10-1339-cv(L), 10-1599-cv(CON)

United States Court of Appeals

for the

Second Circuit

DANIEL WILLIAMS, EDWARD WILLIAMS,

Plaintiffs-Appellees-Cross-Appellants,

– v. –

INTERNATIONAL GUN-A-RAMA, KIMBERLY UPSHAW, JAMES NIGEL BOSTIC, CORNELL CALDWELL, JOHN DOE TRAFFICKERS 1-10,

Defendants,

BEEMILLER, INC. dba HI-POINT, CHARLES BROWN, MKS SUPPLY, INC.,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants make the following corporate disclosures:

1. Beemiller, Inc. has no parent corporations. There are no publicly held companies that own ten percent (10%) or more of Beemiller, Inc.'s stock.

2. MKS Supply, Inc. has no parent corporations. There are no publicly held companies that own ten percent (10%) or more of MKS Supply, Inc.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Section 1447(c) specifies that "[a]n order remanding [a] 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). In 2005, well before the magistrate judge issued his initial Ruling and Recommendation in this matter, the Supreme Court unanimously held that a district court may award such fees ***only*** where the removing party lacked an "objectively reasonable basis" for removing the case. Despite this clear edict from the Supreme Court, and despite the fact that Appellants repeatedly cited this authority, the magistrate judge, and subsequently the district court judge, refused to apply the "objectively reasonable" standard when deciding to award attorneys' fees and costs in this matter.[1] The refusal to apply the delineated standard is even more egregious considering the fact that the district court judge was afforded the opportunity to reexamine his initial ruling when this Court remanded this case to the district judge for a *de novo* review of the magistrate's ruling. The District Court therefore clearly erred when it applied an obsolete standard to award attorneys' fees and costs in this case.

Applying the "objectively reasonable" standard makes plain that awarding fees and costs in this instance cannot be justified. To be clear, this case was not remanded based on the lack of merits in removing but, rather, was remanded due to

[1] Unless specified otherwise, when the term "fees" is used in this brief, it is referring to both attorneys' fees and costs pursuant to 28 U.S.C. § 1447(c).

a purported procedural nonconformity. Specifically, the District Court held that Appellants violated the so-called "rule of unanimity" by failing to obtain consent of all defendants who had "in fact" been served prior to removal as opposed to requiring consent only from those parties to which the removing defendants had notice of service. First, there is no controlling Second Circuit opinion on this issue, and a review of persuasive authority reveals that the better rule is that removing defendants are obligated to obtain the consent to removal from defendants that they know or reasonably should have known had been served. Since removing defendants obtained all the necessary consents prior to removal, removal was procedurally proper in instance. Second, the District Court's reliance on one case to support its conclusion that a removing defendant is obligated to obtain consent from all defendants that had "in fact" been served is misplaced.

Besides, even if removal is held to be procedurally improper, the decision to remove was not "objectively unreasonable." Defendants relied upon substantial legal authority in asserting that removal was proper and case law demonstrates that courts are hesitant to award fees and costs pursuant to Section 1447(c) based solely upon a procedural defect. In addition, the fact that Plaintiffs failed to timely file the affidavits of service and listed incorrect addresses on the summons for the non-consenting defendants demonstrates that Removing Defendants' failure to obtain consents was due to the lack of diligence by Plaintiffs.

In terms of the fee award itself, Plaintiffs are not entitled to fees because they have not incurred actual attorneys' fees as their counsel has been retained on a contingency fee basis. Additionally, the District Court erred in awarding costs which were not incurred solely due to the removal, and since the Second Circuit already denied Plaintiffs' request for attorneys' fees related to the previous appeal, the District Court was not authorized to award fees and costs associated with that appeal. Finally, even if Plaintiffs were entitled to an award, a review of the facts demonstrates that the amount of fees awarded to Plaintiffs should be reduced.

JURISDICTIONAL STATEMENT

Appellants removed the underlying state court action to the district court on the basis of diversity of citizenship as the only non-diverse party was fraudulently joined. *See* 28 U.S.C. §§ 1332, 1441; *see also Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 302 (2d Cir. 2004).

On June 25, 2009, the case was remanded to state court due to a purported defect in the removal procedure, and Appellees were ordered to submit affidavits in support of their request for costs and attorneys' fees. *See* 28 U.S.C. § 1447(c). On March 10, 2010, the District Court entered a Decision and Order awarding Plaintiffs fees and costs. *See Cooter v. Hartmax Corp.*, 496 U.S. 384, 396 (1990); *see also Correspondent Servs. Corp. v. J.V.W. Inv. Ltd.*, 524 F. Supp. 2d 412, 421-22 (S.D.N.Y. 2007) (holding that dismissal of an action for lack of subject matter

jurisdiction did not deprive the court of jurisdiction to award attorneys' fees under the applicable statute).

Pursuant to Rule 4 of the Federal Rules of Appellate Procedure, Appellants timely filed the Notice of Appeal on April 9, 2010. Fed. R. App. P. 4(a)(1)(A). Appellate jurisdiction is proper pursuant to 28 U.S.C. § 1291 because an award of attorneys' fees and costs is a final and appealable order once the amount of such an award has been fixed. *Discon, Inc. v. NYNEX Corp.*, 4 F.3d 130, 132 (2d Cir. 1993); *see also Cooper v. Salomon Bros. Inc.*, 1 F.3d 82, 85 (2d Cir. 1993).

STATEMENT OF THE ISSUES

This appeal presents seven (7) separate, but interrelated, issues for review:

(1) Did the District Court err in applying a no longer valid standard for awarding attorneys' fees and costs incurred as a result of removal, instead of the standard established by the Supreme Court in *Martin v. Franklin Capitol Corporation*, 546 U.S. 132 (2005)?

(2) Did Removing Defendants have a reasonable basis to remove a case when (a) they did not have actual knowledge that certain defendants had been served prior to removal, (b) Plaintiffs failed to file the returns of service with the court clerk, and (c) Plaintiffs listed the wrong addresses for the non-consenting defendants on the summonses thereby precluding Removing Defendants from contacting them directly to determine whether they had been served?

(3) Did the District Court err in awarding attorneys' fees to Plaintiffs pursuant to U.S.C. § 1447(c) when they did not incur any actual attorneys' fees as a result of removal because their attorneys were retained on a contingency fee basis?

(4) Did the District Court err in awarding fees and costs to Plaintiffs pursuant to 28 U.S.C. § 1447(c) when they were not incurred solely in connection with the removal?

(5) Did the District Court err in awarding fees and costs to Plaintiffs pursuant to 28 U.S.C. § 1447(c) for fees and costs associated with an appeal in which Removing Defendants were the prevailing parties?

(6) Did the District Court err in awarding a party the costs and attorneys' fees incurred on appeal after the Circuit Court has already denied that party's motion to recover the costs and attorneys' fees for the appeal?

(7) Were the amount of fees and costs awarded in this instance when the hours billed were excessive, redundant and unnecessary; when the billing records were not contemporaneously maintained; and/or when the billing records were vague and overbroad?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Plaintiffs Daniel Williams and Edward Williams (Daniel's father) allege that on August 16, 2003, a gang member named Cornell Caldwell ("Caldwell")

intentionally shot plaintiff Daniel Williams in the mistaken belief that he was a member of a rival gang. (J.A. at 73, Plts. Am. Compl., ¶¶ 46-56.)[2] Plaintiffs allege that the firearm utilized in the shooting was originally purchased by Kimberly Upshaw ("Upshaw") at a gun show in Dayton, Ohio in 2000, and transferred to James Nigel Bostic ("Bostic"), who was involved in an illegal gun trafficking scheme which eventually brought the firearm to Caldwell. (J.A. at 78, Plts. Am. Compl., ¶¶ 85-90.) The firearm at issue was manufactured by Beemiller, Inc. ("Beemiller") and distributed by MKS Supply, Inc. ("MKS Supply"). (J.A. at 78, Plts. Am. Compl., ¶¶ 85-86.) MKS Supply transferred the firearm to federally licensed firearms retailer Charles Brown d/b/a Great Lakes Supply ("Brown") who then allegedly sold the firearm to Upshaw at the gun show, which Plaintiffs had erroneously alleged was operated by International Gun-A-Rama ("International"). (J.A. at 78, Plts. Am. Compl., ¶¶ 87-91.)

REMOVAL TO THE WESTERN DISTRICT OF NEW YORK

This action was originally commenced on July 28, 2005 when Plaintiffs filed their Complaint, captioned *Williams v. Beemiller, Inc.*, (No. 12005-007056), in the Supreme Court of the State of New York, Erie County. (*See generally* J.A. at 16-64, Plt. Compl.) On October 17, 2005, Plaintiffs filed a First Amended Complaint naming the following defendants: (1) the shooter – Caldwell; (2) the gun trafficker

[2] Please note that "J.A." refers to the Joint Appendix, and "S.A." refers to the Special Appendix.

– Bostic; (3) the purchaser – Upshaw; and (4) the individuals or entities allegedly in the chain of distribution of the firearm – Beemiller, MKS Supply, Brown, and International.[3] (J.A. at 65-68, Plt. Am. Compl., ¶¶ 1-13.) Given that the statute of limitations in New York for intentional acts is one year, *see* N.Y. C.P.L.R. § 215(3) (McKinney 2009), a plain reading of Plaintiffs' Amended Complaint revealed that any claim against the shooter, Caldwell, was time-barred as the lawsuit had not been commenced within one year after the incident. (*See generally* J.A. 65-112, Plt. Am. Compl.) Therefore, since Caldwell had been fraudulently joined as a defendant, the fact that Caldwell was a citizen of New York (J.A. 71-72, Plt. Am. Compl., ¶ 42) did not defeat diversity jurisdiction.

