authorities, it cannot be said that the basis for removal was objectively unreasonable. See Ind. Elec. Workers Pension Trust Fund, supra, 2007 WL 2141697 at *8 ("Given the closeness of the issue in the case and the limited number of decisions, and because the defendants raise 'objectively reasonable' legal arguments . . . the motion for an award of fees is denied.").

Comparing the facts and issues involved in this matter with the Second Circuit case law interpreting Martin clearly demonstrates that removal was not objectively unreasonable. Thus, even if this Court were to ultimately conclude that Removing Defendants were incorrect in removing this case, there was an objectively reasonable reason for doing so, 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, supra, 2007 WL 294129 at *1.

II. REMOVAL WAS SUBSTANTIVELY PROPER PURSUANT TO 28 U.S.C. § 1332(a) AS CALDWELL WAS FRAUDULENTLY JOINED TO DEFEAT DIVERSITY JURISDICTION.

Removing Defendants' second objection the Magistrate Judge Foschio's Report is the failure to address whether Defendant Caldwell was fraudulently joined as a defendant in this case. First, Magistrate Judge Foschio cannot include Caldwell in his procedural analysis without first addressing the fraudulent joinder issue. Consent to remove is not required from a fraudulently joined party. Had the fraudulent joinder issue been addressed by the Magistrate Judge, it is clear that Caldwell was fraudulently joined in this matter. Alternatively, the Magistrate Judge could have addressed the procedural consent issue without Caldwell in the analysis. The Magistrate Judge's Report and Recommendation requiring that the Removing defendant obtain the consent to remove from Caldwell was an error, both from a practical and legal perspective.

A. The Magistrate Judge was Wrong to Include Caldwell in the Analysis as to Whether Removal was Procedurally Proper.

Magistrate Judge Foschio's decision to include Caldwell in his procedural analysis was erroneous. Magistrate Judge Foschio 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 from his analysis of the rule of unanimity.

In terms of common sense and efficiency, prior to addressing whether Removing Defendants complied with the so-called rule of unanimity, Magistrate Judge Foschio should have first determined whether or not Caldwell was fraudulently joined. Removing Defendants' sole basis for removal was that Caldwell's non-diverse citizenship must be disregarded for purposes of diversity jurisdiction. See Pampillonia v. RJR Nabisco, Inc., 138 F. 3d 459, 460-61 (2d Cir. 1998). Plaintiffs claim that Caldwell was correctly joined as a defendant, which, if true, defeats any claim of diversity jurisdiction. Thus, if the Magistrate Judge found that Caldwell was appropriately joined as a defendant, there can be no diversity jurisdiction and whether or not all necessary defendants joined in removal becomes a moot issue.

In substantive terms, the failure to determine whether Caldwell was fraudulently joined affected Magistrate Judge Foschio's analysis of the rule of unanimity. While the Magistrate Judge's decision to address the procedural issues first is not necessarily an error, the Magistrate Judge's inclusion of Caldwell in his procedural analysis was plainly an error. Case law demonstrates that while the consent of all defendants is required to effect removal, "the failure of an improperly joined party to participate in the petition will not defeat removal." In re Rezulin Prod. Liab. Litig., 133 F. Supp. 2d 272, 295 (S.D.N.Y. 2001). Despite this clear case law, Magistrate Judge Foschio included Caldwell in his procedural analysis. (See Doc. No. 55 at p. 6-14.) Since the Magistrate Judge decided to address the procedural issue first, Caldwell should

not have been included in the analysis because (1) if he was improperly joined, his participation in removal was not required, and (2) if he was properly joined, then diversity jurisdiction could not exist anyway and no procedural analysis would be required. Any way one chooses to look at it, Caldwell should not have been included in the procedural analysis.

Magistrate Judge Foschio should have either decided the issue as to whether or not Caldwell was fraudulently joined in this action prior to addressing procedural issues, or Magistrate Judge Foschio should have not included Caldwell in his analysis of the procedural issues. It was clearly an error for Caldwell to be included in the analysis of whether removal was procedurally proper.

B. Since Caldwell Was Fraudulently Joined, Diversity Jurisdiction Exists.

This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) because all proper parties are completely diverse and the amount in controversy exceeds $75,000. Although Caldwell is a citizen of New York, he is a fraudulently joined party whose non-diverse citizenship must be disregarded for purposes of diversity jurisdiction. This issue was fully briefed in Removing Defendants' Opposition to Removal (Doc. No. 27), Rule 72(b) Objections (Doc. No. 34), and Reply in Support of Rule 72(b) Objections (Doc. No. 40). The arguments and case law discussed therein are hereby incorporated by reference and, for the sake of efficiency, those arguments will not be recopied here. Removing Defendants, however, respectfully request that this Court review the arguments outlined in its past filings and issue a decision as to whether Caldwell was fraudulently joined prior to addressing the unanimity issue.

III. REMOVAL WAS PROCEDURALLY PROPER BECAUSE THE REMOVING DEFENDANTS COMPLIED WITH THE RULE OF UNANIMITY.

Removal was procedurally proper because the Removing Defendants complied with the so-called "rule of unanimity." Although not required by statute, most courts require

"unanimous" consent by defendants to remove a case. See, e.g., 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 Gribler v. Weisblat, No. 07 Civ. 11436(NRB), 2008 WL 563469, *1 n. 3 (S.D.N.Y. Feb. 25, 2008). At issue herein is Magistrate Judge Foschio's interpretation of this exception.

The Magistrate Judge, again only relying on one case, held that the Removing Defendants did not comply with the rule of unanimity because Bostic and Upshaw had been "served in fact prior" to removal and, therefore, remand was appropriate. As will be shown, however, this conclusion is incorrect because: (1) the Tate case upon which this ruling is based is not persuasive as it is factually different to the scenario presented in this case; (2) Bostic and Upshaw's consent were not required as there was no actual or constructive notice of service; and (3) Removing Defendants were diligent in attempting to determine whether Bostic and Upshaw had been served and plaintiffs' lack of diligence or intentional delay was the reason that Removing Defendants did not have actual or constructive notice that those two defendants had been served.

A. The Magistrate Judge's Reliance on Tate is Misplaced.

In reaching a conclusion about the necessity of consent to removal from the non-removing defendants, the Magistrate Judge relied upon Tate v. Mercedes-Benz USA, Inc., 151 F. Supp. 2d 222 (N.D.N.Y. 2001). Specifically, the Magistrate Judge interpreted Tate to stand for the proposition that "the relevant inquiry in determining whether removal was proper is not whether the defendants seeking to remove the action had actual or constructive notice of service of process on the other served defendants but, rather, whether the other defendants had in fact

been served." (Doc. No. 55 at p. 10.) Thus, the Magistrate Judge concluded that since the non-removing defendants had "in-fact" been served prior to removal, removal was procedurally improper. This reading of Tate is incorrect as that decision addressed entirely different facts and issues than the ones presented here. This interpretation of the rule is also practically onerous and provides an incentive to a party trying to avoid removal to withhold the filing of affidavits of service in an attempt to procedurally thwart removal.

The Second Circuit has never addressed whether removal is proper if removing parties do not have constructive or actual notice of service on the non-removing parties. The Tate case did not address this issue either because the issue in Tate was what rule will be used to determine the timeliness of a defendant's consent to a removal petition. Tate, 151 F. Supp. 2d at 224. In Tate, the Northern District examined the three rules various federal courts have fashioned in this regard: the first served rule; the last served ruled; and the McKinney rule. Id. After analyzing the three rules, the court concluded that the McKinney rule was the appropriate rule to apply, which holds that an individual defendant has thirty days from the time that it is served with process to join in an otherwise valid removal. Id. at 224-25.

Having decided on what standard to use, the Tate court then looked to the facts. In Tate, defendant Prestige Motors, Inc. ("Prestige") was served on September 19, 2000, and defendant Mercedes Benz ("Mercedes") was served on September 22, 2000. Id. at 223. On October 19, 2000, Mercedes filed a removal petition and did not obtain the consent of Prestige, the first-served defendant. Id. After removal by Mercedes, and more than thirty days after being served, defendant Prestige submitted an affidavit consenting to the removal. Id. Mercedes argued that since plaintiff failed to file proof of service upon Prestige until after the petition for removal was

filed, Mercedes had no ability to know that Prestige had been served and was actually a party to the litigation. Id. Applying the McKinney rule to these facts, the court 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 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. Id. The first-served defendant has the responsibility of timely petitioning for removal and failure to timely remove will not be excused because a later-served defendant lacked "constructive knowledge" that another defendant had been served first. Id.

Clearly, the Tate holding does not address the issue at hand: whether removal is proper when a first-served defendant timely removes and had no constructive or actual knowledge of service on non-moving, later-served defendants. The Tate decision, therefore, does not support the Magistrate Judge's conclusion.

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

The federal cases that have addressed this issue 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). It has been held that, rather than Magistrate Judge Foschio's opinion that consent is

needed from all defendants who had "in fact been served," the better rule is to determine whether removing defendants had actual or constructive knowledge of service:

> [T]he 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).

Removing defendants are not required to obtain consent where, prior to removal, the removing defendants did not know or could not reasonably have known 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, *5 (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); Harlow Aircraft Mfg., Inc. v. Dayton Mach. Tool Co., No. 04-1377-JTM, 2005 WL 1153600, *3 (D. Kan. May 16, 2005) (acknowledging an exception to

the rule of unanimity when a party is "reasonably diligent" in attempting to determine if all defendants had been served); Pianovski v. Laurel Motors, Inc. 924 F. Supp. 86, 87 (N.D. Ill 1996) (recognizing an exception for "sufficient diligence," but that under the circumstances of that case, removing defendant was not reasonably diligent in attempting to determine if co-defendants had been served); Keys v. Konrath, No. 93 C 7302, 1994 WL 75037, *2 (N.D. Ill. March 10, 1994) (holding that the attorney for removing defendant was not reasonably diligent because he failed to ask one of the other defendants, who he also represented, whether he had been served).[4]

This constructive knowledge 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. As the Milstead court explained:

> 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 by making a motion to remand [pursuant to 28 U.S.C. § 1448].

