
07/13/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: NBC Motion to file exhibits under seal	7/2021
07/13/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review Motion to file under seal and order and emails to co-counsel;	7/2021
07/14/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails re: request for extension to file response brief	7/2021
07/15/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	E-mails and telephone conference with Kathy Klein re: request for extension to file response brief;	7/2021
07/19/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review of SmileDirect's Response and email to co-counsel transmitting same;	7/2021
07/20/2021	0040	Harbison, William J.	Associate	4.70	1,480.50	315.00	Receipt/review of Anti-SLAPP Response and lengthy associated filings	7/2021
07/20/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Office discussion with Jay Harbison re: Brief of SmileDirect and review of Brief and filings;	7/2021
07/21/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review of SmileDirect's Brief and Statement of Facts new flash drive videos from plaintiff and review opinion re: constitutionality and further review of pleadings;	7/2021
07/22/2021	0016	Sanders, James F.	Partner	2.00	1,200.00	600.00	Begin review of Plaintiffs' Brief in Opposition to Motion to Strike, as well as Statement of Facts;	7/2021
07/22/2021	0040	Harbison, William J.	Associate	1.40	441.00	315.00	Receipt/review of Anti-SLAPP Response and lengthy associated filings	7/2021
07/23/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conference with Jim Sanders re: Anti-SLAPP Response and strategy;	7/2021

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
07/23/2021	0040	Harbison, William J.	Associate	1.60	504.00	315.00	Receipt/review of Anti-SLAPP Response and lengthy associated filings	7/2021
07/23/2021	0016	Sanders, James F.	Partner	5.00	3,000.00	600.00	Review Plaintiffs' filed response to NBCUniversal's Motion to Dismiss, as well as draft summary of response, and conference with Jay Harbison re: same;	7/2021
07/26/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Continue review of Smile Direct briefing;	7/2021
07/26/2021	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Call w/ Erik Benton re: Anti-SLAPP hearing	8/2021
07/27/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review SmileDirect's lengthy pleadings;	7/2021
07/28/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review NBCU's prior Memorandum re: Motion to Dismiss to Compare to SmileDirect's claims;	8/2021
08/12/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Reviewed/edited draft of Anti-SLAPP Reply Brief	8/2021
08/12/2021	0035	Harris, Ronald G.	Partner	2.50	1,187.50	475.00	Review draft of Reply and send e-mail with comments re: brief;	8/2021
08/17/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review latest draft of Reply Brief;	8/2021
08/18/2021	0016	Sanders, James F.	Partner	0.10	60.00	600.00	Correspondence re: draft reply brief;	8/2021
08/18/2021	0040	Harbison, William J.	Associate	2.50	787.50	315.00	Reviewed/edited draft of Anti-SLAPP Reply Brief	8/2021
08/18/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review Reply Brief with Jay Harbison;	8/2021
08/19/2021	0040	Harbison, William J.	Associate	1.00	315.00	315.00	Edited/filed Anti-SLAPP Reply Brief	8/2021
08/19/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review Reply Brief for filing, as well as follow-up on filing;	8/2021
09/01/2021	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Email with opposing counsel re: copies of authorities cited in briefs;	9/2021
09/16/2021	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Review of Anti-SLAPP Sur-reply brief;	9/2021
09/16/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review Sur-reply of SmileDirect;	9/2021
09/17/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Review SmileDirect Sur-reply and research re: cases cited therein;	9/2021
09/20/2021	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Review of Anti-SLAPP Sur-reply brief;	9/2021
09/21/2021	0040	Harbison, William J.	Associate	4.50	1,417.50	315.00	Review of Anti-SLAPP Sur-reply brief, as well as email to team re: same;	9/2021
09/21/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Further review of SmileDirect Sur-reply and prior pleadings;	9/2021
09/22/2021	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Further review of Anti-SLAPP Sur-reply brief and additional emails to team re: same;	9/2021
09/22/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Strategy call with team re: Anti-SLAPP hearing;	9/2021
09/22/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: hearing schedule;	9/2021
09/22/2021	0035	Harris, Ronald G.	Partner	1.30	617.50	475.00	Prepare for and participate in conference call with co-counsel, as well as office conferences with Jay Harbison;	9/2021
09/23/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: upcoming hearing date;	9/2021
09/23/2021	0040	Harbison, William J.	Associate	0.70	220.50	315.00	Various communications re: rescheduling Anti-SLAPP hearing date;	9/2021
09/24/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: rescheduling Anti-SLAPP hearing;	9/2021
09/24/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Drafted/submitted agreed order re: rescheduling Anti-SLAPP hearing'	9/2021

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Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
10/18/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	E-mails with Dan Petrocelli re: logistics for upcoming Anti-SLAPP Hearing	10/2021
11/08/2021	0016	Sanders, James F.	Partner	4.00	2,400.00	600.00	Review briefs on motion to strike, as well as conference with Jay Harbison re: argument;	11/2021
11/08/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Conference with Jim Sanders re: strategy for November 17 Anti-SLAPP Hearing	11/2021
11/10/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review pleadings in preparation for hearing;	11/2021
11/12/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conference with Jay Harbison in preparation for argument;	11/2021
11/12/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Conference with Jay Harbison and Jeffrey Zager re: upcoming argument;	11/2021
11/12/2021	0040	Harbison, William J.	Associate	0.80	252.00	315.00	Conference with Jim Sanders re: strategy for November 17 Anti-SLAPP Hearing	11/2021
11/15/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conference call re: argument;	11/2021
11/15/2021	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Strategy call with Dan Petrocelli re: upcoming hearing on Anti-SLAPP Petition;	11/2021
11/15/2021	0040	Harbison, William J.	Associate	1.50	472.50	315.00	Review filings in advance of hearing on Anti-SLAPP Petition;	11/2021
11/15/2021	0016	Sanders, James F.	Partner	2.50	1,500.00	600.00	Prepare for argument;	11/2021
11/15/2021	0035	Harris, Ronald G.	Partner	2.00	950.00	475.00	Prepare for hearing by conferences with Jim Sanders and Jay Harbison and participate in conference call with OMM counsel and review prior pleadings;	11/2021
11/16/2021	0016	Sanders, James F.	Partner	4.00	2,400.00	600.00	Prepare for hearing;	11/2021
11/16/2021	0035	Harris, Ronald G.	Partner	1.50	712.50	475.00	Prepare for hearing logistics re: counsel meetings and hearing;	11/2021
11/17/2021	0040	Harbison, William J.	Associate	7.50	2,362.50	315.00	Prepare for and attend hearing on Anti-SLAPP Petition	11/2021
11/17/2021	0016	Sanders, James F.	Partner	4.00	2,400.00	600.00	Attend hearing;	11/2021
11/17/2021	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Prepare for hearing;	11/2021
11/17/2021	0016	Sanders, James F.	Partner	0.70	420.00	600.00	Correspondence re: Order from hearing, as well as correspondence re: hearing transcript;	11/2021
11/17/2021	0035	Harris, Ronald G.	Partner	4.50	2,137.50	475.00	Prepare for hearing and meetings with co-counsel and attend hearing and discussions with counsel re: appellate issues;	11/2021
11/18/2021	0016	Sanders, James F.	Partner	1.50	900.00	600.00	Correspondence re: transcript and Order, as well as conferences with Ron Harris and Jay Harbison re: same;	11/2021
11/18/2021	0016	Sanders, James F.	Partner	1.00	600.00	600.00	Review transcript of Court's decision, as well as correspondence with counsel re: same;	11/2021
11/18/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	E-mails with Kendall Turner re: examples of fee petitions and orders;	11/2021
11/18/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Conference with Jim Sanders and Ron Harris re: drafting of Order on Anti-SLAPP Petition;	11/2021
11/18/2021	0035	Harris, Ronald G.	Partner	1.00	475.00	475.00	Review proposed order and make comments;	11/2021
11/22/2021	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Review and comment on proposed Order from hearing;	11/2021
11/23/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: submission of proposed Anti-SLAPP Order	11/2021
11/23/2021	0035	Harris, Ronald G.	Partner	0.20	95.00	475.00	Review final version of Order and emails re: submission;	11/2021

Date	Atty	Name	Description	Hrs	Amt	Rate	Narrative	Posted
11/24/2021	0016	Sanders, James F.	Partner	0.60	360.00	600.00	Review draft Order and correspondence;	11/2021
11/24/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: submission of proposed Anti-SLAPP Order;	11/2021
11/29/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Various communications re: submission of proposed Anti-SLAPP Order	11/2021
11/30/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Conferences re: fee application;	11/2021
11/30/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Discussions re: attorney fee petition and review email re: same;	11/2021
11/30/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Meeting with Jim Sanders re: fee petition;	11/2021
11/30/2021	0040	Harbison, William J.	Associate	0.30	94.50	315.00	Telephone conference with Dan Petrocelli re: fee petition issues	11/2021
11/30/2021	0040	Harbison, William J.	Associate	0.50	157.50	315.00	Legal research and e-mail to team re: fee petition issues	11/2021
12/01/2021	0040	Harbison, William J.	Associate	0.40	126.00	315.00	Various communications re: fee petition issues	12/2021
12/10/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Correspondence re: order of dismissal;	12/2021
12/13/2021	0016	Sanders, James F.	Partner	0.30	180.00	600.00	Review filings;	12/2021
12/13/2021	0035	Harris, Ronald G.	Partner	0.10	47.50	475.00	Review emails re: Notice of Appeal;	12/2021
12/20/2021	0016	Sanders, James F.	Partner	0.50	300.00	600.00	Review and correspondence re: Court Order;	12/2021
12/21/2021	0035	Harris, Ronald G.	Partner	0.50	237.50	475.00	Review, request for stipulation and email to co-counsel;	12/2021
12/21/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: Appellate Record;	12/2021
12/22/2021	0035	Harris, Ronald G.	Partner	0.80	380.00	475.00	Review issue re: appellate record; email to co-counsel re: same;	12/2021
12/22/2021	0016	Sanders, James F.	Partner	0.20	120.00	600.00	Correspondence re: Appellate Record;	12/2021
12/22/2021	0040	Harbison, William J.	Associate	0.40	126.00	315.00	Various communications re: appellate record issues	12/2021
12/23/2021	0016	Sanders, James F.	Partner	0.40	240.00	600.00	Correspondence re: Appellate Record;	12/2021
12/23/2021	0040	Harbison, William J.	Associate	0.60	189.00	315.00	Call w/ Kathy Klein re: agreed order for appellate record; e-mails re: same	12/2021
12/27/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review requests of Appellate Court and send emails to co-counsel;	12/2021
12/27/2021	0040	Harbison, William J.	Associate	0.20	63.00	315.00	Receipt/review of lead counsel designation forms.	12/2021
12/28/2021	0035	Harris, Ronald G.	Partner	0.30	142.50	475.00	Review for appellate forms and Motion pro hac vice;	12/2021
				450.05	203,433.25			

Service Code Summary Report

Billed and Unbilled

NBCUniversal Media, LLC / SmileDirectClub, Inc et al. v. (00005248-00020616)

01/06/2022

Service Code	Description	Orig Amt	Rev Amt	First	Last
00103	Court Reporter	1,946.66	1,946.66	11/03/2020	06/01/2021
00104	Court Costs	576.25	576.25	11/03/2020	11/12/2020
00140	Filing Fees	340.00	340.00	07/06/2020	07/06/2020
00142	Food	445.52	445.52	06/24/2021	06/24/2021
00155	A+ Conferencing	9.62	9.62	11/30/2020	11/30/2020
Report Totals:		3,318.05	3,318.05		

**IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE**

SMILEDIRECTCLUB, INC.,
SDC FINANCIAL, LLC, and
SMILEDIRECTCLUB, LLC,

Plaintiffs,

v.

NBCUNIVERSAL MEDIA, LLC, and
VICKY NGUYEN,

Defendants.

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No. 20-C-1054
Judge Brothers

DECLARATION OF JONATHAN D. HACKER

I, Jonathan D. Hacker, declare under penalty of perjury that the following statements are true and correct:

1. I am a partner in the law firm O'Melveny & Myers LLP ("O'Melveny"). My O'Melveny colleagues and I served as co-counsel for defendants NBCUniversal Media, LLC and Vicky Nguyen (collectively, "NBC News") in this case, along with Neal & Harwell, PLC.

2. I respectfully submit this declaration in support of NBC News's petition for attorneys' fees, out-of-pocket expenses, and costs under Section 20-17-107 of the Tennessee Code. Unless otherwise noted, the information set forth herein is based on my personal knowledge, my review of records maintained by O'Melveny, and information provided to me by my colleagues at O'Melveny that I believe to be true.

3. NBC News seeks an award of \$1,792,618.00 in fees as well as \$26,831.90 in costs incurred by O'Melveny. That figure consists of a figure based on 1,808 hours reasonably expended litigating NBC News's Anti-SLAPP petition, multiplied by their attorneys' customary

hourly rates. Neal & Harwell is also submitting a separate declaration concerning its attorneys' costs and fees.

4. Below is a description and explanation of (a) the primary litigation team staffed on this matter; (b) the hourly rates charged for each attorney and professional support staff members; (c) the number of hours billed by each attorney and professional support staff member; and (d) the costs incurred in association with this litigation.

Qualifications and Roles of Timekeepers

5. NBC News seeks a fee award for services provided by eleven attorneys and two paralegals affiliated with O'Melveny, including partners Daniel M. Petrocelli and myself; counsels Kendall Turner, Yaira Dubin, and Anwar Graves; associates Vivaan Nehru, Ashley Robertson, Jared Ginsburg, Andrew Hellman, Alexandra Bornstein, and Melissa Cassel; and paralegals Kimberly Grotenrath and Steven Segal.

6. O'Melveny is a global law firm with approximately 800 attorneys. Our entertainment and media law group has particular expertise in handling difficult defamation cases. We are a five-time winner of Law360's Media & Entertainment practice group of the year award. O'Melveny's timekeepers were able to leverage this experience towards their efficient handling of NBC News's case.

7. I chair O'Melveny's Supreme Court and Appellate Practice. I am admitted to practice in both Maryland and Washington, D.C. and have court admissions before every federal appellate court in the country. I joined O'Melveny in February 1999. Before entering private practice, I served as a law clerk to Judge Bruce M. Selya of the First Circuit Court of Appeals. A copy of my biography is attached as Exhibit A, pp. 5-7.

8. Daniel M. Petrocelli chairs O'Melveny's Trial Practice and has significant

experience representing clients in major litigation in a wide variety of areas. The American Law Journal has honored him as the 2020 “Litigator of the Year,” the Daily Journal as among its “Lawyers of the Decade,” and Legal 500 as one of the country’s top ten trial lawyers (as well as selecting him as the winner of its inaugural “Leading Trial Lawyer of the Year”). Mr. Petrocelli is a 1980 graduate of Southwestern Law School, is admitted to practice in California, and has worked at O’Melveny since October 2000. A copy of his biography is attached as Exhibit A, pp. 2-4.

9. Several of our colleagues have assisted in this case:
 - a. Kendall Turner, a counsel at O’Melveny, has provided significant and valuable assistance in all aspects of this case, providing key legal research, drafting portions of the briefs, and coordinating all aspects of discovery. Kendall joined O’Melveny in September 2018, prior to which she worked at another large law firm and was a law clerk for Judge Merrick B. Garland of the U.S. Court of Appeals for the D.C. Circuit and for Associate Justice Stephen G. Breyer of the U.S. Supreme Court. She graduated from law school in 2013 and is admitted to practice in California and Washington, D.C. A copy of her biography is attached as Exhibit A, pp. 7-9.
 - b. Anwar Graves, a counsel at O’Melveny, has provided significant and valuable assistance in this case, particularly in responding to Smile Direct’s discovery requests and developing NBC News’s discovery plans. Anwar joined O’Melveny in July 2019, prior to which he was an Assistant U.S. Attorney for the District of Columbia and a Trial Attorney for the Department of Justice. He graduated from law school in 2012 and is admitted to practice in Washington, D.C. A copy of his biography is attached as Exhibit A, pp. 10-11.

- c. Yaira Dubin, a former counsel at O'Melveny, provided significant and valuable assistance in this case, particularly in addressing key legal issues in NBC News's reply brief in support of its Anti-SLAPP petition. Yaira joined O'Melveny in December 2016, prior to which she was a law clerk for Judge James E. Boasberg of the U.S. District Court for the District of Columbia, Judge Sri Srinivasan of the U.S. Court of Appeals for the D.C. Circuit, and Associate Justice Elena Kagan of the U.S. Supreme Court. She graduated from law school in 2013 and is admitted to practice in Maryland and Washington, D.C. A copy of her biography is attached as Exhibit A, pp. 12-13.
- d. Ashley Robertson, a former associate at O'Melveny, provided significant and valuable assistance in this case, particularly in responding to Plaintiffs' discovery requests, developing NBC News's discovery plans, and drafting NBC News's Anti-SLAPP petition. A copy of her biography is attached as Exhibit A, p. 14.
- e. Vivaan Nehru, a former associate at O'Melveny, provided significant and valuable assistance in this case, particularly in drafting NBC News's Anti-SLAPP petition. A copy of his biography is attached as Exhibit A, p. 15.
- f. Jared Ginsburg, an associate at O'Melveny, has provided significant and valuable assistance in this case, particularly in discovery and responding to the Court's request for supplemental briefing. Jared joined O'Melveny in October 2017. He graduated from law school in 2017 and is admitted to practice in California. A copy of his biography is attached as Exhibit A, p. 16.
- g. Alexandra Bornstein, a former associate at O'Melveny, has provided significant and valuable assistance in this case, particularly in drafting NBC News's Anti-

SLAPP petition. Alexandra joined O'Melveny in October 2018. She graduated from law school in 2018 and is admitted to practice in New York. A copy of her biography is attached as Exhibit A, p. 17.

- h. Melissa Cassel, an associate at O'Melveny, has provided significant and valuable assistance in this case, particularly in responding to the Court's request for supplemental briefing as well as drafting NBC News's reply in support of its anti-SLAPP petition. Melissa joined O'Melveny in September 2019, prior to which she was a law clerk for Judge Julia S. Gibbons of the U.S. Court of Appeals for the Sixth Circuit. She graduated from law school in 2018 and is admitted to practice in California. A copy of her biography is attached as Exhibit A, p. 18.
 - i. Andrew Hellman, an associate at O'Melveny, has provided significant and valuable assistance in this case, particularly in drafting NBC News's reply in support of its anti-SLAPP petition. Andrew joined O'Melveny in January 2021, prior to which he was a law clerk for Judge Diana Gribbon Motz of the U.S. Court of Appeals for the Fourth Circuit. He graduated from law school in 2019 and is admitted to practice in Maryland. A copy of his biography is attached as Exhibit A, p. 19.
- 10. Additionally, several non-attorney staff also assisted in this matter:
 - a. Kimberly Grotenrath, a senior paralegal at O'Melveny, has provided significant and valuable assistance in this case, particularly in supporting O'Melveny attorneys in preparing NBC News's Anti-SLAPP petition. Kimberly joined O'Melveny in 2005, prior to which she was a corporate paralegal at two other national law firms.

- b. Steven Segal, a case manager at O'Melveny, has provided significant and valuable assistance in this case, particularly in supporting O'Melveny attorneys in preparing NBC News's Anti-SLAPP petition. Steven joined O'Melveny in 2003, prior to which he was a contract attorney at various private law firms.

11. O'Melveny has previously served as counsel to NBCUniversal on a variety of matters since February 2017. This preexisting working relationship enabled O'Melveny to efficiently manage NBC News' defense, given that the Firm was already familiar with NBCUniversal, its litigation preferences, and its business priorities.

Type of Work Conducted O'Melveny Timekeepers

12. Smile Direct sued NBC News seeking actual and consequential damages, statutory damages (including treble damages) under the Tennessee Consumer Protection Act, punitive damages, reasonable attorneys' fees, costs of the suit, and prejudgment and post-judgment interest "at the highest lawful rates" as part of their complaint. Compl. ¶ 551. The suit sought to recover more than \$2.85 billion from NBC News, including \$950 million for economic and reputational harm allegedly suffered by Smile Direct, and also sought punitive damages. Compl. ¶ 18.

13. O'Melveny timekeepers worked across all matters on this case, including discovery, drafting the supplemental briefing requested by this Court, drafting the Anti-SLAPP briefs, and preparing for oral argument. Smile Direct's complaint and litigation tactics made this an especially complicated matter, especially for an early stage of the case. The 209-page complaint included 551 paragraphs and 40 counts of allegedly unlawful statements and conduct, all of which implicated NBC's rights under the First Amendment, the Anti-SLAPP Act, Tennessee's Media Shield Law, and the Tennessee Consumer Protection Act ("TCPA"). The process of vindicating NBC News's rights required multiple rounds of briefing, including

preparation of substantive opening and reply brief on a petition to dismiss, as well as multiple supplemental briefs on issues raised by Smile Direct and ordered by the Court. Smile Direct itself filed nine briefs totaling 733 pages, which required O'Melveny attorneys to invest significant time reviewing Smile Direct's argument, reading Smile Direct's cited cases and record citations, and preparing concise and effective responsive briefs (totaling 233 pages). Separately, Smile Direct's discovery requests required additional significant time to investigate, gather relevant information, and prepare responsive materials. And four oral arguments on different issues and one status conference required yet more preparation by several attorneys.

14. I describe the type of work and time allocated further herein:

- a. Anti-SLAPP Petition & Declarations: In response to Smile Direct's Complaint, O'Melveny's attorneys prepared an Anti-SLAPP petition under the TPPA that briefed the legal issues implicated by Smile Direct's numerous defamation claims as well as its TCPA claim. In support of the petition, O'Melveny also prepared factual declarations by defendant Vicky Nguyen, the correspondent on the relevant news report, and Lauren Dunn, the principal producer on the report. Preparation of those declarations required extensive factual interviews with Ms. Nguyen and Ms. Dunn and other NBC News personnel involved in the report, as well as the gathering and review of documentary evidence.
- b. Discovery: Responding to Smile Direct's discovery requests required expending significant time and effort, both because of the depth of the requests and the nature of the instant lawsuit. Discovery in this case required investigation, witness interviews, preparation of declarations, document (including video) review and production, written responses, and the preparation and defense of multiple

depositions. Issues concerning the limit of permissible discovery under the Anti-SLAPP Act also required significant briefing before the Court.

- c. Supplemental Briefing: A great deal of additional time and effort was expended preparing the supplemental briefing ordered by this Court. Our team had to research and draft supplemental briefs addressing numerous issues, including (1) the interaction between the TPPA and the Tennessee Rules of Civil Procedure, (2) the constitutionality of the TPPA, (3) the standard for obtaining discovery under the TPPA, (4) the application of the Media Shield Law to this case, and (5) the process for adjudicating the third step of the Anti-SLAPP analysis—i.e., whether the petitioning party has established a valid defense. NBC News’s supplemental briefs required significant legal research into each of these issues, which implicate many matters of first impression under Tennessee law. NBC News also prepared for and delivered oral argument on these issues on three occasions: on October 30, 2020, NBC News presented argument on the standard for securing discovery in Anti-SLAPP proceedings; on January 12, 2021, it presented argument on the scope of Smile Direct’s discovery requests; and on June 25, 2021, NBC News presented argument on the constitutionality of the TPPA.
- d. Anti-SLAPP Reply Brief & Argument: Preparing NBC News’s reply on the Anti-SLAPP petition and oral argument on the merits of the Anti-SLAPP petition required additional work not duplicative of the work already conducted in response to the Court’s requests for supplemental briefing. For example, preparing that brief required responding to Smile Direct’s statement of facts and chart of allegations, addressing whether Smile Direct was required to show actual malice

by clear and convincing evidence at this stage of the proceedings, and addressing Smile Direct's factual arguments regarding its various claims of falsity. Counsel also prepared for and delivered oral argument on November 17, 2021.

Reasonable Hourly Rates of O'Melveny Timekeepers

15. O'Melveny is a global law firm, and the firm's rates charged for work performed within the United States do not vary based on the location of the client. I primarily work from our Washington, D.C. office, Mr. Petrocelli primarily works from one of our Los Angeles, California offices, and the remainder of our team is distributed between our California, New York, and Washington, D.C. offices.

16. Upon information and belief, the way that O'Melveny structures its rates is typical of the way that other large national and international law firms structure their rates. Likewise, the actual rates that O'Melveny charges its clients are comparable to the rates that other large national and international law firms charge their clients. In other words, O'Melveny charges prevailing market rates for its legal work. These rates are consistent with the rates that attorneys of reasonably comparable skill, experience, and reputation in the relevant legal markets charged their clients for complex defamation-defense advocacy during the years indicated.

17. I am familiar with the billing rates charged by O'Melveny attorneys and professional legal support staff in this action. All of the fees for which reimbursement is sought are based on records maintained by O'Melveny in its normal course of business. The rates charged by each timekeeper on this matter are listed below.

Timekeeper	Title	2020 Rate	2021 Rate	Graduation Year
Daniel M. Petrocelli	Partner	\$1,555.00	\$1,555.00 to \$1,650.00	1980
Jonathan D. Hacker	Partner	\$1,375.00	\$1,475.00	1995
Anwar Graves	Counsel	\$890.00	\$890.00 to \$970.00	2012
Kendall Turner	Counsel	\$925.00	\$925.00 to \$980.00	2013
Yaira Dubin	Counsel	\$970.00	\$1,025.00	2013
Ashley Robertson	Associate	\$800.00	\$800.00	2016
Vivaan Nehru	Associate	\$800.00	\$895.00	2016
Jared Ginsburg	Associate	\$725.00	\$725.00 to \$840.00	2017
Alexandra Bornstein	Associate	\$670.00	\$810.00	2018
Melissa Cassel	Associate	\$645.00	\$760.00	2018
Andrew Hellman	Associate	N/A ¹	\$675.00	2019
Kimberly Grotenrath	Senior Paralegal	\$395.00	\$415.00	N/A
Steven Segal	Case Manager	\$395.00	\$415.00	N/A

Fee Amounts for the O'Melveny Timekeepers

18. The O'Melveny timekeepers kept detailed records of the time that we spent working on this case. Based on a review of those records, I or someone working at my direction prepared Exhibit B, which set forth the time entries by O'Melveny timekeepers for which NBC News seeks an award of attorneys' fees as well as the division of work across each aspect of the proceedings to date.

19. In preparing Exhibit B, we exercised reasonable billing judgment. We reduced or

¹ Andrew Hellman did not join the firm until 2021.

eliminated time entries that were excessive, duplicative or otherwise unreasonable. In addition, we omitted certain categories of time altogether. For example, we omitted time entries by certain paralegals and other staff who assisted with one-off projects. We also omitted all time spent on tasks that we deemed to be clerical in nature.

20. The amount for each O'Melveny timekeeper is set forth in the chart below. I arrived at those figures by multiplying the number of hours each timekeeper reasonably expended on this case by the reasonable hourly rate for that timekeeper for the relevant year, then adding together the annual subtotals.

Timekeeper	2020 Hours	2020 Rate	2020 Total	2021 Hours	2021 Rate	2021 Total	Total Amount
Daniel M. Petrocelli	102.6	\$1,555.00	\$159,543.00	114.2	\$1,650.00 ²	\$186,739	\$346,282.00
Jonathan D. Hacker	74.7	\$1,375.00	\$102,712.50	83.8	\$1,475.00	\$123,605.00	\$226,317.50
Anwar Graves	87.2	\$890.00	\$77,608.00	8.7	\$970.00 ³	\$7,783.00	\$85,391.00
Kendall Turner	282.2	\$925.00	\$261,035.00	336.4	\$980.00 ⁴	\$325,987.00	\$587,022.00
Yaira Dubin	0	\$970.00	\$0.00	55.2	\$1,025.00	\$56,580.00	\$56,580.00
Ashley Robertson	136.2	\$800.00	\$108,960.00	3.5	\$800.00	\$2,800.00	\$111,760.00
Vivaan Nehru	87.6	\$800.00	\$70,080.00	0	\$895.00	\$0.00	\$70,080.00
Jared Ginsburg	57.0	\$725.00	\$41,325.00	160.5	\$840.00 ⁵	\$128,920.50	\$170,245.50
Andrew Hellman	0	\$0.00	\$0.00	45.2	\$675.00	\$30,510.00	\$30,510.00
Alexandra Bornstein	38.9	\$670.00	\$26,063.00	0	\$810.00	\$0.00	\$26,063.00
Melissa Cassel	0	\$645.00 ⁴	\$0.00	79.5	\$760.00	\$60,420.00	\$60,420.00
Kimberly Grotenrath	10.4	\$395.00	\$4,108.00	10.0	\$415.00	\$4,150.00	\$8,258.00
Steven Segal	25.2	\$395.00	\$9,954.00	9	\$415.00	\$3,735.00	\$9,954.00

21. The total amount for all O'Melveny timekeepers, exclusive of the amounts I eliminated for the reasons described above, is \$1,792,618.00, representing 1,808 hours of work.

22. Exhibit B also provides a breakdown of hours worked across each aspect of the

² In 2021, Mr. Petrocelli billed 17.8 hours at a rate of \$1,555.00 and 96.4 hours at a rate of \$1,650.00. The total for that year has been calculated accordingly.

³ In 2021, Mr. Graves billed 8.2 hours at a rate of \$890.00 and .5 hours at a rate of \$970.00. The total for that year has been calculated accordingly.

⁴ In 2021, Ms. Turner billed 67 hours at a rate of \$925.00 and 269.40 hours at a rate of \$980.00. The total for that year has been calculated accordingly.

⁵ In 2021, Mr. Ginsburg billed 51.3 hours at a rate of \$725.00 and 109.2 hours at a rate of \$840.00. The total for that year has been calculated accordingly.

proceedings. The amount is described further herein

- a. Research, Investigation and Preparation of NBC News's Anti-SLAPP Petition and Preparation for Oral Arguments: O'Melveny timekeepers billed 846.4 hours, totaling \$824,467.50 in drafting the Anti-SLAPP petition and preparing for oral arguments concerning the same. This work included fact development, legal research, drafting briefs, motions, and other work product, and preparing for oral arguments.
- b. Discovery: O'Melveny timekeepers spent 681.2 hours responding to discovery requests by Smile Direct, either by responding to document requests, interrogatories, or through depositions. The total amount billed was \$670,475.50.
- c. Supplemental Briefing Requested by the Court: The Court also requested a substantial amount of supplemental briefing concerning the TPPA, as described above. O'Melveny timekeepers billed 280.4 hours in responding to the Court's request (in research, drafting briefing materials and responses to Smile Direct's materials, and otherwise corresponding with counsel concerning the request), totaling \$297,675.00.

Expenses and Costs Incurred by O'Melveny

23. O'Melveny incurred reasonable, out-of-pocket expenses in the amount of \$26,831.90 in connection with this case. An itemized list of those expenses is set forth in the attached Exhibit C.

24. The expenses listed in Exhibit C consist of necessary postage, shipping, and messenger charges; attorney travel expenses; data hosting fees; legal research fees; and printing charges. All of these expenses are part of the costs that O'Melveny typically charges clients.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 10, 2022.

Respectfully Submitted,

/s/ Jonathan D. Hacker

Jonathan D. Hacker (admitted *pro hac vice*)

O'Melveny & Myers LLP

1625 I St. NW

Washington, D.C. 20006

(202) 383-5285

jhacker@omm.com

Attorney for Defendants

Exhibit A – Attorney Bios

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Daniel M. Petrocelli

Partner

Century City

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Daniel Petrocelli is the Chair of O'Melveny's Trial Practice and a Vice Chair of the firm. Dan has a national trial practice representing clients in major litigation in a wide variety of areas, including sports, entertainment, intellectual property, unfair competition, business torts, securities, employment law, and criminal defense.

The American Lawyer honored Dan as the 2020 "Litigator of the Year," noting that he "is a lawyer clients call in the toughest situations," and the *Daily Journal* selected him among its "Lawyers of the Decade." *Legal 500* ranks Dan as one of the country's top 10 trial lawyers and selected him as the winner of its inaugural "Leading Trial Lawyer of the Year," describing him as an "excellent, excellent trial lawyer" in a "whirlwind year which saw him try a slew of different matters back-to-back across various industries." *Chambers USA* ranks Dan as a leading lawyer and quotes sources who say he is "a first-rate trial lawyer" and "a fantastic force," "the one you hire for bet-the-company cases" who is "highly in demand." Clients compliment him for being "very strategic, very good in court and very client-focused." Dan has also been recently recognized by *Billboard Magazine* as a "Top Music Lawyer," *Variety* as one of the industry's "50 Game-Changing Entertainment Attorneys," *The Hollywood Reporter* as a "Power Lawyer," *Benchmark Litigation* as a "Trial Lawyer of the Year," *The National Law Journal* as a "Winning Litigator," and by *Law360* as a "Media & Entertainment MVP." Dan is a frequent national commentator on trials and other legal issues, as well as a featured speaker on legal issues at business groups, bar and judges associations, and citizens groups.

Admissions

Bar Admissions

California

Court Admissions

US District Court, Central, Northern, and Southern Districts of California, and the District of Colorado

US Court of Appeals, District of Columbia, Federal Circuit, Ninth and the Second, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits
US Supreme Court

Education

Southwestern University, J.D., 1980: *magna cum laude*; Editor-in-Chief, *Southwestern University Law Review*

University of California at Los Angeles, B.S., 1976: *cum laude*

Professional Activities

Member

- Trial Advocacy Board, ABA Litigation Section
- Board of Trustees, Southwestern University School of Law
- Los Angeles County Bar Association, Antitrust and Unfair Competition Sections
- ABA's Litigation Section and Corporate Counsel Committee
- California Bar Association, Antitrust and Unfair Competition Sections
- Association of Business Trial Lawyers

Author

- "Reflections on the 20th Anniversary of the O.J. Simpson Saga," *The Hollywood Reporter* (2014)
- "Outside the Courtroom," *Beyond a Reasonable Doubt*, Larry King, Phoenix Books (2006)
- "Effective Witness Preparation," *California Litigation* (Spring 1999)
- "Triumph of Justice: The Final Judgment on the Simpson Saga," *Random House* (1998)
- "Opening Statements under California Law," *Los Angeles Lawyer* (March 1989)

Honors & Awards

- Named a "Lawyer of the Decade" by *Daily Journal* (2021)
- Awarded "Litigator of the Year" by *The American Lawyer* (2020)
- Named to *The Hollywood Reporter's* "Power Lawyers" List (2010-2020)
- Named "Trial Lawyers of the Year," (2019) "Top 100 Trial Lawyers," (2018-2022) "Top 20 Trial Lawyers in California," (2020-2022) and "Local Litigation Star" and "National Practice Area Star" for Energy and Natural Resources (2020) and Product Liability and Recall, Commercial, Energy (2021-2022) by *Benchmark Litigation*
- Consistently ranked in Band 1 by *Chambers USA* in Nationwide: Trial Lawyers, Media & Entertainment: Litigation, and name a Star Individual in California: General Commercial Litigation
- Ranked by *Chambers Global* for Litigation: Trial Lawyers (2016-2021)
- "Life Sciences Star" for Product Liability by *LMG Life Sciences* (2018-2020)
- Named among the "Attorneys of the Year" by *California Lawyer* (2019)
- Received the National Impact Case Award for AT&T/Time Warner trial from *Benchmark Litigation* (2019)
- Recognized by *Variety* magazine in its Legal Impact Report (2012-2020)
- Recognized by *Best Lawyers®* 2022 for Bet-the-Company Litigation and Commercial Litigation in Century City, CA; Dan has been listed in *Best Lawyers®* since 2006.
- Named to Top Music Lawyers List by *Billboard* (2017, 2020)
- Named one of the 500 Leading Lawyers in America by *Lawdragon* (2019)
- Recommended in Sports by *Who's Who Legal* (2019)

- Recognized by *Managing Intellectual Property* as an "IP Star" (2020)
- Named one of the Top 100 Lawyers in California by the *Daily Journal* (2010, 2013-2021)
- Named Hall of Fame for Leading Trial Lawyers (2021); Leading Lawyer for General Commercial Disputes (2021); Recommended for Securities Litigation: Defense (2021); Recommended for Sport (2021); Recommended for Copyright Law (2021); Leading Trial Lawyer (2010-2020), Leading Lawyer for Media and Entertainment (2017-2019), Hall of Fame for Media and Entertainment: Litigation (2020-2021), and Trial Lawyer of the Year (2014) by *The Legal 500 US*
- Recognized by *The American Lawyer* as a Litigator of the Year (2017, 2018)
- Selected to the *National Law Journal's* "Winning Litigators" List (2018)
- Recognized as a Game Changer by *The Recorder* in its Litigation Department of the Year feature (2017)
- Received the CPR Corporate Leadership Award (2017)
- Named a Media & Entertainment MVP by *Law360* (2012, 2015, 2017)
- Selected to the *National Law Journal's* Litigation Trailblazers list (2016)
- Recognized by *Law360* as a national Trial Pro (2016)
- Named a leading entertainment lawyer in California by *Daily Journal* (2015)
- Named a Trial Ace by *Law360* (2015)
- Named Lawyer of the Month by *Attorney at Law Magazine* (2015)
- Recognized as an Outstanding Alumnus in Entertainment & Media by Southwestern Law School (2014)
- Lead counsel in *Lennar Corporation et al. v. Briarwood Capital LLC*, named one of the Top 5 Verdicts, Intentional Torts, *Daily Business Review* (2014)
- Received the Century City Bar Association Litigator of the Year Award (2002-2003)
- Received the Columbus Citizens Foundation Achievement Award In Law (2001)
- Honored by Judicial Watch, Inc. for Legal Excellence and Service to Community (2000)
- Recognized as Southwestern Law School Alumnus of the Year (1998)
- Named the Malibu Bar Association Trial Lawyer of the Year (1998)
- Named the San Diego Trial Lawyers Association Trial Lawyer of the Year (1997)
- Received the Dade County Trial Lawyers Association Champion of Justice Award (1997)
- Named one of Los Angeles' Top 50 Litigators by the *Los Angeles Business Journal*



Jonathan Hacker

Partner

Washington, DC
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 jhacker@omm.com

Jon Hacker chairs O'Melveny's Supreme Court and Appellate Litigation Practice and resides in the firm's Washington, DC office.

Top-ranked by *Chambers USA* since 2012, Jon is regarded by peers as "a phenomenal writer" and "a forceful advocate." He has authored briefs in dozens of US Supreme Court cases at both the merits and certiorari stages. He has argued six cases in the US Supreme Court and appeals in every federal circuit. He has also briefed and argued appeals in numerous state courts, including New York, California, Ohio, Pennsylvania, Florida, Massachusetts, New Jersey, Maine, Montana, Nebraska, and the District of Columbia. Clients praise him as "such a down-to-earth person but an unparalleled oral advocate."

Jon's appellate work has resulted in reversals of trial-court judgments (including jury verdicts) worth tens of millions and even billions of dollars. He has also briefed and argued many trial-level matters, has conducted discovery and depositions in complex litigation matters, and has handled several trials. Jon earns repeated praise for his "outstanding written product," with peers in the field impressed by his "bullet-proof performances in difficult cases."

Jon's areas of expertise include federal constitutional law, insurance, ERISA, criminal law and procedure, and federal jurisdiction and procedure. He is highly regarded by leading industry publications, including the *American Lawyer* as "Litigator of the Week", *Wall Street Journal* as a "Rising Appellate Star", *National Law Journal* as "Appellate Lawyer of the Week", *Chambers USA* and *Legal 500* as a leading nationwide

Admissions

Bar Admissions

District of Columbia
 Maryland

Court Admissions

US Supreme Court
 All federal circuit courts of appeal
 US District Court, District of Columbia

Education

University of Michigan, J.D.,
 1995: *magna cum laude*; Order of the Coif; Henry M. Campbell Memorial Scholarship (Law School's highest award for graduates); Managing Editor, 1994-95, Associate Editor, 1993-94, *Michigan Law Review*; Winner, Campbell Moot Court Competition, 1994

Harvard College, A.B., 1990 (Social Studies): *cum laude*

practitioner, *Benchmark Litigation* as a "Local Litigation Star", and *Best Lawyers in America* as a recognized lawyer since 2010.

Jon was a Lecturer in appellate advocacy for five years at the Harvard Law School, where he co-founded and co-directed the HLS Supreme Court and Appellate Advocacy Clinic. He is Co-Chair of the Supreme Court Amicus Committee of the National Association of Criminal Defense Lawyers.

Professional Activities

Clerkships

- Honorable Bruce M. Selya, US Court of Appeals, First Circuit

Member

- Co-Chair, National Association of Criminal Defense Lawyers, Supreme Court Amicus Committee
- Barrister, Edward Coke Appellate Inn of Court

Co-Founder and Co-Director

- HLS Supreme Court and Appellate Advocacy Clinic, Harvard Law School

Honors & Awards

- Recognized by *Best Lawyers*® 2022 for Appellate Practice in Washington, DC; Jon has been listed in *Best Lawyers*® since 2010
- Recognized by *Chambers USA* for Appellate Law (2021)
- Recognized by *The Legal 500 US* as a Leading Lawyer for Appellate (2020); Listed in *The Legal 500 US* since 2017
- Repeatedly selected as a leading US appellate lawyer by *Chambers*
- "Superstar Of Insurance Law," *Insurance Business Magazine* (2021)
- "Local Litigation Star," *Benchmark Litigation* (2018-2020)
- "Litigator of the Week," *The American Lawyer* (August 2015)
- "Rising Appellate Star," *The Wall Street Journal* (January 2011)
- "Appellate Lawyer of the Week," *National Law Journal* (2011)

**Kendall Turner**

Counsel

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Kendall Turner focuses her practice on appellate matters in federal and state courts. She has presented oral argument in various federal courts of appeals and has examined and cross-examined witnesses during a multi-week trial before a federal agency. Kendall also argued before the US Supreme Court in the 2019 Term, winning a unanimous reversal of her client's criminal sentence. She represents clients throughout the various stages of litigation, including during pre-litigation strategy, motions practice, trial, and appeal, with a focus on cases raising constitutional claims.

Kendall also maintains an active pro bono practice. She has helped litigate several reproductive rights cases and several cases on behalf of criminal defendants seeking to contest their convictions, sentences, and conditions of confinement.

In 2017, Kendall co-founded Law Clerks for Workplace Accountability, an organization dedicated to combating harassment in the federal judiciary. She later testified before the Judicial Conference's committees on Codes of Conduct and Judicial Conduct and Disability Rules to provide feedback on proposed changes.

Before joining O'Melveny, Kendall was a law clerk for Associate Justice Stephen G. Breyer on the US Supreme Court and Chief Judge Merrick B. Garland on the US Court of Appeals for the DC Circuit.

Admissions*Bar Admissions*

California

District of Columbia

Court Admissions

US Supreme Court

US Court of Appeals, Second, Eighth, Ninth, Eleventh, and District of Columbia Circuits

US District Court, Central District of California and District of Columbia

Education

Stanford University, J.D., 2013

Princeton University, B.A., 2007

Experience

Representative US Supreme Court Matters

- *Holquin-Hernandez v. United States*. Presented oral argument and secured a unanimous victory for a criminal defendant seeking to challenge the length of his sentence. Although the Fifth Circuit had held the defendant failed to preserve his challenge for appeal, the Supreme Court reversed 9-0.
- *June Medical Services LLC v. Russo*. With co-counsel the Center for Reproductive Rights, helped brief this reproductive-rights case and secured a 5-4 victory for Louisiana abortion providers.
- *United States v. Gary*. With co-counsel the Stanford Law School Supreme Court Litigation Clinic and the Office of the Federal Defender for South Carolina, helped brief this case addressing criminal defendants' ability to seek relief under new rules establishing the elements of their offenses.

Representative State and Federal Appellate Court Matters

- *Rinehart v. Weitzell*. Briefed and presented oral argument—and secured a rare victory—before the Eighth Circuit on behalf of a disabled prisoner seeking relief under the Americans with Disabilities Act (ADA).
- *Stein v. United States*. Briefed and presented oral argument before the Eleventh Circuit on behalf of a defendant seeking to vacate his conviction and his sentence.
- *Chichakli v. Tillerson*. Briefed and presented oral argument before D.C. Circuit on behalf of a former prisoner seeking to protect his personal information from government disclosure under the Privacy Act.
- *Little Rock Family Planning Services v. Rutledge*. Briefed and presented oral argument before the Eighth Circuit and secured a unanimous victory for abortion providers challenging multiple abortion restrictions in Arkansas.

Other Representative Experience

- *Arkansas Federal District Court*. Led briefing and won a preliminary injunction of three laws restricting access to abortion care in Arkansas.
- *California*. Argued before the Third District Court of Appeal in a tax case presenting the question whether the taxpayer had exhausted its administrative remedies before filing suit.
- *California*. Helped secure multimillion-dollar settlement in trade secrets case.
- *Delaware*. Helped secure dismissal of shareholder claims against buyer of distressed company.

Professional Activities

Author

- Co-Author, "Second Circuit Expands Scope of Insider-Trading Liability," *Bloomberg Law* (February 2020)
- Co-Author, "Next Steps in the Federal Judiciary's #MeToo Moment," *National Law Journal* (January 2018)
- Author, "A New Approach to the Teague Doctrine," 66 *Stan. L. Rev.* 1159 (2014)
- Co-Author, "The Retroactivity of Padilla After *Chaidez v. United States*," *The Champion* (2013)

- Author, "The Scope of Compliance Proceedings Under the WTO Dispute Settlement Understanding: What Are 'Measures Taken to Comply'?", 12 *Asper R. Int'l Bus. & Trade L.* 170 (2013)
- Author, "*Dahlia v. Rodriguez*: A Chance to Overturn Dangerous Precedent," *Stan. L. Rev. Online* (2012)

Clerkships

- Associate Justice Stephen G. Breyer, US Supreme Court
- Chief Judge Merrick B. Garland, US Court of Appeals, District of Columbia Circuit

Leadership

- Founder and Board Member, Law Clerks for Workplace Accountability
- Member, Law Clerk Advisory Group, DC Circuit Court of Appeals
- Former Board Member, Proyecto Villa Nueva

Panelist

- Panelist, "The Story of #MeToo in the Courthouse from the Perspective of Law Clerks," Columbia Law School (February 2020)
- Panelist, "Supreme Court 101," Home Is Here Conference (October 2019)
- Panelist, "Maintaining an Exemplary Workplace," Judges' Conference (April 2019)
- Panelist, "Sexual Misconduct in the Legal Profession," Georgetown Law School (April 2019)
- Panelist, "Judicial Workplace Conduct Reform," Yale Law School (March 2019)
- Panelist, "Regulation in Courts: Previewing the Year Ahead in the Supreme Court and Circuits," Hoover Institution (September 2018)
- Panelist, "#MeToo in the Legal Profession," 2018 Annual Conference, South Asian Bar Association (July 2018)
- Panelist, "The Year Ahead: Regulation in the Supreme Court and the Circuits," Hoover Institution (September 2017)
- Panelist, "Women's Talk Story Event," (January 2017)

Honors & Awards

- *Forbes* 30 Under 30: Law & Policy (2016)

**Anwar Graves**

Counsel

Washington, DC
D: +1-202-383-5191
agraves@omm.com

Anwar Graves is a litigation counsel in O'Melveny's Washington, DC office.

Before joining O'Melveny, Anwar served as an Assistant United States Attorney at the US Attorney's Office for the District of Columbia, and as a Trial Attorney for the Department of Justice's Consumer Protection Branch.

As an Assistant United States Attorney, Anwar led numerous grand jury investigations and prosecuted a range of cases, including violent crime, homicide, and complex conspiracies. Over the course of his career at the US Attorney's Office, he tried more than 40 cases to verdict. Additionally, Anwar served in the Appellate Division of the US Attorney's Office where he authored over twenty appellate briefs, and argued in the District of Columbia Court of Appeals as well as the US Court of Appeals for the District of Columbia Circuit. For each of his four plus years at the United States Attorney's Office, Anwar received a Special Achievement Award from the Department of Justice in recognition of his trial and investigative work.

Most recently, Anwar served as a Trial Attorney for the Department of Justice's Consumer Protection Branch where he prosecuted multi-national criminal and civil conspiracies involving pharmaceutical fraud, wire fraud, bank fraud, money laundering, aggravated identity theft, and violations of the Controlled Substances Act as well as the Food, Drug, and Cosmetic Act. Additionally, Anwar pursued civil injunctive actions against doctors and pharmacies who were engaged in the improper dispensing of opioids.

Admissions*Bar Admissions*

District of Columbia
Maryland

Court Admissions

US District Court, District of Maryland
US Court of Appeals, Fourth and
District of Columbia Circuits

Education

University of Maryland School of Law,
J.D., President, Student Bar
Association; Articles Editor, *University
of Maryland Francis King Carey
School of Law Journal of Health Care
Law & Policy*

Boston College, B.S., Finance &
Political Science

Corporate & Government Experience

- Assistant United States Attorney, US Attorney's Office, Washington, DC
- Trial Attorney, Department of Justice Consumer Protection Branch

Professional Activities**Leadership**

- Coach, University of Maryland Francis King Carey School of Law National Trial Team (2014-Present)

Member

- Order of the Barristers (2012-Present)

**Yaira Dubin**

Counsel

New York
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ydubin@omm.com

Yaira Dubin focuses her practice on appellate advocacy, critical motions, and complex legal questions. She has played a primary role in drafting multiple merits briefs in the U.S. Supreme Court, and she has argued and prevailed in federal and state appellate courts. Yaira has prepared dozens of appellate briefs on a wide range of subjects, including constitutional law, federal jurisdiction and procedure, statutory interpretation, antitrust, bankruptcy, insurance, and substantive liability issues. She has also served in a variety of capacities in trial-level cases, including arguing motions in limine, drafting dispositive motions, and ensuring that questions of law are properly framed for appeal. Yaira regularly provides strategic advice to clients well before a lawsuit begins.

Yaira is an Adjunct Professor of Law at NYU Law School, where she teaches a Supreme Court Seminar.

Prior to joining O'Melveny, Yaira served as a judicial clerk at all three levels of the federal judiciary. Yaira clerked for Associate Justice Elena Kagan on the US Supreme Court, the Honorable Sri Srinivasan on the US Court of Appeals for the DC Circuit, and the Honorable James E. Boasberg on the US District Court for the District of Columbia.

Experience

- Argued and prevailed in the US Court of Appeals for the Eighth Circuit in an appeal addressing the application of the Prison Litigation Reform Act's bar on recovery for mental or emotional injury.

Admissions*Bar Admissions*

New York
Maryland

Court Admissions

US Court of Appeals, Second, Fourth,
Sixth, Seventh, and Eighth Circuit
US Supreme Court

Education

Harvard University, J.D.: *magna cum laude*; *Harvard Civil Rights-Civil Liberties Law Review*, Executive Editor for Student Writing; Ames Moot Court Competition, 2012 Best Overall Team and Best Brief Awards

Yeshiva University, B.A., Molecular and Cellular Biology: *summa cum laude*

- Argued and prevailed in the New Jersey Appellate Division in an appeal addressing the First Amendment's application to a non-disparagement clause and a contested settlement.
- Drafted briefs in numerous appeals in the U.S. Supreme Court, US Courts of Appeals, and state appellate courts.
- Developed trial strategy and drafted critical motions in disputes involving personal jurisdiction, defamation, contract disputes, computer hacking, unfair business practices, and insurance coverage.

Professional Activities

Clerkships

- Honorable Elena Kagan, Supreme Court of the United States
- Honorable Sri Srinivasan, US Court of Appeals, District of Columbia Circuit
- Honorable James E. Boasberg, US District Court, District of Columbia

Co-Author

- "A Private Right to Sue Over Tender Offers," *Daily Journal* (April 22, 2019)

Speaking Engagements

- Panelist, "Overview of the Supreme Court 2020 Term," Massachusetts Continuing Legal Education 6th Annual Appellate Practice Conference (December 2020)

Honors & Awards

- Named to *Crain's New York Business* "Notable Women in Law" (2020)

**Ashley E. Robertson**

Associate

Washington, DC

D: +1-202-383-5185

arobertson@omm.com

Ashley Robertson focuses her practice on appellate matters. Prior to joining O'Melveny, Ashley served as a law clerk for Associate Justice Elena Kagan on the US Supreme Court, Judge Sri Srinivasan on the US Court of Appeals for the DC Circuit, and Judge Jeb Boasberg for the US District Court for the District of Columbia.

Professional Activities**Clerkships**

- Honorable Sri Srinivasan, United States Court of Appeals, DC Circuit
- Honorable James E. Boasberg, United States District Court, District of Columbia
- Honorable Elena Kagan, United States Supreme Court

Admissions*Bar Admissions*

District of Columbia

Education

Stanford Law School, J.D.:

Symposium Editor, *Stanford Law Review*University of Virginia, B.A.,
Psychology/Political Philosophy,
Policy, and Law

**Vivaan Nehru**

Associate

Washington, DC

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vnehr@omm.com

Vivaan Nehru is a litigation associate in O'Melveny's Washington, DC office (not yet admitted in the District of Columbia*). Prior to joining O'Melveny, Vivaan served as a law clerk for Judge Pamela A. Harris on the US Court of Appeals for the Fourth Circuit, and Judge John D. Bates on the US District Court for the District of Columbia

Professional Activities**Clerkships**

- The Honorable John D. Bates, US District Court for the District of Columbia
- The Honorable Pamela A. Harris, US Court of Appeals for the Fourth Circuit

Languages

- Spanish

Admissions*Bar Admissions*

Maryland

Admitted only in Maryland; supervised by principals of the firm.Court Admissions*

US District Court, Maryland and District of Columbia

US Court of Appeals, Fourth Circuit

EducationYale University, J.D.: *Yale Law Journal*, Editor, *Yale Journal of International Law*, Articles EditorSwarthmore College, B.A., Philosophy and Economics: high honors, *Phi Beta Kappa*

**Jared R. Ginsburg**

Associate

Los Angeles

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jginsburg@omm.com

Jared Ginsburg is a litigation associate in the firm's Los Angeles office, where he focuses his practice on white collar criminal defense and corporate investigations, complex civil litigation, and regulatory matters. Jared regularly defends individuals and corporations facing allegations of healthcare fraud, tax evasion, and campaign finance violations.

Prior to joining O'Melveny, Jared received his Juris Doctor from the University of California, Berkeley School of Law, where he served as chair of the Board of Advocates and led the Berkeley Law Trial Advocacy Team to two national championships. While in law school, Jared worked at the United States Attorney's Office for the Northern District of California as an Economic Crimes and Securities Fraud law clerk and also served as a Graduate Student Instructor, teaching multiple undergraduate courses on political campaign strategy and legal aspects of business management.

Admissions

Bar Admissions
California

Education

University of California at Berkeley,
J.D.

University of Southern California,
B.A., Political Science

**Alexandra Bornstein**

Associate

New York

D: +1-212-728-5931

abornstein@omm.com

Alexandra Bornstein is a litigation associate in O'Melveny's New York office.

Professional Activities**Publications**

- "The Facts of Stigma: What's Missing from the Procedural Due Process of Mental Health Commitment," 18 *Yale J. Health Pol'y L. & Ethics* 127 (2019)

Admissions*Bar Admissions*

New York

Court Admissions

US Court of Appeals, Ninth Circuit

Education

Columbia Law School, JD, James Kent Scholar; Harlan Fiske Stone Scholar

Middlebury College, BA, Political Science and Economics: *summa cum laude*

**Melissa C. Cassel**

Associate

San Francisco

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mcassel@omm.com

Melissa Cassel is a litigator who focuses on complex and appellate litigation. She has authored briefs in multiple federal and state courts, including the US Supreme Court, on subjects including administrative law, criminal procedure, antitrust, defamation, products liability, and constitutional law. She has also argued in the US Court of Appeals for the Ninth Circuit.

Melissa maintains an active pro bono practice focused on criminal defense, immigration, free speech, and civil rights issues.

Prior to joining O'Melveny, Melissa served as a law clerk for the Honorable Julia Smith Gibbons of the US Court of Appeals for the Sixth Circuit.

Professional Activities**Clerkships**

- Honorable Julia S. Gibbons, US Court of Appeals, Sixth Circuit

Author

- Co-Author, "CDA Section 230: Its Past, Present, and Future" (O'Melveny & Myers Alert, February 2021)

Admissions*Bar Admissions*

California

Court Admissions

US Court of Appeals, Fifth, Sixth, and Ninth Circuits

Education

University of Michigan Law School,
J.D., *magna cum laude*, Order of the
Coif

University of California at Berkeley,
B.A., High Honors, Phi Beta Kappa

**Andrew R. Hellman**

Associate

Washington, DC

D: +1-202-383-5241

andrewhellman@omm.com

Andrew Hellman is a litigation associate in the firm's Washington, DC office.

Prior to joining O'Melveny, Andrew served as a judicial clerk for the Honorable Diana Gribbon Motz of the United States Court of Appeals for the Fourth Circuit.

Professional Activities**Clerkships**

- Honorable Diana Gribbon Motz, US Court of Appeals, Fourth Circuit

Admissions*Bar Admissions*

Maryland

Washington, DC

Court Admissions

US Court of Appeals, Third and Fourth Circuits

Education

Harvard Law School, JD, 2019:
magna cum laude; Executive Editor,
Harvard Law Review

Harvard College, BA, Psychology,
2013: *summa cum laude*; Phi Beta
Kappa

Exhibit B – Fees Overview

Year	Category	Timekeeper Name	Sum of Hours	Sum of Amount
2020	ANTI-SLAPP BRIEFS & ARGUMENT	Kendall Turner	89.8	\$83,065.00
		Vivaan Nehru	79.6	\$63,680.00
		Ashley E. Robertson	70.8	\$56,640.00
		Anwar Graves	67.6	\$60,164.00
		Daniel M. Petrocelli	47.7	\$74,173.50
		Jonathan Hacker	44.2	\$60,775.00
		Alexandra Bornstein	38.9	\$26,063.00
		Steven Segal	13.4	\$5,293.00
		Kimberly Grotenrath	5.7	\$2,251.50
			457.70	\$432,105.00
2020	DISCOVERY	Kendall Turner	192.3	\$177,877.509
		Ashley E. Robertson	65.4	\$52,320.00
		Jared R. Ginsburg	57.0	\$41,325.00
		Daniel M. Petrocelli	54.9	\$85,369.50
		Jonathan Hacker	30.5	\$41,937.50
		Anwar Graves	19.6	\$17,444.00
		Steven Segal	11.8	\$4,661.00
		Vivaan Nehru	8.0	\$6,400.00
		Kimberly Grotenrath	4.7	\$1,856.50
			444.2	\$429,191.00
2020	SUPPLEMENTAL BRIEFING	Kendall Turner	.1	\$92.50
			.1	\$92.50
			902.00	\$861,388.50
2021	ANTI-SLAPP BRIEFS & ARGUMENT	Kendall Turner	151.2	\$148,176.00
		Melissa C. Cassel	59.4	\$45,144.00
		Yaira Dubin	55.2	\$56,580.00
		Daniel M. Petrocelli	45.4	\$74,910.00
		Andrew R. Hellman	45.2	\$30,510.00
		Jonathan Hacker	22.3	\$32,892.50
		Kimberly Grotenrath	10.0	\$4,150.00
			388.70	\$392,362.50
2021	DISCOVERY	Kendall Turner	100.3	\$94,895.00
		Jared R. Ginsburg	80.7	\$61,888.50
		Daniel M. Petrocelli	47.8	\$77,179.00
		Anwar Graves	8.2	\$7,322.00
			237.00	\$164,105.50
2021	SUPPLEMENTAL BRIEFING	Kendall Turner	84.9	\$82,916.00
		Jared R. Ginsburg	79.8	\$67,032.00
		Jonathan Hacker	61.5	\$90,712.50
		Daniel M. Petrocelli	21.0	\$34,650.00
		Melissa C. Cassel	20.1	\$15,276.00
		Steven Segal	9.0	\$3,735.00
		Ashley E. Robertson	3.5	\$2,800.00
		Anwar Graves	.5	\$461.00
			280.3	\$297,582.50
GRAND TOTAL			906	\$931,229.50
			1808	\$1,729,618.00

Exhibit C – SmileDirect Expenses

Date	Amount	Matter Number	Matter Name	Narrative
6/23/2020	90.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	COURT FEES/FILING FEES (INTERNAL COURT SERVICE); NONE; NATIONWIDE LEGAL, LLC - 18974, SUPREME COURT OF CALIFORNIA; OBTAIN AND PDF COGS TO DCRUZ@NATIONWIDELEGAL.COM OVERNIGHT ORIGINAL TO : O'MELVENY AND MYERS ATTN: STACEE FLOWERS 1999 AVENUE OF THE STARS #700, LOS ANGELES, CA 90067
6/26/2020	11.93	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Delivery Services / Messengers - Tracking # 394262120721 FDX 705625552 Court of Appeals of Maryland
7/1/2020	17.18	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Delivery Services / Messengers - Tracking # 795883909503 FDX 706225951 Kimberly Brown O Melveny & Myers LLP
7/20/2020	16.60	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Delivery Services / Messengers - Tracking # 394980429129 FDX 707512687 Registration Department Board of Professional Responsi
8/13/2020	41.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	BANK OF AMERICA (PURCH CARD) - Other Professional Services (Accounts Payable) - THE SATE BAR OF CA - CK# 6143
8/13/2020	25.56	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	D PETROCELLI-CERTIFICATE OF GOOD STANDING FEE, 6/23
8/13/2020	30.50	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	BANK OF AMERICA (PURCH CARD) - Other Professional Services (Accounts Payable) - DAVIDSON COUNTY (NASHVILLE, TN) - CK# 6150
8/31/2020	68.27	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	K TURNER-ACCESS SUBSCRIPTION FEE, 7/7
9/30/2020	703.67	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	BANK OF AMERICA (PURCH CARD) - Other Professional Services (Accounts Payable) - OAKLAND COUNTY MI CIRCUIT COURT (G2CHARGE.COM) - CK# 6150
10/23/2020	0.40	0610978-00012	SMILEDIRECT DISCOVERY	Data Hosting Fee - Total GB = 5.689222963 For Period 08/01/2020 to 08/31/2020
10/23/2020	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Data Hosting Fee - Total GB = 58.63922296 For Period 09/01/2020 to 09/30/2020
10/23/2020	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 4
10/23/2020	1.00	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
10/23/2020	1.00	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
10/23/2020	2.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 10
10/23/2020	0.70	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 10
10/23/2020	0.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 23
10/23/2020	1.70	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 7
10/23/2020	1.70	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 9
10/23/2020	0.70	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 17
10/23/2020	1.00	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 17
10/23/2020	0.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 7
10/23/2020	0.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 10
10/23/2020	1.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 3
10/23/2020	1.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 9
10/23/2020	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 11
10/23/2020	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 15
10/23/2020	1.00	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
10/23/2020	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
10/23/2020	1.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 10
10/23/2020	4.60	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 5
10/23/2020	0.60	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 13
10/23/2020	1.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 46
10/23/2020	0.60	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 6
10/23/2020	1.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 13
10/23/2020	0.70	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 6
10/23/2020	2.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 15
10/23/2020	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 7
10/23/2020	0.40	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 21
10/23/2020	0.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 5
10/23/2020	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 4
10/23/2020	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 9
10/23/2020	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 5
10/23/2020	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 5
10/23/2020	0.70	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
10/23/2020	1.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 7
10/23/2020	1.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 19
10/23/2020	2.70	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 13
10/23/2020	3.40	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 27
10/23/2020	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 34
10/23/2020	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
10/23/2020	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
10/23/2020	2.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
10/23/2020	1.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 25
10/23/2020	7.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 12
10/23/2020	0.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 73
10/23/2020	0.60	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 9
10/23/2020	1.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 6
10/23/2020	1.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 11
10/23/2020	0.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 12
10/23/2020	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 3
10/23/2020	3.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 5
10/23/2020	1.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 35
10/23/2020	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 19
10/23/2020	1.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
10/23/2020	1.70	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 12
10/23/2020	1.40	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 17
10/23/2020	1.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 14
10/23/2020	0.40	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 12
10/23/2020	0.40	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 4
10/23/2020	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 4
10/23/2020	1.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
10/23/2020	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 15
10/23/2020	51.23	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Color Printing - Turner, Kendall Pages: 5
11/8/2020	3.10	0610978-00012	SMILEDIRECT DISCOVERY	Delivery Services / Messengers - Tracking # OMM0560653 First Legal 10348921 -10/31/20 Petrocelli, Dan
11/30/2020	703.67	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Kemp, Stephen Pages: 31
12/4/2020	2.90	0610978-00012	SMILEDIRECT DISCOVERY	Data Hosting Fee - Total GB = 58.63922296 For Period 11/01/2020 to 11/30/2020
12/31/2020	703.67	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Robertson, Ashley Pages: 29
1/8/2021	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Data Hosting Fee - Total GB = 58.63922296 For Period 12/01/2020 to 12/31/2020
1/8/2021	0.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
1/8/2021	0.60	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 9
1/8/2021	3.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 6
1/8/2021	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 39
1/8/2021	1.00	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
1/8/2021	0.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 10
1/8/2021	0.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 3

Date	Amount	Matter Number	Matter Name	Narrative
1/8/2021	4.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 48
1/8/2021	1.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 12
1/8/2021	0.40	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 4
1/8/2021	3.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 35
1/8/2021	3.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 32
1/8/2021	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
1/8/2021	4.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 43
1/8/2021	1.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 13
1/8/2021	0.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 2
1/8/2021	0.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 2
1/8/2021	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 5
1/8/2021	29.98	0610978-00012	SMILEDIRECT DISCOVERY	Delivery Services / Messengers - Tracking # OMM0563798 First Legal 10965742 Petrocelli, Dan
1/31/2021	703.67	0610978-00012	SMILEDIRECT DISCOVERY	Data Hosting Fee - Total GB = 58.63922296 For Period 01/01/2021 to 01/31/2021
2/28/2021	703.67	0610978-00012	SMILEDIRECT DISCOVERY	Data Hosting Fee - Total GB = 58.63922296 For Period 02/01/2021 to 02/28/2021
3/31/2021	703.67	0610978-00012	SMILEDIRECT DISCOVERY	Data Hosting Fee - Total GB = 58.63922296 For Period 03/01/2021 to 03/31/2021
4/6/2021	3.00	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 30
4/6/2021	0.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 2
4/6/2021	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
4/6/2021	2.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 29
4/6/2021	51.23	0610978-00012	SMILEDIRECT DISCOVERY	Delivery Services / Messengers - Tracking # OMM0567739 First Legal 10391866 Petrocelli, Daniel
4/9/2021	0.90	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 9
4/9/2021	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
4/9/2021	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
4/9/2021	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
4/9/2021	0.50	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 5
4/9/2021	0.60	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 6
4/9/2021	1.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 13
4/9/2021	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
4/9/2021	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
4/9/2021	0.80	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 8
4/9/2021	0.10	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Printing - Turner, Kendall Pages: 1
4/9/2021	51.23	0610978-00012	SMILEDIRECT DISCOVERY	Delivery Services / Messengers - Tracking # OMM0567946 First Legal 10391866 Petrocelli, Daniel
4/29/2021	17.99	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - - KENDALL TURNER; PHONE CHARGES. AIRPLANE WIFI TO WORK ON BRIEF - REPORT ID# 010046027500
4/30/2021	703.67	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Data Hosting Fee - Total GB = 58.63922296 For Period 04/01/2021 to 04/30/2021
5/2/2021	19.99	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Telephone - KENDALL TURNER; PHONE CHARGES. AIRPLANE WIFI TO WORK ON BRIEF - REPORT ID# 010046027500
5/18/2021	0.90	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 9
5/18/2021	4.60	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 46
5/18/2021	1.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 11
5/18/2021	2.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 21
5/18/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 4
5/18/2021	1.60	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 16
5/18/2021	0.80	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 8
5/18/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 4
5/18/2021	1.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 13
5/18/2021	1.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 13
5/18/2021	0.50	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Brooks, Kojo Pages: 5
5/18/2021	4.60	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Brooks, Kojo Pages: 46
5/18/2021	2.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Brooks, Kojo Pages: 23
5/18/2021	3.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Brooks, Kojo Pages: 30
5/18/2021	4.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Brooks, Kojo Pages: 42
5/18/2021	1.60	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Brooks, Kojo Pages: 16
5/25/2021	7.30	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Color Printing - Hacker, Jonathan Pages: 73
5/25/2021	2.60	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Color Printing - Hacker, Jonathan Pages: 26
5/25/2021	3.00	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Color Printing - Hacker, Jonathan Pages: 30
5/25/2021	4.20	0610978-00012	SMILEDIRECT DISCOVERY	Lasertrak Color Printing - Hacker, Jonathan Pages: 42
5/30/2021	1,799.81	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 06/24/2021 - 06/25/2021; TRAVELER: DANIEL MARIO PETROCELLI; ROUTE: LOS ANGELES - NASHVILLE - LOS ANGELES;; AGENCY/INV: LTS - 142318;
5/30/2021	10.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVELER: JONATHAN D HACKER; AGENCY/INV: LTS - 142318;
5/31/2021	703.67	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Data Hosting Fee - Total GB = 58.63922296 For Period 05/01/2021 to 05/31/2021
6/7/2021	762.50	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	THOMPSON COURT REPORTERS, INC. - Deposition Transcripts (Accounts Payable) INVOICE # 25899 - D PETROCELLI - 1 CERTIFIED TRANSCRIPT COPY OF 5/12 PROCEEDING DEPOSITION OF VICKY NGUYEN, DISB. 06/07/21
6/13/2021	754.12	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 06/24/2021 - 06/25/2021; TRAVELER: JONATHAN D HACKER; ROUTE: WASHINGTON - NASHVILLE - WASHINGTON;; AGENCY/INV: LTS - 142431;
6/18/2021	504.75	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	THOMPSON COURT REPORTERS, INC. - Deposition Transcripts (Hold) INVOICE # 26004 - - D PETROCELLI - 5/21/21 CERTIFIED TRANSCRIPT OF L DUNN, DISB. 06/18/21
6/24/2021	121.55	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	DANIEL M. PETROCELLI - Local Travel - DANIEL M. PETROCELLI - CAR SERVICE, HOME/AIRPORT. TRIP TO NASHVILLE TO ATTEND COURT HEARING REGARDING ANTI-SLAPP MOTION - NOTE: CAR SERVICE ON 6/24, PAID 6/25 - REPORT ID# 010046312613
6/27/2021	587.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 06/24/2021 - 06/28/2021; TRAVELER: DANIEL MARIO PETROCELLI; ROUTE: LOS ANGELES - NASHVILLE - ATLANTA - LOS ANGELES; AIRFARE: TRIAL OR MEDIATION; AGENCY/INV: LTS - 142521;
6/28/2021	131.55	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	DANIEL M. PETROCELLI - - DANIEL M. PETROCELLI - CAR SERVICE, AIRPORT (LAX)/HOME. RETURN TRIP FROM NASHVILLE TO ATTEND COURT HEARING REGARDING ANTI-SLAPP MOTION - NOTE: CAR SERVICE ON 6/28, PAID 6/30 - REPORT ID# 010046312613
6/30/2021	883.50	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	SUNNY'S WORLDWIDE CHAUFFEURS - INVOICE # 256983 - - D PETROCELLI - TRAVEL DATE: 06/25/2021, 06/30/21
6/30/2021	2,499.09	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Data Hosting Fee - Total GB = 208.2578179 For Period 06/01/2021 to 06/30/2021
7/21/2021	19.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Hacker, Jonathan Pages: 191
7/31/2021	2,499.09	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Data Hosting Fee - Total GB = 208.2578179 For Period 07/01/2021 to 07/31/2021
8/12/2021	2.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Grottenrath, Kimberly Pages: 23
8/31/2021	2,499.09	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Data Hosting Fee - Total GB = 208.2578179 For Period 08/01/2021 to 08/31/2021
9/27/2021	127.81	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	BANK OF AMERICA (PURCH CARD) - Other Professional Services (Accounts Payable) - DAVIDSON COUNTY GENERAL SESSIONS - CK#6450 K TURNER-SUBSCRIPTION TO THE NASHVILLE CIRCUIT COURT, 7/22
9/27/2021	25.56	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	BANK OF AMERICA (PURCH CARD) - Other Professional Services (Accounts Payable) - DAVIDSON COUNTY GENERAL SESSIONS - CK#6450 K TURNER-SUBSCRIPTION TO THE NASHVILLE CIRCUIT COURT, 7/22
9/30/2021	2,499.09	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Data Hosting Fee - Total GB = 208.2578179 For Period 09/01/2021 to 09/30/2021
10/18/2021	3.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Flowers, Stacie Pages: 33
10/19/2021	19.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 191
10/19/2021	7.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 73

Date	Amount	Matter Number	Matter Name	Narrative
10/19/2021	20.90	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 209
10/19/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/19/2021	9.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 94
10/19/2021	5.90	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 59
10/19/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/19/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/19/2021	2.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 24
10/19/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/20/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 4
10/20/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/20/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 4
10/20/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/20/2021	0.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 7
10/20/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/20/2021	1.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 10
10/20/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 4
10/20/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/21/2021	2.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 23
10/21/2021	0.90	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 9
10/21/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 4
10/21/2021	0.50	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 5
10/21/2021	1.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 13
10/21/2021	1.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 11
10/21/2021	0.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 3
10/21/2021	1.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 10
10/21/2021	0.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 7
10/21/2021	0.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 7
10/21/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 4
10/21/2021	3.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 33
10/21/2021	3.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 37
10/21/2021	1.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 10
10/21/2021	0.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 7
10/21/2021	0.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 2
10/21/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 4
10/21/2021	0.60	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 6
10/21/2021	0.80	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 8
10/21/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
10/21/2021	1.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 11
10/21/2021	1.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 12
10/21/2021	3.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 30
10/21/2021	0.90	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 9
10/21/2021	1.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 12
10/22/2021	2.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 22
10/22/2021	3.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Flowers, Stacey Pages: 31
10/22/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Flowers, Stacey Pages: 1
10/24/2021	963.79	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 11/15/2021 - 11/17/2021; TRAVELER: DANIEL MARIO PETROCELLI; ROUTE: LOS ANGELES - NASHVILLE - LOS ANGELES; AIRFARE; AGENCY/INV: LTS - 144055;
10/24/2021	261.84	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 11/03/2021 - 11/04/2021; TRAVELER: KENDALL KELLY ALEXIS TURNER; ROUTE: SAN FRANCISCO - LOS ANGELES - SAN FRANCISCO; AIRFARE; AGENCY/INV: LTS - 144092;
10/31/2021	26.15	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 11/15/2021 - 11/15/2021; TRAVELER: KENDALL KELLY ALEXIS TURNER; ROUTE: SAN JOSE - PHOENIX; AIRFARE; ANCILLARY FEE; TRIAL OR MEDIATION; AGENCY/INV: LTS - 144222;
10/31/2021	149.78	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 11/15/2021 - 11/16/2021; TRAVELER: KENDALL KELLY ALEXIS TURNER; ROUTE: SAN JOSE - PHOENIX - NASHVILLE; AIRFARE; TRIAL OR MEDIATION; AGENCY/INV: LTS - 144205;
10/31/2021	137.35	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 11/17/2021 - 11/17/2021; TRAVELER: KENDALL KELLY ALEXIS TURNER; ROUTE: NASHVILLE - SAN FRANCISCO; AIRFARE; TRIAL OR MEDIATION; AGENCY/INV: LTS - 144206;
10/31/2021	24.11	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	OUT-OF-TOWN TRAVEL (DIRECT BILL FIRM - AIRFARE); TRAVEL DATES: 11/15/2021 - 11/16/2021; TRAVELER: KENDALL KELLY ALEXIS TURNER; ROUTE: PHOENIX - NASHVILLE; AIRFARE; ANCILLARY FEE; TRIAL OR MEDIATION; AGENCY/INV: LTS - 144223;
10/31/2021	2,499.09	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Data Hosting Fee - Total GB = 208,2578179 For Period 10/01/2021 to 10/31/2021
11/10/2021	1.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Bloom, Craig Pages: 10
11/10/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Bloom, Craig Pages: 4
11/10/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Bloom, Craig Pages: 4
11/10/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Bloom, Craig Pages: 4
11/10/2021	0.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Bloom, Craig Pages: 7
11/10/2021	0.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Bloom, Craig Pages: 7
11/12/2021	3.90	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Fairfoot, Julia Pages: 39
11/13/2021	52.80	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - - KENDALL TURNER; UBER. TRAVEL TO CENTURY CITY OFFICE TO PREP DAN PETROCELLI FOR A HEARING - REPORT ID# 010048457224
11/13/2021	55.16	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Travel - KENDALL TURNER; UBER. TRAVEL TO CENTURY CITY OFFICE TO PREP DAN PETROCELLI FOR A HEARING - REPORT ID# 010048457224
11/15/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 4
11/15/2021	0.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 4
11/15/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 1
11/15/2021	0.80	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 8
11/15/2021	0.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 2
11/15/2021	0.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 3
11/15/2021	0.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 2
11/15/2021	0.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 2
11/15/2021	1.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Flowers, Stacey Pages: 13
11/15/2021	0.30	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 3
11/15/2021	1.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 14
11/15/2021	0.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 7
11/15/2021	0.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 2
11/15/2021	0.10	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Printing - Turner, Kendall Pages: 1
11/15/2021	0.70	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Flowers, Stacey Pages: 7
11/15/2021	2.40	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Flowers, Stacey Pages: 24
11/15/2021	0.20	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	Lasertrak Color Printing - Turner, Kendall Pages: 2
11/16/2021	7.57	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Travel Meals - KENDALL TURNER, DINNER, GUESTS; KENDALL TURNER ATTEND HEARING IN NASHVILLE, TN - REPORT ID# 010048509467
11/16/2021	19.00	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Telephone - KENDALL TURNER; PHONE CHARGES, ATTEND HEARING IN NASHVILLE, TN - REPORT ID# 010048509467

Date	Amount	Matter Number	Matter Name	Narrative
11/16/2021	61.99	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Travel - KENDALL TURNER; UBER. ATTEND HEARING IN NASHVILLE, TN - REPORT ID# 010048509467
11/16/2021	22.97	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Travel - KENDALL TURNER; UBER. ATTEND HEARING IN NASHVILLE, TN - REPORT ID# 010048509467
11/17/2021	289.47	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Travel Hotel - KENDALL TURNER, 11/16/2021-11/17/2021 LODGING. ATTEND HEARING IN NASHVILLE, TN - REPORT ID# 010048509467
11/17/2021	18.60	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Travel Meals - KENDALL TURNER, DINNER, GUESTS; KENDALL TURNER ATTEND HEARING IN NASHVILLE, TN - REPORT ID# 010048509467
11/17/2021	14.99	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Telephone - KENDALL TURNER; PHONE CHARGES. ATTEND HEARING IN NASHVILLE, TN - REPORT ID# 010048509467
11/17/2021	57.48	0610978-00009	SMILEDIRECTCLUB V. NBCU UNIVERSAL	KENDALL TURNER - Out-of-Town Travel - KENDALL TURNER; UBER. ATTEND HEARING IN NASHVILLE, TN - REPORT ID# 010048509467
Total	26,831.90			

Exhibit D – Case Law

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
Middle Section, at Nashville.

Jean ADKINSON, Plaintiff-Appellee,

v.

HARPETH FORD-MERCURY,
INC., Defendant-Appellant,

No. 01-A-01-9009-CH00332.

|
Feb. 15, 1991.Williamson Equity, Appealed from the Chancery Court for
Williamson County, Tennessee, Cornelia A. Clark, Judge.

Attorneys and Law Firms

James W. White, Waller, Lansden, Cortch & Davis, Nashville,
for plaintiff-appellee.William Carter Conway, Kimberly K. Whaley, Alexander,
Conway & Williams, Franklin, for defendant-appellant.

OPINION

LEWIS, Judge.

*1 This case was tried before a jury. The primary issue in the trial court was whether or not the defendant, Harpeth Ford-Mercury, Inc. (Harpeth), had violated the Tennessee Consumer Protection Act, Tenn.Code Ann. § 47-18-101, et seq. in its dealings with plaintiff, Jean Adkinson, when Adkinson purchased an automobile from Harpeth.

The jury found that Harpeth was guilty of violating the Tennessee Consumer Protection Act and found that plaintiff was entitled to actual damages of \$8,555.36. The plaintiff then moved for attorney's fees and an injunction under the Act. The trial court awarded attorney's fees of \$20,004.00 and "permanently enjoin[ed Harpeth] from future violations of the Tennessee Consumer Protection Act, Tenn.Code Ann. § 47-18-101, et seq."

Harpeth has appealed from the judgment.

The pertinent facts are as follows:

Plaintiff had, in 1979 and 1981, purchased automobiles from Harpeth and, on both occasions, had dealt with Kenny Hughes, a salesman for Harpeth. In January 1984, plaintiff went to Harpeth and talked with Hughes about purchasing a new automobile for her personal use. She was very concerned with the cost of an automobile. After looking at several automobiles, she decided on a Ford LTD (Ford). Plaintiff asked Hughes how much the Ford would cost and, when told, stated that she did not feel she could afford the Ford.

Hughes left the office, returned a few minutes later, and asked plaintiff if she had ever considered leasing an automobile. Plaintiff told Hughes she had not. Hughes then told plaintiff her payments would be less leasing an automobile than if she purchased it. She then decided to lease the Ford for, among other reasons, the smaller monthly payment.

The parties entered into a "closed-end" lease. Under a "closed-end" lease, the lessee does not have an option to purchase the leased automobile, and the lessee does not have an obligation to pay for the "residual" or "leased-end" value at the end of the lease term. The lease was for a term of forty-eight months with payments of \$251.63 per month. Plaintiff was required to post a security deposit of \$275.00 which was to be returned at the end of the lease term. She was also to pay six cents (\$.06) per mile for mileage in excess of 60,000 and to pay for "excess wear and tear."

Plaintiff relied on Hughes to explain the lease to her and did not read the lease "in detail." Plaintiff relied on Hughes because she had dealt with him in two previous transactions.

Plaintiff traded in her 1981 automobile when she entered into the lease for the Ford. At the time of the trade-in, plaintiff had equity of \$384.69 in the 1981 automobile.

There is evidence that instead of giving plaintiff credit for the 1981 automobile, Harpeth added the \$384.69 equity to the cost of the lease. The handwritten "Retail Buyer's Order," signed by plaintiff, did not reflect a credit for the \$384.69. The typed version, prepared a day later and which was not signed by plaintiff, shows that plaintiff's equity was added to the cost of the lease. The typed version was used by Harpeth for internal purposes. The net effect of failing to give plaintiff credit for the equity, in fact, increased the cost of the lease by \$769.38 which, in turn, increased the lease payments. Eight

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of the payments (May through December) were ultimately included in the price plaintiff paid to purchase the Ford.

*2 On 29 April 1987, plaintiff called Hughes and asked him if she would be required to do anything to the leased Ford in terms of maintenance or replacement of tires when the lease expired in January 1988. Plaintiff testified that Hughes did not give her a direct answer but asked her to come to Harpeth and talk about it.

Plaintiff testified that she went to Harpeth on that same date and met with Hughes. She again asked him what her obligations would be at the end of the lease as to tires and maintenance. Plaintiff was told by Hughes that she would owe a \$7,000.00 pay-off at the end of the lease.

Plaintiff testified that she tried to explore ways to avoid the pay-off. She asked Hughes about turning in the Ford and leasing a Ford Escort. Hughes told her that she would still be responsible for the pay-off on the Ford and that when the pay-off was added to a Ford Escort lease, the monthly payment would be more than \$400.00. Plaintiff felt she could not pay a \$400.00 monthly payment. Plaintiff testified that Hughes then told her that she could get out of the lease with what he referred to as a "flip-over," a transaction in which she would purchase the Ford.

Under the "flip-over," the monthly payments to purchase the Ford would be only ten cents (\$.10) more per month than her lease payment. However, the payment would be extended for forty-two additional months.

Plaintiff testified that she was confused about the pay-off, that she told Hughes she would be out of town for two weeks and would talk with him when she returned. Hughes told her there was no need to wait, that the paperwork on the "flip-over" could be prepared in a few minutes.

Plaintiff concluded, based upon what Hughes told her, that there was no way she could turn in the leased Ford at the end of the lease term without paying the \$7,000.00. She further testified that she could not afford to pay the \$7,000.00 and also buy or lease another automobile.

Plaintiff then purchased the Ford on the same day she had called Hughes to determine what would be required of her when she returned the automobile at the end of the lease term.

She testified that she did not want to buy the car and was "heart-sick" that she would have to make an additional forty-two payments on an automobile that had 53,000 miles on it.