Beemiller had been served with the Summons and Amended Complaint on October 31, 2005 (J.A. 171, Affidavit of Service on Beemiller), and, accordingly, had until November 30, 2005 to remove the action. Since the defendants involved in the manufacture and chain of distribution of the incident firearm (Beemiller, MKS Supply, Brown, and International – "Removing Defendants") had previous and/or ongoing relationships (J.A. 76, Plts. Am. Compl., ¶¶ 65-84), these defendants were able to communicate with each other and consent to removal (J.A. 14-15, Notice of Removal, ¶ 28). The addresses listed for defendants Upshaw and

[3] Although International consented to and joined in the removal, as well as the first appeal to the Second Circuit Court of Appeals, International is not a party to this appeal.

Bostic on Plaintiffs' Summons, however, were incorrect and, therefore, Removing Defendants had no ability to contact them to obtain their consent. (*Compare* J.A. 16, Summons, *with* J.A. 175-76, Affs. of Service.) [4] Prior to removal, Removing Defendants reviewed the file of the Erie County Clerk's Office, which confirmed that no return of service on either Upshaw or Bostic had been filed. (J.A. 9, Notice of Removal, ¶ 6.) Since only defendants who have been served with the summons and complaint are required to consent to removal, the case was removed by Beemiller and Brown, with the consent of MKS Supply and International, via a Notice of Removal dated November 22, 2005, and filed on November 23, 2005. (J.A. 8, Notice of Removal; *see also* J.A. 157-60, Notice of Consent to Removal.)

Unbeknownst to Removing Defendants, Bostic and Upshaw had been served with the summons and amended complaint on November 2nd and November 22nd, respectively. (J.A. 175-76, Affs. of Service.) Bostic had been served in a federal prison in Pennsylvania, which was a different address than the one listed in the summons, and Plaintiffs failed to file the return of service on Bostic with the Erie County Clerk until November 30, 2005, more than one week after the Notice of Removal had been filed. (J.A. 176.) Likewise, Upshaw was served at an address

[4] The Summons listed Bostic's address as 191 Orleans Street, Buffalo, New York (J.A. 16), but the return service indicates that he was served at USP Lewisburg, Robert Miller Drive, Lewisburg, Pennsylvania (J.A. 176). The Summons listed Upshaw's address as 5513 Woodcreek Road, # D1, Dayton, Ohio (J.A. 16, but the return of service indicates that she was served at 5640 Signet Drive, Huber Heights, Ohio (J.A. 175).

different than the one listed in the summons, and the return of service on Upshaw was filed in state court subsequent to the filing of the Notice of Removal. (J.A. 175.) Furthermore, Upshaw was served on November 22, 2005 at 8:30 p.m. (J.A. 175), which was after the removing defendants had placed their Notice of Removal in the custody and control of Federal Express for delivery and filing with the clerk of the Western District of New York the following day (J.A. 180, Allan Aff. ¶ 7; J.A. 182, Fed. Express Airbill). Although the case had been removed to federal court, Plaintiffs improperly filed the returns of service in state court and failed to serve a copy on counsel for the removing defendants. (J.A. 171-176, Affs. of Service.)

PLAINTIFFS' MOTION TO REMAND

On December 23, 2005, Plaintiffs filed a motion to remand arguing that the removing defendants were required to obtain consent to removal from Upshaw and Bostic because they had been served with the summons and complaint prior to the date the Notice of Removal was filed. (J.A. 161, Plts. Notice Mot. Remand.) On January 24, 2006, the removing defendants submitted their memorandum of law in opposition and argued, *inter alia*, that they were not required to obtain consent from Upshaw or Bostic because they did not have notice, either actual or constructive, that these defendants had been served at the time of removal. (*See*

J.A. 179-180, Allan Aff., ¶¶ 2-9; *see also* J.A. 203, Foschio Report and Recommendation.)

On January 4, 2006, Judge Skretny entered an order referring this case to Magistrate Judge Foschio for all pretrial matters pursuant to 28 U.S.C. § 636(b)(1). (J.A. 178.) Although the parties did not consent to allow a magistrate judge to make dispositive rulings, on June 29, 2006, Magistrate Judge Foschio filed a Decision and Order granting the motion to remand on the sole basis that consent to removal from Upshaw and Bostic was required pursuant to the rule of unanimity. (J.A. 194-210; S.A. 1-17) In addition, Magistrate Judge Foschio awarded Plaintiffs attorneys' fees and costs incurred as a result of the removal of this case. (J.A. 208-10; S.A. 15-17.)

On July 17, 2006, pursuant to Rule 72(b), the removing defendants filed Objections to Magistrate Judge Foschio's Decision and Order arguing, *inter alia*, that (1) the plaintiffs' motion to remand is dispositive and should be decided *de novo* because the parties never consented to having it decided by a magistrate judge; (2) the removing defendants had satisfied the rule of unanimity by obtaining consent from all defendants of which they had actual or constructive knowledge that they had been served with the summons and complaint; and (3) Magistrate Judge Foschio failed to apply the proper standard of review in awarding attorneys' fees and costs to Plaintiffs. (J.A. 229-52.)

On September 26, 2006, Judge Skretny denied the removing defendants' objections to the Decision and Order of Magistrate Judge Foschio on the basis that it was neither clearly erroneous nor contrary to law and that, in the Western District of New York, motions to remand are considered to be non-dispositive. (J.A. 253-55; S.A. 18-20.)

PREVIOUS APPEAL TO THE SECOND CIRCUIT

On October 25, 2006, Removing Defendants filed a Notice of Appeal to the Second Circuit Court of Appeals raising, *inter alia*, the following issues: whether a motion to remand is a dispositive motion that cannot be decided by a magistrate judge without the consent of the parties; and whether the magistrate judge erred in not applying the standard for awarding attorney fees and costs incurred as a result of removal established by the Supreme Court in *Martin v. Franklin Capitol Corporatio*n, 546 U.S. 132 (2005). (J.A. 268-269, Defs. Notice of Appeal.) Plaintiffs subsequently filed a motion to dismiss the appeal and requested fees and costs. (*See generally* J.A. 270-303.) On April 12, 2007, the Court of Appeals denied Plaintiffs' motion to dismiss and for fees. (J.A. 329-31; S.A. 21-25.) With respect to the district court's decision to award attorney fees and costs, however, the Court of Appeals held that the award was not a final judgment since the amount of fees had not been decided and was not immediately appealable under 28 U.S.C. § 1291. (*Ibid.*)

On May 28, 2008, this Court issued a decision and order finding in favor of Removing Defendants and holding that remand orders are dispositive in nature and outside the authority of a magistrate judge without consent of the parties. *See Williams v. Beemiller, Inc.*, 527 F.3d 259 (2d Cir. 2008). (J.A. 333-44; *see also* J.A. 345-59.)

AWARD OF FEES AND COSTS

On July 9, 2008 the Court of Appeals remanded the case and, on September 2, 2008, Judge Skretny referred the matter back to Magistrate Judge Foschio for a Report and Recommendation, which was issued on October 31, 2008. (J.A. 360.) Magistrate Judge Foschio again recommended that Plaintiffs' motion to remand be granted based solely on the failure to obtain the consent of Upshaw and Bostic prior to removal. (J.A. 361-78; S.A. 26-43.) He also recommended awarding attorneys' fees and costs to Plaintiffs without addressing the issue under the appropriate standard as set forth in *Martin v. Franklin Capitol Corporation*, 546 U.S. 132 (2005). (J.A. 374-76; S.A. 40-42.) Removing Defendants filed Rule 72 objections to the Report and Recommendation, which included arguing that Plaintiffs were not entitled to an award of attorney fees and costs because Removing Defendants had an objectively reasonable basis for removal. (J.A. 379-408.)

On June 25, 2009, Judge Skretny adopted the Report and Recommendation, this time stating that he was giving the matter a *de novo* review, and granted the motion to remand the case to state court. *See Williams v. Beemiller, Inc.*, No. 05-cv-836S, 2009 WL 1812819 (W.D.N.Y. June 25, 2009). (J.A. 409-412.) Judge Skretny also agreed with the recommendation to award attorney fees and costs related to the removal and requested Plaintiffs to file an affidavit in support of such fees. (J.A. 412.) Plaintiffs filed an affidavit in support of attorney fees and costs on July 9, 2009 (J.A. 413), and a supplemental affidavit on August 22, 2009 (J.A. 431), in which they claimed a total of $83,479.89 in fees (J.A. 434).

On July 17, 2009, Removing Defendants filed a response opposing the amount of fees sought by Plaintiffs on multiple grounds, including, *inter alia*, that Plaintiffs failed to demonstrate that they incurred *actual* costs and fees; that Plaintiffs are not entitled to any fees or costs associated with the appeal because Removing Defendants prevailed and the attorney fees and costs were not incurred solely in connection with the removal; that the attorney fees and costs requested were not reasonable as they were excessive, redundant and unnecessary; and that the costs should be reduced because the billing records were not contemporaneously maintained and were vague, overbroad and otherwise inadequate. (*See generally* J.A. 435-50, Skretny Order.)