Id. at 572 (citing Getty Oil Corp. v. Ins. Co. of N. Amer., 841 F.2d 1254, 1263 (5th Cir. 1988)). As such, the rationale espoused by the above-cited cases make sense, and it is apparent that federal courts recognize that when removing defendants have neither constructive nor actual knowledge of service upon non-removing defendants prior to removal, the consent of the non-removing defendants is not required for removal.

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[4] See also Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262 (5th Cir. 1988); Lewis v. Rego Co., 757 F.2d 66, 68 (3d Cir. 1985); Eltman v. Pioneer Comm. of Am., Inc., 151 F.R.D. 311, 314-315 (N.D. Ill. 1993); Thompson v. Louisville Ladder Corp., 835 F. Supp. 336, 338 (E.D. Tex. 1993); Brooks v. Rosiere, 585 F. Supp. 351, 353 (E.D. La. 1984).

C. Removing Defendants Were Reasonably Diligent in Attempting to Discover Whether Non-Removing Defendants Had Been Served.

Removing Defendants were reasonably diligent in attempting to determine whether the individual defendants had been served prior to removing this case. Courts require removing defendants, prior to petitioning for removal, to be reasonably diligent in attempting to discover whether non-removing defendants have been served. See, e.g., Laurie, supra, 2001 WL 34377958 at *4 (holding that removing defendant demonstrated reasonable diligence in trying to determine which defendants had been served). 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. See, e.g., id. at *4; Parker, supra, 1999 WL 111889 at *5; 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."). In fact, the Parker case specifically stated that removing defendants are only deemed to have constructive notice of service upon the non-removing defendants *at 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. The constructive notice element should only be applied, however, to removing defendants who had reasonable time to become aware of this filing and to obtain the joinder of such other defendants.

Parker, 1999 WL 111889 at *5.

Applying the case law to this matter, it is undisputed that Removing Defendants did not have actual or constructive notice that any non-removing defendant had been served prior to removal. Preliminarily, Upshaw had not been served prior to execution of the notice of removal. (See Doc. No. 26, Allan Aff. at Ex. 3 (Upshaw Return of Service stating that she was served at

8:30 p.m. on 11/22/05) and Ex. 5 (Federal Express Receipt stating that Notice of Removal was picked up at 8:02 p.m. on 11/22/05).) Additionally, the affidavit of service as to Bostic was not filed with the Erie County Clerk of Court until November 30, 2005 -- seven days after removal (Doc. No. 26, Allan Aff., Ex. 1); and the affidavit of service as to Upshaw was not filed until November 25, 2005 -- two days after removal (id. at Ex. 3). Further, since the Notice of Removal had already been filed, plaintiffs should have filed the affidavits of service on Bostic and Upshaw in the Western District of New York and served them on Removing Defendants instead of filing them in state court. Finally, as previously discussed, since Caldwell was fraudulently joined as a defendant, the date of the filing of the affidavit of service on him is irrelevant to this analysis. See, e.g., Whitaker v. Am. Telecasting Inc., 261 F.3d 196, 207 (2d Cir. 2001). Removing defendants did not have constructive notice of service upon any non-removing defendant prior to petitioning for removal and, therefore, did not violate the rule of unanimity.

In his Report and Recommendation, the Magistrate does not contend that Removing Defendants had constructive knowledge of service on the non-removing defendants. Rather, Magistrate Judge Foschio attempts to create some kind of negative inference by stating that the Removing Defendants fail to explain how the Beemiller and Brown defendants had notice that the other removing defendants had been served given that MKS's and Gun-A-Rama's Returns of Service were filed on November 23, 2005 and on November 30, 2005, respectively. (Doc. No. 55 at p. 11-12.) 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. 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 have substantial pre-existing relationships with each other. Under federal law, each Federal Firearms Licensee is required to maintain the name and address, along with other information, about each entity from which it purchases and to whom it sells a firearm. Thus, it was unnecessary for removing defendants to await the filing of service affidavits to notify them how to locate each other. (See Doc. No. 1, Notice of Removal, Ex. 2 at ¶ 28.) 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. On the other hand, the removing defendants have absolutely no relationship with the individual, non-removing defendants.[5] The fact that Beemiller and Brown were able to locate and obtain consent from other parties in the chain of distribution without the affidavits of service being filed in a timely fashion demonstrates that the Removing Defendants were, in fact, being diligent and trying to comply with the rule of unanimity as best they could. The failure of Removing Defendants to obtain the consent of two individuals involved in criminal acts according to the Complaint, therefore, does not support a conclusion that they knew or should have known that the individual, non-removing defendants had been served.

IV. EVEN IF REMOVAL WAS PROCEDURALLY DEFICIENT, THIS SCENARIO PRESENTS EXTRAORDINARY CIRCUMSTANCES PERMITTING THIS COURT TO RETAIN JURISDICTION.

Even if this Court were to determine that removal was procedurally deficient, the circumstances involved in this matter constitute extraordinary circumstances permitting this case to remain in federal court. Failure to join all defendants in a removal petition is not a

[5] In fact, both Bostic and Upshaw were served at different locations than the invalided addresses listed on the summonses addressed to them preventing defendants from contacting them to obtain consent. (Doc. No. 26, Allan Aff., Exs. 1-3.)

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. Id. 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 1301. The court, however, went on to explain that its own "research has revealed no reported federal appellate court decision where a removing defendant has been excused from obtaining the consent of a codefendant who has been personally served, but against whom a default has been entered for failure to appear and answer the complaint." Id. The court then created a new exception to the rule of unanimity in cases where default has been entered against a party who has entirely failed to appear in the action:

> **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 (emphasis added) (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. Id.; 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 exist permitting this Court to retain jurisdiction over this matter as Removing Defendants had no practical ability to contact the non-removing individual defendants. As already discussed, the affidavits of service on Bostic and Upshaw reveal that they were not served at the addresses that were listed in the Summons and

Complaint.[6] Furthermore, Upshaw was served at 8:30 p.m. on November 22, 2005 (see Doc. No. 16 at p. 6, Affidavit of Service on Upshaw), which was after Removing Defendants had placed their Notice of Removal in the care and custody of Federal Express for overnight delivery (see Doc. No. 26, Ex. 5, Federal Express Receipt). This demonstrates that Upshaw's consent to removal was not even required as she was served after the Notice of Removal had been served. At the very least, this fact reveals that it was impossible for Removing Defendants to have known that Upshaw had been served prior to filing their Notice of Removal. Up until the Notice of Removal was filed, Removing Defendants continuously monitored the state court docket to determine if the individual defendants have been served. These facts, taken together, demonstrate that, despite their diligence, Removing Defendants had no feasible, or possible, way of knowing that Bostic or Upshaw had been served prior to removal.

Plaintiffs, on the other hand, were not diligent in filing the affidavits of service. Despite being served on November 2, 2005, the affidavit of service on Bostic was not filed until twenty-eight days later, on November 30, 2005. Additionally, the affidavits of service on Bostic and on Upshaw were both filed with the New York Supreme Court, Erie County. Having been served with the Notice of Removal on November 23, 2005, plaintiffs offer no explanation as to why the affidavits of service as to Bostic and Upshaw were filed in state court as opposed to in the Western District of New York as required.[7] If plaintiffs had filed the return of service on Bostic

[6] The Summons listed Bostic's address as 191 Orleans Street, Buffalo, New York, but the return of service indicates that he was served at USP Lewisburg, Robert Miller Drive, Lewisburg, Pennsylvania. (See Doc. No. 16 at p. 7, Aff. of Service on Bostic.) As to Upshaw, the summons indicated that she was to be served at 5513 Woodcreek Road, #D1, Dayton, Ohio, but the return of service indicates that she was served at 5640 Signet Drive, Huber Heights, Ohio. (See id. at p. 6, Aff. of Service on Upshaw.)

[7] See Fed. R. Civ. Pro. 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. Pro. 4(l)

in a timely manner in the state court or if plaintiffs had filed the returns of service on Bostic and Upshaw with the Clerk of this Court and served copies on counsel for Removing Defendants, Removing Defendants could have been able to obtain the consent to removal from Upshaw and Bostic within the requisite time to do so. Instead, plaintiffs seek to use their failures to defeat removal.

Finally, it is also without dispute that, despite having been served three years ago, none of the individual defendants have ever answered or appeared in this matter. These individual defendants are in default and, whether it occurs at the federal or state level, default will assuredly be entered against these parties. The fact that these parties have failed to appear for more than three years demonstrates that there was nothing that Removing Defendants could have feasibly or realistically done to locate them, let alone obtain consent to removal. This situation presents "extraordinary circumstances" because the Removing Defendants are in an impossible situation: under Magistrate Judge Foschio's interpretation of the law they cannot remove the case because, despite their diligent efforts, two individual defendants have failed to appear in this case.[8]

In a situation where these individual defendants have failed to appear for three (3) years as well as the other above-described extraordinary circumstances, it is unreasonable and against the interests of justice to penalize Removing Defendants for failure to locate and obtain these individual defendants' consent to removal. It is respectfully requested, therefore, that this Court retain jurisdiction over this matter due to the circumstances presented.

("If service is not waived, the person effecting service shall make proof thereof to the court."); 28 U.S.C. § 1446(d) (noting that after removal "the State court shall proceed no further unless and until the case is remanded").

[8] It is also noteworthy that, despite the fact that Bostic and Upshaw (and Caldwell for that matter), have not appeared in this case in three years, plaintiffs have failed to take any action and have not sought to obtain a default judgment against any of the non-appearing individual defendants.

CONCLUSION

Removing Defendants properly exercised their right to remove this action from state to federal court. They obtained the consent of all necessary parties, and diversity jurisdiction exists because Caldwell's status as a New York resident is irrelevant due to his fraudulent joinder. The Magistrate's recommendations to the contrary should be rejected, and Plaintiffs' motion to remand should be denied. Finally, even if this case is ultimately remanded, the above-cited case law and facts demonstrate that Removing Defendants had an objectively reasonable basis for removal and, as such, costs and fees should not be awarded to plaintiffs.

