10-1339-cv(L),

10-1599-cv(CON)

United States Court of Appeals

for the

Second Circuit

DANIEL WILLIAMS, EDWARD WILLIAMS,

Plaintiffs-Appellees-Cross-Appellants,

– v. –

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

Defendants,

BEEMILLER, INC. d/b/a HI-POINT, CHARLES BROWN, MKS SUPPLY, INC.,

Defendants-Appellants-Cross-Appellees.

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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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PRELIMINARY STATEMENT

Plaintiffs spend considerable time in their brief justifying the ultimate decision of the District Court to remand the case. However, the decision of the District Court to remand this case is not the issue on appeal. The primary issue on appeal is whether the District Court used the proper legal standard to analyze Removing Defendants' basis for removal. If this Court finds that Removing Defendants had an "objectively reasonable basis" to remove, then whether or not the case was ultimately remanded is irrelevant, and the award of costs under 28 U.S.C. § 1447(c) is prohibited.

Removing Defendants contend that the District Court failed to use the proper legal standard when it conducted its legal analysis of Plaintiffs' request for fees and costs pursuant to Section 1447(c).[1] In 2005, the Supreme Court articulated a new standard and unanimously held that a district court may award such fees *only* where the removing party lacked an "objectively reasonable basis" for removing the case. The record is clear that the District Court failed to utilize what was then a relatively new legal standard. The District Court therefore erred when it applied an obsolete standard to award attorneys' fees in this case pursuant to Section 1447(c).

Applying the "objectively reasonable" standard to the undisputed procedural history of this case makes plain that awarding fees cannot be justified. This case

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

was remanded due to a purported procedural nonconformity. Specifically, the District Court held that Removing Defendants violated the "rule of unanimity" by failing to obtain consent of all defendants who had "in fact" been served prior to removal. The District Court found that removing Defendants failed to obtain the consent from three individual defendants who had been served, including two incarcerated persons, but for whom Plaintiffs had failed to file the Affidavits of Service prior to removal.[2] Solely based on that finding, the District Court remanded the case and assessed fees against the Removing Defendants. Removing Defendants contend that they were only required to obtain the consent to remove from those defendants that they knew or should have known had been served.

The case law in place at the time of removal, November 2005, provided the Removing Defendants with proper authority to file the Notice of Removal with an objectively reasonable basis. Initially, it should be noted that at the time of removal there was not, and there still is not, any controlling Second Circuit opinion on this issue. Without controlling authority, a litigant should look to persuasive authority. A review of persuasive authority reveals that many district courts only

[2] The District Court's requirement that Removing Defendants obtain the consent from Defendant Caldwell was misplaced because removal was based on the fraudulent joinder of Caldwell. Further, despite the fact that not one of these three individual defendants have appeared, Plaintiffs have never sought default judgments against them, providing further support for the conclusion that the individual defendants were fraudulently jointed solely to prevent removal based on diversity jurisdiction.

require defendants to obtain consent to remove from defendants that they know or reasonably should know have been served. To hold otherwise places an onerous restriction on out-of-state defendants seeking to remove on diversity grounds. In addition, sustaining the District Court's decision provides an incentive for any plaintiff to "hide-the-ball" regarding service.

Notwithstanding Removing Defendants' opinion as to the better rule, this Court is not asked to decide this issue; rather, the Court is asked to find that, based on the persuasive authority in existence as of November 2005, the Removing Defendants were objectively reasonable in filing the Notice of Removal. Removing Defendants contend that if a single valid and on-point federal case in support of Removing Defendant's position on removal exists, then it should be axiomatic that the basis was objectively reasonable. If just one district court denied remand on the grounds that the Removing Defendants contend justify removal, then such basis cannot be "spurious" as a matter of law. Here, Removing Defendants relied upon not just one case, but upon substantial legal authority in asserting that removal was proper.

Further, case law demonstrates that courts are hesitant to award fees pursuant to Section 1447(c) based solely upon a procedural defect. Indeed, not one of the cases cited by Plaintiffs to support the District Court's decision to remand included an award of fees pursuant to Section 1447(c) based solely upon a

procedural defect. In addition, the fact that Plaintiffs failed to timely file the affidavits of service, improperly filed them in the state court after service of the Notice of Removal, failed to serve them on counsel for Removing Defendants, and listed incorrect addresses on the summons for the non-consenting defendants, reveals that Removing Defendants' failure to obtain consents was due to the lack of diligence by Plaintiffs, not Removing Defendants. Moreover, such a situation highlights the potential for sharp tactics if the District Court's decision is upheld.