On March 10, 2010, Judge Skretny partially granted Plaintiffs' Application for Attorney Fees and Costs, and awarded Plaintiffs $53,531.36 pursuant to 28 U.S.C. § 1447(c). *See Williams v. Beemiller, Inc.*, No. 05-cv-836S(F), 2010 WL 891001, (March 10, 2010). (J.A. 435-50.) Judge Skretny found that although Plaintiffs' counsel was operating on a contingency fee basis, Plaintiffs were nonetheless entitled to an award of attorney fees on an hourly basis. (J.A. 437-38.) Judge Skretny also found that Plaintiffs were entitled to attorney fees and costs associated with the prior appeal, even though Removing Defendants were victorious and this Court had denied Plaintiffs' motion to recover fees incurred on the prior appeal. (J.A. 443-45.)

Although this case was remanded to state court on the basis that not all defendants had consented to removal, the non-consenting defendants have never appeared in this action, and Plaintiffs have made no effort to seek entry of default against them for more than four years. (*See, e.g.*, J.A. 384, Defs. Rule 72 Objections.) This confirms that Plaintiffs had fraudulently joined the non-consenting defendants to prevent the removal of this case and not only are Plaintiffs not entitled to an award of fees incurred as a result of the removal of this case, but that their motion to remand should have been denied. (*Ibid.*)

SUMMARY OF THE ARGUMENT

Defendants respectfully contend that the District Court erred in failing to utilize the correct standard for determining whether to award fees and costs pursuant to Section 1447(c) as espoused by the Supreme Court in *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). Applying the "objectively reasonable" standard demonstrates that Plaintiffs are not entitled to an award of fees and costs because Defendants' removal was procedurally proper and because, even if it was not, the basis for removal was objectively reasonable in light of the authority relied upon by Defendants. In terms of the fee award itself, Defendants contend that Plaintiffs are not entitled to any award because they have not actually incurred any attorneys' fees as they have retained counsel on a contingency fee basis. Persuasive authority, as well as the express terms of 28 U.S.C. § 1447(c), support this conclusion. Furthermore, to the extent the District Court awarded fees which were not incurred solely in connection with the removal, this was an error. Additionally, due to the fact that the this Court has already denied Plaintiffs' request to obtain attorneys' fees associated with the previous appeal, the District Court did not have the authority to award such fees. Finally, based on pertinent case law, the amount of fees awarded by the District Court must be reduced.

ARGUMENT

I. WHEN AWARDING ATTORNEYS' FEES AND COSTS PURSUANT 28 U.S.C. § 1447(C), A DISTRICT COURT MUST APPLY THE "OBJECTIVELY REASONABLE" STANDARD ESTABLISHED BY THE SUPREME COURT IN *MARTIN V. FRANKLIN CAPITAL CORP.*, 546 U.S. 132 (2005).

A. THE STANDARD OF REVIEW IS *DE NOVO*.

Since the proper standard for awarding attorneys' fees and costs incurred as a result of removal is purely a question of law, it should be reviewed by this Court *de novo*. *See Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 140 (2d Cir. 1992).

B. DISCUSSION.

A civil case that is filed in state court may be removed by the defendant to federal district court if the plaintiff could have chosen to file there originally. 28 U.S.C. § 1441. If it is determined, however, that the district court lacks jurisdiction, the case must be remanded. 28 U.S.C. § 1447(c). Section 1447(c) provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." *Ibid.* Prior to 2005, there was a circuit split over the correct standard for awarding costs and fees under the remand statute. *Compare Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 293 (5th Cir. 2000) ("[T]he question we consider in applying § 1447(c) is whether the defendant had objectively reasonable grounds to believe the

removal was legally proper."), *with Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 927 (7th Cir. 2000) (holding that fees and costs should be awarded as "normal incidents of remands for lack of jurisdiction"). This split was resolved by the Supreme Court in *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005), when it adopted the "objectively reasonable basis" test.

In *Martin*, the Supreme Court recognized that the underlying purpose of the fee shifting provision in Section 1447 was to achieve a balance between the desire to deter removals sought for the purposes of prolonging litigation and imposing costs on the opposing party with a defendant's right to remove a case as afforded by Congress.[5] *Id.* at 140. Utilizing this bedrock proposition, the Supreme Court established that the starting point for analyzing whether to award fees upon remand is to determine if the removal was objectively reasonable. *Id.* at 141. If a district court determines that there was an objectively reasonable basis for removal, fees should be denied. *Ibid.* If, however, a district court concludes that there was no objectively reasonable basis for removal, then fees *may* be awarded. *Ibid.* Although objectively unreasonable removals will generally result in fee awards to the plaintiffs, district courts have discretion to consider whether "unusual

[5] It was further emphasized that Section 1447(c) should not be interpreted in such a way as to prevent defendants from exercising their right to remove in all but the most obvious of cases. *Ibid.* ("[T]here is no reason to suppose Congress meant to confer a right to remove, while at the same time discouraging its exercise in all but obvious cases.").

circumstances" warrant a departure from this rule. *Ibid.* Ultimately, the Supreme Court emphasized that such decisions must be "faithful to the purposes" of awarding fees under Section 1447(c). *Ibid.*

Prior to *Martin*, the Second Circuit employed an "overall fairness" test to determine whether fees and costs were appropriate pursuant to Section 1447(c), which took into account "the nature of the case, the circumstances of the remand, and the effect on the parties." *Morgan Guar. Trust v. Republic of Palau*, 971 F.2d 917, 923 (2d Cir. 1992). Although the Second Circuit's "overall fairness" test may not be as blatantly inconsistent with the "objectively reasonable" test as standards formerly in place in other circuits, such as the Seventh Circuit's presumption in favor of an award of fees on remand, it is nonetheless apparent that the test established in *Martin* has replaced the "overall fairness" test. The *Martin* test is narrower than the "overall fairness" test as the "objectively reasonable" test requires a court, in the first instance, to conduct an impartial evaluation regarding the basis for removal. *Martin*, 546 U.S. at 141; *see also* Donald J. Rosenberg, *N.Y. Practice Series: Com. Litig. in N.Y. State Courts*, 2 N.Y. Prac. § 10:42 (2008) ("Recent opinions from district courts in the Second Circuit have applied the new test from *Martin* in determining the appropriateness of cost awards [and a]pplications for attorneys fees under § 1447(c) appear to be denied more often than they are granted.").

Moreover, since *Martin* was decided in 2005, district courts in the Second Circuit have routinely applied the standard espoused therein, refusing to award costs and fees unless the basis for removal was objectively unreasonable. *See, e.g.*, *Sinclair v. City of Rochester*, No. 07-CV-6277, 2007 WL 3047096, *3-4 (W.D.N.Y. Oct. 18, 2007) (denying a request to award attorneys' fees because "the Court cannot find that Defendants' removal was objectively unreasonable"); *Cary v. TIAA-CREF*, No. 06-CV-6421 CJS, 2006 WL 4070768, *4 (W.D.N.Y. Dec. 18, 2006) ("The Court finds that the question of whether ERISA preempted plaintiff's state common-law cause of action was not clearly decided by the prior case law; thus the Court cannot conclude that [defendant] lacked an objectively reasonable basis for removing the case."); *see also Good Energy, L.P. v. Kosachuk*, No. 06 Civ. 1433 (LTS)(KNF), 2006 WL 1096900, *1 (S.D.N.Y. Apr. 25, 2006); *Contreras v. Host Am. Corp.*, 453 F. Supp. 2d 416, 421 n. 6 (D. Conn. 2006).

Based on the above-cited case law, the District Court was required to apply the objectively reasonable standard outlined in *Martin* when determining whether to award fees and costs upon remand in this case. The District Court, however, did not utilize the standard established by the Supreme Court and, instead, merely stated that "[a]n award of costs and fees pursuant to 28 U.S.C. § 1447(c) does not require a finding of bad faith by the removing party." (J.A. 208, Foschio Report & Recommendation 6/29/2006; 375, Foschio Report & Recommendation

10/31/2008; S.A. 15, 40.) Accordingly, the District Court erred in failing to apply the "objectively reasonable" standard for determining whether to award fees pursuant to Section 1447(c).

II. SINCE DEFENDANTS HAD AN OBJECTIVELY REASONABLE BASIS FOR REMOVAL, THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES AND COSTS UPON REMAND.

A. THE STANDARD OF REVIEW IS *DE NOVO*.

"[W]here an appellant's contention on appeal regarding an award of attorneys' fees is that the district court made an error of law in granting or denying such an award, the district court's rulings of law are reviewed *de novo*." *Baker v. Health Mgmt. Sys., Inc.*, 264 F.3d 144, 149 (2d Cir. 2001); *Mautner v. Hirsch*, 32 F.3d 37, 39 (2d Cir. 1994). Thus, although the appellate court may only have jurisdiction to review the award of attorneys' fees, such a review necessarily encompasses a *de novo* examination of whether the remand order was legally correct. *See, e.g., Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992).