Dated: White Plains, New York
November 17, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jeffrey M. Malsch, an attorney, certifies that on this 17th day of November 2008, he caused to be filed via the ECF system for the United States District Court for the Western District of New York the foregoing:

Removing Defendants' Rule 72(b) Objections to Magistrate Judge's Remand Recommendation

He further certifies that a copy of said filing is also being served on all counsel of record via the Court's electronic filing system.

/s/ Jeffrey M. Malsch
Jeffrey M. Malsch, Esq.

A-409

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL WILLIAMS, and EDWARD WILLIAMS,

Plaintiffs,

v.

ORDER
05-CV-836S

BEEMILLER, INC. d/b/a HI-POINT, CHARLES BROWN, MKS SUPPLY, INC., INTERNATIONAL GUN-A-RAMA, KIMBERLY UPSHAW, JAMES NIGEL BOSTIC, CORNELL CALDWELL, and JOHN DOE TRAFFICKERS 1-10,

Defendants.

1. Presently before this Court is the Report and Recommendation of the Honorable Leslie G. Foschio, United States Magistrate Judge, recommending that Plaintiffs' Motion to Remand to State Court be granted and also that Plaintiffs be awarded costs and attorneys' fees. (Docket No. 55.) For the reasons discussed below, this Court adopts Judge Foschio's Report and Recommendation in its entirety including the authorities cited and the reasons given therein.

2. On August 16, 2003, while playing basketball in front of a neighbor's house, Plaintiff Daniel Williams was shot in the stomach by Defendant Cornell Caldwell. Caldwell fled the scene, but was apprehended within minutes. Caldwell eventually pled guilty to first degree assault, for which he is currently serving a term of incarceration at Green Correctional Facility in Caxsackie, New York.

2. On July 28, 2005, Plaintiffs Daniel and Edward Williams (Daniel's father) commenced this civil action in the Supreme Court for the State of New York, Erie County,

alleging five separate claims against the named Defendants for injuries sustained as a result of the shooting. Defendants Beemiller and Brown removed the action to this Court, arguing this Court has subject matter jurisdiction by reason of diversity of citizenship pursuant to 28 U.S.C. § 1332(a). Defendants MKS and Gun-A-Rama filed written consents to the removal. Thereafter, Plaintiffs filed a Motion to Remand to State Court, and also sought recovery of the costs and fees incurred as a result of Defendants' removal. (Docket No. 16.)

3. This Court referred the case to Judge Foschio for all non-dispositive pretrial matters pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket No. 19.) Finding that a motion for remand was not dispositive, Judge Foschio entered a decision and order on June 29, 2006, granting Plaintiffs' motion for remand. (Docket No. 31.) Judge Foschio also held that Plaintiffs were entitled to costs and attorneys' fees. (Id.) In response to Judge Foschio's decision and order, Defendants timely submitted objections. Defendants also argued that this Court should treat Judge Foschio's decision as a report and recommendation and review the decision and order *de novo*.

4. This Court denied Defendants' objections, and affirmed Judge Foschio's decision and order after finding that it was neither clearly erroneous nor contrary to law. (Docket No. 41.) But after an appeal by Defendants, the United States Court of Appeals for the Second Circuit vacated this Court's Order and remanded the matter. (Docket No. 53.) The Second Circuit held that a motion for remand is not a "pretrial matter," and therefore, "a magistrate judge presented with such a motion [for remand] should provide a report and recommendation []." (Id., p. 256.)

5. As a result of the Second Circuit's mandate, this Court referred Plaintiffs' Motion for Remand to Judge Foschio for the issuance of a report and recommendation. (Docket No. 54.) On October 31, 2008, Judge Foschio filed a Report and Recommendation recommending that Plaintiffs' motion be granted, and also that Plaintiffs be awarded costs and attorneys' fees. (Docket No. 55.) Defendants timely filed objections. (Docket No. 56.)

6. This Court has thoroughly reviewed *de novo* Judge Foschio's Report and Recommendation, the Defendants' Objections thereto, and the applicable law. Upon due consideration, this Court finds no legal or factual error in Judge Foschio's Report and Recommendation, and it concurs in his conclusions. Accordingly, Defendants' Objections are denied and this Court will accept Judge Foschio's Report and Recommendation in its entirety.

IT HEREBY IS ORDERED, that this Court accepts Judge Foschio's Report and Recommendation (Docket No. 55) in its entirety, including the authorities cited and the reasons given therein.

FURTHER, that Defendants' Objections to the Report & Recommendation (Docket No. 56) are DENIED.

FURTHER, that Plaintiffs' Motion to Remand to State Court (Docket No. 16) is GRANTED.

FURTHER, that the Clerk of the Court is directed to remand this case to the New York State Supreme Court, County of Erie.

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FURTHER, that Plaintiffs' Motion for Attorneys' Fees and Costs (Docket No. 16) is GRANTED.

FURTHER, that Plaintiffs shall file an affidavit describing the attorneys' fees and costs incurred in connection with Plaintiffs' motion by July 9, 2009.

SO ORDERED.

Dated: June 22, 2009
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL WILLIAMS,
and EDWARD WILLIAMS,

Plaintiffs,

-vs-

BEEMILLER, INC. d/b/a HI-POINT,
CHARLES BROWN,
MKS SUPPLY, INC.,
INTERNATIONAL GUN-A-RAMA,
KIMBERLY UPSHAW,
JAMES NIGEL BOSTIC,
CORNELL CALDWELL, and
JOHN DOE TRAFFICKERS 1-10,

Defendants.

AFFIDAVIT IN SUPPORT OF COSTS AND ATTORNEYS' FEES

Docket No. 05-CV-0836S(F)

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

JAMES W. GRABLE, JR., ESQ., being duly sworn, deposes and says as follows:

1. I am an attorney at law duly licensed to practice my profession in the State of New York and a partner with the law firm of CONNORS & VILARDO, LLP, counsel for plaintiffs Daniel Williams and Edward Williams in the above-captioned action; as such I am fully familiar with the facts and circumstances of this action.

2. I submit this affidavit in response to this Court's direction that plaintiffs file an affidavit describing the attorneys' fees and costs incurred in

connection with the remand motion, as set forth in this Court's Order dated June 22, 2009 (Docket Item 64).

3. As this Court is aware, it has now been over three-and-one-half-years since this action was improperly removed to federal court by defendants Beemiller, Inc. d/b/a/ Hi-Point, Charles Brown, International Gun-A-Rama, and MKS Supply, Inc. (hereinafter "Removing Defendants").

4. Removing Defendants have engaged in an endless procedural battle to keep plaintiffs from having their day in court despite the clear impropriety of removal in this action – and despite the magistrate judge's repeated conclusion that the Removing Defendants' position is "spurious."

5. This Court has directed that we file an affidavit of fees and costs, and the remainder of this affidavit will set forth what is owed and why it is owed.

PROCEDURAL HISTORY AND ATTORNEYS' FEES AND COSTS INCURRED IN CONNECTION WITH PLAINTIFFS' MOTION FOR REMAND

6. Plaintiffs commenced this action on July 28, 2005 by filing a complaint in New York State Supreme Court, Erie County.

7. On November 23, 2005, defendants Beemiller, Inc. d/b/a/ Hi-Point and Charles Brown removed the action to this Court; thereafter defendants International Gun-A-Rama and MKS Supply, Inc. consented to removal (Docket Items 1, 8). Defendants James Nigel Bostic, Cornell Caldwell, and Kimberly Upshaw have never consented to nor joined in removal.

8. On December 23, 2005, plaintiffs moved to remand this action to state court (Docket Items 16, 17).

9. Removing Defendants opposed the remand motion in papers filed January 25, 2006 (Docket Items 26-28), and on January 31, 2006, plaintiffs submitted reply papers (Docket Items 29, 30).

10. On June 29, 2006, the Honorable Judge Leslie G. Foschio, United States Magistrate Judge, issued a Decision and Order granting plaintiffs' motion to remand this action to New York State Supreme Court and awarding costs, including attorney's fees (Docket Item 31). The Decision and Order directed plaintiffs to file an affidavit describing those costs and fees. *Id.*

11. On July 14, 2006, plaintiffs filed an affidavit setting forth attorneys' fees and costs incurred through June 30, 2006 (Docket Item 32). A copy of plaintiffs' initial affidavit, with exhibits, showing attorneys' fees and costs through June 30, 2006, is attached as *Exhibit 1.*

12. On July 17, 2006, Removing Defendants objected to Magistrate Judge Foschio's Decision and Order (Docket Item 34).

13. On August 4, 2006, plaintiffs issued a response to Removing Defendants' objections (Docket Item 39).

14. On September 21, 2006, this Court denied all objections to the Decision and Order, including those regarding the award of attorneys' fees and costs (Docket Item 41).

15. On October 23, 2006, plaintiffs filed a supplemental affidavit in further support of costs and attorneys' fees, including the expenses plaintiffs incurred responding to Removing Defendants' objections to Magistrate Judge Foschio's Decision and Order (Docket Item 43). A copy of plaintiffs' supplemental affidavit in support of costs and attorneys' fees is attached as *Exhibit 2*.

16. On October 25, 2006, Removing Defendants appealed to the United States Court of Appeals for the Second Circuit ("Second Circuit") (Docket Item 44). The appeal centered on a procedural nicety: whether this Court should have applied a different standard to its review of the magistrate judge's conclusions. Notably, the appeal had nothing to do with whether the case should ultimately be remanded.

17. Because the appeal was clearly orchestrated to delay the inevitable remand of this matter, we explicitly invited Removing Defendants to withdraw their appeal, and put them on notice that if they did not, we would move to dismiss and seek fees and costs. *See* correspondence dated October 26, 2006, attached as *Exhibit 3*. They refused.

18. Naturally, plaintiffs were obligated to expend extensive attorney time for their representation in one of the nation's highest courts by, among other things, participating in the organization of the appellate record, researching and drafting a responding brief, and preparing for and traveling to New York City to participate in oral argument. A detailed description of plaintiffs' attorneys' fees and costs from the date Removing Defendants filed their notice of appeal through present is attached as *Exhibit 4*.