Hughes testified that plaintiff indicated that she was very happy with the Ford and wished to purchase it, and that he simply supplied her with the pay-off amount.

After agreeing to purchase the Ford, she was taken to the finance office but was asked to wait in the showroom while her papers were being prepared.

There had been no discussion between plaintiff and anyone at Harpeth to this point about an extended warranty or credit disability insurance. Plaintiff testified that she was completely unaware of the concept of an extended warranty or credit disability insurance.

The person who prepared the finance papers told plaintiff she needed the extended warranty because the Ford was getting older. Hughes, after plaintiff was shown the credit disability insurance form, told plaintiff that almost everyone bought it "because of what it does for you." Plaintiff then signed all the papers that were shown to her.

*3 Plaintiff's purchase of the Ford was financed through the Ford Motor Credit Company (FMCC). Plaintiff was told that the interest rate was 16.5% per annum for a total interest charge of \$2,613.41. Harpeth did not inform plaintiff that 2.5% of the 16.5%, or \$459.37, would be returned to Harpeth by FMCC if plaintiff made all of the payments. FMCC charged an interest rate of 14 percent and Harpeth added for itself an additional 2.5%. Harpeth did not disclose to plaintiff that Harpeth, and not FMCC, had imposed the additional charge.

Plaintiff's security deposit of \$275.00, which she paid at the front end of the lease, was to be refundable. Plaintiff was not refunded the \$275.00 directly, and nothing in the sales documents indicate that the security deposit was credited to plaintiff when she purchased the Ford.

The security deposit could be retained by Harpeth only if the plaintiff failed to make lease payments or if there was damage to the Ford at the end of the lease. The record is clear that neither of these circumstances occurred.

Harpeth insisted at trial that as a matter of policy the security deposit would have been "netted out" of the pay-

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off for the Ford. However, Harpeth's statements through its General Manager Joe Mobley to plaintiff and her fiance Larry Sheehan, approximately one month after the Ford was purchased by plaintiff, was quite different. Joe Mobley told plaintiff and Sheehan that plaintiff could not get the security deposit back because she had not completed the lease. He told them this, in spite of the fact that the price the plaintiff paid for the Ford included the remaining lease payments.

Plaintiff was unaware of exactly what had occurred between her and Harpeth until a day or two after the transaction was completed. At this time she talked with her fiance Larry Sheehan by telephone. Larry Sheehan, who was an airline pilot and was in Nashville on a limited basis, told plaintiff he did not think that she had to buy the Ford but that he would look at the papers when he was in Nashville approximately one month later.

When Larry Sheehan came to Nashville, he and plaintiff met with Joe Mobley at Harpeth. At that time Mobley repeated what Hughes had stated regarding plaintiff being responsible for the \$7,000.00 pay-off. After reviewing plaintiff's lease, Mobley left and returned with a blank lease. Mobley then attempted to support his claim that plaintiff was responsible for the pay-off by showing plaintiff and Sheehan a blank "open-end" lease with option to purchase. This was contrary to plaintiff's "closed-end" lease with no option to purchase.

Larry Sheehan pointed out to Joe Mobley this difference in the structure of the leases. Joe Mobley then said Harpeth did

not use closed-in leases any more. When Mobley was asked why Harpeth no longer used the closed-end lease, he replied that Harpeth wanted its lease customers to buy the cars they leased because if Harpeth had to put the cars on the used car lot, Harpeth would lose some \$1,500.00 to \$2,000.00 on each car.

*4 Plaintiff and Sheehan had been unable to make the numbers add up on the purchase of the Ford. When they met with Joe Mobley, he could not make the numbers add up. He then asked a lady from the accounting department to come into the office to add up the numbers. She could not make them add up.

At this meeting Mobley acknowledged that there had been a "misunderstanding." However, he refused to rescind the transaction, and he never contacted FMCC or made any other effort to resolve the problem.

Sometime later plaintiff filed this suit.

Following an evidentiary hearing, the jury was given a special jury verdict form in which they were asked to answer eight questions. They are as follows:

JURY VERDICT FORM

1. Was Harpeth Ford-Mercury, Inc. guilty of intentional misrepresentation in connection with the April 29, 1987, sale of the Ford LTD to Jean Adkinson?

Yes

X

No

If your answer to No. 1 was "Yes", then do not answer No. 2 and go on to No. 3. If your answer to No. 1 was "No", then go on to No. 2.

2. Was Harpeth Ford-Mercury, Inc. guilty of negligent misrepresentation in connection with the April 29, 1987, sale of the Ford LTD to Jean Adkinson?

X

Yes

No

3. Did Harpeth Ford-Mercury, Inc. use unfair or deceptive acts or practices in connection with the April 29, 1987, sale of the Ford LTD to Jean Adkinson?

X

Yes

No

If the answer to No. 3 was "yes", answer no. 4 before going on. If the answer to No. 3 was "No", do not answer No. 4 but go on to No. 5.

4. Was Harpeth Ford-Mercury, Inc.'s conduct willful or knowing?

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Yes

X

No

If the answer to No. 4 was "Yes", be sure to Answer No. 7. If the answer to No. 4 was "No", do not answer No. 7.

5. If the answer to No. 3 was "yes", should the contract between Harpeth Ford-Mercury, Inc. and Jean Adkinson be rescinded?

X

Yes

No

6. If the answer to any of Questions 1, 2, 3, 4, or 5 was "Yes", enter the amount of actual damages to Jean Adkinson sustained by the acts in question.

\$8,555.36

7. If the answer to Question 4 was "Yes", do you choose to award three times the actual damages as provided by the Consumer Protection Act?

Yes

No

8. If the answer to Question 3 or 4 was "Yes", do you choose to award plaintiff her reasonable attorney fees?

X

Yes

No

18 January 19

/s/

John Morris

Date

Foreman

Judgment was entered on the jury's verdict, and the trial court, pursuant to Tenn.Code Ann. § 47-18-109(a)(1), awarded plaintiff's attorney's fees in the amount of \$20,004.00 and expenses of \$2,885.91 and imposed an injunction pursuant to Tenn.Code Ann. § 47-18-109(b).

Harpeth has presented several issues. We first discuss whether there is material evidence to support the verdict.

*5 This is a jury trial, and in a jury trial, if there is any material evidence to support the verdict, the judgment must be affirmed. Tenn.R.App.P. 13(d); Cary v. Arrowsmith, 777 S.W.2d 8, 23 (Tenn.App.1989). In a case where plaintiff prevails in a jury trial, appellate courts must take as true that which has a tendency to support the plaintiff's right of recovery, discard all countervailing evidence, and allow all reasonable inferences to be drawn from the evidence in favor of the plaintiff. Mason v. Tennessee Farmers Mut. Ins. Co., 640 S.W.2d 561, 564 (Tenn.App.1982). Substantial and material evidence is that which a reasonable mind might accept as adequate to support a rational construction and furnish a reasonably sound basis for the action under consideration. South Cent. Bell Tele. Co. v. Tennessee

Pub. Serv. Comm., 579 S.W.2d 429, 440 (Tenn.App.1979). Appellate courts do not reweigh evidence. If there is some material substantial evidence which supports the jury verdict, the verdict must be affirmed.

While in this case the plaintiff's evidence is, in a lot of particulars, diametrically opposed to the evidence of the defendant, this raises a question of credibility. The credibility of witnesses and the weight to be given their testimony is for the jury. State v. Chumbley, 27 Tenn.App. 377, 385, 181 S.W.2d 382, 385 (1944). In this case the jury has resolved the question of credibility in the plaintiff's favor.

Taking all of the rules into consideration, there is substantial material evidence to support the verdict of the jury.

The evidence shows that plaintiff was an unsophisticated, trusting customer. She was employed by the Baptist Sunday School Board in Nashville. She was not a world-wise career woman who had worked in the business community for several years as insisted by Harpeth. Plaintiff's job was to help churches set up libraries. She had no business training or business education and, according to her testimony, "almost zero" familiarity with business matters.

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The record shows that Harpeth cultivated plaintiff's trust over a period of years. She first met Joe Mobley, Harpeth's general manager, in 1981. He told the plaintiff at that time that he was a leader in his church, a Southern Baptist congregation. Each time that plaintiff saw Joe Mobley, including the 29 April 1987 date that she purchased the Ford, he discussed church matters with her.

The record shows that in January 1984, when Adkinson traded her 1981 automobile in on the lease of the Ford, Harpeth added her equity in the 1981 automobile to the cost of the lease rather than giving her credit for it. Harpeth then appropriated the equity in the 1981 automobile for itself. The document which plaintiff signed did not show this added charge. It was only the typed document which was characterized by Harpeth at trial as an internal document which showed the added charge. This was never shown to plaintiff.

This practice increased the cost of the lease to plaintiff by increasing the lease payments and, ultimately, increased the cost of the Ford when plaintiff purchased it because the remaining lease payments were incorporated into the purchase price. Plaintiff trusted Harpeth and erroneously believed she had been given credit for her equity in the 1981 automobile.

*6 Harpeth does not deny that there is evidence in the record to support a finding that plaintiff was told by Hughes and Mobley that she would owe a \$7,000.00 payment on the Ford at the end of the lease. However, Harpeth spends several pages in its brief arguing in effect that the testimony of Hughes and Mobley is more credible than plaintiff's testimony under the circumstances. Credibility of the witnesses and the weight to be given their testimony is, as we have stated, for the jury to pass upon. State v. Chumbley, 27 Tenn.App. at 385, 181 S.W.2d at 385. Harpeth also fails to acknowledge that there is corroborating evidence of Sheehan that Mobley told both plaintiff and Sheehan that plaintiff would be responsible for the \$7,000.00 pay-off on the Ford at the end of the lease and that Mobley even attempted to justify this position by showing plaintiff and Sheehan a blank "open-end" lease.

Harpeth insists in the face of this that plaintiff's being taken advantage of was her own fault, that she should have known of these misrepresentations because of the documents relating to the transaction. As is pointed out by plaintiff, this argument reflects a "blame the victim" view point.

Tennessee Code Annotated § 47-18-102 sets forth the purposes of the Tennessee Consumer Protection Act and provides:

The provisions of this part shall be liberally construed to promote the following policies:

- (1) To simplify, clarify, and modernize the state law governing the protection of the consuming public and to conform these laws with existing consumer protection policies;
- (2) To protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state;
- (3) To encourage and promote the development of fair consumer practices;
- (4) To declare and to provide for civil legal means for maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels of commerce be had in this state; and
- (5) To promote statewide consumer education.

There is evidence in this record that there were oral misrepresentations made by Harpeth that induced a written contract. Oral misrepresentations that induce a written contract may form the basis for a cause of action under the Tennessee Consumer Protection Act, notwithstanding language of the subsequent written contract.

Brungard v. Caprice Records, Inc., 608 S.W.2d 585, 588 (Tenn.App.1980).

Tennessee Code Annotated § 47-18-104(a) provides: "Unfair or deceptive acts or practices affecting the conduct of any trade or commerce are hereby declared unlawful."

Tennessee Code Annotated § 47-18-104(b)(12) provides that "[r]epresenting that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law" is a deceptive act or practice.

*7 The jury determined that the oral misrepresentation by Harpeth employees concerning the \$7,000.00 pay-off was

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an unfair or deceptive act and a violation of the Tennessee Consumer Protection Act.

We have considered each of the cases cited by Harpeth and find them to be inapposite to the facts of this case.

There is material evidence to support the jury's finding that Harpeth engaged in unfair or deceptive acts or practices regarding the \$7,000.00 pay-off.

There is evidence in the record which supports the jury's finding that Harpeth used high-pressure tactics in pressuring plaintiff to buy the Ford on the same day she called Hughes to determine her obligations on expiration of the Ford lease. When plaintiff told Hughes that she would return in a couple of weeks, he told her there was no need to wait, that the paper work could be prepared in a few minutes. Additionally, Hughes led plaintiff to believe that there was no way to avoid the \$7,000.00 pay-off except by the "flip-over." It was Harpeth's intention through Hughes to sell plaintiff the Ford that day before she could leave and think about it or talk to anyone else.

We are also of the opinion that under the circumstances it was proper for the jury to base a finding of unfair or deceptive acts and practices on the evidence at trial which shows that Harpeth kept for itself 2.5% of the 16.5% annual percentage rate financing which plaintiff was led to believe was charged by FMCC to finance the transaction. Harpeth told plaintiff that FMCC was financing the transaction but failed to disclose to plaintiff that it had secretly imposed the 2.5% additional charge. Plaintiff was led to believe, both by the contract documents and Harpeth's oral representations, that FMCC required the 16.50 annual percentage rate.

The record also supports the finding that Harpeth failed to refund the security deposit, that approximately a month after the time plaintiff purchased the Ford she inquired about the security deposit, and that Joe Mobley told Sheehan and plaintiff that plaintiff could not get the security deposit back because plaintiff had not completed the lease. Mobley denies this, but the credibility of the witnesses is for the jury to determine.

There is substantial material evidence that Harpeth engaged in unfair or deceptive acts or practices under the Tennessee Consumer Protection Act and that it also made negligent misrepresentations to plaintiff.

Harpeth raises the issue of "[w]hether the court erred in failing to direct a verdict for Harpeth based on the undisputed proof at trial and the jury's findings that there were no intentional misrepresentations."

When a motion for a directed verdict is made, the trial judge, and this Court on appeal, must look to all of the evidence, take the strongest legitimate view of it in favor of the opponent of the motion and allow all reasonable inferences from it in the opponent's favor. The court must discard all countervailing evidence and, if then there is any dispute as to any material determinative evidence or any doubt as to the conclusion to be drawn from the whole evidence, the motion for a directed verdict must be denied. *Country Maid Dairy, Inc. v. Hunter*, 57 Tenn.App. 138, 149, 416 S.W.2d 367, 372 (1967). There is material determinative evidence that Harpeth engaged in unfair or deceptive acts or practices affecting the conduct of trade or commerce and pursuant to [Tenn.Code Ann. § 47-18-104](#). Those unfair or deceptive acts are unlawful.

*8 This issue is without merit.

Harpeth also argues:

The jury verdict is excessive and there should be a remittitur and credit given Harpeth for the fair market use or rental value of the LTD by Atkinson from April 29, 1987 until the present. Also, Harpeth is entitled to a credit given on any payment claimed as damages by Adkinson for the extended warranty, credit life and disability in that the undisputed proof shows that the same could be cancelled at any time by Adkinson.

This issue was neither pleaded or tried in the trial court. No proof was offered by Harpeth regarding any credit it should be given. There is not a scintilla of evidence in the record regarding the fair market use or rental value of the Ford.

Issues which were not tried in the trial court cannot be raised for the first time on appeal. *Lake County v. Truett*, 758 S.W.2d 529, 537 (Tenn.App.1988).

Harpeth defended in the trial court on the theory that it had made no misrepresentations of any kind and that it had engaged in no unfair or deceptive acts or practices. It did not plead set-off as a defense and did not introduce any evidence of any fair rental value.

The trial court will not be put in error for not awarding set-off when there was no proof in the record which would entitle

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Harpeth to set-off. See *Mechanic Savings Bank & Trust Co. v. Scoggin*, 52 S.W. 718 (Tenn.Ch.App.1899).

This issue is without merit.

Harpeth's next issue is "[w]hether the trial court erred in giving the special jury verdict form to the jury over Harpeth's objection."

Harpeth says that it "strenuously asserts that submission of the special jury verdict form to the jury by the Trial Court over Harpeth's objection was irreversible [*sic*] error." Harpeth simply argues that the jury verdict form was improper. It cites no authority in support of this contention. Our reading of the jury verdict form fails to disclose that it was improper.

The verdict form was prepared by the court and properly identified the matters for the jury's consideration. We find nothing in the record to show that it was improper.

This issue is without merit.

Harpeth next contends that "the trial court erred in awarding Adkinson's attorney sums in excess of that which he would have otherwise received pursuant to the contingency fee contract...."

Plaintiff entered into a contingency fee contract with her attorneys which provided that the attorneys would receive "one-third of any recovery." Additionally, the plaintiff was responsible for all expenses of the suit. Contingency fee arrangements between an attorney and the client are valid in Tennessee.

Tennessee Code Annotated § 47-18-109(e)(1) provides: "Upon a finding by the court that a provision of this part has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs."

We have found no case, nor have we been cited to a case, that has discussed what is a reasonable attorney's fee under the Tennessee Consumer Protection Act.

*9 Rules of the Supreme Court, Rule 8 DR2-106(B) sets forth "[f]actors to be considered as guides in determining the reasonableness of a fee, includ [ing] the following:


- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

We have reviewed several federal civil rights cases¹ and are of the opinion that the reasoning in those cases is applicable to the awarding of attorney's fees under the Tennessee Consumer Protection Act.

In *Conklin v. Lovely*, 834 F.2d 543 (6th Cir.1987), a case involving 42 U.S.C. § 1988 regarding attorneys fees, the court held that the existence of a contingent fee arrangement is a factor that in certain circumstances may justify an attorney's fee award at a level above the attorney's hourly rate. *Id.* at 553. The court in *Conklin* also held that the risk inherent in litigating under a contingency fee may render the attorney's hourly rate of compensation inadequate. *Id.*

Attorney's fee awards under the civil rights statutes are not tied to the amount awarded by the jury in damages. See *City of Riverside v. Rivera*, 477 U.S. 561, 581, 106 S.Ct. 2686, 2697 (1986). In *City of Riverside*, the Court upheld an award of attorney's fees in excess of \$245,000.00 where the jury awarded damages of only \$33,350.00. The rationale for this rule is that plaintiffs in civil rights cases bring suit as private attorneys general acting for the public benefit as well

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as for themselves.  McCullough v. Cady, 640 F.Supp. 1012, 1021 (E.D.Mich.1986).

While the instant case does not involve a civil rights action, it does involve the Tennessee Consumer Protection Act, Tenn.Code Ann. § 48-18-101 et seq., and we are of the opinion that that reasoning is applicable. Plaintiffs under the Tennessee Consumer Protection Act also act as private attorneys general. The potential award of attorney's fees under the Tennessee Consumer Protection Act is intended to make prosecution of such claims economically viable to plaintiff.

Where a defendant elects to pursue a strategy of delay by erecting hurdles in order to make the cost of litigation prohibitive to the plaintiff, the plaintiff is effectively denied a remedy if the award of attorney's fees is made proportionate to the jury award. A review of the record shows that this was the strategy used by Harpeth. Under the Tennessee Consumer Protection Act, a defendant employs such a strategy of delay and obstruction at its peril.

***10** Taking all the factors into consideration, including the number of hours expended by the plaintiff's attorney at what is clearly a reasonable hourly rate, the award of \$20,004.00 attorney's fees is reasonable.

Defendant argues that the attorney should not receive one-third of the recovery and the award of attorney's fees. The award of attorney's fees by the court in this case is in lieu of one-third of the plaintiff's recovery. Plaintiff's attorney will not receive, in addition to the \$20,004.00 awarded by the court, one-third of the plaintiff's recovery.

This issue is without merit.


By its next issue, Harpeth questions "[w]hether the trial court erred in issuing a permanent injunction against Harpeth pursuant to the Tennessee Consumer Protection Act."


Tennessee Code Annotated § 47-18-109(b) provides in pertinent part as follows:

(b) Without regard to any other remedy or relief to which a person is entitled, anyone affected by a violation of this part may bring an action to obtain a declaratory judgment that the act or practice violates the provisions of this part and to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part; provided, however, that such action shall not be filed once the division has commenced a proceeding pursuant to § 47-18-107 or § 47-18-108.

That part of the trial court's order relating to the injunction is as follows: "It is further ORDERED that defendant Harpeth Ford-Mercury, Inc. is permanently enjoined from future violations of the Tennessee Consumer Protection Act, Tenn.Code Ann. § 47-18-101 et seq."

We are of the opinion that the record in this case does not support an all-encompassing injunction such as that issued.

The evidence shows there was a violation of  Tenn.Code Ann. § 47-18-104(b)(12). We are, therefore, of the opinion that the injunction should be modified to permanently enjoin Harpeth Ford-Mercury, Inc. from future violations of

 Tenn.Code Ann. § 47-18-104(b)(12): "Representing that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law."

In all other particulars the judgment of the trial court is affirmed and the cause is remanded to the trial court for the entry of an order modifying the injunction and in all other respects for the implementation of its judgment. Costs are taxed to the defendant, Harpeth Ford-Mercury, Inc.




CANTRELL, KOCH, JJ., concur.

All Citations

Not Reported in S.W.2d, 1991 WL 17177

Footnotes

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- 1  Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677 (6th Cir.1985), cert. denied, 474 U.S. 1083, 106 S.Ct. 853 (1986);  Northcross v. Board of Educ. of Memphis City Schools, 611 F.2d 624 (6th Cir.1979), cert. denied, 447 U.S. 911, 100 S.Ct. 2999 (1980);  McCullough v. Cady, 640 F.Supp. 1012 (E.D.Mich.1986).

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 United States District Court, C.D. California.

Richard D. BAGLEY

v.

UNITED STATES of America.

Case No. CV 10-483-GHK (FMOx)

|
 Filed 06/30/2011

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Proceedings: (In Chambers) Order
re: Motion for Summary Judgment; [24]

GEORGE H. KING, U. S. DISTRICT JUDGE

*1 This matter is before the Court on the Parties' Joint Brief in Support of and in Opposition to the Motion for Summary Judgment filed by the United States ("Motion"). We have considered the Joint Brief, and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Background

Plaintiff Richard Bagley ("Plaintiff") has filed a tax refund suit against the United States of America ("Defendant") concerning his 2003 tax year assessment. Plaintiff filed a 2003 Form 1040 tax return on October 15, 2004, (Ex. 114), a 2003 Form 1040X first amended return on May 10, 2005, (Ex. 115), and a 2003 Form 1040X second amended return on August 3, 2007, (Ex. 129). Plaintiff paid approximately \$10.3 million in taxes pursuant to his first amended tax return. Plaintiff's position here is that his second amended return, which was disallowed by the Internal Revenue Service, accurately reflects his tax liability in the amount of approximately

\$6.4 million, and he is therefore entitled to a refund of approximately \$3.9 million plus interest.

In 2003, Plaintiff recovered a sizable *qui tam* award for his role as a relator in a False Claims Act ("FCA") lawsuit against his former employer, TRW Inc. ("TRW") (later Northrop Grumman Space & Mission Systems Corporation ("Northrop Grumman")). After almost nine years of litigation, in 2003, TRW agreed to pay the Government \$111.2 million to settle the FCA allegations. Plaintiff received 24.5% of this settlement amount, \$27.5 million, as a *qui tam* award ("FCA Award"). Pursuant to the Amended and Restated Retainer Agreement ("Retainer Agreement"), (Ex. 122), between Plaintiff and his private counsel,¹ one-third of the FCA Award was paid to counsel as a contingency fee ("Contingency Fee"). Also, the Agreement re: Payment of Attorneys' Fees, Costs, and Expenses, (Ex. 123), between TRW/Northrop Grumman, Plaintiff, and his counsel provided for Northrop Grumman's separate and additional payment of approximately \$9.4 million directly to counsel in compromise of Plaintiff's right to attorneys' fees, costs, and expenses under

31 U.S.C. § 3730(d)(1), the FCA's fee-shifting provision ("Statutory Fee").

This Motion raises two issues upon which the Parties move for summary judgment. The first issue concerns whether the Contingency Fee and/or Statutory Fee are includible as gross income on Plaintiff's tax return. To the extent that either item constitutes income to Plaintiff, the second issue is whether such item(s) are deductible as trade or business expenses under 26 U.S.C. § 162. Defendant maintains that Plaintiff may only take these attorneys' fee expenses as itemized deductions under 26 U.S.C. § 212(1). If characterized as business expenses, rather than itemized deductions, Plaintiff avoids liability under the alternative minimum tax.

II. Legal Standard

*2 We grant summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "A party may move for summary judgment ... [on] part of [a] claim." *Id.* We "may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case." *Id.* 56(g). The party asserting that a fact cannot be genuinely disputed must support that assertion by "citing to particular parts of

materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials.” *Id.* 56(c)(1). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). On a motion for summary judgment, the district court’s “function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Id.* at 249.

The moving party bears the initial responsibility to point to the absence of evidence of any genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006)

(citation and quotation marks omitted); *see also* *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (“[I]f the movant bears the burden of proof on an issue, ... he must establish beyond peradventure *all* of the essential elements of the claim ... to warrant judgment in [that party’s] favor.”). Accordingly, “[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial”

in order to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks and citations omitted). Where the non-movant has the burden of proof at trial, the movant can carry its initial burden by “submit[ting] affirmative evidence that negates an essential element of the non-moving party’s claim ... [or by] demonstrat[ing] ... that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.” *Celotex Corp.*, 477 U.S. at 323. The burden then shifts to the non-movant to “to designate specific facts demonstrating the existence of genuine issues for trial.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376,

387 (9th Cir. 2010) (citing *Celotex*, 477 U.S. at 324). This means that the evidence is such that “a jury could reasonably render a verdict in [the non-movant’s] favor.” *Id.* (citing *Anderson*, 477 U.S. at 252). “The evidence of the non-

movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

This action was brought under 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422, which allow a taxpayer to bring an action for recovery of taxes and interest that were wrongfully assessed and paid. In this context, “[t]he factual and legal analysis employed by the Commissioner is of no consequence to the district court.” *R.E. Dietz Corp. v. U.S.*, 939 F.2d 1, 4 (2d Cir. 1991) (citations omitted). We do “not sit in judgment of the Commissioner”; we are instead placed “in the shoes of the Commissioner.” *Id.* (citation omitted). That said, assessments by the Commissioner have “the support of a presumption of correctness.” *Hostar Marine Transp. Sys., Inc. v. U.S.*, 592 F.3d 202, 208 (1st Cir. 2010) (citing *Welch v. Helvering*, 290 U.S. 111, 115 (1933)). Therefore, the taxpayer “bears the burden of persuading the trier of fact that the assessment is incorrect.” *R.E. Dietz Corp.*, 939 F.2d at 4; *see also* *Hostar Marine*, 592 F.3d at 208 (in tax refund suits, “taxpayers bear the burden of proving that a tax deficiency assessment is erroneous” (citation omitted)). Accordingly, at trial, Plaintiff bears the burden of proof.

III. Issue No. 1 ²

*3 Both Parties move for summary judgment concerning the includability of Plaintiff’s Contingency Fee and Statutory Fee as income. Plaintiff’s briefing reveals that there is no dispute as to the Contingency Fee, as he agrees that it is includible as income. Indeed, in all three of Plaintiff’s 2003 tax returns, he included the Contingency Fee in his income. Inasmuch as this issue is undisputed, we **GRANT** Defendant summary judgment to the extent that the Contingency Fee must be included as income to Plaintiff.

The FCA provides for an award of the relator’s reasonable attorneys’ fees. *See* 31 U.S.C. § 3730(d)(1). By the language of this fee-shifting provision, it is the relator himself who receives the attorneys’ fee award:

Award to qui tam plaintiff.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall [receive a percentage of the proceeds or settlement, as described].... Any

payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs.

Id. (emphasis added). Northrop Grumman paid directly to Plaintiff's counsel monies that by statute were awarded to Plaintiff personally. Accordingly, we conclude that Plaintiff constructively received this income.

This conclusion is supported by the reasoning in *Sinyard v. Commissioner*, which held that a defendant's payment directly to the plaintiffs' counsel of statutory attorneys' fees was includible as income to the plaintiffs. 268 F.3d 756, 757 (9th Cir. 2001). The court rejected the plaintiffs' argument that statutory attorneys' fees constituted an independent liability of the defendant to the plaintiffs' counsel, in part because of the "plain language of the ADEA ... [under which] attorney's fees are available to prevailing plaintiffs, not to plaintiff's counsel." *Id.* at 758-59. The FCA contains similar language. Plaintiff attempts to distinguish *Sinyard* by arguing that the case concerned a contingency fee agreement, and therefore the defendant effectively discharged the plaintiffs' debt to their counsel, whereas under Plaintiff's Retainer Agreement, the Statutory Fee is not a debt owing to his counsel. Although Plaintiff, unlike the taxpayers in *Sinyard*, may not contractually owe a debt to his private counsel, the statutory language is plain that the Statutory Fee was awarded to Plaintiff. The *Sinyard* court rejected the taxpayers' attempt to re-characterize the attorneys' fees as non-income by virtue of the fee-shifting provision. The factual distinction highlighted by Plaintiff regarding whether a statutory fee is a contractual debt (or not) from client to attorney has no outcome determinative significance because of the independent statutory provision awarding the Statutory Fee to Plaintiff.

Plaintiff argues that notwithstanding the language of the FCA, the Statutory Fee is not includible as income on account of Congressional intent in passing the FCA. As evidence, Plaintiff observes that the American Job Creations Act of 2004 ("AJCA") amended the tax code to provide for above-the-line deductions for amounts attributable to attorneys' fees

received by FCA relators. He also cites statements given on the Senate floor indicating those Senators' belief that the AJCA reflects Congress's intent even under the FCA.

However, the Act does not apply retroactively. *Comm'r v. Banks*, 543 U.S. 426, 433 (2005). Plaintiff's argument as to Congress's intent in passing the FCA falls flat inasmuch as Congress has pointedly declined the opportunity to make the AJCA retroactive.

*4 Plaintiff further argues that the Supreme Court in *Banks*, which held that contingency fees are includible as income, expressly declined to address whether fee-shifting awards were subject to the same rule. 543 U.S. at 438-39. In itself, this is of no significance because this issue was not before the Court. Plaintiff argues that the reasoning used by *Banks* supports his conclusion that statutory fees in *qui tam* actions are non-includible as income. The Court, in applying the anticipatory assignment doctrine to contingency fees, reasoned that "[l]ooking to control over the income-generating asset ... preserves the principle that income should be taxed to the party who earns the income and enjoys the consequent benefits. In the case of a litigation recovery the income-generating asset is the cause of action that derives from the plaintiff's legal injury. The plaintiff retains dominion over this asset throughout the litigation." *Id.* at 435. Plaintiff argues that in a *qui tam* action, the government has suffered the legal injury, and the relator does not have control over the litigation in the same way as a plaintiff controls his own case, since the government can intervene and dismiss or settle over the relator's objection. This argument misunderstands the Court's concern. Even in a *qui tam* action, the relator stands to "earn[] the income and enjoy[] the consequent benefits" of the prosecution of the claim. *Id.* The relator has certain statutory rights to participate and share in the recovery. Although the government has suffered the legal injury, the relator still has an interest in the government's claim, and the relator's counsel facilitates the realization of that interest. Although the relator's anticipatory interests may be different in scope than those of a plaintiff in another case, the relator nonetheless has assignable interests.

Finally, Plaintiff argues that pursuant to the language of his Retainer Agreement, the Statutory Fee belongs to his counsel. This argument conflates the concept of constructive receipt of income with ownership of property. Plaintiff relies on *Flannery v. Prentiss*, 26 Cal. 4th 572 (2001) and *U.S. ex rel. Virani v. Jerry M. Lewis Truck Parts &*

Equipment, Inc., 89 F.3d 574 (1996). Both cases involved a dispute between attorney and client about the disposition of a statutory attorneys' fee award. Neither is a tax case and neither case raised the issue of whether, in the event that the attorney was ultimately entitled to the award, such award would be considered income to the client. The Retainer Agreement cannot override the clear statutory language awarding the Statutory Fee to Plaintiff; that it may belong to his counsel, without more, does not bear on its includability as Plaintiff's income.

In light of the foregoing, we also **GRANT** summary judgment to Defendant to the extent that the Statutory Fee must be included as income to Plaintiff.

IV. Issue No. 2³

Both Parties move for summary judgment on the issue of whether Plaintiff can deduct the Contingency Fee and Statutory Fee as a trade or business expense, or rather, if these items may only be itemized deductions. This inquiry turns on whether Plaintiff can characterize his relator activities as carrying on a trade or business. Although Plaintiff purports to move for summary judgment, he primarily argues that there are disputed questions of fact concerning whether he was carrying on a trade or business within the meaning of 26 U.S.C. § 162.

There is no statutory definition of "trade or business" as used in § 162. Determining whether an individual is engaged in a trade or business "requires an examination of the facts in each case." *Comm'r v. Groetzinger*, 480 U.S. 23, 36 (1987) (citing *Higgins v. Comm'r*, 312 U.S. 212, 217 (1941)). "[T]o be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and [] the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify." *Id.* at 35; see also *Indep. Elec. Supply, Inc. v. Comm'r*, 781 F.2d 724, 726 (9th Cir. 1986) (the "primary inquiry when determining whether a particular activity constitutes a trade or business is to ask whether the activity was undertaken or continued in good faith, with the dominant hope and intent of realizing a profit" (citations and quotation marks omitted)). The "focus of the test is ... on the subjective intention of the taxpayer," although "objective indicia may be cited to establish the taxpayer's true intent." *Id.* (citation omitted); see

also 26 C.F.R. §§ 1.183-2(b)(1)-(9) (detailing factors to be considered in ascertaining a taxpayer's intent). This test is, at least in part, meant to distinguish between genuine profit seeking activity and tax avoidance behavior. See *Indep. Elec. Supply*, 781 F.2d at 728 ("Although the lack of any reasonable expectation of profit will not by itself show the absence of a profit motive, [the facts in that case] strongly suggest[ed] that the 'dominant' motive ... was tax avoidance and not the making of a profit....").

*5 This test—assessing the taxpayer's subjective profit motivation and requiring sustained, non-sporadic, regularity—plainly calls for a fact-intensive inquiry. See

Groetzinger, 480 U.S. at 36 ("[R]esolution of this issue requires an examination of the facts in each case. This may be thought by some to be a less-than-satisfactory solution, for facts vary. But the difficulty rests in the Code's wide utilization in various contexts of the term 'trade or business,' in the absence of an all-purpose definition by statute or regulation, and in our concern that an attempt judicially to formulate and impose a test for all situations would be counterproductive, unhelpful, and even somewhat precarious for the overall integrity of the Code." (internal citations and quotation marks omitted)); *Green v. Comm'r*, 507 F.3d 857, 871 (5th Cir. 2007) ("The determination of whether Green was engaged in carrying on a trade or business is a determination of fact that we review for clear error."); *Hayden v. Comm'r*, 889 F.2d 1548, 1552 (6th Cir. 1989) ("A finding regarding a taxpayer's [profit] motivation is purely one of fact, and as such may not be disturbed on appeal unless shown to be clearly erroneous." (citations omitted)); *Indep. Elec. Supply*, 781 F.2d at 727 (reviewing under the clearly erroneous standard the Tax Court's finding as to the taxpayer's subjective profit motivation).

Defendant argues that notwithstanding the factual nature of our inquiry, as a matter of law, Plaintiff was not carrying on a trade or business. First, Defendant argues that the attorney-client relationship is not a joint venture or partnership for tax purposes, citing *Banks*, 543 U.S. at 435. Plaintiff does not make any such contention. Consistent with *Banks*'s description of the "relationship between client and attorney ... [as] a quintessential principal-agent relationship," Plaintiff argues that his counsel was his agent in facilitating his separate trade or business as a *qui tam* relator. *Id.* at 436. Defendant also summarily asserts that Plaintiff's self-serving litigation activities are analogous to self-serving investment activities, which cannot constitute a trade or business. See

Higgins, 312 U.S. at 218. However, Plaintiff's activities here were not so insular—he was not seeking to remedy a harm to his own rights; the real party in interest was the government.

Defendant also argues that this case is controlled by the principle in *Green v. Commissioner*, T.C. Memo 2005-250, 2005 WL 2847869 (Oct. 31, 2005), *aff'd* 507 F.3d 857. In *Green*, the taxpayer had won a money judgment in a whistleblower lawsuit against a state agency. The taxpayer attempted to claim as business deductions certain expenses incurred by two companies created by the taxpayer in influencing the payment of the judgment by the state. The Tax Court determined that these activities were not in the nature of a trade or business. The Fifth Circuit affirmed under the clearly erroneous standard of review. 507 F.3d at 871. We disagree with Defendant's reading of *Green* as announcing a *per se* rule that expenses incurred in the collection of a personal judgment are rendered non-business income. The tax court in *Green* developed a full factual record and the Fifth Circuit affirmed its findings based on that record. *See id.* Inasmuch as we conclude herein that there are issues of material fact in dispute, *Green* does not control our case. Defendant also cites *Green* for the proposition that Plaintiff's theory would collapse the distinction between § 212 and § 162. However, as relevant to this concern, *Green* only establishes that where the taxpayer has incurred non-business expenses, such expenses cannot be transformed into business expenses merely by filtering them through a special-purpose entity whose only purpose is to pay said expenses. *Id.* Here, the threshold determination of whether Plaintiff was engaged in a trade or business has not yet been made, so concerns about preserving the boundary between § 212 and § 162 are premature.

We conclude that material facts are in dispute concerning whether Plaintiff had a profit-seeking motivation, as opposed to one of tax avoidance. Defendant's briefing invites the Court to make a credibility determination adverse to Plaintiff. (*See, e.g., J. Brief, Defendant's Position*, at 26-27 (characterizing Plaintiff's position as "disingenuous" and asserting that "[a]ll that is involved in this case are tax computations which are distasteful to [P]laintiff")). Therefore, Defendant itself has highlighted that there are issues of factual dispute concerning whether Plaintiff had a "good faith" and "dominant hope and intent of realizing a profit" in undertaking his activities as a relator. *Indep. Elect. Supply*, 781 F.2d at 726. Questions of

intention, motivation, and good faith are highly material and in this case require factual determinations which cannot be made on summary judgment.

*6 Additionally, there is a dispute of fact concerning the share of the work performed by Plaintiff, in comparison to that performed by his counsel, and the importance of Plaintiff's relative contribution. (*See J. Brief, Defendant's Position*, at 29 (Plaintiff's "lawyers, along with the attorneys representing the Government, did the lion's share of the work in bringing the case to a settlement in favor of the Government.... It is [P]laintiff's lawyers, not [P]laintiff, who carried on a trade or business in prosecuting [P]laintiff's case")). Moreover, Defendant argues that Plaintiff's reliance on private counsel undermines the showing that he was carrying on a trade or business. Yet, the Treasury Regulations suggest that having skilled advisors might, depending on the circumstances, support finding a profit motivation. 26 C.F.R. § 1.183-2(b)(2) (a relevant factor is "[t]he expertise of the taxpayer or his advisors").

Defendant also argues that Plaintiff did not hold himself out as a relator and did not perform services for any customer. However, "while the offering of goods and services usually would qualify the activity as a trade or business, this factor ... is not an absolute prerequisite." *Groetzinger*, 480 U.S. at 34. Moreover, it is not clear, at least as a matter of law, why Plaintiff's efforts could not be regarded as services to the public. *See Alderson v. U.S.*, 718 F. Supp. 2d 1186, 1190-91 (C.D. Cal. 2010) ("In short, the overwhelming weight of the caselaw holds that a False Claims Act *qui tam* award is given in exchange for information and services.... [T]he *qui tam* award—whether it is viewed as a contract between the relator and the Government, a bounty, a reward, or something different—is based entirely on the relator's information and personal efforts.... [A] 'bounty' [is defined] as a payment given 'to induce someone to take action or perform a service,' and ... [a] 'reward' [is defined] as a payment given in return for services (such as recovering property) or information (such as information used to capture a criminal)." (internal citations omitted)).

Finally, Defendant argues that Plaintiff's activities yielded a single payday arising out of a single event, and therefore, they lacked the regular and continuous quality required to constitute a trade or business. However, a taxpayer can be engaged in a trade or business of undertaking a single project. *See Snyder v. U.S.*, 674 F.2d 1359, 1363 (10th Cir. 1982)

(a taxpayer could be in a trade or business of “producing a book” even though he had not yet finished the project). Also, Plaintiff prosecuted ten different alleged schemes, involving 22 TRW projects, consisting of approximately 10,000 allegedly false claims. How to characterize these efforts may be one of semantics, but we cannot say that no reasonable jury could find that Plaintiff’s activities were systematic and continuous.

To the extent that any of these considerations are factors weighing in favor of concluding that Plaintiff lacked a genuine profit motivation, he has pointed to countervailing factors. For example, it is undisputed that Plaintiff spent almost 6,000 hours prosecuting the FCA cases over 8.5 years, and reviewed more than half-a-million pages of documents. He devoted himself full-time to the case and was not otherwise employed. He argues that he undertook significant personal financial risk. The nature of Plaintiff’s involvement appears to have required substantial expertise in accounting and financial analysis. Summary judgment is an inappropriate vehicle for balancing these factors.

In sum, a reasonable jury could find that given the nature of Plaintiff’s activities, given all the facts and circumstances, he was carrying on a trade or business. Although the Government can be forgiven for its repeated suggestion that Plaintiff was not carrying on a trade or business in any traditional sense—and indeed, the Court is troubled by Plaintiff’s theory—our inquiry on summary judgment is whether there is an absence of any triable issues of fact such that Defendant is entitled to

judgment as a matter of law. We cannot say, notwithstanding Defendant’s understandable skepticism, that as a matter of law no reasonable trier of fact could conclude that Plaintiff was carrying on a trade or business. Accordingly, we **DENY** summary judgment to both Parties on this issue.

V. Conclusion

*7 In light of the foregoing, the Parties’ joint Motion is **GRANTED in part and DENIED in part**. We **GRANT** summary judgment to Defendant on Issue No. 1, and conclude that Plaintiff’s Contingent Fee and Statutory Fee are includible as income for the 2003 tax year. All other motions for summary judgment are **DENIED**. In light of this Order, we **DIRECT** counsel to attend a further settlement conference before Judge Olguin **within thirty (30) days hereof** if convenient to Judge Olguin’s calendar. Within **ten (10) days hereof** counsel **SHALL** file a joint status report setting forth the date cleared for such settlement conference within the deadline imposed herein. If the case settles, the Parties shall notify the Clerk forthwith. If the case does not settle, the Parties shall file a joint status report within forty-eight (48) hours of the conclusion of the settlement conference.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2011 WL 13128158

Footnotes

- ¹ Plaintiff’s private counsel included, at various times, Phillips & Cohen LLP, Luce, Forward, Hamilton & Scripps LLP, and Tuttle & Taylor, a Law Corporation.
- ² “Whether plaintiff must include in income on his 2003 U.S. Individual Tax Return (1) that portion of his ‘FCA payment’ (the statutory relator share award under 31 U.S.C. § 3730(d)(1)) that was paid to his attorneys as a contingent fee, and (2) the FCA Statutory Fee awarded to plaintiff’s counsel under 31 U.S.C. § 3730(d)(1), a fee-shifting statute, which was paid directly to plaintiff’s attorneys by Northrop.” (J. Br. at 2).
- ³ “Whether plaintiff’s expenses for attorney’s fees and costs are deductible under 26 U.S.C. § 162 on Schedule C as trade or business expenses, or under 26 U.S.C. § 212(1) as Schedule A miscellaneous itemized deductions for expenses incurred in the collection or production of income.” (J. Br. at 26).

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT NASHVILLE.

John DOE

v.

Jane ROE

No. M2020-01277-COA-R3-CV

|
May 5, 2021 Session|
FILED 06/24/2021**Appeal from the Circuit Court for Davidson County, No. 20C795, Thomas W. Brothers, Judge****Attorneys and Law Firms**John J. Griffin, Jr., Michael A. Johnson, and Kelley Strange, Nashville, Tennessee, and David T. Hooper, Brentwood, Tennessee, for the appellant, Jane Roe.Michelle Owens, Nashville, Tennessee, for the appellee, John Doe.David L. Hudson, Jr., Nashville, Tennessee, for amicus curiae, First Amendment Scholar.Arnold B. Goldin, J., delivered the opinion of the court, in which W. Neal McBrayer and Kenny Armstrong, JJ., joined.**OPINION**

Arnold B. Goldin, J.

*1 This appeal involves review of a trial court's denial of the defendant's motion to dismiss plaintiff's lawsuit pursuant to the Tennessee Public Participation Act. The trial court determined that the Tennessee Public Participation Act was not applicable and denied the motion, finding that the defendant's activity was not protected. The defendant now appeals, contending that the underlying matter involves the exercise of her right to free speech and her right to petition. We agree and find that the defendant engaged in protected activity in the filing of a Title IX complaint. Because we

find that the defendant's appeal is limited to that part of the trial court's judgment relating to the allegations in plaintiff's lawsuit concerning defendant's Title IX complaint, we reverse in part the trial court's cited basis for denial and remand for further proceedings consistent with this Opinion and the Tennessee Public Participation Act.

BACKGROUND AND PROCEDURAL HISTORY

The facts giving rise to this appeal are largely in dispute and are a matter of great contention between the parties. The plaintiff and defendant, identified as John Doe and Jane Roe respectively in this litigation, were acquaintances prior to the events giving rise to this appeal. At the time of the alleged incident, both parties were students at Middle Tennessee State University ("MTSU") in Murfreesboro, Tennessee. On November 30, 2018, Roe met up with Doe. Roe alleges that Doe sexually assaulted her later that night, which Doe disputes. At varying times after the incident, Roe informed friends and family of the assault, including a professor at MTSU. On December 5, 2019, Roe filed a complaint with MTSU's Title IX office. The Title IX office later completed its investigation, finding that there was a lack of evidence to proceed further, specifically noting that "the proof does not show that it was more likely than not" that a Title IX violation occurred.

Doe ultimately filed a complaint in the Davidson County Circuit Court ("the trial court") against Roe for defamation, false light invasion of privacy, and intentional infliction of emotional distress. Specifically, Doe based his claims on Roe's Title IX complaint as well as her purported communications regarding the incident with friends and family and on social media. In response to Doe's complaint, Roe filed a motion to dismiss, arguing that her activity was protected under the Tennessee Public Participation Act ("TPPA"), codified at Tennessee Code Annotated section 20-17-101 et seq.¹ Roe's motion was specifically filed pursuant to the authority in Tennessee Code Annotated section 20-17-104(a), which provides that "[i]f a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action." Tenn. Code Ann. § 20-17-104(a). Following a hearing, the trial court denied Roe's motion, finding that the matter was not one of public concern such as to warrant the application of the TPPA. Roe thereafter filed this interlocutory appeal as permitted by the statute.²

ISSUE PRESENTED

Roe raises a single issue³ for our review on appeal:

1. Whether the trial court erred in holding that the Tennessee Public Participation Act, Tenn. Code Ann. § 20-17-101, et seq., does not apply to the report of an alleged crime to a government entity.

STANDARD OF REVIEW

*2 At the outset, we note that the TPPA is a relatively new creature of the legislature, having only been codified in 2019. In fact, the first Tennessee appellate opinion providing guidance on interpretation of the TPPA was only recently decided. *See Nandigam Neurology, PLC v. Beavers*, M2020-00553-COA-R3-CV, 2021 WL 2494935 (Tenn. Ct. App. June 18, 2021).

Statutory construction is a question of law which we review *de novo* with no presumption of correctness. Tenn. R. App. P. 13(d); *Spears v. Weatherall*, 385 S.W.3d 547, 549 (Tenn. Ct. App. 2012). As we are interpreting a statute, the rules of statutory construction shall apply. Our goal in statutory construction is to “carry out legislative intent without broadening or restricting the statute beyond its intended scope.” *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009) (citing *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002)). As such, we presume that every word contained in a statute has both meaning and purpose and should therefore be given its full effect if the General Assembly's obvious intention is not violated in doing so. *Id.* at 613–14 (citing *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005)). Thus, when the language of a statute is unambiguous, we apply its plain meaning. *State v. Wilson*, 132 S.W.3d 340, 341 (Tenn. 2004) (citing *Carson Creek Vacation Resorts v. Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993)). Essentially, “[o]ur obligation is simply to enforce the written language.” *In re Estate of Tanner*, 295 S.W.3d at 614

(citing *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006)).

DISCUSSION

*Anti-SLAPP Statutes and The
Tennessee Public Participation Act*

The underlying matter involves the application of Tennessee's Anti-SLAPP law, the TPPA, to a lawsuit filed by Doe against Roe for defamation, false light invasion of privacy, and intentional infliction of emotional distress. SLAPP⁴ suits are lawsuits used “as a powerful instrument of coercion or retaliation” against a defendant, George W. Pring & Penelope Canan, “*Strategic Lawsuits Against Public Participation*” (“SLAPPS”): *An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 942 (1992) (quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 740–41, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983)), and anti-SLAPP legislation such as the TPPA is designed to counteract such lawsuits and prevent “meritless suits aimed at silencing a plaintiff's opponents, or at least diverting their resources.” John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPS*, 26 LOY. L.A. L. REV. 395, 396 (1993).

Enacted in 2019, the TPPA is designed to “encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury.” Tenn. Code Ann. § 20-17-102. As with the typical design of anti-SLAPP statutes, the TPPA works to “discourage[] and sanction[] frivolous lawsuits and permits the early disposition of those cases before parties are forced to incur substantial litigation expenses.” Todd Hambridge et al., *Speak Up.*, 55 Tenn. B.J. 14, 15 (2019). Although it has been noted that Tennessee had a limited anti-SLAPP statute before the TPPA, the TPPA “broadens anti-SLAPP protection.” *Id.*

*3 The TPPA provides relief for parties who partake in protected activity constituting either the exercise of the right of association, the exercise of the right of free speech, or the exercise of the right to petition. Tenn. Code Ann. §§ 20-17-104(a), 20-17-105. Specifically, if the petitioning party makes a prima facie case that they have participated in protected activity under the TPPA, the court may then

dismiss the action against them, “unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.” Tenn. Code Ann. § 20-17-105(a)(b). The TPPA also provides definitions as to what constitutes these forms of protected activity. For example, an “exercise of the right of association” is an “exercise of the constitutional right to join together to take collective action on a matter of public concern that falls within the protection of the United States Constitution or the Tennessee Constitution.” Tenn. Code Ann. § 20-17-103(2). An “exercise of the right of free speech” means “a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution.” Tenn. Code Ann. § 20-17-103(3). Finally, an “exercise of the right to petition” means “a communication that falls within the protection of the United States Constitution or the Tennessee Constitution and: (A) Is intended to encourage consideration or review of any issue by a federal, state, or local legislative, executive, judicial, or other governmental body; or (B) Is intended to enlist public participation in an effort to effect consideration of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body[.]” Tenn. Code Ann. § 20-17-103(4).

Notably, the definitions above reveal that both the “exercise of the right of association” and the “exercise of the right of free speech” require that the activity be connected with a “matter of public concern.” Tenn. Code Ann. § 20-17-103(2–3). As defined by the statute, a “matter of public concern” includes issues relating to: “(A) Health or safety; (B) Environmental, economic, or community well-being; (C) The government; (D) A public official or public figure; (E) A good, product, or service in the marketplace; (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or (G) Any other matter deemed by a court to involve a matter of public concern.” Tenn. Code Ann. § 20-17-103(6). As should be evident—and as some commentators have already observed—matters of public concern are “broadly defined” under the statute. Todd Hambridge et al., *Speak Up*, 55 Tenn. B.J. 14, 15 (2019). Unlike the enumerated categories pertaining to “the exercise of the right of association” and the “exercise of the right of free speech,” the “exercise of the right to petition” contains no statutory qualifier requiring that the activity involve a “matter of public concern.” Again, under the statute, “exercise of the right to petition” simply means a “communication” that is constitutionally protected and is “intended to encourage consideration or review of an issue” by some form of governmental body or is “intended to

enlist public participation in an effort to effect consideration of an issue” by a governmental body. Tenn. Code Ann. § 20-17-103(4)(A),(B).

In her brief on appeal, Roe separates her argument for TPPA applicability into two parts. First, Roe asserts that her complaint filed with the Title IX office is a matter of public concern, thus coming within the purview of the “exercise of the right of free speech.” Second, Roe contends that her complaint implicates her “exercise of the right to petition” the government. We will address each of these arguments separately.

Right of Free Speech Under the TPPA

Roe's first argument on appeal concerns whether the contents of her Title IX complaint constitute a matter of public concern as it is defined in section 20-17-103(6) of the TPPA. In her brief, Roe asserts that by filing a complaint with MTSU's Title IX office, she was exercising her right of free speech and, because the subject matter of the complaint is one of public concern, she is afforded protection under the TPPA. Specifically, she contends that the filing of her Title IX complaint is a matter of public concern under the TPPA because sexual assault is an issue that is related to “[h]ealth or safety,” “community-well-being,” or “[a]ny other matter deemed by a court to involve a matter of public concern.” *See* Tenn. Code Ann. 20-17-103(6). Conversely, Doe contends that a matter of public concern in general must pertain to something involving “the greater good or [an] attempt to raise awareness in the community as a whole.”

*4 As noted previously, the “exercise of the right of free speech” is defined by the TPPA as a “communication made in connection with a *matter of public concern* or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution.” Tenn. Code Ann. § 20-17-103(3) (emphasis added). Again, the TPPA goes on to broadly define a “matter of public concern” as an issue that is related to one of the following: “(A) Health or safety; (B) Environmental, economic, or community well-being; (C) The government; (D) A public official or public figure; (E) A good, product, or service in the marketplace; (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or (G) Any other matter deemed by a court to involve a matter of public concern[.]” Tenn. Code Ann. § 20-17-103(6).

In interpreting a statute, “[w]hen the language within the four corners of the statute is unambiguous, the legislative intent must be derived from the statute’s face.” *Bryant v. Genco Stamping & Mfg. Co., Inc.*, 33 S.W.3d 761, 765 (Tenn. 2000) (citing *Davis v. Reagan*, 951 S.W.2d 766, 768 (Tenn. 1997)). Thus, we shall apply the “natural and ordinary meaning” to the language of a statute, unless there exists ambiguity requiring further clarification. *Id.* at 765 (citing *Davis*, 951 S.W.2d at 768). Because certain words used to define a “matter of public concern” are not expressly defined themselves, we “look to [their] usual and accepted meaning from sources of common usage.” *Id.* According to Merriam-Webster, the word “health” is defined as “the condition of being sound in body, mind, or spirit,” or being “free[] from physical disease or pain.” *Merriam-Webster.com Dictionary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/health> (last visited June 3, 2021). Black’s Law Dictionary has a similar definition of “health,” defining it as “[t]he quality, state, or condition of being sound or whole in body, mind, or soul; esp., freedom from pain or sickness.” BLACK’S LAW DICTIONARY 835 (10th ed. 2014). “Safety,” also defined by Merriam-Webster, is “the condition of being safe from undergoing or causing hurt, injury, or loss.” *Merriam-Webster.com Dictionary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/safety> (last visited June 3, 2021). Although “safety” is not expressly defined by Black’s Law Dictionary, we note its definition of “safe,” which includes “[n]ot exposed to danger; not causing danger.” BLACK’S LAW DICTIONARY 1536 (10th ed. 2014). Accordingly, pursuant to their ordinary meanings and common usage, “health” and “safety” may involve the state or condition of a single person. Thus, for our purposes, we understand the legislature’s inclusion of “health” and “safety” under the TPPA as extending to matters affecting individuals.

In interpreting the TPPA as it pertains to the current set of facts, we find that Roe’s filing of her Title IX complaint is an exercise of free speech that comes within the purview of the TPPA. Specifically, we find that the allegations contained in the Title IX complaint constitute an issue related to a matter of public concern as contemplated by the TPPA’s definitions espoused in section 20-17-103(6). In addressing Doe’s argument that a matter of public concern *must* involve something pertaining to “the greater good or [an] attempt to raise awareness in the community as a whole,” we look to the plain language provided by the statute itself. We first note that section 20-17-103(6)(B) includes “community well-being” as an issue that may constitute a “matter of public

concern” under the TPPA. This inclusion of “community” clearly evinces the legislature’s intention to expand the issue of “well-being” to an entire community, as argued by Doe. However, this is only *one* of several possibilities regarding what constitutes a “matter of public concern.” We find it counterintuitive to extend the “community well-being” definition to every category enumerated in section 20-17-103(6) when it is only expressly carved out as one potential option. Thus, although it is true that section 20-17-103(6)(B) includes issues related to “community well-being” as constituting a matter of public concern, we reject Doe’s contention that the statute only mandates that an issue involve the “community as a whole.” Indeed, we are of the opinion that, if the legislature intended to restrict the application of “health or safety” under the TPPA to the limited parameters argued by Doe, it would have done so. Instead, the legislature merely provided that a matter of public concern includes an issue related to health or safety. Therefore, as required by the rules of statutory construction, we find ourselves beholden to the “natural and ordinary meaning” of the language provided to us by the legislature. *See Bryant*, 33 S.W.3d at 765 (citing *Davis*, 951 S.W.2d at 768). Thus, as we interpret it, Roe’s Title IX complaint constituted a matter of public concern as it related to an issue concerning “health or safety.”

*5 In further support of our analysis, we point to other courts who have interpreted almost identical provisions in their jurisdictions’ anti-SLAPP statutes. First, we note the position taken by the Texas Court of Appeals in *Cavin v. Abbott*, 545 S.W.3d 47 (Tex. Ct. App. 2017), wherein a daughter and her husband (“the Abbotts”) brought an action against her parents (“the Cavins”), alleging defamation, among other things. Specifically, the Abbotts predicated their suit on the Cavins’ alleged defamatory communications with the Abbotts’ families, friends, and employers. *Id.* at 50–53. The Cavins filed a motion to dismiss pursuant to the Texas Citizens Participation Act (“TCPA”), contending that their “numerous statements about the Abbotts’ mental health or ‘abuse’ met the TCPA’s definition of the ‘exercise of the right of free speech’ because they were ‘communication[s] made in connection with a matter of public concern,’ namely ‘health or safety.’ ” *Id.* at 54. The trial court denied their motion, finding the claims “are not matters of public concern.” *Id.*

On appeal, the Abbotts contended that her parents’ communications involved a “‘private’ family dispute and conduct that was actionable as ‘private torts,’ ” rather than

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ones involving “matters of public concern.” *Id.* at 61. The Texas Court of Appeals ultimately rejected this argument, explaining:

Although the Abbotts’ arguments might have greater viability under the more conventional understandings of “matters of public concern” in either constitutional jurisprudence or ordinary usage, it remains that the TCPA has prescribed a specific definition of “matter of public concern” requiring, as applicable to this case, only that “an issue relat[e] to ... health or safety,” without further elaboration or qualification

...

[I]n *Lippincott [v. Whisenhunt]*, 462 S.W.3d 507 (Tex. 2015)], the supreme court held that the court of appeals had “improperly narrowed the scope of the TCPA by ignoring the Act’s plain language and inserting the requirement that communications involve more than a ‘tangential relationship’ to matters of public concern.” Likewise, the court continued, “[t]he TCPA does not require that the statements specifically ‘mention’ health, safety, environmental, or economic concerns, nor does it require more than a ‘tangential relationship’ to the same; rather, TCPA applicability requires only that the defendant’s statements are ‘in connection with’ ‘issue[s] related to’ health, safety, environmental, economic, and other identified matters of public concern chosen by the Legislature.”

...

Under these precedents, we must reject the Abbotts’ invitation to read the TCPA’s definition of “exercise of the right of free speech” and “matter of public concern” more narrowly than the ordinary meaning of their words as written. All the Legislature has required is that appellants’ communications be “made in connection with a matter of public concern,” and a “matter of public concern” includes “an issue related to ... health or safety.” As appellants urge, the subjects of mental illness or domestic abuse plainly fall within the ordinary meaning of “health” or safety,” and it is now clear that such “health” and “safety” under the TCPA includes that of private parties embroiled in an otherwise-private dispute far removed from any public participation in government. Consequently, appellants’ “communication[s] made in connection with” those subjects qualify, as a matter

of law, as the “exercise of the right of free speech” under the TCPA definition.

Id. at 61–64 (internal citations omitted).

More recently, the District of Columbia Court of Appeals addressed a similar issue, noting that the District’s own statute

expansively defines an “[i]ssue of public interest” to encompass issues that “relate[] to” a set of wide-ranging, and somewhat nebulous, categories, among them ‘health,’ ‘safety,’ and ‘environmental, economic, or community well-being.’ This drafting choice indicates both that issues of public interest should be liberally interpreted and that the statements need not explicitly refer to a qualifying topic.

*6 *Saudi Am. Pub. Relations Affairs Comm. v. Inst. for Gulf Affairs*, 242 A.3d 602, 611 (D.C. Ct. App. 2020). Taking the reasoning of the above decisions into consideration and noting our own legislature’s decision to define a “matter of public concern” as including issues related to “health or safety,” we decline to consider a narrower interpretation than the one provided to us by the clear statutory language of the TPPA.

Based upon our own reading of the TPPA’s language and the guidance provided by courts similarly posed with the question now before us, we conclude that sexual assault is clearly an issue related to “health or safety,” as those terms are commonly understood. As a result, we conclude that Roe’s Title IX complaint is protected activity under the TPPA and constitutes a matter of public concern within the parameters of the TPPA.

Right to Petition Under the TPPA

The TPPA defines the “exercise of the right to petition” as a “communication that falls within the protection of the United States Constitution or the Tennessee Constitution and: (A) Is intended to encourage consideration or review of an issue

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by a federal, state, or local legislative, executive, judicial, or other governmental body; or (B) Is intended to enlist public participation in an effort to effect consideration of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body.” Tenn. Code Ann. § 20-17-103(4). According to the TPPA, “communication” is “the making or submitting of a statement or document in any form or medium, including oral, written, audiovisual, or electronic.” Tenn. Code Ann. § 20-17-103(1). Although “governmental body” is not defined within the TPPA, we interpret it to include public universities, such as MTSU in the underlying matter. Unlike the right of free speech, the right to petition does *not* require that the matter be one of public concern.

Roe contends that her Title IX complaint involves a protected communication made to a state or other governmental body and thus constitutes the exercise of the right to petition as defined by the TPPA. In his brief, Doe argues that “communication to a governmental body alone is not enough to activate the TPPA” and that “[t]here must also be a *truthful statement that concerns the public good* and not a private matter between two people.” (emphasis in the original). In support of his statement, Doe merely cites Tennessee Code Annotated section 20-17-101 et. seq., but we find no support in the statute itself for this position.⁵ In further addressing this argument, we also note that nowhere in the TPPA’s discussion of the “exercise of the right to petition” does there exist this purported requirement that there must be a “truthful statement that concerns the public good.” Therefore, we respectfully decline to accept Doe’s incorporation of this additional language into the statute. As made clear by the rules of statutory construction, “[j]ust as we may not overlook or ignore any of the words in a statute, we must be circumspect about adding words to a statute that the General Assembly did not place there.” Coleman v. State, 341 S.W.3d 221, 241 (Tenn. 2011) (internal citations omitted) (citing City of Knoxville v. Entm’t Res., LLC, 166 S.W.3d 650, 658 (Tenn. 2005); Howell v. State, 151 S.W.3d 450, 457–58 (Tenn. 2004)). Instead, based on our plain reading of the TPPA, the right to petition merely requires there to be a communication that is either intended to elicit consideration or review by a governmental body or intended to “enlist public participation” to effectuate such consideration. See Tenn. Code Ann. § 20-17-103(4).

*7 In consideration of the foregoing, we conclude that Roe’s actions constitute her “right to petition” under the TPPA. Here, Doe filed suit against Roe partially based on

Roe’s complaint of sexual assault to MTSU’s Title IX office. MTSU, as a state-funded university, clearly qualifies as a governmental body. Doe concedes this point, stating in his brief that “[t]here is no question that MTSU is a state university and therefore qualifies as a type of governmental body.” However, he continues by adding that “[w]hether MTSU is the type of governmental body envisioned by the TPPA is unclear.” We first note that, although the TPPA does not expressly define “governmental body,” we find no distinction in the statute between the numerous forms of governmental bodies. As such, we find no reason why MTSU does not constitute a governmental body as contemplated by the TPPA. Again, Doe concedes it is a governmental body and our reading of the statute does not reveal any exclusions for public universities funded by the state. Moreover, we also conclude that Roe’s Title IX complaint constitutes a “communication” under the TPPA. In filing her Title IX complaint, Roe made a statement regarding sexual assault allegations surrounding an encounter with Doe. We find this to be sufficient to constitute the “making or submitting of a statement or document in any form or medium.” See Tenn. Code Ann. § 20-17-103(1). Thus, we conclude that Roe asserted her right to petition in the present matter by filing her complaint with MTSU’s Title IX office and that this activity is protected under the TPPA.

Effect On the Trial Court’s Proceedings

Once a party petitioning for dismissal under the TPPA has made a prima facie case that the legal action against them is “based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association,” then the court “shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.” Tenn. Code Ann. § 20-17-105(a)(b). If the petitioning party thereafter “establishes a valid defense to the claims in the legal action,” then the court “shall dismiss the legal action.” Tenn. Code Ann. § 20-17-105(c). Therefore, even though a petitioning party’s speech may potentially trigger the TPPA’s protections, the party who initiated the legal action is not prevented from pursuing his or her action, rather the burden shifts to the party filing the complaint to make a prima facie case for each element of his cause of action.

Here, the trial court denied Roe’s motion to dismiss on the ground that Roe had not engaged in protected activity under the TPPA. This Court having now determined that Roe’s act

of filing a complaint with MTSU's Title IX office constitutes both an exercise of her right of free speech as well as her right to petition pursuant to the TPPA, we conclude that Roe satisfied her initial burden of making a prima facie case that Doe's legal action against her is "based on, relates to, or is in response to" her exercise of her right of free speech and her right to petition. *See* Tenn. Code Ann. § 20-17-105(a). Thus, we reverse the trial court's order denying Roe's motion to dismiss pursuant to the TPPA on the ground that it did not qualify as protected activity under the TPPA. Because we are reversing the trial court's dismissal of Roe's motion, the burden-shifting mechanism under the statute will now take effect and Doe is now charged with establishing a prima facie case for each essential element of his claim as it pertains to Doe's Title IX complaint. *See Kruger v. Daniel*, No. 43155-6-II, 2013 WL 5339143, at *5 (Wash. Ct. App. Sept. 17, 2013) (citing *Am. Traffic Sols. Inc. v. City of Bellingham*, 163 Wash.App. 427, 260 P.3d 245, 249 (2011) (finding that the petitioning party had satisfied their burden and remanding the matter to the trial court for a determination of whether

the plaintiff had met his burden of showing probability of prevailing on his claim)).

Taking the above into consideration with our understanding of Tennessee's own anti-SLAPP statute, we remand the matter back to the trial court for a determination regarding whether there is a prima facie case for Doe's claims against Roe insofar as they pertain to her Title IX complaint pursuant to Tennessee Code Annotated section 20-17-105(b).

CONCLUSION

Based on the foregoing, we reverse the trial court's finding that the TPPA is not applicable to Roe's filing of a complaint with MTSU's Title IX office and remand for additional proceedings not inconsistent with this Opinion.

All Citations

— S.W.3d —, 2021 WL 2588394

Footnotes

- 1 Roe also filed a separate motion to dismiss under Tennessee Rule of Civil Procedure 12.02(6). However, that motion is not before this Court.
- 2 Tennessee Code Annotated section 20-17-106 provides:
The court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals. The Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals.
- 3 At the outset, we note that, for the purposes of this Opinion, we concern ourselves only with the portion of Doe's lawsuit that concerns Roe's complaint filed with MTSU's Title IX Office. At oral argument, Roe's counsel indicated that she was proceeding on all facets of Doe's complaint, which includes Roe's purported statements to friends and family, as well as those allegedly on social media, regarding the sexual assault allegations. However, upon a close examination of Roe's brief, we find no articulated issue or argument regarding those contentions that provide any indication that Roe is appealing those matters as well. In support of this, we point to Roe's own statement of the issue on appeal, in which she states the issue as, "[w]hether the trial court erred in holding that the Tennessee Public Participation Act, Tenn. Code Ann. § 20-17-101, et seq., does not apply to the report of an alleged crime to a government entity." Moreover, we also point to the language contained elsewhere in Roe's brief, wherein she states, "[t]he *communication* at issue plainly involves a matter of public concern under the TPPA. [Doe] alleges [Roe] is guilty of defamation based on her accusation of rape made in a Title IX complaint." (emphases added) We note that the only portion of Roe's brief in which she even mentions these other communications is in her discussion on Doe's alleged inability to prove each element of his causes of action. The passing argument developed as to these other communications, therefore, is not in any way directed at Roe's burden under the statute, which requires her to demonstrate that the legal action was in response to her protected activity. Again, the only issue Roe

raises as to her alleged protected activity is in relation to her Title IX complaint, a point her “Statement of the Issue” makes unmistakably clear. Although Roe may have attempted to broaden the scope of our inquiry at oral argument, it is well settled that oral argument is not a permissible way to extend review to issues not raised in briefing. See *Christie v. Christie*, No. M2012-02622-COA-R3-CV, 2014 WL 4293966, at *6 (Tenn. Ct. App. Apr. 25, 2014) (“Issues initially raised at oral argument are not properly presented for review in accordance with this court’s rules.”). Accordingly, for the purposes of this Opinion, we will only address the TPPA’s applicability as it concerns Roe’s Title IX complaint.

4 “SLAPP” serves as an acronym for “strategic lawsuit against public participation.” Todd Hambridge et al., *Speak Up*, 55 Tenn. B.J. 14, 15 (2019).

5 We are unclear as to what Doe is relying on for this proposition. We note that his reference to “public good” may be referring to the “matter of public concern” requirement under the “right of free speech” and “right of association.” However, as we have noted here, the “right to petition” does not require that the matter be one of “public concern.” As such, we find this contention to be without merit.

83 Fed.Appx. 183

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3) United States Court of Appeals, Ninth Circuit.

LEGACY PARTNERS, INC, a California corporation;
 C. Preston Butcher, Plaintiffs—Appellees,
 v.

TRAVELERS INDEMNITY
 COMPANY OF ILLINOIS, an Illinois
 corporation, Defendant—Appellant,
 and

Travelers Insurance Company, a Connecticut
 corporation; Travelers Property Casualty
 Corporation, a Delaware corporation, Defendants.
 LEGACY PARTNERS, INC, a California corporation;
 C. Preston Butcher, Plaintiffs—Appellants,
 v.

Travelers Indemnity Company of Illinois, an
 Illinois corporation, Defendant—Appellee.

Nos. 02–15900, 02–15978.

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 Argued and Submitted Sept. 11, 2003.

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 Decided Dec. 9, 2003.

Synopsis

Background: Business that was additional named insured on policy of insurer, and regional partner, sued insurer for breach of its duty to defend with regard to third party defamation lawsuit against regional partner. The United States District Court for the Northern District of California, Susan Yvonne Illston, J., 2002 WL 500771, ruled on summary judgment that insurer breached its duty to defend, and awarded attorney fees to business and regional partner following a bench trial. Insurer appealed, and business and regional partner cross-appealed the denial of indemnification for the voluntary settlement reached in third party's suit.

Holdings: The Court of Appeals held that:

evidence supported finding that insurer breached its duty to defend business and regional partner, even though business was not named in third party's complaint;

district court did not abuse its discretion by awarding attorney fees associated with insured's use of five separate law firms in defense of third party defamation lawsuit;

Texas law rather than California law governed recovery of attorney fees by business and regional partner;

attorney fees awarded for breach of duty to defend did not have to be allocated between successful and unsuccessful claims;

question of whether to impose statutory penalty of 18% interest on underlying defense costs was to be determined under Texas law; and

insured was not entitled to recover legal fees incurred prior to tendering claim to insurer.

Affirmed.

Superseding,  79 Fed.Appx. 295.

Procedural Posture(s): On Appeal.

*185 Appeals from the United States District Court for the Northern District of California, Susan Yvonne Illston, District Judge, Presiding.

Attorneys and Law Firms


Jonathan C.S. Cox, Cox, Padmore, Skolnik & Shakarchy, Menlo Park, CA, Harvey R. Friedman, Esq., Greenberg, Glusker, Fields, Claman & Machtinger, Los Angeles, CA, Philip Borowsky, Law Offices of Philip Borowsky, San Francisco, CA, for Plaintiffs—Appellees.

William C. Morison-Knox, Esq., Thomas Holden, Esq., Morison-Knox, Holden, Melendez & Prough LLP, Walnut Creek, CA, for Defendant—Appellant.

Before O'SCANNLAIN, TASHIMA, Circuit Judges, and MATZ, District Judge.*

ORDER

****1** The Memorandum disposition filed October 23, 2003,

 79 Fed.Appx. 295, is withdrawn and is replaced by the Amended Memorandum filed concurrently with this Order. The petition for rehearing of Legacy Partners, Inc., and C. Preston Butcher is granted to the extent reflected in the Amended Memorandum. The petitions for panel rehearing are otherwise DENIED.

AMENDED MEMORANDUM**

Defendant Travelers Indemnity Company of Illinois ("Travelers") appeals from the judgment following a bench trial in an insurance coverage dispute between it and plaintiffs C. Preston Butcher ("Butcher") and Legacy Partners, Inc. ("LPI"). Butcher and the plaintiff in the underlying action, Mack Pogue, were in the process of dividing their real-estate holdings when Pogue brought suit against Butcher for making defamatory statements against him and his company, Lincoln Property Company ("Lincoln"). Butcher tendered the defense of the underlying action to Travelers. Travelers refused to defend on the ground that, while LPI was a Named Insured under the policy, LPI was not a named defendant in the complaint. Travelers appeals the district court's ruling on summary judgment that it breached the duty to defend. Travelers also appeals the ***186** district court's calculation of attorney fees following the bench trial. Butcher cross-appeals the court's denial of indemnification for the voluntary settlement reached between him and Pogue, and the district court's refusal to grant pre-tender attorney fees. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm on all grounds.

ANALYSIS

I. Appeal by Travelers


A. Dismissal of LPI



Travelers contends that LPI should have been dismissed from this case because LPI was not a named defendant in the underlying complaint. We disagree. The Travelers policy broadly covers any and all LPI "subsidiaries (including subsidiaries thereof), partnerships (limited or general), joint ventures, associations, corporations, trusts, joint tenancies,

tenancies in common or other entities or commercial enterprises." Travelers issued an insurance policy to Lincoln which named Lincoln as the first Named Insured and which contained a list of additional Named Insureds including LPI and Mack Pogue. Endorsements to the policy state that Travelers must defend not only LPI but also any "commercial enterprises" in which LPI or Lincoln has a "proprietary or managerial interest" in conjunction with any one or more Regional Partners. The policy lists Butcher as a Regional Partner.

LPI is the primary holding company for Butcher's west coast ventures, which include, among other named defendants, "Legacy Partners Commercial," "Lincoln Partners Agency," "Legacy Partners Residential," and "Legacy Partners Management." Although the Travelers policy does not insure Butcher in his individual capacity (as opposed to his capacity as a "Regional Partner" of Pogue or Lincoln), it does insure "commercial enterprises" in which LPI has "a proprietary or managerial interest." We conclude that LPI properly was a plaintiff in the underlying action against Travelers because of its intertwined relationships with Butcher and the other entities that were sued by Pogue.

B. Breach of the Duty to Defend

****2** Travelers also argues that because Pogue's complaint never mentioned LPI, Texas' restrictive "eight-corners" rule permitted it to deny a defense because an insurer could not reasonably recognize the potential for coverage based on the allegations in the underlying complaint or the terms of the policy.¹ In Texas, if the allegations state a claim that is potentially within the coverage of the policy, then the insurer has a duty to defend.  Heyden Newport Chem. Corp. v. S. Gen. Ins. Co., 387 S.W.2d 22, 25 (Tex.1965). The courts will liberally interpret the meaning of the factual allegations in the insured's favor. *Id.* In order to determine whether factual allegations are covered by a policy, however, the allegations must be at least specific enough to "create that degree of doubt which compels resolution of the issue for the insured."

 Nat'l Union Fire Ins. Co. v. Merch. Fast Motor Lines, 939 S.W.2d 139, 142 (Tex.1997). Although the court will not imagine factual scenarios that might trigger coverage or read facts into the pleadings, if a petition alleges facts within the scope of coverage, an insurer is legally required to defend the suit against its insured.  *Id.* at 141.

*187 In this case, the underlying complaint alleged that “Butcher ha[d] made false and disparaging statements to members of the media regarding the [Pogues].” Comparing the complaint and the insurance policy, we conclude, as did the district court, that Travelers erred in not defending Butcher and LPI. We agree that the complaint includes allegations that, when interpreted broadly and in favor of coverage, indicate that Pogue sought damages for disparaging remarks made by Butcher in his capacity as LPI’s officer or director. Travelers’ argument that it did not owe a defense since the complaint did not mention LPI by name is untenable given (1) the complaint named numerous ventures affiliated with LPI, and (2) the complaint made the specific allegation that Butcher made “statements to members of the media”—remarks that he made while announcing plans for LPI as LPI’s “CEO.” This factual allegation concerning “statements to members of the media,” though not referencing the *San Francisco Business Times* article by name, is “at least specific enough to ‘create that degree of doubt which compels resolution of the issue for the insured.’” *Devoe v. Great Am. Ins.*, 50 S.W.3d 567, 570 (Tex.Ct.App.2001) (quoting *Nat’l Union*, 939 S.W.2d at 142). Under Texas law, “any doubts ... [must be settled] in favor of the insured.” *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex.1987).

C. Fee Award for All Retained Counsel

Travelers next contends that the district court abused its discretion in awarding Butcher his fees associated with the use of five separate law firms to defend himself against Pogue’s multi-million dollar lawsuit. Travelers sets forth only the bald allegation that Butcher employed an unreasonable number of law firms. In a lawsuit threatening millions in damages, the use of five law firms is not per se unreasonable. Absent more than its own belief that the court erred in not deciding the issue differently, Travelers fails to establish that the district court abused its discretion in awarding Butcher his defense costs.²

D. Choice of Law and Attorneys’ Fees for This Case

**3 Relying on *Arno v. Club Med Boutique Inc.*, 134 F.3d 1424 (9th Cir.1998), Travelers contends that California rather than Texas law should govern the recoupment of attorneys’ fees. We disagree. *Arno* concerned a claim filed in a California court based on a tort that occurred in French territory. We held that California law governed attorneys’ fees because the French rule making fees discretionary “was not

enacted as a component of France’s tort compensation system, but as a general device to compensate prevailing parties in civil actions.” *Id.* at 1426. In contrast, the provision at issue here is both mandatory and specific to Texas insurance law.

See *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 1–5 (Tex.2000). In such cases, California courts consider damages to be substantive and not procedural. *Cf.*

Robert McMullan & Son, Inc. v. United States Fid. & Guar. Co., 103 Cal.App.3d 198, 162 Cal.Rptr. 720 (1980). The court properly applied Texas law.

E. Failure to Allocate Attorneys’ Fees

Travelers also contends that the district court erred in not allocating the attorneys’ fees between successful and unsuccessful claims in this case. Under Texas law, a party generally can only recover attorneys’ fees for successful claims, and must segregate them from fees related to unsuccessful claims. See *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10–12 (Tex.1991). However, a “recognized exception to this duty to segregate arises when the attorney’s fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their prosecution or defense entails proof of essentially the same facts.” *Id.* at 11 (internal quotation marks omitted). Butcher was unsuccessful in two of his three claims, but each claim, whether sounding in contract or tort, was interrelated with the others and arose out of the same transaction. See, e.g., *Gill Sav. Ass’n v. Chair King*, 783 S.W.2d 674, 680 (Tex.App.1989) (“[A]n award of attorney’s fees is permissible since there was a claim for and a finding of breach of contract, and the tort complained of arose out of that breach.”), cited favorably by *Stewart Title*, 822 S.W.2d at 11–12. Therefore, the district court did not err on this issue, and we adopt its reasoning.

F. Eighteen Percent Statutory Penalty

Pursuant to *Article 21.55 of the Texas Insurance Code*, the district court awarded Butcher 18 percent interest on his underlying defense costs. Travelers argues that the district court erred in applying Texas law because prejudgment interest is a procedural rather than substantive issue.

The recent decision in *Lund v. San Joaquin Valley R.R.*, 31 Cal.4th 1, 71 P.3d 770, 778 (Cal.2003), indicates

that prejudgment interest provisions are substantive if they constitute part of “the proper measure of damages” and are “inseparably connected with the right of action.” The statutory penalty imposed in [Article 21.55](#) satisfies these requirements. First, the purpose of the statutory penalty is to ensure that parties pay their damage judgments for breach of the insurance contract. This penalty is therefore intended to make the insured whole. Second, recovery of the judgment is too important to constitute a mere “local rule of procedure.”

[Monessen Southwestern Ry. Co. v. Morgan](#), 486 U.S. 330, 336, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988). Third, several Texas courts have held that [Article 21.55](#) is an element of damages for breach of the insurance policy. *See, e.g., Lusk v. Puryear*, 896 S.W.2d 377, 380 (Tex.Ct.App.1995). Fourth, the statute speaks for itself. Section 6 of Article 21.55 is entitled “Damages,” and states that the insurer “shall be liable to pay ... in addition to the amount of the claim, 18 percent per annum of such claim *as damages*, together with reasonable attorney fees.” [Tex. Ins.Code art. 21.55, § 6](#) (italics added). This 18 percent penalty is triple Texas’ ordinary 6 percent rate for prejudgment interest. The district court did not err in applying [Article 21.55](#).

****4** Next, Travelers argues that [Article 21.55](#) does not apply to this case because Butcher did not submit a “first party claim.” The Texas Supreme Court, however, has recently held that [Article 21.55](#) applied to an additional insured’s claim for coverage brought against the insurer. [Atofina Petrochem., Inc. v. Evanston Ins. Co.](#), 104 S.W.3d 247, 252 (Tex.2003). We ***189** therefore affirm the district court’s application of [Article 21.55](#) to third-party claims.

II. Cross Appeal by LPI and Butcher

A. Recoupment of Pre-Notice Legal Fees

Butcher argues that, contrary to the district court’s holding, he is entitled to recover legal fees incurred prior to his tendering the claim to Travelers. Butcher acknowledges that the claim contradicts the plain language of the insurance contract, which provides that “[n]o insured will, except at the insured’s own cost, *voluntarily make any payment*, assume any obligation, or incur any expense, other than for first aid, *without [Travelers’] consent*,” but argues that so long as the failure to notify did not cause Travelers actual prejudice, he can recover under the policy pursuant

to Texas’ “notice-prejudice” rule. *See Harwell v. State Farm Mut. Auto. Ins.*, 896 S.W.2d 170, 174 (Tex.1995). We disagree. Texas intermediate and Fifth Circuit decisions hold that an insured is not entitled to pre-notice legal fees where the contract precludes recovery. *See, e.g., E & L Chipping Co. v. Hanover Ins. Co.*, 962 S.W.2d 272, 278 (Tex.Ct.App.1998). Most telling is [Lafarge Corp. v. Hartford Casualty Insurance Co.](#), 61 F.3d 389 (5th Cir.1995), *reversed in part on other grounds, Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1 (Tex.2000), in which the Fifth Circuit stated:

[The insurer] should not be liable for any defense costs incurred prior to the date Lafarge tendered the amended petition because the ‘voluntary payment’ provision of the policy precludes liability for such pre-tender defense costs.... [U]nder Texas law, the duty to defend does not arise until a petition alleging a potentially covered claim is tendered to the insurer. The cases on which the district court relied to support its determination that pre-tender costs were recoverable are inapposite. The terms of the policy are unambiguous and therefore must be enforced as written.

Id. at 399–400 (citations omitted). Notably, in upholding the contract provision, the *Lafarge* court rejected the insured’s attempt to invoke the “notice-prejudice” rule. The court stated that “prejudice is only a factor when the insurer is seeking to avoid all coverage for failure to comply with the notice provisions of the policy.” *Id.* at 399 n. 19. We follow this well-established Texas authority and affirm the district court.

B. Duty to Indemnify

Butcher appeals the district court’s finding that the “no-voluntary payments” provision relieved Travelers of any duty to indemnify Butcher for the voluntary settlement between him and Pogue. With a few limited exceptions, California courts uphold contract provisions that permit the insured to

decline indemnification for any settlements made without the insurer's consent. *Jamestown Builders, Inc. v. Gen. Star Indem. Co.*, 77 Cal.App.4th 341, 91 Cal.Rptr.2d 514, 516–17 (Ct.App.1999). Butcher attempts to overcome the general rule by contending that: (1) the notice-prejudice rule bars reliance on the voluntary payments clause; (2) economic necessity made the settlement nonvoluntary; and, (3) there was sufficient evidence to show that Travelers' failure to defend caused Butcher to pay an excess amount to settle the case, including settlement of the covered claim of defamation. These contentions fail.