B. DISCUSSION.

Defendants removed this case pursuant to 28 U.S.C. § 1332(1)(1) based on diversity jurisdiction. Although one of the defendants, Caldwell, was a citizen of New York, Defendants contended he was a fraudulently joined party whose

citizenship must be disregarded for purposes of assessing subject matter jurisdiction.[6] The District Court never addressed this issue[7] and, instead, this matter was remanded to state court due to Defendants' failure to abide by the "rule of unanimity" and costs and fees were awarded. Despite the District Court's conclusion to the contrary, there is no legal basis to award fees and costs because

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[6] Defendants contended that Caldwell was fraudulently joined for the sole purpose of defeating subject matter jurisdiction. Caldwell, a New York resident, intentionally shot Plaintiff Daniel Williams, which gives rise to a cause of action for the tort of assault and battery. *See, e.g., Zgraggen v. Wilsey*, 606 N.Y.S.2d 444, 445 (N.Y. App. Div. 3d Dep't 1994) ("The elements of a cause of action for battery are bodily contact, made with intent, and offensive in nature."). Pursuant to New York law, a civil action to recover damages for assault and battery is subject to a one year statute of limitations. N.Y. C.P.L.R. § 215(3) (McKinney 2009). Although New York law tolls the statute of limitations on such a claim for one year after termination of a criminal case, *see* N.Y. C.P.L.R. § 215(8) (McKinney 2009), the statute of limitations for any claim against Caldwell expired, at the latest, on March 19, 2005, which is one year after he was sentenced for his conviction for attempted assault in the first degree. (*See* J.A. 179, Allan Aff. 1/25/2006, ¶ 8; 184, Sentence & Commitment Order.) Since Plaintiffs did not commence this action until July 28, 2005, any cause of action against Caldwell is time-barred, and Caldwell was fraudulently joined. *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 302 (2d Cir. 2004).

[7] In deciding to remand, the District Court did not reach the merits of Defendant's fraudulent joinder argument. (*See generally* S.A. 1-20; 26-47.) As already discussed, a district court's decision to award fees and costs is susceptible to appellate review, but, pursuant to 28 U.S.C. § 1447(d), the decision to remand a case is not reviewable. *See Pierpoint v. Barnes*, 94 F.3d 813, 819 (2d Cir. 1996). Since the District Court's decision to award costs was premised only on the alleged procedural defect, there is no basis for this Court to review the propriety of the District Court's decision to not address the fraudulent joinder issue. Thus, although Defendants contend that removal was substantively proper based on the fact that Caldwell was fraudulently joined, such arguments cannot be asserted on appeal.

removal was procedurally proper and even if removal was procedurally defective, Defendants' decision to remove was objectively reasonable.

1. Since Removal was Procedurally Proper, There is No Basis for Awarding Fees and Costs.

Removal was procedurally proper – and, hence, there is no basis for awarding fees – because (1) consent of a defendant to remove is not required absent actual or constructive notice of service upon that defendant; (2) the District Court's requirement that consent is necessary from all defendants who had *in fact* been served is misplaced; and (3) the extraordinary circumstances presented permitted the District Court to retain jurisdiction.

a. Consent of a Defendant to Remand is Not Required Absent Actual or Constructive Notice of Service Upon that Defendant.

Although not required by statute, most courts require "unanimous" consent by defendants to remove a case. *See, e.g., Bradford v. Harding*, 284 F.2d 307, 309 (2d Cir. 1960); *Piacente v. SUNY at Buffalo*, 362 F. Supp. 2d 383, 383 n. 3 (W.D.N.Y. 2004). One of the exceptions to the rule of unanimity is that defendants who have not been served with process at the time of removal are not required to join the petition for removal. *See Borden v. Blue Cross & Blue Shield of W. N.Y.*, 418 F. Supp. 2d 266, 270 (W.D.N.Y. 2006).

Even though the Second Circuit has never addressed the issue, other federal jurisdictions have held that consent of a defendant is not required absent actual or

constructive notice of service upon that defendant: "[J]oinder in or consent to the removal petition must be accomplished by only those defendants: (1) who have been served; and (2) whom the removing defendant(s) actually knew or should have known had been served." *See Milstead Supply Co. v. Cas. Ins. Co.*, 797 F. Supp. 569, 573 (W.D. Tex. 1992). As opposed to a rule that consent is needed from all defendants who had "in fact" been served, "the better rule is that a defendant is required to obtain consent only from those codefendants who it knew or should have known, in the exercise of reasonable diligence, had been served." *See Laurie v. Nat'l Rd. Pass. Corp.*, No. Civ. A -01-6145, 2001 WL 34377958, *4 (E.D. Pa. Mar. 13, 2001).

There are numerous federal cases which support the proposition that removing defendants should not be required to obtain consent where they did not know or could not reasonably have known, prior to removal, of service of process on the non-joining co-defendants. *See, e.g., Waffer v. City of Garland*, No. CIV.A. 3:01CV1355-G, 2001 WL 1148174, at *2 (N.D. Tex. Sept. 19, 2001) (denying motion to remand where state court record at time of removal did not disclose that non-joining defendant had been served); *Parker v. State*, No. C-98-4844 MHP, 1999 WL 111889, *2 (N.D. Cal. Feb. 26, 1999) (holding that only those defendants whom the removing defendants knew or should have known were served should be classified as served for purposes of consenting to removal); *Eltman v. Pioneer*

Communications of Am. Inc., 151 F.R.D. 311, 314-15 (N.D. Ill. 1993) (applying exception where non-joining defendant was served on same day as removal petition was filed, even though service may have occurred first); *Milstead*, *supra*, 797 F. Supp. at 572-74 (denying motion to remand where return of service on non-joining defendant was filed only three hours before the removal petition); *Driscoll v. Burlington-Bristol Bridge Co.*, 82 F. Supp. 975, 985 (D.N.J. 1949); *cf. Barlett v. Hoseclaw*, No. 95-CV-0388E(F), 1995 WL 591140, at *2 (W.D.N.Y. Sept. 7, 1995) (recognizing possibility of exception but refusing to apply it where proof of service was filed nine days before removal petition).

As long as the removing defendants were "reasonably diligent" in attempting to ascertain whether the non-removing defendants had been served prior to removal, the fact that a non-removing defendant had actually been served will not violate the rule of unanimity. *See, e.g.*, *Laurie*, *supra*, 2001 WL 34377958 at *4; *Parker*, *supra*, 1999 WL 111889 at *2; *Driscoll*, 82 F. Supp. at 985. Indeed, case law demonstrates that continuously monitoring and checking the state court's docket to determine if an affidavit of service had been filed constitutes reasonable diligence. *Laurie*, *supra*, 2001 WL 34377958 at *4 (holding that removing defendant demonstrated reasonable diligence in trying to determine which defendants had been served); *Parker*, 1999 WL 111889 at *2; *Driscoll*, 82 F. Supp. at 985 ("Since the petitioners had no information from the official record that other

defendants had been served . . . they were justified in disregarding the other defendants in filing their petition for removal."). For example, in *Parker*, *supra*, it was held that removing defendants are only deemed to have constructive notice of service upon the non-removing defendants on the date of the filing of an affidavit of service with the state court: "**[T]he removing defendants are deemed to have constructive notice of service upon the nonjoined defendants as of the date of filing of a return of service in the state court."** *Parker*, 1999 WL 111889 at *2 (emphasis added).

Finally, the jurisdictions which have embraced this constructive knowledge rule have explained that such a rule does not prejudice any non-joining defendants because "[s]uch defendants would still be able to move to remand the case if they so desired." *Milstead*, *supra*, 797 F. Supp. at 574. "Indeed, if a removal petition is filed by a served defendant and another defendant is served after the case is thus removed, the latter defendant may still either accept the removal or exercise its right to choose the state forum . . . ." *Id.* at 572 (citing *Getty Oil Corp. v. Ins. Co. of N. Amer.*, 841 F.2d 1254, 1263 (5th Cir. 1988)).

Applying the case law to this matter reveals that Defendants did not violate the rule of unanimity because they did not have actual or constructive notice that any non-removing defendant had been served prior to removal and, by continuously monitoring the state court docket, Defendants were reasonably

diligent in attempting to discover whether the non-removing defendants had been served. The following chart reflects the date of actual service on the relevant non-removing defendants[8] and the date the affidavits of service were filed:

Non-Removing Defendant	**Date of Actual Service**	**Date Affidavit of Service Filed**
Bostic	November 2, 2005	November 30, 2005
Upshaw[9]	November 22, 2005	November 25, 2005

Defendants filed their Notice of Removal on November 23, 2005 (J.A. 8), and the affidavits of service as to Bostic and Upshaw were not filed with the Erie County Clerk of Court until **seven days and two days, respectively, after removal** (J.A. 175-76).[10] Defendants diligently monitored the Erie County docket prior to

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[8] Please note that since Defendants contend that Caldwell is a fraudulently joined party, his consent to removal was not required. *See, e.g., Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001). Thus, the date of service on Caldwell is irrelevant and, for that reason, he is not included in this chart.

[9] Upshaw was not served until after the Removing Defendants had executed the Notice of Removal and placed it in the custody and control of Federal Express for delivery to the Clerk of the Western District of New York. (*Compare* J.A. 175, Upshaw Return of Service stating that she was served at 8:30 p.m. on 11/22/2005, *with* J.A. 180, Allan Aff. ¶ 7; J.A. 182, Fed. Express Airbill (stating that the Notice of Removal was picked up at 8:02 p.m. on 11/22/2005).)

[10] Furthermore, once this case was removed to federal court, the previously unfiled returns of service should not have been filed with the Erie County Clerk's Office, but rather with the Clerk of Western District of New York, and the affidavits of service should have been served on counsel for the removing defendants. *See* Fed. R. Civ. P. 81(c) ("These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal."); Fed. R. Civ. P. 41(1) ("If service is not waived, the person effecting

removal to determine whether the other listed defendants had been served (J.A. 5, Allan Aff., ¶ 5), but due to Plaintiffs' lack of diligence, there was no basis to conclude that any other defendant had been served. Additionally, the addresses listed on the Summons for Bostic and Upshaw were incorrect (*see* J.A. 16), which prevented Defendants from being able to contact them directly. Thus, due to Plaintiffs' failures to timely file the affidavits of service and to list the correct addresses, Defendants were effectively precluded from determining whether Bostic and Upshaw had been served prior to removal.