As admitted by Plaintiffs, this Court has yet to rule on whether plaintiffs being represented pursuant to a contingency fee agreement actually *incur* attorneys' fees and costs within the meaning of Section 1447(c). Given that the purpose of this section is to make a non-removing *party* whole for fees occurred due to an improper removal, an award of hourly counsel fees when the party is being represented on a contingency fee basis is clearly improper. Thus, in this case, the award of hourly fees to Plaintiffs would create a monetary windfall in contravention of the specific terms of Section 1447(c).

Moreover, the District Court erred in awarding costs that were not incurred solely due to the removal, and because this Court already denied Plaintiffs' request for attorneys' fees related to the previous appeal, the District Court was not authorized to award fees and costs associated with that appeal. Finally, even if

Plaintiffs were entitled to an award, a review of the facts demonstrates that the amount of fees awarded to Plaintiffs should be reduced.

ARGUMENT

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

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

Plaintiffs claim that the proper standard for review is abuse of discretion. (*See* Brief on Behalf of Plaintiffs-Appellees-Cross-Appellants ["Appellees' Brief"] at 13.) In so doing, Plaintiffs misinterpret the case law and Removing Defendants' argument in favor of the *de novo* standard. All of the cases cited by Plaintiff to support using the abuse of discretion standard here deal with whether or not fees should have been awarded on remand based upon the various sets of facts presented in each case. However, the initial issue on this appeal is whether the District Court applied the correct legal standard when awarding fees, and case law is clear that "[a] court's decision to grant a fee award is reviewed for abuse of discretion, while the underlying legal analysis is reviewed *de novo*." *Porter Trust v. Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1*, 607 F.3d 1251, 1253 (10th Cir. 2010) (quoting *Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1248 (10th Cir. 2005)). The issue of whether the District Court applied the proper standard for

awarding attorneys' fees incurred as a result of removal should be reviewed *de novo* because it is purely a question of law. *See Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 140 (2d Cir. 1992).

B. DISCUSSION.

Prior to 2005, there was a circuit split over the correct standard for awarding fees under the remand statute.[3] *Compare Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 293 (5th Cir. 2000) ("[T]he question we consider in applying § 1447(c) is whether the defendant had objectively reasonable grounds to believe the removal was legally proper."), *with Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 927 (7th Cir. 2000) (holding that fees and costs should be awarded as "normal incidents of remands for lack of jurisdiction"). This split was resolved by the Supreme Court in *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005), when it adopted the "objectively reasonable basis" test.

The Supreme Court established that the starting point for analyzing whether to award fees upon remand is to determine if the removal was objectively reasonable. *Id.* at 141. If a district court determines that there was an objectively reasonable basis for removal, a fee request should be denied. *Ibid.* If, however, a district court concludes that there was no objectively reasonable basis for removal,

[3] It does not appear that the Second Circuit was considered part of the split among circuits. *See Martin*, 546 U.S. at 136.

then fees *may* be awarded. *Ibid.* Still, district courts have discretion to consider whether "unusual circumstances" warrant a departure from this rule. *Ibid.*

Prior to *Martin*, the Second Circuit employed an "overall fairness" test to determine whether fees and costs were appropriate pursuant to Section 1447(c), which took into account "the nature of the case, the circumstances of the remand, and the effect on the parties." *Morgan Guar. Trust v. Republic of Palau*, 971 F.2d 917, 923 (2d Cir. 1992). *Martin* replaced the Second Circuit's "overall fairness" test with an "objectively reasonable" test. The *Martin* test requires a court to conduct an impartial evaluation regarding the basis for removal. *Martin*, 546 U.S. at 141; *see also* Donald J. Rosenberg, *N.Y. Practice Series: Com. Litig. in N.Y. State Courts*, 2 N.Y. Prac. § 10:42 (2008) ("Recent opinions from district courts in the Second Circuit [that] have applied the new test from *Martin* in determining the appropriateness of cost awards. Applications for attorneys fees under §1447(c) appear to be denied more often than they are granted.").