****5** First, the notice-prejudice rule does not apply here. Because the policy language expressly requires notifying the insurer before obtaining indemnification, the controlling rule is found in *Jamestown Builders*, ***190** 91 Cal.Rptr.2d at 516–17. In that case, the court considered the effect of a non-voluntary-payments provision. The court held that although an insured may ignore the provision once the insurer actually denies the tender, the insurer is not obligated to indemnify its insured for a voluntary settlement reached with a third-party claimant if the settlement is reached prior to denial and without consent. Second, as with Butcher's argument for pre-tender fees, we reject Butcher's attempt to restructure the terms of the contract and obtain more than he bargained for by arguing that economic necessity excused his delay in seeking indemnification. A sophisticated party like Butcher easily could have timely notified Travelers. Third, although Butcher contends he raised a triable issue of fact regarding the proper apportioning of the settlement, thereby requiring the district court to deny Travelers' summary judgment motion, Butcher bore the burden of proof at any trial, requiring him to set forth a prima facie case establishing the connection between the settlement and the defamation claim. See *Travelers Cas. & Sur. Co. v. Superior Court*, 63 Cal.App.4th 1440, 75 Cal.Rptr.2d 54, 64 (Ct.App.1998). This, he failed to do. It is insufficient that Pogue dropped the defamation claim after reaching an agreement with Butcher that made no mention of the defamation claim. Butcher's comment that he "overpaid" for the assets because of the outstanding defamation claim is not enough to apportion the alleged settlement.

C. Breach of the Implied Duty of Good Faith Dealing

Butcher contends that he produced sufficient evidence to create a triable issue that Travelers acted in bad faith. "[T]he reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact." *Amadeo v. Principal Mut.*

Life Ins. Co., 290 F.3d 1152, 1161 (9th Cir.2002) (quoting *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.*, 90 Cal.App.4th 335, 108 Cal.Rptr.2d 776, 784 (Ct.App.2001)). In *Amadeo*, however, the court stated that "[t]he genuine issue rule ... allows a district court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law." *Id.* at 1161. Butcher provides no credible evidence that Travelers acted unreasonably in denying coverage. Butcher instead relies on the general rule that the reasonableness of the insurer's conduct is a question of fact reserved for the jury. While this is usually the case, it is also true that the "genuine issue rule" permits the grant of summary judgment where it is clear that the insurer did not act unreasonably. We affirm the court's finding that this case falls under the genuine issue rule.

D. Attorneys' Fees for Prosecution of This Appeal

****6** Pursuant to Article 21.55 § 6 of the Texas Insurance Code, Butcher, as the prevailing party on his duty to defend claim, is entitled to an award of reasonable attorneys' fees. The district court declined to estimate the fees for prosecution of this appeal (which, apparently, is the procedure followed in the Texas courts), but they can now be fixed by this court pursuant to our own procedures.

We therefore award reasonable attorneys' fees on this appeal to Butcher as the prevailing party on his duty to defend claim and refer determination of the appropriate amount of such fees to the Appellate Commissioner, pursuant to Ninth Circuit Rule 39–1.9. Pursuant to said rule, ***191** Butcher shall file a timely request for such fees making a detailed showing of the amount sought.

CONCLUSION

For the foregoing reasons, we affirm the district court on all grounds, except with respect to the award of attorneys' fees for this appeal. Each party shall bear its own costs on appeal.

AFFIRMED.

All Citations

83 Fed.Appx. 183, 2003 WL 22905287

Footnotes

- * The Honorable A. Howard Matz, United States District Judge for the Central District of California, sitting by designation.
- ** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36–3.
- 1 We agree that Texas law applies to the duty to defend issue. The parties negotiated and executed the policy in Texas, Pogue filed and litigated the underlying lawsuit in Texas, and Travelers would have performed the contract in Texas. None of the relevant contacts clearly favored the application of California law. See Abogados v. AT & T, Inc., 223 F.3d 932, 934 (9th Cir.2000).
- 2 Travelers also claims that the fee award is unreasonable because: (1) the law firms conducted duplicative work; (2) the Shultz, Wright law firm focused on the settlement agreement rather than Butcher's defense; and (3) Jonathan Cox spent most of his time coordinating the five law firms. Even if the law firms spent some of their time coordinating among themselves, such time qualifies as time spent defending Butcher in what by all accounts was a large case with potentially massive damages. The district court did not abuse its discretion on these issues.

700 F.2d 268
United States Court of Appeals,
Sixth Circuit.

LOUISVILLE BLACK POLICE
OFFICERS ORGANIZATION, INC., et al.,
Plaintiffs-Appellants-Cross-Appellees,
v.
CITY OF LOUISVILLE, et al.,
Defendants-Appellees-Cross-Appellants.

Nos. 81-5466, 81-5491.

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Argued Sept. 1, 1982.

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Decided Feb. 4, 1983.

Synopsis

Appeal and cross appeal challenged award, by the United States District Court for the Western District of Kentucky, Charles M. Allen, Chief Judge, of attorney fees, in a civil rights case. The Court of Appeals, Holschuh, District Judge, sitting by designation, held that: (1) only upon finding that District Court has refused or failed to recognize guidelines of *Northcross v. Board of Education of Memphis City Schools* or, in applying those guidelines, has abused discretion left by those guidelines in the district court will Court of Appeals overturn fee award, and (2) no abuse of discretion was shown in refusing to make adjustment for inflation, in fixing fair market value of services, in reducing by 25% the hours claimed for preparation of plaintiffs' posttrial brief and by 50% the hours claimed for preparation of their posttrial reply brief, or in adding 33.33% contingency factor.

Affirmed.

See also D.C., 511 F.Supp. 825.

Attorneys and Law Firms

*270 Robert A. Sedler (argued), Detroit, Mich., William H. Allison, Jr., Paul Soreff, Juanita Logan Christian, Louisville, Ky., Jack Greenberg, Patrick O. Patterson, Clyde E. Murphy (lead counsel), New York City, Patrick O. Patterson, Los Angeles, Cal., for plaintiffs-appellants-cross-appellees.

Winston King (argued) Henry Triplett, Louisville, Ky., for defendants-appellees-cross-appellants.

Before LIVELY and KENNEDY, Circuit Judges, and
HOLSCHUH, District Judge.*

Opinion

*271 HOLSCHUH, District Judge.

This appeal and cross-appeal challenge the district court's award of attorneys' fees following plaintiffs' successful challenge of the discriminatory employment practices of the City of Louisville Police Department. The issues raised on this appeal result, for the most part, from a misreading of this Court's decision in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir.1979), cert. denied, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980), and from a failure to recognize that *Northcross* did not eliminate all discretion on the part of district courts in awarding attorneys' fees in civil rights litigation. For the reasons set forth below, we hold that in its award of attorneys' fees in the present case the district court properly exercised its discretion within the guidelines of *Northcross*. We therefore AFFIRM.

I.

The underlying class action discrimination suit was brought initially under 42 U.S.C. §§ 1981 and 1983, alleging that the City of Louisville Police Department had violated the Fourteenth Amendment rights of the plaintiffs. The complaint was later amended to allege claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. On March 7, 1977, trial commenced in the district court on the issues of recruitment, entry-level testing, selection and hiring. The case, tried in stages, took five weeks of trial time. After the final transcript of the proceedings was completed and filed in May 1978 the parties jointly requested and the district court granted additional time for filing post-trial briefs in order that settlement negotiations could take place. The negotiations were unsuccessful, and in September 1978 counsel for plaintiffs filed their post-trial brief and proposed findings of fact and conclusions of law. The defendants then filed their post-trial brief in February 1979, and plaintiffs filed their post-trial reply brief in May 1979.

On September 18, 1979, the district court issued findings of fact, conclusions of law, and a memorandum opinion, finding, *inter alia*, that the City had a history of racial segregation and

discrimination in its police employment practices. The court entered a preliminary injunction with respect to the hiring of black police officers by the defendants. In addition, the district court held that counsel for plaintiffs were entitled to recover interim attorneys' fees, costs and expenses. On May 2, 1980, the parties signed a consent decree which substantially incorporated the remedies set out in the court's preliminary injunction. However, the decree, which was approved by the court, did not resolve the question of interim attorneys' fees, costs and expenses, and the parties were unable to reach any agreement regarding this matter.

The plaintiffs then moved for an award of attorneys' fees in the amount of \$629,182. In support of the motion, plaintiffs' counsel submitted detailed time logs, affidavits of Louisville attorneys regarding prevailing hourly rates for attorneys practicing in the Louisville area, and a summary of the experience and qualifications of the attorneys who participated in the litigation. In addition to submitting the number of hours each attorney spent on the case, plaintiffs also submitted hourly rates for each of the attorneys computed on the basis of each attorney's years of experience at the time the services were rendered. Different rates were proposed for in-court as opposed to office time.

The attorneys for whom fees were claimed are as follows: The principal attorney for the plaintiffs at the time the suit was filed in 1974 was William Allison of Louisville. In 1974-75 he was assisted by Henry Hinton of Louisville. Paul Soreff, who first became involved in the case in 1975 while still a law student, joined Mr. Allison in this case in 1976 when he was admitted to practice. After being denied assistance in litigating the case by the United States Department of Justice, attorneys Allison and Soreff asked the NAACP Legal Defense Fund to assist them. The Legal Defense Fund (LDF) agreed to participate, and LDF attorneys entered the case as *272 counsel for plaintiffs in 1976. Patrick O. Patterson was the primary LDF attorney assigned to the case. He was assisted by Deborah M. Greenberg in 1977, by Kristine S. Knaplund, a volunteer LDF attorney, and by paralegals and other members of the LDF staff. Juanita Logan Christian performed services for plaintiffs while serving as an Earl Warren Fellow at the LDF in 1977 and then served as additional counsel for plaintiff when she entered private practice in Louisville. Frederic Cowden of Louisville also performed some work in 1977.

The City of Louisville challenged the application for attorneys' fees, contending that plaintiffs' attorneys were

entitled to recover no more than \$136,336 as interim attorneys' fees and submitting affidavits of other Louisville attorneys on the question of prevailing rates for legal services in the Louisville area in support of the City's contention.

On February 12, 1981, the district court issued its findings of fact, conclusions of law and memorandum opinion on plaintiffs' motion for attorneys' fees, costs and expenses and entered a judgment thereon. On March 17, 1981, the district court issued a memorandum opinion clarifying its judgment. The court's second opinion set forth in detail the computations it used in calculating the awards. In this Court's review of the district court's decision, the two opinions will be treated as one.

The district court's computation of fees consisted of three principal elements: (1) a determination of the number of hours to be compensated, (2) a determination of a reasonable dollar compensation for those hours, and (3) the addition of a 33.33% contingency factor to the product of the first two. In determining the number of hours to be compensated, the court accepted the hours submitted by the applicants but made the following adjustments. The court concluded that the time sought to be approved for preparing the plaintiffs' post-trial brief (327.90 hours) was excessive by 25% and that the time sought to be approved for preparing the reply brief (511.15 hours) was excessive by 50%. The court, therefore, reduced by 25% and 50%, respectively, the hours each attorney claimed as having been spent on the post-trial brief or the reply brief. In addition, in accordance with the small percentage reduction to eliminate duplication of services approved in *Northcross*, the court reduced by 5% all remaining hours.

The more difficult task before the district court was the assignment of reasonable hourly rates to the approved hours of service. The court prefaced its determination by noting that neither *Northcross* nor other authorities provide specific guidance as to the relationship between a lawyer's experience and his or her ability to charge higher rates based on that experience.

As to Ms. Greenberg's fee, the court compared her experience and skill to that of Mr. Lucas, one of the attorneys in *Northcross*, and determined that the hourly rate of \$75 per hour for office work and \$106 for trial work would adequately compensate Ms. Greenberg who participated in the litigation in 1977 only.

As to the fees for Ms. Knaplund and Mr. Cowden, the court found that the \$40 per hour rate established for Mr. Cowden in another civil rights action in the same court, *Lanier v. City of Louisville*, Civil Action No. C77-0455L(A), represented a reasonable fee for both Mr. Cowden and Ms. Knaplund for services rendered in their first two years of practice.

With regard to the hourly rates of the other attorneys, the court established three categories. An attorney with zero to two years experience was labeled "inexperienced," one with

two to seven years experience was labeled "intermediate," and one with more than seven years experience was labeled "fully experienced." In addition, for all attorneys, the court adopted an increase of roughly 40% over the base rate for work done in the courtroom. Based on this formula and taking into account the affidavits of Louisville attorneys on the issue of prevailing rates, the court determined the following rates would reasonably compensate plaintiffs' attorneys:

Attorney	Admitted to Practice	Years Service Rendered	Basic Rate	In-Court Rate
Allison	1969	1974-76	\$ 50	
		1977-79	\$ 65	\$ 90
Patterson	1972	1976-79	\$ 50	\$ 70
Soreff	1976	1975	\$ 20 *	
		1976-78	\$ 40	\$ 56 (1977)
		1978-79	\$ 60	
Hinton	1971	1974-75	\$ 50	
Christian	1977	1977	\$ 20 *	
		1977-79	\$ 40	\$ 56
Knaplund	1977	1978-79	\$ 40	
Cowden	1975	1977	\$ 40	
Greenberg	1957	1977	\$ 75	\$106

*273 Finally, as noted earlier, after computing a total based on the number of approved hours multiplied by the appropriate hourly rate, the court adopted a contingency factor of 33.33% to increase by that percentage the total fee to

be awarded each attorney. The court denied plaintiffs' request for an additional increase of fees based on inflation. Based on the above formula, the following fees were then awarded:

Paul Soreff	\$72,132.17
William Allison	46,503.51

Patrick Patterson	89,891.09
Deborah Greenberg	17,178.93
Juanita Christian	10,877.60
Christine Knaplund	6,098.27
Henry Hinton	3,093.20
Frederic Cowden	1,471.47
Allison, Soreff and Garber	751.00
for paralegals	
Allison, Soreff and Garber	3,852.40
for Paul Soreff's services as	
law student	
NAACP Legal Defense	4,422.25
Fund for Juanita	
Christian's services as law	
student	

The court also awarded plaintiffs their full claim for costs and expenses in the amount of \$23,468.03.

On March 30, 1981, plaintiffs' attorneys moved to amend the district court's findings of fact, conclusions of law and memorandum opinion of February 12, 1981, and asked the court to alter and amend its memorandum opinion and final judgment entered March 17, 1981. The district court denied the motion in a memorandum opinion and order filed June 3, 1981. On June 19, 1981, the plaintiffs and their attorneys perfected this appeal from the awards made by the district court. On July 2, 1981, defendants-appellees filed a notice of their appeal on the issue of the contingency fee awarded by the district court.

II.

This case raises several questions regarding the extent of the district courts' discretion in awarding attorneys' fees in civil rights cases after this Court's decision in Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624

(6th Cir.1979), cert. denied, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980). The *Northcross* court rejected the "list of factors for consideration" approach first suggested in

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714

(5th Cir.1974), and relied upon by this Court in Monroe v. County Bd. of Education, 505 F.2d 109 (6th Cir.1974), because it did not lead to consistent results or, in many cases, reasonable attorneys' fees. In its stead, this Court promulgated a uniform approach to guide the district courts in making fee awards.

The *Northcross* approach, which is grounded in the number of hours expended on each case, requires the district courts to make clear and adequate findings of fact on the record sufficient to enable an appellate court to intelligently review the award. *Northcross* sets forth guidelines for awarding a "reasonable fee" with specific factors to be considered in determining the number of hours of service to be compensated as well as a reasonable rate of compensation. It is the effect of these guidelines on the district court's discretion that is at issue in the present appeal. The plaintiffs-appellants assert that the district court erred as a matter of law because it

did not follow “rules of law” established by *Northcross*. Defendants-appellees argue that the *Northcross* guidelines are discretionary and that an award is to be overturned only upon a finding that the district court abused its discretion.

*274 Specifically, the applicants assert that the *Northcross* approach embodies the following rules of law which the district court must follow: (1) Where an award of fees is made a substantial period of time after services have been rendered, the award must be adjusted for the effects of inflation. (2) A fee award must be based on the fair market value of the particular attorney, and the court must therefore taken into account the “institutional expertise” of the NAACP Legal Defense Fund and the specialized training and experience of LDF attorneys. (3) Documented hours may be reduced only when there is evidence that such hours were not expended in the goodfaith representation of the plaintiffs. (4) A contingency fee must be awarded when there are special circumstances, such as unusual time constraints or an unusually unpopular cause, which affect the market value of the services rendered, or where there is a risk that the plaintiff will not prevail. Essentially, the gravamen of applicants' argument is that *Northcross* virtually stripped the district courts of any discretion in awarding attorneys' fees and substituted therefor a rigid formula which the district courts are required to use, acting in an administrative, more than judicial, capacity.

The applicants' argument is based largely upon a misconception of this Court's decision in *Northcross*. That decision is not to be interpreted as imposing upon the district courts rigid rules of law. Rather, the *Northcross* approach is a method for the district courts to use in making fee awards. Although, after *Northcross*, the district courts' discretion is to be exercised within the framework of the guidelines, all discretion of the trial court was certainly not extinguished by that decision. See e.g., *Stewart v. Rhodes*, 656 F.2d 1216 (6th Cir.1981), cert. denied, 455 U.S. 991, 102 S.Ct. 1617, 71 L.Ed.2d 851 (1982). This Court recognized then as it does today that the district court judge who presided over a case is in the best position to evaluate the reasonableness of fee requests, both in terms of the number of hours spent and a reasonable hourly rate of compensation. The dual aim of *Northcross* was to establish some uniformity in the district courts' approach to awarding fees and to require the making of a record sufficient to facilitate meaningful appellate review. It did not establish rules of law to be slavishly applied. Only upon a finding that a district court has refused or failed to recognize the *Northcross* guidelines or, in applying those

guidelines, has abused the discretion left by those guidelines in the district court, will this Court overturn a fee award.

III.

The applicants have challenged three specific aspects of the district court's award in the present case: (1) its treatment of the inflation factor, (2) the hourly rates established for LDF attorneys, and (3) the reduction of documented hours of service. They assert that the district court erred as a matter of law on each of these issues. In addition, the defendants-appellees have cross-appealed, challenging as a violation of the *Northcross* approach and a possible abuse of discretion the 33.33% contingency factor which the district court included in the award.

A.

In *Northcross*, this Court stated that

[a]mong other factors, the district court will be required to consider whether the inflation of the intervening years must be taken into account, or whether the lower rate which prevailed for services at the time they were rendered has been balanced by the long delay which will reduce the purchasing power of the award's dollars in the present marketplace.

611 F.2d at 640. Applicants argue that the district court was therefore required to base hourly rates on either the rates prevailing at the time services were rendered and then adjust those rates for inflation, or on the hourly rates currently prevailing at the time of the award.

Northcross, however, does not mandatorily require the district court to adjust for inflation in every fee award. Rather, in keeping with the discretionary nature of *275 fee awards, *Northcross* required only that the district court in that case consider whether the inflation of the intervening years must be taken into account. This is clear from the factual background of *Northcross*.

Northcross was a school desegregation case which was first filed in 1960 and required continuous litigation through 1977. The district court awarded attorneys' fees in 1977 and again in 1978. The 1977 award involved services rendered as early as 1960 for which plaintiffs' attorneys would not be compensated until 1980. This Court remanded that award for further proceedings because there had not been an adequate evidentiary hearing relating to the pre-1971 services and expenses. The district court was directed to *consider* on remand the impact of the inflation of the intervening years in calculating the new award. However, with regard to the 1978 award, which involved only services rendered in 1977, this Court concluded that the record was adequate to enable this Court to independently assess an appropriate award. In determining the hourly rate to be applied to that award, this Court in 1980 relied upon the affidavits of the attorneys which had been accepted by the district court in 1978, made no adjustment for the inflation of the intervening two years and did not request that the attorneys update the rates they had submitted. Consequently, this Court's statement regarding inflation must be read in the context of the particular facts of *Northcross* and not as establishing a hard and fast rule to be applied in every case.

It is clear in the present case from the district court's memorandum opinions of February 23, 1981, and June 4, 1981, that the district court recognized its authority under *Northcross* to consider the effect of inflation in its determination of reasonable fees to be awarded. The district court found, however, that the applicants had been "fairly and adequately compensated without the addition of an inflation factor or the use of a present value-based calculation." In support of its conclusion, the district court distinguished the present case from the facts in *Northcross*. It compared the number of years between the time services were performed and the time of compensation in *Northcross* with the relatively few number of years involved in the instant case (1974 to 1981). In further support of its conclusion, the court noted that


[t]his action was relatively dormant during the years 1974–76, and that great surges of activity took place in the latter years of litigation, and that long periods of time ensued between the trial of the action and the final decision of the Court due, in considerable measure, to the parties'

desire for extensions of time in which to file briefs.

(District Court's Findings of Fact, Conclusions of Law and Memorandum Opinion, February 12, 1981.) The record supports the district court's finding that the bulk of attorneys' services (83.2%) were rendered in the years 1977–1979. Therefore, for most of the hours claimed, a maximum of four years had elapsed before the district court's award was made, and although the period of delay in the present case is greater than the two-year delay in the *Northcross* 1978 award for which inflation was not considered, it is far shorter than the enormous delay in the *Northcross* 1977 award for which this Court directed a consideration of inflation. Certainly nothing in *Northcross* requires an inflation adjustment of the type demanded by applicants under the circumstances of the present case.

Further support for our conclusion that the district court did not abuse its discretion in refusing to directly adjust for inflation can be found in the substantial 33.33% contingency factor awarded by the district court in this case. Although *Northcross* does not refer to delay in payment as an example of a special circumstance that would support a contingency adjustment, the Court of Appeals for the District of Columbia, which has adopted a fair market value approach similar to the Sixth Circuit approach, has recognized delay as one reason for awarding a contingency fee:

Another factor to be considered under the general rubric of "contingency" adjustments is that delay in the receipt of fees may warrant an increase in them.

*276  *Copeland v. Marshall*, 641 F.2d 880, 906 n. 61 (D.C.Cir.1980) (*en banc*). While it is clear that in a proper case a district court is justified in awarding a contingency factor, without regard to whether there should also be an adjustment for inflation, primarily because of the risk of non-payment often shouldered by plaintiffs' attorneys in this type of litigation, applicants' attempt to isolate each "factor" of an award for purpose of review is misdirected. The guidelines of *Northcross* are just that—guidelines—and the appellate function is not to dissect and microscopically examine each

factor considered by the trial court in isolation from the rest. The overall concern is whether the total award was reasonable and within the proper discretion of the trial court. In making that determination the allowance of a substantial contingency factor by the trial court is a circumstance that is properly considered, even if the explanation for that contingency factor does not specifically include delay in receipt of fees. On the record before the district court, and this Court, we find no abuse of discretion on the part of the district court in its refusal to further increase the substantial fees awarded by adding still another percentage as an inflation factor.

B.

Applicants further claim that the district court erred as a matter of law in basing hourly rates of the LDF attorneys on the prevailing rates for Louisville, Kentucky. This argument has two components: (1) that the Legal Defense Fund has acquired an institutional expertise in civil rights cases that makes the time of its attorneys more valuable than the time of most private attorneys providing representation in such cases; (2) that the value of the services of those attorneys should be based on a national market rather than on a local market. We will address each of these claims separately.

1. Institutional Expertise

Applicants argue that by computing the fee award for the LDF attorneys on the basis of prevailing hourly rates for attorneys practicing in Louisville, the district court erroneously ignored the fact that LDF attorneys worked for an organization with a "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation" [citing *NAACP v. Button*, 371 U.S. 415, 422, 83 S.Ct. 328, 332, 9 L.Ed.2d 405 (1963)]. They note the special training and experience in civil rights litigation received by Ms. Greenberg and Mr. Patterson as LDF attorneys as well as the fact that they are both highly qualified and experienced specialists in litigating employment discrimination cases. They also note the institutional expertise and resources of the Fund itself and claim that because the award goes to the LDF itself, the district court must compensate the total services provided by the Fund, including its institutional expertise and resources.

This Court does not dispute the excellent reputation of the Legal Defense Fund. In *Northcross* it was specifically noted that the LDF attorneys' "intimate familiarity with the

issues involved in desegregation litigation undoubtedly meant that their time was far more productive in this area than would be that of a local attorney with less expertise." 611 F.2d at 637. However, we agree with the district court that nothing in *Northcross* requires that attorneys associated with a particular organization be accorded fees higher than their other qualifications would warrant on the assumption that their employment by that organization presumptively makes them superior to other attorneys who specialize in the same area of law.

On the subject of compensation for institutional attorneys, *Northcross* specifically provides that "[f]or those attorneys who have no private practice, the rates customarily charged in the community for similar services can be looked to for guidance." 611 F.2d at 638. However, in keeping with the discretionary nature of fee awards, we did not require the district court to look *only* to such rates. In fact, there is nothing in *Northcross* to prevent a district judge *277 from adjusting a fee upward or downward to reflect the quality of representation. See *Copeland v. Marshall*, *supra*. Likewise, there is nothing in *Northcross* or any of this Court's subsequent opinions which requires such an adjustment. We defer to the district court's judgment on such matters because, unlike an appellate court which is not well situated to assess the quality of counsel, the district court judge closely monitors the litigation on a day-to-day basis and is in close contact with counsel. The record indicates that the district judge followed *Northcross* in looking to the local rates as guidance for setting hourly rates. In doing so, he acted well within his discretion, and his decision, therefore, will not be reversed.

2. The Appropriate "Community"

Applicants further assert that the hourly rate established for the LDF attorneys is erroneous as a matter of law because the district court looked to a "local market" rather than to a "national market" in determining the value of their services. In support of this argument, applicants cite the Congressional directive that the amount of fees is to be governed "by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." *Northcross*, 611 F.2d at 633, quoting S.Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) U.S.Code Cong. & Admin.News 1976, pp. 5908, 5913. They draw an analogy between LDF attorneys who represent civil rights plaintiffs on a nationwide basis and national law firms which successfully represent plaintiffs in antitrust and securities actions and

argue that because the latter are not expected to discount the value of their services in accordance with prevailing local rates, LDF attorneys, likewise, should not be compensated at local rates.

This Court recognizes that institutional attorneys are to be treated no differently than private attorneys simply because the former may be salaried at a lower rate. The fair market value of services is the proper standard for both. However, there are practical differences in determining reasonable rates for the two groups.

As was pointed out in *Northcross*, the marketplace normally sets a value for a private attorney's services: "The hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney." 611 F.2d at 638. The LDF attorneys in the present case cannot offer such a marketplace determination of their rates. Although they presented the district court with an affidavit describing reasonable rates for attorneys practicing in New York City, the location of the LDF offices, there is no evidence that the New York rate is the fair market value of their services as individual attorneys. New York City happens to be the geographical location of the headquarters of the LDF, but the location of an attorney's office is not necessarily a measure of the fair market value of that attorney's services where, as here, the attorney has not practiced as a private attorney at that location to the extent the marketplace has established his or her value. LDF's choice of New York City as a headquarters site should no more require the application of New York City rates than would Oswego, New York, rates automatically be required if the LDF should decide for some reason to relocate its headquarters in that city.

This is not a case in which a private out-of-town practicing attorney has been called in to try a case. In such a situation, the court would be justified in looking to his or her standard rate in the community where that attorney normally practices as a reflection of that attorney's training, background, expertise and skill. However, for non-private attorneys such as the LDF attorneys, *Northcross* offered an alternative method of determining the proper rate—that "rates customarily charged in the community for similar services ... be looked to for guidance." 611 F.2d at 638. In *Horace v. City of Pontiac*, 624 F.2d 765, 770 (6th Cir.1980), this Court suggested that the community to be looked to was "the jurisdiction where the case was tried." That is precisely what the district court did

in this *278 case. We therefore hold that in so doing it did not abuse its discretion.

Today's holding is not to be interpreted as *requiring* district courts to always base the fees awarded non-private attorneys on local rates. District courts are free to look to a national market, an area of specialization market or any other market they believe appropriate to fairly compensate particular attorneys in individual cases. See, e.g., *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir.1982), *petition for cert. filed* 50 U.S.L.W. 3949 (May 19, 1982). *Northcross* and *Horace* offered the local market approach as an *acceptable* approach to determining rates of compensation. However, we reiterate today that the district courts retain their discretion in such matters constrained only by their duty to achieve the goal enunciated in *Northcross*: "to make an award of fees which is 'adequate to attract competent counsel, but which do not produce windfalls to attorneys.'" 611 F.2d at 633. Focusing on the fair market value of the attorney's services will best achieve that goal, and the district court judge is clearly in the best position to determine that value.

C.

Applicants' final ground for appeal is that the district court erred as a matter of law in reducing by 25% the hours claimed for preparation of plaintiffs' post-trial brief and by 50% the hours claimed for preparation of their post-trial reply brief. They do not here challenge the district court's across-the-board reduction of 5% of all hours claimed, conceding that such a reduction for duplication was within the district court's discretion. Applicants contend that *Northcross* requires that attorneys for successful plaintiffs in civil rights cases be compensated for all the documented hours spent in the good faith representation of their clients, and that consequently the district court retains no discretion to reduce documented hours which in its opinion are not reasonably expended in the representation of the plaintiffs. Applicants assert that the district court's authority to reduce hours was strictly limited to the reasons stated in *Northcross*—"hours may be cut for duplication, padding or frivolous claims." 611 F.2d at 636.

By focusing on this single statement, taken out of context, applicants have misinterpreted the meaning of *Northcross*. It is clear from the language and the facts of *Northcross* that this Court did not divest the district courts of their discretion in assessing the number of hours to be compensated. After

concluding in *Northcross* that a fee calculated in terms of hours of service provided the fairest and most manageable approach to calculating a reasonable fee, this Court directed that,

[t]he district court should indicate on the record the number of hours it finds the plaintiffs' attorneys have expended on the case *The hours claimed need not be automatically accepted by the district court*, but to the extent that hours are rejected, the court must indicate some reason for its action, so that we may determine whether the court properly exercised its discretion or made an error of law in its conclusion.

611 F.2d at 636 (emphasis added). This Court's review of the *Northcross* district court's reduction of hours further illustrates the proper standard of review of a district court's reduction of documented hours. Because the district court in that case had simply eliminated, without comment, hundreds of hours of documented service, the 1977 award was remanded for entry of findings of fact adequate to permit review. The wholesale exclusion by the district court of all hours of service rendered by LDF attorneys was reviewed under an abuse of discretion standard. This Court found there was such abuse under the circumstances of that case.

The lesson of *Northcross* is not that this Court has established fixed rules of law regarding a district court's reduction of documented hours. Rather, the aim of the *Northcross* Court was to provide the district courts with an analytical approach to the difficult task of determining compensable hours, an approach which would be fully *279 reviewable by this Court. The guidelines of *Northcross* are nothing more than that—they are not inflexible rules or rigid requirements for decision-making. Accordingly, the district court's determination of hours in the present case shall be reviewed on two levels: (1) Did the district court adequately document which hours it was excluding and its reasons therefor? (2) Did the district court abuse its discretion in so reducing the number of hours claimed?

We believe that the district court judge sufficiently complied with the procedural requirement of *Northcross*. In the findings of fact, conclusions of law and memorandum opinion filed February 12, 1981, the trial judge accepted as accurate the hours claimed by the applicants and then reduced by a specific number the hours claimed for specific services (25% of hours claimed for the post-trial brief and 50% of hours claimed for the reply brief). The district court also set forth as the reason for the reduction in hours its conclusion that the time claimed by applicants was "excessive." Although a more specific finding on the excessiveness of the hours would have been preferable, the percentage by which the hours were reduced was clearly justified by the manifest excessiveness of the claimed 42 eight-hour days to prepare the post-trial brief and 68 eight-hour days to prepare the reply brief, especially in light of the fact that the district court had allowed all hours claimed for reviewing transcripts preparatory to writing the briefs.

Furthermore, the judge's conclusion in this regard cannot be termed arbitrary, for he expressly took into account the complexity of the issues in the case and the fact that the defendants had filed "a lengthy and exhaustive brief, findings of fact and conclusions of law." (Opinion of February 12, 1981). The district judge also cited case authority in support of his conclusion. (*Anderson v. Redman*, 474 F.Supp. 511 (D.C.Del.1979)).

The district court's decision, therefore, is fully reviewable by this Court. There is no question that the district judge was in the best position to evaluate the reasonableness of the time claimed for plaintiffs' briefs in terms of both their quality and the difficulty of the issues they addressed. We find that the reduction of hours was neither arbitrary nor conclusory, and there is nothing on the record to indicate that the court's refusal to award those hours was an abuse of discretion. We therefore affirm that aspect of the district court's award.

D.

The final issue before this Court is the propriety of the district court's upward adjustment of the base fee by a 33.33% contingency factor. This issue was raised on cross-appeal by the defendants-appellees who assert that the district court's failure to articulate its reasons for using a contingency factor rendered the award unreviewable. Furthermore, they assert that this is not a case in which a contingency adjustment would be appropriate as contemplated by the *Northcross*

Court. In response, applicants argue that the inclusion of a contingency adjustment is not a matter of discretion but is required in two situations, both of which are present in this case.

In *Northcross*, this Court approved the upward adjustment of fees by a contingency factor when the routine hourly rate would not otherwise be “reasonable.” 611 F.2d at 638. This Court emphasized that a contingency factor was not to be used as a “bonus,” but as “part of the reasonable compensation to which a prevailing party's attorney is entitled under § 1988.” *Id.* By way of example, two reasons were stated why a routine award might not be reasonable: (1) when the case involved “special circumstances, such as unusual time constraint, or an unusually unpopular cause, which affect the market value of the services,” and (2) when there was a substantial risk of losing the case, because it involved developing areas of law or strongly disputed facts. *Id.*

Both parties have misinterpreted this aspect of *Northcross*. Although this Court did suggest circumstances which would warrant a contingency adjustment, it *280 was not intended to thereby limit the reasons a district court might rely upon in making such an adjustment, nor did this Court intend to require district courts to so adjust whenever the circumstances referred to in that decision exist in a particular case. As is true of the other factors discussed above, the decision to make a contingency adjustment is within the sound discretion of the district court, limited only by the requirement that the fee award be reasonable.

We agree with defendant that the district court made no findings as to whether there existed circumstances sufficient to warrant a contingency adjustment. In *Northcross* this Court did not specifically require the district courts to enter upon the record their findings in support of a contingency adjustment, but in keeping with the overall thrust of *Northcross*, it is our opinion that, with regard to contingency adjustments, “the court's findings and its mode of analysis must be clear to enable an appellate court to intelligently review the award.”

Northcross, 611 F.2d at 632. The district court's failure to articulate its reasons for the contingency factor in the present case is error and could be a ground for remanding the case for such findings.

The requirement of making such a record is to be complied with by the district courts in all fee awards. However, in light of the already protracted nature of the litigation over

attorneys' fees in this case we hesitate to prolong the case by remanding it for further findings. The record on appeal is adequate to allow this Court to review the district court's contingency adjustment for an abuse of discretion. *Monroe v. County Board of Education*, 583 F.2d 263, 265 (6th Cir.1978);

Northcross, 611 F.2d at 632. For the reasons that follow, we hold that the circumstances in this case support the 33.33% contingency adjustment awarded by the district court.

This Court stated in *Northcross* that a significant factor which renders a routine hourly fee unusually low is the fact that the award is contingent upon success. We noted that the risk was greatest in cases involving developing areas of law or those in which the facts are strongly disputed. 611 F.2d at 638. Both elements were present in this case, thereby supporting “a substantial upward adjustment to compensate for the risk.” *Id.*

Although defendant is correct that the proscription against discrimination in hiring on the basis of race was not disputed at the time this suit was filed in 1974, it cannot be said that the law of employment discrimination was not a developing area of the law at that time. As applicants correctly point out, during the course of the case there were several landmark decisions by the Supreme Court concerning issues relevant to this case—employment testing, proof of intentional discrimination, the use of statistical evidence, the determination of a relevant labor market and the permissibility of race-conscious remedies.¹ Furthermore, we find that the district court's extensive findings of fact filed September 18, 1979, the length of the trial on the issues (five weeks), and the vigorous opposition by the City are all indicative of a case in which the facts were strongly disputed.

In addition to these two elements which contributed to the risk of success in this case, we are also persuaded by applicants' argument that the risk of not prevailing was greater in this case than it was in *Northcross*, in which this Court awarded a 10% contingency adjustment. In the present case, the burden was on the plaintiffs to prove discrimination. In *Northcross* the defendant school board, not the plaintiffs, had the burden of showing a justification *281 for altering a final desegregation decree. In setting the fees for that aspect of the case (the 1978 Fee Award) this Court made a 10% upward adjustment in the regular billing rate because “there was a real element of contingency as to whether the attorneys would be compensated for their services at all.” 611 F.2d at 641. The relatively low 10% figure was considered to be reasonable because “[g]iven that the burden was on the Board,

we [did] not believe that there was a very large chance that the plaintiffs would wholly fail to prevail.” *Id.* Plaintiffs in the present case, because they bore the burden of proof, had a greater risk of not prevailing and the consequent risk of non-payment than did the *Northcross* plaintiffs. Accordingly, we find that the district court acted properly in awarding a contingency adjustment in this case greater than that awarded in *Northcross*.

Furthermore, as noted earlier in this opinion, the district court in the present case did not make any specific adjustments for inflation, finding that the applicants had been “fairly and adequately compensated without the addition of an inflation factor or the use of a present value-based calculation.” The district court undoubtedly took into consideration in this regard the 33.33% contingency factor awarded by the court and may have properly concluded that this substantial increase in the fees awarded served also to compensate the applicants for any delay in the receipt of their fees. In determining the reasonableness of the additional 33.33% awarded to the applicants, we examine it in light of the entire amount awarded, and in that connection we take into consideration the fact that no separate percentage increase

was made for inflation, a fact which serves to further support the reasonableness of this incremental award.

In affirming the district court's refusal to specifically adjust for inflation, we stated earlier in this opinion that, “the overall concern is whether the total award was reasonable and within the proper discretion of the trial court.” Guided by that same concern, this Court finds, for the reasons stated, that the district court did not abuse its discretion in awarding the applicants the increase of 33.33% in order to arrive at a total amount representing, as it does, reasonable compensation to the prevailing parties' attorneys in this case.








IV.

For the reasons set forth above, the district court's award of attorneys' fees is AFFIRMED in all respects. Each party shall bear its own costs on this appeal.

All Citations

700 F.2d 268, 30 Fair Empl.Prac.Cas. (BNA) 1505, 31 Empl. Prac. Dec. P 33,321

Footnotes

- * Honorable John D. Holschuh, Judge, United States District Court for the Southern District of Ohio, sitting by designation.
- * before admission to bar
- ¹ See, e.g.,  *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975);  *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976);  *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977);  *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977);   *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978);  *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979).

1995 WL 306166

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Revedia Joan Forrester LOWE, Plaintiff-Appellant,

v.

JOHNSON COUNTY and Sheriff

Ed Casey, Defendants-Appellees.

No. 03A01-9309-CH-00321.

|

May 19, 1995.

Attorneys and Law FirmsWilliam E. Anderson and Melvin J. Werner, Kingsport, TN.Thomas J. Garland, Milligan & Coleman, Greeneville, TN.

SUSANO.

OPINION

*1 The sole issue in this action filed pursuant to the Tennessee Human Rights Act (THRA)¹ is whether the judgment in favor of the plaintiff for attorney's fees and expenses is reasonable. The Chancellor concluded

that an award of Twelve Thousand Dollars (\$12,000.00) in attorney and associated fees is appropriate, plus all court costs, court reporting fees, and expert fees of witnesses who testified at trial.

The plaintiff appeals. She contends that the fees and expenses awarded by the Chancellor are unreasonably low. We agree.

I

This litigation was commenced on March 12, 1992, when the plaintiff, a former Johnson County deputy sheriff, sued² Johnson County and its sheriff, Ed Casey, for compensatory and punitive damages allegedly resulting from discriminatory practices in violation of the THRA. The plaintiff alleged that she was "forced to endure a work environment in which

sexual harassment and intimidation were prevalent to such an extent as to alter the conditions of [her] employment and create an abusive working environment." She further alleged that her termination, effective January 30, 1992, was "a subterfuge for sex discrimination." She later added a specific claim for retaliatory discharge.³

The plaintiff's claims were tried to a jury of Johnson County residents. The trial lasted six days. The plaintiff's claims of sex discrimination, sexual harassment, and retaliation were submitted to the jury. On May 16, 1994, the jury returned a verdict against the defendants for \$25,000 based on its finding that the sheriff had terminated the plaintiff in retaliation for her claims of sex discrimination and sexual harassment. The jury exonerated the defendants on the plaintiff's underlying claims of gender discrimination and harassment.

The plaintiff filed a post-trial motion for attorney's fees and expenses.⁴ As later updated, the motion requested fees and expenses as follows:

After a hearing on the motion, the trial court awarded the plaintiff a fee of \$12,000 on her request for \$96,017.25. He limited his award for expenses to the court costs, court reporting fees, and expert fees of witnesses who testified at trial. In a lengthy written memorandum opinion, he concluded that the legal theories were "relatively simple and straightforward;" that the issues were not novel; that the difficulty of the case was "slight to low-moderate;" that the attorney and paralegal hours were excessive; that the legal assistants' time was overhead and should not be separately charged; that the expenses were excessive; that there was no evidence that the plaintiff's case precluded other employment by her counsel; that the two affidavits submitted by the plaintiff regarding the reasonableness of the fee and expense request were by experienced trial attorneys, which the plaintiff's counsel were not; that defense counsel's rate was \$65-\$75 per hour; that "success at trial was limited;" that the record did not reveal that the plaintiff's case imposed any time limitations on her attorneys; that there was no prior relationship between plaintiff and her counsel; that while the plaintiff's law firm had a good reputation and had "been involved in numerous civil rights cases before administrative bodies," the trial took much longer than necessary due to counsel's lack of trial experience; and that, while there is no documentary evidence in the record, the plaintiff's counsel asserted that the fee in the case was entirely contingent. Without finding which of the claimed hours were reasonable and without determining the reasonable rates for attorneys

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and paralegals in Johnson County, the court found \$12,000 to be a reasonable fee for the time expended by the attorneys and paralegals.

II

*2 We begin our analysis by noting that a determination of a reasonable attorney's fee is necessarily a discretionary inquiry. United Medical Corp. v. Hohenwald Bank, 703 S.W.2d 133, 137 (Tenn.1986). There is no fixed mathematical rule⁵ in this jurisdiction for determining a reasonable attorney's fee. This being the case, an appellate court will normally defer to a trial court's award of attorney fees unless there is "a showing of an abuse of [the trial court's] discretion." Threadgill v. Threadgill, 740 S.W.2d 419, 426 (Tenn.App.1987). In evaluating the lower court's exercise of its discretion in a non-jury setting, we review its award *de novo*. We are not authorized to disturb the trial court's award unless we find that the evidence preponderates against its fact findings supporting that award. Tenn. R.App. P. 13(d).

In this state, the establishment of a reasonable attorney fee is determined in accordance with Disciplinary Rule 2-106 (DR 2-106), which is a part of Rule 8 of the Rules of the Supreme Court. DR 2-106 provides, in pertinent part, as follows:

(B) ... Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

DR 2-106(B)(1)-(8) has been utilized in a wide variety of cases to assess the reasonableness of a fee award. *See, e.g.,*

Connors v. Connors, 594 S.W.2d 672, 676 (Tenn.1980) (fee in divorce litigation); United Medical Corp., 703 S.W.2d at 136 (fee for collecting promissory notes); Adams v. Mellen, 618 S.W.2d 485, 489 (Tenn.App.1981) (fee in wrongful death case); In re Estate of Davis, 719 S.W.2d 526, 528 (Tenn.App.1986) (fee for services to minor); Elk Yarn Mills v. 514 Shares of Com. Stock, 742 S.W.2d 638, 645 (Tenn.App.1987) (fee in dissenting shareholders' suit).

In Roberson v. University of Tennessee, 829 S.W.2d 149 (Tenn.App.1992), a female employee sued the University of Tennessee (UT), alleging sex discrimination under the federal Equal Pay Act⁶ and the THRA. She also alleged that UT retaliated against her because she had filed an EEOC⁷ complaint. After a lengthy trial, the jury awarded the plaintiff \$13,600 on her discrimination claim and \$50,000 on her retaliation claim. Id. at 150. The trial court then awarded her \$26,000 in attorney's fees and expenses, noting that she had employed three different attorneys in the course of pursuing her claim, "with some duplication of work." Id. at 153. This court upheld that award, noting that the trial court had expressly based its award on the factors listed in United Medical Corp., which were in turn based on the factors found at DR 2-106(B)(1)-(8). Id. The opinion in the Roberson case does not recite any of the details regarding the services performed by the plaintiff's attorneys or the amount of their fee and expense request.

III

*3 We now turn our attention to the fee and expense award in this case. Before doing so, we grant the plaintiff's motion⁸ to supplement the record transmitted to us by the court below. We will consider the affidavits of plaintiff's counsel, William E. Andersen, as well as the affidavits of attorneys Tony Seaton and D. Bruce Shine, and the documents reflecting the details of the services of and time expended by the plaintiff's attorneys, paralegals and legal assistants. All of these materials were before the trial judge and considered by him when he set the award in this case.

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The evidence before us does not preponderate against many of the Chancellor's findings. For example, he found that there was no prior professional relationship between the plaintiff and The Andersen Firm. *See* DR 2-106(B)(6). A preexisting, ongoing professional relationship, such as a retainer relationship between a business and an attorney or a relationship between an insurance company and its regular defense counsel², can militate, in some circumstances, for a lesser fee than would be reasonable for a one-time representation for the same legal work.

The evidence also does not preponderate against the Chancellor's finding that there were no "time limitations imposed by the client or by the circumstances." *See* DR 2-106(B)(5). An engagement that requires an attorney to "drop everything else" and immediately become involved in a representation shortly before a scheduled hearing or on the eve of a closing or similar legal undertaking can dictate, again under some circumstances, that a larger than normal fee is required in order to satisfy the standard of reasonableness. In this case, the plaintiff's attorneys were hired in the February-March, 1992, time frame. This case went to trial in May, 1994. While there were many legal services performed by the plaintiff's attorneys in connection with this case, there were no time *limitations* imposed by the plaintiff's case.

We also agree with the trial court that there was no showing "that the acceptance of [this] particular employment preclude[d] other employment by the lawyer." *See* DR 2-106(B)(2). The plaintiff's counsel contends that he had to explain to some of his regular clients his reasons for representing the plaintiff. This alone does not demonstrate facts which would bring the DR 2-106(B)(2) factor "into play." This is not a case where an attorney undertakes the representation of a notorious, unpopular individual, and thereby foregoes an opportunity to attract other clients because of the unpopular client. This also is not a case where a client can recognize that the client's representation will cause the lawyer to be "conflicted out" of other representations. The trial court was correct in discarding DR 2-106(B)(2) as a factor in this case.

We believe the relevant factors in this case are those set forth in subsection 1, 3, 4, 7, and 8 of DR 2-106(B).

Starting in reverse order, we note that the plaintiff's attorneys took her case on a contingent fee basis. If there was no recovery-if the jury had totally exonerated the defendants-the attorneys stood to recover no fee for their efforts. Under

this fee arrangement, attorney and staff time, claimed to be over 900 hours in total, would have gone uncompensated. While the client was obligated to pay the attorney's expenses, experience teaches that this does not always happen. The plaintiff's attorneys were clearly at risk under their fee arrangement with the plaintiff. As the Tennessee Supreme Court said in *United Medical Corp.*, "[a]n attorney's fee should be greater where it is contingent than where it is fixed." 703 S.W.2d at 136.

*4 The trial court did not make a specific finding of fact as to "[t]he fee customarily charged in the locality for similar legal services." *See* DR 2-106(B)(3). The affidavit of plaintiff's counsel, William E. Andersen, and the supporting affidavits of attorneys Tony Seaton and D. Bruce Shine suggest that the plaintiff's requested hourly rate of \$125 is reasonable.¹⁰ The affidavit of the defendants' attorney, Thomas J. Garland, Jr., points out that his hourly rate in this case was \$65 until January 1, 1993, and \$75 thereafter. While conceding that \$100-\$125 is a reasonable range for an experienced litigator, Garland opines in his affidavit that a reasonable hourly rate for plaintiff's counsel was between \$75 and \$100 per hour. We believe that the evidence, taken as a whole, preponderates in favor of a finding that a reasonable hourly rate for an attorney in a civil rights case in Johnson County is \$90. While Mr. Andersen had never tried a jury case to conclusion and his co-counsel, Melvin J. Werner, had tried only one such case, we believe this is offset somewhat by the fact that Mr. Andersen had extensive experience in the labor and employment law fields. He had practiced law in these related fields for ten years in non-jury settings. He also served in Washington as the Deputy Assistant Secretary of Employment Standards Administration for the United States Department of Labor. He was an experienced lawyer, if not an experienced jury trial litigator.

The trial court noted that The Andersen Firm enjoyed a good reputation. That firm apparently had focused its efforts in the past on civil rights matters before administrative bodies. While there are similarities between an administrative law practice and a jury trial practice, there are obvious differences. The dynamics of a jury trial are quite different from those of a trial before a judge or an administrative law judge. The Chancellor found that the trial took longer because of the fact that the plaintiff's counsel did not have jury trial experience. We do not find that the evidence preponderates against this finding, and believe this is a factor that has a downward effect on a reasonable fee in this case.

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We do find that the evidence preponderates against the Chancellor's finding that the legal theories were "relatively simple and straightforward;" his finding that the issues were not novel; his finding that the difficulty of the case was "slight to low-moderate;" and his finding that "success at trial was limited."

In this case, a former female employee pursued a civil rights case¹¹ against a county and its popularly elected sheriff before a jury of local residents. According to the most recent federal census, Johnson County had a population of 13,766 in 1990. It was then the twenty-third smallest county in the state. It had 7633 registered voters as of December, 1992. It is located in the mountainous area of northeast Tennessee and in fact is the farthestmost eastern county in the state.¹² The county has 299 square miles, and hence, again according to the 1990 census, 46 residents per square mile. By contrast, Davidson County had 1017 residents per square mile as of the 1990 census.¹³

*5 This lawsuit was vigorously defended. The defendants' answer denied that the defendants had committed any discriminatory acts against the plaintiff. Their counsel expended some 377 hours in defense of the position that the defendants had not discriminated against the plaintiff, the first and only female deputy road officer in the history of Johnson county.

Rarely are civil rights cases simple or easy to win. We believe the evidence supports the plaintiff's position that this was a difficult case. As far as the jury of Johnson County residents was concerned, any verdict would be paid out of the tax-funded coffers of the county. If there was collectible insurance, the 12 members of the jury certainly did not know it.

At an earlier time, the Chancellor recognized that this was not a simple case. During a hearing on pre-trial motions he stated that

I have had more difficulty attempting to prepare for this case than I have any case in the five years that I've been on the bench. And it's the only case that's kept me awake until about 2:00 in the morning thinking about what it meant and what it is and what to do and trying to anticipate what the appellate courts will do about it. And I apologize, but I need help.

* * *

Now, we're dealing with a complicated law in the case that was set for trial today. And not only is this law complicated, but it is a new law. And because it's a new law, there are no cases for this Court to rely upon in determining what the law means. So, with the help of the lawyers, who have been a terrific help to the Court and I congratulate them for educating me.

At the same hearing, he complimented plaintiff's counsel on the quality of their work:

As a matter of fact, the lawyers may kick themselves because they've done such a good job of educating the Court, which I asked for.... And no offense to you, Mr. Garland, but the Plaintiffs in particular have given the Court volumes-volumes of cases and material in an attempt to educate the Court about the Plaintiffs' theories of recovery. I am very appreciative.

We find that both observations tend to support plaintiff's request for a substantial fee in this case. We further believe that plaintiff, in "taking on" the establishment in a sparsely populated remote mountain county, "had her work cut out for her." This was not a simple lawsuit. The Chancellor's ultimate finding to the contrary is not supported by the record before us.

How successful was the plaintiff? We disagree with the Chancellor's observation that "success at trial was limited." While she did not convince the jury she had been a victim of sex discrimination or sexual harassment, the plaintiff did prevail on her theory of retaliation. We believe a verdict of \$25,000 in Johnson County is a good result under the circumstances of this case.

The Chancellor found that the attorneys' hours claimed by the plaintiff's counsel, 695.75 in total, were excessive; but he failed to point out which of the hours on the detailed bills before him were out-of-line. He also did not make a finding as to how many hours would have been reasonable under the circumstances of this suit. He did find that the trial took longer because of counsel's inexperience, but he

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did not state how long he thought it would have taken had counsel had more jury trial experience; however, in view of the trial court's finding, we believe it is appropriate to reduce the attorneys' hours by 40 hours, being two attorneys, each charging 10 hours per day, for two days.¹⁴ We believe the evidence supports a finding that the remaining 655.75 hours of attorneys' time were reasonably spent on this litigation.¹⁵

*6 The Chancellor specifically found that 54.75 hours of paralegal time was excessive. The evidence does not preponderate against this finding. The Chancellor did not specifically address any of the other paralegal charges although he did refer generally to "like administrative tasks performed by counsel's paralegals which are time-excessive." We are unable to identify these other tasks that the Chancellor thought were time-excessive. We believe the requested paralegal time of 131.5 hours should be reduced by 54.75 hours.

The Chancellor found that the administrative hours of 82.45 were overhead and should not be charged separately. On the meager record before us, we cannot say that the evidence preponderates against this finding. Accordingly, we agree the plaintiff should not be compensated for these hours.

The Chancellor limited the plaintiff's expenses to court reporting fees and fees of expert witnesses who testified. We believe this is too restrictive and represents an abuse of discretion. We believe the plaintiff should also recover long distance phone charges, photocopying charges, fax charges, outside research charges, mileage at \$.27 per mile (the mileage rate charged by defense counsel), overnight delivery charges, lodging charges for the plaintiff's attorneys incurred in connection with depositions and trial, and the full outside cost of exhibits used at trial, *but only to the extent that those charges are separately identified and reflected on the detailed bills in the record before us*. All charges based upon a flat percentage surcharge added to the fee bills are disallowed *in toto*. The meal charges appear to be excessive. For this reason, they are disallowed in full, and no award is made for meals.

We believe that a reasonable fee for the attorneys' time is \$59,017 (\$90 per hour), and that a reasonable charge for the 76.75 hours of paralegal time is \$1,918 (\$25 per hour). We find that the Chancellor abused his discretion in awarding the plaintiff only \$12,000 for the time of her attorneys and their paralegals. Our award is in lieu of any payment by plaintiff under the contingent fee contract.

The hourly rates that we have found to be reasonable, i.e., \$90 for the attorneys, and \$25 for the paralegals, take into consideration the attorneys' lack of jury trial experience and the locale of the trial. While the demographics of Johnson County convince us that a \$25,000 jury verdict is a good result in this case, those same matters also persuade us that an attorney and his paralegals should not be allowed to charge urban rates in this rural mountain county.

The defendants urge us to take into account that the plaintiff was unsuccessful on her discrimination and harassment claims. The plaintiff's three claims were based on a common core of facts. In order to demonstrate her theory as to retaliation, it was necessary to place before the jury the operative facts-what others did to and around her, her attempts to redress these perceived wrongs, and the sheriff's reaction to all of this. This is a case where it would be difficult, if not impossible, to separate the time spent on the claims on which she failed from the time spent on the successful claim. The claims and the facts supporting them are intimately related.

*7 In the United States Supreme Court case of City of Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), eight Chicano individuals sued the city of Riverside, California, its Chief of Police, and 30 individual police officers for allegedly violating their First, Fourth, and Fourteenth Amendment rights when a large number of police officers broke up a party by using tear gas and what the District Court found was unnecessary physical force. Seventeen of the individual defendants were dismissed from the suit on summary judgment. A subsequent jury verdict exonerated 8 other individual officers and the Chief of Police, while awarding the plaintiffs a verdict of \$33,350 in compensatory and punitive damages against the city and the five remaining officers. The District Court awarded the plaintiffs their full requested attorney's fee of \$245,456.25. The latter award was affirmed by the United States Supreme Court.

As in the instant case, the defendants in *City of Riverside* argued, among other things, that the plaintiffs had enjoyed limited success, i.e., only six of the original 32 defendants were found liable; and that the fee award, i.e., \$245,456.25, was disproportionate to the recovery of \$33,350.

In rejecting the first argument, the Supreme Court pointed out that the lawsuit could not be evaluated as a series of "discrete

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claims.” It then quoted from its decision in Hensley v. Eckherhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983):

All claims made by plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail. The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail.

461 U.S. at 435, 103 S.Ct. at 1940.

The Supreme Court also rejected the defendants' argument that the fee award should be proportionate to the monetary award. What the highest court in the land said in *City of Riverside*, applies with equal force here:

A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.... These victims ordinarily cannot afford to purchase legal services at the rates set by the private market.

Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries.

A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights

claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.

*8 477 U.S. at 576-78, 106 S.Ct. at 2695-96. In view of the relationship between the THRA and the federal civil rights acts, we believe the comments of the Supreme Court on these points are persuasive support for our fee and expense award in this case.

We recognize that we are awarding, as fees and expenses, more than twice¹⁶ the amount of the jury award; but this fact does not deter us. We agree with the United States Supreme Court that a rule limiting an attorney's fee to a proportion of the damages awarded would seriously undermine the purpose behind civil rights enactments. “[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.” Id. 477 U.S. at 574, 106 S.Ct. at 2694. Fee awards must fully and reasonably compensate plaintiff's counsel if the purpose and intent of the THRA is to be fulfilled. *See also, Adkinson v. Harpeth Ford-Mercury, Inc.*, No. 01A01-9009-CH-00332, 1991 Tenn.App. LEXIS 114 at *13 (Tenn.App. February 15, 1991).

Attorney's fee awards under the civil rights statutes are not tied to the amount awarded by the jury in damages. (citation omitted) ... The rationale for this rule is that plaintiffs in civil rights cases bring suit as private attorneys general acting for the public benefit as well as for themselves. (citation omitted).

The judgment of the trial court is modified to award an attorney fee of \$59,017, paralegal expenses of \$1,918, and the expenses identified in this opinion, in addition to the expenses previously awarded by the Chancellor. As modified, the judgment is affirmed. This case is remanded to the trial court for the collection of the judgment awarded to the plaintiff for attorney's fees and expenses, and the costs below. The costs on appeal are adjudged against the appellee.

All Citations

Not Reported in S.W.2d, 1995 WL 306166

Footnotes

1 T.C.A. § 4-21-101, et seq. While this statutory scheme is not referred to in the code as the Tennessee Human Rights Act, it is popularly known by this title.

2 This suit was originally filed against the "Johnson County Sheriff's Department." Apparently, it was later amended to reflect that the defendants were Johnson County and Sheriff Ed Casey.

3 T.C.A. § 4-21-301 provides, in pertinent part, as follows:

It is a discriminatory practice for a person or for two (2) or more persons to:

(1) Retaliate ... in any manner against a person because such person has opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this chapter;

4 The THRA provides for such an award at T.C.A. § 4-21-311:

Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in chancery court. In such an action the court may issue any permanent or temporary injunction, temporary restraining order, or any other order and may award to the plaintiff actual damages sustained by such plaintiff, together with the costs of the lawsuit, including a reasonable fee for the plaintiff's attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

Attorneys' time	695.75 hrs. x \$125	\$
		86,968.75
Paralegals' time	131.50 hrs. x 50	6,575.00
Legal assistants' time	82.45 hrs. x 30	2,473.50
		\$
		96,017.25
Expenses		17,595.47
Total fees and expenses sought		\$113,612.72

5 Our Supreme Court has refused to adopt the "lodestar" approach utilized by the federal courts:

The "lodestar" approach places primary emphasis on the hours of effort reasonably expended by the attorney and the rate customarily charged, with an adjustment, usually on a percentage basis, of the usual hourly rate to reflect the risk, or contingency assumed by the attorney in representing their client. We see no advantage to this approach over the consideration of the several factors set out in Disciplinary Rule 2106(B), which include time expended and the customary hourly charges in the locality.

United Medical Corp. at 137.

6 29 U.S.C. § 206(d)(1).

7 Equal Employment Opportunity Commission.

8 The defendants did not object to the motion.

9 This is apparently the type of relationship that the defendants' counsel had with its insurance client in this case.

10 These affidavits focus on what are reasonable rates for a civil rights action; they do not specifically address such an action in Johnson County.

11 The THRA is expressly related to federal civil rights acts. One of the purposes of the THRA is to "[p]rovide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967, as amended; ..." T.C.A. § 4-21-101(a)(1).

12 "As the crow flies," its county seat, Mountain City, is closer geographically to Windsor, Canada, than it is to its Tennessee sister city of Memphis.

13 Demographic and geographic information is taken from reliable maps and the *Tennessee Blue Book, 1991-94*, pp. 506-507. See *Tenn. R. Evid. 201*; Cohen, Paine, and Sheppard, *Tennessee Law of Evidence*, sec. 201.3 (2nd ed.1990).

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- 14 Counsel's detailed time records reflect a uniform charge of 10 hours per attorney per trial day.
- 15 The defendants' counsel suggests that the plaintiff's claimed attorney hours cannot be reasonable since they are substantially more than his own. We disagree. The plaintiff had the burden of proof-the "laboring oar." It takes considerably more time and effort to build a building than it does to tear one down.
- 16 "The fact that the amount of the litigation expenses and attorney's fees is some five times the amount of compensatory damages does not affect the validity of plaintiff's claim for reasonable attorney's fees." *Patton v. McHone*, No. 01A01-9207-CH-00286, 1993 Tenn.App. LEXIS 212 at *10 (Tenn.App. March 24, 1993).

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United States District Court,
M.D. Tennessee.Harry J. MANNERS, Jr., and Philip
A. Levin, on behalf of themselves and
all others similarly situated, Plaintiffs,

v.

AMERICAN GENERAL LIFE
INSURANCE COMPANY, Defendant.

No. Civ.A. 3-98-0266.

|

Aug. 11, 1999.

Attorneys and Law Firms

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Robert E. Cooper, Jr., E. Steele Clayton, IV, (See above), for Agc Life Insurance Company, deft.

Matthew Joseph Sweeney, III, Dinsmore & Shohl, LLP, Nashville, TN, James Rubin Cummins, Aaron A.

VanderLaan, Brown, Cummins & Brown, LPA, Cincinnati, OH, for George K. Griffey, Jr., miscellaneous.

Christopher D. Cravens, Lewis, King, Krieg, Waldrop & Catron, P.C., Nashville, TN, Eva I. Geist, James E. Toothman & Associates, Los Gatos, CA, for Harry G. Brix, trustee.

Christopher D. Cravens, (See above), Eva I. Geist, (See above), for Mariann Brix, trustee.

Martin Stephen Sir, Cross & Sir, Nashville, TN, for Marsha Smolen, intervenor pltf.

Martin Stephen Sir, (See above), for Matthew Weiss, intervenor pltf.

FINDINGS OF FACT AND CONCLUSIONS OF LAWNIXON, J.

*1 Plaintiffs and defendant have submitted for approval a proposed settlement of this class action that is memorialized in a Stipulation of Settlement and a First Amendment to the Stipulation of Settlement, filed with the Court on December 16, 1998 and May 28, 1999, respectively (referred to collectively as the "Settlement Agreement" or "Settlement"). For the reasons set out below, the Court has determined that the Settlement is fair, reasonable and adequate and should therefore be approved. The Court makes the following findings of fact and conclusions of law and issues. It has previously issued an Order Approving Class Action Settlement and Final Judgment approving the Settlement and dismissing the complaint in this action with prejudice.

I. BACKGROUND**A. Materials Considered by the Court**

1. In reaching its decision in this case, this Court has considered the written memoranda of the parties. As discussed below, both sides have fully briefed the request for approval, and they have supported the request with numerous declarations and affidavits of fact and expert witnesses. Both plaintiffs' counsel and defendant's counsel also made oral presentations at the June 3, 1999 Fairness Hearing.

2. As discussed in more detail below, the Court also considered the written objections submitted by Class Members and the oral presentation made on behalf of objector

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Franklin T. Jones, Jr., by his counsel, T. John Ward, at the June 3 Fairness Hearing.

B. History of the Litigation

3. On February 24, 1998, plaintiff Henry J. Manners, Jr. filed *Manners v. American General Life Insurance Co., et al.*, Case No. 98-C-496, in the Circuit Court of Davidson County, Tennessee. Weiss/Stoia Decl. ¶ 48.¹ On March 25, 1998, defendants American General Life Insurance Company ("AGL") and AGC Life Insurance Company (AGL's immediate parent) removed the case to this Court. *Id.* ¶ 49. Defendants answered the complaint on April 8, 1998.

4. On April 27, 1998, defendant AGC Life Insurance Company moved for summary judgment arguing that it could not be sued as the alter ego of AGL. *Id.* ¶ 50.

5. An Initial Case Management Conference was held before Magistrate Judge Haynes on May 5, 1998. *Id.* ¶ 51. Judge Haynes stayed all proceedings in the case pending the parties' negotiation of document production by defendants. *Id.* Thereafter, plaintiff engaged in extensive discovery with AGL relating to plaintiff's allegations. *Id.*

6. While this action was proceeding, a second putative class action also was proceeding against AGL in Texas. That case, *Levin v. American General Life Insurance Company, et al.*, Case No. 97-25626 (80th Jud. Dist. Tex.), was filed on May 13, 1997. *Id.* ¶ 33. Defendants answered that complaint on June 11, 1997. They removed the case to the United States District Court for the Southern District of Texas on June 12, 1997. *Id.* ¶ 34.

7. Plaintiff moved to remand the action on August 14, 1997. *Id.* ¶ 35. The remand motion went through several rounds of briefing. *Id.* During this period, the parties engaged in discovery related to remand issues and the merits. *Id.* ¶ 36.

*2 8. On March 27, 1998, the federal court adopted the Magistrate Judge's recommendation that the case be remanded to state court. *Id.* ¶ 35.

9. Plaintiff Levin subsequently engaged in merits discovery jointly with plaintiff Manners. *Id.* ¶ 46.

10. On December 10, 1998, plaintiffs Levin and Manners jointly requested leave of this Court to file a first amended class action complaint in this action. *Id.* ¶ 53. This complaint

makes claims similar to those raised in Manners' original complaint filed in this case, as well as in Levin's original complaint filed in his Texas action. The amended complaint did not name AGC Life Insurance Company as a defendant.

11. On February 11, 1999, the parties filed a joint motion to stay all proceedings in the Texas action based on execution of the Settlement in this case.

C. Plaintiffs' Allegations

12. The first amended complaint is brought on behalf of a class of persons or entities (the "Class" or "Class Members") who, at any time from January 1, 1982 through December 31, 1997 (the "Class Period"), had an ownership interest in one or more AGL whole life or universal life insurance policies issued in the United States during the Class Period. The Class description (including identification of the individuals and entities who are specifically excluded from the Class) is set out in the Court's Order Approving Class Action Settlement and in the Final Judgment.

13. The complaint² asserts twelve different causes of action, including federal claims based upon 18 U.S.C. § 1962 and common law claims based on fraud, breach of contract and negligent misrepresentation. The complaint seeks declaratory and injunctive relief, reformation and restitution, and compensatory and punitive damages.

14. Plaintiffs allege that AGL engaged in misleading practices in selling its whole life and universal life insurance policies. They allege that AGL developed a scheme involving uniformly fraudulent, misleading and deceptive sales practices in order to increase its own revenues and profitability. [Comp. ¶ 20]

15. The specific practices alleged in the complaint include, among other things, that

a. AGL sold "vanishing premium" insurance policies through the use of false and misleading illustrations that "were cast in a format that was intended to deceive policyowners to believe that premium payments could be terminated without causing the Policy to terminate until the guaranteed termination date" [Comp. ¶ 57];

b. AGL provided its agents with monetary incentives to engage in wholesale replacement of [its] existing book of business [Comp. ¶ 32];

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c. AGL deceived policyowners into believing that they were purchasing investment, retirement, pension, estate or savings plans rather than life insurance policies [Comp. ¶ 38];

d. AGL misrepresented to policyowners that its policies would provide a certain amount of cash and/or account values [Comp. ¶ 44]; and

*3 e. AGL engaged in abuses and other misconduct with respect to the administration and servicing of insurance policies [Comp. ¶ 20].

16. AGL has denied all allegations of wrongdoing.

D. The Parties and Their Counsel

17. The Class Representatives – Plaintiff Harry J. Manners, Jr., is a citizen of Tennessee. [Comp. ¶ 12] Plaintiff Philip A. Levin is a citizen of Maryland. [Comp. ¶ 11]

18. The Class representatives allege a wide variety of fraudulent conduct on behalf of AGL in its marketing, sale, servicing and administration of their policies.

19. Class Counsel – The plaintiffs and the Class are represented by the law firms of Milberg Weiss Bershad Hynes & Lerach LLP (“Lead Counsel”); Abbey, Gardy & Squitieri, LLP; Arnzen, Parry & Wentz, P.S.C.; Bonnett, Fairbourn, Friedman & Balint, P.C.; Hubbard & Biederman, L.L.P.; James, Hoyer, Newcomer, Forizs & Smiljanich, P.A.; Claxton & Hill, PLLC; Law Offices of Charles J. Piven, P.A.; and Schiffrin & Barroway, LLP. All are experienced plaintiffs’ counsel with expertise in insurance, consumer and class action litigation. *See* Weiss/Stoia Decl. ¶ 173.

20. Defendant – AGL is a stock life insurance company incorporated in Texas, with its principal place of business in Houston, Texas. In its current form, AGL is the product of the consolidation and subsequent statutory merger of several life insurance companies. AGL is licensed to issue life insurance throughout the United States, except the state of New York. An AGL subsidiary, American General Life Insurance Company of New York, is licensed to issue life insurance in New York.

21. AGL is a wholly owned subsidiary of AGC Life Insurance Company, which in turn is a wholly owned subsidiary of American General Corporation.

22. Defendant's Counsel – Defendant is represented by the firms of Bass, Berry & Sims PLC and Debevoise & Plimpton. Both of these firms have extensive experience in the defense of complex and class action litigation.

E. The Settlement

23. Both this action and plaintiff Levin's Texas action were vigorously contested from the time they were filed.

24. AGL initiated settlement discussions with plaintiffs in February 1998. Weiss/Stoia Decl. ¶ 69; Santillo Decl. ¶ 12. Initial settlement discussions focused on, among other things, the factual basis for plaintiffs' allegations. *Id.* However, plaintiffs insisted that a settlement could not be achieved until all remaining discovery, including document production and depositions, had been completed. *Id.* ¶ 16; *see* Weiss/Stoia Decl. ¶ 70.

25. AGL continued to produce, on an expedited basis, a substantial volume of additional documents soon after settlement discussions began. *Id.* AGL produced over 695,000 pages of documents, numerous audio tapes, and illustration software. Santillo Decl. ¶ 16; Weiss/Stoia Decl. ¶ 56. The materials were gathered from sources throughout AGL's home office and included, among other things, policy forms, product advertising, field communications, board of directors minutes, regulatory reviews, illustration software and related policy files for the named plaintiffs.

*4 26. Plaintiffs' counsel also deposed seven former or current senior executives, managers and members of AGL's field force. The deponents included the Executive Vice President of Insurance Services, the current Chief Marketing Officer, current and former Regional Vice Presidents, and the Chief Actuary. Santillo Decl. ¶ 16; Weiss/Stoia Decl. ¶ 57.

27. While discovery proceeded, the parties continued their settlement negotiations. There were many meetings, both by telephone and face-to-face, throughout 1998. These meetings were very contentious, and the discussions were often heated. *Id.* ¶¶ 71–79; Santillo Decl. ¶¶ 17–28. Negotiations broke down on more than one occasion. Weiss/Stoia Decl. ¶ 71; Santillo Decl. ¶ 28.

28. The parties focused on a settlement framework similar to that adopted in other cases involving life insurance sales practice class actions – *i.e.*, a framework that would include an alternative dispute resolution process, as well as relief for Class Members who did not elect to participate in

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that process. Weiss/Stoia Decl. ¶ 72; Santillo Decl. ¶ 13. However, plaintiffs' counsel insisted that, among other things, the alternative dispute resolution process be significantly streamlined and the general relief be available to Class Members automatically if they do not elect the alternative dispute resolution process. Weiss/Stoia Decl. ¶ 72; Santillo Decl. ¶ 15. As a consequence, the dispute resolution process included in the Settlement was dramatically restructured over the course of the settlement negotiations. Weiss/Stoia Decl. ¶ 75; Santillo Decl. ¶ 24.

29. The final terms of the settlement continued to be negotiated up to the second week of December 1998. Weiss/Stoia Decl. ¶ 79; Santillo Decl. ¶ 27. With the settlement terms set, an agreement on plaintiffs' attorneys' fees was concluded on December 15, 1998, and a Stipulation of Settlement was executed. Weiss/Stoia Decl. ¶ 79; Santillo Decl. ¶ 27.

F. The December 17, 1998 Hearing and Preliminary Approval Order

30. On December 17, 1998, the Court held a hearing at which it preliminarily approved the Stipulation of Settlement and directed the parties to send notice to the Class.

31. The Court entered its Findings and Order, ruling, among other things, that the Settlement was "sufficiently fair, reasonable and adequate to warrant sending notice of the Action and proposed settlement" to Class Members.

32. Consistent with the Court's Order, the parties provided notice of the proposed Settlement to Class Members. AGL, with Lead Counsel's approval, selected a settlement administrator, Rust Consulting, Inc. ("Rust"), that arranged for mailing of individual notices and publication of the summary notice and, in addition, established a Class Action Information Center, including a toll-free telephone bank, to receive and respond to Class Member inquiries regarding the class action and proposed Settlement. Dahl Decl. ¶¶ 16-18, 30-31.

G. First Amendment to the Stipulation of Settlement

*5 33. In response to objections raised by two Class Members, the parties executed a First Amendment to the Stipulation of Settlement on May 21, 1999. It was filed with the Court on May 28, 1999. The Class Members' objections were subsequently withdrawn.³

34. The First Amendment to the Stipulation of Settlement enhanced the relief available to Class Members by making four changes to the Settlement Agreement. These changes are discussed below.

H. The Fairness Hearing

35. The parties filed extensive memoranda, declarations, affidavits and reports with the Court prior to the Fairness Hearing. These submissions, which were filed with the Court on May 21, 1999, included numerous declarations and affidavits from fact and expert witnesses.

a. Plaintiffs presented declarations from: Timothy G. Blood (associate at Milberg Weiss Bershad Hynes & Lerach LLP); Hal D. Hardin (practicing attorney, Nashville, Tennessee); Samuel Issacharoff (Professor, Joseph D. Jamail Centennial Chair, at the University of Texas School of Law, and Professor, Columbia University); Terry M. Long (Vice President and Principal of Lewis & Ellis, Inc.); John E. Sexton (Dean of the New York University School of Law); John J. Stoia, Jr. (partner at Milberg Weiss Bershad Hynes & Lerach LLP); and Melvyn I. Weiss and John J. Stoia, Jr. (senior partner/partner at Milberg Weiss Bershad Hynes & Lerach LLP).⁴

b. Defendant submitted affidavits and declarations from Karen Champion (Director of Information Technology at AGL); James P. Corcoran (former New York Superintendent of Insurance); Patricia K. Crouch (Associate Director for Client Systems at The Franklin Life Insurance Company); Jeffrey D. Dahl (Senior Vice President and National Director of Claims Administration at Rust); Robert D. Harrison (Lecturer in Legal Method, Yale Law School); Susan Howard (Vice President of Communications, American General Life Division); Anne Milio (Vice President of Policy Administration at AGL); Andrew Novak (Vice President, Kinsella Communications, Ltd.); Randall M. O'Connor (Principal, Tillinghast-Towers Perrin), attached to whose declaration was a report prepared by Tillinghast-Towers Perrin; George L. Priest (John M. Olin Professor of Law and Economics at Yale Law School); Carl Santillo (Executive Vice President, VALIC, an American General Corporation company); Kent D. Syverud (Dean and Garner Anthony Professor of Law at Vanderbilt University Law School) and Leigh Whelan (Senior Attorney, American General Corporation).

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36. The parties' submissions also responded to the 24 objections submitted by Class Members regarding the Settlement.

37. The Court held a hearing regarding the fairness, adequacy and reasonableness of the Settlement Agreement on June 3, 1999.

38. Both plaintiffs' counsel and defendant's counsel made presentations in support of the Settlement at the June 3 hearing. In addition, Class Member Franklin T. Jones, Jr., represented by counsel T. John Ward, Jr., presented certain objections to the Settlement. These objections are discussed below. Mr. Jones also sought to intervene in this proceeding. The Court denied that motion and has issued a separate opinion regarding that denial.

II. THE TERMS OF THE SETTLEMENT

*6 39. The Settlement provides the Class with a substantial and innovative package of relief responsive to the allegations raised in the complaint. Though this Settlement has some similarities to court-approved settlements reached in class actions involving other large insurance companies,⁵ the Settlement is unique in many respects, including the Claim Evaluation Process, which is specifically tailored to meet the needs of the Class in this case.

40. The Settlement provides two alternative types of relief: General Policy Relief and the Claim Evaluation Process ("CEP"), including the Part VIII Alternative Dispute Resolution ("ADR") Process.

A. General Policy Relief

41. As described in detail in the Settlement Agreement, the Settlement provides three forms of General Policy Relief to each Class Member who chooses not to submit a claim to CEP: (i) the General Benefit, (ii) Settlement Scrip and (iii) the Prospective Commitment. Class members will receive this relief automatically and without any evidence of wrongdoing or damages.

42. The General Benefit – The General Benefit will provide two benefits: (i) the Settlement Death Benefit, which provides a new death benefit for 12 to 59 months of up to 10% of the original face amount of the policy making the Class Member eligible for relief, and (ii) the Accidental Death Benefit, which will begin automatically after the end of the Settlement Death Benefit and will provide from 12 to 59 months, and up to 10%

of the original face amount, of an accidental death benefit. The General Benefit will be provided automatically and without cost to all Class Members who do not elect CEP.

43. Settlement Scrip – In addition to receiving the General Benefit, Class Members who do not choose CEP will automatically be able to use Settlement Scrip to buy a new life insurance policy from AGL to which AGL will contribute 100% of the first year premium over the first two years of the policy. Settlement Scrip will be freely transferable and, as specifically set out in the First Amendment to the Stipulation of Settlement, AGL will set up a website at which Class Members and others will be able to post messages or other information regarding transferring or obtaining Scrip. Lead Counsel also will provide a hyperlink to the Scrip website on Lead Counsel's website.

44. With respect to the transfer of Settlement Scrip and the right to designate another person as eligible to receive the General Benefit, the Court finds that, to the extent the opportunity (i) to transfer Settlement Scrip or (ii) to designate another person as eligible to receive the General Benefit under the Settlement constitutes the offer or sale of a security under the Securities Act of 1933, 15 U.S.C. §§ 77a et. seq., the Court's approval of the terms and conditions of the Settlement will exempt the transfer or designation (or opportunity to transfer or designate) from registration under the 1933 Act pursuant to section 3(a)(10) of that Act, which exempts securities "issued in exchange for one or more bona fide ... claims." 15 U.S.C. § 77c(a)(10).

*7 45. Prospective Commitment – Pursuant to this commitment (which was added to the Settlement as a result of the May 21, 1999 First Amendment to the Stipulation of Settlement), AGL has agreed that, for one year following July 1, 1999, it will refund to all Class Members receiving General Policy Relief any increase over scheduled cost-of-insurance charges or any decrease in dividends due to mortality experience. As with the General Benefit, this relief will be provided automatically and without cost to all Class Members who receive General Policy Relief.

B. Individual Relief

46. As described in more detail in the Settlement Agreement, the Settlement also allows any Class Member who believes he or she was misled by a misstatement or omission of material information, or was otherwise harmed in connection with his or her policy, to seek an award through an individualized

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alternative dispute resolution process. Depending on its nature, a Class Member's claim will be reviewed through one of two processes: CEP or the Part VIII ADR Process.

47. The Claim Evaluation Process – CEP will be used to evaluate claims relating to the key sales practice allegations contained in the complaint – Limited Premium Payment Claims (including “Fully Paid-Up” claims), Performance Claims, Replacement Claims and Retirement Claims. The claims will be evaluated by a Claim Evaluator, who will be selected by Lead Counsel. AGL will pay \$1.25 million to cover the administrative costs of CEP, including the Claim Evaluator's fees and expenses.

48. The Claim Evaluator will designate claims as level three, level two, level one or level zero claims based on the nature and strength of the claim, with level three claims receiving the highest level of relief and level zero claims receiving no relief.⁶ Successful CEP claimants will receive cash awards tailored to the harms suffered and damages incurred. *See* Priest Aff. ¶ 32 (“[t]he restitutionary relief provided by [CEP] mirrors the substantive allegations of the class”); Syverud Decl. ¶ 25 (“[t]he settlement will permit individualized treatment of each class member's claim”). These cash awards will have no restrictions limiting, or requirements regarding, how Class Members may use the cash awards.

49. CEP features a number of substantive and procedural protections for claimants, including that (i) the Claim Evaluator will review claims using detailed, objective criteria approved by the Court, (ii) AGL will assemble a Claim File that includes information from its files on the policy(ies) at issue, (iii) AGL will not be able to raise defenses (e.g., statutes of limitations, the parol evidence rule and the statute of frauds) or evidentiary objections it could have asserted against claimants in litigation and (iv) the Claim Evaluator may utilize the evidence uncovered as part of plaintiffs' discovery in evaluating any particular claim. In addition, the Claim Evaluator will have discretion to adjust the scoring and/or awards of relief for claims to reflect the circumstances or injuries suffered by a particular claimant(s). The Claim Evaluator may also in his or her discretion consider a range of factors unique to AGL's alleged misconduct. As noted by AGL's expert, James Corcoran, a former New York Superintendent of Insurance: “[T]he CEP Guidelines are designed to provide for a fair resolution of the four primary sales practice claims made in this case.” Corcoran Aff. ¶ 25. Similarly, plaintiffs' expert, John E. Sexton, Dean of the New York University School of Law, has concluded

that CEP “will be fast and efficient while ensuring that all interests are represented.” Sexton Decl. ¶ 25. Finally, defendant's expert, Kent Syverud, the Dean and Garner Anthony Professor of Law at the Vanderbilt University Law School, has concluded that “the proposed settlement might give an individual claimant a *better* chance of obtaining cash relief than would traditional ADR proceedings, because AGL will waive many defenses that would be available to it in such other proceedings (or in litigation).” Syverud Decl. ¶ 27 (emphasis in original).

*8 50. The Claim Evaluator's decisions will be final, binding and not subject to review or appeal.

51. The Part VIII ADR Process – The Part VIII ADR Process provides a forum for resolving claims that were submitted by the Election Date (as defined in the Settlement Agreement) but do not fall within one of the four categories of claims identified above (*see* ¶ 47; Ex. A to the Settlement Agreement). In addition, a Class Member may require AGL to resolve in the Part VIII ADR Process any policy servicing or administration claim that arose during the Class Period, even if the claim was not submitted by the CEP deadline, as long as the Class Member can demonstrate that, despite exercising reasonable care, he or she did not know and could not have known of the claim by the Election Date. The Settlement also allows AGL to require Class Members to resolve certain other policy-related claims, including pending litigation and regulatory proceedings, through the Part VIII ADR Process if they did not elect to exclude themselves from the Settlement.

52. Claims submitted by the Election Date that do not fall within the claim categories identified above (*see* ¶ 47 above), but that otherwise relate to Sales Practices (as defined in Exhibit A to the Stipulation of Settlement), will be reviewed by the Claim Evaluator pursuant to the CEP procedures. For all other claims, the Part VIII ADR Process provides a two-tiered resolution system: (i) review by a team of three company representatives in accordance with objective scoring and relief criteria set out in the Settlement and approved by the Court⁷ and (ii) an appeal at the discretion of the Class Member (but *not* AGL) to a panel of independent arbitrators (chosen by Lead Counsel), who will review the claim *de novo* using the same objective, Court-approved scoring and relief criteria. AGL will pay all of the costs associated with the Part VIII ADR Process, including the arbitrators' fees and expenses.

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53. As with CEP, the relief in the Part VIII ADR Process has been designed to correspond to the nature of each claim and the information gathered in support of it. In addition, the Part VIII ADR Process provides Class Members with numerous procedural and substantive protections, including AGL's waiver of defenses otherwise available in litigation.

54. The arbitrators' decisions will be final, binding and not subject to review or appeal (except to the limited extent specified in the Settlement Agreement).

C. The Release

55. In exchange for the benefits provided by the Settlement, the Settlement Agreement contains a release that bars Class Members from asserting in any other lawsuit or proceeding any of the claims that have been or could have been asserted in this action. The release was set out in full in the Stipulation of Settlement (pp. 53–59), was reprinted in Appendix A to the individual notice mailed to Class Members), and is included in the Court's Final Order.