Plaintiffs' failures in this case underscore the inherent purpose behind the constructive notice rule. If removal can be prevented because non-removing defendants had been in fact served, there will be a disincentive for plaintiffs to timely file affidavits of service. This will especially be true in cases involving individual defendants who will likely appear *pro se*, like the case at hand. A plaintiff wishing to prevent removal in such a case could simply serve the individual but withhold filing the affidavit of service. Then, if and when the other defendants attempt to remove, the plaintiff can utilize the fact that the individual had already been served to defeat removal. Congress has specifically conferred upon defendants the right of access to federal courts, *see Martin*, *supra*, 546 U.S. at

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service shall make proof thereof to the court."); *see also* 28 U.S.C. § 1446(d) (explaining that "the State court shall proceed no further unless and until the case is remanded").

140, and a plaintiff should not be permitted to manipulate the federal system in such a manner. Plaintiffs in this case did precisely that; they utilized their own failings – in not filing the affidavits of service and failing to list the correct addresses on the Summons – to prevent Defendants from exercising their right to removal. Such conduct should certainly not justify an award of fees.

The facts reveal that at the time of removal Removing Defendants did not have actual or constructive knowledge of service upon any non-removing defendant. Accordingly, the rule of unanimity was not violated, and Defendants' removal was not procedurally improper. *See Parker*, 1999 WL 111889 at *2.

b. The District Court's Conclusion that Removing Defendants are Required to Obtain Consent From Non-Removing Defendants Who Had "In Fact" Been Served is Misplaced.

In concluding that Defendants violated the rule of unanimity, the Magistrate Judge dismissed the above-cited authority as being "inapposite in light of the persuasive authority from other district courts within the Second Circuit cited herein." (*See* J.A. 202, Foschio Report & Recommendation 6/29/2006 at n. 4; J.A. 368, Foschio Report & Recommendation 10/31/2008 at n. 3; S.A. 9, S.A. 33-34.) Incredibly, however, the "persuasive authority" relied upon is, in fact, only *one* case: *Tate v. Mercedes-Benz USA, Inc.*, 151 F. Supp. 2d 222 (N.D.N.Y. 2001). The Magistrate Judge interpreted *Tate* to stand for the proposition that "the relevant inquiry in determining whether removal was proper is . . . whether the

other defendants had in fact been served." (J.A. 203-204, Foschio Report & Recommendation 6/29/2006; J.A. 370-71, Foschio Report & Recommendation 10/31/2008; S.A. 10-11, 35.) Aside from the fact that the *Tate* decision is not precedential (and hardly persuasive in light of the multitude of cases cited by Defendants), a fair reading of the case reveals that the Magistrate Judge's interpretation is incorrect.

The issue confronted in *Tate* was what rule should be applied when determining the timeliness of a defendant's consent to removal. 151 F. Supp. 2d at 224. In that case, the Northern District examined the three rules that federal courts have fashioned to determine when the thirty-day time period to remove is triggered: the first served rule, the last served rule, and the rule espoused in *McKinney v. Board of Trustees of Maryland Community College*, 955 F.2d 924, 928 (4th Cir. 1992) (the "*McKinney* rule"). *Id.* at 224-25. After analyzing the three rules, the court concluded that the *McKinney* rule, which states that an individual defendant has thirty days from the time it is served with process to join in an otherwise valid removal, was the appropriate rule to apply. *Id.* at 224-25.

Having decided on what standard to use, the *Tate* court then looked to the facts: Defendant Prestige Motors, Inc. ("Prestige") was served on September 9, 2000 and Defendant Mercedes Benz ("Mercedes") was served on September 22, 2000. *Id.* at 223. On October 19, 2000, Mercedes filed a removal petition without

obtaining the consent of Prestige, the first-served defendant. *Ibid.* After removal, and more than thirty days after being served, Prestige submitted an affidavit consenting to the removal. *Ibid.* Mercedes argued that since the plaintiff failed to file proof of service upon Prestige until after the petition for removal was filed, Mercedes could not know that Prestige had been served. *Ibid.* Applying the *McKinney* rule, the Northern District explained:

> The proper inquiry under the McKinney rule is not whether the later served defendant had constructive or actual notice of service of process on the earlier served defendant. Rather, the inquiry is on the adequacy of service of process on Prestige, when objectively viewed, "gave fair notice" to it about the state court suit, **Mercedes' lack of "constructive knowledge" about service on Prestige becomes irrelevant as Prestige had a burden to either timely file its own removal petition or join Mercedes' petition.**

Id. at 225 (emphasis added). Thus, the *Tate* court never addressed whether removal is proper if the removing defendants do not have constructive or actual knowledge of an earlier-served, non-removing defendant. *Ibid.* Rather, the holding in *Tate* is that since the thirty (30) day time period for the first-served defendant to remove the case had expired, a second-served defendant cannot remove the case. *Ibid.* In other words, the Northern District concluded that the first-served defendant has the responsibility to timely petition for removal, and the failure to timely remove will not be excused because a later-served defendant

lacked constructive knowledge of service on the first-served defendant. *Ibid.* Accordingly, reliance upon the *Tate* holding should be confined to the facts presented therein and cannot be utilized to justify the Magistrate Judge's conclusion here.

Additionally, in formulating his opinion, the Magistrate Judge attempted to create some kind of negative inference based upon the fact that Beemiller and Brown were able to obtain the consents of MKS and Gun-A-Rama even though the affidavits of service had not yet been filed.[11] Without citation, the Magistrate insinuates that because Removing Defendants Brown and Beemiller were able to obtain consent to removal from MKS and Gun-A-Rama that Removing Defendants should likewise have been able to contact the individual non-removing defendants prior to removal. (J.A. 205, Foschio Report & Recommendation 6/29/2006; J.A. 371-72, Foschio Report & Recommendation 10/31/2008; S.A. 12-13, 36-37.) This argument completely ignores the fact that Removing Defendants Beemiller, MKS, and Charles Brown are in the chain of distribution of the pistol at issue in the litigation and all Removing Defendants had substantial pre-existing relationships with each other. (*See* J.A. 76-77, Plts. Am. Compl., ¶ 65-84.) Removing defendants were simply able to read the caption on the state court Complaint and contact the other entities in the commercial chain of distribution.

[11] The Returns of Service as to MKS and International were filed on November 23, 2005 and on November 30, 2005, respectively. (J.A. 173-74.)

On the other hand, the removing defendants have absolutely no relationship with the individual, non-removing defendants. The fact that Beemiller and Brown were able to locate and obtain consent from other parties in the chain of distribution demonstrates that the Removing Defendants were, in fact, being diligent and were attempting to comply with the rule of unanimity. The failure of Removing Defendants to obtain the consent of two individuals with whom they had no pre-existing relationship and no ability to contact due to the incorrect addresses provided on the Summons, therefore, does not support a conclusion that they knew or should have known that the individual, non-removing defendants had been served. Thus, the Magistrate's conclusion is unsupported both by case law and logic.[12]

[12] It is worth noting that this is not the only error made by the Magistrate in formulating his opinion. In addressing the consent issue, the Magistrate included Caldwell in his analysis. Since Defendants alleged that Caldwell was fraudulently joined, his citizenship must be disregarded for purposes of diversity jurisdiction. *See Pampillonia v. RJR Nabisco, Inc.*, 138 F. 3d 459, 460-61 (2d Cir. 1998). Thus, the Magistrate should have either determined whether Caldwell was fraudulently joined prior to addressing whether removal was procedurally proper or he should have withheld reference to Caldwell in his analysis of the rule of unanimity. This is the only logical approach because if Caldwell was fraudulently joined, Defendants were not required to obtain his consent to remove. *In re Rezulin Prod. Liab. Litig.*, 133 F. Supp. 2d 272, 295 (S.D.N.Y. 2001).

c. The Extraordinary Circumstances Presented in this Case Permitted the District Court to Retain Jurisdiction.

It is well-settled that the failure to join all defendants in a removal petition is not a jurisdictional defect. *See, e.g., Michaels v. State*, 955 F. Supp. 315, 321 (D.N.J. 1996); *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir. 1990). While cognizant of the fact that removal statutes should normally be strictly construed, federal courts have nonetheless permitted removal, even if not procedurally correct, when extraordinary circumstances are present. *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426-27 (5th Cir. 2003); *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986) ("In the absence of waiver of the time limit by the plaintiff, or some equitable reason why that limit should not be applied, however, a defendant who does not timely assert the right to removal loses that right."); *White v. White*, 32 F. Supp. 2d 890, 893-94 (W.D. La. 1998) (applying an equitable exception to the 30-day time limit on removal where the plaintiff engaged in forum manipulation); *Staples v. Joseph Morton Co.*, 444 F. Supp. 1312, 1313 (E.D.N.Y. 1978) (holding that plaintiff could not file a motion to remand a case to federal court when he had convinced the defendant to not remove within the thirty-day time by promising to discontinue the case). Thus, in certain situations "exceptional circumstances" can exist to allow for removal even where removal was procedurally incorrect. *See Getty Oil, supra*, 841 F.2d at 1263, n. 12;

see also Partners in Funding, Inc. v. Quest Capital Res., LLC, No. H-05-0729, 2007 WL 471128, *3 (S.D. Tex. Feb 8, 2007) (holding that "no exceptional circumstances exist in this case" to permit removal).

