UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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DANIEL WILLIAMS, *et al.,*

Plaintiffs,

v.

BEEMILLER, INC. d/b/a HI-POINT FIREARMS, *et al.,*

Defendants.

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Case No.: 05-CV-836S(F)

ORAL ARGUMENT REQUESTED

DEFENDANTS' RESPONSE TO PLAINTIFF'S AFFIDAVIT IN SUPPORT OF REQUEST FOR COSTS AND ATTORNEY FEES

Beemiller, Inc. d/b/a Hi-Point Firearms, MKS Supply, Inc., Charles Brown, and International Gun-A-Rama, Inc., by and through counsel, respectfully submit the following Memorandum of Law in Response to Plaintiff's Fee and Cost Affidavit.

BACKGROUND

In an Order dated June 29, 2006, Magistrate Judge Foschio granted the plaintiffs' motion to remand and request for the costs and attorney fees they incurred in opposing the removal of this case. On September 21, 2006, this Court adopted Magistrate Judge Foschio's Order as being neither clearly erroneous nor contrary to law, including the award of attorney fees and costs. Defendants successfully appealed this Court's September 21, 2006 Order on the grounds that the issue of removal/remand is dispositive in nature and that a magistrate judge does not have the authority to issue such a ruling absent *de novo* review by an Article III judge.

After defendants filed their Notice of Appeal, but prior to plaintiffs filing their improper and unsuccessful motion to dismiss the appeal, defendants offered to withdraw the appeal and immediately proceed in state court, provided that plaintiffs agreed to waive collection of any fees

or costs associated with the removal. Plaintiffs, however, refused to agree to any such settlement of the appeal, and defendants were forced to continue the appeal to a favorable resolution.

Upon remand from the Second Circuit, this Court referred the motion to remand back to Magistrate Judge Foschio for a report and recommendation, instead of simply reviewing Magistrate Judge Foschio's prior Order *de novo* as if it were a report and recommendation as was required by the Second Circuit's mandate. On October 31, 2008, Magistrate Judge Foschio issued his Report and Recommendation. On June 25, 2009, this Court adopted Magistrate Judge Foschio's Report and Recommendation in its entirety.

For the reasons set forth below, and notwithstanding defendants' continued assertion that both Magistrate Judge Foschio and this Court ignored controlling United States Supreme Court authority which changed the standard on whether to award costs and attorney fees pursuant to 28 U.S.C. § 1447(c),[1] plaintiffs should only be awarded reasonable fees and costs up to the date of this Court's original Order, dated September 26, 2006, as all fees and costs incurred by plaintiffs subsequent to that date resulted from defendants' successful appeal.

ARGUMENT

Pursuant to 28 U.S.C. § 1447(c), "an order remanding the case may require payment of just costs and any **actual expenses**, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (emphasis added). In the present case, plaintiffs are not entitled to recover their attorney fees from defendants pursuant to 28 U.S.C. § 1447(c) because they have not provided the court with sufficient evidence that they actually incurred any attorney fees as a result of removal. Further, even if plaintiffs are to be "compensated" for attorney fees that they

[1] See Martin v. Franklin Capital Corp., 546 U.S. 132 (2005).

did not actually incur, the amount of attorney fees requested by plaintiffs are inflated and unreasonable and therefore must be reduced.

I. Plaintiffs are Not Entitled to Attorney Fees Because They Have Not Demonstrated That They Have Incurred Any Fees as a Result of Removal.

Under 28 U.S.C. § 1447(c), the court may order a party to pay just costs and any *actual expenses and attorney fees* which incurred as a result of the removal. While the Second Circuit has encountered this statute on several occasions, it has never addressed the issue of interpreting the rule in terms of what is meant by "actual" expenses and attorney fees. Moreover, case law on this issue involving other statutes may not be germane because most fee-shifting statutes, including those analyzed in the cases cited by plaintiffs, refer to "reasonable" expenses and attorney fees. In contrast, 28 U.S.C. § 1447(c) does not provide for an award of reasonable attorney fees, but rather only the "actual" expenses and attorney fees that the plaintiffs incurred as a result of removal.[2] Although the Second Circuit has not yet addressed this issue, three other circuits have.