D. Value of the Relief

*9 56. The parties' expert actuaries have valued the General Benefit portion of the General Policy Relief that will be provided to Class Members at \$130.3 million. Tillinghast–Towers Perrin (“Tillinghast”) Report (attached as Ex. A to Randall M. O'Connor Decl.) at 77; Long Decl. ¶ 12(b). The actuaries also have concluded that for every 1% of Class Members who use Settlement Scrip, an additional \$17 million in economic value will be provided to the Class. Tillinghast Report at 34; *see* Long Decl. ¶ 12(d). Thus, if 5% of the Class utilize Scrip, the Class will receive an additional \$84.9 million in economic value; if 100% of the Class utilize Scrip, the Class will receive an additional \$1.697 billion. *Id.*

57. Under the Settlement Agreement, AGL has agreed to provide up to \$38.7 million (plus interest) to be disbursed through CEP.⁸ Once all CEP claims have been finally resolved, the total amount of relief awarded to the Class will be calculated. If that total is less than \$38.7 million, the difference between \$38.7 million (plus accrued interest) and the amount paid to claimants will be distributed to the Class through increases to the Settlement Death Benefit and to CEP awards. If that total is more than \$38.7 million (plus interest), CEP awards will be proportionately reduced. The parties' expert actuaries have concluded that, based on, among other things, the number of Class Members who have elected CEP and the demographics of those Class Members electing

CEP, the total CEP relief awarded in this case should not exceed \$38.7 million. Tillinghast Report at 77; *see* Long Decl. ¶¶ 34–35. The actuaries also have concluded that, based on their review of reasonable alternative scenarios regarding CEP elections, there should be no downward adjustment in CEP awards. Tillinghast Report at 78. In any event, the Court finds that, even if CEP benefits have to be adjusted downward, individual CEP claimants will still receive relief that is substantial and reasonably related to their perceived damages.

58. The Court finds that the Settlement will provide a minimum of \$169 million in economic value to the Class. This sum does not include the additional economic value that the class will receive from Settlement Scrip, the Prospective Commitment and the Part VIII ADR Process.

59. Pursuant to a March 31, 1999 Escrow Agreement between the company and Bankers Trust Company, AGL established an escrow fund for the purpose of satisfying a portion of its obligations under the Settlement Agreement. The Court approves this escrow fund as a “qualified settlement fund” under I.R.C. Reg. § 1.468B–1. Nothing in the Escrow Agreement shall alter any of AGL's obligations under the Settlement Agreement, including its obligations to (i) the Class or (ii) Lead Counsel.

III. JURISDICTION

A. Subject Matter Jurisdiction

60. This Court possesses federal question jurisdiction, 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331, over the subject matter of this action pursuant to the plaintiffs' claims based on conduct in violation of federal law, 18 U.S.C. § 1962(c).

*10 61. The existence of federal question jurisdiction over the section 1962(c) claims authorizes the Court to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining state law claims. Section 1367 codifies “principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that ‘derive from a common nucleus of operative fact,’ such that ‘the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.’” *City of Chicago*

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v. International College of Surgeons, 522 U.S. 156, 164–65, 118 S.Ct. 523, 529, 139 L.Ed.2d 525, 535 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218, 227–28 (1966)); see also *Soliday v. Miami County*, 55 F.3d 1158, 1165 (6th Cir.1995).

62. The Court additionally possesses diversity jurisdiction under 28 U.S.C. § 1332. Complete diversity exists between each named plaintiff and the defendant, and each plaintiff and Class Member has pleaded an amount in controversy of more than \$75,000. [Comp. ¶ 3] In any event, the Court would have diversity jurisdiction even if only one named plaintiff satisfied the amount in controversy. See *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930–33 (7th Cir.1996); *In re Abbott Lab.*, 51 F.3d 524, 527–29 (5th Cir.1995).

B. Personal Jurisdiction

63. The Court has personal jurisdiction over the plaintiffs and Class Members from Tennessee because those persons have minimum contacts with this forum. The Court also has personal jurisdiction over out-of-state Class Members because, as discussed in more detail below, proper notice has been provided to them and they have been given a chance to opt out or to be heard. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628, 641–42 (1985); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir.1998), cert. denied, 119 S.Ct. 890 (1999).

64. The Court therefore finds that all Class Members who did not request exclusion from the Class by the April 29, 1999 deadline are subject to this Court's personal jurisdiction. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. at [REDACTED] S.Ct. at 2974–75, 86 L.Ed.2d at 642–43.

IV. NOTICE TO CLASS MEMBERS

65. In its December 17, 1998 Order, the Court found that the individual notice to be provided to Class Members, the procedures for mailing and remailing the individual notice, and the summary publication notice constituted “the best practicable notice” and were “reasonably calculated, under the circumstances, to ... meet the requirements of the Federal

Rules of Civil Procedure (including Fed.R.Civ.P. 23(c) and (e)), the United States Constitution (including the Due Process Clause), the Rules of this Court, and any other applicable law.” Based on the findings set forth below, the Court affirms these conclusions.

*11 66. Approximately 849,851 individual notices were mailed by first-class mail to current and former policyowners at their last-known addresses between January 29 and March 3, 1999. Dahl Decl. ¶¶ 16–18. In addition, copies of individual notices were mailed to 15 attorneys known to represent Class Members in litigation against defendant. *Id.* ¶ 19; Whelan Decl. ¶ 4. The notice was accompanied by, among other things, a cover letter summarizing the notice, a question-and-answer brochure responding to anticipated questions about the case and the proposed Settlement, two “fact sheets” describing in greater detail the various forms of settlement relief and individualized forms regarding the settlement benefits available to the Class Member (collectively, the “notice package”). Dahl Decl. ¶ 8 & Ex. A. Through May 4, 1999, Rust remailed notice packages returned with a forwarding address, as well as notice packages for which either of the two search firms retained by Rust was able to provide updated address information. *Id.* ¶¶ 21–24.

67. The notice package included, among other things, (i) the case caption; (ii) a description of the litigation; (iii) a description of the settlement Class; (iv) identification of counsel for the Class; (v) a description of the proposed Settlement, including the relief available; (vi) the full text of the release to be given AGL; (vii) the date and time of the Fairness Hearing; (viii) information about entering an appearance at the Fairness Hearing individually or through counsel; (ix) the procedure and deadline for filing objections; (x) the manner in which Class Members could obtain access to discovery materials produced in the lawsuit; (xi) the procedure and deadline for filing requests for exclusion; (xii) the consequences of requesting exclusion; (xiii) the consequences of remaining in the settlement Class; (xiv) a description of AGL's responsibility for plaintiffs' attorneys' fees and expenses; (xv) a description of the preliminary injunction issued by the Court; and (xvi) the procedure for obtaining additional information, including the toll-free telephone number established to respond to Class Member inquiries.

68. The notice package provided to Class Members contains clear and comprehensive documents that present, in a reader-friendly format, detailed and accurate information about the

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lawsuit, the proposed Settlement and the options available to Class Members. Harrison Aff. ¶ 11; p. 35; Priest Aff. ¶ 24; Corcoran Aff. ¶ 18; Sexton Decl. ¶ 9. The notice package in this case is quite similar to the notice package considered by the United States Court of Appeals for the Third Circuit in *In re Prudential Ins. Co. of Am. Sales Practices Litig.* That court found that "the provision of individual notice to each class member is by no means typical of the notice provided in most class actions, and certainly qualifies as unprecedented."

In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d at 306.

*12 69. In addition to providing the individual notice described above, the parties published a summary notice on March 9, 10 or 11, 1999 in *The Wall Street Journal* (national edition), *The New York Times* (national edition), *USA Today*, *The Houston Chronicle*, *The Tennessean* (Nashville, Tennessee), and the newspapers with the highest circulation in each of the remaining 48 states and the District of Columbia. Novak Decl. ¶ 4 & Ex. A. The summary notice also was published on AGL's internet website and Lead Counsel's website. Howard Decl. ¶ 3; Weiss/Stoia Decl. ¶ 134.

70. The summary notice included, among other things, (i) the case caption; (ii) a description of the settlement Class; (iii) a brief description of the proposed Settlement; (iv) identification of counsel for the Class; (v) the date and time of the Fairness Hearing; (vi) information about appearing at the Fairness Hearing; (vii) information about and the deadline for filing objections to the Settlement; (viii) information about and the deadline for filing requests for exclusion; (ix) the consequences of requesting exclusion; (x) the consequences of remaining in the settlement Class; (xi) a description of AGL's responsibility for plaintiffs' attorneys' fees and expenses; (xii) a description of the preliminary injunction issued by the Court; and (xiii) the procedure for obtaining additional information, including the toll-free telephone number established to respond to Class Members inquiries regarding how they could obtain an individual notice package.

71. The Court finds that the publication notice provided to Class Members is a clear and comprehensive summary of the proposed Settlement that presents detailed and accurate information about the lawsuit, the terms of the Settlement and the options available to Class Members.

72. At the parties' direction, Rust also established the American General Life Class Action Information Center,

including, among other things, a toll-free telephone bank to respond to Class Member inquiries. Dahl Decl. ¶ 31. The toll-free number was included both in the individual class notice and in the published summary notice, and both notices informed Class Members that, if they had any questions about the Settlement, they should call the toll-free telephone number. The Class Action Information Center was staffed with individuals who were trained by the parties to answer Class Member questions. *Id.* ¶ 35. As of May 5, 1999, the telephone bank had responded to over 57,000 policyowner inquiries. *Id.* ¶ 47. Plaintiffs' counsel was on site at the Class Action Information Center since its opening to participate in the day-to-day operation of the center, to monitor Class Members' conversations with the operators and to speak directly with Class Members. Weiss/Stoia Decl. ¶ 137. As of May 7, 1999, plaintiffs' counsel had spoken directly with over 8,456 Class Members and monitored over 9,012 additional calls between the operators and Class Members. *Id.* ¶ 138.

*13 73. Based upon its review of the individual and publication notice materials and expert testimony concerning those materials, the Court concludes that the best practicable notice was given to the Class in this case and that the notice was reasonably calculated (i) to describe the action and the plaintiffs' rights in it and (ii) to apprise interested parties of the pendency of the action and of their right either to exclude themselves from the Class or to appear and object to the Settlement. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 812, 105 S.Ct. at 2974, 86 L.Ed.2d at 642; accord *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435, 1449 (9th Cir.1987), *rev'd on other grounds*, 490 U.S. 93, 109 S. t. 1661, 104 L.Ed.2d 86 (1989). In determining that the best practicable notice was provided to Class Members, the Court has considered that amendments were made to the Stipulation of Settlement after notice was mailed and published. Because these amendments enhance the relief provided to Class Members, the Court finds that additional notice was not and is not necessary. The notice previously sent to Class Members remains the best practicable notice that could have been given to Class Members and is consistent with constitutional standards.

74. The Court thus affirms its finding and conclusion in the December 17, 1998 Order that the notice in this case meets the requirements of the Federal Rules of Civil Procedure (including *Fed.R.Civ.P. 23(c)(2)* and (e)), the United States

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Constitution (including the Due Process Clause), the Rules of this Court, and any other applicable law.

V. CLASS CERTIFICATION

75. In its December 17, 1998 Order, the Court preliminarily certified the Class for settlement purposes. Plaintiffs argue that final certification of this action is both appropriate and warranted. Weiss/Stoia Decl. ¶¶ 168–75. Defendant has taken no position on the certification of a class action as part of this Settlement. The Court makes the following findings in support of its decision to grant final certification of the Class for settlement purposes, which are intended to supplement and finalize the certification findings made by this Court in its December 17, 1998 Order.

76. In order to certify this settlement class, the Court must find that the proposed class meets the four threshold requirements of Federal Rule of Civil Procedure 23(a) – numerosity, commonality, typicality and adequacy of representation – and, in addition, is maintainable under Rule 23(b)(3). The Rule 23(b)(3) requirements are that common questions “predominate over any questions affecting only individual members” and that class resolution be “superior to other available methods for the fair and efficient adjudication of the controversy.”

77. In Amchem Products, Inc. v. Windsor, 521 U.S. 591, 618, 117 S.Ct. 2231, 2247, 138 L.Ed.2d 689, 706–10 (1997), the Supreme Court expressly acknowledged that cases may be certified for settlement purposes only. In doing so, the Supreme Court stated that the “dominant concern” on which a court should focus in deciding whether to certify a class is “whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives.” Id. at 621. The Court further held that, when the question of certification is raised in connection with a class action settlement, “settlement is relevant to a class certification,” id. at 619, and “must be considered as a factor in the calculus,” id. at 622.

*14 78. Numerosity – There is no question that the class proposed in this case – which has approximately 700,000 Class Members living across the nation – meets the numerosity requirement. E.g., Senter v. General Motors

Corp., 532 F.2d 511, 523 (6th Cir.1976); see also Coburn v. 4-R Corp., 77 F.R.D. 43, 44 (E.D.Ky.1977).

79. Commonality – The commonality requirement is satisfied when the members of a proposed class share at least one common factual or legal issue. Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 884 (6th Cir.), cert. denied, 429 U.S. 870 (1976); H. Newberg & A. Conte, 1 Newberg on Class Actions § 3.10, at 3–51 to –52 (3d ed.1992); 5 James Wm. Moore et al., Moore's Federal Practice § 23.23 [2] (3d ed.1999). This requirement thus is satisfied “as long as the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation.” Day v. NLO, Inc., 144 F.R.D. 330, 333 (S.D. Ohio 1992) (quoting Sweet v. General Tire & Rubber Co., 74 F.R.D. 333, 335 (N.D. Ohio 1976)) (emphasis in original)); see also In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F.Supp. at 511 (collecting cases). “[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class is impermissible.” Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir.1988).

80. In this case, the complaint (¶ 104) alleges over 30 factual and legal issues common to the Class, including whether AGI routinely engaged in fraudulent and deceptive acts, practices and courses of conduct in the design and sale of its insurance policies, and whether AGI failed to disclose to plaintiffs and other Class Members material information relating to its internal projections of future dividend scales or interest crediting rates. The commonality requirement is thus satisfied.

81. Typicality – Typicality is satisfied when the named plaintiff's injuries “arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” Craft v. Vanderbilt Univ., 174 F.R.D. 396, 404 (M.D.Tenn.1996); accord Senter v. General Motors Corp., 532 F.2d at 525 n. 31 (citation omitted); Slight factual differences that may exist between the class representatives and other Class Members will not defeat typicality. See Senter v. General Motors Corp., 532 F.2d at 525 n. 1; Craft v. Vanderbilt Univ., 174 F.R.D. at 404; see also Tucker v.

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Union Underwear Co., 144 F.R.D. 325, 329 (W.D.Ky.1992) (“absolute homogeneity” not required).

82. The typicality requirement is satisfied in this case because the named plaintiffs allege claims that arise from the same alleged course of conduct that purportedly harmed all Class Members and are based on the same legal theories. See

In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F.Supp. at 518 (typicality requirement met in case alleging replacement, vanishing premium and investment plan claims, because defendant's alleged scheme to defraud was “prominent guiding thread through all of the plaintiffs' claims”); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. at 63 (typicality requirement met where “named plaintiffs were subjected to the same deceptive sales techniques allegedly used by [defendant] against other class members”).

*15 83. Adequacy of Representation – Rule 23(a)'s adequacy of representation requirement “serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 625, 117 S.Ct. at 2250, 138 L.Ed.2d at 714 (citations omitted). This requirement is met when (i) the named representatives have common interests with unnamed members of the class and (ii) the representatives have retained qualified counsel. *Senter v. General Motors Corp.*, 532 F.2d at 525; see also *Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir.1977) (the requirement tests “the experience and ability of counsel for plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent”). In this case, both of these requirements are easily met.

84. There are no conflicts of interest or other antagonisms between plaintiffs and other Class Members that would impair the representative plaintiffs' incentive to prosecute vigorously all aspects of the claims against AGL. See Issacharoff Decl. ¶¶ 34–37. The named representatives have the same incentive as other Class Members who believe they were deceived: to establish the alleged fraud and to maximize the overall recovery. See *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir.1981) (“so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation

purposes”) (internal citation omitted). In addition, it is clear that the settlement – which is relevant to determining whether there is adequate representation of absent Class Members, see *Amchem Prods., Inc. v. Windsor* 521 U.S. at 621, 117 S.Ct. at 2248, 138 L.Ed.2d at 711 – benefits the Class and does not involve any sacrifice of the interests of some Class Members for those of others. Issacharoff Decl. ¶¶ 34–37. Finally, the extremely low number of requests for exclusion (less than 0.25% of Class policies) and objections (24 objections submitted on behalf of 25 Class Members) confirms that the interests of the named plaintiffs and of Class Members are closely aligned and that the vast majority of Class Members believe that their interests have been well served.

85. The named class representatives have engaged competent counsel. Lead Counsel in this case, Milberg Weiss Bershad Hynes & Lerach LLP, is a firm of national stature, experienced in the litigation and settlement of large, nationwide class actions. Lead Counsel and the other firms representing the Class in this case are clearly qualified to conduct this action. See generally Weiss/Stoia Decl. ¶ 173. In addition, plaintiffs' counsel have vigorously conducted this litigation from the outset. The settlement negotiations in this case were long and protracted. Only after plaintiffs' counsel had finished their discovery and satisfied themselves that they had procured the best possible settlement for the Class was an agreement reached. The Class thus had more than adequate legal representation. See Priest Aff. ¶ 22.

*16 86. Predominance of Common Questions – The predominance requirement in Rule 23(b)(3) focuses “on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 623, 117 S.Ct. at 2249, 138 L.Ed.2d at 712. This requirement “requires a predominance of common questions, not a unanimity of them.” *Hanrahan v. Britt*, 174 F.R.D. 356, 365 (E.D.Pa.1997) (emphasis added; citation omitted). This requirement is thus “not defeated by slight differences in class members' positions.” *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir.1975), cert. denied, 429 U.S. 816 (1976); accord *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir.1987); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. at 510–11; *Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741, at *15.

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87. The predominance requirement is satisfied when “the litigation will concern ‘similar or standardized oral representations contain[ing] significant legal and factual questions which are common to the class.’” *Hanrahan v. Britt*, 174 F.R.D. at 365 (quotation omitted); see also *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir.) (even a few common issues may satisfy the predominance requirement if resolution of those issues “will so advance the litigation that they may fairly be said to predominate”), *cert. denied*, 479 U.S. 852 (1986). When confronted with a class of purchasers allegedly defrauded over a period of time by a similar common thread or scheme to which all alleged non-disclosures or misrepresentations relate, “courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant’s course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members’ positions, and that the issue may profitably be tried in one suit.” *Blackie v. Barrack*, 524 F.2d at 892; accord *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d at 725. A claim will meet the predominance requirement when there exists generalized evidence that proves or disproves an element on a simultaneous, classwide bases, because such proof obviates the need to re-examine each class member’s individual position. *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D.Minn.1995); see also Issacharoff Decl. ¶ 12.

88. As noted above, in their complaint (¶ 104), plaintiffs allege over 30 factual and legal issues common to the Class. These allegations relate to whether AGL uniformly failed to disclose material information relating to policy dividends, interest credits and values, whether AGL developed a common scheme for fraudulently inducing Class Members to purchase insurance, and whether AGL implemented any such scheme by training agents to use uniformly deceptive sales techniques and by providing agents with uniformly deceptive sales materials and policy illustrations to be used with prospective purchasers. Resolution of these issues will clearly “so advance the litigation that they may fairly be said to predominate.” *In re School Asbestos Litig.*, 789 F.2d at 1010; accord *Sterling v. Velsicol Chem Corp.*, 855 F.2d at 1197.

*17 89. In this case, plaintiffs’ allegations of a common scheme of deception are sufficient to demonstrate that

common questions predominate. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153, 40 L.Ed.2d 732, 749 (1974) (“[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met”) (quoting *Miller v. Mackey Int’l*, 452 F.2d 424, 427 (5th Cir.1971)); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 625, 117 S.Ct. at 2250, 138 L.Ed. at 713 (“[p]redominance is a test readily met in certain cases alleging consumer ... fraud”); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d at 314 (case “involving a common scheme to defraud millions of life insurance policy holders” falls within the category of cases that satisfy the predominance requirement).

90. The Court recognizes that differing state laws might have applied to certain of plaintiffs’ claims had this case been tried. Of course, plaintiffs’ claims under federal law involve a common body of law. Even as to state law claims, however, the possible existence of such variations does not defeat a finding of predominance. In a nationwide insurance sales practice class action involving the same types of claims and legal questions as those at issue here, the United States Court of Appeals for the Third Circuit held that any variations in state law did not defeat the district court’s finding that common issues predominated over individual ones because the potential variations “could be overcome at trial by grouping similar state laws together and applying them as a unit.” *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d at 315; see also Issacharoff Decl. ¶¶ 30–32.

91. Finally, the Court notes that, to the extent any variations in state law would suggest that the case might not be readily manageable as a class action, that is an issue that the Supreme Court has specifically stated a court need *not* consider in determining whether a class should be certified for settlement purposes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 620, 117 S.Ct. at 2248, 138 L.Ed.2d at 710.



92. The Court therefore finds that common issues of law and fact predominate.

93. Superiority – Matters pertinent to a finding of superiority include:



(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

 Fed.R.Civ.P. 23(b)(3).

a. Interests of Individual Members – The interest of class members in conducting separate lawsuits does not require denial of class certification when a large number of class members' claims would be so small that class members would be deterred from bringing actions on their own. *See, e.g.,*

 *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. at 64;  *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. at 523. As the Supreme Court recently emphasized:


*18 The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.


 *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 617, 117 S.Ct. at 2246, 138 L.Ed.2d at 709 (quoting  *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)). In addition, because Class Members who wished to pursue their own

lawsuit could have requested exclusion, no Class Member was precluded from conducting a separate lawsuit if he or she so desired. Moreover, the interest of Class Members in pursuing their individual claims is actually advanced by the settlement class proposed in this case, because the Settlement itself provides an efficient and cost-free means for Class Members to present individual claims and obtain individualized determinations whether their claims merit relief and, if so, at what level.


b. Pending Proceedings – There are only seven individual lawsuits pending against AGL relating to the sales practices at issue in this case. Weiss/Stoia Decl. ¶ 175. This number is very small in comparison to the large number of Class Members who will benefit from this Settlement. Those seven actions will not, separately or collectively, result in an adjudication of the controversy that underlies this class action.

c. Concentration of Litigation in One Forum – Because this case will be settled (not tried), the desirability of concentrating the litigation in a particular forum is consistent with certification. Moreover, it clearly is more efficient to have these claims resolved in one forum.

d. Manageability – Given the Supreme Court's holding that a court certifying a settlement class need not decide whether or not a class action would be manageable at trial,  *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 620, 117 S.Ct. at 2248, 138 L.Ed.2d at 710, this Court need not consider the issue of manageability. It is nevertheless worth noting that the proposed Settlement resolves any manageability problems that would have been present by creating a mechanism for reviewing the individual claims of Class Members. The Settlement Agreement thus permits what may be a sizable number of Class Members to achieve individual relief without burdening the judicial system and thus “result[s] in a large saving of judicial resources.” *See Margaret Hall Found., Inc. v. Atlantic Fin. Management, Inc.*, 1987 U.S. Dist. LEXIS 7528, at *15 (D.Mass. July 30, 1987).

94. Based on the above, the Court grants final certification of the settlement class in this case under  Fed.R.Civ.P. 23(b)(3).

VI. FAIRNESS OF THE SETTLEMENT

95. Under  Federal Rule of Civil Procedure 23(e), a court should approve a proposed class action settlement

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if it determines that the settlement is “fair, adequate, and reasonable, as well as consistent with the public interest.” *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir.1990). In making this determination, a court should consider the following factors: (i) plaintiff’s likelihood of success on the merits, weighed against the amount and form of relief offered in the settlement; (ii) the complexity, expense and likely duration of the litigation; (iii) the stage of proceedings and the amount of discovery completed; (iv) the nature of the settlement negotiations; (v) the objections raised by members of the class and (vi) the judgment of experienced counsel. See, e.g., *Williams v. Vukovich*, 720 F.2d 909, 922–23 (6th Cir.1983); *Berry v. School Dist. of City of Benton Harbor*, 184 F.R.D. 93, 98 (W.D.Mich.1998); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 140 (W.D.Ky.1992); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 371 (S.D.Ohio 1990).

*19 96. In addition, a court should consider the “overriding public interest in favor of settlement of class action lawsuits,” *Whitford v. First Nationwide Bank*, 147 F.R.D. at 143, bearing in mind that compromise is the essence of settlement, see

Williams v. Vukovich, 720 F.2d at 922 (“[a] court may not withhold approval simply because the benefits accrued from the decree are not what a successful plaintiff would have received in a fully litigated case”). The proposed settlement here more than satisfies these various considerations.

97. Plaintiffs’ Likelihood of Success at Trial – “[O]ne of the most important factors in assessing the fairness of a settlement agreement is the strength of the plaintiffs’ case on the merits balanced against the relief offered in the settlement.” *Berry v. School Dist. of City of Benton Harbor*, 184 F.R.D. at 98. In assessing plaintiffs’ likelihood of success at trial for purposes of determining whether the Settlement is fair, reasonable and adequate, the Court should make only a “limited inquiry into whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement.” *Ressler v. Jacobson*, 822 F.Supp. 1551, 1553

(M.D.Fla.1992); accord *Williams v. Vukovich*, 720 F.2d at 921 (in determining fairness of consent decree, “[t]he Court has no occasion to determine the merits of the controversy or the factual underpinning of the legal authorities advanced by the parties”).

98. Furthermore, although the Court has considered the effect of possible variations in state law in certifying the Class, it has neither made, nor is required to make, any choice of law

determination in assessing the obstacles plaintiffs might face at trial. See *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 167–68 (S.D.Ohio 1992); *Michels v. Phoenix Home Mut. Life Ins. Co.*, 1997 N.Y. Misc. LEXIS 171, at *51–52, *Willson v. New York Life Ins. Co.*, 1995 N.Y. Misc. LEXIS 652, at *41.

99. The Court notes that defendant’s submission [at 33–36] raises a number of potential legal and factual obstacles that plaintiffs would have faced if this litigation had proceeded to the merits, including, among others, that (i) plaintiffs’ claims of misrepresentations would be contradicted by the language of the policies themselves; (ii) alleged promises of future conduct or expressions of opinion cannot support misrepresentation claims; (iii) the economic loss doctrine bars plaintiffs’ tort claims; and (iv) plaintiffs’ claims would have to overcome statutes of limitations, parol evidence and statute of frauds defenses. Plaintiffs acknowledge in their submission [at 28] that these defenses are “potentially formidable.”

100. The existence of these (and other) potential obstacles to plaintiffs’ success on the merits argues in favor of approving the settlement.

101. Amount and Form of Relief Offered in the Settlement – When plaintiffs’ likely success on the merits is weighed against the amount and form of relief offered in the settlement, the balance tips decisively in favor of approving the settlement.

*20 102. There is no fixed point above or below which a settlement is or is not fair. Indeed, “[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is inadequate; there is no reason why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.” *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 463–64 (2d Cir.1982) (internal quotation marks omitted).

103. The parties’ actuarial experts have opined that the Settlement’s benefit package will provide at least \$169 million in economic value to the class. See Tillinghast Report at 77–78; Long Decl. ¶ 12. This valuable relief falls well within the “range of reasonableness” required for settlement approval. See, e.g., *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D.Ga.1993) (“[i]n assessing the settlement, the Court must determine whether it falls

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within the range of reasonableness, not whether it is the most favorable possible result in the litigation”) (internal citations omitted).

104. Class Members who elect General Policy Relief automatically will receive an aggregate economic value of \$130.3 million in death benefits and also will have the opportunity to use or transfer Settlement Scrip. These Class Members also will automatically receive the benefits of the Prospective Commitment if AGL increases its cost-of-insurance charges or decreases its dividends due to its mortality experience for one year following July 1, 1999.


105. Class Members who elect CEP will have an opportunity to present their individual claims to a Claim Evaluator chosen by Lead Counsel. If they are successful, they will receive cash awards. AGL will make up to \$38.7 million (plus interest) available for distribution through CEP. A CEP claimant who receives the highest level designation for his or her claim may receive an award that approximates the economic loss suffered. *See* Weiss/Stoia Decl. ¶ 77; Santillo Decl. ¶ 25; *see also* Priest Aff. ¶ 32 (“[t]hese various forms of [CEP] relief represent substantial restitution of meritorious claims and, in fact, appear not fully adjusted to reflect the defenses that would be available to the Defendant if affected class members were required to prosecute active litigation”). As noted above, the Court finds that, even if the total amount of awards made under CEP require a pro rata reduction of all awards (an outcome the actuarial experts do not expect), CEP still will provide substantial compensation to individual CEP claimants.

106. The Court notes that the Settlement makes additional value available, including that derived from the very existence of CEP and the Part VIII ADR Process (both of which will provide fair, simple and essentially cost-free mechanisms to resolve Class Members' individual claims). *See Spitz v. Connecticut General Life Ins. Co.*, MDL No. 1136, No. CV95-8484, slip op. at 3 (C.D.Cal. Jan. 13, 1997).



*21 107. Additionally, the Court notes that the finality provisions for CEP and Part VIII ADR determinations represent an appropriate and efficient means of providing expeditious relief to the class and minimizing the burden on the Court and the parties. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d at 925;

  *Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741, at *7-8;  *Stewart v. Rubin*, 948 F.Supp. 1077,

1082 (D.D.C.1996), *aff'd*, 125 F.3d 1309 (D.C.Cir.1997); *Haynes v. Shoney's, Inc.*, 1993 WL 19915, at *18, *42 (N.D.Fla. Jan. 25, 1993). The potential for appeals could create an ongoing administrative burden for the Court and the parties, thereby undermining one of the purposes of settling this case, *see, e.g., Bachman v. Miller*, 559 F.Supp. 150, 152 n. 7 (D.D.C.1982), and could also delay the provision of relief to the Class as a whole. Class Members who elected CEP did so after having been specifically informed through the notice package that claim decisions would not be reviewed, and Class Members are properly bound by their elections. *See, e.g., Bachman v. Miller*, 559 F.Supp. at 151-52; *Gramling v. Food Mach. & Chem. Corp.*, 151 F.Supp. 853, 855-56 (D.S.C.1957). Moreover, the very structure of the claim procedure (including, among other things, the use of objective scoring criteria that are part of the approved Settlement) should ensure that claims will be processed in a procedurally and substantively fair manner. The Court retains jurisdiction over this case to consider issues regarding whether the Settlement has been implemented consistent with the terms of the Settlement Agreement. *See Security Pac. Fin. Servs. v. Jefferson*, 259 Ill.App.3d 914, 921, 632 N.E.2d 299, 304, 198 Ill.Dec. 240, 245 (1994).





108. For all of these reasons, there is no question that the proposed Settlement provides relief that is fair and adequate and within the “range of reasonableness.”  *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D.Ga.1993).

109. Length, Complexity and Cost of Further Litigation – The Court finds that this factor also supports approval of the Settlement. The complaint's allegations concern the sale and performance of approximately 850,000 life insurance policies. If this case were to proceed without settlement, the resulting litigation would be lengthy, complex and expensive.

See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d at 318; *In re Manufacturers Life Ins. Co. Premium Litig.*, No. 96-CV-230 BTM (AJB), slip op. at 10 (S.D.Cal. Dec. 21, 1998);   *Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741, at *27. The proposed Settlement grants Class Members timely relief without their having to endure the risk, complexity, duration and expense inherent in continuing this litigation. *See Michels v. Phoenix Home Life Mut. Ins. Co.*, 1997 N.Y. Misc. LEXIS 171, at *88.

110. Stage of Proceedings at Which Settlement Was Achieved – In assessing this factor, the relevant inquiry is whether

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the parties have conducted sufficient discovery to assess the strengths and weaknesses of their claims and defenses. *See, e.g., Woodward v. NOR-AM Chem. Co.*, 1996 WL 1063670, at *21 (S.D.Ala. May 23, 1996). Comprehensive discovery is not necessary, *id.*; “only some reasonable amount of discovery” is required,   *Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741, at *31 (internal quotation marks omitted). In this case, extensive document discovery and numerous depositions were completed. The discovery enabled plaintiffs' counsel not only to assess the legal and factual merits of their clients' claims, but also to negotiate a settlement that provides relief specifically tailored to Class Members' needs. Discovery has therefore afforded the Court and the parties a clear view of “the facts and legal issues involved, as well as the strengths and weaknesses of [the parties'] positions.”  *In re Dun & Bradstreet Servs. Customer Litig.*, 130 F.R.D. at 371; accord, *e.g., Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741, at *31;  *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. at 67. Thus, this factor also favors approval of the Settlement.

***22** 111. The Nature of the Negotiations – This settlement was the product of extensive, contentious, arm's length negotiations that lasted for close to a year. *See generally* Santillo Decl. ¶¶ 11–28; Weiss/Stoia Decl. ¶¶ 67–79. The Settlement was not finalized until after plaintiffs had conducted extensive document and witness discovery. The history of the settlement negotiations thus clearly counsels in favor of approving the Settlement. *See, e.g., In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. at 372 (approving settlement negotiated at arms' length, with no evidence of collusion and no indication that any party or subgroup of class members benefited at class's expense).

112. Substance and Amount of Opposition to the Settlement – There has been very little opposition to this Settlement. Only 1,976 policies (representing only 0.24% of the Class policies) have been excluded from the Class. Second Supplemental Dahl Decl. ¶ 5. Only 24 objections were submitted on behalf of 25 Class Members.² This small amount of opposition strongly supports approving the Settlement.

113. After due consideration, for the reasons set out below, the Court finds that none of these objections prevents the Court from approving the Settlement.

114. As noted above, one Class Member, Franklin T. Jones, Jr., moved (two days before the Fairness Hearing) to intervene in this action. That motion has been denied. The Court's denial of Mr. Jones' intervention motion is discussed in a separate Order filed in this action. Mr. Jones also appeared, through his counsel, T. John Ward, at the June 3, 1999 Fairness Hearing and was heard.

115. It appears that Mr. Jones' objection to the Settlement has changed since he filed his first objection, which was the only timely objection he filed, on April 28, 1999 (one day before the deadline for filing objections). In that submission, Mr. Jones' only objection was that he was unable to obtain a copy of the CEP Guidelines.¹⁰ This objection became moot when he received a copy of the Guidelines from plaintiffs' counsel in late April or early May, immediately after plaintiffs' counsel became aware of Mr. Jones' desire to obtain a copy.

116. Mr. Jones next complained (in a submission entitled “Motion to Intervene” filed two days before the June 3 hearing and well after the April 29, 1999 deadline for objections) that the relief available to him under CEP would be inadequate to address his economic loss. This objection is untimely. In any event, at the hearing, Mr. Jones' counsel acknowledged that this objection was based on his own erroneous calculations.

117. Mr. Jones' counsel then focused his presentation on an entirely different objection: that the CEP process is somehow procedurally flawed because the Claim Evaluator's decision is final and binding and not subject to review. This objection, which received only passing reference (one sentence to be exact) in Mr. Jones' June 1, 1999 submission, is again untimely, and the Court overrules it for that reason. Mr. Jones has no excuse for not raising that issue much earlier. The Court nevertheless has considered the objection and finds it is without merit.

***23** 118. Mr. Jones received notices for the multiple Class policies he owns. These notices clearly informed him in two places that the Claim Evaluator's decision would be final and unreviewable. The notices stated that “[t]he Claim Evaluator's decision will be final.” *See* Dahl Decl. Ex. A, Notice at 12 Notice at 12. In addition, the Fact Sheet on CEP that was included in each notice package stated that

[t]he Claim Evaluator's decision about
 the relief for a claim will be final and

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binding on [AGL] and on you. *It will not be subject to any appeal by anyone or on any basis.*

Id. Ex. A, CEP Fact Sheet at 15 (emphasis added).¹¹ If Mr. Jones found this provision objectionable, he should have raised it in his earlier objection, or he could have requested exclusion from the Class and pursued any claims he had in the courts. Instead, Mr. Jones affirmatively chose to participate in CEP by returning election forms for his policies within the Class.¹²

119. Moreover, as noted above (*see* ¶ 107), the parties had very good reasons for including the finality provisions of CEP and the Part VIII ADR Process in the Settlement Agreement. Based on the record before the Court, it is clear that the parties sought to make those processes as streamlined and efficient as possible, to avoid burdening the Court and themselves with extended and drawn-out proceedings and to provide relief as quickly as possible to the Class. As discussed above, during settlement negotiations, plaintiffs' counsel insisted on a streamlined alternative dispute resolution process. *See* Weiss/Stoia Decl. ¶ 72; Santillo Decl. ¶ 13. The finality provision will allow the Class as a whole to obtain relief much more quickly and efficiently than if review of the Claim Evaluator's decisions were allowed.

120. In streamlining the process, however, the parties have been careful to ensure that the process will remain fair to claimants. Thus, they included in the Settlement objective scoring criteria both for CEP and the Part VIII ADR Process. Those criteria, which are part of the Settlement Agreement, have been reviewed by the Court and are being approved as part of the Settlement. The Claim Evaluator will be chosen by plaintiffs' counsel, and he or she will review claims and award relief pursuant to these Court-approved guidelines. Given these provisions of the Settlement Agreement, the Court finds that the claim review procedures are procedurally and substantively fair.

121. Based on its review of the Settlement Agreement, the Court finds that the CEP and the Part VIII ADR finality provisions strike a lawful, appropriate and fair balance by providing for general judicial supervision of the implementation of the detailed guidelines without burdening judicial resources or delaying relief to the Class. The Court also notes that many other courts have approved class action settlements in which a claim administrator or other non-

judicial person determines class members' entitlement to relief without a right of appeal. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d at 925;  *Stewart v. Rubin*, 948 F.Supp. at 1082; *Haynes v. Shoney's, Inc.*, 1993 WL 19915, at *40-41; *cf. In re Dep't of Energy Stripper Well Exemption (Hertz)*, 846 F.2d 756, 759 (Temp.Emer.Ct.App.1988). Moreover, limiting individual appeals is consistent with well-established general legal principles governing settlements and voluntary ADR. *E.g., Gramling v. Food Machinery & Chemical Corp.*, 151 F.Supp. 853, 856 (D.S.C.1957).

*24 122. This Court has reviewed the Settlement Agreement and has provided all Class Members – including Mr. Jones – with an opportunity to be heard on any aspect of the Settlement, including CEP and the Part VIII ADR Process. This Court has approved those processes, specifically including the substantive standards that will govern evaluation of all submitted claims. The Court's review of the Settlement – including CEP and the Part VIII ADR Process – satisfies any right a Class Member might have had to have a court consider his or her claims. Once this Court enters its Final Judgment, Class Members' rights and claims are extinguished and released, except to the extent they arise under the Settlement. The Settlement Agreement that creates those contractual rights can prescribe their terms – and can prohibit review of final and binding determinations in the Court-approved CEP and Part VIII ADR Process. *See, e.g., Bachman v. Miller*, 559 F.Supp. 150, 152 (D.D.C.1982) (“From the time of the approval of the settlement by this Court, any claim ... Movants may have had against the [defendant] was res judicata – the settlement agreement itself finally disposed of Movant's claims.... When Movants brought their claims [in the claim-review process], their requests for relief arose under the settlement agreement.”).

123. Mr. Jones' counsel acknowledged that there are good reasons for the finality provision, but nevertheless argued that there should be a review process. After due consideration and for the reasons stated above, the Court disagrees. Moreover, if Mr. Jones' real concern is that the settlement might be implemented in a manner that is systemically inconsistent with the terms of the Settlement Agreement, the Settlement contemplates that the Court will retain jurisdiction over the Settlement to ensure that such systemic inconsistencies do not occur. *See Security Pac. Fin. Servs. v. Jefferson*, 259 Ill.App.3d at 921, 632 N.E.2d at 304, 198 Ill.Dec. at 245. *See* ¶ 107 above; Stipulation of Settlement at 70.

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124. The Court therefore finds that Mr. Jones' only timely objection (about the CEP Guidelines) is without merit and, in any event, is moot. Mr. Jones' other objections are untimely and are overruled. Furthermore, these claims also are without basis and do not prevent this Court's final approval of the Settlement.

125. Most of the other objectors challenge the adequacy of the settlement benefits, while a few criticize certain aspects of CEP, the class notice, the scope of the release, and plaintiffs' requested attorneys' fees. One other individual makes an assortment of objections that are all factually unfounded.

a. Adequacy of Settlement Benefits – A number of objections are based on the objectors' preference for some type of relief other than the death benefits and opportunity to buy a new policy that comprise two forms of General Policy Relief. In making this objection, these Class Members ignore the Claim Evaluation Process, through which they can seek a cash award. Moreover, their assertion that the free death benefits are worthless because the objectors do not expect to die is misguided. Regardless of whether a death benefit actually is paid, the *free* protection itself has value to the Class as a whole, as demonstrated by Class Members' prior purchase of life insurance. See *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 1986 WL 6531, at *18 (E.D. Pa. June 10, 1986) (extra title insurance provides benefit to all class members, regardless of whether they make any claim for the insurance), *aff'd*, 815 F.2d 695 (3d Cir.1987), *cert. denied*, 485 U.S. 909 (1988). Similarly flawed is the objectors' assertion that Settlement Scrip is worthless because they may not wish to use it. Settlement Scrip provides Class Members with an opportunity to purchase a life insurance product with a substantial AGL contribution if they so wish.

This opportunity has value. See *Dunk v. Ford Motor Co.*, 48 Cal.App. 4th 1794, 1805, 56 Cal.Rptr.2d 483, 490 (4th Dist.1996) (fact that some class members might not use settlement relief to obtain discounted products does not warrant disapproval of settlement). Moreover, Settlement Scrip is fully transferable by Class Members to family members or third parties (for value if they wish), and AGL will set up a website to allow Class Members and others to post an interest in transferring or obtaining Scrip. Under certain circumstances (defined in the Settlement Agreement), simplified underwriting will apply to policies purchased with Scrip.

*25 b. Furthermore, the narrow focus of these objectors on their own personal situations ignores that they have chosen

to litigate their claims in a class action and that the proposed settlement must be analyzed in terms of the relief provided to the entire Class. See *In re Xoma Corp. Sec. Litig.*, 1992 U.S. Dist. LEXIS 10502, at *10 (N.D.Cal. July 10, 1992) (“[t]he Court must be concerned with ensuring fairness to the class as a whole, rather than with satisfying any particular plaintiffs' demands”). If the objectors want *individualized* relief, CEP exists to provide it.

c. The objection that the General Policy Relief is based on the original face amount of each Class Member's policy, rather than on the value of the policy at some later date, is similarly based on the narrow personal situation of the three Class Members who make this objection. They object to this provision because the face amounts of their particular policies have increased since the date of purchase. For many other Class Members, however, this will not be the case; their policies' face amounts have *decreased* since the date of purchase. Because of these variations, it was necessary to establish some standard that could be uniformly applied throughout the Class – most logically, the value of the policy on the date of the transaction that gave rise to each Class Member's complaint. Again, the interest of the entire Class is the relevant issue, not the personal preferences of these few objectors.

d. The objectors' preferences for other types of relief are irrelevant. The issue is not whether the proposed settlement could have offered *different* or even more generous relief; the only question is whether the benefits *actually being offered* are fair, reasonable and adequate. If they are, the settlement should be approved. See *Bowling v. Pfizer*, 143 F.R.D. at 169 (settlement is “not a wish-list of class members that the Defendant must fulfill”).

e. Finally, the objector's complaint that the premiums on the policies that may be purchased with Settlement Scrip will vary depending on the insured's age, sex and medical condition ignores the fact that premium amounts are always based on these factors. In addition, AGL's contribution to the policy purchased with Settlement Scrip depends on the amount of the first-year base premium. Purchasers who pay higher premiums will get larger contributions from AGL.

f. CEP is an Efficient and Fair Process – One Class Member (Kenneth Klayman, who is a lawyer) criticized the \$38.7 million upper limit on CEP relief. The objector's apparent concern that this sum may not be enough to cover the awards that are ultimately issued has no basis in fact. As noted above,

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the parties' actuarial experts have concluded that the \$38.7 million should be more than sufficient to pay all CEP awards.

g. Additionally, Mr. Klayman seems to suggest that he did not have sufficient information at the time he made his election for CEP to know whether he wanted to participate in the process. However, as the notice states, even if Mr. Klayman elected CEP and later decided he did not want to participate, he would automatically receive General Policy Relief. *See* Dahl Decl. Ex. A, Notice at 12; Notice at 12. Furthermore, to the extent Mr. Klayman complains about not having enough information about the Settlement, much of the information was publicly available. The class notice specifically explained how Class Members could obtain additional information about the Settlement, including the Stipulation of Settlement (which includes the CEP Guidelines and is on file with the Clerk of the Court), and how they could review documents and other discovery produced in the litigation. Mr. Klayman, a lawyer residing in San Diego, could have reviewed these documents at the offices of Lead Counsel in San Diego, but chose not to do so.

***26** h. The Notice Is Clear and Comprehensive – The objection of Class Member Kathy Wood that the notice does not “make sense” to her is without merit. The class notice provided clear and detailed information about the lawsuit, the relief made available under the proposed settlement, and the choices – including whether to opt out or object – that Class Members were required to make. *See* Priest Aff. ¶ 24; Harrison Aff. ¶ 11, p. 35; Corcoran Decl. ¶ 18; Sexton Decl. ¶ 9.

i. The Scope of the Release Is Proper – Class Member Henry Clinton's objections that the release will give AGL free rein to engage in misconduct in the future, that the settlement lacks any provision to prevent such misconduct, and that the release bars Class Members “from responding to fresh actions by the company adversely affecting their interests” is also unfounded. The release expressly states that it does not alter a Class Member's right (i) to make a claim for benefits that become payable pursuant to the express terms of the policy or (ii) to assert a claim that independently arises from acts, facts or circumstances arising after the end of the Class Period. *See* Release ¶ II. Moreover, if Mr. Clinton (or any other Class Member), felt that the release was too broad, he could have requested exclusion from the Class.

j. Objections to Attorneys' Fees Are Unfounded – The objections to the amount of attorneys' fees and expenses

to be paid to plaintiffs' counsel overlook the corresponding benefits Class Members will receive because of plaintiffs' counsel's commitment of time and resources to this action. This case involved contentious litigation. Plaintiffs and their counsel faced the significant risk that they could have walked away from a litigation of this matter empty-handed. The record before the Court reflects the enormous and continuous resources (including out-of-pocket expenses) plaintiffs' counsel have dedicated to this litigation. In addition, plaintiffs' counsel will have continuing obligations to the case for which no additional compensation will be awarded. *See* Weiss/Stoia Decl. ¶ 192.

k. The objection that plaintiffs' counsel did not adequately represent the Class, but rather “became hirelings for the Company,” has absolutely no basis in fact. Likewise, the objection by Robert W. Bennett that plaintiffs' counsel improperly negotiated their fees at the same time as the settlement is unfounded. The terms of the settlement were finalized *before* an agreement on plaintiffs' attorneys' fees was concluded. Santillo Decl. ¶ 27; Weiss/Stoia Decl. ¶ 79. Moreover, the Court notes that the payment of fees and expenses to plaintiffs' counsel will have *no effect* on the relief available to Class Members.

l. The Remaining Objections Are Without Merit – Mr. Bennett makes several other objections that are not based on the facts.¹³ For example, Mr. Bennett objects to the determination at the Fairness Hearing of “some matters that should have been ruled upon sooner (such as certification of the class, class representatives and lawyers for the class).” While Fed.R.Civ.P. 23(c)(1) provides that a class certification order “may be altered or amended before the decision on the merits,” all of the issues that Mr. Bennett cites were addressed (at least preliminarily) in the Court's December 17, 1998 Order.

***27** m. Mr. Bennett also claims it is unconstitutional to enter an order enjoining any Class Members who have not timely excluded themselves from the Class from bringing an action based on the same claims or facts underlying this suit. Again, Mr. Bennett is simply incorrect. Every Class member who wants to pursue an independent action has been given the opportunity to opt out of this case. Any Class Member who has not exercised that option has voluntarily submitted to the

jurisdiction of this Court. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811–12, 105 S.Ct. at 2974, 86 L.Ed.2d at 641–42.¹⁴

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n. Another objector (Mr. Clinton) contends that policyholders' interests conflict with AGL's interest in increasing the company's earnings and stock price for its shareholders. Rather than stating an objection to the settlement, Mr. Clinton appears to be expressing a concern about how AGL, as a stock company, weighs various factors in making financial decisions. This concern is irrelevant to any consideration of the fairness of this settlement and, in any event, Mr. Clinton cites no improper conduct on the part of AGL.

o. Finally, some submissions that are styled "objections" are actually complaints about the underlying sales transactions, rather than objections to the settlement. These submissions are perfect candidates for CEP, which was designed to deal with just such complaints.

126. Views of Experienced Class Counsel – Another factor to be considered in determining whether to approve the Settlement is the experience of class counsel and their views of the Settlement. *Williams v. Vukovich*, 720 F.2d at 922–23. Plaintiffs' counsel have extensive experience in litigating and settling large, nationwide class actions – including life insurance sales practice cases. Numerous courts have recognized their vast experience and expertise, and have given counsel's opinion substantial weight in approving other similar settlements. *E.g., Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741, at *28; *In re Manufacturers Life Ins. Co. Premium Litig.*, No. 96–CV–230 BTM (AJB), slip op. at 14 (S.D.Cal. Dec. 21, 1998); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. at 542; *Natal v. Transamerica Occidental Life Ins. Co.*, No. 694829 (Cal.Super. Ct., San Diego County, July 28, 1997). This factor also weighs in favor of finding the Settlement fair, reasonable and adequate.

127. The Public Interest – The final factor to be considered is the public interest. The proposed settlement would avoid complex and protracted litigation, provide valuable relief to the Class, and "foster[] the goals of certainty, finality and economy, which lie at the heart of our general preference for settlement of class actions." *Berry v. School Dist. of City of Benton Harbor*, 184 F.R.D. at 106. In addition, the proposed settlement would resolve the parties' dispute "in a manner which does its best to ensure that Defendants can continue to provide valuable service to Class Members in an atmosphere that will foster trust and confidence." *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. at

372. In these circumstances, the public interest clearly weighs in favor of approving the settlement.

*28 128. The Settlement is Fair, Reasonable and Adequate – For all of the reasons set out above, the Court finds that the Settlement in this case is fair, reasonable and adequate.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PLAINTIFFS' ATTORNEYS' FEES AND EXPENSES

A. Attorneys' Fees and Expenses of Plaintiffs' Counsel of Record

129. The Settlement provides a minimum of \$169 million in economic value and other benefits, and up to \$193.6 million in total classwide benefits. *See Weiss/Stoia Decl.* ¶ 6. Consequently, plaintiffs have requested an award of attorneys' fees and the reimbursement of expenses in an amount not to exceed \$19.5 million, currently comprised of \$19.1 million in fees and approximately \$389,858 in current expenses. *See Plaintiffs' Fee Declarations* filed on May 21, 1999. This fee request reflects more than 18,300 hours of time over nearly 2 years, valued at \$5.01 million at current rates. *Id.*; *Weiss/Stoia Decl.* ¶¶ 190–91. The Court finds that the fee and expense negotiations were conducted at arm's length, only after the parties had reached agreement on all terms of the Settlement. There is no evidence in this case that the Settlement, or the fee and expense agreement, was in any way collusive. Under these circumstances, the Court gives great weight to the negotiated fee in considering the fee and expense request.

130. Such agreements between plaintiffs and defendants in class actions are encouraged, particularly where the attorneys' fees are negotiated separately and only after all terms of the settlement have been agreed to between the parties. *See Williams v. MGM–Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir.1997) ("parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees"); *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40, 53 (1983) (noting that negotiated, agreed upon attorneys' fees are the "ideal" toward which the parties should strive and stating that "[i]deally, of course, litigants will settle the amount of a fee"); *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714, 720 (5th Cir.1974).

131. The Court finds that plaintiffs' counsel are indeed entitled to be paid fees and their expenses as a result of the substantial

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common benefit provided to the Class and, for the reasons discussed below, approves plaintiffs' counsel's request for an award of attorneys' fees and expenses for the full amount of \$19.5 million. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed. 676, 681 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorney's fee from the fund as a whole"). As the court noted in *Malchman v. Davis*, 761 F.2d 893, 905 n. 5 (2d Cir.1985), *cert. denied*, 475 U.S. 1143 (1986):

[W]here ... the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems to the author of this opinion that an agreement "not to oppose" an application for fees up to a point is essential to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged. It is difficult to see how this could be left entirely to the court for determination after the settlement.

*29 See also Hardin Decl. ¶¶ 5–6.

132. The preferred approach to calculating attorneys' fees to be awarded in a common benefit case is as a percentage of the class benefit. *In re Teletronics Pacing Systems, Inc. Accufix Atrial "J" Leads Prods. Liab. Litig.*, MDL 1057, Master File No. C–1–95–87, slip op. at 63 (S.D. Ohio, W.Div. Mar. 5, 1999); see also *In re Pacific Enterprises Secs. Litig.*, 47 F.3d 373, 379 (9th Cir.1995) ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases."); see also Hardin Decl. ¶¶ 10–11. This accomplishes two objectives. First, it is consistent with the private marketplace where contingent fee attorneys are routinely compensated on a percentage of recovery method. *In re Public Service Co. of New Mexico*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,988, at 94,291–92 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery."). Second, it provides a

strong incentive to plaintiffs' counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances. See also *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir.1992); *Duhaime v. John Hancock Mut. Life. Ins. Co.*, 989 F.Supp. 375, 377 (D.Mass.1997) (the advantage of the percentage method is that it "focuses 'on result, rather than process, which better approximates the workings of the market place.'") (citation omitted). As the Seventh Circuit has noted:

The contingent fee uses private incentives ... to align the interests of lawyer and client.... At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation.

Kirchoff v. Flynn, 786 F.2d 320, 325–26 (7th Cir.1986).

133. Finally, the percentage approach reduces the burden of the Court to review and calculate individual attorney hours and rates and expedites getting the appropriate relief to class members. See *In re Continental Illinois*, 962 F.2d at 572; *In re Activision Sec. Litig.*, 723 F.Supp. 1373 (N.D. Cal.1989).

134. Plaintiffs' Request For An 11.5% Award Is Reasonable – Plaintiffs' counsel's request for fees and reimbursement of expenses totals 11.5% of the minimum value of the settlement, only 10.1% if the costs normally borne by the Class but paid here by AGL are considered. This represents a far lower percentage than is awarded in contingent class actions here and elsewhere. Indeed, throughout the Sixth Circuit, attorneys' fees in class actions have ranged from 20%–50%. See, e.g., *In re Cincinnati Microwave Inc. Sec. Litig.*, Consolidated Master File No. C–1–95–905, Order and Final Judgment (W.D. Ohio Mar. 21, 1997) (awarding 30%); *Meyers v. Abbott Laboratories*, No. 97–C–612, Memorandum (5th Cir. Ct. Davidson County, Tenn., Mar. 26, 1998) (awarding 25%); *Teletronics*, slip op. at 71 (awarding 28%); *Adams v. Standard Knitting Mills, Inc.*, [1978 Transfer

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Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,377 (E.D. Tenn. Jan. 6, 1978) (35.8% award); *see also* Hardin Decl. ¶¶ 19–20 & n. 3.

*30 135. Moreover, in the above cases the fees and expenses awarded were deducted from the common fund, reducing the amount of the fund available to the class. Here, AGL will pay plaintiffs' counsel's attorneys' fees and expenses over and above the settlement costs and benefits with no reduction of class benefits. Finally, the fee and expense request does not include the additional effort and expense plaintiffs' counsel will expend in implementing and monitoring and administering the Settlement, for which they shall receive no additional compensation.

136. Plaintiffs' Counsel's Fee And Expenses Request Satisfies Sixth Circuit Criteria – The Sixth Circuit has adopted neither the percentage approach nor the lodestar multiplier approach as the sole determinant of the awards in common fund cases, requiring only that awards of attorneys' fees by federal court be “reasonable under the circumstances.” *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir.1993). However, *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir.1974), *cert. denied*, 422 U.S. 1048 (1975), set out six specific factors a court should consider in assuming a reasonable award from a common fund:

- the value of the benefit conferred upon the class;
- society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
- whether the services were undertaken on a contingent fee basis;
- the value of the services on an hourly basis;
- the complexity of the litigation; and
- the professional standing and skill of all counsel.

Accord *In re Rio Hair Naturalizer Prods. Liab. Litig.*, 1996 WL 780512, at *17 (E.D.Mich. Dec. 20, 1996). Application of these factors further demonstrates that plaintiffs' counsel's request is reasonable.

a. Value Of The Benefits Obtained – Courts frequently consider this factor to be the most critical. *See e.g.*, *Hensley*, 461 U.S. at 436, 103 S.Ct. at 1941, 76 L.Ed.2d at 52 (“the most critical factor is the degree

of success obtained”). In this instance, plaintiffs have negotiated a process which provides substantial economic relief, including relief tailored to each Class Member's individualized circumstances, through a fair and expeditious process. The minimum economic value to the Class is \$169 million and the total relief to the Class, assuming only 5% Scrip usage, is in excess of \$253.9 million. *See* ¶¶ 56–58 above. In the Court's view, this result is extraordinary and warrants approval of plaintiffs' request.

b. The role of class actions in the public interest has long been noted. As the court in *In re Rio Hair* noted:

Without compensation to those who are willing to undertake the inherent complexities and unknowns of consumer class action litigation, enforcement of the federal and state consumer protection laws would be jeopardized. As the Supreme Court has recognized, without a class action, small claimants individually lack the economic resources to vigorously litigate their rights. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). Thus, attorneys who take on class action matters enabling litigants to pool their claims provide a huge service to the judicial process.

*31 *In re Rio Hair*, 1996 WL 780512, at *17. Absent the efforts of plaintiffs' counsel, these nearly 710,000 Class Members would have received no relief at all.

c. The Contingent Nature Of The Fee – Plaintiffs' counsel expended over 18,300 hours of time and effort valued at over \$5 million at current rates. In addition, plaintiffs' counsel advanced the Class nearly \$390,000 in costs of litigation. This task was undertaken entirely on a contingent basis with plaintiffs' counsel bearing the full risk of no recovery at all.

See In re Rio Hair, 1996 WL 780512, at *18 (recognizing risks entailed in a major investment of attorney time and financial resources over a period of nearly two years). The risk of loss in any litigation is quite real. Plaintiffs' counsel's efforts here demonstrates their commitment to obtaining valuable and meaningful relief for the Class.

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d. The Value Of The Services On An Hourly Basis – Plaintiffs' counsel expended over 18,300 hours of attorney time valued at over \$5 million at current rates in litigating and resolving this action. *See* Plaintiffs' Counsel's Fee and Expense Declarations. This expenditure of time and effort, on a wholly contingent basis, confirms the reasonableness of plaintiffs' counsel's fee request under the lodestar/multiplier approach. It is important to note, however, that time expended is just one factor in examining the reasonableness of a fee award using lodestar.

e. This case also involved complex actuarial, accounting, financial and related issues requiring a level of experience and expertise few other plaintiffs' counsel have achieved. Moreover, the Court understands that additional time and effort will be required after approval to ensure that the Settlement is properly implemented. Under these circumstances, plaintiffs' counsel's request for a multiplier of 3.8 is fully warranted. This multiplier is well within the range of multipliers for similar litigations, which have ranged from 1–4 and have reached as high as 10. *See, e.g., In re Beverly Hills Fire Litig.*, 639 F.Supp. 915 (E.D.Ky.1986) (multiplier of 5); *Ace Seat Cover Co. v. Pacific Life Ins. Co.*, Case No. 97–CI–00648, Slip op. at 87 (Ky. Cir. Ct., Kenton County Nov. 19, 1998) (multiplier of 2.65); *Willson v. New York Life Ins. Co.*, 1995 N.Y. Misc. LEXIS 652, at *94 (multiplier of 4.6); *Michels v. Phoenix Home Life Mutual Ins. Co.*, 1997 N.Y. Misc. LEXIS 171, at *95 (multiplier of 3.3); *In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F.Supp. 450 (multiplier of 5.1); *Natal v. Transamerica Occidental Life Ins. Co.*, No. 694829 (Cal.Super. Ct., San Diego County July 28, 1997) (multiplier of 2.2); and *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F.Supp. 375 (multiplier of 2.4). *See generally*, Hardin Decl. ¶¶ 24–27.

f. The Complexity Of The Litigation – Litigation of this case involved claims of insurance product performance requiring a knowledge of complex actuarial, accounting, investment and financial concepts. Litigating the case through trial would have entailed extensive proof of AGL's internal procedures for establishing dividends and interest crediting rates, the performance of AGL's investment portfolio, policy pricing assumptions, product development and other critical determinations. All of this would require substantial expert testimony covering a period of over 15 years. *See* Weiss/Stoia

Decl. ¶¶ 150–56. Without question, the claims litigated by plaintiffs' counsel were “complex.”

*32 g. The Professional Skill And Standing Of Counsel – Plaintiffs' counsel here are among the most experienced in the country in both complex class actions and in similar life insurance deceptive sales practices litigation. The Settlement is a direct result of their experience, reputation and ability in these sorts of cases. Similarly, AGL was represented by able counsel, both in-house and its outside counsel. The professional skill and standing of the representation in this case is beyond question and supports approval of the requested award.

137. In sum, plaintiffs' counsel's request for attorneys' fees and reimbursement of expenses is fair and reasonable under all relevant criteria. The Court hereby approves the requested fee and expense award in the amount of \$19.5 million, to be paid within ten days of the Court's entry of the Final Order and Judgment.

B. Attorneys' Fees and Expenses of Objectors Weiss and Smolen

138. Martin S. Sir, on behalf of a group of counsel (“Objectors' Counsel”) has requested an award of attorneys' fees and reimbursement of expenses in any amount not to exceed \$600,000 in connection with Objector's Counsels' representation of Class Members Matthew Weiss and Marsha Smolen.

139. As noted above, the objections raised by Mr. Weiss and Ms. Smolen resulted in a First Amendment to the Stipulation of Settlement. As further noted above, this amendment enhanced the relief available to Class Members.

140. Based on the submissions of Objectors' Counsel to this Court, on defendant's and Lead Counsel's representation to this Court that they do not object to awarding Objectors' Counsel the amounts for which they have applied, and on the fact that this amount will not reduce the amount of relief available to Class Members, this Court finds it appropriate to award Objectors' Counsel \$600,000 in attorneys' fees and expenses. The defendant is instructed to pay this amount to Objectors' Counsel in the manner specified in the May 24, 1999 agreement resolving Mr. Weiss' and Ms. Smolen's objections, which is on file with the Court.

1999 WL 33581944

All Citations

Not Reported in F.Supp.2d, 1999 WL 33581944

Footnotes

- 1 Declarations and Affidavits submitted by the parties are cited, respectively, as "[Witness] Decl. ¶ ___" and "[Witness] Aff. ¶ ___."
- 2 All further references to plaintiffs' complaint are to the first amended complaint filed on December 10, 1998.
- 3 The objectors, Matthew Weiss and Marsha Smolen, also filed a motion to intervene and a complaint in intervention. Subsequent to the execution of the First Amendment to the Stipulation of Settlement, Mr. Weiss and Ms. Smolen withdrew their motion and their complaint, as well as their objections to the settlement.
- 4 Declarations also were submitted by plaintiffs' counsel listed in paragraph 19 above in support of plaintiffs' application for attorneys' fees and expenses.
- 5 *E.g.*, *Willson v. New York Life Ins. Co.*, 1995 N.Y. Misc. LEXIS 652 (N.Y.Sup.Ct. Feb. 1, 1996), *aff'd*, 644 N.Y.S.2d 617 (App.Div.1996), *appeal denied*, 677 N.E.2d 289 (N.Y.1997), *cert. dismissed*, 521 U.S. 1112 (1997); *Michels v. Phoenix Home Life Mut. Ins. Co.*, 1997 N.Y. Misc. LEXIS 171 (N.Y.Sup.Ct. Jan. 3, 1997); *Natal v. Transamerica Occidental Life Ins. Co.*, No. 694829 (Cal.Super. Ct., San Diego County, July 28, 1997); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. 450 (D.N.J.1997), *aff'd in part, vacated and remanded in part*, 148 F.3d 283 (3d Cir.1998), *cert. denied*, 119 S.Ct. 890 (1999); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54 (D.Mass.1997), *aff'd*, No. 98-1901 (1st Cir. Dec. 1, 1998), *cert. denied*, 67 U.S.L.W. 3784 (U.S. June 24, 1999); *Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741 (M.D.Fla. Jan. 27, 1998); *Ace Seat Cover Co. v. Pacific Life Ins. Co.*, No. 97-CI-00648 (Ky. Cir. Ct., Kenton County, Nov. 19, 1998); *In re Manufacturers Life Ins. Co. Premium Litig.*, No. 96-CV-230 BTM (AJB) (S.D.Cal. Dec. 21, 1998).
- 6 As originally set out in the Stipulation of Settlement, a claim would be designated a level zero claim if there was documentary evidence contradicting the Class Member's claim. As part of the First Amendment to the Stipulation of Settlement, this provision was eliminated. Thus, contradictory documentary evidence alone will no longer cause a claim to be designated as a level zero claim. Only claims based on blank or otherwise deficient claim forms will be designated as level zero claims.
- 7 As part of the First Amendment to the Stipulation of Settlement, the Settlement Agreement was amended to provide an enhanced opportunity to receive the highest level of relief under the Part VIII ADR Process without documentation. See First Amend to Stipulation of Settlement at 8.
- 8 Under the settlement agreement, a portion of the \$38.7 million also may be used to pay any CEP administration costs not covered by the additional \$1.25 million that AGL will pay specifically to cover such costs.
- 9 The Court notes that one objector (Carl Schmuck) withdrew his objection. In addition, one objector (Douglas Marpe) filed a late objection. That objection is overruled. Finally, one objector (Bill Burdock) filed a timely request for exclusion after filing his objection. Because Mr. Burdock is no longer a Class Member, he lacks standing to object, and his objection is invalid. See, e.g., *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir.1979), *cert. denied*, 452 U.S. 905 (1981). In any event, none of these objections would justify disapproval of this settlement.

In addition, as noted above, two objectors (Matthew Weiss and Marsha Smolen) withdrew their objection in light of the amendment that was made to the Settlement on May 21, 1999. As discussed above, this amendment enhanced the relief available to Class Members.

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- 10 Mr. Jones' objection regarding his inability to obtain a copy of the CEP Guidelines ignores the fact that he could have obtained a copy from the Court Clerk. The Guidelines (which are part of the Stipulation of Settlement) have been on file with the Court since December 1998. The notice sent to Class Members explicitly notified them that the Stipulation of Settlement was on file with the Court. See Dahl Decl. Ex. A, Notice at 18Notice at 18.
- 11 The CEP Fact Sheet similarly describes the arbitrator's decision in the Part VIII ADR Process as "binding" and "not subject to any appeal." Dahl Decl. Ex. A, CEP Fact Sheet at 16.
- 12 When asked at the Fairness Hearing why Mr. Jones did not exclude himself from the Class if he found the finality provisions objectionable, Mr. Jones' counsel acknowledged that the Settlement provides good relief.
- 13 The Court notes that Mr. Bennett's counsel filed a notice of appearance in the case but did not appear at the June 3, 1999 Fairness Hearing.
- 14 Mr. Bennett's objection "to a Magistrate presiding over the 'fairness hearing'" is equally unfounded.

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37 Fed.Appx. 730

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1. United States Court of Appeals, Sixth Circuit.

Michael MCHUGH, Plaintiff–Appellee,
v.

OLYMPIA ENTERTAINMENT, INCORPORATED;

Richard Ward; James Duffin; Al Glazewski;
Robert Barrett; Theater Operators,
Limited; Jesse Harris; William Grace;
Gregory Palmer, Defendants–Appellants,
The City of Detroit; John Doe, certain
unknown security guards at the Fox Theater;
John Doe, certain unknown officers of
the Detroit Police Department; Ronald
Cooper; Jeff Shasheen, Defendants.

No. 00–1956, 00–2195, 00–2234.

|
May 28, 2002.

Synopsis

Plaintiff brought action to recover for injuries sustained when he was allegedly assaulted at concert by security guards, police officers, and police reservists. Following jury verdict against police officers, the United States District Court for the Eastern District of Michigan denied defendants' motions for judgment notwithstanding verdict, new trial, and remittitur, and for granting plaintiff's motion for attorney fees and expenses. The Court of Appeals held that: (1) defendants were not entitled to new trial; (2) submission of additional jury interrogatories to clarify applicability of comparative fault to civil rights claims was not abuse of discretion; and (3) award of \$1.2 million in punitive damages was not excessive.

Affirmed.

***732** On Appeal from the United States District Court for the Eastern District of Michigan.

Before GUY and BATCHELDER, Circuit Judges; WALTER, District Judge. *

Opinion

PER CURIAM.

****1** Defendants, Jesse Harris and William Grace, appeal from a judgment in favor of plaintiff, Michael McHugh, claiming reversible error in the denial of their motion for judgment notwithstanding the verdict or for a new trial. They also argue the district court erred in denying their motion for remittitur and in granting in total plaintiff's motion for attorney fees and expenses. Defendants, Olympia Entertainment, Incorporated; Theater Operators, Limited; Richard Ward; James Duffin; Al Glazewski; and Robert Barrett (the Olympia defendants), appeal the denial of their motions for sanctions, attorney fees, and costs. Defendant, Gregory Palmer, appealed the denial of his motion for costs. ¹ After review, we affirm.

I.

Plaintiff attended a Black Crowes concert at the Fox Theatre in Detroit, Michigan, on October 18, 1996. Olympia Entertainment, Inc., owns and operates the Fox. Theater Operators, Inc., provides security guards or crowd managers for concerts at the Fox under contract with Olympia Entertainment. Robert Barrett, Al Glazewski, Richard Ward, and James Duffin were employed by Theater Operators as security guards at the Black Crowes concert. Jesse Harris and William Grace were Detroit police officers. Gregory Palmer was a reservist with the Detroit police department.

Plaintiff attended the concert with Nicole Weidenfeller. During the concert, security guards ordered plaintiff to take his seat when he began dancing in the aisle. When he failed to do so, the security guards removed him from the theater. Plaintiff testified that the guards grabbed his head and arms and forcibly dragged him up the aisle while repeatedly pushing his face into the floor.

Plaintiff has no memory of the following events. Weidenfeller, however, was present and testified that plaintiff was seized by a reservist and police officer when he was ejected from the theater. The officer ***733** grabbed him by the head and neck and began beating him. Plaintiff was

thrown onto a police car, grabbed by his hair, and thrown to the ground striking his head on the cement.

After the assault, plaintiff and Weidenfeller waited in a parking lot until the end of the concert. Friends took plaintiff to the hospital when they observed bruises on his face. Plaintiff also had lacerations on his face and a broken nose. He was placed in cervical traction and later had fusion surgery. Plaintiff claimed the surgery was required because the assault caused an acute subluxation in his neck. The subluxation put him in danger of further dislocation of his vertebrae with resulting paralysis or death. The defendants argued that the traction and surgery were required because of an os odontoideum (a preexisting or old fracture in his neck).

Plaintiff brought this action against the City of Detroit; police officers William Grace and Jesse Harris; police reservists Ronald Cooper, Jeff Shasheen, and Gregory Palmer; and the Olympia defendants alleging violations of 42 U.S.C. § 1983 and state law claims of assault and battery, gross negligence and negligence, and failure to supervise and train.¹ During the 23-day jury trial, 31 witnesses and nine expert witnesses were called.

****2** The jury returned a verdict against plaintiff in favor of the Olympia defendants and the police reservists. The jury returned a verdict in favor of plaintiff against the police officers, Grace and Harris. The jury found that Grace and Harris (1) committed an assault and battery upon plaintiff; (2) were grossly negligent or recklessly indifferent to any injury to plaintiff in their detention and physical restraint of him; (3) violated plaintiff's constitutional right to be free from excessive use of force; (4) violated his constitutional right to be free from unreasonable detention; and (5) failed to protect or intercede to protect plaintiff from excessive force by the crowd managers, police reservists, or other police officers. The jury awarded zero dollars in actual damages and \$1,200,000 in punitive damages. The jury found that plaintiff was 60% comparatively negligent, and that Grace and Harris were each 20% comparatively negligent. The jury was then instructed over objection from defendants Grace and Harris that comparative negligence does not apply to civil rights claims. The jury then found \$200,000 in noneconomic damages for the civil rights claims. On March 16, 2000, the district court entered judgment against Grace and Harris in the amount of \$1,400,000 plus pre and post-judgment interest.

The district court denied a motion for judgment notwithstanding the verdict or new trial and a motion for

remittitur filed by Grace and Harris. The district court granted plaintiff's motion for attorney fees and costs, but denied the motions for attorney fees and costs filed by the Olympia defendants and Palmer. This appeal followed.

II.

A. Motion for Judgment Notwithstanding the Verdict or for New Trial

We review *de novo* the denial of a motion for judgment notwithstanding the verdict. We do not weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the ***734** jury. Instead, we must view the evidence in a light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. We will reverse the denial of the motion only if reasonable minds could not come to a conclusion other than one in favor of the movant. *Wehr v. Ryan's Family Steak Houses, Inc.*, 49 F.3d 1150, 1152 (6th Cir.1995).

A new trial is warranted under Fed.R.Civ.P. 59(a) when a jury has reached a seriously erroneous result as evidenced by (1) the verdict being against the weight of the evidence, (2) the damages being excessive, or (3) the trial being unfair to the moving party. See *Holmes v. City of Massillon*, 78 F.3d 1041, 1045-46 (6th Cir.1996). We review the grant or denial of a motion for new trial under an abuse of discretion standard.

Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669, 675 (6th Cir.2000).

Defendants Grace and Harris argue that they were prejudiced by the exclusion of the treating physician's testimony, the admission of plaintiff's expert witness's testimony, and the reinstruction of the jury after it returned its initial verdict.

1. Exclusion of Testimony of Treating Physician

****3** Grace and Harris argue that the district court erred when it ruled that defendants could not question plaintiff's treating physician, Dr. Daniel Elskens, on whether the fracture in plaintiff's neck preexisted the 1996 incident, and whether Dr. Elskens would have performed surgery upon plaintiff regardless of any acute injury sustained on October 18, 1996. A review of the record shows that defendants ultimately were given the opportunity to ask Dr. Elskens these questions.

Dr. Elskens was listed as an expert witness by the defendant police officers, but a written report under Fed.R.Civ.P. 26(a)(2) was never submitted. Plaintiff filed a motion *in limine* to exclude the testimony of certain experts, including Dr. Elskens. The district judge initially denied the motion. In a subsequent motion *in limine*, plaintiff again asked the court to exclude or limit Dr. Elskens's testimony. The district court held that the motion was moot because the parties had resolved the issues raised in the motion *in limine* at a pretrial conference. The record does not indicate how the issue was resolved.

At trial, the Olympia defendants called Dr. Elskens. The Olympia defendants had listed Dr. Elskens as a witness but not an expert witness. When asked whether plaintiff had a fractured neck, Dr. Elskens testified that plaintiff had os odontoideum, which he described as a healed or old fracture. When asked to explain the plaintiff's condition, Dr. Elskens testified that the first cervical vertebra (C1) was separated from the second cervical vertebra (C2). Upon plaintiff's objection, the district court refused to allow defendants to ask Dr. Elskens when the separation occurred. The district court also refused to allow Dr. Elskens to testify whether he would have done the surgery even without the 1996 injury because Dr. Elskens could not offer expert opinion testimony when an expert report was not provided under Rule 26.

The Olympia defendants later made an offer of proof that Dr. Elskens would have testified that the 1996 injury brought to light the need for the surgery on the os odontoideum. After a recess, the district judge said that his notes showed that he ruled at the second pretrial conference that the treating physician's notes were comparable to a formal Rule 26 report. The district judge then informed defense counsel that he could recall Dr. Elskens *735 and "ask the questions that call for his opinion."

When Dr. Elskens was recalled, however, he was only asked why he operated on the plaintiff. Dr. Elskens testified: "I operated on him to stabilize the spine for the os odontoideum." He was asked no further questions by any party.

The record shows, therefore, that the district court modified the original ruling, which defendants challenge in this appeal, to allow the expert opinion testimony of Dr. Elskens. Defendants, however, elected not to ask Dr. Elskens whether he would have performed the surgery upon plaintiff regardless of any injury sustained in 1996.

2. Admission of Plaintiff's Expert Testimony

**4 Defendants Grace and Harris argue the district court erred when it allowed Dr. Albert I. King to testify beyond his Rule 26 report as to the mechanical forces necessary to cause subluxation in an individual with a preexisting fracture. Defendants argue that Dr. King's report was focused on the forces necessary to cause an odontoid fracture, and that the district court should have excluded his testimony because plaintiff did not supplement his report to cover subluxation.

Rule 26 requires a party to supplement an expert report "by the time the party's disclosures under Rule 26(a)(3) are due." FED. R. CIV. P. 26(e)(1). Nothing in Rule 26, however, precludes an expert from revising or further clarifying opinions, particularly in response to points raised in the presentation of a case. See *Johnson v. H.K. Webster, Inc.*, 775 F.2d 1, 7 (1st Cir.1985). See also *Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F.2d 342, 344 (8th Cir.1979) (noting trial judge has wide discretion to allow expert testimony even though it was revised shortly before trial). Rule 26 must be read in light of its dual purposes of narrowing the issues and eliminating surprise. We need to balance fairness to the opposing party with the realities of adversarial litigation.

Johnson, 775 F.2d at 7. We review evidentiary decisions under Rule 26 for abuse of discretion. See *King v. Ford Motor Co.*, 209 F.3d 886, 900 (6th Cir.2000); and *United States v. Talley*, 194 F.3d 758, 765 (6th Cir.1999).

Dr. King's report stated in pertinent part: "Three sets of x-rays taken over the next day or so revealed a fracture of the odontoid process near its base with anterior displacement of the odontoid along with the arch of C1." In his report, Dr. King opined that: "Mr. Michael McHugh sustained an odontoid fracture with anterior displacement of C1 over C2." He further opined that: "There is no biomechanical basis to assert that he had a chronic os odontoideum prior to the assault because he would have been killed or paralyzed if his odontoid process was not intact before the assault."

At trial, Dr. King changed his opinion and stated that there was a preexisting fracture or os odontoideum at the time of the assault.² The district court ruled that Dr. King could testify as to the forces necessary to cause subluxation:

The motion is denied. And the motion is denied for several reasons, but the key reason is what Mr. Hecht just said; that anterior displacement, as I recall the testimony of the neuroradiologist, can be described as an anterior displacement or a fracture. Obviously, when *736 somebody talks about a broken neck, a layperson, they may not be very careful. And his definition of subluxation is not any different than anterior displacement.

Plaintiff clearly identified Dr. King as a biomechanical expert who would testify as to the mechanical forces necessary to cause injury to a neck. His report indicated that he was opining as to a fracture and an anterior displacement. Expert testimony showed that an anterior displacement was the same thing as subluxation.³ The change in his position on the preexisting fracture did not constitute unfair surprise as to the nature of Dr. King's testimony. His testimony was not a departure from the general scheme of his report. See *Johnson*, 775 F.2d at 8.

**5 Moreover, defendants have not identified how they were prejudiced by Dr. King's testimony beyond baldly asserting that they were prejudiced. Obviously, any error that might arise was harmless when the same facts were presented to the jury through other witnesses. Plaintiff's other witness, Dr. William Sanders, also testified the subluxation occurred in 1996. Furthermore, defendants were able to rebut Dr. King's testimony through their own experts who testified as to the preexisting nature of the fracture and the subluxation. Finally, defendants were able to impeach Dr. King's testimony by questioning him about his changed opinion. Under these circumstances, we cannot find that the district court abused its discretion in allowing Dr. King's testimony or in denying the motion for new trial.

3. Reinstruction of the Jury

The district judge did not immediately excuse the jury after the original verdict was read. Instead, he sent the jury back to the jury room and asked counsel whether the comparative negligence rule applied to punitive damages. Counsel for the police officers responded that the rule did apply. The record does not reflect how the district judge answered this question. Comparative negligence, however, does not apply to damages for federal constitutional rights violations. See *Quezada v. County of Bernalillo*, 944 F.2d 710, 721 (10th Cir.1991);

Clappier v. Flynn, 605 F.2d 519, 530 (10th Cir.1979).⁴

Counsel for the police officers then raised the issue of whether punitive damages can be awarded without actual damages. The district judge said that issue could be addressed without involvement of the jury. In fact, punitive damages may be recovered in civil rights cases even in the absence of actual loss to the plaintiff. *737 See *Beauford v. Sisters of Mercy—Province, Inc.*, 816 F.2d 1104 (6th Cir.1987) (§ 1981); *Davis v. Locke*, 936 F.2d 1208 (11th Cir.1991) (§ 1983).

Plaintiff then argued that a previous instruction on comparative fault in tort actions under Michigan law may have improperly caused the jury not to award noneconomic damages for the civil rights claims because they found that plaintiff was 60% comparatively negligent.⁵ The first sentence of the instruction given to the jury at the close of arguments on comparative negligence referenced to "Plaintiff's claim of negligence only." After describing the law on comparative negligence and the burden of proof, the court then instructed the jury that: "The Plaintiff, however, is not entitled to noneconomic damages if he is more than 50% at fault for his injuries." On the written instructions that were provided to the jury, this sentence appears by itself on a separate page (page 42) from the rest of the instruction on comparative negligence.

During deliberations, the jury sent a note to the district judge that said: "At page 42, what does this sentence mean?" The district judge identified the sentence on page 42 as the one stating that plaintiff is not entitled to noneconomic damages if he is more than 50% at fault. After discussion with counsel, the district court instructed the jury as follows:

**6 The Court and counsel agree that this question is asking for a definition of noneconomic damages. And if you will refer to page seven of the verdict form, number 5(A), which is also repeated—that's in terms of present injuries, injuries up to the present, which obviously includes the past—and page 11, which is 6(B), which talks about future injuries, noneconomic damages may be defined as pain and suffering, embarrassment, humiliation, outrage, mental anguish, fright and shock—and you don't have to write these because I'm

reading from 5(A)—denial of social pleasure, disfigurement, disability and aggravation of conditions.

After receiving the jury's verdict and discussing the parties' concerns, the district court reinstructed the jury, over the defendant police officers' objection, as follows: "Comparative negligence's 50 percent rule does not apply to civil rights claims. The question then for you is should any noneconomic damages be awarded to Michael McHugh for the civil rights claims? If so, how much?"⁶ After approximately one hour of deliberation, the jury returned and answered that there were noneconomic damages for the civil rights claims in the amount of \$200,000.

Defendants Grace and Harris argue that there was no apparent confusion or mistake on the part of the jury with their original verdict and that, therefore, the district court did not have authority to resubmit the issue to the jury. Defendants also argue that the jury may have been coerced to award noneconomic damages by the district court's reinstruction.

This case used a general verdict with interrogatories. Rule 49(b) governs general verdicts accompanied by interrogatories and specifically allows resubmission:

When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

FED. R. CIV. P. 49(b).

We should be deferential to the determination of inconsistency made by a district judge "who has observed the jury during the trial, prepared the questions and explained them to the jury" because he "is in the best position to determine whether the answers reflect confusion or uncertainty." Richard v. Firestone Tire & Rubber Co., 853 F.2d 1258, 1260 (5th Cir.1988). See also Veranda Beach

Club v. Western Sur. Co., 936 F.2d 1364, 1381 (1st Cir.1991) (trial court must be given substantial latitude in determining whether the jury response to the verdict form is clear and free from ambiguity.)

In the present case, the district judge did not just resubmit the original questions and verdict form. He reinstructed the jury and submitted clarifying questions. In McLaughlin v. The Fellows Gear Shaper Company, 786 F.2d 592 (3d Cir.1986), the district court gave the jury further instructions and submitted to the jury two supplemental interrogatories in order to clarify an inconsistency in the answers to the original interrogatories. The Third Circuit held:

****7** Although the *Stanton* case involves resubmission to the jury of the same questions and the case under review presently involves resubmission of supplemental interrogatories, the underlying purpose of both options is identical: namely, to obtain clarification from a still-empaneled jury of the meaning of its answers and verdict. Interestingly, we did identify and endorse in *Stanton* the option of submitting supplemental interrogatories to harmonize inconsistent jury responses.

Id. at 597. See also Riley v. K Mart Corp., 864 F.2d 1049 (3d Cir.1988) (while the district court's original jury instructions were comprehensive and correct, the district court had sufficient cause to believe that the jury was somewhat confused).