While these above-cited cases dealt with "exceptional circumstances" permitting a party to petition for removal beyond the statutory time limit, at least one case, *White v. Bombardier Corp.*, 313 F. Supp. 2d 1295 (N.D. Fla. 2004), has addressed a scenario where non-joining defendants have failed to appear in the action. In *White*, a class of defendants (the "Bombardier defendants") failed to obtain consent of co-defendants (the "Destiny defendants") prior to filing the notice of removal. *Id.* at 1298. The Destiny defendants were served and the return of service was filed with the Florida state court, and the Bombardier defendants removed the case after the return of service had been filed. *Ibid.* Because the affidavits of service had been filed prior to removal, the Northern District of Florida held that the Bombardier defendants were not excused from the rule of unanimity on the grounds of the non-service exception. *Id.* at 1302. However, since the defendants who did not consent never appeared in the matter, the court excused the unanimity requirement: "I conclude that, consistent with a strict interpretation of the removal statutes in favor of remand, it is possible under some circumstances for the unanimity requirement to be excused with respect to a defaulted defendant who has not appeared." *Id.* at 1303-04 (footnotes omitted).

Thus, at least one federal court has allowed removal where there were extraordinary circumstances based on the non-removing defendants' failure to appear in a case. *Ibid.*; *but see First Indep. Bank v. Trendventures, L.L.C.*, No. 07-CV-14462, 2008 WL 253045, *6 n. 11 (E.D. Mich. Jan. 30, 2008) (holding that "the Court declines to recognize the *White* court's 'non-appearing, defaulted defendant' exception to the unanimity rule").

In this case, extraordinary circumstances existed permitting the District Court to retain jurisdiction, and, therefore, Defendants had a reasonable basis to remove. Specifically, Defendants had no practical ability to contact the non-removing defendants as the affidavits of service on Bostic and Upshaw reveal that they were not served at the addresses listed in the Summons. (*Compare* J.A. 16, with J.A. 175-76.) Furthermore, up until the Notice of Removal was filed, Removing Defendants continuously monitored the state court docket to determine if the individual defendants had been served (J.A. 9, Allan Aff., ¶ 5), but, due entirely to the fault of Plaintiffs, the affidavits of service had not been filed. On top of that, once this matter had been removed, Plaintiffs failed to file the affidavits of service in the Western District of New York or on the Removing Defendants as required by the Federal Rules. (*See* Footnote 12, *supra*.) Instead, after removal, Plaintiffs filed the affidavits of service in the state court. (J.A. 171-177.) If plaintiffs had filed the return of service on Bostic in a timely manner in the state

court ***or*** if plaintiffs had filed the returns of service on Bostic and Upshaw with the Clerk in the Western District of New York and served copies on counsel for Removing Defendants, Removing Defendants would have been afforded the opportunity to obtain the consent to removal from Upshaw and Bostic within the requisite time to do so. Instead, Defendants are confronted with a situation where Plaintiffs utilized their own failures to defeat removal – and seek and award of fees for doing so.[13]

Finally, and potentially most telling, is that despite having been served almost five (5) years ago, none of the individual defendants have appeared in this matter. The fact that these parties have failed to appear for such an extended period of time demonstrates that there was nothing that Removing Defendants could have feasibly or realistically done to locate them, let alone obtain their consent to removal. Moreover, Plaintiffs have failed to seek a default judgment against these individual defendants, even upon remand to state court.[14] Such a

[13] Indeed, even the Magistrate Judge recognized that Plaintiffs were careless in filing the affidavits of service. (*See* J.A. 206, Foschio Report & Recommendation at n. 7 ("Plaintiffs do not explain why, on November 23, 2005, despite filing a Return of Service establishing that Caldwell was served on November 16, 2005 pursuant to N.Y. C.P.L.R. § 308(1) (McKinney 2009), they also filed a Return of Service reflecting the initial, incomplete service attempt on Caldwell on November 4, 2005.").)

[14] In fact, pursuant to New York laws, if a plaintiff fails to seek an entry of default judgment within one year after a defendant has defaulted, "the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its

situation presents "extraordinary circumstances" and, accordingly, it is unreasonable and against the interests of justice to penalize Removing Defendants for a failure to locate and obtain these individual defendants' consents to removal.

2. Even if Removal Was Procedurally Defective, Defendants' Decision to Remove Was Not Objectively Unreasonable.

Even if it was found that removal was procedurally defective because of the failure to obtain the consent of the individual defendants who had in fact been served prior to removal, attorneys' fees and costs should still not be awarded because the removal was not objectively unreasonable. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140-41 (2005).

Initially, in light of the authority relied upon by Removing Defendants to support their position that the constructive notice rule should be applied (*see* Argument Section II.(B)(1), *supra*), it is apparent that Defendants relied upon substantial legal authority from federal courts throughout the country as a basis for removal. In support of their position, Removing Defendants cited at least ten cases from federal courts throughout this country that stand for the proposition that removing defendants are only required to obtain the consent of other defendants who the removing defendants knew or should have known had been served at the

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own initiative or on motion . . . ." N.Y. C.P.L.R. § 3215(c) (McKinney 2009). This case was remanded on June 25, 2009, and Plaintiffs have never sought to obtain a default judgment against the non-removing defendants. Thus, whether via motion or upon the state court's own initiative, the cause of action against the non-consenting defendants will assuredly be dismissed.

time of removal. In determining that removal was procedurally improper, Magistrate Judge Foschio relied on **one** case from the Northern District of New York, which holds no precedential value and, as already discussed, does not address the issues at hand in this matter. Even if it is determined that the District Court's interpretation of *Tate* was correct, however, such a finding still would not justify an award of fees pursuant to Section 1447(c). At best, the *Tate* case is persuasive authority, and Defendants' reliance upon other federal court precedent cannot be considered objectively unreasonable. *See, e.g., Bankcroft v. Bayer Corp.*, No. 09-787-GPM, 2009 WL 3156706, *5 (S.D. Ill. Sept. 29, 2009) (explaining that a removal that merely contravenes the non-precedential decisions of a district court, rather than controlling authority, is not objectively unreasonable).

Furthermore, the only basis for remanding this case was an alleged procedural defect in the removal process, and many courts are hesitant to award fees and costs based solely on a defect in the removal procedure. *See Wallin v. Shanamn*, No. 08-cv-01987-MSK-KLM, 2010 WL 554794, *1 (D. Colo. Feb. 16, 2010) (declining to award fees when the case was remanded for failure to obtain consent of all defendants); *Pinnacle Choice, Inc. v. Silverstein*, No. 07-5857 (WJM), 2008 WL 2003759, *8 (D.N.J. May 6, 2008) ("[A] procedural mistake will rarely warrant an award of costs."); *Brady v. Lovelace Health Plan*, 504 F. Supp.

2d 1170, 1174 (D.N.M. 2007) (refusing to award fees where removal would have been proper but for the removing defendant's failure to join all defendants); *cf. Heimuli v. Am. Home Mortg. Serv.*, No. C-10-0020 EMC, 2010 WL 1445601, *2 (N.D. Cal. April 9, 2010) ("[T]he removal fails because of a procedural defect – i.e. lack of unanimity. There is authority suggesting that an award of fees may not be mandated under these circumstances."); *Babin v. Isaman*, No. 09-408-C, 2009 WL 3672901, *5 (M.D. La. Nov. 4, 2009) (refusing to award fees when the case was remanded due to lack of consent of all defendants).

Additionally, in this case, at the time of removal it cannot be said that Defendants removal was objectively unreasonable because the non-joining defendants still had time to join in the notice after it was filed; Bostic and Upshaw had until December 2, 2005 and December 22, 2005, respectively, to consent to removal. *See Evans v. Banktek W., Inc.*, No. CIV. 08-2966 WBS GGH, 2009 WL 700426, *5 (E.D. Cal. March 12, 2009) ("[Defendant's] notice of removal fails because of the procedural defect of lack of unanimity. The absence of [the defendant's] consent at the time of removal alone, however, did not make [the] removal objectively unreasonable at the time, because [the non-joining defendant] still had a week to join in the notice after it was filed."); *Heimuli*, *supra*, 2010 WL 1445601 at *2 (holding that since the non-removing defendant still had two days after the notice of removal was filed to join in the removal and cure the procedural

defect, the procedural defect of lack of unanimity did not make the removal objectively unreasonable).

Moreover, as the *Martin* decision makes clear, even if removal is determined to be objectively unreasonable, "unusual circumstances" permit a court to refrain from awarding fees. *Martin*, 546 U.S. at 141. In *Martin*, the Supreme Court provided two examples of unusual circumstances which may require a court to refrain from awarding fees because such acts undermine the rationale underlying Section 1447(c): a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction. *Ibid.* As demonstrated, in this case there are unusual circumstances present, which include the fact that Plaintiffs failed to timely file the affidavits of service and failed to provide the correct addresses for the individual defendants. (*See* J.A. 16, 175-76.) Just like a situation where a plaintiff fails to disclose facts necessary to determine jurisdiction, Plaintiffs herein failed to provide relevant information (the correct addresses) and failed to timely file the affidavits of service in state court prior to removal or in federal court after removal – either of which would have given Defendants notice that the individual defendants had been served prior to removal.