In 2000, the Seventh Circuit interpreted Section 1447(c) on the issue of whether there can be reimbursable attorney fees when the lawyers are governmental employees on the payroll as salaried employees. Wisconsin v. Hotline Indus., 236 F.3d 363, 365 (7th Cir. 2000). The court narrowly construed the language of the statute, explaining that the rationale behind fee-shifting rules is to make the victorious party whole. Id. at 367. **The court ultimately held that only actual attorney fees could be recouped.** Id. at 368. Accordingly, where the work is performed by salaried government attorneys, the defendant only has to reimburse the plaintiff for a

[2] See Gotro v. R & B Realty Group, 69 F.3d 1485, 1489 n.1 (1995) (O'Scannlain, J., dissenting) (listing thirteen statutes which all contain the word "reasonable").

proportional share of those attorneys' salaries, commensurate with the amount of time they devoted to opposing the removal. Id.

In Gotro v. R & B Realty Group, 69 F.3d 1485, 1486 (1995), the Ninth Circuit addressed whether the district court had discretion to award attorney fees to a plaintiff who was being represented on a contingency fee basis. The majority held that the words in the statute did not limit the court's discretion from awarding fees to an attorney operating on a contingency basis. Id. at 1488. However, the dissent by Judge O'Scannlain offers the sounder reasoning, explaining that Section 1447(c) "means that a defendant who improperly removes a case to federal court may be liable for costs but only for such attorney fees that the plaintiff is actually obligated to pay as a result of the removal episode." Id. at 1489. Judge O'Scannlain supports his opinion by comparing the language of Section 1447(c) to other federal statutes which provide for an award of attorney fees. Id. His rationale is that Congress drafted this statute and utilized language that did not include the word "reasonable." Id. at 1490.

In terms of contingency fees, Judge O'Scannlain points out that a plaintiff who is being represented on a contingency fee agreement is in a different position than parties paying their attorneys on an hourly basis:

> The fact is, if Gotro were eventually to recover damages, she would owe her attorneys the same percentage of the damages regardless of whether the case had been improperly removed. Similarly, if Gotro were later to recover nothing, then she would owe her attorneys nothing, despite their having contested the improper removal. Thus, it is clear that Gotro incurred no expenses (including attorney fees) as a result of the removal and consequently was entitled to no award un Section 1447(c).

Id. Further, since the purpose of this section of the statute is to reimburse plaintiffs who have actually incurred attorney fees as a result of the improper removal of a case, a plaintiff who has a contingency fee agreement will not have incurred such fees. Id. Here, of course, it is not

entirely clear from the request for costs and attorney fees filed by plaintiffs' counsel that any fees that may ultimately to be awarded by this Court are to be reimbursed to plaintiffs for monies paid as opposed to given to their attorneys as some sort of windfall. Finally, the Tenth Circuit addressed the interpretation of Section 1447(c) in Huffman v. Saul Holdings Ltd. P'ship, 262 F.3d 1128 (10th Cir. 2001). The Tenth Circuit held that "the statute's limit on actual fees to those 'incurred as a result of removal' requires the district court to conduct some sort of reasonableness inquiry." Id. at 1135. The court cautioned that "excessive fee requests flow from, and accumulate by means of improper billing practices." Id.

The Second Circuit has never had occasion to address this specific issue, but the Hotline Industries case and the dissent in Gotro offer the best reasoned interpretation of Section 1447(c). In the present case, plaintiffs have not provided any evidence that they are actually paying Connors & Vilardo, LLP or the Brady Center to Prevent Gun Violence Legal Action Project on an hourly basis, and it appears that they are in fact being represented on a contingency fee basis. Plaintiffs have failed to produce a retainer agreement containing the fee structure. Accordingly, because plaintiffs have not actually incurred any attorney fees as a result of the removal of this case, they are not entitled to any reimbursement pursuant to 28 U.S.C. § 1447(c).

The fee shifting provision in 28 U.S.C. § 1447(c) is designed only to place plaintiffs in the same financial position in which they would have been if a case had not been removed.[3] Accordingly, because plaintiffs have failed to submit any evidence that they actually incurred attorney fees as a result of the removal of this case, their request for attorney fees should be denied.

[3] This is unlike fee shifting provisions applicable to civil rights statutes, such as 42 U.S.C. § 1983, which are designed to encourage private enforcement of civil rights statutes. Helbrans v. Coombe, 890 F. Supp. 227, 230 (S.D.N.Y. 1995).

Alternatively, plaintiffs should produce their retainer agreement with their counsel to the court to demonstrate the true fee and cost arrangement between plaintiffs and their counsel, and the award of costs and attorney fees, if any, should be limited accordingly.