19. On January 12, 2007, Removing Defendants filed their initial brief with the Second Circuit. Removing Defendants also filed a Joint Appendix containing the record on appeal. Plaintiffs had to spend further attorney time to review draft appendix indices before filing.

20. Plaintiffs moved to dismiss the appeal on January 22, 2007, which required significant time and resources in order to try to get this matter back to state court without further delay; Removing Defendants opposed, requiring plaintiffs to expend more time in legal researching, drafting, and filing reply papers.

21. In an order filed April 12, 2007, this Court granted plaintiffs' motion to dismiss the appeal of the award of attorneys' fees, but otherwise denied the motion. The Second Circuit directed briefing on three specific issues – none of which involved whether remand was required – and implemented a briefing schedule.

22. On July 30, 2007, Removing Defendants filed a revised brief.

23. Plaintiffs filed a responding brief on August 29, 2007, requiring extensive attorney time for legal research and writing, and incurring substantial printing costs.

24. Removing Defendants filed a reply brief on September 12, 2007.

25. Oral argument was held in New York City on April 30, 2008. As this Court will appreciate, preparing for oral argument before the Second Circuit required considerable amounts of attorney time and effort, as well as travel time and expense.

26. On May 28, 2008, the Second Circuit issued an opinion vacating and remanding the appealed-from order based on its conclusion that a magistrate judge could not order remand and instead could only recommend it. The Second Circuit specifically stated that it "express[ed] no view as to the merits of Plaintiffs-Appellants' motion to remand under § 1447(c)" (Docket Item 53).

27. In response to the Second Circuit's mandate, this Court re-referred plaintiffs' motion for remand back to Magistrate Judge Foschio for a Report and Recommendation (Docket Item 54), which Magistrate Judge Foschio issued on October 31, 2008 (Docket Item 55).

28. Unsurprisingly, since removal was patently improper, Magistrate Judge Foschio again found Removing Defendants' arguments spurious and recommended that plaintiffs' motion for remand be granted. *Id.*

29. Nevertheless, still intent on delaying this matter further, on November 17, 2008, Removing Defendants filed another set of objections (Docket Item 56) requiring plaintiffs to expend yet more time and resources performing legal research and drafting a response, which was filed on December 22, 2008 (Docket Item 60). On January 5, 2009, Removing Defendants filed a reply in further support of their objections (Docket Item 61).

30. On June 25, 2009, this Court accepted Magistrate Judge Foschio's Report and Recommendation, granted plaintiffs' motion for remand, and granted an award of attorneys' fees and costs (Docket Item 64).

31. Notwithstanding the clear facts necessitating remand, Removing Defendants have nevertheless persisted, throughout this tortured procedural history, in maintaining an indefensible and meritless legal position.

PLAINTIFFS ARE ENTITLED TO ALL ATTORNEYS' FEES AND COSTS INCURRED IN CONNECTION WITH PLAINTIFFS' MOTION TO REMAND

32. As the procedural history of this matter reveals, plaintiffs have now spent three-and-one-half years undoing Removing Defendants' patently improper removal, and are entitled to all attorneys' fees and costs for the effort they have been forced to expend against Removing Defendants' legally sophisticated but transparent delay tactics.

33. As plaintiffs described nearly three years ago when we submitted our first affidavit for attorneys' fees and costs, Second Circuit courts calculate attorneys' fees through the "lodestar" method, which accounts for factors such as the nature of the services rendered, the experience level of the attorneys involved, and the customary rates charged by the local bar for similar services by similarly experienced attorneys. *See F. H. Krear & Co. v. 19 Named Trus.*, 810 F.2d 1250, 1263 (2d Cir. 1987). The party claiming fees bears the burden of producing contemporaneous time records that specify the work done and the time spent for each attorney involved. *See Panek v. Donald J. Braasch Constr., Inc.*, No. 03-CV-6044E, 2005 WL 3243303, at *3 (W.D.N.Y. Nov. 29, 2005).

34. For the reasons provided in *Exhibits 1 & 2* and incorporated by reference as if fully set forth herein, plaintiffs are entitled to attorneys' fees and

costs for the time period of July 2005 through October 2006 – which encompasses plaintiffs' initial motion for remand and responding to Removing Defendants' spurious objections prior to appeal. As detailed therein, those costs total $30,916.30. *See Exhibits* 1 & 2.

35. Additionally, plaintiffs are entitled to the attorneys' fees and costs incurred since and including Removing Defendants' appeal to the Second Circuit, as described in detail in the contemporaneous time records attached as *Exhibit 4.*

36. Plaintiffs are entitled to the fees and costs associated with the appeal even though Removing Defendants' appeal was granted. Specifically, but without relitigating the issues, not only was their removal clearly improper, but as of the time that they filed their appeal, Removing Defendants were on notice that Magistrate Judge Foschio found their arguments for removal to be spurious and this Court agreed. Subsequently, the Second Circuit expressly limited its decision to procedural grounds and did not reach the merits of plaintiffs' motion for remand. Removing Defendants' appeal constituted nothing more than a protraction of litigation to delay plaintiffs' ability to realize its entitlement to remand. Consequently, plaintiffs are entitled to all costs and fees in connection with the appeal.

37. Finally, as the Court will note from each of the attached exhibits, we have requested the same hourly rate throughout this matter, even though our hourly rates have increased during the length of this protracted procedural battle and even though these rates are lower than those which we have

charged many of our other clients since the commencement of this litigation. Upon information and belief, the rates requested herein are competitive or even lower than many of the prevailing rates in our legal community. The hourly rates that we request are $275 for Terrence M. Connors's and Lawrence J. Vilardo's time, $250 for my time and that of other partners, and $200 for associates.

38. As described in detail in *Exhibit 4*, the total amount of attorneys' fees and costs incurred in connection with our motion for remand since our initial applications nearly three years ago is $52,563.59.

WHEREFORE, plaintiffs respectfully ask the Court to award the full amount that we requested in Docket Items 32 and 43 (*Exhibits 1 and 2*), plus the amount that we have specified in *Exhibit 4* to this affidavit, for a total amount of $83,479.89, along with any additional relief that the Court deems just and proper.

James W. Grable, Jr.
CONNORS & VILARDO, LLP
Attorneys for Plaintiffs
Daniel Williams and
Edward Williams
1000 Liberty Building
Buffalo, New York 14202
(716) 852-5533
jwg@connors-vilardo.com

Sworn to before me this
9th day of July, 2009.

Elizabeth B. Harned
Notary Public
State of New York
Erie County
Commission Expires 08/18/2011

ELIZABETH BROOKE HARNED
Notary Public State of New York
Qualified in Erie County
My Commission Expires 08/18/20

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CONNORS & VILARDO, LLP
1000 Liberty Building
424 Main Street
Buffalo, NY 14202
TAX ID NO. 16-1282035

July 9, 2009

DANIEL WILLIAMS
13 Girard Place
Buffalo, NY 14211

Invoice# 17782 TMC
Our file# 006031 00001
Billing through 06/30/2009

DANIEL WILLIAMS

PROFESSIONAL SERVICES

10/26/2006	GAI	Research into whether remand motions can be appealed.	0.50 hrs.	200 /hr	100.00
11/09/2006	JWG	Confer with Brady Center regarding appeal issues; suggestions to associate, Giuseppe A. Ippolito for motion to dismiss the appeal.	0.30 hrs.	250 /hr	75.00
11/14/2006	JWG	Preparation for conference call with Second Circuit.	0.20 hrs.	250 /hr	50.00
11/15/2006	GAI	Research into motion deadlines at the Second Circuit in response to removing defendants.	0.50 hrs.	200 /hr	100.00
11/20/2006	JWG	Preparing for appeal teleconference.	0.20 hrs.	250 /hr	50.00
11/22/2006	JWG	Prepared for and participated in telephone conference with the Second Circuit and opposing counsel; communication amongst our litigation team regarding same; work on motion to dismiss the appeal.	1.90 hrs.	250 /hr	475.00
12/21/2006	JWG	Suggestions to associate, Elizabeth B. Harned regarding motion to dismiss the appeal; work on same.	0.40 hrs.	250 /hr	100.00
12/22/2006	EBH	Drafting motion to dismiss removing defendants' appeal and perform legal research for same.	1.50 hrs.	200 /hr	300.00
12/27/2006	EBH	Extensive research regarding appeals of remand order,	6.10 hrs.	200 /hr	1,220.00

		whether remand is non-dispositive versus dispositive, and appeals of magistrates' orders; work on affidavit and memorandum of law in support of motion to dismiss removing defendants' appeal.			
12/29/2006	EBH	Research at NYS Supreme Court library regarding appeals of remands; work on motion to dismiss appeal.	5.00 hrs.	200 /hr	1,000.00
01/01/2007	EBH	Further research and drafting motion to dismiss appeal.	5.20 hrs.	200 /hr	1,040.00
01/02/2007	JWG	Work on motion to dismiss the appeal.	0.30 hrs.	250 /hr	75.00
01/05/2007	JWG	E-mails to and from opposing counsel regarding record on appeal; discussed strategies for motion to dismiss appeal and response with Terrence M. Connors; work on motion to dismiss the appeal.	0.80 hrs.	250 /hr	200.00
01/06/2007	JWG	Review file regarding necessary items for record on appeal; e-mails to and from opposing counsel regarding the record on appeal and proposed stipulation.	0.90 hrs.	250 /hr	225.00
01/08/2007	EBH	Work on motion to dismiss appeal memorandum of law.	7.00 hrs.	200 /hr	1,400.00
01/11/2007	EBH	Review defendants' proposed index and joint appendix.	0.30 hrs.	200 /hr	60.00
01/12/2007	JWG	Work on motion to dismiss appeal; received and reviewed correspondence from opposing counsel regarding same.	1.10 hrs.	250 /hr	275.00
01/13/2007	EBH	Work on motion to dismiss; identify and gather exhibits for same.	1.20 hrs.	200 /hr	240.00
01/16/2007	EBH	Review defendants' appeal brief; worked on motion to dismiss papers in light of same.	2.20 hrs.	200 /hr	440.00
01/18/2007	EBH	Edit motion to dismiss; draft	1.40 hrs.	200 /hr	280.00