Based on the above-cited case law, the District Court was required to apply the objectively reasonable standard outlined in *Martin* when determining whether to award fees and costs upon remand in this case. In fact, not only is every district court required to utilize the *Martin* standard, but a broad survey of such decisions reveals that the district courts actually include "objectively reasonable" terminology when writing their opinions. The District Court in this case failed to

refer to the applicable standard or cite to *Martin* in any of its opinions issued in this case, and it is clear that it failed to apply the required legal standard. The District Court merely stated that "[a]n award of costs and fees pursuant to 28 U.S.C. §1447(c) does not require a finding of bad faith by the removing party." (J.A. 208, Foschio Report & Recommendation 6/29/2006; 375, Foschio Report & Recommendation 10/31/2008; S.A. 15, 40.) At best, this Court cannot know what standard the District Court used in determining that fees were justified in this case. At worst, the District Court used an incorrect and obsolete standard. Either way, based on the analysis, the District Court erred in failing to apply the "objectively reasonable" standard for determining whether to award fees pursuant to Section 1447(c).

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

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

Plaintiffs again incorrectly contend that the standard of review is abuse of discretion. Plaintiffs rely on *Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82 (2d Cir. 2010), in support of this argument. However, *Victor* dealt with whether the fee amount allocated by lead counsel from the common fund to non-lead counsel following a class action settlement was reasonable. This standard of review is appropriate with respect to Removing Defendants' contention

that the *amount awarded* in this case by the District Court was unreasonable. However, "where an appellant's contention on appeal regarding an award of attorneys' fees is that the district court made an error of law in granting or denying such an award, the district court's rulings of law are reviewed *de novo*." *Baker v. Health Mgmt. Sys., Inc.*, 264 F.3d 144, 149 (2d Cir. 2001); *Mautner v. Hirsch*, 32 F.3d 37, 39 (2d Cir. 1994). Here, Removing Defendants challenge the legal basis of the fee award. Thus, this Court's review of whether the remand order was legally correct is *de novo*. *See, e.g., Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992).

B. DISCUSSION.

Removing Defendants timely removed this case pursuant to 28 U.S.C. §1332(a)(1) based on diversity jurisdiction. While one of the defendants, Caldwell, was a citizen of New York, Removing Defendants contended he was a fraudulently joined party. The District Court never addressed this issue and, instead, this matter was remanded to state court solely due to Removing Defendants' failure to abide by the "rule of unanimity." Plaintiffs claim that this procedural defect is a sufficient basis alone for the District Court to award fees pursuant to Section 1447(c).

There is no legal basis to award fees because removal was procedurally proper. Removing Defendants further contend that even if removal was procedurally improper, such a defect is not a sufficient basis to award fees on remand. Finally, Removing Defendants' decision to remove was objectively reasonable.

1. Plaintiffs Cite to Authority Which Does Not Stand for the Proposition That a Procedural Defect is Sufficient to Award Fees.

Although Removing Defendants contend that the Removal Notice was not procedurally defective, it must initially be pointed out that Plaintiffs have failed to put forth any legal authority in support of their argument that the absence of unanimity is a sufficient basis in-and-of-itself to award attorneys' fees and costs. Indeed, none of the eight (8) cases cited by Plaintiffs actually supports this proposition.

Most of the cases cited involved the award of attorneys' fees and costs on remand based on *substantive* failures in the removal petition. In *Lott v. Pfizer, Inc.*, 492 F.3d 789 (7th Cir. 2007), the court held that an award of fees and costs on remand was inappropriate because the defendant's attempt to remove was objectively reasonable because the case law was divided on the interpretation of a statute upon which removal was based. *Id.* at 793. In *PNC Bank, National v. Rencher/American Manor, LLC*, No. 4:10-cv-00421-BLW, 2010 WL 3834071 (D.

Idaho Sept. 23, 2010), the District Court found that the plaintiff was entitled to an award of attorneys' fees and costs on remand because "[t]he Court finds no objectively reasonable basis for federal question jurisdiction, and thus no justification for removal." *Id.* at *2. Similarly, *De la Rosa v. 610-620 West 141 LLC*, No. 08 Civ. 8080 (PKL), 2009 WL 1809467 (S.D.N.Y. June 24, 2009), never addressed the "rule of unanimity" and awarded fees and costs on remand because the defendants were all New York residents who impermissibly attempted to remove the case to the Southern District of New York based on diversity jurisdiction. *Id.* at *1, *3-4. In *Falcon v. Ochoa*, No. 09-665-JJB-SCR, 2009 WL 4906547 (M.D. La. Dec. 16, 2009), the court awarded fees on remand "[b]ecause the defendant failed to show by a preponderance of the evidence that the amount in controversy exceeds $75,000." *See id.* at *3. In another case, the fees and costs were awarded due to the defendants' improper attempts to circumvent a state court hearing and violate a temporary restraining order. *Harvey v. Quality Loan Servs. Corp. of Wash.*, No. C09-1615RSM, 2010 WL 148384, at *4-6 (W.D. Wash. Jan. 11, 2010).