II. The Attorney Fees Listed by Plaintiffs Should Be Reduced.

Even if plaintiffs are entitled to attorney fees in this case, the amount requested by plaintiffs must be reduced. Initially, any and all fees and costs associated with the appeal cannot be recovered by plaintiffs, because the defendants were the prevailing party on the appeal and because the Court of Appeals already denied plaintiffs' request for just such a recovery. Further, in the Second Circuit, the lodestar approach governs the initial estimate of reasonable attorney fees. Grant v. Martinez, 973 F.2d 96, 99 (2d Cir. 1992); Anderson v. Rochester-Genessee Reg'l Transp. Auth., 388 F. Supp. 2d 159, 163 (W.D.N.Y. 2005); Alnutt v. Cleary, 27 F. Supp. 2d 395, 399 (W.D.N.Y. 1998). To utilize this approach, "the number of hours reasonably expended on the litigation is multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The party seeking fees has the burden to establish the reasonableness of both the number of hours worked and the rate charged. Alnutt, 27 F. Supp. 2d at 399. A party seeking an award of attorney fees must support the request with contemporaneous time records that specify, for each attorney, the date, the hours expended and the nature of the work done. N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983). The initial fee calculation should exclude hours that were not "reasonably expended" because they were "excessive, redundant or otherwise unnecessary." Alnutt, 27 F. Supp. 2d at 399.

In this case, plaintiffs request attorney fees pursuant to 28 U.S.C. § 1447(c). When evaluating a request for attorney fees under 28 U.S.C. § 1447(c) the court must disallow hours which were not incurred solely in connection with the remand motion. See Greenridge v. Mundo

Shipping Corp., 60 F. Supp. 2d 10, 13 (E.D.N.Y. 1999); see also Mattice v. ITT Hartford Ins. Group, 837 F. Supp. 499, 500 (N.D.N.Y. 1993) (reducing attorney fees by the amount that was not attributed to the remand motion).

A. Plaintiffs' Fees and Costs Related to the Appeal are not recoverable.

Upon defendants filing the appeal in this case, plaintiffs' moved to dismiss the appeal and also moved for damages and costs, pursuant to Fed. R. App.38. The Second Circuit denied plaintiffs' motion to dismiss and request for damages and costs, stating:

> It is further ORDERED that the motion for costs and damages pursuant to Fed. R. App. P. 38 is DENIED as, in light of the split of authority concerning the appealability of 1447(c) orders issued by magistrate judges, the appeal is not frivolous.

Thus, based on the Second Circuit's denial of plaintiffs' initial request for damages and costs and the ultimate decision in defendants' favor with respect to the sole issue on appeal, plaintiffs cannot be awarded fees and costs associated with the appeal.

B. The Hourly Rates Charged Are Not Reasonable.

The burden is on the party seeking attorney fees to prove what a reasonable rate would be. Anderson, 388 F. Supp. 2d at 167. It is generally required that a party produce satisfactory evidence *in addition to the attorney's own affidavits* that the requested rates are in line with those prevailing in the community for similar lawyers of **reasonably comparable skill, experience, and reputation**. Blum v. Stenson, 465 U.S. 886, 895 (1984) (emphasis added). In addition to the affidavits, the court may rely in part on its own knowledge of private firm hourly rates in the community. Miele v. N.Y. State Teamsters Conference Pension and Ret. Fund, 831 F.2d 407, 409 (2d Cir. 1987). The court does not have to solely consider the hourly rate data that is submitted into evidence. Id. Additionally, a court may consider the rates that have been awarded in similar cases in the same district. Anderson, 388 F. Supp. 2d at 167.

For example, in Alnutt the attorney seeking attorney fees submitted the expert affirmations of three prominent attorneys in Rochester (the local community) who attested that the rates being requested were in line with the rates charged by other attorneys in the community with "similar levels of education, experience, and reputation." Alnutt, 27 F. Supp. 2d at 399. In Anderson, the plaintiff submitted expert affidavits of two local lawyers stating that the fees (which ranged from $200 to $300) were reasonable. Anderson, 388 F. Supp. 2d at 167-68. This Court, however, used its own discretion to lower the rates to $175 to $250.

In Critchlow v. First Unum Life Ins. Co., 377 F. Supp. 2d 337, 342 (W.D.N.Y. 2005), the lawyers seeking attorney fees only submitted their own affidavits to demonstrate the reasonableness of their rates. The court stated that they cannot "simply take counsel at their word that the rates requested are the prevailing market rate." Id. The court reduced the requested hourly rates from $275 and $250 to $250 and $200 because the attorneys seeking the fees did not offer "any other evidence, such as affidavits of other area attorneys of comparable background and experience, to support [their] assertions." Id.