Finally, there is no allegation that this case was removed to purposely prolong litigation nor is there a showing that the removal was frivolous. Indeed, the case law relied upon by the District Court in granting attorneys' fees are

distinguishable from this case. For example, in *Zanghi v. Laborers' Int'l Union of N. Am.*, 2000 WL 743986 (W.D.N.Y. June 6, 2000), fees were awarded because the defendant removed without obtaining the consent of the other defendants even though ***every proof of service had been filed with the state court prior to removal***: "Where, as here, proof of service as to each defendant was filed prior to removal but removal was nonetheless sought without the consent of each, there can be no question as to the impropriety of such removal." *Id.* at *1; *see also Thompson v. Williams*, No. 98-CV-6177 (ILG), 1998 WL 938778, *2-3 (E.D.N.Y. Nov. 20, 1998) (removing defendant was undeniably aware of the fact that complete diversity did not exist and had no good faith reason to believe otherwise); *Wallace v. Wiedenbeck*, 985 F. Supp. 288, 291 (N.D.N.Y 1998) (eleventh-hour removal in order to prevent a hearing the following day was improper when the feeble grounds for federal jurisdiction were all "contrary to overwhelming authority on each of the stated grounds"). The cases relied upon, therefore, are clearly distinguishable from scenario confronted in this matter.

Thus, even if Defendants' removal was procedurally improper, there was an objectively reasonable reason for removal, and attorneys' fees are inappropriate as there is "no showing how the defendant[s'] error is distinguishable from conduct found to be objectively reasonable in other cases [in the Second Circuit]." *See*

Tuccio v. Corleto, No. 3:06CV01934 AWT, 2007 WL 294129, *1 (D. Conn. Jan. 30, 2007).

III. THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES AND COSTS TO PLAINTIFFS PURSUANT TO 28 U.S.C. § 1447(C) BECAUSE PLAINTIFFS DID NOT INCUR ANY ACTUAL FEES AS A RESULT OF REMOVAL AS THEIR ATTORNEYS WERE RETAINED ON A CONTINGENCY FEE BASIS.

A. THE STANDARD OF REVIEW IS *DE NOVO*.

Although a court's decision to grant fees is reviewed for an abuse of discretion, the underlying legal analysis is reviewed *de novo*. *Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1248 (10th Cir. 2005); *see also White v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993) ("We review *de novo* whether the district court correctly interpreted [a] statute."). A claim that there was no basis in law or fact for an award of attorney fees is subject to *do novo* review. *Mautner v. Hirsch*, 32 F.3d 37, 39 (2d Cir. 1994).

B. DISCUSSION.

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. The Second Circuit has never addressed the issue of interpreting Section 1447(c) 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 only the "actual expenses and attorney fees" that the plaintiffs incurred as a result of removal.

Although the Second Circuit has not yet addressed this issue, three other circuits have. In *Wisconsin v. Hotline Industries*, 236 F.3d 363 (7th Cir. 2000), the Seventh Circuit examined the nature of the fee-shifting provision in Section 1447(c):

> Section 1447(c) is unusual among fee-shifting statutes. **Unlike the numerous statutes that authorize recovery of "reasonable" attorney's fees, § 1447(c) expressly limits fee awards to actual outlays – specifically, to "any *actual* expenses, including attorney fees, *incurred*."** The mention of "actual" and "incurred" is significant. Neither word appeared in the statute's earlier version that authorized only "the payment of costs." As amended in 1988, § 1447(c) now explicitly includes "attorney fees" among the "actual expenses" that can be awarded. The statutory change makes clear that § 1447(c) constitutes an alternative means to reimburse the victorious party without resorting to Rule 11.

Id. at 366-67 (emphasis added) (internal citations omitted). Based on this analysis, where the work was performed by government attorneys, the defendant only had to reimburse the plaintiff for a proportional share of those attorneys' salaries, commensurate with the time they devoted to opposing the removal. *Id.* at 367-68. Accordingly, the plaintiffs were reimbursed for the fees they incurred. *Ibid.*

In *Gotro v. R & B Realty Group*, 69 F.3d 1485, 1486 (9th Cir.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 "reasonable" attorney fees. *Id.* at 1489-90.

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 under Section 1447(c).

Id. at 1490. Further, it appears that the purpose of Section 1447(c) is to make the *plaintiff* whole in terms of putting plaintiff in the same financial position as if the case had never been removed. A *plaintiff* who has a contingency fee agreement will not have incurred attorneys' fees. *Id.*

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). In *Huffman*, the Tenth Circuit looked to the decisions in *Hotline* and *Gotro* and held that:

> We have concluded that the phrase "incurred as a result of removal" informs and narrows the meaning of "actual expenses, including attorney fees." Nothing in *Hotline* or *Gotro* suggests that courts are compelled to award unreasonable, if actual, fees to plaintiffs who successfully obtain an order of remand. **To be compensable, their fees must be actually "incurred," that is, they must reflect efforts expended to resist removal.**

Id. at 1135 (emphasis added).

The plain language of Section 1447(c) supports the holdings in *Huffman*, *Hotline*, and the dissent in *Gotro*, which all stand for the proposition that attorneys' fees and costs should only be awarded for "actual outlays" and fees "actually incurred." *See* 28 U.S.C. § 1447(c). When a statute is clear and unambiguous, a court must give effect to the expressed intent of Congress. *See Hamdam v.*

Rumsfeld, 548 U.S. 557, 658 (2006) (Scalia, J. dissenting); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007). The clear and unambiguous language of Section 1447(c) permits the award for "any **actual** expenses, including attorney fees, **incurred as a result of the removal**." 28 U.S.C. § 1447(c) (emphasis added).

Moreover, interpreting the fee provision of Section 1447(c) to mean any "reasonable fees" may be awarded regardless of whether fees were actually incurred is inconsistent with the longstanding principle of statutory interpretation that all parts of a statute should be read so as to give effect to all the words utilized. *See TRW v. Andrews*, 534 U.S. 19, 31 (2001) ("[A] cardinal principle of statutory construction [is] that a statute should, upon the whole, be construed so that, if possible, no clause, sentence or word is rendered superfluous, void or insignificant."); *United States v. Daniels*, 279 F. 844, 849 (2d Cir. 1922) ("It is a cardinal rule of construction that effect is to be given, if possible, to every word, clause, and sentence of the statute."). Not only would interpreting Section 1447(c) to permit "reasonable" attorney fees render the words "actual" and "incurred" void, but such an interpretation also begs the following question: if the intent of Section 1447(c) was to permit the award of "reasonable" fees, why did Congress not simply use the word "reasonable" in the statute like it has done in a multitude of other statutes? *See, e.g.*, 11 U.S.C. § 523(d) ("The court shall grant judgment . . .

for the costs of, and a reasonable attorney's fee for the proceeding."); 42 U.S.C. § 1988(b) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ."); 42 U.S.C. § 6305(d) ("The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party . . . ."). The answer to this question must be that Section 1447(c) is unlike most fee-shifting statutes, and Congress only intended to reimburse a party for actual expenses incurred as a result of an improper removal.

In addition to principles of statutory interpretation, case law demonstrates that the fee shifting provision of Section 1447(c) applies to the *parties* to the litigation, not the attorneys. *See In re Crescent City Estates, LLC*, 588 F.3d 822, 826 (4th Cir. 2009) (explaining that the fee shifting provision of Section 1447(c) shifts fees from the prevailing party (the party successfully obtaining remand) to the losing party (the party erroneously attempting removal)). Thus, the purpose of the fee shifting statute is to ensure that the ***party*** is made whole. *Ibid.* In this case, no evidence has been presented that the plaintiffs have incurred attorneys' fees as a result of the removal of this case. Rather, it appears that awarding fees would be tantamount to providing the ***plaintiffs' attorneys*** with a windfall. Such a scenario contravenes the underlying purpose of the fee shifting provision of Section 1447(c). Thus, since a plaintiff who has a contingency fee agreement with his or

her attorney has not incurred any actual fees due to removal, there is no basis to award fees pursuant to Section 1447(c).

IV. THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES AND COSTS TO PLAINTIFFS PURSUANT TO 28 U.S.C. § 1447(C) WHEN THE FEES WERE NOT INCURRED SOLELY IN CONNECTION WITH THE REMOVAL.

A. THE STANDARD OF REVIEW IS *DE NOVO*.

A claim that there was no basis in law or fact for an award of attorney fees is subject to *de novo* review. *Mautner v. Hirsch*, 32 F.3d 37, 39 (2d Cir. 1994); *see also White v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993) ("We review *de novo* whether the district court correctly interpreted [a] statute.").

B. DISCUSSION.

As Section 1447(c) makes clear, even if an award of fees is proper, a plaintiff is only entitled to fees incurred as a result of removal. 28 U.S.C. § 1447(c). In this instance, the District Court erred in awarding fees that were not incurred solely in connection with removal and that were associated with an appeal in which Removing Defendants were the prevailing party.

In awarding fees, the District Court stated that fees and costs incurred opposing Defendant's first appeal was "directly related to, and incurred only as a result of the removal." (J.A. 445, Skretny Order 3/10/2010; S.A. 57-58.) However, the District Court erroneously stated that the previous appeal "sought vacatur of the District Court's remand order." (J.A. 444; S.A. 57.) In reality, the

prior appeal sought clarification on the proper standard of review employed by a District Court when reviewing a Magistrate Judge's decision to remand a case. (*See* J.A.A-333-44, Second Circuit Opinion 5/28/2008.) Accordingly, these fees and costs were not associated with removal.