In this case, the verdict form had sets of questions on different pages. The sets were numbered one through ten. Numbers one through four asked the jury to find whether each defendant had committed the separate acts alleged by the plaintiff. In number four, the jury stated that the police officers had committed assault and battery; were grossly negligent or recklessly indifferent in their detention and physical restraint of plaintiff; had violated plaintiff's constitutional right to be free from excessive use of force and from unreasonable detention; and had failed to protect or intercede to protect

plaintiff from excessive force by the crowd managers, police reservists, or other police officers. Numbers five and six asked the jury to state the amount of present and future actual damages (economic and noneconomic) suffered by plaintiff. It did not ask the jury to distinguish the damages suffered from the separate acts committed by the police officers, *i.e.*, the damages for the constitutional violations were not distinguished from the damages for the negligence. Numbers seven through nine asked about plaintiff's comparative negligence. Number ten asked the jury whether punitive damages should be awarded against any of the parties. Again, no distinction was made between the negligence and the constitutional rights violations.

***739** The jury found that defendants Grace and Harris used excessive force and unlawfully detained plaintiff in violation of his constitutional rights but did not award any noneconomic damages. Under these circumstances, we cannot find that the district court abused its discretion under Rule 49(b) in finding that the answers reflected confusion and were inconsistent. The district court could have reasonably been concerned that there was confusion on the part of the jury given the layout of the instruction on the 50% rule and comparative fault, the jury's question on this instruction, the form of the questions on the verdict form, and the finding of constitutional violations. Defendants offered nothing more than mere speculation that the reinstruction was coercive. The court's reinstruction simply clarified that the comparative fault rule did not apply to civil rights claims. The district judge did not instruct the jury that it had to award noneconomic damages. The instruction simply asked for the amount *if* the jury found that there were noneconomic damages for the civil rights claims. Because the district court did not redetermine the findings made by the jury, we find no error in using a reinstruction and supplemental questions to obtain clarification of a jury's original answers and verdict.

B. Remittitur

****8** We review the district court's denial of a motion for remittitur *de novo*. See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 514 (6th Cir.2001).

Defendants argue that the punitive damages were excessive. Grossly excessive damages are prohibited by the due process clause of the Fourteenth and Fifteenth Amendments. See

BMW of North Am., Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Determination of whether an award is grossly excessive requires analysis of three factors: (1) reprehensibility of the wrongful conduct, (2) disparity between the harm or potential harm and the amount of the award, and (3) comparison of the punitive award with other penalties imposed in similar cases. Id. at 575.

In determining the reprehensibility of a defendant's wrongful conduct, an important factor is whether violence has occurred.

See Id. at 576. The jury found that the police officers used excessive force and intentionally assaulted plaintiff. The plaintiff presented evidence that plaintiff was grabbed by the head and neck and beaten by police officers. Plaintiff was also thrown onto a police car, grabbed by his hair, and thrown to the ground striking his head on the cement. The assault continued while plaintiff's friend, Nicole Weidenfeller, pleaded with the officers to stop. This conduct was clearly violent and exhibited reprehensibility.

Defendants rely heavily on the ratio of punitive damages to actual damages in arguing that the punitive damages were excessive. The ratio of punitive damages to actual damages was six to one. The Supreme Court has consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. BMW, 517 U.S. at 582–83. The jury could have believed that potential damages were much larger than \$200,000, given the evidence of the assault upon plaintiff. The ratio, therefore, could be even lower than the already reasonable ratio of six to one.

When considering the final BMW factor, the court may look to the amount of punitive damages award necessary to deter similar misconduct in the future. ***740** BMW, 517 U.S. at 584–85. Given the evidence of the intentional assault upon plaintiff, the punitive damages were not an inappropriately large deterrent amount.

C. Award of Attorney Fees and Costs to Plaintiff

Defendants Grace and Harris argue that the attorney fees awarded to plaintiff were unreasonable in both the number of hours and the hourly rates. We review an award of attorney fees, including the fee rate, for abuse of discretion. Hadix v. Johnson, 65 F.3d 532, 534 (6th Cir.1995).

Defendants argue that plaintiff's Chicago attorney rates were unreasonably high in comparison to the Detroit market rates. Plaintiff offered two affidavits stating that the rates were reasonable in national and Chicago markets. Plaintiff also relied on affidavits submitted by the Olympia defendants in support of their motion for attorney fees, which stated that \$350 is an appropriate hourly rate in the Detroit market. This is the same top rate billed by plaintiff's Chicago attorneys. In opposing plaintiff's motion for attorney fees, defendants Harris and Grace did not offer any evidence on reasonable rates in any market.

****9** Generally district courts are free to look to national markets, an area of specialization, or any other market they believe is appropriate to fairly compensate attorneys in individual cases. See Louisville Black Police Officers Org. v. City of Louisville, 700 F.2d 268, 278 (6th Cir.1983). A court's choice not to apply local market rates for attorney fees is not an abuse of discretion. See Wayne v. Village of Sebring, 36 F.3d 517, 533 (6th Cir.1994). All the evidence in the record shows that the rates charged by plaintiff's Chicago attorneys were reasonable in national, regional, and local markets. The district court did not abuse its discretion in refusing to reduce the amount of attorney fees based on the hourly rates charged.⁷

Defendants argue that since plaintiff did not prevail against all the parties, the amount of fees should have been reduced. Defendants also claim that plaintiff did not keep accurate records to account for fees incurred against the other defendants. A party seeking an award of attorney fees must establish entitlement to an award and document the appropriate hours expended. See Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). When claims are based on related legal theories, they should not be treated as distinct claims for the purpose of calculating attorney fees. The cost of litigating related claims, therefore, should not be reduced. See Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1169 (6th Cir.1996). Nor should the fees be reduced when the suit is successful against some of the defendants but not others if the theories of recovery are related. See Wayne, 36 F.3d at 532.

Plaintiff in this case provided the district court with itemized, contemporaneous time records. Plaintiff reduced the fees for work relating to the Olympia defendants. The theories and proofs against the police officers and

the reservists were similar if not the same. Some of the theories and proofs against all of the defendants, including the Olympia defendants, overlapped. Based on the documentation provided by plaintiff, we cannot find that the district ***741** court abused its discretion in awarding the attorney fees requested by plaintiff. Given the "district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters," an award of attorney fees under ***1988** is entitled to substantial deference. See Hadix, 65 F.3d at 534.

D. Denial of Attorney Fees to Olympia Defendants

At the conclusion of trial, the Olympia defendants moved for an award of attorney fees and costs under 28 U.S.C. § 1927, Fed.R.Civ.P. 37(c), and Fed.R.Civ.P. 26(g)(3). The Olympia defendants argue that plaintiff persistently pursued the groundless claim that he did not have a preexisting fracture in his neck (the os odontoideum).

We review the denial of attorney fees under 28 U.S.C. § 1927, Fed.R.Civ.P. 37(c), and Fed.R.Civ.P. 26(g)(3) for abuse of discretion. See Holmes v. City of Massillon, 78 F.3d 1041, 1049 (6th Cir.1996) (§ 1927); Bradshaw v. Thompson, 454 F.2d 75, 81 (6th Cir.1972) (Rule 37(c)); and Martin v. Labelle, No. 00-1157, 2001 WL 345791, 7 Fed.Appx. 492 (6th Cir. March 27, 2001), cert. denied, 534 U.S. 827, 122 S.Ct. 67, 151 L.Ed.2d 34 (2001) (unpublished disposition) (Rule 26(g)(3)).

****10** An attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. An award is warranted if an attorney engaged in conduct from an objective standpoint that "falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." Holmes, 78 F.3d at 1049 (internal quotation marks omitted). While a showing of bad faith is not required, the attorney's conduct must amount to more than inadvertence or negligence. *Id.*

Rule 37(c) allows a party to request reasonable expenses, including attorney fees, incurred in proving the truth of a matter the other party refused to admit in response to a request for admissions. The court "shall make the order [for

reasonable expenses] unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.” FED. R. CIV. P. 37(c)(2).

Rule 26 requires discovery-related filings to be signed by the attorney of record. The signature certifies that the filing conforms to the discovery rules, is made for a proper purpose, and does not impose undue burdens on the opposing party in light of the circumstances of the case. FED. R. CIV. P. 6(g)(2). Sanctions under Rule 26(g)(3) are not discretionary if the district court finds that a discovery filing was signed in violation of the rule.

Plaintiff's complaint stated that his neck was broken as a result of the defendants' actions. In response to Requests for Admissions, plaintiff stated as follows:

REQUEST NO. 4: That when Plaintiff alleged he sustained a broken neck, Plaintiff was referring to the fracture at the odontoid process.

RESPONSE: Denied. Plaintiff was referring generically to injuries he sustained in the neck area. Mr. McHugh was not advised of the specific nature of his injuries other than reference by Dr. Elskins and others to a “broken neck.”
*742 Indeed, Dr. Elskins and others advised Mr. McHugh that his neck was broken.

REQUEST NO. 5: That the incident at the Fox Theatre on or about October 18, 1996 did not cause the odontoid fracture.

RESPONSE: Denied. Plaintiff's expert has concluded that the fracture at the odontoid process as well as other injuries sustained by Mr. McHugh were consistent with his beating by security guards and police.

The expert referred to by plaintiff in his response to Request No. 5 was Dr. Albert King. Dr. King opined in his expert report and during his deposition that the fracture was not preexisting to plaintiff's 1996 injuries. At trial, however, Dr. King changed his opinion. Plaintiff's other expert, William Sanders, also testified at trial that there was a preexisting fracture:

****11** Well, he had another condition in his neck, which is what's kind of confusing in this case, I think, to some of the people involved. He has a condition in which part of the bone of C2 is not fused to the rest of the bone of C2. It's called os odontoideum.

The Olympia defendants argue that plaintiff should have been aware that the fracture was preexisting when it obtained a copy of a dental x-ray in April 1999. Defendants assert that Plaintiff's expert, Dr. Sanders, admitted the dental x-ray taken in 1988 showed a preexisting fracture. In fact, Dr. Sanders testified:

Q. Looking at those—I thought I heard you say today that there is a suggestion of the OO condition in those?

A. I did not say that.

Q. Is there any hint at all in those 1988 x-rays of the OO condition?

A. It's very difficult to say. The x-ray was not performed to look at the neck. So, the quality wasn't that great. And on just a single lateral view, that can actually be a very difficult diagnosis to make.

Q. I appreciate that answer, Doctor. And that's why I didn't ask that question. That's why I—what I did say is, is there any hint of the OO condition in 1988?

A. There might be a hint, yes.

In denying the Olympia defendants' motion for attorney fees and costs under § 1927, Rule 37(c), and Rule 26(g)(3), the district court held:

I find that there is no bad faith on the part of the Plaintiffs.

... I am denying the request for attorney fees and costs both under statute 28 USC Section 1927 and under the court rules cited by Mr. Seward, Federal Rules of Civil Procedure 26(b) and Federal Rules of Civil Procedure 37(c)(2).

....

I think that at least before the trial started, the OO, the question of the OO condition was a subject of dispute by the experts. And again, I find there was no basis for awarding costs and attorney fees.

On this record, we cannot find that the district court abused its discretion in finding that, at least until the trial, the fracture was a condition subject to dispute by the experts.⁸ In preparing the complaint and responding to the Request for Admissions, plaintiff relied on the statements *743 made by his treating physician and his retained expert. Dr. Sanders's testimony showed that it was not reasonable to expect plaintiff to detect the fracture from the 1988 dental x-ray.

Defendants do not allege that Dr. King changed his opinion prior to trial, or that plaintiff should have conceded the existence of the fracture before trial because of Dr. King's or Dr. Sanders's opinions. Other than the dental x-rays, defendants rely on contradictory statements made in closing arguments to support their claim for attorney fees and costs. The statements in closing argument are not relevant to the question of whether plaintiff needlessly multiplied the proceedings by forcing defendants to prove the os odontoideum. The relevant and determining fact is that plaintiff had reasonable grounds to dispute the existence of the fracture until his expert changed his opinion *at trial*.

****12** Moreover, defendants were not required to incur unnecessary expense in discounting the claim of a broken neck. Defendants had to present evidence not only that the fracture but also the subluxation preexisted the 1996 injuries suffered by plaintiff. The plaintiff never conceded that, in layman's terms, his neck was not broken in 1996 or that the subluxation did not occur in 1996.

E. Denial of Costs under Fed.R.Civ.P. 54(d)(1)

The Olympia defendants also challenge the district court's refusal to grant them costs under Fed.R.Civ.P. 54(d)(1). We review for abuse of discretion. *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir.1986).

Costs are generally awarded to a prevailing party as a matter of course. The district court, however, may in its discretion deny a request for costs. *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1233 (6th Cir.1986). The district court's discretion is more limited than it would be if the rule were nondirective. The unsuccessful party must show circumstances sufficient

to overcome the presumption favoring an award of costs to the prevailing party. *Goostree v. Tennessee*, 796 F.2d 854, 863–64 (6th Cir.1986). On appeal, the party seeking reversal of a denial of costs must show that the district court committed error in applying the criteria for the denial of costs. *White & White, Inc.*, 786 F.2d at 732.

A district court's denial of costs is a proper exercise of discretion when the case is "close and difficult." *Id.* at 730 (quoting *United States Plywood Corp. v. Gen. Plywood Corp.*, 370 F.2d 500, 508 (6th Cir.1966)). The closeness of a case is determined by the refinement of perception required to recognize, sift through, and organize relevant evidence and by the difficulty of discerning the law of the case. *White & White*, 786 F.2d at 732–33. A case can be characterized as difficult based on the length of the trial, the number of witnesses, and the amount of evidence submitted to the jury. *Id.* at 732.

In denying costs to the Olympia defendants, the district court held:

And the fourth factor is the one that I do think applies, and that is where the case is a close and difficult one. And I think we are not talking about the legal theories, and I fear I would agree with Mr. Hecht when he says that—and agree with Mr. Seward when they both say that this factually and conceptually was not an overwhelmingly difficult case, such as Mr. Seward referred to the Microsoft case.

Although there was some complexity injected and came into play in terms of the alternative theory of liability which required some extra work and extra instructions *744 to clarify to the Jury, but I think Mr. Hecht has the better of the arguments in terms of the closeness of the case when we're talking about a difference between the slam dunk, and I guess the extreme slam dunk would be a motion for summary judgment having been granted, and the other extreme, the perhaps ultimate close case would be a hung jury where the facts were that close that reasonable minds could and would and did differ.

****13** On that continuum, this case is a close case, and I'm exercising my discretion in denying Rule 54 costs.

The Olympia defendants argue they are entitled to costs because the district court did not find that the case was difficult. While the district court concluded that the case was

not as difficult as the Microsoft case, it did find that there were complex issues presented on the alternative theory of liability requiring extra instructions to the jury. We also find that the case was difficult on the question of causation. The trial in this matter lasted 23 days, and the jury was presented with the testimony of 31 witnesses and nine expert witnesses. The jury was required to recognize, sift through, and organize all of this evidence to determine the parties' respective liability and to understand complex medical testimony on fractures and subluxation to determine the legal issue of causation.

The district court did not abuse its discretion in finding that the case was close and difficult and denying the Olympia defendants' request for costs.

AFFIRMED.

All Citations

37 Fed.Appx. 730, 2002 WL 1065948

Footnotes

- * The Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.
- 1 Defendant Palmer's appeal was dismissed on December 12, 2001, upon his motion to dismiss pursuant to Fed. R.App. P. 42(b).
- 1 The case was originally filed in Wayne County Circuit Court and removed by defendants to federal court.
- 2 No one claims that Dr. King changed his opinion before trial. Nor does anyone claim that plaintiff deliberately concealed or evaded disclosing his changed opinion on the existence of the os odontoideum.
- 3 Subluxation is defined as "an incomplete or partial dislocation." Dorland's Illustrated Medical Dictionary 1488 (25th ed. 1974). Dislocation is defined as "the displacement of any part, more especially of a bone Called also *luxation*." *Id.*, at 465. Anterior is defined as "situated ... toward the head end of the body." *Id.*, at 103.
- 4 We also reject defendants' argument that Michigan's comparative fault statute applies to plaintiff's civil rights claims under 42 U.S.C. § 1988(a). Section 1988 authorizes a federal court to use state law to facilitate but not to hinder proceedings in the vindication of civil rights. Lefton v. City of Hattiesburg, 333 F.2d 280, 284 (5th Cir.1964). A state law should be disregarded if it is inconsistent with the policy underlying § 1983: deterrence and compensation. See Board of Regents v. Tomanio, 446 U.S. 478, 489, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). The protection afforded under § 1983 was not intended to differ from state to state, and federal, not state, common law governs the determination of damages in a § 1983 action. Busche v. Burkee, 649 F.2d 509, 518 (7th Cir.1981). To apply comparative fault statutes in civil rights actions would result in the protection afforded under § 1983 to differ from state to state and would be inconsistent with the underlying policy of deterrence and compensation.
- 5 Michigan Compiled Laws Annotated § 600.2959 (West 2000) provides: "In an action based on tort or another legal theory seeking damages for personal injury ... the court shall reduce damages by the percentage or comparative fault of the person upon whose injury ... the damages are based If that person's percentage of fault is greater than the aggregate fault of the other person ... noneconomic damages shall not be awarded."
- 6 No one challenges the other question submitted to the jury after the original verdict was rendered—whether plaintiff's comparative negligence was attributable to his intoxication.
- 7 Defendants also argue that plaintiff could have found a less expensive attorney in Detroit and did not have to retain a Chicago attorney. A party is free to choose whatever attorney it desires. The question is the reasonableness of the rate. Defendants also argue that the rates charged for travel time should have been reduced. Defendants offered no proof on reasonable rates for travel time in any market.

- 8 Defendants argue that the district court applied the wrong standard under § 1927. While the district court noted no bad faith, it applied an objective standard as required under § 1927 when it concluded that the fracture was the subject of dispute between the experts.

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United States District Court, S.D. New York.

MSC MEDITERRANEAN SHIPPING
 COMPANY HOLDING S.A., Plaintiff,

v.

FORSYTH KOWNACKI LLC, et al., Defendants.

16 Civ. 8103 (LGS)

|

Filed 03/30/2017

Attorneys and Law Firms

Adam H. Offenhartz, Anne Marie Champion, James L. Hallowell, Gibson, Dunn & Crutcher, LLP, New York, NY, for Plaintiff.

OPINION AND ORDER

Lorna G. Schofield, United States District Judge

*1 This application for attorneys' fees arises out of a default judgment in favor of Plaintiff MSC Mediterranean Shipping Company Holding S.A.'s ("MSC") claims for an anticipatory breach of contract and breach of contract, granting Plaintiff injunctive relief, declaratory relief and attorneys' fees and costs pursuant to Federal Rule of Civil Procedure 54(d) and the terms of a financing agreement executed between the parties. Plaintiff seeks \$489,537.00 in costs and fees. For the following reasons, Plaintiff's motion is granted in part.



I. BACKGROUND

MSC and Defendant Forsyth Kownacki LLC ("FK") executed an agreement about a potential confidential financing transaction (the "Financing Agreement") in 2014. The terms of the Financing Agreement and a separate non-disclosure agreement contained confidentiality clauses, which bound FK and its principals, including Defendant Michael Kownacki. Default Judgment was entered against Defendants on February 2, 2017, for breaching the terms of the non-disclosure agreement by refusing to return or destroy the confidential information in their possession in response to MSC's request to do so and for anticipatorily breaching the nondisclosure agreement and Financing Agreement by threatening to disclose MSC's confidential information.


The Financing Agreement also stated: "To the extent any dispute arises between the parties hereto regarding any of the subject matter hereof, the prevailing party in any action or proceeding brought in connection therewith will be entitled to reasonable attorneys' fees and courts costs from the losing party."

Plaintiff filed a motion for attorneys' fees and costs on January 31, 2017, supported by a memorandum of law and attorney declaration requesting \$455,778.03 in fees and costs. Plaintiff filed a supplemental declaration seeking an additional \$32,727.19 in legal fees and \$1,031.78 in costs, bringing the total sought to \$489,537.00. Defendants have not appeared in this action.

II. DISCUSSION

Attorneys' fees and costs are appropriately awarded pursuant to the terms of the Financing Agreement and Federal Rule of Civil Procedure 54(d). "It is an ancient common axiom that a defendant who defaults thereby admits all well-pleaded factual allegations contained in the complaint."  City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011) (internal quotation marks omitted). "[A] federal court will enforce contractual rights to attorneys' fees if the contract is valid under applicable state law."  McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1313 (2d Cir. 1993). "Although a district court has broad discretion in awarding attorneys' fees, ... where a contract authorizes an award of attorneys' fees, such an award becomes the rule rather than the exception." *Id.*

The clear language of the Financing Agreement awards "reasonable attorneys' fees and court costs" to the "prevailing party in any action or proceeding" connected to the Financing Agreement. Plaintiff brought this action to enforce the confidentiality terms of the Financing Agreement and is the "prevailing party" by virtue of the Default Judgment entered in its favor. The Financing Agreement's clause granting fees is also enforceable. "Under New York law, a contract that provides for an award of reasonable attorneys' fees to the prevailing party in an action to enforce the contract is enforceable if the contractual language is sufficiently clear."

 NetJets Aviation, Inc. v. LHC Commc'ns, LLC, 537 F.3d 168, 175 (2d Cir. 2008). Here, the Financing Agreement provided that New York law governs and contains clear

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language that a prevailing party is entitled to fees and costs. Accordingly, an award of fees and costs is warranted.

*2 To determine the amount of attorneys' fees to be awarded, a court begins with the "lodestar—the product of a reasonable hourly rate and the reasonable number of hours required by the case," which results in a "presumptively reasonable fee."

Perez v. AC Roosevelt Food Corp., 744 F.3d 39, 44 (2d Cir. 2013) (citation omitted). "A district court may adjust the lodestar when it does not adequately take into account a factor that may properly be considered in determining a reasonable fee." *Millea v. Metro-N. R.R. Co.*, 658 F.3d 154, 167 (2d Cir. 2011) (internal quotation marks omitted). "The presumptively reasonable fee boils down to what a reasonable, paying client would be willing to pay, given that such a party wishes to spend the minimum necessary to litigate the case effectively." *Simmons v. N.Y.C. Transit Auth.*, 575 F.3d 170, 174 (2d Cir. 2009) (internal quotation marks omitted).

In determining what a reasonable client would pay, a court applies the *Johnson* factors:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the level of skill required to perform the legal service properly;
- (4) the preclusion of employment by the attorney due to acceptance of the case;
- (5) the attorney's customary hourly rate;
- (6) whether the fee is fixed or contingent;
- (7) the time limitations imposed by the client or the circumstances;
- (8) the amount involved in the case and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and length of the professional relationship with the client;
- and (12) awards in similar cases.

Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany, 522 F.3d 182, 186 n.3 (2d Cir. 2008)

(citation omitted). The requesting party bears the burden of establishing the appropriateness of the hours expended and hourly rates. See *SEC v. Cope*, No. 14 Civ. 7575, 2016 WL 7429445, at *2 (S.D.N.Y. Dec. 23, 2016). "[T]he customary hourly rate and awards in similar cases are strong evidence of what the market will bear." *Dimopoulou v. First Unum Life Ins. Co.*, No. 13 Civ. 7159, 2017 WL 464430, at *2 (S.D.N.Y. Feb. 3, 2017) (internal quotation marks omitted). "[H]ours that are excessive, redundant, or otherwise unnecessary" should be excluded. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

Plaintiff requests \$67,122.00 in attorneys' fees for 86.2 hours of work by attorneys at Sheppard Mullin during the two weeks between September 22 and October 19, 2016. Plaintiff requests fees it paid Sheppard Mullin "associated with its pre-suit responses to Kownacki's threats," specifically, researching, drafting and sending three letters to Defendants in an attempt to enforce MSC's contractual rights. The Sheppard Mullin timesheets however show that the firm billed time for drafting a complaint and motion papers in support of a TRO, work that apparently was duplicated and completed by Gibson Dunn. This amount, which the Court in its discretion estimates to be \$37,173 should be deducted. Also, time billed by two attorneys, partner Charles Donovan and associate Blanka Wolfe, of \$3,332.50, should be deducted as it appears that both were briefly brought into the matter but never called upon to draft, revise, research or comment on the firm's work product.

The Sheppard Mullin hourly rates are reasonable, though somewhat higher than those recently awarded within this district for the firm. See *TufAmerica Inc. v. Diamond*, No. 12 Civ. 3529, 2016 WL 1029553, at *5 (S.D.N.Y. Mar. 9, 2016). The Court appreciates that billing rates will likely vary, and reasonably so, based on the seniority, expertise and sometimes practice area of a particular partner within the same firm. Accordingly, in its discretion, the Court reduces Plaintiff's request for Sheppard Mullins fees by \$40,506 in fees, for reimbursement of \$26,616.¹ Reasonable costs of \$371.38 are supported by the records submitted.

*3 Plaintiff requests \$399,224.10 (€378,863.67)² in fees related to work by Gibson Dunn, but the invoices submitted reflect \$398,839.45 billed in fees. The fees represent 547 attorney hours and approximately 70 hours worked by other staff, including paralegals and research librarians, during the period from September 27, 2016 to January 31, 2017.

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This work included the preparation and filing of a motion for a temporary restraining order, memorandum of law, and supporting documents; motion for default judgment; motion for attorneys' fees as well as three court appearances and a telephonic hearing.

The time entries and corresponding fees should be reduced to exclude the time of senior partner Adam Offenhartz from October 13 to October 20, 2016, amounting to \$8,688 because he transitioned off the matter during that period and was replaced by James Hallowell. The matter did not warrant the involvement of two senior partners, and was not staffed in that way except during this brief period. Also, half the billed time of paralegal Angel Arias, or \$13,325 should be deducted because his time entries reflect fewer tasks that contributed directly to the work on this matter than the time would suggest.

Plaintiff charged at rates ranging from \$210.75 (€200) to \$437.30 (€415) per hour for non-legal staff; \$569.02 (€540) to \$753.42 (€715) per hour for associates; and \$874.60 (€830) to \$1,048.47 (€995) per hour for partners at Gibson Dunn. These rates are reasonable under the circumstances, given the experience and work performed by the particular individuals.

See *U.S. Bank Nat'l Ass'n v. Dexia Real Estate Capital Mkts.*, No. 12 Civ. 9412, 2016 WL 6996176, at *8 (S.D.N.Y. Nov. 30, 2016) ("[P]artner billing rates in excess of \$1,000 an hour [] are by now not uncommon in the context of complex commercial litigation.") (citation omitted); *Inter-Am. Dev. Bank v. Venti S.A.*, No. 15 Civ. 4063, 2016 WL 642381, at *7–8 (S.D.N.Y. Feb. 17, 2016) (approving rates of \$600 to \$690 per hour for partners with 10 to 13 years of experience; \$410 and \$565 per hour for senior associates; and \$270 per hour for legal assistants). The one exception is the unexplained anomaly between the more senior Richard Dudley (class of 2012 with a billing rate of €540 or \$569, which increased to €595 or \$627 for work performed in 2017) and the more junior

Hanae Fujinami (class of 2014 with a billing rate of €565 or \$595, which increased to €620 or \$653 for work performed in 2017). Accordingly, Ms. Fujinami's rate is reduced to Mr. Dudley's rates for this purpose, resulting in a deduction of \$3,080.

This case—which involved unopposed, relatively straightforward breach of contract and anticipatory breach claims—was not particularly complex. On the other hand, there were issues of foreign law, and work was done on an urgent basis to prepare the application for a temporary restraining order, including work on nights and weekends as evidenced by the billing and disbursement records. Accordingly, in its discretion, the Court reduces Plaintiff's requested fees for work by Gibson Dunn in the amounts listed above for a total reduction of \$25,093 from the amount invoiced, resulting in reimbursement of \$373,747. Plaintiff's request for costs and disbursements of \$17,862.62 in relation to work done by Gibson Dunn is reasonable and supported by the invoices.

*4 Plaintiff seeks fees of \$4,956.90 (UK£4,025.00) paid to London firm Fountain Court Chambers in connection with the preparation of an expert declaration on foreign law. The firm's invoice itemizes the tasks performed and corresponding fees, but no hourly rate or number of hours is included. The declaration was, however, submitted to the Court to provide an opinion on English law regarding the enforceability of the Non-Disclosure Agreement between MSC and FK. The Court, in its discretion, finds that the fees are reasonable for an expert declaration on issues of foreign law and grants the fees requested for work done by Fountain Court Chambers.

The Court, in its discretion, awards Plaintiff \$423,554 in fees and costs, as reflected in the table below.

Summary of Awards for Fees and Costs

Law Firm	Attorneys' Fees	Costs
Sheppard Mullins	\$ 26,616	\$ 371.38
Fountain Court	\$ 4,957	\$ 0
Gibson Dunn	\$373,747	\$17,862.62
TOTAL	\$405,320	\$18,234.00
COMBINED	\$423,554	
TOTAL		

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for attorneys' fees and costs is GRANTED in part. Plaintiff is entitled to \$423,554 in attorneys' fees and costs.

The Clerk of Court is respectfully directed to close the application at Docket Number 43.

All Citations

Not Reported in Fed. Supp., 2017 WL 1194372

Footnotes

- 1 The Court does not suggest that Sheppard Mullin should not be paid for work duplicated by Gibson Dunn, but only that the total reasonable fee amount does not include duplicative work, which may have been requested or reasonably expected by the client.
- 2 Plaintiff provides fees and costs amounts in United States Dollars, Pounds Sterling and Euros. Plaintiff is based in Switzerland and invoices reflect that it was billed in all three currencies. Foreign currencies are, for the purposes of this Opinion and Order, converted using the most recent foreign exchange rates provided by the U.S. Department of Treasury: €0.9490 to \$1 USD, and £0.8120 to \$1 USD. See U.S. Dep't of Treasury, Bureau of the Fiscal Serv., *Treasury Reporting Rates of Exchange*, <https://www.fiscal.treasury.gov/fsreports/rpt/treasRptRateExch/currentRates.htm> (rates as of Dec. 31, 2016).

2021 WL 2494935

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
 Middle Section, AT NASHVILLE.

NANDIGAM NEUROLOGY, PLC et al.

v.

Kelly BEAVERS

No. M2020-00553-COA-R3-CV

|

Assigned on Briefs February 2, 2021

|

FILED 06/18/2021

**Appeal from the General Sessions Court for Wilson
 County, No. 2020-CV-152, Barry Tatum, Judge**

Attorneys and Law Firms

Angello L. Huong, Lebanon, Tennessee, for the appellants,
 Nandigam Neurology, PLC, and Dr. Kaveer Nandigam.

Daniel A. Horwitz, Nashville, Tennessee, and Sarah L.
 Martin, Nashville, Tennessee, for the appellee, Kelly Beavers.

Kristi M. Davis, J., delivered the opinion of the court, in which
J. Steven Stafford, P.J., W.S., and Kenny W. Armstrong, J.,
 joined.

OPINION

Kristi M. Davis, J.

*1 This case arises from a defamation and false light lawsuit filed in the General Sessions Court for Wilson County (the “general sessions court”). The action was dismissed pursuant to the Tennessee Public Participation Act (the “TPPA”) and the plaintiffs appealed the dismissal to the Circuit Court for Wilson County (the “circuit court”). After concluding that it lacked subject matter jurisdiction to hear the appeal, the circuit court transferred the case to this Court. On appeal, the parties dispute whether this Court has subject matter jurisdiction, and the defendant argues that the ruling of the general sessions court should be affirmed. We conclude that this Court has subject matter jurisdiction to decide this appeal

and, discerning no error, we affirm the decision of the general sessions court dismissing the plaintiffs’ legal action pursuant to the TPPA.

I. FACTUAL & PROCEDURAL BACKGROUND

This case centers on the recently enacted TPPA, found at Tennessee Code Annotated section 20-17-101 et. seq. Kelly Beavers (“Defendant” or “Appellee”) and her father visited the office of Dr. Kaveer Nandigam (“Dr. Nandigam”), a neurologist, in early November 2019. Although the details of the visit are disputed, Dr. Nandigam and Defendant agree that there was a disagreement over whether Defendant could make a video recording of the appointment with her phone. According to Defendant, she often does this at her father’s doctor’s appointments because he has neurological and memory issues. According to Dr. Nandigam, however, videotaping a doctor’s appointment violates his office policy. In any event, after the appointment, Defendant posted an online Yelp! review regarding Dr. Nandigam and his practice, Nandigam Neurology, PLC (together with Dr. Nandigam, “Plaintiffs” or “Appellants”). Defendant’s review stated in its entirety:

This “Dr’s” behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me. Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does not belong in the medical field at all.

On November 27, 2019, Nandigam Neurology initiated the first action against Defendant in the circuit court. Dr. Nandigam was not listed as a plaintiff in that action. Nandigam Neurology claimed causes of action for defamation, libel, false light, and conspiracy and alleged, *inter alia*, that Defendant’s Yelp! review contained “false, disparaging, and misleading statements.” Defendant responded by filing a motion to dismiss pursuant to the TPPA, specifically sub-section 20-17-104(a). Defendant averred that

Nandigam Neurology's lawsuit was a strategic lawsuit against public participation, meaning the suit was intended to deter Defendant's lawful exercise of her right to free speech and that the lawsuit should be dismissed. Before the circuit court could rule on Defendant's petition, however, Nandigam Neurology filed a notice of voluntary dismissal.

Soon thereafter, on January 21, 2020, Plaintiffs filed a new action in the general sessions court, this time listing both Nandigam Neurology and Dr. Nandigam as plaintiffs. The summons alleged "[d]efamation as to Nandigam Neurology, PLC and [Dr. Nandigam]; and [f]alse light invasion of privacy as to [Dr. Nandigam]." ¹ Again, Defendant responded by filing a petition to dismiss Plaintiffs' case in its entirety. First, Defendant argued that Plaintiffs failed to state any claim for which relief could be granted, pointing out that Plaintiffs failed to plead the substance of any statement over which they complained. Defendant also averred that her statement was not defamatory because it expressed only opinions and rhetorical hyperbole. Defendant again relied on the TPPA in asserting that her review was a statement made in connection with a matter of public concern and that Plaintiffs' lawsuit "qualifies as one filed in response to [Defendant's] exercise of the right to free speech[.]" Defendant requested that the suit be dismissed, that she be awarded costs and attorney's fees, and that the general sessions court sanction Plaintiffs pursuant to Tennessee Code Annotated section 20-17-107. Attached to Defendant's petition to dismiss was an affidavit executed by Defendant which provided that her Yelp! review was based on her personal observations and that she had no reason to believe any of the statements in the review were false.

*2 Plaintiffs answered Defendant's petition for dismissal on January 31, 2020, asserting that section 20-17-101 et. seq. could not apply to their claims because "it is a rule of [c]ivil [p]rocedure, and the rules of [c]ivil [p]rocedure do not apply in general sessions court." Plaintiffs further argued that they "[met] the pleading requirements for general sessions court" and that they were entitled to a hearing at which they would provide evidence of their damages. Plaintiffs also asserted that because "there is no discovery in general sessions court, ... no affidavit by Plaintiffs or Defendant is necessary or appropriate." As such, Plaintiffs' response to Defendant's TPPA petition for dismissal did not address the substance of Defendant's argument nor did Plaintiffs offer any countervailing proof in response to Defendant's affidavit.

The general sessions court held a hearing on Defendant's TPPA petition on February 6, 2020. While Defendant

reiterated the argument that her Yelp! review was not defamatory as a matter of law, Plaintiffs maintained that "there's no discovery in General Sessions Court[.]" and that the court should "go ahead and just have the trial." Rather than respond to the merits of Defendant's petition at the February 6, 2020 hearing, Plaintiffs' counsel relied solely on the theory that the TPPA is a rule of civil procedure that does not apply in general sessions court. On the other hand, Defendant maintained that the TPPA is a duly enacted Tennessee statute that, by its terms, applies to all legal actions, and that the general sessions court should rule on the petition and dismiss Plaintiffs' case. The general sessions court took the petition under advisement and informed the parties that a ruling would be announced on February 13, 2020, one week later.

On February 12, 2020, six days after the hearing on Defendant's TPPA petition, Plaintiffs filed a pleading titled "Plaintiff's Supplemental Answer to Defendant's § 20-17-104(a) Motion to Dismiss[.]" In this pleading, Plaintiffs addressed the substance of Defendant's TPPA petition for the first time, arguing that Plaintiffs could prove a prima facie case for defamation and false light. Specifically, Plaintiffs asserted that the use of ironic quotes in Defendant's Yelp! review was defamatory because the quotes suggest Dr. Nandigam is not a real doctor. Plaintiffs further asserted that the allegations that Dr. Nandigam "threw a temper tantrum" and "slammed things" were defamatory because these allegations amount to facts as opposed to opinion or hyperbole. In support of their contention that they could plead their prima facie case, Plaintiffs attached to their supplemental answer an affidavit of Dr. Nandigam, which provided his version of the circumstances surrounding Defendant's visit to Nandigam Neurology in November 2019.

The parties appeared in the general sessions court the following day, February 13, 2020, to hear the ruling on Defendant's TPPA petition. At this hearing, Defendant argued that Plaintiffs' supplemental answer was untimely pursuant to section 20-17-104(c), which provides that a response to a TPPA petition to dismiss "may be served and filed by the opposing party no less than five (5) days before the hearing or, in the court's discretion, at any earlier time that the court deems proper." As Plaintiffs' supplemental response and affidavit were not filed until nearly a week after the hearing on Defendant's petition and on the eve of the general sessions court's scheduled ruling, Defendant urged that Plaintiffs' response should not be considered. Defendant therefore averred that Plaintiffs had offered no countervailing proof in response to Defendant's TPPA petition and that

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Plaintiffs' case must be dismissed. The general sessions court acknowledged that it had only received Plaintiffs' response the prior afternoon and ruled that: (1) Plaintiffs failed to state a claim for defamation because they did not plead the substance of the statement at issue; (2) the TPPA applies in general sessions court because it is a Tennessee statute; and (3) Defendant's petition for dismissal was granted due to the "lack of facts" offered by Plaintiffs. While the notation on the general sessions warrant indicates that the case was dismissed pursuant to the TPPA, the order did not resolve Defendant's requested costs, attorney's fees, or sanctions pursuant to section 20-17-107. Defendant informed the court, however, that she would be filing an itemized petition for her attorney's fees.

*3 Plaintiffs appealed to circuit court on February 18, 2020. Defendant responded by filing a motion to dismiss for failure to state a claim and another TPPA petition to dismiss. As a threshold issue, however, Defendant also asserted that Plaintiffs had appealed to the wrong court because the general sessions order dismissing Plaintiffs' case was appealable only to the Court of Appeals. Defendant's argument in this regard was two-fold. First, Defendant noted the language of section 20-17-106, which provides that a trial court's "order dismissing or refusing to dismiss a legal action pursuant to a petition filed under [the TPPA] is immediately appealable as a matter of right to the court of appeals." Accordingly, Defendant averred that "only the Court of Appeals may adjudicate the Plaintiffs' appeal of the General Sessions Court's February 13, 2020 Order[.]" Alternatively, Defendant argued that the general sessions court's order was interlocutory insofar as it did not resolve the issue of attorney's fees and that the circuit court therefore lacked jurisdiction to review that judgment. Plaintiffs filed a written response to Defendant's motion but made no argument regarding whether the circuit court had subject matter jurisdiction.

The parties agree that the circuit court held a telephonic hearing on March 24, 2020; however, a transcript of this hearing does not appear in the record. On March 30, 2020, the circuit court entered an order transferring Plaintiffs' notice of appeal to this Court, finding that pursuant to section 20-17-106, the circuit court lacked subject matter jurisdiction over the case. The transfer order was received by this Court on April 2, 2020. On April 14, 2020, Defendant filed a notice of cross-appeal.

II. ISSUES

Plaintiffs raise the following issues for review:

1. Whether the circuit court erred in concluding that it lacked subject matter jurisdiction over the appeal from general sessions court and in transferring the case to this Court.
2. Whether an appeal from general sessions court to circuit court is reviewed de novo.

In her posture as appellee and cross-appellant, Defendant raises the following issues:

3. Whether Plaintiffs waived their right to challenge the circuit court's transfer order.
4. Whether this Court is the only court with jurisdiction to adjudicate the appeal from general sessions court.
5. Whether the general sessions court correctly dismissed Plaintiffs' claims pursuant to the TPPA.
6. Whether this Court should recognize that Tennessee's presumption of falsity doctrine in defamation cases has been abrogated.
7. Whether Defendant should be awarded attorney's fees on appeal.

III. DISCUSSION

A. Standard of Review

This case presents issues of law. First, we must determine whether the circuit court properly concluded that it lacked subject matter jurisdiction. "Since a determination of whether subject matter jurisdiction exists is a question of law, our standard of review is de novo." *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 712–13 (Tenn. 2012) (quoting *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)). Additionally, this case requires us to construe the TPPA. "[W]hen an issue on appeal requires statutory interpretation, we review the trial court's decision de novo with no presumption of correctness." *Nationwide Mut. Fire Ins. Co. v. Memphis Light, Gas and Water*, 578 S.W.3d 26, 30 (Tenn. Ct. App. 2018) (citing *Wade v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 469 S.W.3d 54, 58 (Tenn. Ct. App. 2015)). The polestar

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of statutory interpretation is the intent and purpose of the legislature in enacting the statute. *Nationwide*, 578 S.W.3d at 30. We begin by “reading the words of the statutes using their plain and ordinary meaning in the context in which the words appear.” *Id.* When the language is clear and unambiguous, we look no further than the language of the statute itself to determine its meaning. *Id.*

B. Anti-SLAPP Statutes Generally

The instant case centers on the TPPA, which is more commonly known as an “anti-SLAPP” statute. See Todd Hambidge, et al., *Speak Up. Tennessee's New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights*, 55 TENN. B.J. 14 (Sept. 2019) (“Tennessee recently adopted a Strategic Lawsuit Against Public Participation (‘Anti-SLAPP’) statute.”). To better understand the issues before us, a general overview of anti-SLAPP legislation is beneficial. The term “SLAPP” stands for “strategic lawsuits against public participation,” meaning lawsuits which might be viewed as “discouraging the exercise of constitutional rights, often intended to silence speech in opposition to monied interests rather than to vindicate a plaintiff’s right.” *Id.* at 14, 15; see also *Sandholm v. Kuecker*, 356 Ill.Dec. 733, 962 N.E.2d 418, 427 (Ill. 2012) (“‘SLAPPs ... are lawsuits aimed at preventing citizens from exercising their political rights or punishing those who have done so.’” (quoting *Wright Dev. Group, LLC v. Walsh*, 238 Ill.2d 620, 345 Ill.Dec. 546, 939 N.E.2d 389, 395 (2010))).² Regarding SLAPP lawsuits generally, the Illinois Supreme Court has aptly explained:

*4 SLAPPs use the threat of money damages or the prospect of the cost of defending against the suits to silence citizen participation. The paradigm SLAPP suit is “one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development.”

Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523, 525 (N.D. Ill. 1990). A SLAPP is “based upon nothing more than defendants’ exercise of their right, under the first amendment, to petition the government for a redress of grievances.” *Hogan*, 740 F. Supp. at 525. SLAPPs are, by definition, meritless. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 Loy. L.A. L.Rev. 395, 396 (1993). Plaintiffs in SLAPP suits do not intend to win but rather to chill a defendant’s speech or protest activity and discourage opposition by others through delay, expense, and distraction. *Id.* at 403–

05. “In fact, defendants win eighty to ninety percent of all SLAPP suits litigated on the merits.” *Id.* at 406. While the case is being litigated in the courts, however, defendants are forced to expend funds on litigation costs and attorney fees and may be discouraged from continuing their protest activities. *Id.* at 404–06. “The idea is that the SLAPP plaintiff’s goals are achieved through the ancillary effects of the lawsuit itself on the defendant, not through an adjudication on the merits. Therefore, the plaintiff’s choice of what cause of action to plead matters little.” Mark J. Sobczak, Comment, *SLAPPED in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. Ill. U.L. Rev. 559, 561 (2008). SLAPPs “masquerade as ordinary lawsuits” and may include myriad causes of action, including defamation, interference with contractual rights or prospective economic advantage, and malicious prosecution. Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 Loy. L.A. L.Rev. 801, 804–05 (2000). Because winning is not a SLAPP plaintiff’s primary motivation, the existing safeguards to prevent meritless claims from prevailing were seen as inadequate, prompting many states to enact anti-SLAPP legislation. *Id.* at 805. These statutory schemes commonly provide for expedited judicial review, summary dismissal, and recovery of attorney fees for the party who has been “SLAPPED.” *Id.*

Sandholm, 356 Ill.Dec. 733, 962 N.E.2d at 427–28 (some internal citations omitted); see also *Steidley v. Cmty. Newspaper Holdings, Inc.*, 383 P.3d 780, 786 (Okla. Civ. App. 2016) (citations omitted) (“SLAPP suits are designed to intimidate the petitioners into dropping their initial petitions due to the expense and fear of extended litigation. Libel is a common cause of action in SLAPP suits.”).

Anti-SLAPP statutes have arisen in response to SLAPP lawsuits. See Hambidge, *supra*, at 15 (“[A]nti-SLAPP statutes are not a recent development[;] [s]tates began enacting anti-SLAPP statutes in the 1980s in response to an increasing number of lawsuits that were filed for the purpose of discouraging the exercise of constitutional rights.”); see also

Liberty Synergistics Inc. v. Microflo Ltd., 718 F.3d 138, 147 (2nd Cir. 2013) (“[T]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights.”). Over thirty states now have anti-SLAPP statutes in place, and while the particular language varies, the stated purpose of anti-

SLAPP legislation is consistent. *See, e.g.,* Ga. Code Ann. § 9-11-11.1(a) (“[I]t is in the public interest to encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech ... [T]he valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process.”); Ark. Code Ann. § 16-63-501 (“[I]t is in the public interest to encourage participation by the citizens of the State of Arkansas in matters of public significance through the exercise of their constitutional rights of freedom of speech ... Strategic lawsuits against political participation can effectively punish concerned citizens for exercising the constitutional right to speak and petition the government for a redress of grievances.”); Colo. Rev. Stat. § 13-20-1101 (“[I]t is in the public interest to encourage continued participation in matters of public significance and [] this participation should not be chilled through abuse of the judicial process.”).

C. The TPPA

In that vein, the stated purpose of the TPPA, which was enacted by the General Assembly on July 1, 2019, is found at Tennessee Code Annotated section 20-17-102:

***5** The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury. This chapter is consistent with and necessary to implement the rights protected by Constitution of Tennessee, Article I, §§ 19 and 23, as well as by the First Amendment to the United States Constitution, and shall be construed broadly to effectuate its purposes and intent.

The TPPA is “intended to provide an additional substantive remedy to protect the constitutional rights of parties and to supplement any remedies which are otherwise available

to those parties under common law, statutory law, or constitutional law or under the Tennessee Rules of Civil Procedure.” Tenn. Code Ann. § 20-17-109.

Under the TPPA, “[i]f a legal action is filed in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action.” *Id.* § 20-17-104(a). The TPPA defines the “[e]xercise of the right of free speech” as “a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution[.]” *Id.* § 20-17-103(3). A “matter of public concern” under the TPPA can include, *inter alia*, “an issue related to ... [h]ealth or safety[.]” “[a] good, product, or service in the marketplace[.]” or “[a]ny other matter deemed by a court to involve a matter of public concern.” *Id.* § 20-17-103(6)(E), (G).

Once a TPPA petition is filed, “[a] response to the petition, including any opposing affidavits, may be served and filed by the opposing party no less than five (5) days before the hearing[.]” and “all discovery in the legal action is stayed upon the filing of a petition under” the TPPA. *Id.* § 20-17-104(c), (d). If the party petitioning for dismissal makes a “prima facie case that [the] legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association[.]” the court “shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.” *Id.* § 20-17-105(a), (b). Notwithstanding subsection 105(b), “the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.” *Id.* § 20-17-105(c). When considering a petition filed under the TPPA, the court may consider “supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.” *Id.* § 20-17-105(d).

If the court dismisses a legal action pursuant to a TPPA petition, the petitioning party shall be awarded “court costs, reasonable attorney’s fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition[.]” and, under certain circumstances, the party who brought the lawsuit may face sanctions. *Id.* § 20-17-107(a)(1), (2). Finally, the TPPA also provides that:

[t]he court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals. The Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals.

*6 *Id.* § 20-17-106.

Accordingly, while there is no Tennessee case law construing the TPPA as of yet, the statute is, on its face, consistent with the anti-SLAPP legislation of many other states.

D. Subject Matter Jurisdiction

Bearing this framework in mind, we return to the present case. As a threshold matter, there is disagreement as to whether this Court has subject matter jurisdiction over this appeal. "Subject matter jurisdiction relates to a court's authority to adjudicate a particular type of case or controversy brought before it." *In re Estate of Trigg*, 368 S.W.3d 483, 489 (Tenn. 2012) (citing *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004)). As orders and judgments entered by courts lacking subject matter jurisdiction are void, "issues regarding subject matter jurisdiction should be considered as a threshold inquiry" and "resolved at the earliest possible opportunity." *Estate of Trigg*, 368 S.W.3d at 489 (citing *Redwing v. Catholic Bishop for the Diocese of Memphis*, 363 S.W.3d 436, 445 (Tenn. 2012); *Brown v. Brown*, 198 Tenn. 600, 281 S.W.2d 492, 497 (1955)).

The instant case raises several questions implicating subject matter jurisdiction. First, we must consider whether the finality of the general sessions order affects the present appeal. Second, we must determine whether Tennessee Code Annotated section 20-17-106 confers upon this Court exclusive jurisdiction over appeals brought pursuant to the TPPA. Finally, Defendant asserts that Plaintiffs did not file a timely notice of appeal to this Court. We address each of these issues in turn.

1. Finality of the general sessions order dismissing Plaintiffs' lawsuit

The dispute over the finality of the general sessions order granting Defendant's TPPA petition arises from the fact that the order makes no mention of attorney's fees, despite the fact that Defendant requested such fees in her petition.³ Generally, "unless an appeal from an interlocutory order is provided by the rules or by statute, appellate courts have jurisdiction over final judgments only." *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 559 (Tenn. 1990) (citing *Aetna Cas. & Sur. Co. v. Miller*, 491 S.W.2d 85 (Tenn. 1973)); see also *Tenn. R. App. P. 3(a)*. A final judgment adjudicates all "claims, rights, and liabilities of all the parties," *Discover Bank v. Morgan*, 363 S.W.3d 479, 488 n.17 (Tenn. 2012), and "resolves all the issues in the case, leaving nothing else for the trial court to do." *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003) (internal quotations omitted). Under some circumstances, it is true that a trial court's failure to rule on a request for attorney's fees renders an order nonfinal and deprives this Court of subject matter jurisdiction. See, e.g., *E Sols. for Buildings, LLC v. Knestrick Contractor, Inc.*, No. M2017-00732-COA-R3-CV, 2018 WL 1831116 (Tenn. Ct. App. Apr. 17, 2018) (appeal dismissed due to outstanding request for attorney's fees pursuant to a contractual provision); *City of Jackson v. Hersh*, No. W2008-02360-COA-R3-CV, 2009 WL 2601380, at *4 (Tenn. Ct. App. Aug. 25, 2009) (collecting cases and noting that "this Court has concluded on several occasions that an order that fails to address an outstanding request for attorney's fees is not final").

*7 Nonetheless, there are circumstances under which the absence of a ruling on attorney's fees or other outstanding issues does not affect the appealability of a judgment; however, these exceptions are created by rule or statute. See, e.g., *Tenn. R. App. P. 9* (addressing interlocutory appeals); *Tenn. R. App. P. 10* (addressing extraordinary appeals); *Tenn. R. Civ. P. 54.02* (allowing courts to direct entry of a final judgment as to one or more but fewer than all of the claims or parties); see also *Levitt, Hamilton, and Rothstein, LLC v. Asfour*, 587 S.W.3d 1, 8 n.7 (Tenn. Ct. App. 2019) (noting that exceptions to the final judgment rule are "creatures of statute"). A helpful example is found at Tennessee Code Annotated section 29-5-319, which is

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somewhat similar to section 20-17-106 in that it provides, *inter alia*, for an immediate appeal in the event a court denies a motion to compel arbitration. See Tenn. Code Ann. § 29-5-319(a)(1) (“An appeal may be taken from ... [a]n order denying an application to compel arbitration made under § 29-5-303[.]”). This Court has interpreted section 29-5-319 to mean that an immediate appeal to this Court may be taken as soon as a motion to compel arbitration is denied, notwithstanding whether other issues remain. See Altom v. Capital Resorts Group, LLC, No. E2019-00739-COA-R3-CV, 2020 WL 3400680, at *4 (Tenn. Ct. App. June 19, 2020) (“[D]eclining to compel arbitration and ruling that the issues would be decided by the court rather than an arbitrator ... clearly constituted an order ‘denying an application to compel arbitration’ as contemplated by Tennessee Code Annotated § 29-5-319. Such order is therefore appealable to this Court.”); see also Person v. Kindred Healthcare, Inc., No. W2009-01918-COA-R3-CV, 2010 WL 1838014, at *3 (Tenn. Ct. App. May 7, 2010) (“Tennessee Code Annotated § 29-5-319 permits an immediate appeal from an order denying an application to compel arbitration under § 29-5-303.”).

Although not precisely the same, another instructive example is found at Tennessee Code Annotated section 20-12-119(c), which provides *inter alia* that “where a trial court grants a motion to dismiss pursuant to Rule 12 of the Tennessee Rules of Civil Procedure for failure to state a claim upon which relief may be granted, the court shall award the party or parties against whom the dismissed claims were pending” reasonable costs and attorney’s fees. § 20-12-119(c)(1). That statute further provides that “[a]n award of costs pursuant to this subsection (c) shall be made only after all appeals of the issue of the granting of the motion to dismiss have been exhausted[.]” Id. § 20-12-119(c)(3). Based on the foregoing language, we recently concluded that this Court has subject matter jurisdiction to review a trial court’s decision on a Rule 12.02(6) dismissal, despite the outstanding issue of recoverable attorney’s fees, when those fees are awarded by virtue of section 20-12-119(c). Irvin v. Green Wise Homes, LLC, No. M2019-02232-COA-R3-CV, 2021 WL 709782, at *5–6 (Tenn. Ct. App. Feb. 24, 2021) (citing Donovan v. Hastings, No. M2019-01396-COA-R3-CV, 2020 WL 6390134, at *3 (Tenn. Ct. App. Oct. 30, 2020)).

The foregoing examples highlight the principle that appellate courts have jurisdiction over final judgments only *unless* a rule or statute provides otherwise, and that statutes providing for expedited appellate review are not an aberration.

Bayberry Assocs., 783 S.W.2d at 559 (citing Aetna Cas. & Sur. Co., 491 S.W.2d 85). The language of section 20-17-106 is in keeping with other statutory and rule-based exceptions to the final judgment rule, particularly Tennessee Code Annotated section 29-5-319. To reiterate, section 20-17-106 provides that a court order “dismissing or refusing to dismiss a legal action pursuant to a petition filed under [the TPPA] is immediately appealable as a matter of right to the court of appeals.” The word “immediate” indicates that a party’s right to appeal the disposition of a TPPA petition is triggered not by the eventual entry of a judgment resolving the entire case, but rather only by a ruling on the petition. See Altom, 2020 WL 3400680, at *4. This conclusion is buttressed by the fact that section 106 also provides that an immediate appeal may be taken when a trial court “**refus[es]** to dismiss a legal action pursuant to a [TPPA] petition.” (Emphasis added). A trial court’s denial of a TPPA petition to dismiss would necessarily constitute an interlocutory order inasmuch as the case would remain pending. In this sense, the statute unambiguously contemplates that orders involving the disposition of a TPPA petition are “immediately appealable,” regardless of whether the order is final or interim. Tenn. Code Ann. § 20-17-106.

*8 This conclusion is consistent with the intent and purpose of the TPPA and anti-SLAPP statutes generally. See *id.* § 20-17-102; Coffee Cnty. Bd. of Educ. v. City of Tullahoma, 574 S.W.3d 832, 845–46 (Tenn. 2019) (“In all cases involving statutory construction, judges must look not only at ‘the language of the statute,’ but also ‘its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment.’” (quoting Spires v. Simpson, 539 S.W.3d 134, 143 (Tenn. 2017))); Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 526 (Tenn. 2010) (“When courts are called upon to construe a statute, their goal is to give full effect to the General Assembly’s purpose, stopping just short of exceeding its intended scope.” (citing Larsen–Ball v. Ball, 301 S.W.3d 228, 232 (Tenn. 2010))). Indeed, “the point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights[;] ... [t]he protections afforded by the anti-SLAPP statute against the harassment and burdens of litigation are in large measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process.” Liberty Synergistics, 718 F.3d at 147–48 (emphasis in original).⁴

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Here, the general sessions order itself plainly satisfies the statutory definition of an “immediately appealable” order because it is an “order dismissing ... a legal action pursuant to a petition filed under [the TPPA].” Tenn. Code Ann. § 20-17-106. Under these circumstances, the fact that the general sessions court did not address Defendant’s request for attorney’s fees, costs, or sanctions⁵ is inapposite in light of the clear import of the statute. In enacting section 20-17-106, the General Assembly created a statutory exception to the final judgment rule and we are not inclined to second-guess that decision. See Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ., 60 S.W.3d 65, 74 (Tenn. Ct. App. 2001) (“[I]t is not for the courts to question the wisdom of a legislative act.”). Rather, “[w]e must take the TPPA as [we] find [it],” Id. (quoting Tennessee Mfr’d Housing Ass’n v. Metro. Gov’t, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990)), while construing it in a manner that furthers “the purpose sought to be accomplished in its enactment.” Coffee Cnty., 574 S.W.3d at 845–46.

*9 Accordingly, we conclude that this Court does not lack subject matter jurisdiction over this appeal due to Defendant’s outstanding request for attorney’s fees.

2. Jurisdiction over TPPA appeals

Next, the parties dispute whether the circuit court properly found that it lacked subject matter jurisdiction over Plaintiffs’ appeal from general sessions court. While Plaintiffs maintain that they are entitled to a de novo hearing in circuit court and should not be forced to litigate in this Court, Defendant argues that under section 20-17-106, the Court of Appeals is the only court that has subject matter jurisdiction over the present case.

Once again, the pertinent portion of the TPPA is section 20-17-106, specifically the phrase “is immediately appealable as a matter of right to the court of appeals.” This section also provides that “[t]he Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals.” According to Plaintiffs, appeal to this Court is permissive rather than mandatory, and they urge that section 106 “is not the only exclusive and mandatory avenue afforded to the [Plaintiffs].” Plaintiffs rely on Tennessee Code Annotated section 27-5-108⁶ to further assert that they “should not be forced into pursuing this matter in the Court of Appeals if they do not desire to do so.” On the other hand, Defendant urges that the circuit court properly concluded that it lacked subject matter jurisdiction for multiple reasons.

First, Defendant asserts that although the absence of a ruling on attorney’s fees does not affect the appealability of the general sessions court order to this Court in light of section 20-17-106, the order is still interlocutory and cannot be appealed to circuit court because no rule or statute provides as much. See Wells Fargo Bank, N.A. v. Dorris, 556 S.W.3d 745, 753–54 (Tenn. Ct. App. 2017) (noting that the same rules of finality apply to appeals from general sessions court to circuit court); U.S. Bank Nat. Ass’n v. Rzezutko, No. E2011-00058-COA-R3-CV, 2011 WL 5051428, at *3 (Tenn. Ct. App. Oct. 25, 2011) (same). Alternatively, Defendant avers that section 20-17-106 confers exclusive jurisdiction over TPPA appeals on this Court regardless of whether the trial court’s order is final or interlocutory, and that such an interpretation “comports with the General Assembly’s intent in enacting the TPPA.” Defendant urges that the TPPA “requires that litigants like the Plaintiffs be deterred from heaping litigation costs upon defendants in General Sessions Court,” rather than being allowed to “restart SLAPP litigation anew” by seeking a de novo hearing in circuit court followed by an appeal to this Court. Having thoroughly reviewed the TPPA and the history of its enactment, we are persuaded by the latter of Defendant’s two arguments.

As we have already established, section 20-17-106 allows immediate appeal of an order disposing of a TPPA petition, notwithstanding whether other issues remain. The essence of the dispute now before us then is whether the phrase “is immediately appealable as a matter of right to the court appeals” requires such appeals arising in general sessions court to be heard by this Court, or leaves open the possibility of appeal to circuit court pursuant to section 27-5-108. As we perceive it, however, the language of section 20-17-106 itself does not unambiguously answer this particular question. At first blush, the use of the term “is immediately appealable,” rather than “shall be immediately appealable” appears to support Plaintiffs’ argument, as the term “shall” tends to indicate an intention that the requirement is mandatory. Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 308 (Tenn. 2012) (citing Bellamy v. Cracker Barrel Old Country Store, Inc., 302 S.W.3d 278, 281 (Tenn. 2009)). Additionally, as Plaintiffs point out, the drafters of the TPPA could have specified in section 106 that any appeal under that section is immediately appealable “exclusively” to the court of appeals. By the same token, Defendant notes that to the extent the drafters wished to provide litigants the option of an immediate appeal to circuit court under these circumstances, the inclusion of the phrase “to the court of appeals” is confounding. Further, the second clause of section

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106 provides that the Rules of Appellate Procedure govern “appeals as a matter of right” arising under the TPPA. Because the Rules of Appellate Procedure do not apply in circuit court, see *Tenn. R. App. P. 1*, this portion of section 106 appears to support Defendant’s contention that appeals regarding the disposition of a TPPA petition belong exclusively in this Court.

***10** Our inquiry does not end here, however, as we do not “put on blinders to *all* considerations outside the specific text in question.” *Coffee Cnty.*, 574 S.W.3d at 845 (emphasis in original). Rather, we also examine “the subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment.” *Id.* at 845–46 (quoting *Spires*, 539 S.W.3d at 143). Further, when determining whether a provision is permissive or mandatory, which we must do here, our “prime object is to ascertain the legislative intent from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it one way or the other[.]” *Baker v. Seal*, 694 S.W.2d 948, 951 (Tenn. Ct. App. 1984) (citing *Stiner v. Powells Valley Hardware Co.*, 168 Tenn. 99, 75 S.W.2d 406 (1934)).

Accordingly, the stated purpose of the TPPA and the circumstances giving rise to its enactment are relevant here. See *Robinson v. Fulliton*, 140 S.W.3d 312, 321 (Tenn. Ct. App. 2003) (noting that “reliable guides” for construing a statute include the legislative history as well as the statute’s stated purpose). The TPPA provides that its purpose “is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law[.]” and that the TPPA is “necessary to implement the rights protected by *Constitution of Tennessee, Article I, §§ 19 and 23*, as well as by the First Amendment to the United States Constitution.” *Tenn. Code Ann. § 20-17-102*. It also provides that the TPPA serves to “protect the rights of persons to file meritorious lawsuits for demonstrable injury.” *Id.* Thus, while there is an interest in protecting the public’s right to free speech, this interest must be balanced against the rights of those seeking redress of a legitimate grievance.

Nonetheless, according to one of its sponsors, former senator Steve Dickerson, the TPPA was primarily intended to protect “citizens across Tennessee who are engaged in Constitutionally protected exercise of their First Amendment rights [who] have been subjected to frivolous lawsuits aimed at silencing them.” *Hearing on S.B. 1097 Before the S.*

Judiciary Comm., 111th Gen. Assemb. (Tenn. Mar. 12, 2019) (statement of Sen. Steve Dickerson). Noting that SLAPP lawsuits “intimidate individuals and groups and deter them from speaking out on public issues[.]” Sen. Dickerson further explained that “the threat of costly, time consuming, and expensive litigation tends to silence whistleblowers, journalists, and political protestors.” *Id.* Ultimately, Sen. Dickerson maintained that the TPPA serves to “protect the right of free speech and defend individuals from frivolous lawsuits.” *Id.* Sen. Dickerson also invited Tennessee attorneys and citizens to testify regarding the TPPA, several of whom echoed the sentiment that the TPPA is imperative in protecting the public’s right to free speech, protest, and assembly. Tellingly, at a different proceeding on March 18, 2019, Sen. Dickerson gave the following example of the type of case the TPPA should apply to:

For example, you could have a window washing business, and you could get a bad rating on Yelp!.... And in order to go after that individual you could file a suit, even if that rating was legitimate, even if that person’s opinion was well-founded. And what this suit does is intercedes in that process.... And what ends up happening is the individual, he or she who has put this rating, frequently will have to spend tens of thousands of dollars defending themselves during the discovery process of that trial.... What this bill does is allow a judge to look at the suit before the very expensive discovery portion of the suit comes up, and decide whether the suit has merit.

***11** *S. Floor Sess. on S.B. 1097 Before the S.*, 111th Gen. Assemb. (Tenn. Mar. 18, 2019) (statement of Sen. Dickerson). The General Assembly passed the TPPA unanimously, and our review of the additional legislative proceedings at which the TPPA was discussed revealed no challenges to the TPPA’s legislative intent as explained by Sen. Dickerson.

Bearing in mind our responsibility to construe the TPPA in light of “the wrong or evil which it seeks to remedy or prevent[.]” *Coffee Cnty.*, 574 S.W.3d at 845, the foregoing

is highly probative here. Plaintiffs' interpretation of section 20-17-106 would require the parties to proceed through another layer of litigation in the circuit court before the case could ultimately be resolved at the appellate level, yet this is the precise scenario the TPPA seeks to avoid. A primary reason for the statute's enactment was the prevention of individuals incurring substantial costs associated with defending themselves in SLAPP litigation, which is accomplished by allowing courts to expediently resolve such cases prior to the often-expensive discovery phase and trial. Although Plaintiffs urge that they are entitled to a de novo hearing in circuit court, this result is in clear contravention of the TPPA's purpose because it would force Defendant to contend with Plaintiffs' allegations for no less than the third time before appellate review would be available.⁷ Under Plaintiffs' reading of section 20-17-106, SLAPP plaintiffs may file a case in general sessions court, proceed to circuit court, and then potentially appeal to this Court and beyond. Consequently, should we construe section 20-17-106 as Plaintiffs do, the result is circumvention of the TPPA's purpose and a largely ineffective statute. See *Baker*, 694 S.W.2d at 951 ("[T]he prime object is to ascertain the legislative intent from a consideration of the entire statute ... and the consequences that would result from construing it one way or the other[.]" (quoting *Stiner*, 75 S.W.2d at 407)). This is plainly not the law; indeed, we may employ the presumption that the General Assembly did not intend to enact a toothless statute or an absurdity. *Lee Med., Inc.*, 312 S.W.3d at 527.

While the legislative history of the TPPA does not state directly that appeals under section 20-17-106 mandatorily lie in the Court of Appeals, "the overall tenor of the discussion strongly supports such an interpretation." *Robinson*, 140 S.W.3d at 324. Keeping in mind that "the cardinal rule of statutory construction is to effectuate legislative intent[.]" we simply cannot conclude that section 20-17-106 affords Plaintiffs the opportunity for an appeal to circuit court. *Coffee Cnty.*, 574 S.W.3d at 844 (citing *Spires*, 539 S.W.3d at 143). Rather, in light of the legislative history and the purpose of the TPPA, we conclude that section 20-17-106 confers exclusive jurisdiction upon this Court to adjudicate the appeal of an order "dismissing or refusing to dismiss a legal action pursuant to a petition filed under [the TPPA]." *Tenn. Code Ann. § 20-17-106*. Appeals pursuant to section 20-17-106 lie in this Court whether the order is final or interlocutory, and regardless of whether the case is appealed from general sessions or circuit court.

*12 The circuit court did not err in concluding that it lacked subject matter jurisdiction over this appeal and in transferring the case to this Court. Because we conclude that the circuit court correctly transferred the case to this Court, Plaintiffs' second issue on appeal is pretermitted.

3. Plaintiffs' notice of appeal

Finally, Defendant asserts that Plaintiffs cannot challenge the circuit court's transfer order because Plaintiffs never filed a separate notice of appeal regarding the transfer order itself.⁸ Because we have already concluded, however, that the circuit court properly transferred Plaintiffs' notice of appeal to this Court, this issue is without merit. See *Tenn. Code Ann. § 16-1-116* (providing that a court lacking subject matter jurisdiction shall transfer a civil action "to any other such court in which the action or appeal could have been brought at the time it was originally filed[.]" and that upon transfer, "the action or appeal shall proceed as if it had been originally filed in the court to which it is transferred on the date upon which it was actually filed in the court from which it was transferred").⁹ Moreover, Plaintiffs' issues on appeal ultimately go to the subject matter jurisdiction of this Court and the circuit court, and issues of subject matter jurisdiction can be raised at any time by the parties or the court *sua sponte*. See *Johnson v. Hopkins*, 432 S.W.3d 840, 844 (Tenn. 2013) ("[S]ubject matter jurisdiction is a threshold inquiry, which may be raised at any time in any court."). Accordingly, we see no reason why Plaintiffs were required to file a new notice of appeal in order to raise the questions at hand. For the same reason, we also conclude that Plaintiffs did not waive their arguments regarding subject matter jurisdiction on appeal by failing to preserve those issues in the circuit court. See *Freeman v. CSX Transp., Inc.*, 359 S.W.3d 171, 176 (Tenn. Ct. App. 2010) ("[T]he issue of subject matter jurisdiction need not be raised in the trial court to be considered on appeal." (citing *First American Trust Co. v. Franklin-Murray Dev. Co.*, 59 S.W.3d 135, 140-41 (Tenn. Ct. App. 2001))).

E. Dismissal of Plaintiffs' case pursuant to the TPPA

Next, in her posture as appellee, Defendant argues that the general sessions court correctly dismissed Plaintiffs' case in its entirety pursuant to Defendant's TPPA petition. The Plaintiffs failed to respond to the substance of Defendant's arguments under the TPPA in both the general sessions court

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and in their briefs to this Court. We therefore agree with the Defendant that the decision of the general sessions court should be affirmed.

Under the TPPA, the party petitioning the court for dismissal “has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.” *Tenn. Code Ann. § 20-17-105(a)*. The exercise of the right of free speech includes “communication[s] made in connection with a matter of public concern[.]” and matters of public concern include issues related to “[h]ealth or safety” or “[a] good, product, or service in the marketplace[.]” *Id.* § 20-17-103(3), (6). The petitioner may rely on sworn affidavits or other admissible evidence in reaching this burden. *Id.* § 20-17-105(d). If the petitioner satisfies his or her burden, the burden shifts to the responding party, who must “establish[] a prima facie case for each essential element of the claim in the legal action.” *Id.* § 20-17-105(b). In the event the responding party does not meet this burden, the court “shall” dismiss the legal action. *Id.* A party’s “response to [a TPPA] petition, including any opposing affidavits, may be served and filed by the opposing party no less than five (5) days before the hearing or, in the court’s discretion, at any earlier time that the court deems proper.” *Id.* § 20-17-104(c).

*13 In this case, the communication at issue was an exercise of Defendant’s right of free speech as that right is defined for purposes of the TPPA. *Id.* § 20-17-103. Defendant filed a timely TPPA petition challenging the substance of Plaintiffs’ claims and alleging that as a matter of law, Defendant’s Yelp! review was not defamatory. Defendant also raised several defenses to Plaintiffs’ action. Plaintiffs failed to respond to the merits of the petition in accordance with the statute. *See id.* § 20-17-105(b). Rather, Plaintiffs’ counsel argued at the hearing on the petition that the TPPA is a rule of civil procedure as opposed to a statute and that it was inapplicable in general sessions court. Plaintiffs made no substantive arguments, nor did they offer any sworn affidavits containing admissible evidence in support of their claims, notwithstanding the fact that the burden of proof had shifted to Plaintiffs by virtue of section 20-17-105(a) and (b). It was not until nearly a week later that Plaintiffs filed their “supplementary answer” to the TPPA petition and offered an affidavit by Dr. Nandigam. At the hearing in which the general sessions court ruled on Defendant’s petition, the court noted that it had only received Plaintiffs’ supplemental answer the afternoon before, and

dismissed Plaintiffs’ legal action based on the “lack of facts” offered by Plaintiffs.

The record reflects that the general sessions court was well-founded in its conclusion that Plaintiffs failed to meet their burden of proof under section 20-17-105(b), insofar as Plaintiffs essentially failed to respond to Defendant’s TPPA petition at all. Indeed, under section 20-17-105(b), dismissal of Plaintiffs’ legal action was mandatory unless Plaintiffs “establishe[d] a prima facie case for each essential element of the[ir] claim[s].” Moreover, Plaintiffs have not argued on appeal that the general sessions court erred in disregarding their late-filed response, nor have Plaintiffs made any argument to this Court that they can establish a prima facie case for each essential element of their claims. Rather, Plaintiffs have not addressed the substance of the underlying defamation and false light claims in their appellate briefs at all, but have pursued only the theory that this case should be remanded to the circuit court.

“It is not the role of the courts, trial or appellate, to research or construct a litigant’s case or arguments for him or her.”

■ *Sneed v. Bd. of Resp. of the Supreme Court*, 301 S.W.3d 603, 615 (Tenn. 2010). Because Plaintiffs declined to respond to Defendant’s TPPA petition in accordance with the statute and have made no argument on appeal as to how the general sessions court erred in its decision to dismiss Plaintiffs’ case, we conclude that the general sessions court’s decision should be affirmed. *See Tenn. Code Ann. § 20-17-105(b), (c)*.

F. The presumption of falsity doctrine in defamation cases

Defendant next urges this Court to take the opportunity to acknowledge that the “presumption of falsity doctrine” in defamation law is unconstitutional. Under the circumstances of this case, however, we need not reach this question. This Court “refrain[s] from addressing constitutional issues when a case can be decided on non-constitutional grounds.” *Rodgers v. Rodgers*, No. M2004-02046-COA-R3-CV, 2006 WL 1358394, at *5 (Tenn. Ct. App. May 17, 2006) (citing *State v. Thompson*, 151 S.W.3d 434, 442 (Tenn. 2004); ■ *Wilson v. Wilson*, 984 S.W.2d 898, 902 (Tenn. 1998)); *see also Haynes v. City of Pigeon Forge*, 883 S.W.2d 619, 620 (Tenn. Ct. App. 1994) (“[O]ur courts do not decide constitutional questions unless the issue’s resolution is absolutely necessary for determination of the case and the rights of the parties.”).

Here, it is unnecessary to address whether the presumption of falsity doctrine is unconstitutional in order to resolve this case, as we have already concluded that the general sessions court did not err in dismissing Plaintiffs' legal action based on their failure to respond to Defendant's TPPA petition in accordance with the statute. As such, we decline to consider this issue.

G. Attorney's fees

Finally, Defendant asks this Court to award her attorney's fees incurred on appeal. Defendant asserts that she is entitled to her appellate attorney's fees because such an award is in keeping with section 20-17-107, which provides for costs and attorney's fees when a case is dismissed under the TPPA, as well as "[a]ny additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated." As to this issue, we agree with Defendant.

*14 "Tennessee has long followed the 'American Rule' with regard to attorney's fees." Eberbach v. Eberbach, 535 S.W.3d 467, 474 (Tenn. 2017) (citing State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 194 (Tenn. 2000)). The American Rule provides that "a party in a civil action may recover attorney's fees only if: (1) a contractual or statutory provision creates a right to recover attorney's fees; or (2) some other recognized exception to the American Rule applies, allowing for recovery of such fees in a particular case." Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308 (Tenn. 2009) (citing Taylor v. Fezell, 158 S.W.3d 352, 359 (Tenn. 2005)). Although Tennessee Code Annotated section 20-17-107 does not expressly provide for attorney's fees incurred at the appellate level, our Supreme Court has explained that "legislative provisions for an award of reasonable attorney's fees need not make a specific reference to *appellate* work to support such an award where the legislation has broad remedial aims." Killingsworth v. Ted Russell Ford, 205 S.W.3d 406, 409 (Tenn. 2006) (emphasis in original) (citing Forbes v. Wilson County Emergency Dist. 911 Bd., 966 S.W.2d 417 (Tenn. 1998)); see also Beacon4, LLC v. I&L Investments, LLC, 514 S.W.3d 153, 211 (Tenn. Ct. App.

2016), *overruled on other grounds by* In re Mattie L., 618 S.W.3d 335 (Tenn. 2021), (applying Killingsworth and concluding that the Prompt Pay Act allows for award of reasonable attorney's fees incurred on appeal).

We are required to construe the TPPA "broadly to effectuate its purposes and intent." Tenn. Code Ann. § 20-17-102. As discussed at length already, the TPPA is largely intended to deter SLAPP lawsuits and prevent litigants from spending thousands of dollars defending themselves in frivolous litigation. Consequently, as a matter of first impression, we conclude that the TPPA allows for an award of reasonable attorney's fees incurred on appeal, provided that the court dismisses a legal action pursuant to a petition filed under this chapter and that such fees are properly requested in an appellate pleading. See Tenn. Code Ann. § 20-17-107;

Killingsworth, 205 S.W.3d at 409. Because we conclude that Plaintiffs' legal action was properly dismissed under the TPPA, and because Defendant properly requested her appellate fees in this case, Defendant's request for attorney's fees is well-taken. We remand this matter to the general sessions court for a determination of the proper amount of reasonable fees incurred by Defendant during this appeal.

IV. CONCLUSION

The order of the General Sessions Court for Wilson County is affirmed and this case is remanded for further proceedings consistent with this opinion. On remand the general sessions court shall award Defendant her costs and reasonable attorney's fees incurred at both the trial and appellate level and shall resolve Defendant's outstanding request for sanctions against Plaintiffs pursuant to section 20-17-107(a)(2). We express no opinion regarding the outcome of Defendant's request for additional sanctions.

Costs of this appeal are assessed against the plaintiffs, Dr. Kaveer Nandigam and Nandigam Neurology, PLC, for which execution may issue if necessary.

All Citations

— S.W.3d —, 2021 WL 2494935

Footnotes

- 1 The action that originated in the general sessions court on January 21, 2020 is the action at issue in this appeal. While the procedural history of the first action filed in circuit court is pertinent to our discussion, we express no opinion regarding that case.
- 2 Because there are not yet any Tennessee cases addressing the TPPA, we look to the case law of our sister states for helpful authority. [Ottinger v. Stooksbury](#), 206 S.W.3d 73, 79 (Tenn. Ct. App. 2006).
- 3 An award of costs and attorney's fees is mandatory in the event the court grants a TPPA petition to dismiss. See Tenn. Code Ann. § 20-17-107(a)(1).
- 4 We find further support for our conclusion in case law from other jurisdictions. Having thoroughly reviewed the anti-SLAPP statutes of other states, inclusion of a procedure that allows for expedited appellate review is a common trend and is regarded as furthering the overall purpose of anti-SLAPP legislation. See, e.g., Reyes v. Kruger, 55 Cal.App.5th 58, 269 Cal. Rptr. 3d 549, 557 (2020) (concluding that order amounted to an "order granting or denying a special motion to strike" under California's anti-SLAPP statute and was therefore appealable, notwithstanding the fact that the issue of attorney's fees was unaddressed when the order was entered); Grogan v. City of Dawsonville, 305 Ga. 79, 823 S.E.2d 763, 767 (2019) (outstanding claim for attorney's fees did not affect appellate court's subject matter jurisdiction where appeal was taken pursuant to anti-SLAPP statute allowing for a "direct appeal" of an order granting or dismissing a motion to strike under that chapter); [Cordova v. Cline](#), 396 P.3d 159, 165 (N.M. 2017) (concluding that final order was not required for direct appeal under anti-SLAPP statute and noting that such procedure furthers the purpose of the anti-SLAPP statute and that such claims should be subject to prompt dismissal or judgment to prevent abuse of legal process); Steidley, 383 P.3d at 782 (citing [12 Okl. Stat. Ann. § 1437](#)) (recognizing that Oklahoma anti-SLAPP statute allows a specific right to appeal the denial of a motion to dismiss filed under that chapter regardless of whether the order is final or interlocutory).
- 5 The general sessions court also left unresolved the issues of costs and sanctions. Because of all the reasons addressed herein, we also conclude that neither of these additional issues affects this Court's subject matter jurisdiction.
- 6 Section 27-5-108(a)(1) explains that "[a]ny party may appeal from a decision of the general sessions court to the circuit court of the county within a period of ten (10) days on complying with this chapter."
- 7 It is noteworthy that in this case, Plaintiffs initially filed suit in circuit court, but voluntarily dismissed the case and shortly thereafter refiled it in general sessions court. In a pleading filed by Plaintiffs, they admit to dismissing the case and refiled it in general sessions court under the misguided belief that the TPPA is a rule of civil procedure rather than a statute, and that the TPPA was therefore inapplicable to their case. Accordingly, Plaintiffs admit to the sort of forum shopping and gamesmanship anti-SLAPP legislation seeks to prevent, inasmuch as Plaintiffs' admitted strategy is to take as many bites at the apple as possible. As Defendant aptly notes in her principal brief, "the TPPA ... was designed to prevent and deter such abuse, not to enable it."
- 8 Although Defendant has not couched this issue as one pertaining to subject matter jurisdiction, the timeliness of a notice of appeal creates a jurisdictional question. Brooks v. Woody, 577 S.W.3d 529, 533 (Tenn. Ct. App. 2018).
- 9 It is undisputed that Plaintiffs' notice of appeal to circuit court was timely filed.

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio, Eastern Division.NORTHEAST COALITION FOR
the HOMELESS, et al., Plaintiffs,

v.

Jennifer BRUNNER, in her official capacity
as Secretary of State, et al., Defendants.

No. 2:06-CV-896.

|
Nov. 30, 2010.**Attorneys and Law Firms**

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OPINION & ORDER

ALGENON L. MARBLEY, District Judge.

I. INTRODUCTION

*1 This matter is before the Court on Plaintiffs Northeast Ohio Coalition for the Homeless' ("NEOCH") and Service Employees International Union, Local 1199's ("SEIU") (collectively "Plaintiffs") Third Motion for Attorneys' Fees and Costs ("Third Motion") (Doc. 212). For the reasons set forth below the Plaintiffs' Third Motion for Attorney Fees is **GRANTED** in part and **DENIED** in part.

II. FACTS**A. Background**

On January 31, 2006, the Ohio General Assembly amended Ohio's Election Code to require that voters provide one of several types of identification in order to cast a regular ballot in state and federal elections held in Ohio ("Voter ID Law"). On October 24, 2006, Plaintiffs filed a thirteen-count complaint under 42 U.S.C. § 1983 against then Ohio Secretary of State J. Kenneth Blackwell challenging the constitutionality of several provisions of the Voter ID Law.

1.) Fall 2006 Election Season Litigation

During the Fall of 2006, the Plaintiffs sought a temporary restraining order¹ and a preliminary injunction relating to Defendants' enforcement of certain provisions of the Voter ID Law. That litigation resulted in this Court's entry of a Consent Order negotiated by the parties that applied to the 2006 election. Following the 2006 election, Plaintiffs believed that the Ohio Board of Elections ("Ohio BOE") was improperly counting provisional ballots. Consequently, the parties negotiated an Agreed Enforcement Order, which the Court entered on November 15, 2007.

2.) First Motion for Attorney's Fees

The Court granted the Plaintiffs leave to request attorneys' fees and costs expended during the litigation of the 2006 Consent Order and Agreed Enforcement Order (the "2006 Orders"). Accordingly, Plaintiffs filed their First Motion for Attorneys' Fees on January 4, 2008. On February 27, 2008, Defendants responded with a Motion to Dismiss based on the grounds that: (1) the Plaintiffs lacked standing to challenge the constitutionality of the Voter ID Law and; (2) the Plaintiffs were not prevailing parties, and thus not entitled to attorneys' fees with respect to the 2006 Orders. The Court dismissed six of the Plaintiffs' thirteen claims for lack of standing, but granted Plaintiffs' request for attorneys' fees and costs in an Order dated September 30, 2008. *Ne. Ohio Coal. for the Homeless v. Brunner*, 2008 WL 4449514, at *5-8 (S.D. Ohio Sept. 30, 2008).

The Court held that the Plaintiffs lacked standing to bring, *inter alia*, Counts One and Two of their Complaint. *Id.* at *6-7. The Court also held that the Plaintiffs were prevailing

parties with respect to the 2006 Orders and were, therefore, entitled to attorneys' fees and costs. *Id.* at *9–10. The Court reserved for a subsequent hearing the issue of what constituted reasonable fees and costs given the degree of success the Plaintiffs had obtained. *Id.* at *10. The Court requested supplemental briefing on the reasonableness of fees. Pursuant to the Court's order, the Plaintiffs filed a supplemental brief on January 20, 2009, and the Defendants filed their supplemental brief on February 27, 2009. Both the Plaintiffs and the Defendants moved for reconsideration of the September 30, 2008 Opinion.