The other cases relied upon by Plaintiffs either never addressed the issue of awarding fees based on a procedural defect in removal or are simply not authoritative. In *Deluca v. Ocwen Loan Servicing, LLC*, No. 5:10-cv-00421, 2010 WL 2197789 (S.D. W.Va. May 26, 2010), the issue of whether to award costs and

fees based on procedural defects was never even addressed because the parties had failed to discuss the appropriate standard in their briefs. 2010 WL 2197789 at *3 (explaining how neither party addressed the appropriate standard for awarding attorneys' fees on remand and stating that if the plaintiffs "file a motion and an accompanying memorandum in support asserting the request and reasons in light of the standard articulated in *Martin*," an award of fees will be considered). The remaining cases cited by Plaintiffs are not authoritative as they were decided prior to *Martin* and, accordingly, do not apply the correct standard. *Hammer v. Scott*, No. 04-2243, 2005 WL 1414395, at *1-2 (3d Cir. 2005) (unpublished & non-precedential); *Traynor v. O'Neil*, 94 F. Supp. 2d 1016, 1024 (W.D. Wis. 2000) (applying the Seventh Circuit's test that was specifically disapproved by the Supreme Court in *Martin*).

As repeatedly explained by Defendants, the undeniable reality is that the federal courts addressing this issue have held the opposite of Plaintiffs' argument. *See, e.g., Wallin v. Shanaman*, No. 08-cv-01987-MSK-KLM, 2010 WL 554794, at *1 (D. Colo. Feb. 16, 2010) (declining to award fees when the case was remanded due to the failure to obtain the consent of all defendants); *Brady v. Lovelace Health Plan*, 504 F. Supp. 2d 1170, 1174 (D.N.M. 2007) (refusing to award fees where removal would have been proper but for the removing defendant's failure to join all defendants); *Babin v. Isaman*, No. 09-408-C, 2009 WL 3672901, at *5 (M.D.

La. Nov. 4, 2009) (refusing to award fees when the case was remanded due to lack of consent of all defendants).

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

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

The issue before the District Court on remand and – so that Defendants' objectively reasonable basis for removal can be assessed – currently before this Court, is whether Removing Defendants were required to obtain consent from the individual defendants who had been served prior to removal when Removing Defendants had no actual knowledge of service due to the lack of diligence of Plaintiffs.

Federal jurisdictions have held that consent of a defendant is not required absent actual or constructive notice of service upon that defendant: "[J]oinder in or consent to the removal petition must be accomplished by only those defendants: (1) who have been served; and (2) whom the removing defendant(s) actually knew or should have known had been served." *Milstead Supply Co. v. Cas. Ins. Co.*, 797

F. Supp. 569, 573 (W.D. Tex. 1992). As opposed to a rule that consent is needed from all defendants who had "in fact" been served, "the better rule is that a defendant is required to obtain consent only from those codefendants who it knew or should have known, in the exercise of reasonable diligence, had been served." *Laurie v. Nat'l R.R. Pass. Corp.*, No. Civ. A-01-6145, 2001 WL 34377958, at *4 (E.D. Pa. Mar. 13, 2001).

Plaintiffs claim that *Milstead* "cannot even be cited in the district where it was issued in the manner that Appellants urge here." (*See* Appellees' Brief at 19.) This argument is incorrect and, at best, is a misinterpretation of the cited authority. First, Plaintiffs only cite to one case "in the district" from which *Milstead* arose. *See KLN Steel Products v. CNA Ins. Cos.*, No. SA-06-CA-0709-XR, 2006 WL 3228534, at *5 (W.D. Tex. Nov. 6, 2006). More importantly, each case cited specifically uses the *Milstead* standard to determine if the lack of unanimity should be excused or not. *See Vanouwerkerk v. Owens-Corning Fiberglass Corp.*, No. 1:99CV179, 1999 WE 335960, at *12 (E.D. Tex. May 26, 1999) (finding that *Milstead* did not support the argument by removing defendant(s) that there were too many defendants to obtain consent); s*ee also Guajardo v. Powermate Corp.*, No. C-10-208, 2010 WL 2990974, at *3 (S.D. Tex. July 28, 2010) (using *Milstead* as "second test" to determine whether to excuse lack of unanimity); *KLN Steel Products*, *supra*., at *5-6 (finding removing defendant had notice of non-

consenting defendant's service due to filing of Return of Service in state court eight days before removal). Thus, it is curious how Plaintiffs make the precarious leap and certify to this Court that *Milstead* "cannot be cited."