		letter to court for filing; finalize affidavit of service and exhibits.			
01/22/2007	EBH	Finalize motion to dismiss; service of same.	1.50 hrs.	200 /hr	300.00
02/01/2007	EBH	Telephone conference with Second Circuit Law clerk regarding status of motions; begin draft reply papers.	0.50 hrs.	200 /hr	100.00
02/05/2007	EBH	Draft additional affidavit in support of motion to dismiss; review removing defendants' opposition papers; draft reply.	1.60 hrs.	200 /hr	320.00
02/06/2007	EBH	Research for and drafted reply papers in further support of motion to dismiss.	1.50 hrs.	200 /hr	300.00
02/07/2007	JWG	Work on our reply in further support of motion to dismiss the appeal.	0.90 hrs.	250 /hr	225.00
02/07/2007	EBH	Work on reply papers; letter to court regarding same; service of same.	1.60 hrs.	200 /hr	320.00
02/28/2007	JWG	Suggestions to associate, Elizabeth B. Harned regarding briefing schedule relative to pending motion.	0.10 hrs.	250 /hr	25.00
03/09/2007	EBH	Letter serving Second Circuit Amended Order.	0.10 hrs.	200 /hr	20.00
03/28/2007	EBH	Receipt and review of Second Circuit correspondence.	0.10 hrs.	200 /hr	20.00
07/05/2007	EBH	Review order from Second Circuit; telephone conference with Stanley Bass, staff counsel for the Second Circuit Court of Appeals regarding order.	0.70 hrs.	200 /hr	140.00
07/23/2007	EBH	Review corrected order and communication with Brady Center.	0.20 hrs.	200 /hr	40.00
07/31/2007	JWG	Suggestions to associate, Elizabeth B. Harned regarding our brief on appeal.	0.20 hrs.	250 /hr	50.00
07/31/2007	EBH	Review brief and communications with Brady Center.	0.30 hrs.	200 /hr	60.00

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08/06/2007	VED	Meeting with associate, Elizabeth B. Harned regarding appellate briefing and strategy for our brief; review brief and pleadings; legal research on appeal of remand decision.	2.60	hrs.	250 /hr	650.00
08/06/2007	EBH	Conferred with Vincent E. Doyle III regarding status and background of Second Circuit appeal and drafting our brief; e-mails with Brady Center regarding strategy for brief.	0.70	hrs.	200 /hr	140.00
08/07/2007	VED	Research and drafting of brief.	2.50	hrs.	250 /hr	625.00
08/09/2007	VED	Legal research and work on brief.	5.00	hrs.	250 /hr	1,250.00
08/17/2007	VED	Legal research and draft brief.	5.90	hrs.	250 /hr	1,475.00
08/21/2007	VED	Work on brief.	7.50	hrs.	250 /hr	1,875.00
08/23/2007	LJV	Worked on Second Circuit brief; office conference with attorneys handling case regarding same.	3.00	hrs.	275 /hr	825.00
08/24/2007	JWG	Work on our brief on appeal.	3.40	hrs.	250 /hr	850.00
08/25/2007	EBH	Review and edit brief.	1.20	hrs.	200 /hr	240.00
08/26/2007	JWG	Work on our brief on appeal.	1.30	hrs.	250 /hr	325.00
08/28/2007	JWG	Completed research for brief; completed brief itself; attending to matters related to our appeal and brief.	4.00	hrs.	250 /hr	1,000.00
08/28/2007	LJV	Final preparation of brief on appeal.	4.50	hrs.	275 /hr	1,237.50
09/13/2007	JWG	Received and reviewed reply brief; communication with our litigation team regarding same.	1.00	hrs.	250 /hr	250.00
09/13/2007	EBH	Review appellants' reply brief.	0.30	hrs.	200 /hr	60.00
03/18/2008	JWG	Received and reviewed Second Circuit oral argument forms; e-mails to and from Jon Lowy of Brady Center regarding same.	0.60	hrs.	250 /hr	150.00
03/29/2008	JWG	Communication with Brady Center regarding appeal conference.	0.10	hrs.	250 /hr	25.00
04/01/2008	JWG	Conferences with associate,	1.20	hrs.	250 /hr	300.00

		Elizabeth B. Harned, Vincent E. Doyle III, and John Lowy of the Brady Center to discuss preparations for oral argument of the appeal; completed oral argument forms and letter to the Second Circuit regarding same.			
04/01/2008	EBH	Work on issues for preparation for Second Circuit oral argument.	0.30 hrs.	200 /hr	60.00
04/10/2008	JWG	Communication with Brady Center regarding strategy for oral argument of the appeal; preparing an outline of the issues to be argued.	0.80 hrs.	250 /hr	200.00
04/24/2008	JWG	Communication with Brady Center regarding oral argument of the appeal; preparations for the oral argument.	0.70 hrs.	250 /hr	175.00
04/28/2008	JWG	Preparing for oral argument and research for same.	7.00 hrs.	250 /hr	1,750.00
04/29/2008	JWG	Preparing for appeal argument, travel, and research for the argument.	9.20 hrs.	250 /hr	2,300.00
04/30/2008	JWG	Prepared for and participated in oral argument of the appeal before the Second Circuit; travel from same.	8.00 hrs.	250 /hr	2,000.00
05/28/2008	JWG	Received and review Second Circuit decision; e-mails to and from Jon Lowy of the Brady Center regarding same.	0.70 hrs.	250 /hr	175.00
11/03/2008	JWG	Reviewing Judge Foschio's Report and Recommendation; work on plan going forward in light of Judge Foschio's Report and Recommendation; suggestions to associate, Elizabeth B. Harned, regarding same.	0.70 hrs.	250 /hr	175.00
11/03/2008	EBH	Receipt and review of electronic filing notice of Magistrate Judge Foschio's Report and Recommendation; compare to	0.30 hrs.	200 /hr	60.00

		Judge Foschio's previous Decision and Order.			
11/18/2008	EBH	Receipt and review of objections to Magistrate Judge's Report and Recommendation; research local rules regarding time to file objections; review former papers -- removing defendants' objections, our response, and their reply in preparation for responding to objections.	1.00 hrs.	200 /hr	200.00
11/22/2008	EBH	Work on response to removing defendants' objections to Magistrate Judge's recommendations.	0.20 hrs.	200 /hr	40.00
11/28/2008	EBH	In response to removing defendants' objections, prepare to respond by reviewing removal papers from 2005, our motion for remand, all papers associated therewith, Magistrate Judge Foschio's 2008 Report and Recommendation and Removing Defendants' Rule 72 Objections; research all case law cited in Judge Foschio's Report and Recommendation and Removing Defendants' Rule 72 Objections.	5.60 hrs.	200 /hr	1,120.00
12/02/2008	EBH	Work on response to objections.	0.50 hrs.	200 /hr	100.00
12/03/2008	EBH	Work on responses to objections.	0.50 hrs.	200 /hr	100.00
12/04/2008	EBH	Work on response to removing defendants' objections.	0.80 hrs.	200 /hr	160.00
12/06/2008	EBH	Communication with Brady Center regarding responding to removing defendants' objections; review J. Skretney's September 21, 2006 order; research Rule 72 objections; review Second Circuit opinion; draft introduction, procedural history, and outline argument.	3.70 hrs.	200 /hr	740.00
12/11/2008	EBH	Work on response to objections.	5.80 hrs.	200 /hr	1,160.00
12/12/2008	JWG	Suggestions to associate, Elizabeth B. Harned regarding	0.20 hrs.	250 /hr	50.00

		our objections.			
12/12/2008	EBH	Work on response to removing defendants' objections, including section on subject matter jurisdiction; update research on CPLR 214(b) argument and unanimity of consent; further draft of response.	6.90 hrs.	200 /hr	1,380.00
12/13/2008	EBH	Work on response, including drafting section on costs and fees and section on unanimity of consent and subject matter jurisdiction.	5.20 hrs.	200 /hr	1,040.00
12/15/2008	EBH	Research fraudulent joinder issue; review all research cited by removing defendants and Magistrate Judge Foschio regarding unanimity of consent, fraudulent joinder, and statutes of limitations and edits to sections of response regarding same; work on draft of section regarding cost and fees.	8.30 hrs.	200 /hr	1,660.00
12/16/2008	JWG	Work on our response to Removing Defendants' objections.	1.20 hrs.	250 /hr	300.00
12/16/2008	EBH	Review all caselaw cited by removing defendants regarding research regarding awards of costs and fees in this Circuit since Martin; work on draft of response; edit whole response; conference with James W. Grable, Jr. regarding outstanding response.	6.90 hrs.	200 /hr	1,380.00
12/17/2008	JWG	Work on response to removing defendants' objections.	7.10 hrs.	250 /hr	1,775.00
12/18/2008	EBH	Further work on editing drafts and researching for Response to Removing Defendants' Rule 72(B) Objections.	7.20 hrs.	200 /hr	1,440.00
12/19/2008	JWG	Research on Rule 6 provisions; additional work on our response to the objections and research on the issue of fees after remand	4.10 hrs.	250 /hr	1,025.00

		(Bryant v. Britt).			
12/19/2008	EBH	Work on Response to Removing Defendants' Rule 72(B) Objections; instructions to associate, Giuseppe A. Ippolito regarding substantive cite check for Response; further research for Response.	5.10 hrs.	200 /hr	1,020.00
12/20/2008	GAI	Thorough cite check of response to objections to magistrate report and recommendation.	3.00 hrs.	200 /hr	600.00
12/22/2008	EBH	Work on Response to Removing Defendants' Rule 72(B) Objections; conference with James W. Grable, Jr. regarding drafts and further edits in light of same; draft certificates of service.	7.00 hrs.	200 /hr	1,400.00
01/06/2009	JWG	Received and reviewed removing defendants' reply in support of their objections; deciding on whether to request a sur-reply to respond to new "factual" argument; suggestions to associate, Elizabeth B. Harned regarding same.	1.10 hrs.	250 /hr	275.00
01/06/2009	EBH	Receipt and review of reply to rule 72(B) objections from removing defendants and plan for further handling.	0.40 hrs.	200 /hr	80.00
01/07/2009	JWG	Analysis of fee issue in contemplation of additional papers.	0.30 hrs.	250 /hr	75.00
06/28/2009	JWG	Received and reviewed Judge Skretny's remand and fee decision and order.	0.40 hrs.	250 /hr	100.00
		Total fees for this matter			$45,017.50