3.) Attorneys' Fees Appeal and Settlement

*2 In October of 2008, the Plaintiffs filed a motion for a preliminary injunction seeking to require the Ohio BOE to apply uniform procedures for counting provisional ballots. As a result of the parties' negotiations regarding the preliminary injunction motion, the Court entered two orders (the "2008 Orders"). The Court's October 24, 2008 Order set forth procedures that would be used in the counting and processing of provisional ballots. Similarly, on October 27, 2008, the Court ordered: (1) that provisional ballots cast by individuals who did not live in buildings would be counted; and (2) that provisional ballots could not be invalidated due to poll worker error.

On January 20, 2009, the Plaintiffs filed their Second Motion for Attorneys' Fees (Doc. 179). The Plaintiffs claimed that they were prevailing parties with respect to the 2008 Orders and were entitled to attorneys' fees and costs. The Defendants opposed this motion. On July 28, 2009, this Court granted the Plaintiffs' First and Second Motions for Attorney Fees and Costs. Though granting the Plaintiffs' motions for attorneys' fees, the Court concluded that a 20% reduction in fees was appropriate in light of the Plaintiffs' meaningful, but less than total, success (Doc. No. 203, p. 22). The Court, therefore, reduced the Plaintiffs' total lodestar fee request of \$502,381.87 by 20%. This reduction resulted in a fee award of \$401,905.50. The Court also awarded the Plaintiffs' costs and expenses in the amount of \$29,468.55. Thus, the total award to the Plaintiffs was \$431,374.05 (Doc. 203, p. 23).

Two days later, the Plaintiffs filed an unopposed Motion for Reconsideration of this attorneys' fees and costs award (Doc. 205). In that motion, the Plaintiffs requested an increased award to include fees and costs that Subodh Chandra ("Chandra"), attorney for the Plaintiffs, generated

for his work during the 2006 election season. The Court granted that motion and revised its previous award to include Chandra's fees and costs, which resulted in a revised fees award of \$474,418.50. The Court increased the costs award by \$4,527.06 to account for Chandra's incurred costs, resulting in a revised total cost award of \$29,995.61. Thus, the revised fees and costs award granted to the Plaintiffs totaled \$504,414.11 (Doc. 205).

Subsequently, the Defendants appealed this fees and costs award to the Sixth Circuit (Doc. 207). While the appeal was pending, the parties began to negotiate a settlement to this litigation under the direction of the Sixth Circuit mediator. These negotiations eventually led this Court to sign a Consent Decree (the "Decree") on April 19, 2010 (Doc. 210). The Decree awarded Plaintiffs the total fees and costs amount of \$504,414.11 (Doc. 210, p. 6).

On June 3, 2010, the Plaintiffs filed a Third Motion for Attorneys' Fees and Costs, arguing that additional fees and costs should be granted for work their attorneys performed: (1) briefing and arguing their first two motions for attorneys' fees; (2) during the appeal of this Court's decision to grant those motions; and (3) negotiating the Decree that terminated the litigation (Doc. 212). On August 9, 2010, the Defendant filed a Response opposing the Plaintiffs' Third Motion because the Decree was "final and binding" and arguing that the Plaintiffs' requested fees were unreasonable (Doc. 219). This matter is currently before the Court.

III. LEGAL STANDARDS

*3 Under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (the "Fees Act"), a court can award reasonable attorneys' fees to the prevailing party in a civil rights action brought under 42 U.S.C. § 1983. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–92, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *see also DiLaura v. Twp. of Ann Arbor*, 471 F.3d 666, 670 (6th Cir.2006). After determining a party is entitled to an attorneys' fees award, the Court must then determine whether the hours claimed by the petitioner are reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). When making a reasonableness determination, the Court should first calculate the "lodestar" amount, a multiple of the number of hours reasonably expended in the litigation

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and the reasonable hourly rate. *Imwalle v. Reliance Med. Prods.*, 515 F.3d 531, 551 (6th Cir.2008) (citing *Hensley*, 461 U.S. at 433). The party seeking fees bears the burden of proving that the number of hours expended was reasonable. *Granzeier v. Middleton*, 173 F.3d 568, 577 (6th Cir.1999). Once a party has established that the number of hours and the rate claimed are reasonable, the lodestar amount is presumed to be the reasonable fee to which counsel is entitled. *Id.* at 552 (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)). The petitioning attorney has an obligation to weed out hours that are excessive, redundant, or otherwise unnecessary from his or her fee request. *Hensley*, 461 U.S. at 434. Fees incurred in "preparation of an original fee petition" are supplemental "fees for fees." Such supplemental hours should not exceed three percent of the award (the "Three Percent Rule") in the main case when the fees issue is decided without a trial or five percent of the award in the main case when there is a trial. *Coulter v. Tennessee*, 805 F.2d 146, 151 (6th Cir.1986); *Bank One v. Echo Acceptance Corp.*, 2009 U.S. Dist. LEXIS 35633, at *5 (S.D.Ohio Apr. 10, 2009).

IV. LAW & ANALYSIS

1. Entitlement to a Fee Award

The Plaintiffs argue they are prevailing parties under the Fees Act and are entitled to fees for work performed from January 2009 until April 2010 with respect to: (1) the briefing and argument of their prior motions for fees and costs; (2) the settlement of the State of Ohio's appeal of this Court's award of fees; and (3) and the negotiation of the Decree. The Defendant contests that because the Decree was meant to be final, the Plaintiffs waived their right to collect further attorneys' fees after signing the Decree.

A party waives its right to collect further fees if the parties intended a settlement to be a final disposition of all claims.

Jennings v. Metro. Gov't. of Nashville, 715 F.2d 1111, 1114 (6th Cir.1983). Intent is normally an issue of fact unless the Court determines only one possible inference can be drawn from the record. *Id.* at 1114. A settlement in full does not require that parties reach a separate agreement on each aspect of the claim; thus, silence in an agreement regarding attorneys'

fees is not controlling in making an award entitlement determination. *Id.* In this case, both parties agree that the Decree does not expressly mention an award of attorneys' fees covering the time period Plaintiffs' attorneys worked between January 21, 2009 and April 19, 2010 to negotiate and finalize the Decree (Doc. 212, 219). The Decree, therefore, is silent as to the issue of attorneys fees requested in the Plaintiffs' Third Motion. Pursuant to *Jennings*, this silence is not controlling; rather, the question becomes whether the parties intended the Decree to be a final disposition of all claims, thus waiving the Plaintiffs' right to collect further fees.

*4 The Defendants point to specific language in the Decree to prove the agreement's finality under the *Jennings* standard. First, the Defendants cite the Decree's preamble, which states that the parties entered into the Decree negotiations "desiring that this action be settled ... without a burden of protracted litigation" (Doc. 219, p. 2). The Defendants also argue language stating that the Decree was "final and binding" as to "the issues raised in the Plaintiffs' Complaint and Supplemental Complaint," which included attorneys' fees, is evidence of the Decree's finality. Further, the Defendants cite the Decree's introduction, which described the document as being "in resolution of this action," as evidence the Decree was meant to be a final settlement of all claims, thereby waiving the Plaintiffs' right to receive further fees (*Id.*).

The Defendant likens the foregoing portions of the Decree to language the Sixth Circuit has found to be "comprehensive" enough for the court to infer that the parties intended the settlement to be final. See *McCuiston v. Hoffa*, 202 Fed.Appx. 858, at 865 (6th Cir.2006). The consent judgment in *McCuiston* stated, "[t]his is a final order of the court, disposing of all remaining claims in this action." The issue of attorneys' fees was neither discussed during the settlement proceedings nor included in the final judgment. *Id.* at 863. While recognizing this silence, the Sixth Circuit held that the above-cited language led to the single inference that the parties intended for the agreement to be final, precluding an award of further attorneys' fees. *Id.* at 865.

The Court finds language in the Decree at issue here, however, does not lead to a similar inference of finality. The Decree in this case, unlike the consent judgment in *McCuiston* that resolved "all remaining claims in this action," expressly restricts its scope to the issues raised in the Plaintiffs'

Complaint and Supplemental Complaint. *McCuiston*, 202 Fed.Appx. at 861; Doc. 210, p. 2. The Decree's language is not

as expansive as that in the *McCuiston* consent judgment, an indication that the parties to the present action did not intend the Decree to be final. Additionally, in the Decree herein the parties agreed to allow for modification and extension of the agreement for good cause (Doc. 210, p. 6). By contrast, the consent judgment in *McCuiston* did not allow the parties to seek to modify or to extend the terms of the agreement and contained no qualifiers as to the scope of the consent judgment's terms. Thus, *McCuiston* is distinguishable from the case sub judice and the record here leads to the single inference that the parties did *not* intend the Decree to be a final settlement of all claims. The Plaintiffs, therefore, did not waive their right to further attorneys' fees and are entitled to collect an additional fee award.

2. The Fee Award

The Plaintiffs seek an award to cover fees related to: (1) the briefing and argument of Plaintiffs' prior motions for fees and costs; (2) opposition to and settlement of the State of Ohio's appeal of this Court's award of fees; and (3) the negotiation of the Consent Decree. The Defendants challenge the Plaintiffs' requested fees award on two grounds. First, they argue that the fees requested are unreasonable. In the alternative, Defendants claim that even if the Plaintiffs' fee request is reasonable, this Court should cap *all* three categories of fees the Plaintiffs have requested pursuant to the Three Percent Rule (Doc. 219, p. 13). Thus, the Court has two issues to decide regarding the Plaintiffs' fee award: (1) whether the requested fee award is reasonable; and (2) which of the requested fees are "fees for fees" and thus subject to the Three Percent Rule cap.

a. Hours Reasonably Expended

*5 A court determines reasonableness by performing a lodestar analysis. A lodestar amount refers to the multiple of the number of hours reasonably expended in the litigation and the reasonable hourly rate. *Imwalle v. Reliance Med. Prods.*, 515 F.3d at 551. If reductions to the requested number of hours are appropriate, a court has the discretion to utilize a simple across-the-board reduction by a certain percentage as an alternative to line-by-line reductions. *Project Vote v. Blackwell*, 2009 U.S. Dist. LEXIS 34571, at *6 (N.D. Ohio Mar. 31, 2009) (citing *Alliance Int'l, Inc. v. United States Customs Serv.*, 155 Fed. Appx. 226, 228 (6th Cir.2005)).

Three of Plaintiffs' attorneys are claiming fees in the present action: (1) Chandra of The Chandra Law Firm, LLC ("Chandra Law Firm"); (2) Caroline Gentry ("Gentry") of Porter, Wright, Morris, & Arthur LLP ("Porter Wright"); and (3) H. Ritchey Hollenbaugh ("Hollenbaugh") of Carlile Patchen & Murphy LLP ("Carlile Patchen"). The Chandra Law Firm submits they incurred \$29,750 worth of fees in briefing the original fees request, defending against the State's appeal of this Court's fee award, and in settling the Consent Decree. Porter Wright submits they incurred \$27,732.50 in fees for these three phases. Carlile Patchen claims their fees totaled \$28,441.05. The Defendants challenge the reasonableness of these fees on several grounds and ask for a reduction in the Plaintiffs' requested fees. First, they claim the Plaintiffs "overlawyered" the issues argued in the Third Motion, resulting in "excessive, redundant, or otherwise unnecessary" fees that reflected no "billing judgment" (Doc. 219, p. 15). Specifically, the Defendants question the need for three different law firms to work on this matter (*Id.* at p. 16). Use of one or more lawyers, however, is a common practice that can often result in a more efficient distribution of work. *Gautreax v. Chicago Hous. Auth.*, 491 F.3d 649, 661 (7th Cir.2007) (citing *Kurowski v. Krajewski*, 848 F.2d 767, 776 (7th Cir.1988)). Though there is no "hard-and-fast" rule as to how many lawyers can be at a meeting or spend time discussing a project at one time, attorneys must make a good faith effort to exclude hours that are "excessive, redundant, or otherwise unnecessary." *Id.* After reviewing the evidence the Plaintiffs have submitted in support of their Third Motion, this Court finds that the Plaintiffs did make such an effort to apply "billing judgment" principles to their request for fees (Docs.213–15). Though more than one attorney might have worked on projects related to the Third Motion and the settlement proceedings, the fees all three firms have listed reflect work that is reasonably related to their pursuit of fees. Hence, the Defendants' argument that the Plaintiffs' attorneys' work was redundant because they were doing the same work fails and this objection does not warrant a reduction to the requested fee award.

*6 Similarly, the Defendants argue that the motions for attorneys' fees, the appeals process, and the settlement negotiations did not involve issues that were complex enough to warrant the work of three separate law firms and thus the court should find the fees requested to be redundant. Though courts are "alert to needless duplication of efforts by multiple law firms," a court will review the evidence

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provided to determine whether such duplication actually took place. *Thirty Eight St. v. Chatur Corp.*, 2010 U.S. Dist. LEXIS 75247 (N.D.Ohio July 27, 2010). The record in the present case shows no such duplication. Though attorneys from more than one firm collaborated on the same project, the evidence the parties have presented demonstrates an attempt at cost-efficient allocation of work among the three attorneys. Courts have previously found such efficient allocation to be reasonable. *Gautreux v. Chicago Hous. Auth.*, 491 F.3d

649, 661 (7th Cir.2007) (citing *Kurowski v. Krajewski*, 848 F.2d 767, 776 (7th Cir.1988)). Additionally, though the Defendants argue that this is a “relatively straightforward

§ 1988 attorneys’ fee issues,” the Plaintiffs’ request for attorneys’ fees has had three distinct phases: (1) the briefing and argument of Plaintiffs’ prior motions for fees and costs; (2) opposition to and settlement of the State of Ohio’s appeal of this Court’s award of fees; and (3) the negotiation of the Consent Decree. Preparing for these three distinct proceedings makes this attorneys’ fee request less straightforward than the Defendants suggest and justifies the work of multiple law firms. Accordingly, the Court finds these objections do not warrant a reduction to the fee award.

Additionally, the Defendants challenge the Plaintiffs’ inclusion in their requested fee award of “non-compensable tasks” that did not “contribute in any meaningful way to the litigation” (Doc. 219, p. 17). Specifically, the Defendants challenge the Plaintiffs’ request for fees related to their efforts to “track down” and “locate” their client and “working with the investigator” (*Id.*). Though non-compensable tasks are generally not reasonable fees, fees the Plaintiffs incurred to locate their clients do not fall within the “non-compensable” category. Settling the Decree required determining whether the homeless clients who were plaintiffs authorized a settlement that would end the appellate process. Thus, the fact that two of the attorneys requested fees for their investigation efforts to locate these plaintiffs is not unreasonable, and the Defendant’s argument warrants no reduction to the Plaintiffs’ requested fee award.

Next, the Defendant argues the Court should reduce the Plaintiffs’ award because they failed to obtain “significant relief.” This argument, however, is misplaced. This Court has already found that the Plaintiffs were entitled to an attorneys’ fees award based on their level of success in the original case (Doc. 203). Thus, the degree of the Plaintiffs’ success with regard to the Voter ID Law is not at issue; rather, at issue is the reasonableness of the award requested for fees incurred

in preparation of its earlier motion for fees incurred during their work obtaining relief for their clients and in defending that original fee award. The Plaintiffs’ level of success in the original litigation, therefore, is not an appropriate ground on which to reduce the current fees request, and the Court will make no reductions based on this objection. Because none of the Defendants’ reasonableness objections was persuasive, the Court finds the three law firms’ total requested hours to be reasonable.


b. Reasonable Hourly Rates


*7 Next in the lodestar analysis, the Court must determine if each attorney’s provided rate is reasonable. “To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.” *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir.2004). In determining the reasonable rate, the Court has the discretionary authority to consider a party’s submissions, awards in analogous cases, and its own knowledge and experience from handling similar requests for fees. *Project Vote*, 2009 U.S. Dist. LEXIS 34571, at *5 (citing *Johnson v. Connecticut Gen. Life Ins. Co.* 2008 LEXIS 24026, at *14 (N.D.Ohio Mar. 13, 2008)). Defendants challenge the rates of two attorneys: (1) Chandra’s rate of \$400/hour; and (2) Hollenbaugh’s rate of \$325/hour (Doc. 219, p. 19). They argue these fees should be reduced because the legal matters involved in the Third Motion were not complicated. Previously, however, this Court decided that both Chandra and Hollenbaugh’s hourly rates were reasonable given their substantial experience in litigating election law cases (Doc. 203, p. 19). In the present motion, Hollenbaugh again seeks the rate of \$325/hour. The Court earlier found this rate to be reasonable and does not choose to revise that finding. Chandra seeks an increased rate of \$400/hour from the \$395/hour rate sought based on his work in 2006. The Court finds that an increase of \$5/hour is reasonable given this litigation has spanned over a four-year period. Thus, Chandra’s requested rate of \$400/hour is also reasonable. The Defendants do not object to Gentry’s requested rate, and this Court finds her requested rates of \$280/hour and \$290/hour to be reasonable. The Court, therefore, finds all three requested rates to be reasonable.

c. Application of the Three Percent Rule

In a supplemental petition such as this, which seeks fees for the preparation of an original petition, a practical rule of thumb has developed that the supplemental award should be limited to three percent of the award for the main case when it is decided on the papers without a trial, and five percent of the award for the main case when trial is necessary.² In *Coulter v. Tennessee*, the Court explained:

The cases from this and other circuits uniformly hold that a lawyer should receive a fee for preparing and successfully litigating the attorney fee case after the original case is over ... In the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee case should not exceed 3% of the hours in the main case when the issue is submitted on the papers without a trial and should not exceed 5% of the hours in the main case when a trial is necessary. Such guidelines and limitations are necessary to insure that the compensation from the attorney fee case will not be out of proportion to the main case and encourage protracted litigation.

*8  *Coulter v. Tennessee*, 805 F.2d 146, 151 (6th Cir.1986)

accord  *Gonter v. Hunt Valve Company, Inc.*, 510 F.3d 610, 621 (6th Cir.2007) (“[b]ecause *Coulter* controls this situation, we apply the three-percent rule to the district court’s lodestar award”). Because this case has involved no trial, any supplemental fees reduction will be capped at three percent of the original award.

Both parties agree that time the Plaintiffs spent on “the briefing and argument of Plaintiffs’ prior motions for fees and costs” was a supplemental fees request and is subject to the Three Percent Rule. The parties disagree, however, about whether hours spent in “opposition to and settlement of the State of Ohio’s appeal of this Court’s award of fees” and for “the negotiation of the Consent Decree” should also qualify as supplemental “fees for fees” and be subject to the Three Percent Rule. The Plaintiffs argue the hours spent on the appeal and in negotiating the Decree were separate from the time spent preparing and litigating the attorneys’ fees case and, therefore, fees incurred during the latter two phases of these proceedings should not be subject to the Three Percent Rule. This Court disagrees and finds that the hours spent at all three stages of this attorneys’ fees case constituted preparation for and litigation of the attorneys’ fees case and are subject

to Three Percent Rule. Even though the appeals and Decree negotiation were unique proceedings after the Plaintiffs’ filing of the original fees motion, all steps taken in both of those stages were done in pursuit of obtaining fees in the absence of “unusual circumstances” that would justify a departure from the Three Percent Rule. Thus, this Court will apply the three percent cap to all the Plaintiffs’ requested fees.

In reaching this finding, the Court rejects the Plaintiffs’ argument that their hours should be exempt from the Three Percent Rule because the Sixth Circuit in *Coulter* intended the cap to prevent prevailing parties from prolonging litigation and here the Defendants, not the Plaintiffs, initiated the appeals process. This Court finds this argument to be a misinterpretation of the Sixth Circuit’s intent. In *Coulter*, the Sixth Circuit reasoned that the Three Percent Rule was “necessary to insure that the compensation from the attorney fee case will not be out of proportion to the main case.” *Id.* Nothing in this statement suggests that the *Coulter* court’s proportionality concerns turned on which party’s actions served to extend the litigation; rather, the Sixth Circuit was concerned with the *overall* fees outcome in supplemental fees cases. Thus, this Court will cap all the Plaintiffs’ requested fees, which the Court has determined to be supplemental “fees for fees,” at three percent of the awards in the main case pursuant to *Coulter*.

The awards in the main case were as follows: (1) \$321,942.15.51 to Porter Wright; (2) \$99,722.58 to Carlile Patchen; and (3) \$82,749 .38 to the Chandra Law Firm. Thus, the cap for each firm’s receipt of supplemental fees awards based on the Three Percent Rule will be: (1) \$9,658.3 to Porter Wright; (2) \$2,991.70 to Carlile Patchen; and (3) \$2,482.5 to the Chandra Law Firm. Because each firm’s requested fees award exceeds the three percent cap, their respective fees award will be equal to the calculated cap figures listed above.

d. Costs and Expenses

*9 The Plaintiffs moves the Court for an award of costs and expenses incurred: in (1) the briefing and argument of Plaintiffs’ prior motions for fees and costs; (2) opposition to and settlement of the State of Ohio’s appeal of this Court’s award of fees; and (3) the negotiation of the Consent Decree. Specifically, the Chandra Law Firm requests \$2,702.39 in costs, and Porter Wright requests \$1,108.24 in costs. The Defendant argues Chandra’s requested costs are improper for two reasons: (1) because his travel costs are duplicative;

and (2) because Chandra submitted costs related to his client's travel expenses. This Court does not find either of these arguments persuasive. First, the Plaintiffs properly distinguish between the reimbursement for Chandra's time spent traveling to various proceedings related to this matter that can be billed at his hourly rate and the actual incidental costs inherent with travel such as gas and mileage. Because these two costs are distinct, this Court finds no duplication in awarding Chandra's costs that were incidental to travel and including his compensable time as part of the prior lodestar analysis of reasonable hours for the fee award. Similarly, the Court finds it reasonable to award the Chandra Law Firm's costs incurred to insure their client was present for proceedings. Thus, this Court awards the Chandra Law Firm its entire requested award of \$2,702.39. The Defendants do not object to Porter Wright's requested cost award of \$1,108.24. The Court, therefore, will also award Porter Wright their entire requested cost amount.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** in part and **DENIES** in part the Plaintiffs' Third Motion for Attorneys Fees (Doc. 212). Pursuant to this finding, the Court **AWARDS** \$15,132.5 in total supplemental attorneys' fees. Of this total fees award, Porter Wright shall receive \$9,658.30, Carlile Patchen shall receive \$2,991.70, and the Chandra Law Firm shall receive \$2,482.50. Additionally, the Court **AWARDS** total costs and expenses in the amount of \$3,810.63. Of this total costs and expenses award, the Chandra Law Firm shall receive \$2,702.39 and Porter Wright shall receive \$1,108.24.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4939946

Footnotes

- 1 On October 26, 2006 Plaintiffs were granted a temporary restraining order ("TRO") by this Court, the majority of which was stayed by an October 31, 2006 order of the Sixth Circuit.
- 2 Language taken from this Court's decision in: *Bank One, N.A. v. Echo Acceptance Corp., et al.*, 595 F. Supp 2d 798 (S.D.Ohio 2009)

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Only the Westlaw citation is currently available.

United States District Court, E.D.
 Tennessee, Southern Division,
 at Chattanooga.

Jerry NUTT

v.

Sonny SMART, Dan Rawls, and Sammy Garner

Case No. 1:20-cv-00002-TRM-CHS

|
Filed 06/02/2021**Attorneys and Law Firms**

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James H. Snyder, Jr., Alcoa, TN, for Sammy Garner.

REPORT AND RECOMMENDATION

Christopher H. Steger, UNITED STATES MAGISTRATE
 JUDGE

I. Introduction

*1 This matter is before the Court upon Plaintiff's motion for attorney fees and expenses [Doc. 46] following the Court's entry of default judgment against Defendants Sonny Smart and Dan Rawls [Doc. 45]. For the reasons stated herein, it is **RECOMMENDED** that the Motion for attorney fees and expenses be **GRANTED** and that \$47,004.40 in attorney fees and \$2,272.96 in expenses be **AWARDED** to Plaintiff Jerry Nutt against Defendant Sonny Smart.

II. Background

On February 23, 2021, this Court entered a Report and Recommendation [Doc. 44] recommending that Plaintiff's motion for default judgment should be granted as to all Plaintiff's claims against Defendants Sonny Smart and Dan Rawls. Plaintiff had asserted claims for breach of fiduciary duty, conversion, breach of contract, fraud, and elder abuse against Defendant Smart and claims of breach of contract and fraud against Defendant Rawls. A third defendant, Sammy Garner, answered the complaint and no default has been entered against him. Plaintiff asserts a single claim


of conversion against Defendant Garner. The Court detailed the factual allegations of the Plaintiff's complaint in a Report and Recommendation entered on February 23, 2021, recommending default judgment in favor of Plaintiff against Defendants Smart and Rawls. [Doc. 44, R&R at 5-7]. Those allegations are incorporated by reference herein.

The claim for elder abuse in violation of the Tennessee Adult Protection Act (TAPA), Tenn. Code Ann. § 71-6-120(b), brought exclusively against Defendant Smart, creates a cause of action for an elderly person for theft of money or property by fraud, deceit, coercion, or otherwise. *Id.* Under TAPA, a plaintiff is entitled to recover reasonable expenses, including attorney fees, if intentional or fraudulent conduct is proven by clear and convincing evidence. *See Tenn. Code Ann. § 71-6-120(d)*. The Court concluded Plaintiff was entitled to attorney fees under TAPA against Smart but denied the motion without prejudice because Plaintiff had not differentiated between fees incurred for work that was "distinct and severable" from the work performed on the TAPA claim. In other words, Plaintiff had not excluded fees for work performed *solely* for claims other than the TAPA claim. As support for this conclusion, the Court relied on State Auto. Ins. Co. v. Jones Stone Co., Inc., No. M2009-00049-COA-R3-CV, 2009 WL 4841080 (Tenn. Ct. App. Dec. 15, 2009). [Doc. 44, Report and Recommendation at 14]. On March 16, 2021, the District Court adopted and accepted *in toto* this Court's Report and Recommendation, including the denial without prejudice of Plaintiff's motion for attorney fees under TAPA. [Doc. 45]. Subsequently, on March 29, 2021, Plaintiff filed the current motion for attorney fees.

III. Discussion

Plaintiff seeks the entire amount of attorney fees Plaintiff's counsel has billed in this case, i.e., \$58,755.50, or, in the alternative, a 20% reduction of that total amount, i.e., \$47,004.40. The alternative amount is counsel's estimate of the amount of fees incurred for work completely related to the TAPA claim. Plaintiff also seeks \$2,272.96 in expenses.

*2 Tennessee follows the "American Rule" regarding the award of attorney fees wherein a party may recover attorney fees in a civil action only if "(1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American rule applies, allowing for recovery of such fees in a particular case."

 Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 309 (Tenn. 2009). The party seeking attorney

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fees bears the burden to show that he is entitled to the amount of fees sought. See *Wilson Mgmt. Co. v. Star Distribs. Co.*, 745 S.W.2d 870, 873 (Tenn. 1988). A court has discretion in awarding attorney fees. *Eberbach v. Eberbach*, 535 S.W.3d 467, 478 (Tenn. 2017).

The Tennessee Supreme Court has held that the determination of reasonable attorney fees is governed by Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5.

Wright ex rel. Wright, 337 S.W.3d 166, 176-77 (Tenn. 2011). Rule 1.5 provides:

- (a) A lawyer's fee and charges for expenses shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) The fee customarily charged in the locality for similar legal services;
 - (4) The amount involved and the results obtained;
 - (5) The time limitations imposed by the client or by the circumstances;
 - (6) The nature and length of the professional relationship with the client;
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (8) Whether the fee is fixed or contingent;
 - (9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
 - (10) Whether the fee agreement is in writing.

Tenn. Sup. Ct. R. 8, Rule 1.5, see also *Eberbach*, 536 S.W. 3d at 478 (citing Tenn. Sup. Ct. R. 8, Rule 1.5).

Plaintiff's attorneys, Nader Bayoun and Stephen Knight, are based in Nashville, Tennessee, and practice law throughout the state. They enjoy a good reputation and their work in this case has been excellent. Mr. Bayoun has 40 years'

experience practicing in the field of general and commercial litigation, including contracts and business tort litigation. He charged \$395.00 an hour for his services. Mr. Knight has nearly twenty years' experience in the practice of law and charges \$325.00 per hour. Counsel submitted billing reports for 159.70 hours of work by counsel, attorney fees in the amount of \$58,755.50, and expenses in the amount of \$2,272.96.

The Court has reviewed the Matter Billing Detailed Report (billing invoices). [Doc. 42-1]. The Court has extensive experience with the practice of law in this locality and concludes that the rates charged and number of hours billed are reasonable in light of the experience of the attorneys, the issues involved, and the factual complexity of the case. However, as the Court observed in its Report and Recommendation entered on February 23, 2021, the only cause of action for which there are grounds to award attorney fees is for the attorneys' work performed in connection with the TAPA claim. The other claims provide no statutory or contractual basis for an award of attorney fees.

Tennessee courts have consistently relied on *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and its progeny to determine the amount of fees to award a plaintiff who has prevailed on some claims but not on others, where all claims give rise to a right to attorney fees. See e.g., *Goree v. United Parcel Service, Inc.*, No. W2016-0119-COA-R3-CV, 2017 WL 2398707 (Tenn. Ct. App. June 2, 2017); *Crescent Sock Company v. Yoe*, No. E2015-0098-COA-R3-CV; 2016 WL 3619358, at *7-8 (Tenn. Ct. App. May 25, 2016).

*3 *Hensley* instructs that courts should not reduce fees simply because a plaintiff has not prevailed on all claims.

461 U.S. at 434-37; *Hescott v. City of Saginaw*, 757 F.3d 518, 527 (6th Cir. 2014) ("We have repeatedly rejected mechanical reductions in fees based on the number of issues on which a plaintiff has prevailed.") (quoting *De ja Vu, Inc. v. Metro. Gov't of Nashville & Davidson Cnty. Tenn.*, 421 F.3d 417, 423 (6th Cir. 2005); *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 553 (6th Cir. 2014) ("In no case should a court reduce the full fee award 'simply by using a ratio of successful claims to claims raised.' ") (quoting *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 822 (6th Cir. 2013)). Rather, the court should consider whether work performed for one or more unsuccessful claims can also apply to successful claim(s); where a plaintiff's claims involve "a common core

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of facts or are based on related legal theories, ... [m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley*, 461 U.S. at 435; *see also*, *Jordan v. City of Cleveland*, 464 F.3d 584, 603 (6th Cir. 2006) ("when claims 'involve a common core of facts' or are 'based on related legal theories,' the district court's rejection of certain grounds is not a sufficient reason for reducing a fee. There is no precise test for determining whether claims are related") (quoting *Hensley*, 461 U.S. at 437)); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996) ("When claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorney fees they should not be treated as distinct claims, and the cost of litigating the related claims should not be reduced.").

What makes the fee request in the instant case a bit unusual is that Plaintiff has prevailed on *all* claims against Defendants Smart and Rawls—but only one of those claims, the TAPA claim brought against Smart, provides for recovery of attorney fees. The other claims are subject to the American Rule where each party bears his own fees. The Tennessee Court of Appeals addressed this same scenario in *State Auto. Ins. Co. v. Jones Stone Co., Inc.*, No. M2009-00049-COA-R3-CV, 2009 WL 4841080 (Tenn. Ct. App. Dec. 15, 2009). In *Jones Stone Co.*, an insurance company sought a declaratory judgment that it did not owe the insured, Jones Stone Co. ("Jones"), coverage under a policy it had issued to it for a lawsuit by a homeowner against Jones for allegedly providing defective stone work. Jones countersued under the Tennessee Consumer Protection Act ("TCPA") for bad faith refusal to provide coverage and breach of the duty to defend. Jones prevailed on both the coverage claim and the TCPA claim and sought attorney fees under the TCPA. In reviewing the award of attorney fees, the court held, "[t]he TCPA claim

was discrete and severable from the coverage claim and time spent related to the coverage issue only should be disregarded in the court's determination of a reasonable fee pursuant to the TCPA." *Id.* at *11. While both claims arose from Jones' placement of stonework at a private home, "the basis for the declaratory judgment action was whether the damage to the [home's] stone was an 'occurrence' as defined in the policy at issue; the breach of the duty to defend and the TCPA claims were based on State Auto's conduct in the defense (or lack thereof) of Jones in the [homeowner's] lawsuit." *Id.* at *10. Thus while both the coverage claim and the TCPA claims arose from the same general incident, the facts which were determinative of each claim did not overlap, thus the court held Jones was not entitled to attorney fees for the claim which had no fee shifting statute or fee shifting contractual provision. *Id.*

This Court finds *Jones Stone Co.*'s holding and reasoning in-step with *Hensley*, and the Court will apply the principles enunciated in *Hensley* and its progeny in determining the payment of attorney fees where the prevailing plaintiff is permitted to recover fees for some claims but not for others

IV. Conclusion

For the reasons stated herein, it is **RECOMMENDED** that Plaintiff's motion for attorney fees against Sonny Smart be **GRANTED** and that:

1. Plaintiff be **AWARDED** attorney fees against Defendant Sonny Smart in the amount of \$47,004.40; and
- *4 2. Plaintiff be **AWARDED** expenses against Defendant Sonny Smart in the amount of \$2,272.96.¹




All Citations

Slip Copy, 2021 WL 2561763

Footnotes

- ¹ Any objections to this Report and Recommendation must be served and filed within fourteen (14) days after service of a copy of this recommended disposition on the objecting party. Such objections must conform to the requirements of Rule 72(b) of the Federal Rules of Civil Procedure. Failure to file objections within the time specified constitutes a forfeiture of the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S. Ct. 466 (1985). The district court need not provide *de novo* review where

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objections to this report and recommendation are frivolous, conclusive or general.   *Mira v. Marshall*,
806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review.  *Smith v. Detroit*
Federation of Teachers, 829 F.2d 1370 (6th Cir. 1987).

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT JACKSON.

Steven H. PARKER

v.

BRUNSWICK FOREST
HOMEOWNERS ASSOCIATION, INC.

No. W2018-01760-COA-R3-CV

|
April 10, 2019 Session|
06/13/2019|
Application for Permission to Appeal Denied
by Supreme Court September 18, 2019**Appeal from the Chancery Court for Shelby County, No.
CH-16-1541, JoeDae L. Jenkins, Chancellor****Attorneys and Law Firms**John R. Candy, Collierville, Tennessee, for the appellant,
Steven H. Parker.Brandon F. McNary and Peter D. Baskind, Memphis,
Tennessee, for the appellee, Brunswick Forest Homeowners
Association, Inc.J. Steven Stafford, P. J., W.S., delivered the opinion of the
court, in which Arnold B. Goldin and Kenny Armstrong, JJ.,
joined.**OPINION**

J. Steven Stafford, P. J.

Following a bench trial, the trial court awarded the Defendant/Appellee \$ 28,372.06 in attorney's fees based upon an attorney's fees provision in the parties' written agreement. Plaintiff/Appellant appeals the award of attorney's fees on the basis that the relevant provision is inapplicable under the circumstances. Because we conclude that the trial court did not err in awarding the Appellee its attorney's fees, we affirm.

BACKGROUND

*1 This case is about fees assessed by the Brunswick Forest Homeowners Association ("the Association") against Steven H. Parker ("Homeowner") related to Homeowner's residence in Shelby County, Tennessee. Homeowner purchased his home in 2014 subject to various provisions enshrined in the Declaration of Covenants, Conditions and Restrictions for Brunswick Forest ("CCRs" or "the Declaration"). One such provision states that the homeowners in Brunswick Forest "shall be deemed to covenant and agree to pay to [the Association] ... annual assessments or charges." As such, the Association assessed charges against Homeowner for the years 2015 and 2016. Homeowner, however, did not tender payment, and the Association mailed a letter to the Homeowner indicating that Homeowner was delinquent. The Association requested that Homeowner tender \$ 280.00 to cover the late assessments, as well as \$ 100.00 in related attorney's fees.

Homeowner again refused to pay the assessments. On July 18, 2016, the Association sent a second letter to Homeowner, advising him that due to the delinquency of the assessments, a lien on Homeowner's property was to be recorded in the Shelby County Register's Office. In response, Homeowner, acting pro se, filed a complaint against the Association on September 29, 2016, in the Chancery Court for Shelby County ("the trial court"). Appellant also named two directors of the Association, Paul T. Ryan and Garrett Temple, individually, in the complaint, however, both Mr. Ryan and Mr. Temple were dismissed from the case early in the litigation and are not parties to this appeal. In his complaint, Homeowner alleged that the Association did not follow the relevant bylaws of the CCRs in calculating the assessments and because of that, the assessments and the lien placed on Homeowner's home were invalid. According to Homeowner, the Association was liable for breach of fiduciary duty, a conflict of interest, and for intentional harm inflicted upon the Homeowner. Homeowner sought the removal of the lien from his property, and a declaration that "the amount of the assessment for which the lien was filed was not set in accordance with the [CCRs] and the Tennessee Code Annotated regarding Non-profit corporations."

On November 7, 2016, the Association filed an answer denying the material allegations contained in Homeowner's complaint. The Association also filed a counterclaim against

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Homeowner, asserting a cause of action for breach of contract on the basis that Homeowner failed to fulfill his obligations under the CCRs, namely, payment of the annual assessments for 2015 and 2016. The Association further asserted that it was entitled to costs and attorney's fees pursuant to the CCRs.

Contentious litigation ensued. The first trial judge assigned to the case recused himself due to a conflict of interest; the case was thereafter transferred to a different division of the Shelby County Chancery Court. In the meantime, Homeowner sought to amend his complaint, and eventually filed an amended complaint wherein he also alleged a breach of contract action; specifically, Homeowner averred that he was unlawfully denied access to the "books and records" of the Association, in violation of the CCRs. Eventually, on August 24, 2017, the Association filed a motion for partial summary judgment asking the trial court to find Homeowner liable for breach of contract "for his failure to pay assessments." The motion was heard September 27, 2017, and on September 29, 2017, the trial court entered an order granting the Association summary judgment on its breach of contract claim.¹

*2 Also on September 29, 2017, conflict with the second trial judge came to a head after allegations from the Homeowner that the judge had been harassing Homeowner and attempting to force him to retain counsel. While the trial judge denied these allegations, he ultimately decided to recuse himself from the case. Accordingly, a second order of recusal was entered September 29, 2017, and the case was again transferred to a different division of the chancery court.

Homeowner eventually retained counsel, and this matter proceeded to trial on August 23, 2018. At the hearing, the court first heard testimony from the Homeowner, who conceded that he purchased his home in 2014 and that he signed the CCRs at issue at that time. Homeowner testified in support of his affirmative claims, generally testifying that the Association did not provide access to information needed to support the assessments, such as how the assessments were calculated, and that the assessments, along with the lien to secure them, were invalid as a result.

The trial court also heard testimony from Mr. Ryan and Mr. Temple. Mr. Ryan testified that he was one of the partners in the Brunswick Forest development and that he was serving as a director of the Brunswick Homeowner's Association when the dispute with the Homeowner began.² With regard to the assessments, Mr. Ryan testified that the assessment amount

had been the same for many years because the Association "had a history with the expenses and knew what the expenses were." He also testified that the Association followed all provisions in the CCRs when assessing the various fees for each lot, including estimating the annual amounts thirty days before each assessment period and sending a notice of assessment to each homeowner. Mr. Ryan also confirmed that the Homeowner refused to pay his assessments for 2015 and 2016.

Mr. Temple's³ testimony regarding how the assessments were calculated largely reiterated that of Mr. Ryan. Mr. Temple also recalled a meeting with the Homeowner during December of 2016, at which time the Homeowner's delinquent assessments totaled \$ 280.00. Mr. Temple testified that in the meeting, Homeowner agreed to pay assessments going forward if the Association would waive the outstanding \$ 280.00 and remove the lien from Homeowner's property. Mr. Temple testified that when the Association would not agree to those terms, Homeowner abruptly left the meeting. Finally, Mr. Temple stated that because of the protracted litigation caused by this case, the Association had been forced to raise the yearly assessment amount to \$ 650.00.

The trial court issued an oral ruling in which it concluded that the Homeowner failed to carry his burden of proof in showing that the Association breached its contract with the Homeowner, or that Homeowner had suffered any damage as a result of the Association's actions. The trial court determined that Homeowner's complaint should be dismissed in its entirety; the issue of attorney's fees, however, was reserved for a later date.

The trial court held a final hearing on September 5, 2018 in order to determine the issue of attorney's fees, which both parties had requested they be awarded. At the hearing, counsel for the Association testified about the fees incurred throughout the case, stating that much of the Association's work was done in response to the multitude of motions and pleadings that were filed by the Homeowner while he was proceeding pro se. Counsel's overall testimony was that the fees incurred were reasonable under the circumstances, and that the total amount including costs came to \$ 32,371.06.

*3 The dispute at this hearing, however, largely centered on the language of the CCRs and whether, pursuant to that language, the Association could collect attorney's fees related to its defense of Homeowner's claims. One provision of the CCRs, found in Article VI, section five, provides that "[t]he

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Association may bring an action at law against” a homeowner in the event that the assessments are unpaid, and that “the Association may collect from the said [m]ember interest, costs and reasonable attorneys' fees.” Further, Article XII, section 3 expressly discusses enforcement of the CCRs and states that “[t]he expense of enforcement by the Association shall be chargeable to the Owner of the Lot violating these covenants and restrictions and shall constitute a lien on of the Lot, collectible in the same manner as assessments hereunder.”

Based upon the language in the CCRs, particularly the Article VI provision, the Homeowner argued that most of the fees incurred by the Association arose in defense of Homeowner's actions, rather than from prosecuting its own breach of contract claim. As such, the Homeowner argued that the Association's attorney's fees did not accrue as a result of the Association “bring[ing] an action at law[.]” In support, the Homeowner alleged that he had examined the bills submitted by the Association, and that the fees accrued in prosecuting the Association's counterclaim only amounted to approximately \$ 1,500.00. Based upon the language of the contract, Homeowner asserted that the Association was not entitled to any award of attorney's fees over and above what was accrued in bringing the counterclaim. Essentially, Homeowner argued that the Association should only be awarded, if anything, \$ 1,500.00 in attorney's fees.

At the conclusion of the hearing, the trial court ruled that it would award attorney's fees to the Association. In addressing the Homeowner's argument that the Association was entitled only to fees accrued in furtherance of its counterclaim, the trial court noted the following:

It appears that this litigation rolls out of the Association's right to collect Association dues through annual assessments. [Homeowner] disputed the Association's right to collect the annual assessments and refused to pay them, which gave rise to his lawsuit, which initiated this litigation.

The gravamen of his lawsuit was to avoid the payment of annual assessments, two years' worth, plus an [sic] attorney fees of \$ 100.00. The litigation was protracted; although not overly complicated, it was protracted based upon the numerous pleadings filed by [Homeowner] who did a pretty decent job being a non-lawyer requiring the Association's counsel to respond to the various motions and pleadings that he filed.

Accordingly, the trial court found that the Association was entitled to attorney's fees in the amount of \$ 28,372.06.

On September 10, 2018, the trial court entered two written orders finalizing its rulings. The first order, titled Order Dismissing Plaintiff's Complaint, provided that although Homeowner was contractually required to pay assessments to the Association, Homeowner failed to pay in 2015, 2016, and 2018.⁴ As such, the Association's “lien on the property was valid[.]” and, further, Homeowner failed to show how he was damaged by the lien. Accordingly, it was the trial court's conclusion that Homeowner did not carry his burden of proof as to any of his claims. A separate order was entered addressing the attorney's fees, wherein the trial court found that “this matter arose solely out of the [Association's right to collect assessments[.]]” and that Homeowner's “lawsuit against [the Association] was for the sole purpose of avoiding the payment of assessments.” The trial court further noted that the Association was required to respond to Homeowner's pleadings in order to fully prosecute its counterclaim, and that as such, the Association was entitled to an award of attorney fees pursuant to the language in the CCRs. Finally, the trial court determined that the requested attorney's fees were reasonable in light of all the circumstances.

*4 Homeowner filed a timely notice of appeal to this Court on September 26, 2018.

ISSUE PRESENTED

The Homeowner raises a single issue for review: Whether the trial court erred in awarding attorney's fees to the Association.

STANDARD OF REVIEW

This case was resolved following a bench trial. Under rule 13 of the Tennessee Rules of Appellate Procedure, the trial court's findings of fact from a bench trial are reviewed “de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d). A trial court's conclusions of law, however, are not entitled to a presumption of correctness. Johnson v. Johnson, 37 S.W.3d 892, 894 (Tenn. 2001).

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We also bear in mind that the single issue for review in this case centers on the trial court's interpretation and application of an attorney's fees provision within a written contract. "The interpretation of a written agreement is a question of law and not of fact." *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009). Moreover, "[t]hrough normally review of an award of attorney's fees is subject to an abuse of discretion standard," where the parties dispute the trial court's "interpretation and application of a contractual provision allowing for attorney's fees[.]" our review is de novo. *Southwind Residential Prop. Ass'n, Inc. v. Ford*, No. W2016-01169-COA-R3-CV 2017 WL 991108, at *10 (Tenn. Ct. App. Mar. 14, 2017) (citing *Clark v. Rhea*, No. M2002-02717-COA-R3-CV, 2004 WL 63476, at *2 (Tenn. Ct. App. Jan. 13, 2004)).

DISCUSSION

The dispute in the present case turns on the trial court's application of a provision within the CCRs providing for attorney's fees incurred in a collection action. We have previously held that CCRs "arise from a series of overlapping contractual transactions" and as such, "should be viewed as contracts." *General Bancshares, Inc. v. Volunteer Bank & Trust*, 44 S.W.3d 536, 540 (Tenn. Ct. App. 2000) (citing *Maples Homeowners Ass'n v. T & R Nashville Ltd. P'ship*, 993 S.W.2d 36, 39 (Tenn. Ct. App. 1998)). Accordingly, CCRs "should be construed using the rules of construction generally applicable to the construction of other contracts." *Id.*; see also *Southwind*, 2017 WL 991108, at *6 ("Because the instant case involves the interpretation of restrictive covenants, we apply well-established rules of construction and law in order to construe the terms of the covenants."). Thus, because the CCRs at issue here are subject to the rules of construction applicable to contracts, we turn first to an overview of those rules.

As we have previously noted,

"[t]he cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention consistent with legal principles." *Rainey v. Stansell*, 836 S.W.2d 117, 118–19 (Tenn. Ct. App. 1992) (quoting *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975)). "A primary objective in the construction of a contract is to discover the intention of the parties from a consideration of the whole

contract." *Id.* at 119 (citing *McKay v. Louisville & N.R. Co.*, 133 Tenn. 590, 182 S.W. 874, 875 (1916)). When resolving disputes concerning contract interpretation, we are to ascertain the intention of the parties based upon the "usual, natural, and ordinary meaning" of the contractual language. *Id.* "All provisions in the contract should be construed in harmony with each other, if possible, to promote consistency and to avoid repugnancy between the various provisions of a single contract." *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999) (citing *Rainey*, 836 S.W.2d at 118–19).

*5 If the contract language is unambiguous, the written terms control, not the "unexpressed intention of one of the parties." *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526, 530 (Tenn. Ct. App. 1981). "The language of a contract is ambiguous when its meaning is uncertain and when it can be fairly construed in more than one way." *Gredig v. Tenn. Farmers Mut. Ins. Co.*, 891 S.W.2d 909, 912 (Tenn. Ct. App. 1994) (citing *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975)). "A strained construction may not be placed on the language used to find ambiguity where none exists." *Id.* (quoting *Farmers-Peoples Bank*, 519 S.W.2d at 805). "An ambiguous provision in a contract generally will be construed against the party drafting it." *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 612 (Tenn. 2006).

Commerce Union Bank, Brentwood, Tennessee v. Bush, 512 S.W.3d 217, 227–28 (Tenn. Ct. App. 2016).

Moreover, the present case centers on the trial court's decision to award the Association its attorney's fees based upon the parties' written agreement. "Tennessee, like most jurisdictions, adheres to the 'American rule' for the award of attorney fees." *Cracker Barrel*, 284 S.W.3d at 309 (citing *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998); *Pullman Standard, Inc. v. Abex Corp.*, 693 S.W.2d 336, 338 (Tenn. 1985)). "As a general principle, the American rule reflects the idea that public policy is best served by litigants bearing their own legal fees regardless of the outcome of the case." *Id.* (citing *House v. Estate of Edmondson*, 245 S.W.3d 372, 377 (Tenn. 2008)). There are, however, recognized exceptions to the American rule; indeed, "a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the

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American rule applies, allowing for recovery of such fees in a particular case.” *Id.* (citing *John Kohl*, 977 S.W.2d at 534; *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005)). Thus, “[i]n the context of contract interpretation, Tennessee allows an exception to the American rule only when a contract specifically or expressly provides for the recovery of attorney fees.” *Id.* (citing *House*, 245 S.W.3d at 377) (emphasis in original); see also *Pinney v. Tarpley*, 686 S.W.2d 574, 581 (Tenn. Ct. App. 1984) (“In the absence of an express agreement to pay attorney’s fees for enforcement of a contract, such fees are not recoverable in Tennessee.”); *Eberbach v. Eberbach*, 535 S.W.3d 467, 474 (Tenn. 2017) (noting that in the absence of a contractual provision providing for attorney’s fees, “litigants are responsible for their own attorney’s fees.”). “Accordingly, parties who have prevailed in litigation to enforce their contractual rights are entitled to recover their reasonable attorney’s fees once they demonstrate that the contract upon which their claims are based contains a provision entitling the prevailing party to its attorney’s fees.”

Eberbach, 535 S.W.3d at 474.

It has also been held, however, that a contractual provision allowing for attorney’s fees must explicitly convey the right to recover those fees. For instance, on its own the phrase “all costs and expenses” is not specific enough to include an award of attorney’s fees. *Cracker Barrel*, 284 S.W.3d at 310—

11; compare *Kultura, Inc. v. S. Leasing Corp.*, 923 S.W.2d 536, 540 (Tenn. 1996) (determining that alone, the phrase “any loss” does not include attorney’s fees), with *Harris v. 4215 Harding Road Homeowners Ass’n*, 74 S.W.3d 359, 361 (Tenn. Ct. App. 2001) (holding that an award of attorney’s fees was appropriate where the master deed at issue provided that “all costs and expenses, including a reasonable attorney’s fee,” was recoverable in an action to enforce the deed), and *Urbanavage v. Capital Bank*, No. M2016-01363-COA-R3-CV, 2018 WL 3203100, at *10 (Tenn. Ct. App. June 29, 2018) (recognizing that the language “late fee and interest ... and cost of collection when delinquent, including reasonable attorney’s fees[,]” was a proper legal basis upon which to award attorney’s fees). Consequently, a departure from the American rule is inappropriate in the absence of a provision expressly providing for an award of attorney’s fees.

*6 Turning to the instant case, the pertinent clause of the CCRs is found in Article VI, section five of the Declaration:

Any assessment levied pursuant to this Declaration or any installment thereof, which is not paid within ten (10) days after it is due, may, upon resolution of the Board of Directors, bear interest at a rate not to exceed the highest rate allowed under the laws of the State of Tennessee, and may, by resolution of the Board of Directors, subject the Member obligated to pay the same to the payment of such penalty or “late charge” as the said Board may fix. **The Association may bring an action at law against the Member personally obligated to pay the same, or foreclose the lien against the Lot or Lots subject to prior mortgages or Deeds of Trust upon the Lot or Lots, then belonging to said Member; in either of which events, the Association may collect from the said Member interest, costs and reasonable attorneys’ fees.** No Owner may waive or otherwise escape liability for the assessments provided for herein by abandonment of his Lot.

(emphasis added). Clearly, the CCRs at issue provide for an award of attorney’s fees when the Association “bring[s] an action at law” to recover an unpaid assessment. Thus, there can be no dispute that the Association was, in fact, at least entitled to its attorney’s fees incurred solely in prosecuting its counterclaim for the unpaid assessments. Unlike other contracts we have previously considered, however, the CCRs do not specifically state whether the attorney’s fees also extend to defense of an action. The dispute, then, involves whether the above language also authorizes the Association to recover the fees incurred in ostensibly defending against Homeowner’s claims.

In the absence of specific language authorizing attorney’s fees for defending actions, this Court has often rejected claims for attorney’s fees by defendants, albeit based on different contractual language and factual situations not present in this case. For instance, in *Smith v. Crossman*, No. M2003-01108-COA-R3-CV, 2004 WL 1732319 (Tenn. Ct. App. Aug. 2,

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2004), we addressed the issue of an attorney's fees provision within a commercial lease. In *Smith*, the tenants of small grocery store sued their landlord after a Dollar General store in the same complex began selling food items, which the tenants alleged was in violation of a protective covenant within their lease. 2004 WL 1732319, at *1. In response, the landlord argued that it had no authority to constrain the Dollar General from selling food, and also added a counterclaim for attorney's fees only. *Id.* Eventually, the tenants dismissed their lawsuit, but the landlord's counterclaim for attorney's fees remained. *Id.* The trial court held that the landlord was entitled to attorney's fees in the amount of \$ 14,320, based on the following provision in the lease:

Tenant shall pay reasonable attorneys fees incurred by Landlord in the enforcement of any terms, covenants, or provisions of this lease, and the Landlord also agrees to reimburse tenant for reasonable attorney fees in the enforcement of any terms, covenants, or provisions of this lease.

*7 The tenants appealed, making a similar argument to that of the Homeowner in the case-at-bar; specifically, the tenants asserted that the landlord's attorney's fees were only incurred in defense of their claim, rather than through the landlord's enforcement of his rights under the lease. *Id.* at *2. We agreed:

In its counterclaim, [l]andlord merely invoked the attorney's fees provision and alleged that it was 'incurring attorneys fees in the defense of this action....' At no time did [l]andlord counter that [t]enants were in breach of the lease or seek to enforce any term of the agreement.

Id. In the *Smith* lease, attorney's fees were only recoverable where terms of the lease were being enforced. *Id.* In that particular case, the landlord was not attempting "to enforce any term, covenant or provision of the lease[.]" but rather only sought to defend against the tenants' claim. *Id.* As such, the award of attorney's fees was inappropriate under the circumstances, and we reversed the trial court's decision. *Id.* at *3.

Similarly, in *White v. Empire Exp. Inc.*, 395 S.W.3d 696 (Tenn. Ct. App. 2012), we again considered the propriety of a trial court's award of attorney's fees. In that case, the plaintiff

truck driver brought suit against his employer and an affiliated company for breach of contract and conversion over a rent-to-own lease of the plaintiff's truck. 395 S.W.3d at 705. The defendants filed an answer, arguing that plaintiff had defaulted on the contract by failing to make various payments, and sought a declaration "saying that [plaintiff] failed to satisfy his obligations." *Id.* Defendants also counterclaimed for money damages, "including attorney fees incurred in defending the suit." *Id.*

Eventually, the defendants sought summary judgment on the plaintiff's breach of contract claim, and also "claimed they were entitled to summary judgment on their counterclaim for attorney's fees and other damages pursuant to the [l]ease." *Id.* Likewise, the plaintiff filed a cross-motion for summary judgment asking the trial court to determine that the defendants had breached the lease agreement. *Id.* at 706. The trial court granted in part the plaintiff's motion for summary judgment, finding that the plaintiff was not in breach of contract; on the other hand, the defendants' motion for summary judgment was denied completely, and their counterclaim for attorney's fees under the terms of the lease was dismissed. *Id.* The case proceeded to trial, and the plaintiff prevailed on all of the remaining claims. *Id.* at 710—11. The defendants thereafter appealed to this Court. *Id.*

One of the many issues raised on appeal was whether the trial court erred in denying the defendants' motion for summary judgment for attorney's fees under the terms of the parties' agreement. *Id.* at 711—12. In that lease, the attorney's fees clause provided that "[p]laintiff agrees to pay all expenses incurred by [the defendant] in enforcing its rights after the occurrence of any event of default hereunder, including the reasonable fees of any attorneys retained by [the defendant]" *Id.* at 718. On appeal, we concluded that pursuant to the particular language of the lease at issue, the trial court was correct in determining that the defendants were not entitled to attorney's fees. *Id.* In so holding, we pointed out that the defendants were "being required to defend their own actions rather than seeking to enforce their rights as provided in [the lease]." *Id.* Because the lease indicated that attorney's fees were only available through action by the defendant "enforcing its rights" after a default, this Court determined that the counterclaim for attorney's fees, on its own, was insufficient to bring the counterclaim within the purview of the attorney's fees clause at issue. *Id.* Consequently, the trial court's decision to deny the defendants their attorney's fees was upheld on appeal in *White*.

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*8 Finally, in Southwind Residential Prop. Ass'n, Inc. v. Ford, No. W2016-01169-COA-R3-CV, 2017 WL 991108, at *10 (Tenn. Ct. App. Mar. 14, 2017), we yet again addressed a situation in which the parties disputed the applicability of an attorney's fees provision, as it relates to fees incurred defending and pursuing a claim. In that case, the plaintiff homeowner's association filed suit against two homeowners after a dispute arose over the homeowners' refusal to pay the full amount of the annual assessments on their property. *Id.* at *2. In addition to the assessments, the association's petition asked for costs and attorney's fees. *Id.* The homeowners responded by answering the petition but also by filing a counterclaim for other various actions such as negligent misrepresentation, intentional misrepresentation, and breach of contract. *Id.* The parties litigated for several years before the matter proceeded to trial, and the association was eventually awarded a judgment for the assessments at issue, as well as an award of nearly \$ 67,000 in attorney's fees. *Id.* at *6. The homeowners appealed, raising, inter alia, the trial court's decision to grant the association its attorney's fees. *Id.*

In addressing the attorney's fees issue on appeal, we looked to the language of the relevant CCRs, which provided that "[e]ach such assessment, together with interest and costs of collection, including reasonable attorney's fees, shall be a personal obligation of the person who was the owner of such Member's Property at the time when the assessment fell due." *Id.* at *10. Based upon the foregoing language, the homeowners argued that

the attorney's fees incurred in this case are not properly categorized as 'costs of collection,' because the fees awarded by the trial court include fees incurred in the defense of two separate lawsuits, [n]either [of which] involves the collections of assessments, nor [are] reasonably related to the collection of assessments in the present action.

Id.

Essentially, the homeowners asserted that to the extent the attorney's fees at issue were incurred in defense of the

homeowners' claims unrelated to the assessments, those could not be construed as "costs of collection." *Id.* at *11. However, because we concluded that the homeowners failed to preserve a specific objection to the attorney's fees award at trial, this argument was waived on appeal. *Id.* Notably, however, we stated in dicta that "typically, we would agree with [the homeowners] that **costs incurred in separate litigation not related to this collection action** cannot be categorized as costs of collection for purposes of the CCRs." *Id.* (emphasis added). Accordingly, although the homeowners in Southwind failed to properly raise the argument that the association could not recover certain fees accrued in defense of a separate, unrelated claim, we acknowledged that under different circumstances, such an argument could have merit.

Distilled to their essence, the above cases stand for the proposition that, in the absence of an express provision authorizing attorney's fees for the defense of an action, the defendant cannot recover attorney's fees where the defendant: (1) did not assert a claim for affirmative relief, such as a breach of contract action, against the plaintiff, see Smith, 2004 WL 1732319 at *2-*3; (2) did not prevail in showing that the plaintiff breached some duty to the defendant, see White, 395 S.W.3d at 718; and (3) sought attorney's fees related to a wholly separate action unrelated to the present enforcement proceeding. See Southwind, 2017 WL 991108, at *10 (involving fees related to an action involving landscaping rather than assessments). In this case, however, the Association promptly filed a counterclaim for breach of contract against Homeowner, prevailed on all claims, both in prosecution of the counterclaim and defense of Homeowner's claims, and the claims were clearly interrelated as they both concerned the validity of the assessments and the lien. Consequently, none of the above cases prohibit the award of fees in this case.

*9 Of course, determining that our caselaw does not prohibit the award in this situation does not settle the matter of whether the fees were authorized by the language in the CCRs. As such, we turn to caselaw from our sister jurisdictions to inform our analysis. For example, several states have held that where attorney's fees were authorized for bringing certain claims under a statute, fees incurred in defending such a claim could be authorized where "the claim and counterclaim are so interrelated that segregation of fees incurred in prosecution of the claim and defense of the counterclaim is not necessary."

G.R.A.V.I.T.Y. Enterprises, Inc. v. Reece Supply Co., 177 S.W.3d 537, 551 (Tex. App. 2005); see also Regency Homes

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of *Dade, Inc. v. McMillen*, 689 So.2d 1204 (Fla. Ct. App. 1997) (noting that where the issues involved both defense of a lien and a counter-petition for breach of contract, the issues were so intertwined that the attorney's time could not reasonably be apportioned); *Jerels v. Begue*, No. 24700, 2010 WL 1780140, at *3 (Ohio Ct. App. May 5, 2010) (finding under an Ohio landlord/tenant statute that when a trial court concludes that work completed in support of a claim and the work completed in defending the related counterclaim are indivisible, "it is within the trial court's discretion to award the prevailing [party] the attorney fees he or she reasonably incurred in both pursuing the claim and defending against the counterclaim. To hold otherwise would be illogical."). The attorney's fee award in this case, however, is not based upon statute, but based upon a contract; accordingly, the trial court had considerably less discretion in the award of fees in this case. See *Eberbach*, 535 S.W.3d at 478—79 ("[T]he trial court does not have the discretion to set aside the parties' agreement and supplant it with its own judgment.").

Other courts, however, have come to similar conclusions after considering attorney's fees based solely on a contract. First, in *Heyde v. State Sec., Inc.*, 1958-NMSC-009, 63 N.M. 395, 400, 320 P.2d 747, the New Mexico Supreme Court held that where attorney's fees were authorized "to enforce covenants" in a lease, attorney's fees were authorized not only for the fees associated with their complaint, but also with defending against the tenants' counterclaim. *Id.* at 11. The Wyoming Supreme Court soon adopted an arguably more expansive rule on this issue. See *Barker v. Johnson*, 591 P.2d 886 (Wyo. 1979). In *Barker*, the parties entered into a sales contract that provided that if the seller "must bring an action to foreclose ... or to collect any damages," the buyers would be responsible for "all costs" of the action including attorney's fees. *Id.* at 890. The buyers eventually sued the seller for specific performance; the seller answered and filed a counterclaim for possession and quiet title. Although the buyers prevailed in their claim for specific performance in the trial court, the trial court awarded the seller attorney's fees. *Id.* at 888. The Wyoming Supreme Court reversed the trial court, ruling in favor of the seller on the substantive merits of the claim. The court, however, affirmed the award of attorney's fees to the seller, despite the fact that the lawsuit was "instituted by the [buyers]" because the buyers' action "added to the necessity for [the seller] to obtain a decree quieting its title." *Id.*

Federal courts have adopted a similar rule. First, in *Exchange Nat. Bank of Chicago v. Daniels*, 763 F.2d

286 (7th Cir.), on reh'g in part, 768 F.2d 140 (7th Cir. 1985), the United States Court of Appeals for the Seventh Circuit held that attorney's fees associated with defending against counterclaims were authorized by the contract as costs to enforce the debt, as "the Borrowers' counterclaims ... were integral to the 'enforcement' of the note, and that the other litigation commenced by the Borrowers was designed to frustrate the enforcement of the note." *Id.* at 294.

Again, the situation was reversed and the rule somewhat expanded in *Duryea v. Third Nw. Nat. Bank of Minneapolis*, 606 F.2d 823 (8th Cir. 1979). In *Duryea*, the United States Court of Appeals for the Eighth Circuit agreed with the district court that attorney's fees were authorized to the defendant creditor where attorney's fees were authorized by the contract as "costs of collection." *Id.* at 826. As the Court explained:

If the Bank had instituted suit to collect the note and plaintiff had, by way of counterclaim, served the complaint that is the basis of this action, all costs of both bringing suit and defending against the counterclaim would be "costs of collection" of the note. See *Taylor v. Continental Supply Co.*, 16 F.2d 578 (8th Cir. 1926). This court sees little difference where plaintiff brings suit to prevent collection of the note. Because it is necessary for the Bank to defend against such an action in order to collect on the note, attorney's fees incurred in defending against plaintiff's suit are a "cost of collection" as that term is used in the note. A contrary result would permit the maker of a note by winning the "race to the courthouse" to coerce settlement. This would render the "cost of collection" provision of little value, apparently contrary to what the parties to the note intended.

*10 *Id.* (quoting the district court with approval). District courts considering the above opinions describe them as

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creating as a rule allowing the recovery of attorney's fees where the debtor's action has "been brought as a roadblock to collection" on the debt. Kennington Ltd., Inc. v. Wolgin, No. CIV. A. 89-0080, 1989 WL 83556, at *3 (E.D. Pa. July 28, 1989). As the district court explained, without such a rule, "costs of defense would be made to depend on which party files first ('the race to the courthouse'), an arbitrary and undesirable result." *Id.*

State courts have relied on the federal precedent to reach similar conclusions. See State Bank of Cokato v. Ziehwein, 510 N.W.2d 268, 270 (Minn. Ct. App. 1994) ("For example, where a debtor sued a creditor to prevent collection and the creditor successfully counterclaimed for the amount due, the creditor was entitled to recover attorney fees incurred in both defending the debtor's claim and prosecuting the counterclaim as 'costs of collection.' Similarly, where a debtor brought a counterclaim which, if successful, would have reduced the amount due under the note, the creditor was entitled to fees related to its action on the note as well as fees for the counterclaim.") (citations omitted) (citing Duryea, 606

F.2d at 826). But see Carefree Foliage, Inc. v. Am. Tours, Inc., 153 Ill. App. 3d 190, 196, 505 N.E.2d 1039, 1043 (1987) (holding that the *Daniels* rule only applies when the contract provides for attorney's fees related to both "collection" and "enforcement" of the debt); see also Kaiser v. Olson, 105 Ill. App. 3d 1008, 1017, 435 N.E.2d 113, 120 (1981) (holding that "some language more express than 'costs of collection' should have been employed to have placed the party charged on notice that he was undertaking to protect the obligee from costs incurred in defending against a separate claim and not just the ordinary collection expenses in recovering upon a defaulted promissory note").

Keeping the above authority in mind, we again turn to the language of the CCRs at issue here. See Sutton v. First Nat'l Bank of Crossville, 620 S.W.2d 526, 530 (Tenn. Ct. App. 1981) (holding that, in general, the written terms control interpretation of a contract). As previously stated, the CCRs expressly provide that the Association may recover its attorney's fees when the Association "bring[s] an action at law" related to unpaid assessments. This language is both broad and vague. Black's Law Dictionary defines "bring an action" as "[t]o sue; institute legal proceedings." Black's Law Dictionary 219 (9th ed. 2009). The contract therefore simply states that where such an action is brought against a homeowner obligated to pay assessments, the Association may recover its attorney's fees; neither the terms "collection"

nor "enforcement" are included in this provision. Clearly, here the Association did institute legal proceedings against Homeowner, albeit in the posture of counter-plaintiff.


The language of this provision, however, should not be read in isolation but must be construed in light of the contract as a whole. Fisher v. Revell, 343 S.W.3d 776 (Tenn. Ct. App. 2009) (quoting 77 C.J.S. Contracts § 304) ("[In interpreting a contract,] the whole instrument must be considered, and not an isolated part, such as a single sentence or paragraph. The language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract."). Elsewhere in the contract the Association's right to enforce the terms of the CCRs is discussed. Article XII General Provision Section 3 expressly discusses enforcement of the CCRs and states that "[t]he expense of enforcement by the Association shall be chargeable to the Owner of the Lot violating these covenants and restrictions and shall constitute a lien on of the Lot, collectible in the same manner as assessments hereunder."

*11 We agree with Homeowner that a contract providing only that a party is entitled to recover "costs" and "expenses" does not authorize the award of attorney's fees. See Cracker Barrel, 284 S.W.3d at 310 ("The term 'costs' has not generally been construed to encompass attorney fees."); Nyrstar Tennessee Mines-Strawberry Plains, LLC v. Claiborne Hauling, LLC, No. E2017-00155-COA-R3-CV, 2017 WL 5901017, at *2 (Tenn. Ct. App. Nov. 29, 2017) (holding that a provision allowing for "expenses" or even "legal expenses" did not authorize an award of attorney's fees). Such is not the case here. In this case, while the "expense of enforcement" provision of the CCRs does not expressly contain an attorney's fees provision, this provision explicitly references the manner in which assessments are collected. The provision regarding collection of assessments expressly provides that the Association may recover its attorney's fees when its provisions are met, i.e., when an action is brought. Reading the contract as a whole, as we must, we conclude that the contract provides for collection of attorney's fees and costs where the Association "bring[s]" an action for collection of assessments and enforcement of the terms of the CCRs.

Further, we conclude that all actions taken in this particular case, including the action of defending against Homeowner's complaint, fall within the ambit of the CCRs' attorney's fee provision. The constellation of facts shown at trial

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demonstrate that this collection action was initiated by the mailing of a letter pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. 1692(g). Thereafter, Homeowner filed the instant action whose primary goal was to rescind the lien placed on his property for the unpaid assessments and be awarded damages that allegedly resulted from the lien. In support of that relief, Homeowner testified at trial that the assessments were invalid because he was not provided sufficient information to determine the proper calculation of the assessments. Homeowner's claim that the lien should be rescinded therefore rested on his claim that assessments upon which the lien was based were invalid. Moreover, the trial court made an express finding, based upon Homeowner's own testimony, that the gravamen of Homeowner's lawsuit has always been to avoid payment of the assessments.⁵ This finding, coupled with Homeowner's decision to file this lawsuit shortly after receiving the debt collection letter, supports our conclusion that Homeowner's lawsuit was an effort "to frustrate the enforcement of the [CCRs]."

 Daniels, 763 F.2d at 294.

Here, it was necessary for the Association to respond to Homeowner's claim in order to obtain relief on its counterclaim to collect on the assessments; stated differently, had Homeowner succeeded in showing that the assessments were in some way invalid, the Association would likely not have prevailed on its claim to collect the unpaid assessments. The same is true regardless of which party actually filed suit first. To hold otherwise would be to exalt form over function and reward parties for winning the race to the courthouse in violation of Tennessee's long-settled public policy. See Word v. Metro Air Serv's, Inc., 377 S.W.3d 671, 675 (Tenn. 2012) (citing West v. Vought Aircraft Indus., Inc., 256 S.W.3d

618, 622 (Tenn. 2008)) (noting that a race to the courthouse protocol "engages attorneys in the undignified spectacle of literally racing to secure perceived procedural advantages."); Watson v. Watson, 658 S.W.2d 132, 134 (Tenn. Ct. App. 1983) (rejecting the argument that plaintiff had priority in boundary dispute "simply because [plaintiff] 'won the race to the courthouse' irrespective of the actual intent of any of the parties to either conveyance.").

*12 Based on the foregoing, we conclude that the trial court did not err in holding that the CCRs provided for an award of attorney's fees that arose not only out of prosecution of the Association's counterclaim, but also with regard to defending against the claims contained in Homeowner's complaint. Nothing in Homeowner's brief on appeal can be construed as arguing that the fees awarded by the trial court were unreasonable under the circumstances. As such, the decision of the trial court to award the Association \$ 28,372.06 in attorney's fees is affirmed.

CONCLUSION

The order of the Shelby County Chancery Court awarding Brunswick Forest Homeowners Association its attorney's fees and costs is affirmed. Costs of this appeal are taxed against the Appellant, Steven H. Parker, for which execution may issue if necessary.

All Citations

Slip Copy, 2019 WL 2482351

Footnotes

1 The trial judge relied on the following provision from the CCRs in rendering his decision:

Article VI, Section I of Declaration provides that:

[e]ach Owner of any Lot, by acceptance of a deed therefor, whether or not it shall be so expressed in any such deed or other conveyance, shall be deemed to covenant and agree to pay to the Association: (1) annual assessments or charges; (2) special assessments for capital improvements; and (3) emergency assessments, such assessments to be fixed, established and collected from time to time as hereinafter provided. The annual special and emergency assessments, together with such interest thereon and costs of collection thereof as are hereinafter provided, shall be a charge on the land and shall be a continuing lien upon the Lot against which each such assessment is made. Each such assessment, together with

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such interest thereon and cost of collection thereof as are hereinafter provided, shall also be the personal obligation of the Person who was the Owner of such Lot at the time when the assessment fell due.

Accordingly, the trial court found that "[Homeowner] failed to pay the assessments for 2015 and 2016."

2 Mr. Ryan no longer serves as a director of the Association.

3 Mr. Temple was still serving as the president of the Association at the time of trial.

4 It is undisputed that Homeowner did pay the assessments for 2017. It is also undisputed that after trial, on August 28, 2018, the Homeowner remitted \$ 980 to the Association in order to have the lien on Homeowner's property removed.

5 Arguably, such a finding, rendered by the trial court following a trial on the merits, is entitled to a presumption of correctness and will not be overturned unless the evidence preponderates otherwise. ¹¹ Turner v. Turner, 473 S.W.3d 257, 269 (Tenn. 2015) (citing Tenn. R. App. P. 13(d)). The evidence does not preponderate against the trial court's characterization of Homeowner's claims.

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2013 WL 3353898

Only the Westlaw citation is currently available.

United States District Court,
M.D. Tennessee,
Columbia Division.

John PILKINTON, Plaintiff,

v.

David M. HARTSFIELD; Connie Thomason,
as personal representative of Morris E. Ezell,
deceased; and Bridgnorth Partners, Defendants.

No. 1:12-cv-0026.

|

July 2, 2013.

Attorneys and Law FirmsEugene N. Bulso, Jr., Paul J. Krog, Steven A. Nieters, Leader,
Bulso & Nolan, PLC, Nashville, TN, for Plaintiff.Thomas J. Wolaver, Tisher & Wolaver, PLLC, Columbia, TN,
for Defendants.**MEMORANDUM AND ORDER**ALETA A. TRAUGER, District Judge.

*1 On June 3, 2013, the court issued a Memorandum Opinion granting the Plaintiff's Motion for Summary Judgment (Docket No. 14) on his claim to recover on a July 3, 2001 promissory note ("the Note") having a principal value of \$100,000 and bearing interest at the rate of seven percent each year.¹ (Docket No. 27.) However, in doing so, it limited the plaintiff's recovery to six of the ten annual principal installment payments of \$10,000 due under the Note. (*Id.* at 10.) Specifically, it held that he could only recover those six installments that became due between July 3, 2006 and July 3, 2011, as the due dates of the remaining installments fell outside the applicable six year statute of limitations. (*Id.*) In light of this ruling, the court ordered the plaintiff to file an affidavit setting forth a revised figure reflecting the total sum of principal and interest due and recoverable under the Note. (Docket No. 28.)

On June 14, 2013, the plaintiff timely filed a declaration from his counsel, Steven A. Nieters of the law firm Leader, Bulso & Nolan PLC ("Nieters Declaration"), in support of

his damages claim. (Docket No. 29.) The declaration contains a revised calculation of \$97,893.36 in principal and interest recoverable under the Note through June 24, 2013. (*Id.* ¶ 3.) It also requests reasonable attorney's fees in the amount of \$15,578.25 and costs of \$3,151.75 pursuant to the Note's express provisions.² (Docket No. 29-1.) Finally, the Nieters Declaration makes a request for \$15,000 in estimated costs to collect upon the judgment in this case. (Docket No. 29 ¶ 10.) In sum, the plaintiff seeks a total damages award of \$131,623.36, along with continuing interest of \$11.92 per day to begin after June 24, 2013³ and run until the date that a judgment is entered in this case.⁴ (*Id.* ¶ 11.) The defendants timely filed their objections to the declaration on June 21, 2013. (Docket No. 30.)

I. Principal and Interest

At the outset, the court notes that the defendants do not object to the calculation of principal and interest shown in Exhibit 1 of the Nieters Declaration. Nonetheless, in performing its own review of the calculations, the court has discovered a significant computational error contained therein. This error involves the calculation of simple interest between July 3, 2006 and July 3, 2011 attributable to the six annual installment payments totaling \$60,000 that are recoverable under the Note. As the court previously stated, the principal value of the Note is to bear interest at the rate of seven percent each year. Seven percent of the \$60,000 in principal that is recoverable here equals \$4,200. In Exhibit 1 of the Nieters Declaration, interest during the aforementioned time period is calculated to be \$29,400. (Docket No. 29-1.) However, that figure reflects the amount of simple interest attributable to seven, rather than six annual installment payments. A reduction of \$4,200 from the \$29,400 figure is thus warranted. With this change, the court will award the plaintiff \$93,693.36 in total principal and interest through June 24, 2013. An additional \$95.36 in interest will be awarded to reflect the eight days that have run since June 24, 2013 to the date of this Memorandum and Order.⁵

II. Attorney's Fees and Incurred Costs

*2 The defendants primarily direct their objections to the reasonableness of the attorney's fees sought by the plaintiff. (Docket No. 30 at 1.) Specifically, they object to the fact that the plaintiff's case was staffed with three attorneys from Leader, Bulso & Nolan. (*Id.*) Pointing to the billing statements contained in Exhibit 2 of the Nieters Declaration, they argue that all three attorneys performed similar tasks on multiple

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occasions, such as preparing for the Initial Case Management Conference held on June 4, 2012 and having multiple internal discussions about case developments. (*Id.* at 2.) They also contend that, because the plaintiff only recovered 60% of the total principal value of the Note due to the applicable statute of limitations, the court should impose a similar proportional adjustment on the request for reasonable attorney's fees. (*Id.* at 3–4.)

In diversity cases, the determination of attorney's fees and costs are governed by state law. *Hometown Folks, LLC v. S & B Wilson, Inc.*, 643 F.3d 520, 533 (6th Cir.2011). Where, as here, a contract provides for reasonable attorney's fees and costs, “[t]he parties are entitled to have their contract enforced according to its express terms.” *Wilson Mgmt. Co. v. Star Distrib. Co.*, 745 S.W.2d 870, 873 (Tenn.1988). The Tennessee Supreme Court has noted that the appropriate factors to consider in determining a reasonable attorney's fee include:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent;
- (9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) Whether the fee agreement is in writing.

Wright ex. rel. Wright v. Wright, 337 S.W.3d 166, 176–77 (Tenn.2011); see also Tennessee Rule of Professional

Conduct (“RPC”) 1.5(a). These factors are not exclusive and each factor may not be relevant to every case. RPC 1.5, cmt. 1. Moreover, while a review of these factors should guide a court's analysis, “ultimately[,] the reasonableness of the fee must be based upon the particular circumstances of the individual case.” *White v. McBride*, 937 S.W.2d 796, 800 (Tenn.1996).

Before delving into an analysis of the relevant *Wright* factors, the court first addresses the defendants' objection concerning the staffing of this case by the plaintiff's counsel. It is true, as the defendants note, that the firm representing the plaintiff in this matter, Leader, Bulso & Nolan PLC, staffed the case with three attorneys: Eugene N. Bulso, Jr., Steven A. Nieters, and Paul J. Krog. However, the billing records attached to the Nieters Declaration demonstrate that the attorney commanding the highest hourly rate of \$350, Mr. Bulso, only devoted 4.5 hours to this case, which constituted 5% of the firm's 86.85 total billable hours on the matter. (Docket No. 29–2 at 1.) The attorney with the next highest hourly rate of \$250, Mr. Nieters, worked 19.5 hours, which represented 23% of the hours billed. (*Id.*) Finally, the attorney with the lowest hourly rate of \$145, Mr. Krog, accounted for the lion's share of the billable hours on this matter, as he spent 62.85 hours or 72% of the hours billed. (*Id.*) Given this breakdown, the court fails to see how the staffing of this case by the plaintiff's counsel was unreasonable.

*3 Nevertheless, having reviewed the billing records relating to the June 4, 2012 Initial Case Management Conference, the court questions the reasonableness of the total number of hours collectively billed by the plaintiff's counsel in connection with this fairly routine event. The Case Management Order issued by the court was brief (only three pages long) and did not reference any uniquely complex issues affecting the management of this case. However, in light of its 40% reduction to the plaintiff's fee request, *see infra* at p. 7, the court need not make a specific adjustment to the fees sought in connection with this event. As for the time billed by the plaintiff's counsel to discuss case developments and strategy, the court's review of the billing records has not revealed anything out of the ordinary. Nor have the defendants identified any specific billing entries as being particularly egregious.

The court now turns its attention to consider those factors outlined in *Wright* that have relevance to the instant case. While the defendants do not challenge the hourly rates charged by the plaintiff's law firm, the court finds, based

on its experience with this firm and its familiarity with the rates charged by other comparable firms within this judicial district, that the rates charged in this matter were reasonable. Moreover, the court also acknowledges that the plaintiff was counseled by experienced and reputable attorneys who diligently prosecuted this case through the summary judgment stage and obtained a favorable ruling for their client.

Nonetheless, the court notes that this was not a terribly complex case. Indeed, as the plaintiff proclaimed in the opening salvo of his summary judgment brief, “[t]his is a simple action on a simple promissory note.” (See Docket No. 15 at 1.) The case did not present any novel legal questions, but instead hinged on a straightforward application of Chapter 3 of the Tennessee Uniform Commercial Code governing negotiable instruments and the well-settled statute of limitations on actions to enforce an installment note. Nor did it involve complex and wide-reaching discovery. Indeed, the defendants note that they did not serve written discovery on the plaintiff and that neither party took any depositions. (Docket No. 30 at 2.) In addition, when examining the results obtained in this litigation, the court observes that, while the plaintiff demanded payment of the Note's total principal value of \$100,000 plus interest, his recovery was ultimately limited by the statute of limitations to \$60,000 plus interest.

Focusing on the amount involved in this litigation and the results obtained, the defendants urge the court to proportionally adjust any award of reasonable attorney's fees to match the ratio of the plaintiff's success to what he actually demanded. (Docket No. 30 at 4.) Taking into account all of the circumstances of this case, the court believes that such an adjustment is warranted. Because the plaintiff recovered 60% of the total principal value of the Note, the court will similarly award reasonable attorney's fees equaling 60% of the requested \$15,578.25, which yields a revised sum of \$9,346.95. The Sixth Circuit previously approved of a Tennessee district court's use of this methodology in fixing a reasonable attorney's fee award in a case invoking diversity jurisdiction. ⁶ See *Hometown Folks, LLC*, 643 F.3d at 536 (noting that “the district court did not err in placing primary

reliance on the ratio of Hometown's success to what it claimed in calculating an attorneys' fee award”). Moreover, the court believes that the adjusted fee award strikes a reasonable balance in compensating the plaintiff's counsel for its diligent prosecution of this case to a favorable outcome, while also taking into account the less than full recovery obtained in this fairly straightforward matter.

*4 The plaintiff also seeks to recover the costs incurred by his counsel in prosecuting this case thus far. While the defendants do not appear to directly challenge the reasonableness of the incurred expenses sought, the court believes that, in light of the foregoing discussion, a similar adjustment should be made. Therefore, the court will award 60% of the requested \$3,151.75 in incurred costs, which yields a revised sum of \$1,891.05.

III. Estimated Collection Costs

Finally, the defendants have raised an objection to the \$15,000 in estimated collection costs sought by the plaintiff's counsel. (Docket No. 30 at 4.) According to the Nieters Declaration, this amount is a reasonable estimate of the costs necessary to collect upon the judgment in this case, given the need for asset discovery and for working through the Tennessee Probate Court. ⁶ (Docket No. 29 ¶ 10.) The defendants object to this request as being speculative and note that awarding estimated collection costs now may give the plaintiff's counsel an unearned windfall. (Docket No. 30 at 4.) This objection is persuasive. Indeed, the court is not inclined to award such a large sum of estimated costs that have yet to be incurred. Accordingly, this specific request will be denied at this time. Of course, nothing here precludes the plaintiff from seeking, at a later time, recovery for the costs that were actually incurred in collecting upon the judgment in this case.

CONCLUSION

Based on the foregoing, the plaintiff is hereby AWARDED damages in the sum of \$105,026.72. This total damages award consists of the following components:

Principal and Interest Through 6/24/13:	\$93,693.36
Per Diem Interest at \$11.92 after 6/24/13:	\$95.36
Attorney's Fees:	\$9,346.95
Incurred Costs:	\$1,891.05

Total:

\$105,026.72

Entry of this order shall constitute the judgment in this case.
It is so Ordered.