Additionally, the District Court cited to a list of cases to support the conclusion that the fees and costs associated with the first appeal are related to the removal and are therefore recoverable. (J.A. 444-45; S.A. 57-58.) However, only two of those cases (*Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407 (7th Cir. 2000) and *Avitts v. Amoco Products Co.*, 111 F.3d 30, 32 (5th Cir. 1997)) even touch upon the issue of whether fees related to an appeal are recoverable upon remand, and both cases are distinguishable from the facts at hand. In *Garbie*, after the district court remanded the case, the defendant appealed the remand order twice and filed a petition for mandamus. 211 F.3d at 410-11. The Seventh Circuit described such actions as frivolous and "in the teeth of contrary decisions by the Supreme Court." *Id.* at 410. The Court concluded that "almost every step of the defendant's conduct throughout this litigation *has* been in bad faith (objectively understood to mean frivolous tactics and arguments)." *Id.* at 410-11 (emphasis in original). Accordingly, the court awarded fees related to the appeal because the appeal was frivolous and impermissibly sought to appeal the ruling of a remand order. *Ibid.* In *Avitts*, although an appeal related to subject matter jurisdiction had

been taken, the case did not address whether costs related to such an appeal were recoverable. 111 F.3d at 32. Accordingly, neither case supports the proposition for which the District Court cites them.

Finally, from a practical perspective, there is no basis to award fees related to Defendants' prior appeal. Unlike the cases where appellate fees were awarded, *see, e.g.*, *Garbie*, 211 F.3d at 410, in this case, Defendants did not improvidently seek appellate review of a remand order, nor was the appeal contrary to established law. In fact, it was the District Court's error in treating a remand motion as non-dispositive that led to the appeal, not Defendants' conduct. Furthermore, there is no assertion of bad faith on the part of Defendants. Rather, in this case, Defendants successfully appealed to the Second Circuit to obtain a determination as to the appropriate standard of review a District Court must use when evaluating a Magistrate Judge's remand recommendation. As previously held by this Court, the District Court utilized an incorrect standard. It is counterintuitive to award fees and costs to Plaintiffs associated with an appeal where the Defendants were meritorious. Thus, there is no basis for the District Court to award fees that were incurred solely due to its own failure to apply the correct standard of review.

V. THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES AND COSTS RELATED TO THE PREVIOUS APPEAL PURSUANT TO 28 U.S.C. § 1447(C) BECAUSE THE COURT LACKED AUTHORITY TO ISSUE SUCH AN AWARD.

A. THE STANDARD OF REVIEW IS *DE NOVO*.

Although a court's decision to grant fees is reviewed for an abuse of discretion, the underlying legal analysis is reviewed *de novo*. *Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1248 (10th Cir. 2005); *see White v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993) ("We review *de novo* whether the district court correctly interpreted [a] statute."); *see also Huffman*, *supra*, 262 F.3d at 1131 ("[W]e review *de novo* the district court's application of the legal principles underlying the decision [to award costs].")

B. DISCUSSION.

There is no justification for the District Court to award fees associated with the prior appeal because this Court has already denied such an award. The doctrine of "law of the case" applies to issues previously decided either explicitly or by necessary implication. *United States v. Hatter*, 532 U.S. 557, 566 (2001) ("The law of the case doctrine presumes a hearing on the merits."); *Arizona v. California*, 460 U.S. 605, 618 (1983) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."). "The law-of-the-case doctrine has two facets. First, when a court has ruled on an issue, that decision should generally be adhered to by that court in

subsequent stages in the same case. Second, when the court of appeals has ruled on an issue and has remanded the case to the district court, the district court on remand is required to follow that ruling." *United States v. Carr*, 557 F.3d 93, 102 (2d Cir. 2009); *see also Huffman*, *supra*, 262 F.3d at 1132 ("[T]he mandate rule provides that a district court must comply strictly with the mandate rendered by the reviewing court."). It has also been expressly stated that once a court of appeals "has entertained an application for appellate attorneys' fees, a district court may not." *Yaron v. Township of Northampton*, 963 F.2d 33, 37 (3d Cir. 1992).

For example, in *Huffman*, the Tenth Circuit held that there was no subject matter jurisdiction as the notice of removal had not been timely filed. 262 F.3d at 1131. In its ruling, the Tenth Circuit also expressly refused to award appellate fees to the plaintiff. *Id.* at 1131-32. In the District Court's remand order, however, fees and costs were nonetheless awarded. *Ibid.* When the fee issue was appealed, the Tenth Circuit reversed the award of fees holding that due to the "law of the case," the district court lacked authority to award appellate fees. *Id.* at 1133 ("The district court's authority [to award fees], however, was circumscribed by the terms of the mandate and the law of the case doctrine. . . .").

In this case, when Defendants appealed to the Second Circuit, the Plaintiffs filed a motion to dismiss the appeal and also requested fees and costs. (J.A. 270-303; 316-322.) The Second Circuit, however, issued an order denying Plaintiffs

motion to dismiss and denying their request for costs because the appeal was not frivolous given the "split of authority." (J.A. 329-31; S.A. 21-25.) Despite this ruling, when the case was ultimately remanded to the District Court, the Plaintiffs again sought fees and costs associated with the appeal (J.A. 413-21, Grable Aff. 7/9/2009; 422-430; *compare* J.A. 287-289, Records of Attorneys' Fees 1/12/2007, *with* J.A.422-430, Records of Attorneys' Fees 7/9/2009) and the District Court awarded such fees (J.A. 435-450; S.A. 48-63). In light of the "law of the case" doctrine, the decision to award fees and costs related to the appeal is clearly erroneous. Since the Second Circuit already ruled on this fee issue, the District Court lacked authority to consider the matter, and Plaintiffs are not entitled to an award of fees related to the appeal.

VI. THE AMOUNT OF FEES AND COSTS AWARDED BY THE DISTRICT COURT WAS NOT REASONABLE.

A. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

The reasonableness of a District Court's award of fees and costs is reviewed for an abuse of discretion. *See, e.g., Salovaara v. Eckert*, 222 F.3d 19, 27 (2d Cir. 2000).

B. DISCUSSION.

Even if an award of fees was legally proper in this instance, which it clearly is not, the amount of fees awarded by the District Court is inappropriate. In awarding attorneys' fees and costs, courts are to set a reasonable hourly rate for the

attorneys and then use that rate to calculate a presumptively reasonable fee. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 493 F.3d 110 (2d Cir. 2007), *amended on other grounds by* 522 F.3d 182 (2d Cir. 2008). Defendants do not challenge the rates conferred by the District Court but, rather, challenge the amount of the award in light of the excessive amount of hours billed; the reliance upon billing records which were not contemporaneously maintained; and the use of impermissibly inadequate billing records.

Excessive, redundant or unnecessary hours are to be excluded from a fee award. *Anderson v. Genesee Reg'l Transp. Auth.*, 388 F. Supp. 2d 159, 163 (W.D.N.Y. 2005). Additionally, a court may apply a reasonable percentage reduction to an award of attorneys' 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. Although the District Court reduced the hours billed by the Brady Center lawyers (*see* S.A. 62), Defendants respectfully contend that since their work was entirely cumulative and amounted to a duplication of the efforts put forth by the attorneys at Connors & Vilardo, LLP, none of the fees associated with the Brady Center should be awarded. *See Anderson*, 388 F. Supp. 2d at 164 (explaining that it was unreasonable to bill for duplication of effort and excessive

hours). This is especially true with a straightforward issue such as removal. Furthermore, it was excessive to bill over 100 hours to produce a twelve-page memorandum in opposition. (*See* J.A.422-30.) The number of hours claimed is excessive and, hence, unreasonable, "considering the nature and history of th[e] case." *Anderson*, 388 F. Supp. 2d at 165 (reducing the amount of attorneys' fees "considering the nature and history of th[e] case"). 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). In this case, even with the District Court's reduction of the hours, Mr. Grable, a partner at Connors & Vilardo, LLP, billed over 100 hours on this case. (J.A. 422-30, 448.) Defendants should not have to pay extra money because tasks were done by a partner when they could have just as easily been done by an associate.

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, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983); *see also Miele v. N.Y. State Teamsters Conference Pension & Ret. Fund*, 831 F.2d 407, 408 (2d Cir. 1987) (stating that the court requires hours to be kept in *detailed*

contemporaneous time records). The Brady Center's time records are clearly not maintained contemporaneously (*see* J.A. 222-228), and no evidence was presented that the Connors & Vilardo firm contemporaneously maintained their time records for this case, which is improbable considering that it is acting on a contingency fee basis. Therefore, the total amount of fees awarded should be accordingly reduced.

Furthermore, much of the billing records are "vague" and lack proper description. *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 190 F. Supp. 2d 509, 522 (W.D.N.Y. 2001) (holding that entries that included "hearing preparation," "prepare for hearing," "review records," "telephone conference with client," and "prepare for discovery" to be insufficient). Plaintiffs' counsel's billing records contain numerous instances of "block billing" so that one cannot tell how much time was spent addressing which activity. (*See generally*, J.A. 222-228.) Accordingly, Plaintiffs should not be able to recover for any vague entries, and Defendants respectfully request that the award of fees and costs be reduced accordingly.

CONCLUSION

Based on the foregoing, it is respectfully requested that the District Court's order granting attorneys' fees and costs be reversed or, in the alternative, the amount of fees be reduced.

Dated: White Plains, New York
July 30, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, counsel for Defendants-Appellants hereby certifies as follows:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,982 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced type-face using Microsoft Word in 14-point Times New Roman.

Dated: July 30, 2010
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I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

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