In this case, the plaintiffs' counsel seeks attorney fees, and they only offer their own affidavits to support the reasonableness of their fees. Further, the rates appear to be unreasonably high based on the level of experience of the lawyers. Plaintiffs request an hourly rate of $200 per hour for Elizabeh Harned (Connors & Vilardo, LLP), who was admitted to the New York bar in 2003 and had only two years of experience at the time the motion to remand was filed. Plaintiffs also request $200 per hour for Guiseppe Ippolito (Connors & Vilardo, LLP), who was an admission-pending law school graduate at the time the motion was filed. The amounts requested for work performed by Ms. Harned and Mr. Ippolito are clearly excessive for the Western District of New York, particularly considering that this Court has recently found

$200 to be a reasonable rate for attorneys with between twelve and thirty-three years of experience. See Critchlow v. First Unum Life Ins. Co. of America, 377 F. Supp. 2d 337, 342 (W.D.N.Y. 2005) (finding $200 to be a reasonable rate for an attorney admitted to the New York bar in 1993) and Brock v. Wright, No. 00-CV-0085(SR), 2005 WL 2459112, at *2 (W.D.N.Y. Oct. 4, 2005) (finding $200 per hour to be a reasonable rate for an attorney with extensive litigation experience who had practiced in the Western District of New York since 1972).

Similarly, plaintiffs request an hourly fee of $250 for Elizabeth Haile, who was not admitted to the bar until 1999. Further, the work performed by Ms. Haile and Jonathan Lowy for which plaintiffs seek compensation from defendants was performed before they were even admitted to practice *pro hac vice* before this Court and should therefore not be compensable. In contrast, this Court has recently found $250 to be a reasonable hourly rate for attorneys with between twenty-nine and forty-six years of experience. See Anderson, 388 F. Supp. 2d at 169 (finding $250 to be a reasonable rate for an attorney with twenty-nine years of experience) and Critchlow, 377 F. Supp. 2d at 342 (finding $250 to be a reasonable rate for an attorney with forty-six years of experience). The hourly rates requested by plaintiffs are clearly excessive for the Western District of New York and should be reduced if plaintiffs are to be awarded any fees.

C. The Amount Billed for Is Not Reasonable.

Excessive, redundant or unnecessary hours are to be excluded from a fee award. Anderson, 388 F. Supp. 2d at 163. Additionally, a court may apply a reasonable percentage reduction to an award of attorney fees. See Kirsch v. Fleet St., Ltd., 148 F.3d 149, 173 (2d Cir. 1998) (stating that applying a reasonable percentage reduction is "a practical means of trimming fat from the fee application"). In this case, plaintiffs' hours billed are not reasonable because they are redundant, excessive, and unnecessary.

The use of multiple attorneys is not *per se* unreasonable, but in certain cases it is not necessary or reasonable because it will lead to duplication of effort and excessive hours being billed. Anderson, 388 F. Supp. 2d at 164. In Anderson, the court deemed it unreasonable and unnecessary to have multiple attorneys attend oral arguments when only one was arguing. Id. The court reasoned that the "defendants . . . should not be required to compensate all of plaintiffs' attorneys for those appearances when the use of just one or two would have been adequate." Id. at 165.

In this case, plaintiff is represented by both the Brady Center and Connors & Vilardo, LLP. Throughout the billing sheet of Connors & Vilardo, LLP, there are many instances which refer to their firm's review of work done by the attorneys at the Brady Center. According to their time notes, Elizabeth Haile at the Brady Center billed thirteen (13) hours for research related to the motion to remand and billed twelve (12) hours writing and editing the motion. John Lowy at the Brady Center billed an additional one and a half (1.5) hours "reviewing and editing" the memorandum to remand.

After the Brady Center spent 26.5 hours researching and writing what plaintiffs contended was a straight-forward and uncomplicated motion for remand, Connors & Vilardo, LLP spent an additional 26.1 hours (essentially duplicating the first 26.5 hours of work by the Brady Center)[4] "reviewing" and "working on" what the Brady Center had already written:

12/12/2005	JWG	**Work on remand motion**, and suggestions to associate, Giuseppe A. Ippolito regarding same	0.30 hours
12/19/2005	EBH	**Review Brady Center draft of remand motion**	0.80 hours

[4] Due to the imprecise manner of time-keeping, it is impossible to determine actually how many hours were spent reviewing Brady Center material. This will be addressed in Section II(C) of this memorandum. Additionally, meaningless labels such as "review" and "work on" are disfavored by anyone involved in attorney billing, including courts, insurance companies, clients, etc.