All Citations

Not Reported in F.Supp.2d, 2013 WL 3353898

Footnotes

- 1 A more thorough recitation of the factual background underlying this case appears in the court's June 3, 2013 Memorandum Opinion.
- 2 Specifically, the Note states that the "[m]aker ... agree[s] to pay reasonable attorney's fees and all court and other costs that Holder may incur in the course of efforts to collect the debt." (Docket No. 1–1.) In its June 3, 2013 Memorandum Opinion, the court noted that the plaintiff was the Note's holder and defendant Bridgnorth Partners was its maker. (Docket No.27 at 1.)
- 3 This date corresponds to the first business day following the deadline for the defendants to file their objections to the damages sought by the plaintiff.
- 4 The per diem interest of \$11.92 corresponds to the formula interest rate (7.25%), applicable under the Note's default provision and Tenn.Code Ann. § 47–14–105. As the plaintiff notes, the formula rate announced by the Tennessee Department of Financial Institutions has been 7.25% at all relevant times. See <https://news.tn.gov/taxonomy/term/73> (last visited July 2, 2013).
- 5 To arrive at this figure, the court multiplied the \$11.92 per diem figure corresponding to the formula rate by eight, which represents the number of days that have elapsed since June 24, 2013.
- 6 Both of the individuals who executed the Note in question on behalf of Bridgnorth Partners, David M. Hartsfield and Morris E. Ezell, are now deceased. (See Docket Nos. 10 and 31.) Mr. Ezell passed away on July 2, 2012 (Docket No. 10), while Mr. Hartsfield recently passed away on June 21, 2013 (Docket No. 31).

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2015 WL 12791467

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Only the Westlaw citation is currently available.

United States District Court, M.D.
Tennessee, Nashville Division.Denise SAVAGE, Plaintiff,

v.

CITY OF LEWISBURG, TENNESSEE, Defendant.

1:10-0120

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Signed 02/24/2015

Attorneys and Law FirmsCharles H. Barnett, III, Lewis L. Cobb, Jr., Teresa A. Luna,
Spragins, Barnett & Cobb, PLC, Jackson, TN, for Plaintiff.Stephen W. Elliott, Howell & Fisher, Nashville, TN, for
Defendant.**ORDER**

MARVIN E. ASPEN, District Judge:

*1 Presently before us is Plaintiff's counsel's affidavit of attorneys' costs and fees, filed pursuant to our December 3, 2014 order granting in part Plaintiff's motion for discovery sanctions. For the reasons discussed below, we award Plaintiff \$3,576.50, which is the total claim of \$4,834.58 offset by the amounts attributable to counsel's November 12, 2014 trip to Lewisburg.

In her motion for sanctions, Plaintiff requested that we sanction Defendant for failing to comply with discovery orders and requested attorneys' costs and fees for bringing the motion. We granted Plaintiff's motion in part, finding that Defendant was negligent in allowing certain audio recordings to become inaccessible, but denying Plaintiff's request as to other categories of documents. (*See* Dkts. 147 & 163.) We further noted that, under Federal Rule of Civil Procedure 37(b)(2)(C), some reasonable attorneys' fees and expenses associated with bringing the motion were warranted and ordered Plaintiff to file an affidavit of reasonable costs and attorneys' fees within thirty days after trial. (Dkt. 147 at 7.)

Plaintiff filed the requested affidavit of her attorney Brandon White, seeking \$4,567.50 for Mr. White's attorney's fees and

\$267.08 in costs. (Dkt. 175, B. White Aff., Ex. A.) Defendant objects only to the portions of the fees and costs related to Mr. White's trip to Lewisburg on November 12, 2014. (Dkt. 176, Def's Obj.) It does not raise any objections to the hourly attorney rate or the other hours billed or copying costs.

We will first address the fees and costs associated with Mr. White's November 12, 2014 trip to Lewisburg. Plaintiff seeks \$1,080.00 in attorney's fees and \$178.08 in costs for this trip, which Mr. White states he took, in large part, to retrieve the inaccessible audio recordings. (Dkt. 177, B. White Aff. in Resp. ¶ 10.) Defendant objects that Plaintiff's counsel never communicated that Mr. White was driving to Lewisburg in order to pick up the audio recordings, and contends that the sole purpose of the trip was instead to inspect personnel files. (Def's Obj.) Since the personnel files were not part of the Court's sanction award, Defendant argues that Plaintiff is not entitled to recover fees and costs for the trip. (*Id.*) Plaintiff's counsel has not directed us to any communication notifying Defendant that Mr. White intended to pick up the audio recordings on November 12. To the contrary, correspondence between counsel before the visit indicates that the primary purpose for the trip was to review personnel files. (B. White Aff. in Resp., Ex. A.) Moreover, Mr. White does not dispute that he and co-counsel did in fact review personnel records for approximately nine hours that day, disarming any argument that, but for his intent to retrieve the audio recordings, the fees and costs would not have accrued. Accordingly, Defendant's objection to the November 12, 2014 trip fees and costs is sustained.

Next, while Defendant did not object to the remaining fees or costs, we nonetheless conducted an independent review and find them reasonable. First, Mr. White represents that he reduced the stated costs and fees by the amounts attributable to aspects of the sanctions motion that we denied. (B. White Aff. ¶ 10.) Since we have no reason to disbelieve Mr. White and Defendant did not object on this basis (other than the November 12 issue), it appears that the remaining request is appropriately limited to fees and expenses incurred in litigating the successful aspects of the sanctions motion.

*2 Second, the hourly rate of \$225 used to calculate counsel's fees—which Mr. White represents is the rate traditionally used by Plaintiff's law firm for associates working on plaintiff's cases—is reasonable and appears consistent with the hourly rates charged by attorneys in this district. *See Johnson v. City of Clarksville*, 256 Fed.Appx. 782, 784 (6th Cir. 2007) (affirming award of attorneys' fees

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at hourly rate of \$250); *Rich v. Sevier*, No. 11 C 0362, 2011 WL 2669263, at *1 (M.D. Tenn. July 7, 2011), *report and recommendation adopted sub nom. Rich v. Severe Records*, 2011 WL 3154754 (M.D. Tenn. July 26, 2011) (finding hourly rates ranging from \$200 to \$250 were reasonable and “in line with the hourly rates charged by attorneys in the Middle District of Tennessee”); *Guesthouse Int’l Franchise Sys., Inc. v. British Am. Props. MacArthur Inn, LLC*, No. 7 C 814, 2009 WL 792570, at *10 (M.D. Tenn. Mar. 23, 2009) (approving award of attorneys’ fees at an average hourly rate of \$271); *Carroll v. United Compucard Collections, Inc.*, No. 99 C 152, 2008 WL 3001595, at *4 (M.D. Tenn. July 31, 2008) (finding hourly attorneys’ rates from \$180 to \$300 were reasonable).

Third, we approve the remaining number of hours billed. Mr. White’s affidavit includes a detailed time entry table describing the work he performed to prepare and file the sanctions motion and to search for the missing discovery. After reviewing that table, we find that 15.5 hours (20.3 minus

4.8 for the November 12, 2014 trip) is a reasonable amount of time to litigate the audio recording discovery dispute. In sum, we conclude that the lodestar calculation for warranted attorney’s fees is \$3,487.50.

Finally, we find that the requested copying charges—\$0.25 per black and white page and \$0.50 per color page—is reasonable, particularly because Defendant does not object. See *Sykes v. Anderson*, No. 5 C 71199, 2008 WL 4776837, at *8 (E.D. Mich. Oct. 31, 2008), *aff’d*, 419 Fed.Appx. 615 (6th Cir. 2011) (approving \$0.25 per page copying charges). Thus, we will award Plaintiff the entire requested amount of \$89.00 for copying expenses.

It is so ordered.

All Citations

Not Reported in Fed. Supp., 2015 WL 12791467

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2015 WL 5139304

2015 WL 5139304

Only the Westlaw citation is currently available.

United States District Court,
M.D. Tennessee,
Nashville Division.

SHONEY'S NORTH AMERICA, LLC, Plaintiff,

v.

SMITH & THAXTON, INC., et al., Defendants.

No. 3:12-cv-00625.

|
Filed Sept. 1, 2015.**Attorneys and Law Firms**James N. Bowen, Stuart A. Burkhalter, Riley, Warnock &
Jacobson, Nashville, TN, for Plaintiff.

Andre M. Smith, Farmville, VA, pro se.

Brenda K. Thaxton, Green Bay, VA, pro se.

MEMORANDUM

KEVIN H. SHARP, District Judge.

*1 Plaintiff, Shoney's North America, LLC, filed a *Motion for Award of Attorneys' Fees and Costs Against Defendants Smith & Thaxton, Inc. and Andre M. Smith* (Docket Entry No. 109), to which Defendants filed no response in opposition. The Court has reviewed all the papers filed in support of Plaintiff's motion. For the reasons discussed herein, Plaintiff's motion will be granted.

I. RELEVANT PROCEDURAL HISTORY

This case was filed in June 2012, asserting claims against Smith & Thaxton, Inc. ("Smith & Thaxton") for breach of various provisions of the parties' franchise License Agreements, and against Ballard G. Thaxton ("Mr. Thaxton")¹ and Andre M. Smith ("Mr. Smith")—the former owners of two Shoney's® franchises in Virginia, for their breach of personal guaranty of Smith & Thaxton's obligations under the License Agreements. (Docket Entry No. 1). On May 2, 2014, the Clerk of the Court entered Default Judgment against Smith & Thaxton "pursuant to

Federal Rule of Civil Procedure 55(b) (1) in the amount of \$59,430.27, plus prejudgment interest in the amount of \$168.20 and post-judgment interest at the statutory rate." (Docket Entry No. 93). Plaintiff filed a partial summary judgment on June 7, 2013 for its breach of contract claims against the individual Defendants, Mr. Thaxton and Mr. Smith (Docket Entry No. 41). On December 29, 2014, the Court granted Plaintiff's motion for summary judgment against the individual Defendants on Plaintiff's claims of breach of their guaranty agreements. The Court held Mr. Smith and Mr. Thaxton's estate (represented by his wife, Brenda K. Thaxton), jointly and severally liable on the default judgment previously entered against Smith & Thaxton. (Docket Entry No. 105).²

II. ANALYSIS

Plaintiff moves this Court for an award of attorneys' fees and costs against Defendants Smith & Thaxton and Andre Smith pursuant to Section 18.F of Plaintiff's License Agreements³ with Defendants and Rule 54(d) of the Federal Rules of Civil Procedure. (Docket Entry No. 109). The amount of attorneys' fees sought in Plaintiff's motion is \$23,224.75. This amount is calculated by multiplying the number of hours worked on this case by James N. Bowen ("Bowen"), by the hourly rate of \$325.00 per hour in calendar year 2012; \$335.00 per hour in calendar year 2013; and \$360.00 per hour in calendar year 2014—and Stuart A. Burkhalter ("Burkhalter"), by the hourly rate of \$195.00 per hour in calendar years 2012 and 2013; and \$225.00 per hour in calendar year 2014.⁴ (Docket Entry No. 110, Bowen Deck at 5 and 8). Additionally, Plaintiff seeks costs incurred in the amount of \$490.00. (*Id.* at ¶ 7).

"A reasonable fee is one that is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers." *Dowling v. Litton Loan Serv., LP*,

320 Fed. Appx. 442, 446 (6th Cir.2009) (quoting, *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir.2004)). A determination of reasonableness begins with the "lodestar" method of calculation, *i.e.*, determining a reasonable fee based on a reasonable hourly rate and reasonable number of hours of service. The United States Supreme Court described the lodestar method in *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), as follows:

*2 The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

A list of the factors to consider in establishing the lodestar fee and adjusting the fee was enunciated by the Fifth Circuit Court of Appeals in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir.1974). The Johnson factors have now become part of the settled law of lodestar analysis under both the United States Supreme Court and Sixth Circuit decisions. These factors include:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the

nature and length of the professional relationship with the client; and (12) awards in similar cases.

Hensley, 461 U.S. at 430 n. 4; Blanchard v. Bergeron, 489 U.S. 87, 92 n. 5, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989); Reed v. Rhodes, 179 F.3d 453 (6th Cir.1999).

Based on a thorough review of the information and supporting documents before the Court, in conjunction with an analysis of the aforementioned lodestar factors, the Court finds that the hours expended and rates charged by Plaintiff's attorneys are reasonable, and expenses requested are recoverable.

III. CONCLUSION

Accordingly, Plaintiff's [Unopposed] Motion for Award of Attorneys' Fees and Costs Against Defendants Smith & Thaxton, Inc. and Andre M. Smith (Docket Entry No. 109) is hereby GRANTED. Plaintiff shall be awarded \$23,714.75 for reasonable attorneys' fees and costs in this matter.

An appropriate Order shall be entered.

ORDER

For the reasons set forth in the accompanying Memorandum, Plaintiff's Motion for Award of Attorneys' Fees and Costs Against Defendants Smith & Thaxton, Inc. and Andre M. Smith (Docket Entry No. 109) is hereby GRANTED. Plaintiff is awarded \$23,224.75 in attorneys' fees and \$490.00 in costs, for a total of \$23,714.75.

It is SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5139304

Footnotes

¹ The Court notes that Defendant has not requested attorneys' fees against Mr. Thaxton (or his estate).

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- 2 Since Plaintiff failed to address their federal claims for trademark and service mark violations in the summary judgment motion, the Court deemed those claims abandoned and dismissed them with prejudice.
- 3 Pursuant to Section 18.F of Shoney's License Agreements with Smith & Thaxton:
In any proceeding to enforce or interpret any provision of this Agreement, or appeal of that proceeding, the party prevailing in the proceeding will be entitled to reimbursement of its costs and expenses, including (without limitation) accounting and attorneys' fees.
(Docket Entry No. 1.2 at § 18.F; No. 1.3 at § 18.F).
- 4 Billable time was also expended by paralegal DeDe Gibby ("DDGP") at a rate of \$110.00 per hour.

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT JACKSON.

Sypriss SMITH

v.

ALL NATIONS CHURCH OF GOD et al.

No. W2019-02184-COA-R3-CV

September 16, 2020 Session

FILED 11/25/2020

Appeal from the Circuit Court for Madison County, No. C-17-41, Donald H. Allen, Judge**Attorneys and Law Firms**Robert David Martin and Thomas W. Shumate, IV, Nashville, Tennessee, for the appellant, Sypriss Smith.Nathan Blake Pride, Jackson, Tennessee, for the appellee, All Nations Church of God d/b/a Covenant Child Care Development Center.J. Steven Stafford, P.J., W.S., delivered the opinion of the court, in which Arnold B. Goldin, and Carma Dennis McGee, JJ., joined.**OPINION**

J. Steven Stafford, P.J.

*1 Former employee sued her former employer for retaliatory discharge under the Tennessee Public Protection Act, disability discrimination, and religious discrimination. Former employee voluntarily dismissed the religious discrimination claim prior to trial; the jury returned a verdict in favor of the former employee on only the retaliatory discharge claim, awarding total damages of \$15,500.00, inclusive of punitive damages. Former employee then sought an award of over \$100,000.00 in attorney's fees under the applicable statutes, which the trial court reduced to \$12,500.00, the same amount of punitive damages awarded

by the jury. Former employee appeals only the attorney's fee award. We vacate the judgment of the trial court and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On February 17, 2017, Plaintiff/Appellant Sypriss Smith ("Appellant") filed a complaint against a number of defendants, including Defendant/Appellant All Nations Church of God ("All Nations," and together with the individual defendants, "Defendants").¹ Therein, Appellant alleged that she had been employed by All Nations in the daycare center that it operated. On or about June 9, 2016, however, All Nations terminated Appellant's employment. Appellant alleged that the termination was illegal and set forth three separate theories in support thereof: (1) disability discrimination based on the necessity that Appellant receive allergy shots during the work week; (2) retaliation for Appellant's action in reporting other workers in the daycare for child abuse; and (3) discrimination based on Appellant's refusal to attend All Nations church services. According to Appellant, these allegations resulted in three separate claims: (1) a violation of the Tennessee Public Protection Act ("TPPA"), for retaliation against a whistleblower; (2) a violation of the Americans with Disabilities Act and the Tennessee Disability Act ("TDA"); and (3) a violation of the Civil Rights Act and the Tennessee Human Rights Act ("THRA") due to religious discrimination.

Appellant alleged that she was unable to find alternative employment and that she suffered extreme stress, pain, suffering, and humiliation as a result of the termination of her employment. For these injuries, Appellant requested back pay, front pay, and other compensatory damages "in an amount not less than \$100,000.00"; punitive damages "in an amount not less than \$500,000.00"; a permanent injunction; and pre- and post-judgment interest, costs, and reasonable attorney's fees.

On March 20, 2017, Defendants answered the complaint, denying the material allegations contained therein. Generally, the answer denied that Appellant's employment was terminated for any unlawful reason.

Appellant next asked for leave to amend her complaint to state that the Equal Employment Opportunity Commission ("EEOC") had issued her a "right to sue" letter with regard to her disability and religious discrimination claims. The

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subject letter was attached to Appellant's motion. All Nations responded in opposition to Appellant's request, arguing that the EEOC did not grant Appellant a "right to sue" letter. Rather, Defendants alleged that the EEOC found no "cause upon which [Appellant] could rely upon [] as a basis for a lawsuit." Thus, All Nations argued that Appellant should not be permitted to amend her complaint.

Appellant responded, arguing that All Nations' contention that she was not awarded a "right to sue" letter was baseless, as the letter was attached to her motion. Relevant to this case, Appellant also asserted that she could "only speculate that Defendants are attempting to drive up costs by forcing [Appellant's] counsel to drive two hours, each way, to attend a routine hearing on a motion that the Defendants do not have a good faith basis for opposing." Appellant therefore gave notice of her intention to file Rule 11 sanctions should the response to the motion to amend "not be withdrawn." On May 26, 2017, the parties entered into an agreed order that the motion to amend the complaint be granted. The amended complaint was then filed and Defendants answered, again denying the material allegations contained therein.

***2** On June 26, 2017, Appellant filed a notice of voluntary nonsuit as to all of the individual defendants, leaving only All Nations as a defendant. The trial court entered an order confirming the voluntary dismissal on June 29, 2017.

The parties thereafter entered into a period of discovery. All Nations requested additional time to respond on July 20, 2017, on the basis of the "complexity" of the files requested. All Nations also was required to amend its admissions when it inadvertently admitted one request that it intended to deny.

In January 2018, Appellant requested a continuance of the trial scheduled for May 2018. Therein, Appellant admitted that counsel was not present for a docket call when the case was set for trial, but alleged that no notice was provided of the docket call. Appellant further noted that discovery was ongoing and no depositions had yet been taken. All Nations responded that it was present for the docket call and that the trial could take place as scheduled, despite discovery still taking place. According to All Nations, the only outstanding discovery was due from Appellant. In February 2018, the trial court entered a scheduling order setting dates for the completion of discovery, depositions, expert disclosures, and dispositive motions. A trial was set for October 16, 2018.

Each party thereafter scheduled depositions of the other parties' witnesses. On October 14, 2018, Appellant filed a motion to exclude a witness because she had not been previously disclosed by All Nations. This witness was first disclosed on October 1, 2018, approximately two weeks prior to trial. All Nations responded in opposition on October 10, 2018. Therein, All Nations stated that it had no objection to a continuance being granted to allow Appellant to depose the witness. All Nations disclosed two additional witnesses on October 11, 2018. It also appears that Appellant at some point disclosed her own "surprise" witness. The trial court thereafter entered an order allowing discovery to be reopened and resetting the trial date for January 30, 2019. The order further required that the parties participate in mediation prior to trial. The parties later filed a joint motion to continue the trial for a third time. The trial court ordered mediation to take place by March 30, 2019, and for trial to take place on July 9, 2019.

On March 27, 2019, Appellant filed a motion for an extension of the time period for holding mediation and for relief from the costs of mediation. Therein, Appellant alleged that although mediation was both ordered and scheduled, All Nations refused to participate in mediation. As such, Appellant was required to pay a \$250.00 cancellation fee and asked to be reimbursed those funds and all attorney's fees incurred, as well as for a short extension on the time to mediate.

All Nations did not deny that it refused to participate in mediation, but attempted to assert that its action was in good faith. In particular, All Nations responded that "unfortunately, [All Nations was] brutally honest in [its] belief[], that perhaps that time, that Mediation may not be helpful" and that to mediate the case "would be an admission of falsehood and a lie." All Nations indicated that although counsel prepared for mediation, All Nations' pastor refused to participate, as he "did not feel in his heart, that would be in his best interest." All Nations further contended that it acted in good faith by informing Appellant of its intent not to mediate. All Nations therefore asked that mediation be reset, but denied that Appellant should receive any reimbursement.

***3** The trial court entered an order requiring the parties to mediate the case and put forth a good faith effort at resolution no later than May 15, 2019. All Nations was to be solely responsible for the fees associated with the prior cancellation. The trial court, however, held Appellant's

request for attorney's fees in abeyance. Unsurprisingly, no settlement was reached at mediation.

On July 1, 2019, Appellant filed two motions in limine to exclude portions of one witness's testimony, as well as certain statements by All Nations counsel. Appellant also filed a motion in limine to be allowed to distribute a juror questionnaire during voir dire. On July 3, 2019, All Nations filed two motions in limine of its own, one seeking to limit the testimony of one of Appellant's witnesses and one seeking to exclude a letter related to Appellant's alleged allergy diagnosis. Appellant responded in opposition to All Nations' motions in limine, asserting that objections should be dealt with on a "statement-by-statement basis[.]" and that the subject letter was admissible because claims under the TDA do not require the support of expert proof. The trial court apparently did not enter any written order ruling on the pending motions in limine pre-trial.

At some point, Appellant voluntarily dismissed her claim under the THRA.² The trial was eventually held on July 23 and 24, 2019 on Appellant's claims under the TPPA and the TDA. Following the proof, the jury returned a verdict in favor of Appellant as to her TPPA claim and awarded her \$2,500.00 for lost wages, \$500.00 in emotional damages, and \$15,500.00 in punitive damages.³ The jury did not return a verdict in Appellant's favor as to the remaining claim under the TDA. The trial court entered a judgment in this amount on August 1, 2019, which judgment reserved requests for attorney's fees and costs.

On August 23, 2019, Appellant filed a motion for attorney's fees and costs. Therein, Appellant alleged that she was entitled to attorney's fees as the prevailing party under the TPPA, and that she had incurred \$107,756.91 in attorney's fees, court costs of \$497.50, and discretionary costs of \$2,870.00. Appellant also requested both pre- and post-judgment interest. Appellant filed a memorandum in support of the motion, as well as a letter sent to All Nations during the proceedings warning of the high amount of attorney's fees, detailed time sheets showing the work performed by Appellant's counsel on the matter, a declaration from Appellant's lead counsel, a 2013 fee survey showing the fees charged to be in line with both the Nashville and Memphis areas, and declarations from two unaffiliated attorneys as to the reasonableness of the fees in relation to both a TPPA claim and compared to other attorneys in the Middle Tennessee area.

On September 11, 2019, All Nations filed a motion to pay the \$15,500.00 judgment into the court. Appellant opposed the payment because the court had yet to rule on the pending motions for attorney's fees. Eventually, the judgment was paid to Appellant, though apparently under protest. On September 18, 2019, All Nations responded in opposition to Appellant's attorney's fees request, characterizing the amount as excessive, not reflective of the TPPA claim alone, and unreasonable. All Nations agreed to the payment of court costs and discretionary fees, argued that \$10,000.00 in attorney's fees was reasonable, and denied that interest should be awarded.

*4 Of course, Appellant responded to All Nations' opposition, asserting that the fees were statutorily required, that they were an accurate reflection of the work required to prevail on the TPPA claim, and that Appellant and her counsel should not be deprived of their full attorney's fees simply because Appellant was a low wage worker entitled to only a small amount of compensation. For this argument, Appellant likened her TPPA claim to a civil rights action. Additionally, Appellant argued that All Nations failed to consider all of the factors for determining reasonable attorney's fees under the Rules of the Tennessee Supreme Court.

The attorney's fees dispute was heard on September 20, 2019. Therein, Appellant argued that the fees were reasonable given the two years of litigation, the two-day trial, and All Nations sometimes contumacious conduct, particularly with regard to mediation. The trial court pointed out, however, that some of the delays were attributable to Appellant. All Nations argued that the hourly fees charged by Appellant's counsel were not in line with the fees of Madison County; Appellant pointed out that All Nations provided no proof whatsoever of the customary fees charged in the locality. In the end, the trial court focused heavily on the fact that that Appellant was awarded a mere \$15,500.00 in damages, after having requested \$600,000.00 in damages in her complaint. The trial court also stated that the jury rejected Appellant's TDA claim; Appellant argued that the jury could not legally find in favor of Appellant on both her TPPA claim and her TDA claim, as under the TPPA, the retaliation must be the sole reason for the termination of employment.

In any event, the trial court entered an order on November 13, 2019, awarding Appellant only a portion of the requested attorney's fees. Specifically, the trial court's order stated as follows:

The Plaintiff requests attorneys' fees and expenses of \$107,756.91. The Court finds this amount to be excessive because of the amount of damages awarded by the jury and because the jury did not find in favor of Plaintiff on her alternative claim for relief under the Tennessee Disability Act, and Plaintiff voluntarily dismissed her alternative claim under the Tennessee Human Rights Act prior to trial. Additionally, the Court finds that the hourly rate charged by the Plaintiff's attorneys is not in line with the hourly rates of attorneys in Jackson, Tennessee. The Court finds that \$12,500, the amount the jury awarded as punitive damages, to be a reasonable award of attorneys' fees. As such, the Court awards the Plaintiff \$12,500 in attorneys' fees, \$497.50 in court costs, and \$2,870 in discretionary costs.

The Court denies the Plaintiff's request for pre-judgment interest. The Court finds that the trial could have favored either party, so pre-judgment interest is not appropriate.

From this order, Appellant appeals.

ISSUES PRESENTED

Appellant raises several issues in her appellate brief.⁴ As we perceive it, there are two issues in this appeal:

1. Whether the trial court abused its discretion in awarding Appellant only \$12,500.00 in attorney's fees.
2. Whether Appellant should be awarded attorney's fees incurred in this appeal.

DISCUSSION

I.

*5 Under the American Rule, litigants in our courts typically bear the cost of their own attorney's fees unless fee shifting is permitted by contract or statute, or some recognized exception to the rule applies. *Eberbach v. Eberbach*, 535 S.W.3d 467, 474 (Tenn. 2017). In this case, Appellant prevailed in her claim that her employment was terminated for her refusal to remain silent about illegal activities under the TPPA. The TPPA provides that "[a]ny employee terminated in violation of subsection (b) solely for refusing to participate

in, or for refusing to remain silent about, illegal activities who prevails in a cause of action against an employer for retaliatory discharge for the actions shall be entitled to recover reasonable attorney fees and costs." *Tenn. Code Ann. § 50-1-304(c)(2)*. As such, there is no dispute in this appeal that Appellant was entitled to reasonable attorney's fees incurred in prosecuting her action.

When reasonable attorney's fees are permitted by statute, however, the trial court generally has considerable discretion in fixing the amount of the fees awarded. *See Killingsworth v. Ted Russell Ford, Inc.*, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002) ("[A] determination of reasonable attorney's fees and costs is necessarily a discretionary inquiry."). As we have explained,

There is no fixed mathematical rule in this jurisdiction for determining reasonable fees and costs. This being the case, an appellate court will normally defer to a trial court's award of attorney's fees unless there is "a showing of an abuse of [the trial court's] discretion." *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App. 1987)[.]

Id. (one citation omitted); *see also Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005) (quoting *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995)) ("The allowance of attorney's fees is largely in the discretion of the trial court, and the appellate court will not interfere except upon a clear showing of abuse of that discretion.").

The Tennessee Supreme Court has also provided guidance for courts in determining reasonable fees:

The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;

- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

Tenn. Sup. Ct. R. 8, RPC 1.5(a). Where attorney's fees are at issue, the Tennessee Supreme Court has explained the appropriate procedure to be followed by the trial court:

In terms of procedure, the trial court should develop an evidentiary record, make findings concerning each of the factors, and then determine a reasonable fee that depends upon the particular circumstances of the individual case. To enable appellate review, trial courts should clearly and thoroughly explain the particular circumstances and factors supporting their determination of a reasonable fee in a given case.

Wright ex rel. Wright v. Wright, 337 S.W.3d 166, 185–86 (Tenn. 2011) (internal quotation marks, alterations, and citations omitted). When the trial court's order provides no indication that it considered the reasonableness of the fee or any of the RPC factors, the appropriate remedy is to vacate and remand for the trial court to make an express determination as to the reasonableness of the fees. See, e.g., **Ferguson Harbour Inc. v. Flash Mkt., Inc.**, 124 S.W.3d 541, 552–53 (Tenn. Ct. App. 2003) (remanding fee award for reconsideration where the trial court made “no specific findings as to the factors which justify this amount in fees”); **Southwind Residential Properties Ass'n, Inc. v. Ford**, No. W2016-01169-COA-R3-CV, 2017 WL 991108, at *13 (Tenn. Ct. App. Mar. 14, 2017) (remanding where “the trial court's

ruling makes no mention of many of the factors outlined under Rule 1.5” and “neither the trial court's oral ruling, nor its written order, contains any finding that the award is reasonable under the circumstances”).

*6 There can be no dispute that the trial court considered at least some of the factors contained in RPC 1.5. Still, Appellant argues that the trial court erred in failing to consider all of the above factors. According to Appellant, the trial court gave only minimal consideration to three factors (1, 3, and 8), focused nearly exclusively on a single factor (4), and ignored the remaining factors.

We begin with consideration of the factors that the trial court allegedly ignored. Even to the extent that we agree with Appellant that consideration of all the factors would have been helpful in this particular case,⁵ we cannot find fault in the trial court's failure to consider many of the above factors. For example, although it appears undisputed that Appellant's fee agreement was in writing, see Tenn. Sup. Ct. R. 8, RPC 1.5(a)(10), Appellant does not address this factor in any fashion in her appellate brief. The same is true of any consideration of whether the fee was advertised. See Tenn. Sup. Ct. R. 8, RPC 1.5(a)(9). These omissions appear to result from Appellant's failure to cite to the current version of Rule 1.5, rather than caselaw quoting a prior version of the rule from nearly two decades ago. Still, we concede that these factors may have less relevance in a case in which a party is seeking payment of his or her attorney's fees from the opposing party rather than seeking to resist the attorney's fees charged by his or her own counsel.

Appellant does assert, however, that other factors not considered by the trial court favor a larger award in this case. In particular, Appellant asserts that factor two, regarding the likelihood that the acceptance of the employment would preclude other work by the lawyer, and factor five, regarding the time limitations imposed by the client, are in her favor. See Tenn. Sup. Ct. R. 8, RPC 1.5(a)(2) & (5). In support, Appellant alleged that the case required the attorneys “to dedicate nearly all of their work hours” to preparation and that the matter took away from other work. First, we note that no proof was presented that there were any time limitations imposed by the situation or the circumstances. For example, this is not a case where an attorney was required “to ‘drop everything else’ and immediately become involved in a representation shortly before a scheduled hearing or on the eve of a closing or similar legal undertaking[.]” **Lowe v. Johnson Cty.**, No. 03A01-9309-CH-00321, 1995 WL

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306166, at *3 (Tenn. Ct. App. May 19, 1995) (holding that such facts “can dictate ... that a larger than normal fee is required in order to satisfy the standard of reasonableness” with regard to this factor). Likewise, we cannot conclude that proof was presented to show that this case precluded other employment. While it is true that upon the eve of trial, much work was devoted to Appellant's case, as Appellant repeatedly states, this case was pending for two years. The time sheets submitted clearly indicate that Appellant's case did not require full devotion during this entire period. Instead, it appears that this case was a rather typical contingency fee case that allowed Appellant's attorneys to work on other matters during its pendency. Nor is this a case in which counsel chose to represent an unpopular client and “thereby foregoes an opportunity to attract other clients because of the unpopular client.” *Id.* Given the dearth of proof presented on these factors and the fact that the proof in the record does not support Appellant's arguments, we cannot conclude that the trial court erred in making no express findings as to these factors.

*7 Appellant also takes issue with the trial court's failure to consider factor six relating to the length of the professional relationship between the client and the attorney. *See Tenn. Sup. Ct. R. 8, RPC 1.5(a)(6)*. Appellant insists that the short-term relationship between herself and her counsel militates in favor of a higher fee. *See Lowe v. Johnson Cty.*, No. 03A01-9309-CH-00321, 1995 WL 306166, at *3 (Tenn. Ct. App. May 19, 1995) (“A preexisting, ongoing professional relationship, such as a retainer relationship between a business and an attorney or a relationship between an insurance company and its regular defense counsel, can militate, in some circumstances, for a lesser fee than would be reasonable for a one-time representation for the same legal work.”) (footnote omitted). We cannot, however, agree that the trial court did not consider this factor. Although not included in the trial court's written order, the trial court's oral ruling indicates that it did not rule on this factor because neither party put on proof about the relationship between the parties.⁶ While oral rulings that are not incorporated into a trial court's written order are generally not part of the trial court's official ruling, *see Steppach v. Thomas*, 346 S.W.3d 488, 522 (Tenn. Ct. App. 2011), we simply cannot ignore this oral statement to conclude that the trial court in fact improperly failed to consider this factor. Thus, taking into account the trial court's oral ruling, we cannot conclude that the trial court improperly ignored this factor. Given that no proof was presented on this issue, we can find no error in

the trial court's determination that this factor favored neither party's argument.

Appellant also asserts that the trial court's failure to properly consider factor seven, regarding the experience of the attorneys, *see Tenn. Sup. Ct. R. 8, RPC 1.5(a)(7)*, negatively affected a factor that the trial court did consider, the hourly rate charged in the locality. *See Tenn. Sup. Ct. R. 8, RPC 1.5(a)(3)*. At the hearing on Appellant's fee request, All Nations asserted that the rates charged by Appellant's counsel were excessive compared to the rates charged by Jackson, Tennessee attorneys. Rather than the \$275.00 per hour that Appellant's lead counsel charged for both in-court and out-of-court time, All Nations asserted that a rate of \$150.00 per hour for in-court time and \$100.00 per hour for out-of-court time was reasonable. The problem with this assertion is that All Nations presented no proof whatsoever to support this assertion. And statements of counsel are simply not evidence. *Dayhoff v. Cathey*, No. W2011-02498-COA-R3-JV, 2012 WL 5378090, at *2 (Tenn. Ct. App. Nov. 1, 2012) (citing *Metro. Gov't of Nashville & Davidson Co. v. Shacklett*, 554 S.W.2d 601, 605 (Tenn. 1977)).

We agree that some cases have suggested that in the absence of countervailing proof as to the fees customarily charged in the locality, a claim that the fee is excessive on this basis should not prevail. *See Carihfield v. Carihfield*, No. 02A01-9103CV00020, 1991 WL 222224, at *3 (Tenn. Ct. App. Nov. 4, 1991) (“The husband argues that the \$200 per hour charged by the wife's lead counsel exceeds the customary fee charged by counsel in Lauderdale County. There is no evidence in the record, however, to indicate what the customary fee is in Lauderdale County.”); *Keith v. Howerton*, 165 S.W.3d 248, 253 (Tenn. Ct. App. 2004) (reversing the trial court due, in part, to the fact that “defendants introduced no countervailing evidence to show the requested fees were unreasonable”). Other authorities suggest, however, that the trial court may call upon its own judgment and expertise in determining a proper rate in the locality. *Cf. Connors v. Connors*, 594 S.W.2d 672, 677 (Tenn. 1980) (“[T]his Court is not bound either by the expert opinion of lawyers as to the value of professional services or the action of the lower courts when in our judgment the fees allowed are excessive or inequitable.”); *see also District Court Procedures Appellate Review*, SNETLSAF § 5.12 (“In determining the prevailing market rate in the community, the district court may draw upon its own expertise. Although this is a relevant consideration, most courts stress that the governing rates should also be supported by record

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evidence.”). Indeed, Appellant, relying on federal caselaw, concedes in her brief that trial courts may rely on their “own knowledge and experience in handling similar fee requests.”

Van Horn v. Nationwide Prop. & Cas. Ins. Co., 436 F. App’x 496, 499 (6th Cir. 2011); see also *Wright*, 337 S.W.3d at 180–81 (“Regardless of the approach used, the determination of what constitutes a reasonable fee is still a subjective judgment based on evidence and the experience of the trier of facts, and the reasonableness of the fee must depend upon the particular circumstances of the individual case.”) (emphasis added) (internal citations and quotation marks omitted).

*8 Even assuming that the trial court was permitted to determine the appropriate hourly rate in the locality in the absence of proof, however, the trial court in this case failed to actually do that in a way that affords meaningful appellate review. As previously discussed, the trial court made a specific finding that the hourly rates charged by Appellant’s counsel were not in line with the rates of the locality. The trial court did not, however, provide any detail to illuminate its reasoning for reaching this result.

For example, the trial court did not discuss the experience of Appellant’s counsel. See *Tenn. Sup. Ct. R. 8, RPC 1.5(a) (7)* (directing the trial court to consider the experience and reputation of the attorney requesting the fee). Appellant asserts that the affidavits she provided indicate that these rates were appropriate given the experience of her counsel. On the other hand, however, Appellant’s lead counsel was a relatively recent law school graduate who lauded his educational, rather than his trial, experience. And there was little to no proof presented as to the reputations of Appellant’s attorneys. The trial court gave no indication that it considered these facts or that these factors favored one party’s position. The trial court also did not indicate whether Appellant could have retained competent counsel in her local area to represent her. Cf. *Crihfield*, 1991 WL 222224, at *3 (“[I]n a case such as this where the parties live in a rural area such as Lauderdale County, the possibility exists that one of the parties may need to go to the nearest major city to find disinterested or competent counsel. In light of these factors, we find that the trial court did not abuse its discretion in allowing the plaintiff an attorney’s fee based on the \$200 per hour rate charged by her lead counsel.”). This consideration appears to be quite relevant in this case, as at least one of the declarations filed by an independent lawyer in support of the attorney’s fees request indicated that the case was “undesirab[le]” due to the high

burden of proof required of TPPA actions and that he would not have accepted this case due to that issue.

Far more importantly, however, the trial court did not indicate what it believed to be the proper market rate for the representation in this case. The trial court’s failure to provide this Court with any indication of the market rate of the locality hinders our appellate review, as we have no way to evaluate how the trial court reached the figure it chose for the ultimate award of attorney’s fees. If All Nations had provided some support for its assertion of the proper rate in the locality, perhaps we could “fill in the blanks” to exercise appropriate appellate review and afford the trial court appropriate deference. In this case, however, there was no proof presented of the appropriate rate in the locality and no determination by the trial court of the appropriate rate. Thus, in order to review this case, we would simply be guessing at how the trial court reached its decision. Applying the necessary presumption of correctness based on mere assumptions and guesswork is simply not appropriate. Cf. *Hadjopoulos v. Sponcia*, No. E2015-00793-COA-R3-CV, 2016 WL 1728250, at *4 (Tenn. Ct. App. Apr. 28, 2016) (“[W]e are left to guess or assume in order to conduct appellate review. We decline to do so.”); *Friendship Water Co. v. City of Friendship*, No. W2019-02039-COA-R9-CV, 2020 WL 4919796, at *4 (Tenn. Ct. App. Aug. 21, 2020) (“As it is, the trial court’s order does not provide a satisfactory explanation as to why the court concluded that the parties’ contract was legally valid. Accordingly, this largely leaves this Court in an untenable position to speculate.”). Nor does an order that requires us to guess as to the reasoning employed comply with the Tennessee Supreme Court’s guidance in this area. See *Wright*, 337 S.W.3d at 185–86.

*9 Given the trial court’s heavy reliance on this factor, without some indication of the hourly rate that should be applied, or at least an approximation of the amount of hours that were necessary to prosecute Appellant’s claims,⁷ the ultimate award chosen by the trial court appears no more than an arbitrary reduction to reflect the amount of punitive damages awarded.⁸ A decision that is arbitrary may constitute an abuse of discretion. See *Carothers v. Giles Cty.*, 162 Tenn. 492, 39 S.W.2d 584, 586 (Tenn. 1931) (quoting *Scott v. Marley*, 124 Tenn. 388, 137 S.W. 492, 493 (Tenn. 1911)) (“In the first place, the discretion which is conferred on the judge is a judicial discretion, and is not an arbitrary, vague, or fanciful discretion, but is a legal and regular power or discretion, the abuse of which by the judge is subject to review

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by writ of error or by appeal.”); *Martin v. Franklin Cool Springs Corp.*, No. M2014-01804-COA-R3-CV, 2015 WL 7062124, at *4 (Tenn. Ct. App. Nov. 10, 2015) (citing *Brown v. Shappley*, 290 S.W.3d 197, 200 (Tenn. Ct. App. 2008) (“An abuse of discretion occurs when the decision of the lower court has no basis in law or fact and is therefore arbitrary, illogical, or unconscionable.”). Other courts have applied this rule when the trial court arbitrarily reduces a requested fee.

See *Hansen v. Moore*, No. G025047, 2002 WL 1019078, at *4 (Cal. Ct. App. May 21, 2002) (holding that the trial court abused its discretion in arbitrarily reducing the amount of attorney's fees requested). But see *Elgohary v. Lakes on Eldridge N. Cmty. Ass'n, Inc.*, No. 01-14-00216-CV, 2016 WL 4374918, at *13 (Tex. App. Aug. 16, 2016) (affirming the amount of attorney's fees awarded even after the trial court characterized its own reduction as “completely arbitrary”). In fact, this Court has previously held that a trial court abused its discretion when it reduced the hours incurred by an attorney without “point[ing] out which of the hours on the detailed bills before him were out-of-line” or explaining “how many hours would have been reasonable under the circumstances of this suit.” *Lowe*, 1995 WL 306166, at *5. This failure along with others resulted in the trial court's decision being reversed. *Id.* at *5–6.

All Nations contends, however, that the reduction was not arbitrary, relying on its unsupported argument that the fees charged by Appellant's counsel were out-of-line with the locality, the trial court's finding that the case was simple, and their contention that the other factors considered by the court support the reduction. But Appellant denies that the trial court was correct in its consideration of these factors.

For example, Appellant asserts that in finding that the case was simple, the trial court failed to consider the high burden of proof necessary in TPPA claims, as well as the affidavit of disinterested attorneys that, given the nature of TPPA claims, the requested amount of attorney's fees was reasonable. See *Tenn. R. Sup Ct. 8, RPC 1.5(a)(1)* (involving the difficulty of the questions involved in the case, the skill required, and the time and labor required). Indeed, one of the independent declarations filed in support of the attorney's fees request indicated that due to the high burden, a TPPA claim is undesirable. Appellant further contends that the trial court's basis for its finding that the case was simple is erroneous. The transcript from the fee request hearing indeed reflects the trial court's statement that “this was a simple case where the church didn't believe she was performing the job. They let

her go.” We agree with Appellant that this finding is plainly contrary to the jury's finding that Appellant's employment was not terminated due to poor performance, but due to her refusal to be silent about illegal activities under the TPPA.

Moreover, Appellant asserts that the trial court failed to fully consider the amount of time that was expended due to All Nations' contumacious conduct in refusing to participate in the mediation ordered by the trial court. The time sheets do indicate that a fairly large amount of time was expended to prepare for the mediation.⁹ All Nations, however, unreasonably refused to participate in the mediation, requiring Appellant to expend more time and effort in preparation. The trial court specifically reserved the award of attorney's fees related to the mediation. At the final hearing on the motion for attorney's fees, however, the trial court suggested that it had already awarded attorney's fees related to the mediation and was corrected by Appellant. Nevertheless, the ultimate award of attorney's fees fails to mention if or how this conduct on the part of All Nations factored into the trial court's determination of the appropriate fees in this case.

*10 Appellant further contends that the trial court failed to give proper weight to the fact that this case was taken on a contingency basis, which factor often supports a higher attorney's fees award. See *Tenn. R. Sup Ct. 8, RPC 1.5(a)(8)* (directing the court to consider whether the fee was fixed or contingent); *United Med. Corp. of Tennessee v. Hohenwald Bank & Tr. Co.*, 703 S.W.2d 133, 136 (Tenn. 1986) (“An attorney's fee should be greater where it is contingent than where it is fixed.”). Although this fact was discussed during the hearing on Appellant's fee request, the trial court's ruling does not indicate that it actually considered this fact in reducing the fee awarded to Appellant.

Most importantly, Appellant contends that the trial court focused too narrowly on the amount involved and results reached in this case. See *Tenn. R. Sup Ct. 8, RPC 1.5(a)(4)*. According to Appellant, this focus amounts to a proportionality requirement that is at odds with the nature of a TPPA claim. In support of this argument, Appellant asserts that her claim under the TPPA should be likened to other claims in which proportionality is not the deciding factor. In the seminal case on this issue, the United States Supreme Court opined:

A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously

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undermine Congress' purpose in enacting § 1988 ... because ... the private market for legal services fail[s] to provide many victims of civil rights violations with effective access to the judicial process.... These victims ordinarily cannot afford to purchase legal services at the rates set by the private market.

* * *

Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries.

* * *

A rule of proportionality would make it difficult, if not impossible for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts.... Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.

City of Riverside v. Rivera, 477 U.S. 561, 576–78, 106 S. Ct. 2686, 2688, 91 L. Ed. 2d 466 (1986). The Sixth Circuit later applied this rule to award a plaintiff 100% of her requested fees under the Individuals with Disabilities Education Act, although the plaintiff only prevailed on 25% of her claims. See *Phelan v. Bell*, 8 F.3d 369, 374 (6th Cir. 1993). And because the Tennessee Consumer Protection Act is to be liberally construed in favor of protecting consumers, we applied the same rule against mandatory proportionality to claims under that statute. See *Keith v. Howerton*, 165 S.W.3d 248, 253 (Tenn. Ct. App. 2004) (holding that in consumer protection actions, “the rule of proportionality would make it difficult, if not impossible, for individuals with meritorious claims but relatively small potential of damages to obtain redress from the courts without the attorneys for such parties to be reasonably compensated for their legal services in obtaining the relief sought”). Thus, “[w]hen a plaintiff prevails in either a civil rights or consumer protection claim, his counsel will ordinarily be entitled to full compensation for time and effort expended in the representation.” *Id.* (citing

Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). Under this rule, Appellant contends that she should likewise be entitled to all of her attorney's fees, despite ultimately prevailing on only one of the three theories raised in her complaint.

*11 All Nations asserts that the trial court's failure to specifically address this argument is irrelevant, as it contends that this rule is entirely inapplicable where Appellant's claim lies under the TPPA rather than a civil rights or consumer protection statute. Moreover, All Nations asserts that even if applicable, *City of Riverside* and its progeny merely reject a requirement of proportionality between judgments and attorney's fees awards; according to All Nations, the cases do not hold that any fee award in which the trial court considered proportionality “is de facto erroneous.”

See *City of Riverside*, 477 U.S. at 574 (“The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988. It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees. We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.”) (citation omitted); *cf.*

Lowe, 1995 WL 306166, at *1 (awarding plaintiff only a portion of her requested fees related to a THRA claim). All Nations asserts that because proportionality was only one among the many factors that the trial court considered, its ruling was not an abuse of discretion.

Appellant concedes that no Tennessee court has held that the rule prohibiting mandatory proportionality applicable in civil rights and consumer protection claims should also apply to claims under the TPPA. *But see* *Maestas v. Town of Taos*, 2020-NMCA-027, ¶ 23, 464 P.3d 1056, 1063, cert. granted (Apr. 27, 2020) (holding that proportionality should be the deciding factor in determining attorney's fees in a whistleblower action). However, she argues that because TPPA claims serve to protect the same interests as claims under civil rights or consumer protection acts, the same rule should apply under the TPPA. It is true that Tennessee courts have applied the rule against mandatory proportionality to a number of statutes intended to protect the rights of others.¹⁰

Moreover, Appellant argues that proportionality is inappropriate in this particular case for two reasons. First, Appellant contends that it is error to hold her failure to prevail

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on her TDA claim is a bar to her total attorney's fees because her TDA claim was necessarily alternative to her claim under the TPPA. In other words, due to the "sole cause" standard under the TPPA, the jury could not have legally also found that she was terminated as result of a disability as, prohibited by the TDA. See *Williams v. City of Burns*, 465 S.W.3d 96, 110 (Tenn. 2015) ("[T]he TPPA requires the plaintiff to prove that retaliation for the protected conduct was the sole reason [for the termination of employment].").

*12 Moreover, Appellant contends that the majority of the work performed in this case on the competing claims cannot be extricated. Appellant contends that this situation is akin to that faced by the panel in *Lowe v. Johnson City*, which rejected such apportionment:

The defendants urge us to take into account that the plaintiff was unsuccessful on her discrimination and harassment claims. The plaintiff's three claims were based on a common core of facts. In order to demonstrate her theory as to retaliation, it was necessary to place before the jury the operative facts—what others did to and around her, her attempts to redress these perceived wrongs, and the sheriff's reaction to all of this. This is a case where it would be difficult, if not impossible, to separate the time spent on the claims on which she failed from the time spent on the successful claim. The claims and the facts supporting them are intimately related.

¹⁰ 1995 WL 306166, at *6 (involving a THRA action). Appellant contends that the same is true in this case, as the work performed by her counsel often involved the global case, rather than each claim individually. Indeed, removing the time entries that are solely attributable to Appellant's claims related to religious and disability discrimination does not account for the over 80% reduction in Appellant's attorney's fees ordered by the trial court.¹¹ Thus, Appellant asserts that further reducing her fees to remove portions that might be

attributable to her unsuccessful claims is both impossible and arbitrary.

Although Appellant generally raised the above arguments in the trial court in support of the attorney's fees request, neither the trial court's oral statements nor its written order address these arguments in any fashion. Indeed, as is evident from the above analysis, the trial court's ruling leaves us with more questions than it answers. For one, the trial court's findings with regard to the excessiveness of both the hours incurred and the hourly rate in the locality is so vague as to be practically nugatory for purposes of appellate review. Leaving out this factor, the bulk of the trial court's ruling seems to focus solely on the results obtained by Appellant in this matter. However, the Tennessee Supreme Court has generally cautioned against reliance on a single factor in determining a reasonable attorney's fee under the circumstances. See generally *Wright*, 337 S.W.3d at 180 (declining to require trial courts to focus on a single factor, but rather directing trial courts to consider all of the relevant factors and circumstances). And nothing in the record indicates that the trial court in any way considered Appellant's arguments that this case was not an appropriate circumstance for near total reliance on that factor, given the high burden required of a TPPA claim and the resulting undesirability of the case, the alternative nature of Appellant's TDA claim, and the policy of protection inherent in civil rights and consumer protection-type actions, if applicable. Moreover, the trial court's order leaves us with doubt as to whether the trial court considered All Nations' conduct with regard to the cancelled mediation, upon which the trial court had reserved attorney's fees, the contingent nature the representation, and the jury's actual verdict that the termination of Appellant's employment was unrelated to any alleged poor performance. Respectfully, these deficiencies coupled with the trial court's decision to identically mimic the jury's award of punitive damages undermines All Nations' suggestion that the fee award was actually the product of a careful weighing of all of the factors. In the absence of more specific findings by the trial court to support such a drastic reduction in fees, we must conclude that it failed to "clearly and thoroughly explain the particular circumstances and factors supporting [its] determination of a reasonable fee" in this case. *Id.* at 186. In this situation, a remand to the trial court is necessary. See, e.g., *Ferguson Harbour*, 124 S.W.3d at 552–53; *Southwind Residential Properties*, 2017 WL 991108, at *13.

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*13 Appellant, however, requests that this Court avoid remand and independently review the record to determine a reasonable fee, as this Court did in *Lowe v. Johnson County*. In that case, the plaintiff requested a fee of over \$96,000.00; the trial court awarded the plaintiff only \$12,000.00. 1995 WL 306166, at *1. After noting a number of respects in which the trial court's ruling was deficient, we held that a more appropriate attorney's fee would be little more than \$59,000.00. *Id.* at *8. Appellant asks that we perform the same review in this case and award her the full requested fee.

We decline Appellant's invitation. Since the decision in *Lowe*, the Tennessee Supreme Court had issued an opinion that emphasizes the high duty of trial courts to exercise their independent judgment in deciding the cases before them.

See generally *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 314 (Tenn. 2014). Based on this ruling, we have held that the more modern remedy for deficiencies in the trial court's explanation for its ruling is to vacate the ruling and remand to the trial court for the entry of a more illuminating order. See *Grissom v. Grissom*, 586 S.W.3d 387, 396–97 (Tenn. Ct. App. 2019) (quoting *Heun Kim v. State*, No. W2018-00762-COA-R3-CV, 2019 WL 921039, at *6 (Tenn. Ct. App. Feb. 26, 2019)) (“The more modern remedy, however, appears to be vacation of the trial court's ruling and remand for adequate findings, in light of the Tennessee Supreme Court's directive that this Court should not ‘relieve trial courts of the ‘high judicial function’ required of judicial decision-making by conducting ‘archeological digs’ of the record in an effort to support a trial court's decision.’”). This is especially true in cases in which the trial court's judgment is reviewed only for an abuse of discretion. Cf. *In re Connor S.L.*, No. W2012-00587-COA-R3-JV, 2012 WL 5462839, at *4 (Tenn. Ct. App. Nov. 8, 2012) (stating that this Court needs appropriate findings by the trial court to evaluate discretionary decisions, otherwise the appellate court is “unable to afford appropriate deference to the trial court's decision”).

The trial court here is in a far better position to determine the appropriate attorney's fees in this case. As previously noted, this Court was not provided with a transcript of the trial on this cause, making it difficult to evaluate the attorney's fees incurred at trial, as well as the overall amount of time that should have reasonably been expended in this case due to the complexity of the ultimate issues argued at trial. Moreover, the trial court in this case clearly believed, based on its experience, that the fees charged by Appellant's counsel were

too great for the locality. Unlike in *Lowe*, however, we have nothing in the record to support a determination of what a reasonable fee for the locality might be. See *Lowe*, 1995 WL 306166, at *4 (noting that defendant's counsel submitted an affidavit as proof of his position as to the fee charged in the locality). As such, we would simply be speculating by attempting to determine the fee in the locality for purposes of RPC 1.5(a)(3).

Moreover, even if the *Riverside* rule is applicable to Appellant's TPPA claim, it does not appear to remove the trial court's discretion; a remand will therefore give the trial court an opportunity to expressly rule on Appellant's arguments concerning proportionality in conjunction with its consideration of the other applicable factors. See *City of Riverside*, 477 U.S. at 574 (allowing the trial court to consider a multitude of factors even when its rule is applicable); *Wright*, 337 S.W.3d at 180–81 (holding that the amount of fees to be awarded is left to the trial court's subjective judgment after consideration of the appropriate factors); *Lowe*, 1995 WL 306166, at *1 (declining to award all of the requested attorney's fees based on consideration of all the applicable factors). Allowing the trial court to first pass its judgment upon these arguments is crucial due to the deferential standard of review that this Court must employ in evaluating a trial court's attorney's fee award. Cf. *St. John-Parker v. Parker*, No. E2018-01536-COA-R3-CV, 2020 WL 1491371, at *19 (Tenn. Ct. App. Mar. 27, 2020) (“Given the trial court's discretion, these arguments should be considered by the trial court in the first instance.”). Under these circumstances, we conclude that the most appropriate remedy is to vacate the judgment of the trial court and remand for the entry of a more detailed order. We understand that such a remand will require Appellant to incur additional attorney's fees in the trial court proceedings following this appeal. The trial court should take this into account on remand.

II.

*14 Appellant also seeks an award of attorney's fees incurred in this appeal. Appellant concedes that the award of fees on appeal is discretionary and that this court should consider a number of factors, including her success on appeal, the relative financial conditions of the parties, and whether the appeal was taken in good faith. See, e.g., *(Cooley) v. Cooley*, 543 S.W.3d 674, 688 (Tenn. Ct. App. 2016) (quoting *Chaffin*

v. Ellis, 211 S.W.3d 264, 294 (Tenn. Ct. App. 2006)) (“‘When considering a request for attorney’s fees on appeal, we also consider the requesting party’s ability to pay such fees, the requesting party’s success on appeal, whether the requesting party sought the appeal in good faith, and any other equitable factors relevant in a given case.’”). There can be no dispute that this appeal was taken in good faith. But while we know that at the time of the events in this case Appellant was making close to minimum wage, there is little in the record concerning All Nations’ ability to pay or Appellant’s current financial circumstances. We have also agreed with Appellant that the trial court’s order was deficient in some respects. As such, additional proceedings are necessary to resolve the dispute at the center of this appeal. Based on these considerations, we respectfully decline to award attorney’s fees on appeal. Should an additional appeal be necessary, however, Appellant may

also request payment of the fees incurred in this appeal, if warranted.

CONCLUSION

The judgment of the Madison County Circuit Court is vacated and remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellee, All Nations Church of God d/b/a Covenant Child Care Development Center, for which execution may issue if necessary.

All Citations

Slip Copy, 2020 WL 6940703

Footnotes

- 1 Appellant also sued a number of individuals affiliated with All Nations. As noted *infra*, these individuals were later voluntarily dismissed.
- 2 There is no order to this effect in the record, nor is there a transcript of the trial. Rather, this fact was mentioned in the trial court’s order granting, in part, Appellant’s request for attorney’s fees. It does not appear to be disputed.
- 3 The jury form is not included in the record, but these figures are not in dispute.
- 4 Specifically, Appellant frames her issues as follows:
 1. The Tennessee Public Protection Act (“TPPA”) provides that a successful plaintiff must be awarded her reasonable attorney’s fees. After two years of discovery, seven depositions, three trial continuances, two attempts at mediation, and a two-day trial in which the jury found for the plaintiff, Ms. Smith, and awarded her compensatory and punitive damages, Ms. Smith requested approximately \$107,000 in attorney’s fees and expenses. Are these fees and expenses reasonable?
 2. In support of her attorney’s fee request, Ms. Smith submitted a detailed accounting of hours worked on the case by each attorney and paralegal who contributed to the successful verdict, two affidavits of other employment lawyers attesting to the reasonableness of their hourly rates and time spent on the case, and a fee survey showing comparable rates in the region. The Defendants produced no countervailing evidence or affidavits. Yet the trial court reduced Ms. Smith’s attorney’s fees by approximately 88.31% to \$12,500, for an effective hourly rate of only \$35 per hour. Was this an abuse of discretion?
 3. In reducing the attorney’s fees award by over \$94,000, the trial court held that \$12,500 was a reasonable attorney’s fee because it was proportional to the punitive damages awarded by the Jury. Was this an abuse of discretion?
 4. Because of the Trial Court’s reduction in attorney’s fees by over \$94,000, Ms. Smith’s attorneys have had to expend additional time and effort on this appeal. Should the Plaintiff’s attorneys be awarded their attorney’s fees and costs incurred in pursuing this appeal?

As is evident from the above, Appellant assigns no error to the trial court’s decision to deny both pre- and post-judgment interest.

- 5 We note that the Tennessee Supreme Court has specifically rejected use of a “lodestar” approach to determining the reasonableness of fees in which only the hourly rate and the reasonable time expended are necessary to determine the fee. Instead, the court held that all the factors should be given weight. See **Wright**, 337 S.W.3d at 180.
- 6 Specifically, the trial court stated that “I can’t really comment on the time and length of the relationship between the clients and the attorneys.” This was the only mention of the length of the professional relationship at the hearing.
- 7 The trial court did indicate that case was simple, but it did not state how many hours were necessary to prosecute it. We assume, however, that the trial court did reduce the hours incurred substantially, as leaving the time entries intact results in Appellant’s attorney’s receiving an hourly fee of approximately \$35.00 per hour, which is far less than even the lower limit argued by All Nations. In order to avoid this absurdity, we must therefore assume that the trial court found both the hourly amount and the time expended excessive, although the trial court’s order certainly does not clearly express such a finding.
- 8 That is not to say, however, that these are the only factors that should be considered. See **Wright**, 337 S.W.3d at 180 (rejecting such an approach).
- 9 The time sheets indicate that Appellant was billed nearly \$4,000.00 for work performed in preparation for the first mediation. This represents more than 30% of the fees ultimately awarded by the trial court.
- 10 Appellant asserts that this Court held in **Whitney v. First Call Ambulance Service, et al.**, No. M2018-01155-COA-R3-CV, 2019 WL 2026495 (Tenn. Ct. App. May 8, 2019), that the elements of a TPPA claim and THRA claim are “nearly identical.” The **Whitney** opinion does not state this. Rather, we characterized the elements of a THRA claim as
- (1) membership in a protected class; (2) racially motivated conduct that constituted an unreasonably abusive or offensive work-related environment or which adversely affected the reasonable employee’s ability to do his or her job; (3) the employer knew or should have known of the harassment; and (4) the employer failed to respond with prompt and appropriate corrective action.
- Id.** at *3. In contrast, we described the elements of a TPPA claim as requiring the plaintiff prove “(1) his status as an employee; (2) his refusal to participate in, or remain silent about, illegal activities; (3) the employer’s discharge of the employee; and (4) an exclusive causal relationship between his refusal to participate in or remain silent about illegal activities and his termination by the employer.” **Id.** at *4. A prior version of that case that was later vacated on rehearing did state that THRA claims and claims under Title VII of the Civil Rights Act of 1964 were “virtually identical.” **Whitney v. First Call Ambulance Serv.**, No. M2018-01155-COA-R3-CV, 2019 WL 1594929, at *2 (Tenn. Ct. App. Apr. 15, 2019), *opinion vacated on reh’g*, No. M2018-01155-COA-R3-CV, 2019 WL 2053526 (Tenn. Ct. App. May 6, 2019), and *superseded sub nom. Whitney v. First Call Ambulance Service, et al.*, No. M2018-01155-COA-R3-CV, 2019 WL 2026495 (Tenn. Ct. App. May 8, 2019). Obviously, a comparison to the federal civil rights statute does not equate to a statement that the THRA and the TPPA are also nearly identical.
- 11 We will not tax the length of this opinion with a detailed recitation of the time entries that were solely attributable to the non-TPPA claims. Suffice it to say that they make up a small portion of the fees allegedly incurred.

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Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

THEMIS CAPITAL and Des Moines
Investments Ltd., Plaintiffs,
v.
DEMOCRATIC REPUBLIC OF CONGO
and Central Bank of the Democratic
Republic of Congo, Defendants.

No. 09 Civ. 1652(PAE).

Signed Sept. 4, 2014.

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge.

*1 On July 9, 2014, the Court entered judgment in favor of Themis Capital, LLC ("Themis") and Des Moines Investments, Ltd. ("Des Moines") (collectively, "plaintiffs" or "Themis") in their breach-of-contract lawsuit against the Democratic Republic of the Congo (the "DRC") and the Central Bank of the Democratic Republic of the Congo ("Central Bank of the DRC") (collectively, "defendants").

Dkt. 213; *Themis Capital, LLC v. Democratic Republic of Congo*, No. 09 Civ. 1652(PAE), 2014 WL 3360709 (S.D.N.Y. July 9, 2014) ("July 9, 2014 Opinion"). The Court held that plaintiffs were entitled to recover the principal, interest, and compound interest on debt that had been restructured-pursuant to a Restructuring Credit Agreement ("Credit Agreement")-in 1980, and which had gone unpaid since 1990.

The Court, however, reserved judgment on plaintiffs' application for the reimbursement of attorneys' fees and costs. The Court directed the parties to brief those issues. On August 8, 2014, plaintiffs submitted a motion for such fees and costs, Dkt. 218, an accompanying memorandum of law, Dkt. 219 ("Themis Br."), and a declaration in support, Dkt. 220 ("Hranitzky Decl."). On August 15, 2014, defendants filed a memorandum of law in opposition, Dkt. 223 ("DRC Br.").

For the reasons that follow, the Court approves an award to plaintiffs from defendant DRC, representing attorneys' fees

and costs. However, as described in this decision, the Court has reduced the size of, and excluded discrete items from, plaintiffs' application. The Court also holds that the award of fees and costs runs solely against the DRC, and not against co-defendant the Central Bank of the DRC.

I. Defendant Responsible for Paying Fees and Costs

At the outset, defendants seek a ruling that plaintiffs may recover an award for attorneys' fees and costs solely from the DRC-and not the Central Bank of the DRC. The basis for this argument is that under the Credit Agreement, only the "Obligor" is responsible for paying such fees and costs, and the DRC alone is defined as the "Obligor."

The Court agrees with defendants. The relevant provision of the Credit Agreement states that:

The Obligor agrees to pay, in the currency in which incurred:

...

(iv) to each Bank and Agent upon its demand all out-of-pocket expenses (including, without limitation, all counsel fees and court costs, stamp taxes, duties and fees) incurred in connection with investigating any Event of Default or enforcing this Agreement or suing for or collecting any overdue amount payable by the Obligor hereunder or otherwise protecting its rights in the event of any failure by the Obligor or Bank of Zaire to comply with the provisions [of the Credit Agreement.]

Credit Agreement § 12.05(a) (emphasis added). The Credit Agreement defines the Republic of Zaire as the "Obligor," see Credit Agreement at R-1; it is undisputed that the DRC is the successor-in-interest to the Republic of Zaire. Accordingly, any award for attorneys' fees and costs is binding solely on the DRC, not the Central Bank of the DRC.

*2 This ruling is consistent with the Court's July 9, 2014 Opinion, which held, *inter alia*, that the DRC and the Central Bank of the DRC are jointly and severally liable for all damages awarded to plaintiffs. See *2014 WL 3360709*, at *30-31. The basis of that ruling was that two provisions in the Credit Agreement- § 9.01 and § 8.03-expressly make "the Central Bank of the DRC legally responsible for paying plaintiffs the principal and interest owed them." *Id.* at *30. By contrast, here, no provision in the Credit Agreement analogously obliges the Central Bank of the DRC to pay the fees and costs that plaintiffs incurred in enforcing the

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agreement. Accordingly, plaintiffs may recover the award for attorneys' fees and costs only from the DRC, and not from the Central Bank of the DRC.

II. Assessment of Plaintiffs' Fee Application

In their application for fees and costs, plaintiffs request a total of \$4,197,131.54, broken down as follows:

- \$3,793,121.35 in fees for attorneys and support staff;
- \$273,371.63 in costs for expert witnesses, translators, and interpreters; and
- \$130,638.56 in other litigation costs.

Defendants object to plaintiffs' request on three grounds: that (1) certain categories of fees should be excluded from the fee award ("category objections"); (2) the amount requested in attorneys' and support staff fees is unreasonable ("fee reasonableness objections"); and (3) the amount requested for experts and other litigation costs is unreasonable ("cost reasonableness objections"). The Court addresses each objection in turn.

A. Category Objections

1. Work Between October 3 and November 12, 2013

Defendants first argue that fees should not be granted for the "entire period between October 3 and November 12, 2013." DRC Br. at 3. As defendants note, the original deadline set by the Court for the parties' joint pretrial order ("JPTO") was October 22, 2013. Dkt. 159. On October 3, 2013, plaintiffs' counsel, Dechert LLP ("Dechert"), informed counsel for defendants, DLA Piper LLP ("DLA Piper"), that plaintiffs agreed to waive the issue of actual authority and to submit the case on the papers without a live trial. The parties then worked together on the JPTO based on this shared understanding. On October 22, 2013, however, Dechert informed DLA Piper that plaintiffs had changed course, that plaintiffs would no longer waive the actual authority argument, and that a live trial was therefore necessary on that point. The same day, the Court held a telephone conference with the parties to address this issue. The Court permitted plaintiffs to pursue the claim of actual authority and granted plaintiffs' request for an extension of time, until November 12, 2013, to submit the JPTO. Dkt. 162. However, in recognition that plaintiffs' change of course had potentially inconvenienced defense counsel, the Court directed plaintiffs to "reimburse defendants for reasonable out-of-pocket costs (not fees),

which defendants and defendants' counsel expended due to their reliance on plaintiffs' statement, on October 3, 2013, but now repudiated, that it was waiving the issue of actual authority." *Id.*

*3 Based on this sequence of events, defendants argue that, because plaintiffs' change of strategy was responsible for the extra work that each side did preparing the JPTO, plaintiffs ought not be reimbursed for the fees or costs that plaintiffs incurred between October 3 and November 12, 2013. This, defendants represent, would reduce plaintiffs' reimbursable fees by \$450,326.50. DRC Br. at 3.

The Court agrees with defendants that plaintiffs' fee application should be reduced to reflect this circumstance, but does not agree as to the scope of the proposed remedy. Plaintiffs ought not be reimbursed for any fees or costs incurred during the period when the parties were working under the assumption that actual authority had been waived and would not be an issue in the case—*i.e.*, the period beginning on October 3, 2013 and extending up to and including October 22, 2013. In the interest of clarity, the Court categorically excludes all fees and costs incurred by plaintiffs' counsel during this period, even though some work during this period assuredly related to projects or issues unaffected by plaintiffs' change of position as to actual authority, and even though some of plaintiffs' counsel's work on October 22, 2013 likely postdated counsel's call with the Court, in which the Court authorized plaintiffs to litigate the issue of actual authority. This order applies to the fees and costs both of Dechert, plaintiffs' lead counsel, and Miller & Wrubel P.C. ("Miller & Wrubel"), which also represented plaintiffs. However, there is no charter for excluding, from the sum to be reimbursed, fees and costs incurred *after* October 22, 2013, by which point plaintiffs' position as to actual authority had come to rest. The DRC properly is responsible for reimbursing plaintiffs for fees and costs incurred after October 22, 2013.

As discussed below, the Court is not equipped itself to tabulate the sum of fees and costs incurred by plaintiffs between October 2 and October 22, 2013. The Court will therefore leave it to the parties to tabulate that figure.

2. "Second Generation" Compound Interest

Defendants next argue that plaintiffs are not entitled to fees related to their claim for "second generation" compound interest. DRC Br. at 3. Defendants argue that plaintiffs are entitled to fees and costs only to the extent they were the "prevailing party" in this litigation. Because plaintiffs did

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not prevail on their claim for “second generation” compound interest, *see* July 9, 2014 Opinion, [2014 WL 3360709](#), at *1 (“plaintiffs are not entitled to recover any compound interest on such compound interest”), defendants argue that plaintiffs may not recover fees or costs incurred in pursuit of that claim.

The Court rejects this argument, for a number of independent reasons. First, defendants, relying on [Green v. Torres](#), 361 F.3d 96 (2d Cir.2004), wrongly depict it as a hard and fast rule that reimbursement may not be had for fees and costs associated with a failed claim. *Green* states only that a district court “may exclude any hours spent on severable unsuccessful claims.” [361 F.3d at 98](#) (emphasis added). It does not require a district court to do so. *See* [Rozell v. RossHolst](#), 576 F.Supp.2d 527, 538 (S.D.N.Y.2008) (“Reasonable paying clients may reject bills for time spent on entirely fruitless strategies while at the same time paying their lawyers for advancing plausible though ultimately unsuccessful arguments.”). Moreover, *Green* arose in the context of awarding fees to a successful plaintiff in a case brought under [42 U.S.C. § 1983](#), under which the payment of fees is, by statute, expressly limited to the “prevailing party.” *See* [42 U.S.C. § 1988\(b\)](#) (“[T]he court, in its discretion, may allow the prevailing party ... a reasonable attorney’s fee.”). But the Credit Agreement here is not cast in those terms, but in broader ones:

*4 It commits the Obligor to pay “without limitation, all counsel fees and [costs] ... incurred in connection with investigating any Event of Default or enforcing this Agreement or suing for or collecting any overdue amount payable by the Obligor hereunder or otherwise protecting its rights in the event of any failure by the Obligor or Bank of Zaire to comply with the provisions [of the Credit Agreement.]”

In any event, on the facts of this litigation, plaintiffs’ claim for compound interest does not afford a basis for reducing the fees and costs for which plaintiffs are to be reimbursed. Plaintiffs clearly prevailed not only in their effort to enforce the Credit Agreement so as to recoup the principal amount of their loans to the DRC, but also in their effort to receive interest on that principal sum, and indeed also compound interest on interest on principal. The only recovery which plaintiffs sought but failed to receive was for “second generation” compound interest. This aspect of the case, however, was a far cry from

the “central relief sought.” Indeed, it was not briefed with any distinctness: The briefs for both sides barely referenced the issue of “second generation” compound interest, treating it instead as bound up in plaintiffs’ broader bid for compound interest (which defendants resisted, but on which, as noted, plaintiffs largely prevailed). Instead, the line drawn between first—and second-generation compound interest was drawn largely by the Court itself, based on its independent analysis of the Credit Agreement.

For these reasons, the Court declines to reduce the award of fees and costs to reflect plaintiffs’ unsuccessful attempt to obtain second-generation interest.

3. Plaintiff’s July 24, 2013 Letter

Finally, defendants seek to strike the fees and costs associated with Dechert’s drafting of a July 24, 2013 letter to the Court regarding plaintiffs’ “subsequently aborted request for summary judgment.” DRC Br. at 5. In that letter, plaintiffs asked the Court, with expert discovery having concluded, for leave to permit them to renew their motion for summary judgment. Dkt. 156. At a conference with the parties on August 1, 2013, however, the Court concluded, and plaintiffs appeared to come to agree, that it would be more time—and costeffective to resolve the issues of actual and apparent authority at a bench trial.

The Court declines to penalize plaintiffs for proposing to attempt to resolve this case at summary judgment, even if the Court eventually decided that a bench trial was the better and more efficient course. *See* [Rozell](#), 576 F.Supp.2d at 538. Plaintiffs’ advocacy of summary judgment was legitimate and indeed helped focus the Court on the pros and cons of the casemanagement options available to it. There is no basis to suggest that plaintiffs’ proposal to move for summary judgment was the product of bad faith or dilatory conduct. Defendants’ application to reduce plaintiffs’ fee award on that ground is, therefore, denied.

B. Fee Reasonableness Objections

*5 Next, defendants assert that the amount that plaintiffs seek in fees for attorneys and paralegals is unreasonable.¹ Defendants argue that both the number of hours, and the hourly rates at which plaintiffs seek to be compensated, are unreasonable.

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"Under New York law, 'when a contract provides that in the event of litigation the losing party will pay the attorneys' fees of the prevailing party, the court will order the losing party to pay whatever amounts have been expended by the prevailing party, so long as those amounts are not unreasonable.'" *Antidote Int'l Films, Inc. v. Bloomsbury Pub., PLC*, 496

F.Supp.2d 362, 364 (S.D.N.Y.2007) (quoting *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1263 (2d Cir.1987)). "A variety of factors informs the court's determination of whether a requested amount of attorneys' fees is reasonable or unreasonable, including the difficulty of the questions involved; the skill required to handle the problem; the time and labor required; the lawyer's experience, ability and reputation; the customary fee charged by the Bar for similar services; and the amount involved." *Id.* (citation omitted). District courts have broad discretion to determine both the reasonable number of compensable hours and the reasonable hourly rate. See *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Plaintiffs are to be compensated only for "hours reasonably expended on the litigation," and not for hours "that are excessive, redundant, or otherwise unnecessary." *Id.* at 433-34.

Here, plaintiffs' request-prior to the exclusion the Court has made for the October 3-22, 2013 period-is for \$3,729,973.82 in attorneys' fees (\$3,590,185.07 billed by Dechert and \$139,788.75 billed by Miller & Wrubel) and \$314,319 in fees for legal assistants, office support, and office administrative staff (\$307,736.72 billed by Dechert and \$6,582.28 billed by Miller & Wrubel).² *Hranitzky Decl. Ex. D.* The total request for fees paid to Dechert and Miller & Wrubel, therefore, equals \$4,044,292.82. Defendants propose that these fees be reduced, across-the-board, by (1) one-third to account for unreasonable hours, and (2) 20% to account for unreasonable rates.

The Court has closely, and at length, examined plaintiffs' counsels' billing records, particularly those of Dechert, which did the vast majority of work on plaintiffs' behalf. The Court does not believe there is a basis for the sizeable across-the-board adjustments that defendants pursue. However, there is a basis for more targeted reductions to the proposed fee award, as detailed below.

1. Number of Hours Billed for Attorneys

First, some reduction is merited in light of the sheer number of attorney timekeepers who billed time on the case. A total

of 48 attorneys from Dechert billed time on this case. This consisted of 10 partners, one counsel, one senior attorney, 32 associates, two law clerks, one staff attorney, and one summer associate. See *Hranitzky Decl. Ex. D.* The Court does not fault plaintiffs for such staffing. The case lasted for five years, during which time some turnover of personnel, particularly at junior levels, was inevitable. It also called upon a variety of litigation skill-sets. Inevitably, however, with that many attorneys, some inefficiency creeps in, as new entrants to the case are required to get up to speed, and to learn relevant facts, law, and strategy.

*6 To address these problems, plaintiffs have proposed to "voluntarily exclude[] the majority of hours worked by various Dechert employees who spent less than ten hours working on this matter, or who billed less than \$2,000 to it."³ *Themis Br.* at 22. However, plaintiffs' formulation-in which they state that they have excluded "the majority of hours worked" by such attorneys-leaves unclear to the Court which specific employees, and which specific hours, have been excluded.

In the Court's judgment, two separate, more substantial excisions are warranted to take account of these inefficiencies and to address the DRC's legitimate concern about overstaffing. First, the Court will exclude *all* time entries by *all* attorneys who billed less than 25 hours total to the case. By the Court's calculation, this would remove 34 Dechert attorneys from the bill-nine partners, one senior attorney, 22 associates, one law clerk, and one summer associate. See *Hranitzky Decl. Ex. D.* Plaintiffs would then be reimbursed for the hours billed by 14 Dechert attorneys-one partner, one counsel, 10 associates, one law clerk, and one staff attorney. This adjustment would, by the Court's calculation, reduce plaintiffs' fee award by \$102,217.77.⁴

Second, the Court will reduce by 10%, across the board, the hours for the remaining Dechert attorney timekeepers. This reduction achieves two purposes. First, it reflects the staffing inefficiencies addressed above. Second, although by and large Dechert's time entries were admirably clear and sufficiently detailed, this adjustment takes account of occasional (but far from widespread) instances of block billing, or vague time entries, that the Court has noted in the course of reviewing Dechert's time entries.

In addition, with respect to two Dechert attorney timekeepers, the Court is reducing the hours worked by 20%, rather than by 10%. These are the attorneys who billed 1,314.30 hours

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and 806.50 hours, respectively, to the case. The Court has no reason whatsoever to doubt that these attorneys worked these hours, and that they did so diligently, productively, and with complete professionalism. However, defendants are correct that these two attorneys, as a formal matter, have engaged in fairly frequent “block billing,” which the Court defines as grouping multiple tasks into a single billing entry, so as to leave unclear how much time was devoted to each constituent task. On many occasions, these two attorneys compressed more than five hours of work on multiple tasks into a single time entry, without specifying the time spent on each task. For instance: (1) 10.5 hours to “prepare for and attend deposition of professor Songa, follow up re waiver issues, communications with plaintiffs’ counsel, prepare outline for central bank dep, review documents produced” (Oct. 22, 2012); (2) 9.0 hours for “tel con with H Tether to discuss response to Butler report, draft outline of H Tether report to send to the expert, review DRC law expert report and discuss same with the experts, follow up re travel logistics and dep arrangements for DRC law experts, meet with [colleagues] to review the task list” (Aug 2, 2013); (3) 9.3 hours for “finalize pretrial filings, numerous communications with defense counsel, review and suggest revisions to summary exhibit, arrange for copying of exhibits, review draft letter to the court, review Red Barn calculations, review dep designations” (Oct. 21, 2013); (4) 8.2 hours for “team meeting in New York for discovery plan, drafting letter to the court, exchanging emails regarding discovery” (Aug. 7, 2012); (5) 7.1 hours for “research case law in response to motion to amend answer, research proof of assignment case law, review letter to court” (March 4, 2013); and (6) 9.1 hours for “drafting and editing pretrial filings, findings of fact, conclusions of law, deposition designations” (Oct. 16, 2013).

*7 By the standards used in this District in fee-shifting cases, these entries are impermissibly broad. To be sure, there is no *per se* rule against block billing, see *Rodriguez v. McLoughlin*, 84 F.Supp.2d 417, 425 (S.D.N.Y.1999), but to justify imposing an award of attorney’s fees on an opposing party, counsel must provide enough information for the Court, and the adversary, to assess the reasonableness of the hours worked on each discrete project. The block billing at issue here effectively prevented the Court, and the DRC, from independently assessing whether the time spent on each task was reasonable. Accordingly, the Court decreases the total number of compensable hours for these two attorneys by 20%.

See *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 173 (2d Cir.1998) (upholding 20% reduction in fee award because

of “vagueness, inconsistencies, and other deficiencies in the billing records,” including block billing); *Abeyta v. City of New York*, No. 12 Civ. 5623(KBF), 2014 WL 929838, at *5 (S.D.N.Y. Mar.7, 2014) (“[G]iven the vague nature of certain entries in the spreadsheet documenting the hours worked by defendants’ counsel, the Court hereby decreases the total number of hours for which compensation is sought by 10%.”); *Wise v. Kelly*, 620 F.Supp.2d 435, 452 (S.D.N.Y.2008) (reducing fees by 25% because certain entries were too vague to enable the court to assess their reasonableness).

The Court estimates that these adjustments-reducing the compensable hours for Dechert’s attorneys by 10% and, in two instances, by 20%-will reduce the overall recovery for Dechert’s attorneys’ fees by an additional \$490,846.68.

See *Rodriguez*, 84 F.Supp.2d at 425 (“Upon finding that counsel seeks compensation for excessive hours, ‘the court has discretion simply to deduct a reasonable percentage of the number of hours claimed as a practical means of trimming fat from a fee application.’”) (quoting *Kirsch*, 148 F.3d at 173). With these adjustments having been made, in an exercise of the Court’s discretion and based on its careful review, the Court is confident that the resulting attorney hours were well spent, entirely reasonable, and tightly targeted on relevant tasks. They are thus appropriately reimbursed by the DRC.

2. Billing Rate for Attorneys

Second, defendants object to the rates at which the Dechert lawyers billed their hours. The average hourly rates, for the remaining Dechert attorneys, over the course of the engagement were as follows: for (1) the one partner, \$871.04; (2) the one counsel, \$742.84; (3) the ten associates, \$505.55⁵; (4) the one law clerk, \$204.89; and (5) the one staff attorney, \$388.23. Defendants assert, without citation to case authority, that these “rates are too high and are therefore unreasonable.” DRC Br. at 7.

The Court disagrees. Based on the relevant factors, including the difficulty of the questions involved, the skill required to handle the problem, and the lawyer’s experience, ability and reputation, see *Antidote Int’l Films, Inc.*, 496 F.Supp.2d at 364, this case is one in which higher than ordinary rates were justified. This case presented difficult questions of law and fact; the skill, time, and labor required was substantial; and the experience, ability, and reputation of the attorneys

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were high. Plaintiffs' counsel were required, *inter alia*, to brief and argue summary judgment motions dealing with complex issues of sovereign immunity and the actual or apparent authority of officials of a foreign government to sign debt acknowledgment letters. Counsel engaged in cross-border fact discovery and deposed various witnesses and experts, before litigating a bench trial on whether Congolese law granted certain government officials actual authority to sign the debt acknowledgment letters. Having witnessed the litigation (pretrial and trial), having been in a position to appraise counsel's performance firsthand, and having taken into consideration the factors the Court is required to weigh under New York law, the Court's firm judgment is that the rates at which Dechert billed for these estimable professionals were not, in any sense, unreasonable.⁶ Further, as plaintiffs note, billing rates substantially above those charged here, including partner billing rates in excess of \$1,000 an hour, are by now not uncommon in the context of complex commercial litigation. *See Hranitzky Dec. Exs. M–V*. And, although not necessary to the Court's determination, the fact that Themis, the plaintiff, has paid Dechert's bills in full at these rates supplies a form of market confirmation as to their reasonableness. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany & Albany Cnty. Bd. of Elections*, 522 F.3d 182, 190 (2d Cir.2008) ("The reasonable hourly rate is the rate a paying client would be willing to pay."); *Anderson v. YARP Rest., Inc.*, No. 94 Civ.7543 (CSH)(RLE), 1997 WL 47785, at *2 (S.D.N.Y. Feb. 6, 1997) ("The best evidence of a reasonable fee rate is the amount actually charged by counsel[.]") (citations omitted). Accordingly, the Court rejects defendants' challenge to the rates billed by Dechert.

*8 Therefore, the only adjustment to the amount requested in Dechert's attorneys' fees is to the number of hours billed. Applying this adjustment, the Court's calculation is that plaintiffs are entitled to recover \$2,997,120.62 in attorneys' fees paid to Dechert.