DISBURSEMENTS

07/02/2008	OUTSIDE REPRODUCTION OF DOCUMENTS	28.80
06/30/2009	POSTAGE	54.05
06/30/2009	FEDERAL EXPRESS	147.00
06/30/2009	COMPUTER RESEARCH - WESTLAW	5,159.04

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06/30/2009	TRAVEL EXPENSE	913.57
06/30/2009	LONG DISTANCE	1.22
06/30/2009	DOCKET SHEET	87.68
06/30/2009	OUTSIDE REPRODUCTION OF DOCUMENTS - BATAVIA LEGAL PRINTING, INC.	304.53
06/30/2009	PHOTOCOPIES	850.20
	Total disbursements for this matter	$7,546.09

BILLING SUMMARY

TOTAL FEES	$45,017.50
TOTAL DISBURSEMENTS	$7,546.09
TOTAL CHARGES FOR THIS BILL	$52,563.59
TOTAL BALANCE NOW DUE	$52,563.59

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL WILLIAMS,
and EDWARD WILLIAMS,

Plaintiffs,

-vs-

BEEMILLER, INC. d/b/a HI-POINT,
CHARLES BROWN,
MKS SUPPLY, INC.,
INTERNATIONAL GUN-A-RAMA,
KIMBERLY UPSHAW,
JAMES NIGEL BOSTIC,
CORNELL CALDWELL, and
JOHN DOE TRAFFICKERS 1-10,

Defendants.

REPLY AFFIDAVIT IN FURTHER SUPPORT OF COSTS AND ATTORNEYS' FEES

Docket No. 05-CV-0836S(F)

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

JAMES W. GRABLE, JR., ESQ., being duly sworn, deposes and says as follows:

1. I submit this affidavit in reply to Removing Defendants' Response to Plaintiffs' Affidavit in Support of Request for Costs and Attorney Fees (hereinafter "Response") (Docket Item 66) and in further support of plaintiffs' request for costs and attorneys' fees.

2. Removing Defendants suggest that plaintiffs should not receive an award of fees and costs because they are not available in a contingency case. They also argue that the fees for the appeal are not recoverable and that the fees are excessive and unreasonable.

3. On their first point, that an award of fees is not available in a contingency case, the only circuit authority on point concluded that 28 U.S.C.

§ 1447(c) "do[es] not limit the district court's discretion to award attorneys' fees to a contingency fee litigant." *Gotro v. R&B Realty Group*, 69 F.3d 1485, 1487-88 (9th Cir. 1995); *see also Keesling v. Richman*, No. 1:02-CV-1392-DFH, 2003 WL 1921812, at *2 (S.D. Ind. Apr. 18, 2003) ("[T]he court must recognize that the vast majority of fee awards under § 1447(c) will go to plaintiffs and/or their attorneys, and that a very large proportion of plaintiffs' cases are handled on a contingent fee basis."); *Lawrence v. Biotronik, Inc.*, No. 04-C-1876, 2005 WL 2338812 (N.D. Ill. Sept. 20, 2005). There is no caselaw to support Removing Defendants' argument on this point, so they cite to the dissent in *Gotro*.

4. As this Court's Order made clear, however, it is no longer in dispute *whether* this Court will award costs and fees; rather, the only question that remains is the precise amount of costs and fees that should be awarded.

5. Removing Defendants suggest that their willingness to withdraw their appeal if plaintiffs would waive the collection of the fees and costs owed is a factor that should cause this Court not to include the fees and costs associated with the appeal in the award. *See* Response at 1-2. But the willingness of Removing Defendants to forego the appeal altogether if plaintiffs would waive the penalty for Removing Defendants' ongoing intransigence underscores the point that the appeal was a complete waste of time and resources.

6. Indeed, Removing Defendants never dispute that the procedural nicety that was the subject of their appeal had nothing to do with the merits of their removal. Notwithstanding that fact, Removing Defendants persisted in pursuing

this appeal to address an obscure measure of a magistrate judge's authority – all the while depriving plaintiffs of the right to the forum in which it was inevitable that this case would proceed.

7. As for Removing Defendants' argument that the fees claimed are excessive and the suggestion that plaintiffs' counsel are unethical, *see* Response at 6-15 & n.5, our prior submissions in this matter describe why the amount owed is reasonable and was required as a result of the Removing Defendants' refusal to abandon an indefensible position and surrender an unwinnable and unnecessary war. Removing Defendants concede as much by admitting in their response: "This Court . . . ultimately remanded [this] case based on the very simple issue of lack of unanimity among defendants." *See* Response at 12 (emphasis added).

8. Had Removing Defendants acknowledged this fact at the outset instead of several years after improper removal, the fees and costs set forth in our submission would not be owed.

WHEREFORE, Plaintiffs respectfully ask the Court to award the full amount that we requested in Docket Item 65, for a total amount of $83,479.89, along with any additional relief that the Court deems just and proper.

James W. Grable, Jr.
CONNORS & VILARDO, LLP
Attorneys for Plaintiffs
Daniel Williams and
Edward Williams
1000 Liberty Building
Buffalo, New York 14202
(716) 852-5533
jwg@connors-vilardo.com

Sworn to before me this
22nd day of August, 2009

Notary Public

LAWRENCE JOSEPH VILARDO
NOTARY PUBLIC-STATE OF NEW YORK
No. 02VI4761372
Qualified in Erie County
Commission Expires August 31, 2010

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL WILLIAMS and EDWARD WILLIAMS,

Plaintiffs,

v. **DECISION AND ORDER**

BEEMILLER, INC. d/b/a HI-POINT FIREARMS, et al., 05-CV-836S(F)

Defendants.

I. INTRODUCTION

Plaintiffs commenced this action on or about July 28, 2005, in New York State Supreme Court, County of Erie, and filed a First Amended Complaint on or about October 17, 2005. Four of seven named Defendants removed the action to this Court, on November 23, 2005, based on diversity of citizenship. Thereafter, Plaintiffs successfully moved to remand the case, and for costs and attorney fees incurred in connection with their motion. Now before this Court is Plaintiffs' application for costs and attorneys fees. (Docket No. 32.)[1]

[1] In support of their application, Plaintiffs filed the Affidavit of Terrence M. Connors, Esq., sworn to July 14, 2006, with Exhibits A-C (Docket No. 32); the Supplemental Affidavit of Terrence M. Connors, Esq., sworn to October 23, 2006, with Exhibit A (Docket No. 43); the Affidavit of James W. Grable, Jr., Esq., sworn to July 9, 2009, with Exhibits 1-4 (Docket No. 65); and the Reply Affidavit of James W. Grable, Jr., Esq., sworn to August 22, 2009 (Docket No. 67).

Defendants oppose the fee request and have filed a Memorandum of Law (Docket No. 42); and an Amended Memorandum of Law (Docket No. 66).

II. BACKGROUND

By Decision and Order dated June 29, 2006, United States Magistrate Judge Leslie G. Foschio granted Plaintiffs' motion to remand, and their request for costs and attorney fees incurred in connection with the removal. Defendants filed objections to the Decision arguing, *inter alia*, that a decision to remand is dispositive in nature and must be reviewed by the District Judge, *de novo*. This Court disagreed and, on September 21, 2006, denied Defendants' objections and found Judge Foschio's determinations were neither clearly erroneous nor contrary to law. Defendants successfully appealed the issue of whether a decision to remand is dispositive in nature, and the Second Circuit remanded the case to this Court for proceedings consistent with its opinion.

This Court then referred Plaintiffs' motion to remand to Magistrate Judge Foschio for a report and recommendation. Judge Foschio recommended, on October 31, 2008, that the case be remanded to state court and that Plaintiffs be awarded costs and attorney fees. On June 25, 2009, this Court adopted the Report and Recommendation in its entirety. Thereafter, Plaintiffs supplemented their previously filed fee application, and now seek a total of $83,479.89 in attorney fees and disbursements in connection with the removal. (Docket No. 65, Exs. 1, 2 and 4.)

Defendants oppose the fee application on the grounds that: (1) Plaintiffs have not demonstrated that they incurred any fees as a result of removal; (2) fees and costs associated with the appeal on which Defendants prevailed are not recoverable; (3) the attorney hourly rates are unreasonable; (4) the time billed includes excessive, redundant or unnecessary hours; (5) the records in support of the application are inadequate or

impermissibly vague; and (6) Plaintiffs cannot seek reimbursement for computer research expenses as a matter of law.

II. DISCUSSION

A. Plaintiffs are Eligible to Receive Fees

Fees and costs were awarded to Plaintiffs here under 28 U.S.C. § 1447(c), which provides, in pertinent part, that:

> 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.

(emphasis supplied.)

Defendants speculate that these Plaintiffs, as is the case with many personal injury plaintiffs, have a contingent fee arrangement with their counsel. They urge that because Plaintiffs will not have incurred any "actual" attorney fees relative to removal under such an arrangement, an award of fees is nothing more than a windfall for counsel. Defendants rely on a dissenting opinion from the Ninth Circuit in support of their contention that § 1447(c) does not contemplate fee awards to attorneys working on a contingent fee basis. Gotro v. R & B Realty Group, 69 F.3d 1485, 1489-90 (9th Cir. 1995). However, the Gotro majority thoroughly examined the text and legislative history of § 1447(c), and concluded that district courts have discretion to award § 1447 fees to contingency fee litigants. *Id.* at 1487-88.

While our Circuit appears not to have addressed this issue, at least one other has. In Garbie v. DaimlerChrysler Corp., the Seventh Circuit agreed, at least implicitly, with the holding in Gotro. 211 F.3d 407, 411 (7th Cir. 2000) (treating class action attorneys' time,

for which they almost certainly had not been paid, as "actual expense" under 1447(c)). Subsequent district court decisions from that circuit are in accord. *See, e.g.*, Simenz v. Amerihome Mortgage Co., LLC, 544 F. Supp. 2d 743, 746 (E.D. Wis. 2008) (finding "actual expenses" were "incurred" by contingent fee attorneys who "forwent other paying work and paid costs out of pocket" to contest removal); Keesling v. Richman, 02-CV-1392, 2003 U.S. Dist. LEXIS 6756, at * (S.D. Ind. Apr. 18, 2003) (awarding § 1447 costs and fees in contingency case). I find the reasoning of these cases persuasive and reject Defendants' contention that, assuming Plaintiffs' attorneys are working on a contingency basis, they are not entitled to fees and costs.