12/19/2005	EBH	**Review motion to remand** and federal rules Regarding removal and remand.	0.80 hours
12/20/2005	JWG	**Work on remand motion**; searching for information on Bostic for inclusion in our motion	1.50 hours
12/21/2005	EBH	**Worked and remand papers and review research cited by Brady Center in draft.**	4.10 hours
12/22/2005	GAI	Research into statute of limitations for crime victims; **shepardizing and quote check for all cases cited by Brady Center** or defendants in their respective removal/remand papers	4.00 hours
12/22/2005	EBH	**Review research cited by defendants in removal notice and cited by Brady Center in draft remand motion**; conferences with and instructions to associate, Giuseppe A. Ippolito regarding research for remand motion; work on remand motion; correspondence with Brady Center.	3.20 hours
12/22/2005	JWG	**Work on motion to remand**	3.90 hours
12/23/2005	JWG	**Completed**, filed and served **motion to remand**; e-mail to our team regarding same.	4.30 hours
12/23/2005	EBH	**Worked on and serve remand papers.**	2.00 hours
12/23/2005	TMC	**Working on remand papers**.	1.20 hours

These entries all indicate that this is a situation of duplicative billing. Although there is no evidence that plaintiffs have actually paid Connors & Vilardo, LLP and the Brady Center for the hours they are seeking compensation from defendants, such duplicative work would never have been billed to a client and therefore should not be shifted to defendants.[5] Therefore, the Court should not award duplicate attorney fees simply because there is more than one set of lawyers representing plaintiffs.

[5] While it is impossible to determine from the information currently available whether the line was crossed here, at some point, excessive/duplicative billing moves from merely unacceptable to an ethical issue for the attorneys involved.

Additionally, the amount requested is wholly excessive. In the Anderson case, the court added up the total time billed and declared that the amount was too high "considering the nature and history of th[e] case." Anderson, 388 F. Supp. 2d at 165. The court looks to the history of a case and the situation involved to determine the reasonableness of the amount of hours billed. Id. In this case, the plaintiffs claim they billed a total of $83,479.89 related to the motion to remand. This Court, however, ultimately remanded the case based on the very simple issue of lack of unanimity among defendants. As such, the Court cannot award plaintiffs $83,479.89 as fees and costs on this issue. The length of plaintiffs' remand papers further supports the need to drastically reduce the number of hours claimed by plaintiffs' counsel. It is entirely unreasonable to have spent approximately 100 hours to produce a twelve-page memorandum in support of a motion to remand and a nine-page reply memorandum, the initial number of hours billed prior to the appeal. The number of hours claimed is excessive and hence unreasonable, in light of the circumstances.

Finally, partners in law firms have a duty to delegate work that can be performed by associates at a lower rate. See Anderson, 388 F. Supp. 2d at 165 (noting that much of the work that attorneys had listed on their billing statement was performed by higher paid partners and senior attorneys). While there may be a genuine reason for so much work being allotted to a senior attorney, the defendants should not "be forced to shoulder completely the resulting financial burden." Id. In this case, James Grable, a partner with Connors & Vilardo, LLP, for whom plaintiffs seek an hourly rate of $250, was responsible for more than 60% of the total amount of money billed ($8,200.00 out of $13,650.00) prior to the appeal. Mr. Grable, however, should have delegated a substantial portion of this work (such as research and drafting) to

associates with a lower hourly rate. The defendants should not have to pay extra money because tasks were done by a partner when they could have just as easily have been done by an associate.

D. The Billing Records are Impermissibly Inadequate, Vague, and Overbroad.

The Second Circuit has held that a party seeking an award of attorney fees must support the request with contemporaneous time records that specify, for each attorney, the date, the hours expended and the nature of the work done. N.Y. State Ass'n for Retarded Children, 711 F.2d at 1148; see also Miele v. N.Y. State Teamsters Conference Pension & Ret. Fund, 831 F.2d 407, 409 (2d Cir. 1987) (stating that the court requires hours to be kept in *detailed* contemporaneous time records). The purpose of this requirement is to allow the court to have enough information to "audit the hours and determine whether they were reasonably expended." Anderson, 388 F. Supp. 2d at 166. The Brady Center's time records are clearly not maintained contemporaneously, and the affidavits submitted in support of those entries are glaringly missing this critical factor. As such, the Brady Center's request for fees should be denied in whole.