In addition to attorneys' fees from Dechert, plaintiffs seek to recover for legal work performed by Miller & Wrubel. After excluding the hours worked by attorneys who billed fewer than 25 hours, which the Court again finds appropriate as a means of correcting against overall inefficient staffing, plaintiffs are entitled to recover fees for two attorneys—one partner and one associate. *See Hranitzky Decl. Ex. D*. These attorneys' time records do not present concerns about block billing or vagueness. The Court will, therefore, not reduce,

by any percentage, the hours claimed by Miller & Wrubel. The Court also finds the rates charged by these lawyers reasonable. Accordingly, plaintiffs may recover \$123,022.75 in the attorneys' fees paid to Miller & Wrubel.

In total, across the two firms, plaintiffs may therefore be reimbursed \$3,120,143.37 for attorneys' fees, less the fees incurred between the period October 3 and October 22, 2013.

3. Fees for Paralegals

Plaintiffs also seek reimbursement for fees charged for the work of legal assistants (paralegals) and administrative staff. Here, Dechert billed a total of \$286,088 for its paralegals. Hranitzky Decl. Ex. D. A total of 17 paralegals are listed, most of whom billed well under 10 hours. Again, as a corrective for potential staffing inefficiencies over this long case, the Court will (1) permit reimbursement for the work only of employees who worked at least 25 hours on the case, which would leave just four paralegals, who billed, respectively, 722, 189, 67.20, and 27.40 hours; and (2) reduce the compensable hours of these four paralegals by 10%.

Plaintiffs also seek \$6,582.28 in fees for the five paralegals billed by Miller & Wrubel. Of the five, four billed fewer than 10 hours; the fifth billed 12.13 hours. The Court will permit plaintiffs to be reimbursed for the full hours of that fifth paralegal, but, in the interest of addressing defendants' valid concerns about overall staffing inefficiency, it will not permit reimbursement as to the other four paralegals. *See supra* Part I.B.1. In total, these adjustments would reduce the total number of hours reimbursed for paralegals from 1091.08 to 917.17.

As to the paralegals' hourly billing rates, plaintiffs seek reimbursement for rates ranging from \$125 to \$340 an hour. Plaintiffs in fact paid these rates to Dechert and to Miller & Wrubel. However, unlike in the context of counsel's legal work, the Court is unpersuaded, and there has been no showing, that the nature of the paralegal work in this case was unusually complex, so as to justify billing an above-market rate. And the caselaw reflects that paralegal billing rates of between \$90 and \$125 are more in line with the prevailing market rates in this District. *See, e.g., K.L. v. Warwick Valley Cent. Sch. Dist.*, No. 12 Civ. 6313(DLC), 2013 WL 4766339, at *8 (S.D.N.Y. Sept.5, 2013) ("With respect to paralegal rates, courts in the Southern District typically award fees for paralegal work in IDEA cases at a rate of \$90 or \$125 per hour."); *M.C. ex rel. E.C. v. Dep't of Educ. of*

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City of N.Y., No. 12 Civ. 9281(CM)(AJP), 2013 WL 2403485, at *7 (S.D.N.Y. June 4, 2013) (“\$125 per hour ... is the prevailing market rate in this District for paralegals”), *report and recommendation adopted*, No. 12 Civ. 9281(CM)(AJP), 2013 WL 3744066 (S.D.N.Y. June 28, 2013). Plaintiffs do not provide any case support for the much higher paralegal billing rates they propose to use in calculating their fee award. Accordingly, the Court will permit reimbursement for paralegals at a rate of \$125 an hour. At that rate, plaintiffs may recover a total of \$114,646.25 in paralegal fees-or, about \$178,024.03 less than the \$292,670.28 requested.

*9 Finally, plaintiffs request reimbursement for \$11,442.75 in fees paid to Dechert for “Office Support” and \$10,205.97 for “Other, Admin.” See Hranitzky Decl. Ex. D. Plaintiffs do not adequately explain or support these expenses. Accordingly, plaintiffs may not recover them.

4. Conclusion

For the reasons above, plaintiffs may recover \$3,120,143.77 in attorneys' fees and \$114,646.25 in paralegal fees, for a total of \$3,234,789.62, less the amount of fees and costs incurred during the period from October 3 to October 22, 2013.⁷

C. Cost Reasonableness Objections

In addition to attorneys' and paralegal fees, plaintiffs also request reimbursement for “costs”—i.e., for experts, translators, and other expenses. Plaintiffs seek a total of \$404,010.19 in costs.

1. Experts

Defendants object to the amount requested for experts on two grounds:

First, they assert that plaintiffs are not entitled to be reimbursed for the costs of experts who did not testify at trial.

Defendants rely on *U.S. for Use & Benefit of Evergreen Pipeline Const. Co., Inc. v. Merritt Meridian Const. Corp.*, 95 F.3d 153 (2d Cir.1996). But that case involved the shifting of costs associated with fact witnesses, not experts, and pursuant to statute, not a contractual obligation. See *id.* at 173. It does not support defendants' broad claim that a party's retention of an expert is subject to reimbursement only where the expert testifies at trial. Quite the contrary, courts in this District routinely reimburse prevailing parties for the costs of expert witnesses and consultants, regardless whether the

expert testified at trial. See, e.g., *Weiwei Gao v. Sidhu*, No. 11 Civ. 2711(WHP)(JCF), 2013 WL 2896995, at *6 (S.D.N.Y. June 13, 2013) (granting the full \$5,000 requested “for the expert valuation performed by LVP” because the expense was “reasonable and necessary,” and because the “Fee Sharing Agreement provides for recovery of ‘other costs incurred’”); *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Fin. Corp.*, No. 04 Civ. 3854(LAK)(AJP), 2008 WL 4833025, at *9 (S.D.N.Y. Nov. 3, 2008) (because the contract “clearly-and undisputedly-provide [d] for reasonable attorneys' fees ‘and other costs’ “ and because defendant did not use “duplicative or unnecessary expert witnesses,” the Court declined to “make any reductions in the costs related to [defendant's] use of these witnesses”). And in the Court's experience, the expertise of such non-testifying experts may often prove pivotally helpful in educating counsel, shaping litigation strategy, and/or eliminating areas of controversy. The Court, therefore, denies defendants' request to limit recovery to the costs of experts who testified at trial.

Second, defendants claim that the costs billed by plaintiffs' experts are unreasonable. The Court's assessment of that issue is governed by familiar standards. “Courts in this district assess the reasonableness of expert fees using the same method they do for attorneys' fees-by first multiplying the reasonable hourly rate by the reasonable number of hours expended.” *Matteo v. Kohl's Dep't Stores, Inc.*, No. 09 Civ. 7830(RJS), 2012 WL 5177491, at *5 (S.D.N.Y. Oct.19, 2012) *aff'd*, 533 F. App'x 1 (2d Cir.2013). The party “seeking reimbursement for expert fees bears the burden of proving reasonableness.” *Penberg v. HealthBridge Mgmt.*, No. 08 Civ. 1534(CLP), 2011 WL 1100103, at *15 (E.D.N.Y. Mar.22, 2011) (citation omitted). “If the parties do not provide sufficient evidence to support the moving party's interpretation of a reasonable rate, a court may use its discretion to determine a reasonable fee.” *Matteo*, 2012 WL 5177491, at *5. “In the face of very limited evidence, a court may, in its discretion, simply apply an across-the-board reduction of expert's fees.” *Id.*; see also *Watson v. E.S. Sutton, Inc.*, No. 02 Civ. 02739(KMW)(THK), 2006 WL 6570643, at *13 (S.D.N.Y. Aug. 11, 2006) (reducing expert fees by 50% for lack of detailed information provided in support of proposed fees).

*10 Defendants validly challenge several, but not all, of plaintiffs' expert expenditures as insufficiently justified to support full reimbursement. The Court addresses these in turn.

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Here, the first expert employed by plaintiffs was Nicaise Chikuru Muniyogwarha ("Chikuru"). Chikuru was plaintiffs' testifying expert on DRC law at trial. Plaintiffs seek to be reimbursed \$117,731.69, which they represent to be the fees they paid to Chikuru, and which appears to reflect a rate of \$300 per hour for Chikuru and \$200 per hour for his research assistant. Themis Br. at 24. The amount also reflects travel expenses and value-added taxes ("VAT") under Congolese law. *Id.*

However, the three invoices received from Chikuru that plaintiffs adduce to support the reasonableness of these costs are woefully inadequate. *See* Hranitzky Decl. Ex. G. They merely provide the total amount billed by Chikuru and a terse explanation of services rendered. Chikuru's invoice provides absolutely no insight into how he, or his research assistant, spent their time. *Id.* It does not even identify the hours worked on this matter by Chikuru (or his research assistant). These omissions are particularly significant given that Chikuru's expertise is in law. There is no reason why his invoices could not have described his work in the same manner and level of detail as expected of a domestic attorney. Further, plaintiffs do not explain the basis upon which Chikuru chose to bill, for himself and his research assistant, respectively, at hourly rates of \$300 and \$200. *See* [Matteo](#), 2012 WL 5177491, at *5 (listing eight factors for determining whether an expert's proposed rate is reasonable, including the expert's education and area of expertise, and the cost of living in the particular geographic area).

That said, the Court did review Chikuru's expert report (and rebuttal report) and his deposition, and heard his live testimony at trial. It was clear to the Court that Chikuru had genuine expertise and that he had devoted thoughtful attention and time to the matter. Those three tasks themselves (the expert report, the deposition, and the trial testimony) perforce took substantial time. However, apart from the time spent on his deposition and trial testimony, the Court is unable to reliably estimate the amount of time Chikuru had spent actually working on the matter. It is also unclear how much of Chikuru's relevant knowledge was already in hand before he began work on this engagement.

Because plaintiffs have failed to establish the reasonableness of their bill for Chikuru's services, and because plaintiffs have not equipped the Court or the defense with evidence that would allow it to determine the value of his services, the Court, to assure that the DRC is obliged to pay

only reasonable expenses of plaintiffs, is compelled to substantially reduce the request for reimbursement as to Chikuru's time. The Court reduces the bill as to Chikuru by 75%. Accordingly, plaintiffs may recover \$29,432.92 in costs billed by Chikuru.

*11 The second expert employed by plaintiffs was Steven De Backer, a lawyer with Webber Wentzel, a law firm in South Africa. De Backer billed at a rate of \$500 and his colleagues billed at rates between \$85 and \$340 per hour. The total bill for Webber Wentzel, for which plaintiffs seek to be reimbursed, was \$53,799.99. *See* Hranitzky Decl. Ex. H. According to plaintiffs, De Backer and his firm provided "expert consulting services on African law" and acted as a liaison between Dechert and Chikuru with respect to Chikuru's expert reports. Themis Br. at 25. In fact, nearly every item on Webber Wentzel's bill concerned "liais[ing] with Chikuru" and attending meetings. *See* Hranitzky Decl. Ex. H. The only subject of African law relevant to this litigation was actual authority under Congolese law. Therefore, in total, plaintiffs paid their expert on DRC law, Chikuru, \$117,731.69 for the work surrounding his expert reports and testimony as to this single issue, and paid Webber Wentzel another \$53,779.99 to serve as a liaison to Chikuru. Chikuru, however, is fluent in English. He could just as easily have spoken with Dechert's own attorneys. It is unclear why a liaison with him was necessary. Because plaintiffs have not justified the fees paid to De Backer, plaintiffs' request for the reimbursement of the \$53,779.99 paid to Webber Wentzel is denied in its entirety.

The third expert employed by plaintiffs was Harry Tether ("Tether"), who charged \$500 per hour. Plaintiffs seek reimbursement for the \$49,524.70 in costs paid to Tether for his expert work, which related to banking practices relevant to the negotiation and restructuring of defaulted sovereign debt. Plaintiffs employed Tether as an expert to rebut the testimony that defendants for a time intended to proffer from their expert on sovereign debt, James Butler. Themis Br. at 18. Defendants ultimately withdrew Butler as an expert; plaintiffs, in response, withdrew Tether. Tether's expenses were therefore all incurred in response to defendants' decision to use Butler as an expert. As to Tether, plaintiffs have submitted detailed invoices and receipts as evidence of the outlays made to Tether. *See* Hranitzky Decl. Ex. I. Because the Court concludes that this evidence is adequate to justify the costs associated with Tether, and because Tether's rate of \$500 per hour is reasonable, plaintiffs may be reimbursed for the \$49,524.70 paid in fees to Tether.

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Finally, the fourth expert employed by plaintiffs was John Hargett, a handwriting expert. Hargett was retained to verify that the signatures on the Acknowledgement Letter were authentic. At the time Hargett was retained, defendants' stated position was that they intended to challenge the authenticity of those signatures. Once defendants withdrew that challenge, plaintiffs ceased using Hargett's services. Plaintiffs seek to recover \$1,000 for the costs associated with Hargett. *See* Hranitzky Decl. Ex. J. Because that fee is reasonable, its recovery is granted.

***12** Accordingly, plaintiffs are entitled to recover a total of \$79,957.62 in costs for their expert witnesses and consultants-\$29,432.92 for Chikuru, \$49,524.70 for Tether, and \$1,000 for Hargett.

2. Other Costs and Expenses

Finally, defendants assert that plaintiffs' request for other costs and expenses are "exorbitant and should be reduced." DRC Br. at 17.

These costs include, first, \$51,335.25 for translation fees. These costs are substantiated by detailed billing records. *See* Hranitzky Decl. Ex. K. In the Court's judgment, such costs were reasonable to incur in a case that involved the translation of numerous documents from French into English and that lasted for approximately five years. Plaintiffs' request to be reimbursed for these translation costs is, therefore, granted.

The remaining costs sought by plaintiffs total \$130,638.56 (\$128,054.15 for costs incurred by Dechert and \$2,584.41 for costs incurred by Miller & Wrubel). *See* Hranitzky Decl. Ex. F. The breakdown of this amount is as follows: (1) online research (*i.e.*, Westlaw and Lexis charges) (\$45,334.13); (2) making copies (\$25,031.30); (3) ordering transcripts (\$16,711.19); (4) travel and accommodations (\$16,781.57); (5) meals (\$5,835.29); and (6) "miscellaneous" (\$20,945.08)-which, in turn, includes legal publication expenses, staff overtime, document review, and shipping and delivery costs. *Id.* Defendants object to these costs on the grounds that plaintiffs fail to itemize these costs or support them with any evidence, such as invoices or other forms of documentation.

Although plaintiffs could have done a better job coming forward with documentary corroboration of the fact of these expenses, *e.g.*, for online legal research, defendants do not dispute that these were incurred. Defendants claim instead that they were unreasonable. Based on its detailed familiarity with and close attention to this litigation, the Court disagrees.

The first four of these expenses are reasonable both in nature and scale. The Court will permit plaintiffs to recover for costs that are typical in a complex litigation such as this-*i.e.*, the cost of online research, making copies, and ordering transcripts. The Court can independently verify that the legal research required in this case was substantial and that plaintiffs sent the Court large binders containing courtesy copies of all pleadings and trial exhibits, reflecting voluminous copying. The Court will also permit plaintiffs to recover the costs of travel and accommodations, which are justified by the fact that plaintiffs had to travel, *inter alia*, to take various depositions in this case and to litigate the bench trial.

The Court will not, however, permit the recovery of the cost to plaintiffs of counsels' meals or "miscellaneous" expenses. Clients often decline to pay for attorney or legal assistant meals, and reasonably decline to pay expenses labeled only as "miscellaneous."

***13** Accordingly, of the \$130,638.56 in other expenses requested by plaintiffs, the Court will permit the recovery of \$103,858.19.

Therefore, of the \$404,010.19 in costs requested, plaintiffs will be permitted to recover a total of \$235,151.06, less the costs incurred between October 3 and 22, 2013.

CONCLUSION

For the foregoing reasons, the Court grants plaintiffs' motion for an award of fees and costs as follows:

As to fees:

- Plaintiffs will not be reimbursed for any attorney or paralegal fees incurred between October 3 and October 22, 2013, inclusive;
- Plaintiffs will be reimbursed only for fees incurred by: (1) attorneys from Dechert and Miller & Wrubel who worked at least 25 hours on this matter; (2) paralegals from Dechert who worked at least 25 hours on this matter; and (3) the paralegal from Miller & Wrubel who worked 12.13 hours on this matter;
- The hours billed by the Dechert attorneys and paralegals who worked at least 25 hours on the case will be reduced by 10% and, in the case of the two attorneys identified above, these hours will be reduced by 20%;

- Plaintiffs will be reimbursed for the hours worked by Dechert and Miller & Wrubel attorneys at the rates those firms billed plaintiffs, and will be reimbursed for the work of paralegals at a rate of \$125 per hour; and
- Plaintiffs will not be reimbursed for fees incurred by "Office Support" or "Other, Admin."

Based on the Court's calculation, plaintiffs may therefore recover \$3,234,789.62 in attorneys' and paralegals' fees, less the fees incurred between October 3 and October 22, 2013.

As to costs:

- Plaintiffs will not be reimbursed for any costs incurred by their law firms between October 3 and October 22, 2013, inclusive;
- Plaintiffs will be reimbursed for 25% of the costs billed by expert Chikuru;
- Plaintiffs will not be reimbursed for any costs billed by expert Webber Wentzel;
- Plaintiffs will be reimbursed for the full costs billed by experts Tether and Hargett;
- Plaintiffs will be reimbursed for the full costs of translation services;
- Plaintiffs will be reimbursed for all costs associated with legal research, making copies, ordering transcripts, and travel and accommodations; and

- Plaintiffs will not be reimbursed for the cost of meals or "miscellaneous" expenses.

Based on the Court's calculations, plaintiffs may therefore recover \$79,957.62 in costs for expert witnesses and consultants, \$51,335.25 for translators and interpreters, and \$103,858.19 for other litigation expenses-for a total of \$235,151.06, less the costs incurred between October 3 and October 22, 2013.

Accordingly, plaintiffs may recover a total of \$3,469,940.68, less the amount billed for fees and costs between October 3 and October 22, 2013.⁸ This amount is recoverable solely from the DRC.

The Clerk of Court is directed to terminate the motion pending at docket number 218. The parties are directed to meet and confer promptly as to the tabulation of fees and costs consistent with this Opinion & Order, and to submit, by September 11, 2014, a proposed order with respect to fees and costs that reflects the rulings herein.⁹ The Court's intention is to promptly sign such an order and then to close this case.

***14 SO ORDERED.**

All Citations

Not Reported in F.Supp.3d, 2014 WL 4379100

Footnotes

- ¹ Defendants depict plaintiffs as claiming that they are entitled to attorneys' fees and costs "without limitation," as opposed to only "reasonable" attorneys' fees. DRC Br. at 5–6. Plaintiffs, however, plainly state that they are entitled only to *reasonable* fees and costs, and their brief is substantially devoted to arguing why their requests are in fact reasonable. See Themis Br. at 5–21.
- ² For attorneys' fees, plaintiffs seek reimbursement for persons with the following job titles: Partner, Counsel, Senior Attorney, Associate, Law Clerk, Staff Attorney, and Summer Associate. See Hranitzky Decl. Ex. D.
- ³ Plaintiffs claim that these exclusions result in a "reduction of \$251,171.47 from the fees sought by Plaintiffs." *Id.* For this reason, plaintiffs state, the amount of their request for attorneys' fees is \$3,793,121.35, not \$4,044,292.82. The Court's review of the Hranitzky Decl. Ex. D, however, does not substantiate this math. Even eliminating all hours worked by Dechert attorneys who billed 10 hours or fewer to the case reduces the overall request by only \$44,573.40. It appears to the Court that the \$251,171.47 reduction plaintiffs contemplate is substantially comprised of time excluded for other reasons.

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- 4 This steps also eliminates the 12 hours billed by a summer associate for which plaintiffs seek to recover from the DRC. In the Court's experience, clients often will not pay for the work of summer associates. The Court's judgment, apart from the fact that the hours worked by this summer associate were below the 25-hour cutoff that the Court has set, is that the DRC ought not be required to pay for them either.
- 5 The billing rate for the associates ranged from approximately \$380 to \$682. See Hranitzky Decl. Ex. D. But considered cumulatively, the remaining 10 associates on the case averaged a billing rate of \$505.55 per hour. *Id.*
- 6 The Court's conclusion that Dechert's rates in this case were reasonable and appropriate is also informed by, and consistent with, the Court's prior experience as a commercial litigator.
- 7 Plaintiffs also claim that they incurred fees totaling \$28,253.30, which were paid to law firms in Canada and Hong Kong, for work relating to "the enforceability of a potential default judgment in those jurisdictions." See Themis Br. at 22. Plaintiffs have agreed to forego reimbursement for these fees. *Id.* at 22 n. 5.
- 8 As part of this figure, the Court notes, plaintiffs seek reimbursement for fees and costs associated with the preparation of their application for fees and costs. See Themis Br. at 21. Defendants do not object to this aspect of the request, and for good reason. In other contexts, the prevailing party is generally entitled to recover fees incurred in connection with the preparation of a fee application. See, e.g., *Tucker v. City of New York*, 704 F.Supp.2d 347, 358 (S.D.N.Y.2010) ("Time devoted to a fee application is generally compensable.") (collecting cases); cf. *Barbour v. City of White Plains*, 788 F.Supp.2d 216, 223 (S.D.N.Y.2011) ("[T]he law ... dictates that a prevailing civil rights plaintiff may include the costs of drafting a motion to recover fees as part of a fee award."). Because no reply brief was filed with respect to plaintiffs' fee application, the compensable time will be measured up to July 31, 2014, which is "the end of the period for which [plaintiffs seek] attorneys' fees." See Themis Br. at 21.
- 9 The Court has endeavored to calculate accurately the bottom-line fee and cost figures that result from its rulings herein. However, it is possible that the Court's math was in error. In that event, counsel are directed that it is the Court's rulings—e.g., the exclusion of certain timekeepers and the application of various percentage reductions to other timekeepers' hours—and not its arithmetic that controls.

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United States District Court, S.D. New York.

U.S. BANK NATIONAL ASSOCIATION, as
Trustee for the Registered Holders of Wachovia
Bank Commercial Mortgage Trust, Commercial
Mortgage Pass-through Certificates, Series 2006-
c28, Acting by and Through Its Special Servicer
Cwcapital Asset Management LLC, Plaintiff,

v.

DEXIA REAL ESTATE CAPITAL MARKETS f/k/a/
Artesia Mortgage Capital Corporation, Defendant.

12 Civ. 9412 (PAE)

|

Signed 11/30/2016

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OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

***1** Plaintiff—whom the Court refers to as “the Trust”—brought this breach of contract action against defendant Dexia Real Estate Capital Markets (“Dexia”). In an earlier Opinion and Order, issued August 12, 2016, the Court held that Dexia, having prevailed in this litigation, was entitled to an award of attorneys’ fees. *See* Dkt. 150 (“Fees Decision”). This decision addresses remaining issues in the case relating to such fees, as well as to costs, expenses, and prejudgment interest. For the following reasons, the Court holds that (1) the Trust is not entitled to an offset against the Court’s award of attorneys’ fees to Dexia; (2) Dexia is entitled to reasonable attorneys’ fees and costs in a total amount of \$1,821,227.88; and (3) Dexia is not entitled to prejudgment interest on this award.

I. Background**A. Factual Background**¹

The Court assumes familiarity with the Fees Decision, and recounts here only those facts necessary to this decision.

In September 2006, Dexia made a \$13,800,000 commercial mortgage loan (the “Loan”) to MP Operating, LLC and Annex Operating, LLC (collectively, the “Borrowers”). The Loan was secured by a mortgage against a commercial property in Minnesota (the “Property”). In connection with the Loan, four individuals (the “Guarantors”) who were associated with the Borrowers agreed to guarantee the loan (the “Guaranty”). If certain financial requirements were not met, the Guarantors were to be personally liable, under Section 2(b)(iv) of the Guaranty (the “Full Recourse Provision”), for the full amount of the Loan.

On October 1, 2006, Dexia sold the Loan to Wachovia Commercial Mortgage Securities, Inc. (“Wachovia”), pursuant to a Mortgage Loan Purchase Agreement (“MLPA”). *See* Dkt. 147, Ex. A (“MLPA”). On that same day, Dexia and Wachovia entered into a Pooling and Servicing Agreement (“PSA”) to govern the administration of the Trust, into which the Loan (among others) was to be deposited. Pursuant to the PSA, Wachovia assigned to the Trust all of its “rights, title and interest” in the Loan, as well as its “rights” under Sections 2, 3, 9, 10, 11, 12, 13, 14, 16, 17, 18 and 19 of the MLPA. *See* Dkt. 131, Ex. 10 (“PSA”), at § 2.01(a). Relevant to the dispute at hand, section 16 of the MLPA provided for the shifting of attorneys’ fees to the prevailing party in any action commenced between Dexia and Wachovia regarding the MLPA.²

***2** In the MLPA, Dexia made certain representations and warranties regarding the loans that were sold to Wachovia and ultimately deposited into the Trust. Dexia represented, *inter alia*, that the underlying loan documents were enforceable and were not subject to any valid offset, defense, counterclaim, abatement, or right to rescission.

In January 2010, the Loan went into default. In September 2010, the Trust filed suit in Stearns County, Minnesota, against the Borrowers and Guarantors (“Stearns County Litigation”). The Guarantors, as an affirmative defense, maintained that the Guaranty that they had executed did not, in fact, contain the Full Recourse Provision, but a more limited provision. The Guarantors contended that Dexia’s

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closing counsel, Best & Flanagan, had attached the signature page from the limited guaranty to the version containing the Full Recourse Provision without their consent.

After discovery closed, the Guarantors moved for summary judgment. In July 2011, the Stearns County court held that the Full Recourse Provision of the Guaranty was unenforceable. The Trust appealed, but dismissed the appeal with prejudice before any briefs were filed.

In August 2012, the Guarantors sued Dexia and Best & Flanagan in Hennepin County, Minnesota for fraud and negligence relating to the swapped signature pages ("Hennepin County Litigation"). Dexia filed a counterclaim for contract reformation. In March 2014, the Hennepin County court granted the Guarantors' motion to dismiss this counterclaim, holding that Dexia was barred from relitigating issues already decided in the Stearns County Litigation. The parties later settled in March 2015. As part of the settlement, Dexia received money from Best & Flanagan.

B. Procedural History of This Lawsuit

On September 29, 2011, the Trust wrote to Dexia, asserting that because the Guaranty was unenforceable, Dexia had breached its representations in the MLPA. The Trust asked that Dexia either cure the alleged breach or repurchase the Loan; Dexia refused. On December 27, 2012, the Trust commenced this breach of contract action, Dkt. 1 ("Compl."), which was assigned to Judge Scheindlin.

On January 25, 2013, Dexia filed a motion to dismiss on statute-of-limitations grounds. Dkts. 6–7. Dexia argued that any breach occurred in October 2006—when the Loan was sold to Wachovia—and therefore a lawsuit brought more than six years later was untimely. On June 6, 2013, Judge Scheindlin denied this motion, holding that the Trust's claim did not accrue until the value of the Loan suffered material adverse effects from Dexia's alleged misrepresentations. Dkt. 15, reported at *U.S. Bank Nat. Ass'n v. Dexia Real Estate Capital Markets*, 959 F. Supp. 2d 443 (S.D.N.Y. 2013).

Following discovery, the parties cross-moved for summary judgment. Dkts. 68–89. On July 9, 2014, Judge Scheindlin granted the Trust's motion for summary judgment and denied

Dexia's cross-motion. Dkt. 90, reported at *U.S. Bank Nat'l Ass'n v. Dexia Real Estate Capital Mkts.*, No. 12 Civ. 9412 (SAS), 2014 WL 3368670 (S.D.N.Y. July 9, 2014) ("*Dexia P*"). In pertinent part, Judge Scheindlin held that the

Trust's suit was timely, *see id.* at *6, and that Dexia was collaterally estopped from denying its breach of the MLPA because the Stearns County court had found that the Full Recourse Provision was unenforceable. *See id.* at *9. The Trust, invoking section 16 of the MLPA, then sought and was granted attorneys' fees and prejudgment interest. Dkt.

102, reported at *U.S. Bank Nat. Ass'n v. Dexia Real Estate Capital Markets*, No. 12 Civ. 9412 (SAS), 2014 WL 4290642 (S.D.N.Y. Aug. 28, 2014).

*3 Dexia appealed. On March 16, 2016, the Second Circuit reversed and remanded with instructions to grant Dexia's summary judgment motion on statute-of-limitations grounds. *See* Dkt. 118, reported at *U.S. Bank Nat. Ass'n v. Dexia Real Estate Capital Markets*, No. 14 Civ. 2859, 2016 WL 1042090 (2d Cir. Mar. 16, 2016), as amended (Mar. 18, 2016) (summary order) ("*Dexia II*"). The Circuit held that the six-year statute of limitations for the Trust's contract claims had begun to run in October 2006, when the MLPA was executed.

On April 11, 2016, this Court, to which this matter was reassigned upon Judge Scheindlin's retirement, granted Dexia's motion for summary judgment, in accordance with the Second Circuit's instructions. Dkt. 123. On April 22, 2016, Dexia moved for attorneys' fees pursuant to section 16 of the MLPA, Dkt. 125. On August 12, 2016, after briefing, Dkts. 126 ("Def. Fees Br."), 130 ("Pl. Fees Br."), 133 ("Def. Fees Rep. Br."), and argument, Dkt. 148, the Court issued the Fees Decision. The Court held that Dexia was entitled to an award of attorneys' fees under the MLPA, but it reserved decision on the issue of the amount of the fee award. The Court directed the parties to propose a schedule for discovery and briefing on the limited issue of whether the Trust was entitled to an offset, against the fee award, for any part of the money Dexia had received when it settled with Best & Flanagan. *See* Fees Decision at 17–18.

On August 26, 2016, the parties submitted a joint letter, Dkt. 151, setting out their respective positions on the necessary discovery and as to a briefing schedule with respect to the issue of an offset to the fee award. Consistent with the schedule set by the Court, Dkt. 152, on August 29, 2016, the Trust filed a supplemental memorandum of law in support of its position, Dkt. 156 ("Pl. Supp. Br."), and a supporting declaration, Dkt. 157; thereafter, Dexia filed a supplemental memorandum, Dkt. 161 ("Def. Supp. Br."), and a supporting declaration, Dkt. 163; the Trust filed a supplemental reply memorandum, Dkt. 162 ("Pl. Supp. Rep. Br."), and a supporting declaration, Dkt. 165, and Dexia filed

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a supplemental reply memorandum, Dkt. 164 (“Def. Supp. Rep. Br.”).

II. Applicable Legal Standards Governing Fees Awards

As the Fees Decision recognized, under New York law,³ a contract such as the MLPA “that provides for an award of reasonable attorneys’ fees to the prevailing party in an action to enforce the contract is enforceable if the contractual language is sufficiently clear.” *Metro Found. Contractors, Inc. v. Arch Ins. Co.*, 551 Fed.Appx. 607, 610 (2d Cir. 2014) (summary order) (quoting *NetJets Aviation, Inc. v. LHC Comms., LLC*, 537 F.3d 168, 175 (2d Cir. 2008)) (internal quotation marks omitted). Thus, “when a contract provides that in the event of litigation the losing party will pay the attorneys’ fees of the prevailing party, the court will order the losing party to pay whatever amounts have been expended by the prevailing party, so long as those amounts are not unreasonable.” *Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 19 (2d Cir. 1992) (quoting *F.H. Krear & Co. v. Nineteen Named Trs.*, 810 F.2d 1250, 1263 (2d Cir. 1987)) (internal quotation marks omitted).

III. Discussion

Three questions remain to be resolved with regard to the amount of attorneys’ fees owed by the Trust to Dexia in light of the Court’s ruling that Dexia, as the prevailing party, is entitled to a fee award. First, must any part of the money received by Dexia pursuant to its settlement with Best & Flanagan be used to offset the award it is due here, so as to avoid an impermissible “double recovery” by Dexia? Second, is the amount of fees sought by Dexia in connection with the litigation in this District⁴ reasonable? Third, is Dexia entitled to prejudgment interest on the award of attorneys’ fees, and if so, at what rate and starting at what date? The Court addresses these questions in turn.

A. Offset

*4 The main unresolved dispute between the Trust and Dexia, and the focus of their briefs following the Fees Decision, is whether Dexia’s fee award should be offset to reflect the payout that Dexia received pursuant to its settlement with its closing counsel, Best & Flanagan, to the extent that payment reflects—or is construed to reflect—attorneys’ fees that Dexia incurred in the course of this litigation.⁵

In brief, Dexia had brought counterclaims against Best & Flanagan in the Hennepin County, Minnesota, litigation for legal malpractice and indemnity. Dexia claimed that Best & Flanagan failed to ensure that the Guarantors executed a full-recourse guaranty, giving rise to exposure to—and litigation with—the Guarantors. Dexia’s counterclaims were settled on April 28, 2015, as part of a broader settlement agreement among Dexia, Best & Flanagan, Best & Flanagan’s malpractice insurer, One Beacon, and the three Guarantors. Under the settlement agreement, the parties dismissed their claims and released any potential claims they may have had against one another, and Dexia received a \$1,135,000 payout. The settlement agreement did not state what that payout represented, including whether, and if so to what extent, the payout to Dexia compensated Dexia for its attorneys’ fees and costs in this (or the Hennepin County) action, as opposed to, for example, the risk of substantive liability to the Guarantors that Dexia then faced.⁶ However, in light of the Second Circuit’s later ruling that the Guarantors’ claims against Dexia were time-barred, Dexia concedes that the settlement funds it received necessarily functioned to compensate it for litigation fees and costs in the two cases. *See, e.g.*, Dkt. 153 at 1.

The Trust argues that under New York law, any award against it of attorneys’ fees in this case must be offset by the amount of money that Dexia obtained in the Best & Flanagan settlement, to the extent that payout may be attributed (after the fact) to fees in this case. The Trust claims that this offset is necessary, lest otherwise Dexia receive a “double recovery” of such fees which, the Trust argues, New York law forbids. Dexia opposes such an offset on multiple grounds, including that it is unsupported by the text of the MLPA and by New York law relating to double recoveries. Dexia also emphasizes that the settlement does not earmark any part of its payout for attorneys’ fees in this litigation, rendering conjectural any allocation of the settlement payout to Dexia’s legal fees in this case. Finally, Dexia notes, even if an offset to the fee award here were theoretically available, its litigation costs for the Hennepin County action would themselves account for nearly all of the settlement amount, making a significant offset factually unjustified.

The Court analyzes the Trust’s claim for an offset both under the MLPA and under the body of New York substantive law on which it relies. For the reasons that follow, the Court holds, with Dexia, that the law does not entitle the Trust to an offset to Dexia’s fee award, even assuming, *arguendo*, that some part of Dexia’s settlement recovery can at this point be fairly

understood to compensate Dexia for the attorneys' fees that it incurred in this case.

1. The Text of the MPLA

*5 The Court's analysis begins with the text of the MLPA, which, as the Court held in the Fees Decision, entitles Dexia to an award of attorneys' fees as the prevailing party in this litigation. The Trust urges the Court to ignore the text of the MLPA as a "red herring," claiming that "[w]hether or not an offset is appropriate is not an issue of contract interpretation" but is exclusively a matter of New York substantive law pertaining to double recoveries. Pl. Supp. Rep. Br. at 3. On that question of legal methodology, however, the Trust is wrong. As reviewed below, the absence of an offset provision in the MLPA—in contrast to other agreements reported in the case law that provide for offsets to damages in the event of indemnification or an insurance recovery by the prevailing party—is germane. Its absence suggests—consistent with New York law regarding "double recoveries," which does not require such an offset in the circumstances here, *see pp. 12–15, infra*—that the parties did not contemplate an offset being available here.

"When an agreement is unambiguous on its face, it must be enforced according to the plain meaning of its terms." *Lockheed Martin Corp. v. Retail Holdings, N. V.*, 639 F.3d 63, 69 (2d Cir. 2011). Under New York law, contract language is ambiguous if "a reasonably intelligent person viewing the contract objectively could interpret the language in more than one way." *Topps Co. v. Cadbury Stani S.A.I.C.*, 526 F.3d 63, 68 (2d Cir. 2008). The question of whether contract language is ambiguous is for the Court. *See Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 232 F.3d 153, 158 (2d Cir. 2000). In making that determination, "a court should accord [contractual] language its plain meaning giving due consideration to the surrounding circumstances and apparent purpose which the parties sought to accomplish." *Thompson v. Gijvoje*, 896 F.2d 716, 721 (2d Cir. 1990) (alteration and internal quotation marks omitted).

Section 16 of the MLPA provides:

Attorneys Fees. If any legal action, suit or proceeding is commenced between the Seller and the Purchaser regarding

their respective rights and obligations under this Agreement, the prevailing party shall be entitled to recover, in addition to damages or other relief, costs and expenses, attorneys' fees and court costs (including, without limitation, expert witness fees). As used herein, the term "prevailing party" shall mean the party which obtains the principal relief it has sought, whether by compromise settlement or judgment.

Notable here, section 16 of the MLPA does not contain any "offset" provision. No part of section 16 provides, for example, that attorneys' fees are recoverable to the prevailing party "to the extent not recovered from any other source" or "net of any recovery from any third party." The absence of such qualifying language is textual evidence that the parties did not intend for there to be such an offset, given that, as Dexia's brief canvasses, such provisions are relatively common in insurance policy contracts, and have generally been enforced by courts applying New York law. *See, e.g., In re Metro. Prop. & Cas. Ins. Co.*, 247 A.D.2d 921, 922 (N.Y. App. Div. 4th Dep't 1998); *Valente v. Prudential Prop. & Cas. Ins. Co.*, 571 N.E.2d 71, 71 (N.Y. 1991). It is fair, too, to assign weight to the absence of an offset provision, given that the parties that negotiated the MLPA—Dexia and Wachovia—were "sophisticated, counseled business people negotiating at arm's length," as was the Trust that succeeded to Wachovia's rights under it. *Wallace v. 600 Partners Co.*, 658 N.E.2d 715, 715 (N.Y. 1995).

New York courts, examining whether an offset is appropriate against contract-based damage awards have treated the issue as one of contract interpretation, and have consistently held that an offset against an award is appropriate where the contract at issue provides for such an offset. For example, in

Hager v. Allstate Ins. Co., 636 N.Y.S.2d 586, 586 (Sup. Ct. 1995), the court held that under New York law, "the only offsets that respondent would be entitled to are those which are included in the contract of insurance, and which are enforceable as a matter of law." Similarly, in *Nelson v. Travelers Prop. Cas. Companies*, 19 Misc. 3d 1129(A), 866 N.Y.S.2d 93 (Sup. Ct. 2008), the court found that a damages offset was appropriate in that case only because the contract between the parties contained a "clear and unambiguous"

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provision explicitly authorizing the offset. And in *Valente*, *supra*, the court held that an offset to contract damages was appropriate “[u]nder [the] circumstances” because “[t]he contract between the parties contains a standard clause which expressly provides for such an ‘offset.’ ” 77 N.Y.2d at 895. To be sure, none of these cases addresses attorneys’ fees specifically, as opposed to other forms of damages. But in contrast to this persuasive authority, the Trust has not cited—and indeed the Court is unaware of—case law imputing the availability of an offset to a negotiated damages formula where the contract did not provide for such an offset.

*6 In light of this precedent, then, the MLPA’s text does not support the Trust’s argument that an offset to the fee award to which Dexia is contractually entitled as the prevailing party in this litigation is warranted to the extent that Dexia’s settlement with Best & Flanagan, in hindsight, functions to compensate Dexia for its legal fees in this litigation. On the contrary, inferring the availability of such an offset would be in tension with the plain text of the MLPA. *Lockheed Martin Corp.*, 639 F.3d at 69.

2. Double Recovery

The Trust argues that, notwithstanding the absence of a contractual basis for an offset, New York law requires that the contractual fee award here be offset to prevent Dexia from obtaining a “double recovery” of the sort that New York case law bars. Pl. Supp. Br. at 12; Pl. Supp. Rep. Br. at 1. Dexia counters that under the relevant law, “a contractually-mandated award of attorneys’ fees may not be offset or reduced by proceeds from a third party source.” Def. Supp. Br. at 8. Dexia’s reading of the law is more persuasive.

In arguing that denying an offset here would give rise to a forbidden “double recovery,” the Trust primarily relies on two cases. *Waehner v. Frost*, 770 N.Y.S.2d 596, 598 (Sup. Ct. 2003), the Trust argues, reflects a “longstanding public policy in [New York] that litigants are to be fairly compensated but that duplicative recoveries and windfalls should be avoided,” Pl. Supp. Rep. Br. at 1, which, the Trust argues, bars Dexia from gaining a fee award to the extent the Best & Flanagan settlement has functionally compensated it for its fees in this case. But *Waehner* is far afield. That case involved a damages offset in a case where a plaintiff sued joint tortfeasors. 770 N.Y.S.2d at 598. It held that an arbitrator should have used an award paid by one tortfeasor

as part of a settlement agreement to offset a damages award against a second tortfeasor meant to compensate the victim for the same injury. *Id.* In so holding, the *Waehner* court relied on tort cases which applied a New York doctrine prohibiting duplicative recovery for damages among joint tortfeasors. *See id.*; *Fisher v. Qualico Contr. Corp.*, 98 N.Y.2d 534, 537 (2002); *Whalen v. Kawasaki Motors Corp.*, 92 N.Y.2d 288, 292 (1998); *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 116 (1st Dep’t 2003). But that doctrine does not speak to how courts should apply a contractual fee-shifting provision that, unlike others, is silent on potential offsets. And there are sound reasons why contracting parties might choose not to negotiate for a potential offset to a prevailing party fee award. For example, they must wish to spare the parties a potentially costly, burdensome, intrusive and inexact inquiry into how, after-the-fact, to allocate a payout pursuant to a broader settlement that contained no allocation formula. The Trust’s bid for an offset here would, in fact, invite just such an inquiry.

Also inapposite is *Inchaustegui v. 666 5th Ave. Ltd. P’ship*, 96 N.Y.2d 111 (2001). In the context of a party whose loss had already been covered by its own insurance policy, the Court of Appeals there stated that “[u]nder settled contract principles, [the prevailing party] is entitled to be placed in as good a position as it would have been had the tenant performed. Its recovery is limited to the loss it actually suffered by reason of the breach.” *Id.* at 115–16. By extension, the Trust contends, any award of attorneys’ fees to Dexia should be limited to the extent to which Dexia’s settlement with Best & Flanagan, viewed in hindsight following the Second Circuit’s decision finding the claims against Dexia time-barred, may today be deconstructed as, in part, compensation to Dexia for its fee outlays here. Pl. Supp. Rep. Br. at 2. But New York courts have explicitly limited *Inchaustegui* to cases in which a party has been compensated by its own insurance, “and therefore sustained no loss beyond its out-of-pocket costs.” *Murray v. N.Y. City Transit Auth.*, 20 Misc.3d 5, 8 (2d Dept. 2008). Thus, the Second Department held, *Inchaustegu*’s rationale did not apply where, for example, the defendant sought “to recover legal expenses pursuant to the indemnification provision of the subcontract.” *Am. Ref-Fuel Co. of Hempstead v. Res. Recycling, Inc.*, 307 A.D.2d 939, 941, 763 N.Y.S.2d 657 (2003); *see also 515 Ave. I Corp. v. 515 Ave. I Tenants Corp.*, 2010 WL 4904671, at *8 (Sup. Ct. Kings County Dec. 1, 2010) (similarly limiting *Inchaustegui*).

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*7 The two cases on which Dexia primarily relies on are more apposite. Both address attempts to offset contractual awards of attorneys' fees. In *Isaacs v. Jefferson Tenants Corp.*, 270 A.D.2d 95, 96 (1st Dep't 2000), for example, the defendant cooperative prevailed on a breach of contract claim, and was therefore entitled—like Dexia—to attorneys' fees under the contract at issue. Like the Trust, the plaintiff in *Isaacs* argued that because the cooperative's insurer had paid for the cooperative's attorneys' fees, the cooperative's award should be reduced in order to avoid double recovery. *Id.* The First Department held, however, that the plaintiff “was not entitled to a credit against his counsel fee obligation in the amount of the payment made to the cooperative by its insurer” because the plaintiff “may not benefit from the circumstance that the cooperative had an insurance policy to cover its legal costs.” *Id.* Similarly, in *O'Neill v. 225 E. 73 Owners Corp.*, 748 N.Y.S.2d 255, 256 (1st Dep't, App. Div., 2002), the First Department held that “plaintiffs were not effectively relieved of their counsel fee obligation by reason of the payment of those fees by defendant's insurance carrier,” and were thus bound by a provision of their lease agreement with the prevailing defendant to pay its legal fees.

The Trust attempts to distinguish *Isaacs* and *O'Neill* on the ground that in each of these cases, the insurer had contractually and common-law subrogation rights, allowing the insurer to seek reimbursement from its insured following the insured's receipt of the fee award. But *Isaacs* and *O'Neill* did not turn on that fact. Indeed, neither decision addressed subrogation or the right of the insurer to recoup the prevailing party's attorney's fees. In declining to offset the award of attorneys' fees, both cases instead emphasized the need to avoid a windfall for the *losing* party, freeing it from having to pay the attorneys' fees that it was contractually obliged to pay. See *Isaacs*, 270 A.D.2d at 96 (“Plaintiff may not benefit from the circumstance that the cooperative had an insurance policy to cover its legal costs.”); *O'Neill*, 298 A.D.2d at 239 (“plaintiffs were not effectively relieved of their counsel fee obligation by reason of the payment of those fees by defendant's insurance carrier”). While *Isaacs* and *O'Neill* are factually distinguishable insofar as they address a payment by an insurer, and not by a third-party pursuant to a settlement agreement as is alleged here, the policy concern of *Isaacs* and *O'Neill*—of not giving an unjustified windfall to a party that had contracted to pay the attorneys' fees of its adversary if the adversary prevailed—is equally applicable and relevant here.

To be sure, the Court has not found on-point authority addressing the precise question at hand: Whether a party that has unconditionally committed to pay its adversary's attorneys' fees if the adversary prevailed may be relieved from this obligation based on a settlement payment to the adversary from a third party which, in hindsight, may be seen as covering some of the same attorneys' fees. But the weight of New York case law, including *Isaacs* and *O'Neill*, suggests that there is no principle precluding Dexia from exercising its contractual right to demand that the Trust pay its reasonable attorneys' fees. And the MLPA, which does not contain an offset provision, points in the same direction. The Court accordingly rejects the Trust's claim that enforcing the prevailing-party attorney's fees provision against it here is inconsistent with New York law regarding double recoveries. Dexia is, therefore, entitled to payment in full, by the Trust, of Dexia's reasonably-incurred attorneys' fees.⁷

B. Reasonableness

*8 The Court next considers whether the fees requested by Dexia are reasonable. “Under New York law, ‘when a contract provides that in the event of litigation the losing party will pay the attorneys' fees of the prevailing party, the court will order the losing party to pay whatever amounts have been expended by the prevailing party, so long as those amounts are not unreasonable.’ ” *Antidote Int'l Films, Inc. v. Bloomsbury Pub., PLC*, 496 F. Supp. 2d 362, 364 (S.D.N.Y. 2007) (quoting *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1263 (2d Cir. 1987)). “A variety of factors informs the court's determination of whether a requested amount of attorneys' fees is reasonable or unreasonable, including the difficulty of the questions involved; the skill required to handle the problem; the time and labor required; the lawyer's experience, ability and reputation; the customary fee charged by the Bar for similar services; and the amount involved.” *Id.* (citation omitted). District courts have broad discretion to determine both the reasonable number of compensable hours and the reasonable hourly rate. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Plaintiffs are to be compensated only for “hours reasonably expended on the litigation,” and not for hours “that are excessive, redundant, or otherwise unnecessary.” *Id.* at 433–34.

In its application for fees and costs, Dexia seeks a total of \$1,893,952.88, as follows:

- \$1,581,636.60 in fees for attorneys and support staff (reflecting \$501,033.35 for the work of the Morgan Lewis law firm, and \$1,080,603.25 for the work of the Polsinelli law firm⁸), *see* Dkt. 133, Ex. A, and;
- \$314,746.28 in costs (\$25,010.61 for Morgan Lewis, \$85,276.47 for Polsinelli, and \$202,029.20 for Dexia⁹), *see id.*

The Trust objects to Dexia's overall requested award of \$1,893,952.88 on three grounds: that (1) Dexia's appellate fees and costs, incurred in connection with its successful appeal to the Second Circuit of Judge Scheindlin's summary ruling, are not covered by the fee-shifting provision in the MLPA; (2) Dexia cannot recover "pre-litigation fees," *i.e.*, fees incurred before the Trust's complaint was filed; and (3) fees attributable to Dexia's switch of counsel, from Polsinelli to Morgan Lewis, were not reasonably incurred. The Court addresses each objection in turn.

1. Hourly rates

Before turning to these specific objections, the Court briefly addresses the reasonableness of the hourly rates charged by counsel and paid by Dexia. The attorneys from Polsinelli, which handled the proceedings in the district court, and Morgan Lewis, which largely handled the proceedings on appeal, together billed at rates ranging from \$250 per hour to \$1,055 per hour. *See* Def. Fees Br. at 16. The Trust has not challenged the reasonableness of any attorney's billing rate. And on its independent review, the Court agrees that the billing rates that Dexia's attorneys charged were reasonable. As the Court has noted in approving billing rates in another complex commercial litigation, "partner billing rates in excess of \$1,000 an hour [] are by now not uncommon in the context of complex commercial litigation." *See Themis Capital v. Democratic Republic of Congo*, No. 09 Civ. 1652 (PAE), 2014 WL 4379100, at *7 (S.D.N.Y. Sept. 4, 2014). And this case involved difficult questions, calling for skillful work by able and experienced counsel. *See Antidote Int'l Films*, 496 F. Supp. 2d at 364. That Dexia's overall attorneys' fees amount to less than 10% of the now-vacated judgment against it further supports that the fees incurred were reasonable, as does its attorneys' ultimate success, at the Second Circuit, in vacating that judgment.

Furthermore, although not necessary to the Court's determination, it is significant, as a form of "market confirmation" as to their reasonableness, that Dexia—a sophisticated consumer of legal services—agreed to both Polsinelli's and Morgan Lewis's fees in an "arms-length" transaction, and paid the invoices for those fees in full.

See Def. Fees Br. at 18; *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany & Albany Cnty. Bd. of Elections*, 522 F.3d 182, 190 (2d Cir. 2008) ("The reasonable hourly rate is the rate a paying client would be willing to pay."); *Anderson v. YARP Rest., Inc.*, No. 94 Civ. 7543 (CSH) (RLE), 1997 WL 47785, at *2 (S.D.N.Y. Feb. 6, 1997) ("The best evidence of a reasonable fee rate is the amount actually charged by counsel[.]") (citations omitted). Accordingly, the Court finds the rates that Dexia asks the Trust to pay entirely reasonable.

2. Appeal Fees

*9 The Trust next argues that Dexia may not recover its fees for appellate work because "Section 16 of the MLPA does not state that fees are allowed through an appeal." Pl. Fees Br. at 17. That argument is clearly wrong. Section 16 of the MLPA covers legal fees incurred in *any* "legal action, suit or proceeding." An appeal, being a stage or proceeding in a legal action or lawsuit, meets each part of this definition. And New York law is clear on this point: Attorneys' fees for appellate work are authorized by a statute or contractual provision that awards attorneys' fees to the prevailing party in an "action" even if the language of the statute or contract does not explicitly authorize fees in connection with an appeal. *See Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 316 (2d Cir. 1990).

3. Pre-litigation fees

The Trust next objects to paying Dexia's legal fees for the period between October 3, 2011, when Dexia received the Trust's repurchase demand letter, and December 27, 2012, when the Trust filed its complaint. Pl. Fees Br. at 16. Citing no case law for this position, the Trust simply asserts that "[n]one of these fees are properly recoverable." *Id.* That assertion, too, is baseless. Courts in this district have clearly held that where—as here—a party "was justified in retaining counsel when a lawsuit was reasonably anticipated (indeed, imminent)" and that party is entitled to an award of attorneys' fees, that party

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“should be reimbursed for its attorneys’ fees for reasonable work done in advance of the actual commencement of suit.”

See, e.g., *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Fin. Corp.*, No. 04 Civ. 3854 (LAK) (AJP), 2008 WL 4833025, at *8 (S.D.N.Y. Nov. 3, 2008). The Trust’s argument is also in conflict with its own earlier fee application: When the Trust sought an award of attorneys’ fees from Dexia at a time when the Trust appeared to have prevailed, it sought and—was ultimately awarded—its pre-litigation costs. See Dkt. 92 ¶ 6. Both on the merits and as a matter of judicial estoppel, the Trust’s claim that Dexia may not recover pre-litigation costs therefore fails. See *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

4. Morgan Lewis appeal fees

Finally, the Trust argues that it is unreasonable to ask it to pay Dexia the \$501,033.35 that Dexia paid Morgan Lewis for handling the appeal in this case, because Dexia “made exactly the same legal arguments on appeal that it advanced in the trial.” Pl. Fees Br. at 18. The Trust argues that Morgan Lewis benefited from the substantial work that Polsinelli had already done, and that Morgan Lewis’s work was limited to “drafting two briefs, submitting five letters, and oral argument,” *id.*, not meriting the payment of fees on this scale. *Id.* Dexia counters that even if its fees increased by virtue of a change of counsel, it was nevertheless “entitled to conclude that it needed a fresh set of eyes and new voice for the appeal.” Def. Fees Rep. Br. at 9.

On this point, both parties’ positions have merit. Dexia was entitled to replace Polsinelli with Morgan Lewis, and parties that have lost below commonly seek out the fresh perspective of new counsel on appeal. Dexia was, further, at liberty to retain a more expensive firm on appeal. And the Trust’s attempts to depict as limited the volume of work necessary for Dexia to ably litigate the appeal are quite unpersuasive. Dexia’s success on appeal—obtaining wholesale reversal and instatement of judgment its favor—emphatically validate its approach to appellate staffing and presentation.

At the same time, a change in counsel invariably breeds inefficiencies, as new counsel is required to get up to speed with the relevant facts, record, law, and procedural history. And “fees incurred because a change in counsel requires new counsel to ‘get up to speed’ are not appropriately passed on to a defendant.” *Ent’l Grp. Int’l L.L.C. v. N.Y. One Cafe Inc.*,

No. 05-CV-1655 (CPS), 2007 WL 869587, at *10 (E.D.N.Y. Mar. 20, 2007); see also *Lunday v. City of Albany*, 42 F.3d 131, 135 (2d Cir. 1994). In recognition of these inefficiencies, Dexia has rightly not sought to pass along to the Trust the fees paid to the Polsinelli firm in connection with the appeal, which presumably consisted largely of work on the transition or on review of Morgan Lewis’ submissions. But Morgan Lewis, too, no doubt devoted more work to getting up to speed for the appeal than would have been necessary had it been trial counsel. And, on its application for payment by the Trust of its attorneys’ fees, Dexia has not written off any of Morgan Lewis’s fees, including those allocated to cover the process of getting up to speed. A reduction in Dexia’s fees is thus warranted, to the extent that these fees reflected work by Morgan Lewis as new counsel to “get up the learning curve,” as such work, while reasonably commissioned, is not reasonably passed along to an adversary. The Court—drawing on its familiarity with this litigation, its review of the record, and its pre-judicial experience handling appellate matters, including as successor counsel retained to pursue appeals of adverse district court outcomes—therefore reduces the portion of Dexia’s fees award attributable to Morgan Lewis’s legal work by 15%, from \$501,033.35 to \$425,878.35.

*10 In sum, therefore, the total amount of attorneys’ fees and costs that the Court finds reasonable to award to Dexia pursuant to the Fees Decision is \$1,821,227.88.

C. Prejudgment Interest

Dexia, finally, seeks prejudgment interest on its award of attorneys’ fees. In support, Dexia relies on CPLR § 5001(a) which provides, in pertinent part, that “[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract.” But Dexia’s bid for prejudgment interest here on the award to it of attorneys’ fees is not supported by the plain language of that provision, because the sum awarded Dexia is not on account of “of a breach of performance,” CPLR § 5001(a) (emphasis added). The Court has not ordered the Trust to pay Dexia’s attorneys’ fees because the Trust breached the parties’ agreement; the Court instead has done so pursuant to a provision of that agreement that provides for the payment of such an award to a prevailing party. Dexia has not alleged that the Trust, which filed this action against Dexia based on *its* (Dexia’s) alleged breach of contract, has itself breached the MLPA.

Dexia cites cases where courts in this district have awarded prejudgment interest on an award of attorneys' fees, including

some citing CPLR 5001(a).¹⁰ But none, or any other case found by the Court, awarded prejudgment interest based on an award of attorneys' fees to a prevailing party where the prevailing party neither (1) established a breach of contract by its adversary or (2) identified a contract provision providing for prejudgment interest on such an award.¹¹

Because the Court finds no legal basis for awarding prejudgment interest to Dexia on its award of attorneys' fees, the Court denies Dexia's application for such prejudgment interest.

CONCLUSION

*11 For the foregoing reasons, the Court holds that Dexia is entitled to an award of attorneys' fees under Section 16 of the MLPA in the amount of \$1,821,227.88, but that Dexia is not entitled to prejudgment interest on this award. The Court respectfully directs the Clerk of Court to close this case.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 6996176

Footnotes

- ¹ The following facts are drawn from Judge Scheindlin's summary judgment decision in favor of the Trust, see U.S. Bank Nat'l Ass'n v. Dexia Real Estate Capital Mkts., No. 12 Civ. 9412 (SAS), 2014 WL 3368670 (S.D.N.Y. July 9, 2014) ("*Dexia I*"), the Second Circuit's reversal of that decision on statute-of-limitations grounds, see 2016 WL 1042090 (2d Cir. Mar. 18, 2016) (summary order) ("*Dexia II*"), and the materials cited therein, and the Fees Decision. Except where specifically quoted or referenced, no further citations to these sources will be made.
- ² Section 16 of the MLPA provides:
If any legal action, suit or proceeding is commenced between the Seller [Dexia] and the Purchaser [Wachovia] regarding their respective rights and obligations under this Agreement, the prevailing party shall be entitled to recover, in addition to damages or other relief, costs and expenses, attorneys' fees and court costs (including, without limitation, expert witness fees). As used herein, the term "prevailing party" shall mean the party which obtains the principal relief it has sought, whether by compromise settlement or judgment.
MLPA § 16.
- ³ As both parties recognize, both the MLPA and PSA are governed by New York Law. See MLPA § 15; PSA § 11.04.
- ⁴ Dexia is not seeking attorneys' fees incurred in connection with the Minnesota litigation.
- ⁵ Although the Court only directed the parties to brief the issue of offset as it relates to the Best & Flanagan settlement, and not the Lloyds settlement, see Fees Decision at 17–18, the foregoing analysis applies equally to both settlements.
- ⁶ Other provisions of the settlement agreement required Dexia to continue to litigate its statute of limitations defense against the Trust in this case, and addressed different scenarios depending on which party prevailed in this case.
- ⁷ For avoidance of doubt, had the Court found that an offset of the contractual fee award to avoid a double recovery alongside the Best & Flanagan settlement was warranted, the Court would not have offset the fee award by the full amount (\$1,135,000) of that settlement, but only by the subset that could not have been applied to other expenses (*i.e.*, the fees and costs that Dexia incurred in the Hennepin County litigation). Given its holding that no offset is warranted, the Court has no occasion to tabulate this "net" figure, but

Dexia represents that the fees and expenses it paid in connection with the Hennepin County litigation would subsume all but \$64,794.21 of the \$1,135,000.

8 This reflects a \$13,775.50 reduction from the fees of Polsinelli that Dexia paid; Dexia made this reduction in response to objections by the Trust. See Def. Fees Rep. Br. at 9 n.9.

9 This reflects a \$2,704.80 reduction to Dexia's original requests, reflecting the fact that the Second Circuit has separately ordered such costs taxed in Dexia's favor. See Def. Fees Rep. Br. at 9 n.9.

10 See Dkt. 126 at 23; see, e.g., *Carco Grp., Inc. v. Maconachy*, 718 F.3d 72, 88 (2d Cir. 2013) ("Although [CPLR] § 5001 does not explicitly mention attorneys' fees, Appellate Division courts have cited to § 5001 in approving or otherwise discussing an award of interest on contract-based attorneys' fees."); *Centennial Contractors Enters. v. East New York Renovation Corp.*, 79 A.D.3d 690, 693 (2d Dep't 2010); *Miller Realty Associates v. Amendola*, 51 A.D.3d 987, 990 (2d Dep't 2008); *Solow Management Corp. v. Tanger*, 19 A.D.3d 225, 226–27 (1st Dep't 2005).

11 Dexia claims that *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Fin. Corp.*, No. 04 Civ. 3854 (LAK) (AJP), 2008 WL 4833025 (S.D.N.Y. Nov. 3, 2008), supports it because the contract provision at issue did not specifically authorize prejudgment interest on attorneys' fees. But a provision there authorized an award of prejudgment interest to either party should that party prevail, which the Court read as sufficient clear to have that effect. See *id.* at *11 ("[A]lthough [the contractual provision] does not explicitly refer to the prevailing party's entitlement to pre-judgment interest on attorneys' fees, this Court concludes that any other interpretation of the [provision] makes little sense.... [The] prejudgment interest provision must entitle a prevailing party to pre-judgment interest on attorneys' fees or else it is mere surplusage."). The MLPA contains no such provision here.

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Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

VR OPTICS, LLC, Plaintiff,

v.

PELOTON INTERACTIVE, INC., a

Delaware Corporation, Defendant.

Peloton Interactive, Inc., Third-Party Plaintiff,

v.

Villency Design Group, LLC, Eric Villency
and Joseph Coffey, Third-Party Defendants.

16-CV-6392 (JPO)

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Signed 03/30/2021

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OPINION AND ORDER**J. PAUL OETKEN**, District Judge:

*1 On April 2, 2020, this Court issued an Opinion and Order granting summary judgment in favor of Peloton on its claim that Villency Design Group, L.L.C. ("VDG") breached its contractual duty to defend Peloton against certain intellectual property claims. (Dkt. No. 308.) See VR Optics, LLC v. Peloton Interactive, Inc., No. 16-cv-6392, 2020 WL 1644204

(S.D.N.Y. Apr. 2, 2020). The Opinion and Order resolved all questions of liability in this case, but it did not decide the quantum of damages that VDG owes to Peloton in light of the breach. (*Id.*) On June 16, 2020, Peloton moved for \$5,152,503.62 in attorney's fees (Dkt. No. 315), which it claims as damages for the breach (Dkt. No. 42 ¶ 88). For the reasons that follow, the motion is granted.

I. Discussion

In opposition to Peloton's motion, VDG argues that: (1) the motion is procedurally improper because the quantum of damages should have been raised in Peloton's motion for summary judgment or should be determined at trial; (2) Peloton is not entitled to attorney's fees insofar as those fees relate to Peloton's advancement of its affirmative claims in this case; and (3) Peloton's claimed fees are unreasonably high, given the invoices and information submitted in support of the present motion. These arguments are considered in turn.

A. The Propriety of a Motion for Attorney's Fees

To prevail on a breach of contract claim under New York law, a party must show, *inter alia*, "damages resulting from the breach." Dee v. Rakower, 112 A.D.3d 204, 208–09 (2d Dep't 2013). VDG contends that Peloton is precluded from proving damages now, in a motion for attorney's fees, because Peloton failed to provide evidence regarding its damages in discovery or in support of its motion for summary judgment. VDG is correct that, for a typical breach of contract claim, a party's failure to disclose damages pursuant to Federal Rule of Civil Procedure 26 can limit recovery. See, e.g., Gould Paper Corp. v. Madisen Corp., 614 F. Supp. 2d 485, 490 (S.D.N.Y. 2009). This, however, is not a typical breach of contract claim.

Here, the only damages Peloton claims are the legal fees it incurred as a result of VDG's default on its duty to defend. Exempting this class of claims from the general rule that damages must be established on a motion for summary judgment or at trial, the Second Circuit has held that, "when a contract provides for an award of attorneys' fees, the jury is to decide at trial whether a party may recover such fees," and "then the judge is to determine a reasonable amount of fees." McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1313 (2d Cir. 1993). Consistent with this exemption, courts in the Second Circuit regularly assess damages for violations of indemnification or defense provisions on a motion for attorney's fees, not on a motion for summary judgment or at trial. See *id.*; Smart Style Indus., Inc. v. Pennsylvania Gen.

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Ins. Co., 930 F. Supp. 159, 165 (S.D.N.Y. 1996) (granting summary judgment on the plaintiff's duty-to-defend claim and directing the plaintiff to submit "supporting documentation detailing the attorneys' fees and costs incurred").

*2 Nevertheless, VDG maintains that Peloton's motion is procedurally improper. VDG suggests that the exemption should apply only in insurance cases, citing *Dresser-Rand Co. v. Ingersoll Rand Co.*, No. 14-cv-7222, 2015 WL 4254033, at *7 (S.D.N.Y. July 14, 2015), for the proposition that, "[o]utside the context of insurance policies, contractual defense obligations are generally treated like any other contractual provision" (Dkt. No. 322 at 1). *Dresser-Rand Co.* is of no assistance to VDG. First, the language that VDG quotes is taken out of context. *Dresser-Rand Co.* did not address the procedure for seeking attorney's fees but instead the interpretive principles applicable to insurance contracts vis-à-vis regular contracts. 2015 WL 4254033, at *7. Second, the language from *Dresser-Rand Co.* is not absolute; it states that defense obligations are *generally* treated like other contractual obligations, allowing the possibility that, in some circumstances, defense obligations may be treated differently. *Id.* Third and most important, VDG provides no explanation for why limiting the exemption to the insurance context makes sense or is otherwise required by the case law. See *McGuire*, 1 F.3d 1306, 1313 (grounding the exemption in "common sense"). Trial courts are regularly responsible for, are expert at, and have a procedural mechanism for assessing attorney's fees. This is true irrespective of whether the party seeking to enforce an indemnification or defense obligation is an insured.

VDG has not shown any procedural impropriety in Peloton's decision to move for attorney's fees instead of proving damages through a summary judgment motion or at trial.

B. The Duty to Defend Affirmative Claims

VDG also problematizes Peloton's decision to seek full reimbursement for its attorney's fees, including those fees associated with Peloton's affirmative claims against VDG, VR Optics LLC ("VRO"), Eric Villency, and Joseph Coffey. There is some merit to this challenge. In addition to its defense against VRO's patent claim, Peloton brought the following affirmative claims: (1) counterclaims against VRO seeking declaratory judgments of non-infringement or the invalidity of the patent at issue; (2) counterclaims and third-party claims against VRO, Villency, and Coffey regarding

their supposed intentional interference with the contract between Peloton and VDG; (3) third-party claims against VDG regarding its supposed breach of the contract's non-infringement warranties, breach of the covenant of good faith and fair dealing, and fraudulent concealment of the potential infringement claim that was ultimately brought by VRO; and (4) a third-party claim against VDG seeking damages for VDG's default on its duty to defend. In general, a party "cannot recover its legal expenses for prosecuting [a] counterclaim" or third-party claim. *Commercial Union Ins. Co. v. Int'l Flaors & Fragrances, Inc.*, 639 F. Supp. 1401, 1402 (S.D.N.Y. 1986); see also *Johnson v. Gen. Mut. Ins. Co.*, 24 N.Y.2d 42, 50 (1969).

Despite the general rule, Peloton can again avail itself of an exception to claim some amount of attorney's fees. Courts in this district have held that, when "two cases are mirror images of each other," as when an insurer and insured file competing claims for declaratory relief, the party owed a defense may claim attorney's fees for its responsive affirmative claim.

Am. Motorist Ins. Co. v. GTE Corp., No. 99-cv-512, 2000 WL 1459813, at *6 (S.D.N.Y. Sept. 29, 2000). In other words, the party "is entitled to recover costs incurred in connection with its [affirmative] claims ... that were or would have been incurred in any event in connection with its defense." *Smart Style Indus., Inc.*, 930 F. Supp. at 165. Without question, Peloton's counterclaims against VRO seeking declaratory judgment of non-infringement or the invalidity of the patent at issue mirrored VRO's infringement claim. Peloton can seek attorney's fees arising from the prosecution of these counterclaims.

Relying on *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1997), Peloton argues that it can additionally recover for any affirmative claim "inextricably intertwined" with VRO's infringement claim, such that the claim and Peloton's defense "involved a common core of facts" or "related legal theories." (Dkt. No. 331 at 5.) Although the inextricably-intertwined standard applies to the allocation of attorney's fees under federal fee-shifting provisions, see *Quaratino*, 166 F.3d at 424 & n.4 (interpreting Title VII's fee-shifting provision), the Court is not aware of any New York case employing this standard to identify the bounds of a defense obligation, *St. Paul Fire & Marine Ins. Co. v. Scopia Windmill Fund, LP*, No. 14-cv-8002, 2015 WL 5440694, at *11 & n.15 (S.D.N.Y. Sept. 9, 2015) (acknowledging that "other jurisdictions" use the inextricably-intertwined standard to

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identify covered affirmative claims but that “[t]he Court has not come across any case applying New York law that has considered this standard”). Instead, New York courts have hewed to the relatively restrictive mirror-image standard, which requires more than “common” facts and “related” legal theories. To implicate the duty to defend, a party’s affirmative claims cannot be “separable from the main action on any coherent grounds” and cannot go “further than merely seeking the opposite of the relief demanded” of the party. *Commercial Union Ins. Co.*, 639 F. Supp. at 1402–03. Aside from the claims for declaratory judgment, Peloton’s counterclaims and third-party claims address facts and law not directly pertinent to VRO’s infringement claim.

*3 Furthermore, and contrary to Peloton’s suggestion, New York law does not provide, as an absolute rule, that “a party owed a duty to defend may recover its fees [] for ... bringing the action to enforce the duty to defend.” (Dkt. No. 331 at 5.) To be sure, an insured may recover attorney’s fees for a claim to enforce the duty to defend when that claim is the inverse of an insurer’s initial action to disclaim liability. In such cases, the party’s affirmative claim to enforce is the mirror image of an earlier claim against which the party is defending.

See, e.g., *Lancer Ins. Co. v. Saravia*, 967 N.Y.S.2d 593, 599 (Sup. Ct. Kings Cnty. 2013) (permitting an insured to recover attorney’s fees for its declaratory judgment action filed in response to an insurer’s earlier action disclaiming liability); *Admiral Ins. Co. v. Weitz & Luxenberg, P.C.*, No. 02-cv-2195, 2002 WL 31409450, at *5 (S.D.N.Y. Oct. 24, 2002) (accord). By contrast, when an affirmative claim to enforce is not a mirror-image claim, “[t]here is nothing in the nature of [the] suit ... that should cause [courts] to add to the exceptions to” “the universal rule in this country not to allow a litigant to recover damages for the amounts expended in the successful prosecution ... of its rights.” *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21–22 (1979). New York courts have held “that [an] insurer is not liable for attorneys’ fees and disbursements necessarily incurred in the policyholder’s successful prosecution of the action it brought to compel the insurer to comply with its policy obligations.” *Id.* at 561; *AFI Protective Sys., Inc. v. Atlantic Mut. Ins. Co.*, 549 N.Y.S.2d 783, 786 (2d Dep’t 1990) (“[The plaintiff] is entitled to recover its legal fees thus far expended by it for its defense.... However, [it] is not entitled to reimbursement for legal fees incurred in connection with the prosecution of this declaratory judgment action [to enforce the duty to defend].” (citation omitted)). VDG never initiated an action to free itself from its defense obligations. It follows that

Peloton is not entitled to attorney’s fees in relation to the third-party claim seeking damages for VDG’s default on those obligations.

Having concluded that Peloton can claim attorney’s fees for just two its affirmative claims, the Court must determine what portion of its claimed \$5,152,503.62 Peloton may actually seek. VDG contends that many of the invoices submitted by Peloton in support of its motion are “so hopelessly vague” or otherwise deficient “that it is impossible to apportion the time” between reimbursable and non-reimbursable claims. (Dkt. No. 329 at 9.) VDG therefore concludes that “Peloton is not entitled to any of these fees.” (*Id.*) VDG misapprehends the role of the Court in assessing attorney’s fees. As the Supreme Court explained in *Fox v. Vice*, “the determination of fees should not result in a second major litigation,” and “trial courts need not, and indeed should not, become green-eyeshade accountants.” 563 U.S. 826, 838 (2011) (internal quotation marks and citation omitted). The Court may achieve “rough justice” by taking into account the documentation submitted, as well as its “overall sense of the suit,” and then estimating the allocation of attorneys’ time. *Id.*

VDG has helpfully provided an accounting of the invoices. In a declaration appended to its opposition to Peloton’s motion, VDG states that around 900 of the hours billed by Peloton’s attorneys were “clearly identified as reflecting work that was performed in defending the patent” claim or as “solely related to the prosecution of the third-party claims.” (Dkt. No. 330 ¶¶ 10–11.) Eighty-one percent of those roughly 900 hours were spent on the former. (*Id.*) From this sizeable sample of billing information, which the Court assumes to be representative given the case’s heavy focus on the patent issue, it can reasonably be extrapolated that 81% of the hours billed by Peloton’s attorneys were spent defending against VRO’s infringement claim. See *Firstland Int’l, Inc. v. I.N.S.*, No. 02-cv-4043, 2008 WL 11504220, at *1 (E.D.N.Y. Oct. 1, 2008) (approving of mathematical extrapolation as a means of estimating an appropriate fee award). Because of the near-total overlap between Peloton’s defense against the infringement claim and Peloton’s affirmative claims for declaratory judgment, the Court determines that the covered affirmative claims warrant reimbursement of an additional 2% of the hours billed — for a total of 83% for all covered claims. VDG does not contend that any of the experts retained by Peloton worked on issues other than those bearing on the content and validity of the contested patent. Accordingly, the Court determines that Peloton is entitled to full reimbursement of its experts’ fees.

C. The Reasonableness of the Fees Sought

Finally, VDG challenges that the fees sought are simply too high for the work reflected on Peloton's invoices. Specifically, VDG argues that the fees should be reduced based on (1) the "presence of significant redactions" in the invoices, (2) the attorneys' use of block-billing, (3) the inefficiency of Peloton's attorneys, (4) the lack of information provided by Peloton on the prevailing rates for comparable attorneys, and (5) the overly high rates charged for paralegals and support staff. (Dkt. No. 330 at 18–20.) VDG is correct that "[a]n award of an attorney's fee pursuant to a contract provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered." *Citicorp Trust Bank, FSB v. Vidaurre*, 155 A.D.3d 934, 935 (2d Dep't 2017). Still, VDG, in presenting its arguments, fails to recognize that the "reasonable" compensation of an attorney depends on the factors of the case at bar, including the nature of the case and the difficulty of the questions presented. *See id.* This dampens the persuasive power of VDG's challenge, which is largely meritless.

*4 VDG's complaint about Peloton's use of redactions, for instance, reads as disingenuous given the nature of this case: a hotly contested patent dispute in which briefing was often redacted and nearly all deposition transcripts and expert reports were filed under seal. (*See, e.g.*, Dkt. No. 210; Dkt. No. 237.) Peloton's heaviest redactions (*see, e.g.*, Dkt. No. 317-8; Dkt. No. 317-11 at 14; Dkt. No. 319-8 at 4–8) appear to correspond with its attorneys' preparation for depositions, management of the privilege log, and client communications.

See Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 970 F. Supp. 333, 342 (S.D.N.Y. 1997) ("[C]ourts may attempt to decipher [time entries] by reference to the context in which these entries occur to determine what work was involved." (internal quotation marks and citation omitted)). This is to be expected and does not, as VDG suggests, "prevent any meaningful review by this Court." *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 327 F. Supp. 3d 606, 645 (S.D.N.Y. 2018).

Nor does Peloton's block-billing trouble the Court. Block-billing is not inherently objectionable and warrants the kind of across-the-board reduction that VDG seeks only in "situations where there is evidence that the hours billed are independently unreasonable or that the block-billing was mixing together tasks that were not all compensable, or not all compensable



at the same rate." *Danaher Corp. v. Travelers Indem. Co.*, No. 10-cv-121, 2015 WL 409525, at *14 (S.D.N.Y. Jan. 16, 2015) (internal quotation marks and citation omitted). VDG does not suggest that this is one such situation. Indeed, the block-billed entries that VDG highlights as "particularly egregious" reflect entirely compensable work. (Dkt. No. 13–15.) The Court's own review of the invoices turned up just one instance of questionable block-billing: an entry from December 5, 2018, that grouped travel time with time spent on deposition preparation. (Dkt. No. 318-16 at 2.) This is not a circumstance in which the invoices are so deficient, by virtue of their structure or redactions, as to warrant a fee reduction. *See Ragin v. Harry Macklowe Real Estate Co.*, 870 F. Supp. 510, 521 (S.D.N.Y. 1994) ("[C]ourts in this Circuit intermittently have seen fit to adopt roughly a 30% fee reduction rule for an attorney's failure to keep contemporaneous time records of their services." (emphasis added)).

VDG is no more persuasive in urging that Peloton's fees should be reduced because its attorneys performed duplicative work. This argument appears to be rooted in Peloton's retention of two law firms, rather than one, as well as a partner's numerous time entries dedicated to reviewing others' work product and conferring with other attorneys. (Dkt. No. 329 at 10.) In a complex patent dispute, this is a thin reed on which to rest argument. This case is unlike *Martinez v. Paramount Country Club, LLC*, No. 18-cv-4668, 2019 WL 2450856 (S.D.N.Y. Apr. 1, 2019), the case VDG relies on to cast doubt on the attorneys' efficiency. (Dkt. No. 329 at 10.) *Martinez* "did not enter discovery or involve significant or complex motion practice," and the plaintiff's "retained counsel worked on [the] matter for about five months after the initial complaint had already been filed."

2019 WL 2450856, at *5. There was no explanation in *Martinez* for why the plaintiff there "retained two law firms instead of one." *Id.* Here, by contrast, the litigation has carried on for over four years, involved numerous dispositive motions and discovery disputes, and produced 331 docket entries. Moreover, based on the issues in this case, Peloton's decision to retain both a firm specializing in patent disputes and a more traditional "big law" firm like K&L Gates LLP (and subsequently Sheppard, Mullin, Richter & Hampton LLP, after Peloton's lead counsel from K&L Gates joined that practice) is unspectacular. Given the stakes of a patent infringement lawsuit targeting the core of Peloton's business, it is hardly surprising that the company took it seriously.

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*5 So too are the rates billed by Peloton's attorneys unspectacular, notwithstanding VDG's argument that they were unsupported and unsupportable. It is, as VDG argues, incumbent on the movant to make "a showing of ... the prevailing hourly rate for similar legal work in the community." *Gamache v. Steinhaus*, 776 N.Y.S.2d 310, 311–12 (2d Dep't 2004). Peloton has attempted to make this showing by offering that Peloton's attorneys charged their standard rate and their invoices reflect what Peloton was actually charged and agreed to pay. This suffices, when considered alongside the "rates awarded in prior cases" and the Court's "own knowledge of hourly rates charged in the district." *Suk Joon Ryu v. Hope Bancorp, Inc.*, No. 18-cv-1236, 2018 WL 4278353, at *5 (S.D.N.Y. Aug. 29, 2018). With respect to Peloton's showing, "[c]ourts in this district ... have recognized that an attorney's customary billing rate for fee-paying clients is ordinarily the best evidence of a reasonable hourly rate." *Id.* (internal quotation mark and citation omitted). And with respect to the rates awarded in prior cases, the highest-billed partner in this case, lead counsel, had an hourly billing rate of \$845, which falls well within the permissible range for experienced big law partners litigating in the district. *Vista Outdoor Inc. v. Reeves Family Trust*, a case regarding rates from 2018, assessed that hourly billing rates as high as \$1,260 "are not excessive in the New York City 'big firm' market." No. 16-cv-5766, 2018 WL 3104631, at *6 (S.D.N.Y. May 24, 2018) (collecting cases). Peloton's hourly billing rates for associates, the highest of which is \$690, similarly fall within the rates awarded in prior cases. *See, e.g., id.* (approving an hourly billing rate of \$693.75 for associates).




Altogether, VDG's reasonableness arguments succeed on one front: The hourly billing rates for Peloton's paralegals and support staff were too high. Courts in this district have been loath to approve hourly billing rates in excess of \$200 for paralegals and support staff. *See id.*;  *Beastie Boys v. Monster Energy Co.*, 112 F. Supp. 3d 31, 56–57 (S.D.N.Y. 2015). The hourly billing rates claimed here range from \$250 to \$345. Following the example set in *Beastie Boys v. Monster Energy Co.*, which also involved Sheppard Mullin's paralegals and support staff, the Court "finds that a fee reduction to a \$200 per hour rate for such personnel, but no greater reduction, is merited."  112 F. Supp. 3d at 57.


In total, the value of the legal work performed on behalf of Peloton, as adjusted, comes to \$4,568,444.47.¹ As discussed, the Court awards Peloton 83% of this figure,

or \$3,791,808.91, in relation to the work performed by Peloton's lawyers, paralegals, and support staff on the patent infringement and invalidity claims. The Court additionally awards Peloton the full cost of its expert services, or \$507,354.65.² Combined, this results in an award of \$4,299,163.56.

D. Prejudgment Interest

Peloton requests prejudgment interest on its award, and VDG does not address the point. Neither party addresses how interest should be calculated.

Under New York law, "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract..."  N.Y. C.P.L.R. § 5001(a). The statutory interest rate is nine percent. *Id.* § 5004. Prejudgment interest is calculated "from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred."  *Id.* § 5001(b). In a duty-to-defend case, damages are "incurred" when a party pays legal fees and expenses that the breaching party has refused to cover. Thus, courts in such cases ordinarily calculate prejudgment interest as running from the date each legal bill was invoiced to or paid by the party. *See, e.g., United Parcel Serv. v. Lexington Ins. Grp.*, 983 F. Supp. 2d 258, 268 (S.D.N.Y. 2013); *Harleysville Worcester Ins. Co. v. Wesco Ins. Co., Inc.*, 314 F. Supp. 3d 534, 552 (S.D.N.Y. 2018). That calculation can be quite complicated, especially where, as here, the Court has applied reductions to certain categories of legal fees. Fortunately, New York law also provides that where damages were incurred at "various times," interest may be calculated "upon all of the damages from a single reasonable intermediate date."  N.Y. C.P.L.R. § 5001(b).

*6 Peloton served notice on VDG invoking the latter's duty to defend on September 9, 2016. VDG's initial breach of contract was shortly thereafter — the Court deems it October 9, 2016 — when VDG declined to undertake its duty to defend against the patent claim asserted by VRO. *See*  *Peloton*, 2020 WL 1644204, at *8. Peloton was incurring significant expenses in connection with this case relatively consistently through August 15, 2019, when the parties' dispositive motions were fully briefed. The Court finds that a "reasonable intermediate date" for Peloton's damages is

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March 15, 2018. Therefore, prejudgment interest will be calculated from that date.³

II. Conclusion

For the foregoing reasons, Peloton's motion for attorney's fees is GRANTED. VDG must pay Peloton \$4,299,163.56, plus interest, for the reasonable attorney's fees, costs, and expenses Peloton incurred in defending against VRO's patent infringement claim and bringing its claims seeking declaratory judgment.

The pending motions to seal are also GRANTED.

The Clerk of Court is directed to enter final judgment in favor of Peloton Interactive, Inc. against Villency Design Group, L.L.C. in the amount of \$4,299,163.56, plus nine percent interest calculated from March 15, 2018. All other claims in this case are dismissed.

The Clerk of Court is directed to close the motions at Docket Numbers 309, 311, 312, and 315, and to close this case.

SO ORDERED.

All Citations

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Footnotes

- ¹ To reach this figure, the Court totaled the legal fees calculated by Peloton, subtracted the amount billed to paralegals and support staff, and added back the number of hours billed by paralegals and support staff, multiplied by \$200: $[(\$417,512.19 + \$401,900.44 + \$3,825,736.84) - (\$33,955.00 + \$1,884.00 + \$261,245.00 + \$4,275.00 + \$5,917.50 + \$2,247.00 + \$1,885.00 + \$224.00 + \$472.50) + \$200 \times (118.5 + 5.6 + 1.7 + 996.4 + 15 + 23.1 + 7.9 + 6.5 + 0.8 + 1.5)]$.
- ² To reach this figure, the Court totaled the cost of the expert services performed by Duff & Phelps, Goodin & Associates, and IMS Expert Services: $(\$252,132.00 + \$72,215.28 + \$183,007.37)$.
- ³ Peloton also requests postjudgment interest on its award of damages. Postjudgment interest, which is also nine percent, runs automatically from the date the judgment is entered. See [N.Y. C.P.L.R. §§ 5003, 5004](#).