When calculating "actual expenses" under § 1447(c), courts consistently have considered the "reasonableness" of the fee request. *See, e.g.*, Huffman v. Saul Holdings Ltd. P'ship, 262 F.3d 1128, 1135 (10th Cir. 2001) (§ 1447's reference to "actual expenses" does not relieve district court from examining reasonableness of number of hours worked and rate of pay); Beauford v. E.W.H. Group Inc., 09-CV-00066, 2009 U.S. Dist. LEXIS 94985, at *3-4 (E.D. Ca. Sept. 29, 2009) (employing lodestar method to calculate reasonable fee); Simenz, 544 F. Supp. 2d at 746-47 (multiplying hours reasonably expended by reasonable rate to arrive at "actual expenses"); Southwestern Bell Tel., L.P. v. Accutel of Tex., L.P., 05-CV-0292, 2005 U.S. Dist. LEXIS 13722 (N.D. Tx. July 11, 2005) (modifying fee request based on reasonableness factors). This Court will proceed to do so here.

B. Amount of Attorney Fees and Costs

Defendants contend that, should this Court find Plaintiffs are entitled to attorney fees, the Court must apply the lodestar approach and reduce the amount requested. As an initial matter, I note that the Second Circuit revised its approach to fee calculations prior to Defendants' filing of their opposition to the fee request.

1. Legal Standard

Recently, in Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,[2] the Second Circuit "undertook to simplify the complexities surrounding attorney's fees awards that had accumulated over time" in the circuit and district courts. Simmons v. New York City Transit Auth., 575 F.3d 170, 174 (2d Cir. 2009). In particular, the Circuit Court sought to reconcile the "lodestar" method[3] of determining fees (the product of the attorney's usual hourly rate and the number of hours worked, subject to adjustment based on case-specific considerations to arrive at a "reasonable fee"), with the method developed in Johnson v. Georgia Highway Express, Inc. (which considered twelve specific factors to arrive at the "reasonable fee"). Arbor Hill, 493 F.3d at 114. "Relying on the substance of both approaches, [the Second Circuit] set forth a standard that [it] termed the 'presumptively reasonable fee.'" Simmons, 575 F.3d at 174.

District courts now are directed to set a reasonable hourly rate, bearing in mind all the case-specific variables the Second Circuit and other courts have identified as relevant to the reasonableness of attorney's fees, and then use the reasonable hourly rate to

[2] 493 F.3d 110 (2d Cir. 2007), *amended on other grounds by* 522 F.3d 182 (2d Cir. 2008)

[3] The lodestar method was developed by the Third Circuit. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), and is the method this Court previously employed.

calculate a "presumptively reasonable fee." Arbor Hill, 493 F.3d at 117.

"[T]he most critical factor in a district court's determination of what constitutes reasonable attorney's fees in a given case is the degree of success obtained by the plaintiff." Barfield v. N.Y. City Health & Hosps. Corp., 537 F.3d 132, 152 (2d Cir. 2008) (citations and quotations omitted). After Arbor Hill, the presumptively reasonable fee is "what a reasonable, paying client would be willing to pay," given that a client "wishes to spend the minimum necessary to litigate the case effectively." 493 F.3d at 112, 118. To arrive at that fee, district courts must also consider the twelve Johnson factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson, 488 F.2d at 717-19. Finally, a district court must consider that a client may be able to negotiate with his or her attorneys, based on their desire for the reputational benefits that could accrue from association with the case. Arbor Hill, 493 F.3d 119.

Notwithstanding this shift from the "lodestar" approach, the presumptively reasonable fee is still to be determined by reference to the number of hours reasonably expended on a matter and the reasonable fee to be charged for those hours. *See generally*, Bliven v. Hunt, 579 F.3d 204, 213 (2d Cir. 2009). Thus, the task still requires a

review of reasonably detailed time records as contemplated by New York Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983).

2. Calculating the Reasonable Hourly Rates

In determining a "reasonable hourly rate," the court should look to market rates "'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" Gierlinger v. Gleason, 160 F.3d 858, 882 (2d Cir. 1998) (quoting Blum v. Stenson, 465 U.S. 886, 896 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)). The court "may also rely on its own knowledge of hourly rates charged in private firms to determine what is reasonable in the relevant community." Nike, Inc. v. Top Brand Co., 00-CV-8179, 2006 U.S. Dist. LEXIS 8381, *4-5 (S.D.N.Y. Feb. 24, 2006) (citing Miele v. N.Y. State Teamsters Conf. Pens. & Retirement Fund, 831 F.2d 407, 409 (2d Cir. 1987)).

For purposes of determining the reasonable hourly rate, "[t]he relevant community to which the court should look is the district in which the case was brought." Marisol A. v. Giuliani, 111 F. Supp. 2d 381, 386 (S.D.N.Y. 2000) (citing In re Agent Orange Prod. Liab. Litig., 818 F.2d 226, 232 (2d Cir. 1987)). The Second Circuit recently reaffirmed and clarified this approach in Simmons, where it held that when determining an award of attorney's fees, there is "a presumption in favor of application of the forum rule," 575 F.3d at 175, such that courts "should generally use 'the hourly rates employed in the district in which the reviewing court sits' in calculating the presumptively reasonable fee," *id*. at 174 (quoting Arbor Hill, 493 F.3d at 119).

Plaintiffs are represented by the local law firm of Connors & Vilardo LLP, and are

seeking attorney fees at the following hourly rates: $275 for work performed by the firm's two founding partners, $250 for other firm partners, and $200 for associates.

Defendants object to a rate of $200 for the two associates appearing in the billing records, one of whom had been admitted for two years at the outset of the case, and one of whom was an admission-pending recent law school graduate. As Defendants correctly note, a rate of $200 for attorneys of that level of experience is excessive in this District. This Court recently reviewed rates billed and awarded in this District and, based on that review, I find a rate of $150.00 per hour to be an appropriate rate for the associate billing.[4] Disabled Patriots of Am., Inc. v. Niagara Group Hotels LLC, 07-CV-284, 2010 U.S. Dist. LEXIS 9574, at *14-15 (W.D.N.Y. Feb. 2, 2010) (collecting cases and finding rates of $200-$240 for firm partners and $125-$175 for associates reflective of current market rates in community). Defendants further suggest that partner rates of $275 and $250 per hour also are higher than the prevailing market rate for lawyers of comparable skill and experience in this community. Again, I must agree, and find that rates of $250 for attorneys Connors (over 30 years of federal litigation experience) and Vilardo, and $200 for all other firm partners (e.g., James W. Grable, Jr. with 10 years' federal clerkship and litigation experience) are appropriate here.

In addition to the hours billed by Connors & Vilardo, that firm worked with co-counsel in Washington who are purported to have "extensive experience with the jurisdictional issues that sometimes arise during this particular type of litigation." (Docket No. 32 ¶ 14.)

[4] While an even lower hourly rate may have been appropriate at the outset of this case, I note that these same associates continued to work on the matter for three years. The $150 figure represents an appropriate average market rate for these associates over the course of their efforts.

Plaintiffs seek fees for Jonathan Lowy, a Senior Attorney for the Legal Action Project of the Brady Center to Prevent Gun Violence, who graduated law school in 1998 (seventeen years' experience at the outset of this case), and Elizabeth Haile, a staff counsel for that same entity, who graduated law school in 1999 (six years' experience). A rate of $250 is sought for attorney Haile's work in researching and drafting the remand motion, and a rate of $250 for attorney Lowy to review and edit same. Plaintiffs contend these billing rates are consistent with a reasonable rate in Western New York. I disagree and, consistent with the foregoing discussion, find a rates of $200 for attorney Lowy and $150 for attorney Haile to be appropriate here. In particular, while these attorneys may have expertise in the subject matter of the underlying litigation, their special knowledge does not appear to extend to remand motions, for which Ms. Haile billed thirteen hours of research time.

Although the removal issue clearly was contentious and time-consuming, questions regarding the propriety of removal and remand are not particularly novel or complex. I have considered all other factors contemplated in Arbor Hill and find that none warrants an upward adjustment to the rates prevailing in this District, as reflected in recent decisions.

3. The Hours Reasonably Expended

a. *Fees Associated with Appeal*

Defendants argue that the fees Plaintiffs incurred in opposing their appeal are not recoverable at all because Defendants prevailed on the appeal. Defendants' one-paragraph argument is devoid of analysis or supporting authority. This Court rejects Defendants' unsupported contention.

The purpose of § 1447's fee provision is to compensate plaintiffs for costs and expenses incurred "as a result of the removal." Fees and costs are incurred as a result of the removal if they (or similar fees and costs) would *not* have arisen had the case remained in state court. For example, had Plaintiffs responded in this Court to Defendant International Gun-A-Rama, Inc.'s Motion for Summary Judgment (Docket No. 48),[5] their fees and costs in doing so presumably would have replaced similar fees and costs incurred for dispositive motion practice in state court. In contrast, fees and costs incurred opposing Defendants' appeal, which sought vacatur of the District Court's remand order, are directly related to, and incurred only as a result of, the removal. Garbie, 211 F.3d at 411 (awarding fees for services in connection with removal, "which included extensive briefing, interrogatories, and *two requests for appellate review*" (emphasis added)); *see also*, Avitts v. Amoco Prod. Co., 111 F.3d 30, 32 (5th Cir. 1997) (language of § 1447 limits awards to "fees and costs incurred in federal court that would not have been incurred had the case remained in state court"); Baddie v. Berkeley Farms, 64 F.3d 487, 490 (9th Cir. 1995) (expenses relating to seeking a remand are a direct result of the removal); Simenz, 544 F. Supp. at 747 (granting costs and fees under § 1447(c) for seeking remand, but denying fees related to motion to dismiss and motion to strike); SRE-Cheaptrips, Inc. v. Netblue, Inc., 07-CV-49, 2007 U.S. Dist. LEXIS 65280, at *4-5 (D. Idaho Aug. 31, 2007) (same); Villas at the Ridge Condominium Council of Co-Owners, Inc. v. ID Investors Ltd., 08-CV-8001, 2008 U.S. Dist. LEXIS 47701 (D. Az. June 19, 2008) (awarding fees for work that

[5] The motion was filed in this District on the same date the Second Circuit's Mandate was filed. No briefing schedule was set and Plaintiffs did not respond to the motion prior to this Court's order remanding the case to state court.

clearly related to remand motion, and rejecting fees for work that related to merits of case irrespective of venue); Greenidge v. Mundo Shipping Corp., 60 F. Supp. 2d 10, 13 (E.D.N.Y. 1999) ("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.").