Time records are impermissibly inadequate when there are "vague entries." Id. (stating that descriptions of meetings and conferences as "strategy," "research," and "status," as well as general reference to work on "briefs" and "affidavits" and "preparation" were impermissibly vague entries); see also Sabatini v. Corning-Painted Post Area Sch. Dist., 190 F. Supp. 2d 509, 521 (W.D.N.Y. 2001) (holding entries that included "hearing preparation," "prepare for hearing," "review records," "telephone conference with client," and "prepare for discovery" to be insufficient). It is customary to reduce the requested amount when the time records submitted do not "bear sufficient indicia of contemporaneousness or are vague, overbroad or . . . demonstrably inaccurate." Huangs v. Runyon, No. 96-CV-0650E(SC), 2000 WL 1209381, at *2 (W.D.N.Y. Aug. 18, 2000).

In this case, the amount of fees requested by the plaintiffs must be reduced by the court because the time entries are overbroad, vague and inaccurate. Looking at the case law, plaintiffs' counsels' time entries are wholly inadequate because their entire billing sheet is littered with almost nothing but vague, general, and meaningless entries. The excerpts from the billing sheet discussed in Section II(B) of this memorandum already demonstrated one example of vagueness. The time entries use general words or phrases like "worked on remand brief" or "suggestions to associate" or "review motion to remand." These phrases are entirely too vague.

Second, the purpose of submitting contemporaneous time records to the court (namely, to allow a court to determine if the hours were reasonably billed) is not met in this situation because with many of the counsels' "block billed" time entries one cannot tell how much time was spent performing what activity. For example, on 1/30/2006 Mr. Grable bills 10.10 hours for "received and reviewed defendants' responses to our remand motion; research for reply; work to draft same; e-mails to our team regarding same." Another entry from Mr. Grable on 1/31/2006 bills 9.90 hours for "e-mails to and from our team regarding our reply; finalized, filed, and served same." These are just a few of the many examples. Entries like these are precisely the type that the court wants to avoid, and they are easily seen for what they really are. Based on the case law and the billing entries, plaintiffs' attorney fees should be reduced accordingly.

E. Plaintiff Cannot Claim WESTLAW Computer Research as a Disbursement.

Plaintiff states that their firm spent $5,159.04 conducting online research and lists this amount of money as part of the fees and costs. However, the Second Circuit has disallowed reimbursement for computer research on the grounds that it is "merely a substitute for an attorney's time that is compensable under an application for attorney's fees and is not a

separately taxable cost." Alnutt, 27 F. Supp. 2d at 404 (quoting United States v. Merritt Meridian Const. Corp., 95 F.3d 153, 173 (2d Cir. 1996)).

Throughout plaintiffs' billing statement, there are time entries for legal research. To allow plaintiffs to recover the cost of WESTLAW research in addition to billing for the time it takes to conduct the research would be like paying the plaintiffs twice, especially when books remain both free and useful. Therefore, money spent on legal research cannot be recouped as costs in this situation because that amount should already be considered in the attorney fees, just like counsel cannot collect for rent, utilities, and other overhead such as the cost of their books. Plaintiffs other claimed costs should similarly be disallowed, including: outside reproduction of documents, postage, Federal Express, travel expenses (which must be related to argument on appeal in New York City), long distance telephone charges, "docket sheet," and photocopies.

CONCLUSION

WHEREFORE, Defendants respectfully request that this Court hold that plaintiffs are not entitled to any attorney fees based on: (1) the statutory language in 28 U.S.C. § 1447(c) in that there is no proof that plaintiffs have actually "incurred" any such costs and attorney fees in this case, and (2) controlling United States Supreme Court authority; or, in the alternative, to limit the amount to those reasonable costs and attorney fees incurred prior to the filing of the appeal to the Second Circuit by defendants, and to dramatically reduce the amount of those attorney fees incurred during that particular time frame to a reasonable amount.

Dated: While Plains, New York
July 16, 2009

Respectfully submitted,

s/ Jeffrey Malsch

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CERTIFICATE OF SERVICE

Jeffrey Malsch, an attorney, certifies that, on this 17th day of July 2009, he caused to be filed via the ECF system for the United States District Court for the Western District of New York the foregoing:

MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S REQUEST FOR CERTAIN FEES AND COSTS

He further certifies that a copy of said filing is being served on all counsel of record via the Court's electronic notification system and via U.S. Mail, Postage Prepaid to the following attorneys of record who are not registered users of the Court's ECF filing system for this case:

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