Fees in connection with Plaintiffs' motion to remand and appellate review of this Court's remand order were incurred solely in connection with removal and, therefore, are recoverable to the extent they are otherwise reasonable.

b. *Excessive, Redundant, or Unnecessary Hours*

"Applications for fee awards should generally be documented by contemporaneously created time records that specify, for each attorney, the date, the hours expended, and the nature of the work done." Kirsch v. Feet Street, Ltd., 148 F.3d 149, 173 (2d Cir. 1998) (*citing* Hensley, 461 U.S. at 437 n.12). The purpose of this requirement is to provide sufficient information so the court can audit the hours and determine whether they were reasonably expended. Anderson, 388 F. Supp. 2d at 165 (citations and quotation omitted).

In assessing whether attorney time was "reasonably expended," the Court also must ask whether the attorney exercised "billing judgment." As the Supreme Court has explained:

> counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. In the private sector, billing judgment is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly

billed to one's adversary pursuant to statutory authority.

Hensley, 461 U.S. at 434 (citation and quotation marks omitted).

Defendants contend that counsels' time billed to researching, drafting, and finalizing the motion to remand appears duplicative. In particular, they point to 26.5 hours spent by the Brady Center attorneys to draft the motion, and 26.1 hours billed by Connors & Vilardo attorneys for "work on," "review," and "shepardizing" the Brady Center draft.

In response, Plaintiffs urge that their prior submissions "describe why the amount owed is reasonable" and they blame Defendants' "refusal to abandon an indefensible position" for elevating fees. (Docket No. 67 ¶ 7.) But neither Plaintiffs' reply nor their prior submissions explain the necessity for what clearly reads as a duplication of effort with regard to the remand motion—*e.g.*, 3 hours on 12/6/2005 for attorney Haile's (Brady Center) "caselaw research on statute of limitations for actions by crime victims," and 4 hours on 12/22/2005 for attorney Ippolito's (Connors & Vilardo) "research into statute of limitations for crime victims." Based on the billing records, the efforts on the motion to remand appear redundant. In light of the amount of work apparently required to finalize and file the Brady Center draft, I find it appropriate to disallow the 26.5 hours attributed to the Brady Center's research, drafting, and review.

Defendants next argue that the overall time spent on the motion to remand was excessive, and urge a further unspecified reduction in hours. The disallowed Brady Center time represents a reduction in hours of more than 27 percent. Absent further specifics from Defendants, this Court finds further reduction unwarranted.

c. *Impermissibly Inadequate, Vague, or Overbroad Billing Records*

Defendants next argue that billing records from both the Brady Center and Connors & Vilardo are impermissibly vague, and fail to meet the level of specificity required by the Second Circuit. They urge a further reduction for this reason. Plaintiffs have not responded to the contention their billing is inadequate.

With regard to the Brady Center, I first note that most of its hours already are disallowed. For those that remain, I find that their entries, though succinct, sufficiently specify the nature of the work and the hours expended. Therefore, no further reduction is warranted. Likewise, the Connors & Vilardo billings are not, as Defendants would suggest, devoid of all detail. All entries include a date, the subject of the communication or work, and some explanation of how time was expended. Though more detail may have been welcome, the entries are not akin to those that courts in this Circuit have rejected as overly vague. *See* Sabatini v. Corning-Painted Post Area Sch. Dist., 190 F. Supp. 2d 509, 522 (W.D.N.Y. 2001) (applying percentage reduction for non-specific entries such as "hearing preparation," "prepare for hearing," "review records," "telephone conference with client," "prepare for discovery," etc.); In re Olson, 280 U.S. App. D.C. 205, 884 F.2d 1415, 1428 (D.C. Cir. 1989) (disallowing entries that failed to identify the subject of a meeting, conference, or phone call); Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984) ("in cases involving fee applications . . . the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award, or in egregious cases, disallowance").

Defendants go on to object to a total of 20 hours billed by Mr. Grable in two time

entries. They urge that, because he "block billed" his time, "one cannot tell how much time was spent on what activity." (Docket No. 66 at 14.) All of the time at issue relates to preparing reply papers in connection with the motion to remand. Defendants do not appear to object to the total time spent, but to the fact they cannot tell from the billing how much of that time was spent reviewing their response papers, researching, drafting, editing, and filing. Although block billing is disfavored, the entries are sufficient to permit this Court to assess the reasonableness of the time expended. Accordingly, no additional reduction is warranted on this basis.

In sum, the Court finds an appropriate fee award is:

Connors	1.2 hours x $250	$ 300.00
Vilardo	7.5 hours x $250	$ 1,875.00
Grable	104.7 hours x $200	$ 20,940.00
Loss	0.6 hours x $200	$ 120.00
Doyle	23.5 hours x $200	$ 4,700.00
Harned	120.2 hours x $150	$ 18,030.00
Ippolito	22.6 hours x $150	$ 3,390.00
Lowy	0.5 hours x $200	$ 100.00
Haile	10.6 hours x $150	$ 1,590.00
Total		**$51,045.00**[6]

4. Costs

In addition to their attorney fees, Plaintiffs seek to recover $10,927.39 purportedly

[6] The total amount sought for attorney fees was $72, 552.50.

incurred for: computer research, document reproduction, photocopies, postage, travel, and phone charges. Defendants object only to the charges for Westlaw computer research which, at $8,441.03, represent the bulk of the disbursements sought. Plaintiffs have not responded to this objection.

As this Court previously has noted, "computer research is merely a substitute for an attorney's time that is compensable under an application for attorneys' fees and is not a separately taxable cost." Brigiotta's Farmland Produce & Garden Center, Inc., 05-CV-273, 2006 U.S. Dist. LEXIS 48004, at *28 (W.D.N.Y. Jul. 13, 2006) (quoting United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 173 (2d Cir. 1996)); *see also*, King v. JCS Enters., Inc., 325 F. Supp. 2d 162, 172 (E.D.N.Y. 2004) ("private market attorney fee rates reflect overhead costs like electronic research, just as they would reflect the cost of case reporters and other necessary books purchased for a law firm's library"). Accordingly, the Westlaw computer research charges are disallowed and Plaintiffs are entitled to costs in the amount of **$2,486.36**.

III. CONCLUSION

For the reasons stated, this Court finds that Plaintiffs are entitled to recover attorneys' fees and costs in the amount of Fifty-three Thousand, Five Hundred, Thirty-one Dollars and Thirty-six Cents ($53,531.36).

ORDER

IT HEREBY IS ORDERED that Plaintiffs' Application for Attorney Fees and Costs (Docket No. 32, supplemented by Docket No. 65) is GRANTED IN PART and DENIED IN

PART, and Plaintiffs are awarded $53,531.36 in fees and costs.

SO ORDERED

Dated: March 10, 2010
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
Chief Judge
United States District Court

A-451

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---x

DANIEL WILLIAMS and EDWARD WILLIAMS,

Plaintiffs,

v.

BEEMILLER, INC. d/b/a HI-POINT FIREARMS; CHARLES BROWN; MKS SUPPLY, INC.; INTERNATIONAL GUN-A-RAMA; KIMBERLY UPSHAW; JAMES NIGEL BOSTIC; CORNELL CALDWELL; and JOHN DOE TRAFFICKERS 1-10,

Defendants.

---x

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

NOTICE OF APPEAL

Notice is hereby given that Defendants Beemiller, Inc. d/b/a Hi-Point Firearms; Charles Brown; and MKS Supply, Inc. hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the Orders entered in this action on June 25, 2009 (Document 64) and March 10, 2010 (Document 70), which granted Plaintiffs' Application for Attorney Fees and Costs incurred as a result of the removal of this case and set the amount of the attorneys fees and costs awarded to Plaintiffs at $53,531.36.

Dated: White Plains, New York
April 9, 2010

Respectfully submitted,

/s/ Jeffrey M. Malsch

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A-453

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL WILLIAMS,
and EDWARD WILLIAMS,

Plaintiffs,

-vs-

NOTICE OF CROSS-APPEAL
Case No: 10-1339
No. 05-CV-0836S

BEEMILLER, INC. d/b/a HI-POINT,
CHARLES BROWN,
MKS SUPPLY, INC.
INTERNATIONAL GUN-A-RAMA,
KIMBERLY UPSHAW,
JAMES NIGEL BOSTIC,
CORNELL CALDWELL, and
JOHN DOE TRAFFICKERS 1-10,

Defendants.

Notice is hereby given that plaintiffs Daniel Williams and Edward Williams hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the Order entered in this action on March 10, 2010 (Document 70), which denied in part plaintiffs' application for attorney fees and costs incurred as the result of the removal of this case and set the amount of the attorneys fees and costs awarded to plaintiffs at Fifty Three Thousand Five Hundred Thirty-One Dollars and Thirty-Six Cents ($53,531.36).

DATED: Buffalo, New York
April 22, 2010

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF CM/ECF SERVICE

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

On July 30, 2010

deponent served the within: **Joint Appendix**

upon:

PLEASE SEE THE ATTACHED SERVICE LIST

via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on July 30, 2010

Malika K. Julien
Notary Public State of New York
No. 01JU6096798
Qualified in New York County
Commission Expires September 4, 2011

Job # 231115

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