Moreover, the holding in *Milstead* that a removing defendant should not be required to obtain consent where it did not know or could not reasonably have known, prior to removal, of service of process on a non-joining co-defendant has been frequently relied upon. In addition to the numerous federal cases cited in Appellants' opening brief supporting this proposition, recently decided cases have also applied this exception to the unanimous consent rule. *See, e.g., Bilyeu v. Berenson*, No. 1:08-CV-02006, 2010 WL 1189822, at *1 (W.D. La. March 26, 2010) (denying motion to remand because, "in reality, attempting to discover with any degree of accuracy, in thirty days or less, the status of service of process on multiple businesses in multiple states, some of which may or may not have legal departments, is a daunting task."); *Rodriguez v. County of Stanislaus*, No. 1:08-CV-00856, 2008 WL 4765110, at *4-5 (E.D. Cal. Oct. 30, 2008) (relying upon *Milstead* to recommend denial of motion to remand), *report and recommendation adopted by* 2008 WL 5389709 (E.D. Cal. Dec. 24, 2008). Clearly, contrary to Plaintiffs' assertion, *Milstead* is not dead.

Applying the case law to this matter reveals that Removing Defendants did not violate the rule of unanimity because they did not have actual or constructive

notice that any non-removing defendants had been served prior to removal and, by continuously monitoring the state court docket prior to removal, Removing Defendants were reasonably diligent in attempting to discover whether such defendants had been served. Removing Defendants filed their Notice of Removal on November 23, 2005 (J.A. 8), and the Affidavits of Service as to non-consenting defendants Bostic and Upshaw were not filed with the Erie County Clerk of Court until *seven days and two days, respectively, after removal* (J.A. 175-76). Due to Plaintiffs' lack of diligence, there was no basis to conclude that any other defendant had been served. Additionally, the addresses listed on the Summons for Bostic and Upshaw were incorrect (*see* J.A. 16), which prevented Defendants from being able to contact them directly. Thus, due to Plaintiffs' failures to timely file the affidavits of service and to list the correct addresses, Defendants were effectively precluded from determining whether Bostic and Upshaw had been served prior to removal. Further, non-consenting defendant Upshaw was served *after* the Removing Defendants had signed the notice of removal and given it to Federal Express for overnight delivery. It therefore strains credulity to argue that the Removing Defendants acted without an objectively reasonable basis in failing to obtain her consent.

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

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

Removing Defendants suggest that the constructive notice rule espoused in *Milstead, supra,* should be made the rule of law in the Second Circuit to give clarity to district courts for future analyses. However, even if this Court does not, or is not willing to make such a determination under these circumstances, it is clear that Removing Defendants relied upon substantial, persuasive legal authority from federal courts throughout the country and therefore had an objectively reasonable basis for removal. In support of their position, Removing Defendants cited at least twelve cases from federal courts throughout this country that stand for the proposition that removing defendants are only required to obtain the consent of other defendants who the removing defendants knew, or should have known, had been served at the time of removal. In determining that removal was procedurally improper, Magistrate Judge Foschio relied on *one* case from the Northern District of New York, which holds no precedential value and does not address the issues at hand in this matter. See *Tate v. Mercedes-Benz USA, Inc.*, 151 F. Supp. 2d 222

(N.D.N.Y. 2001). Even if it is determined that the District Court's interpretation of *Tate* was correct, however, such a finding still would not justify an award of fees pursuant to Section 1447(c). Removing Defendants' reliance upon other federal court precedent interpreting a federal rule cannot be considered objectively unreasonable. *See, e.g.*, *Bankcroft v. Bayer Corp.*, No. 09-787-GPM, 2009 WL 3156706, at *5 (S.D. Ill. Sept. 29, 2009) (explaining that a removal that merely contravenes the non-precedential decisions of a district court, rather than controlling authority, is not objectively unreasonable).

Thus, even if Defendants' removal was procedurally improper, there was an objectively reasonable basis for removal, and any award of attorneys' fees is inappropriate.

III. THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 1447(C) BECAUSE PLAINTIFFS' ATTORNEYS WERE RETAINED ON A CONTINGENCY FEE BASIS.

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

Plaintiffs claim that the standard of review is abuse of discretion and that Appellants' assertion of *de novo* review "misses the mark." *See* Appellees' Brief at 31. The issue here is whether a plaintiff who enters into a contract for legal services on a contingency fee arrangement, as is common in personal injury cases, has incurred "actual expenses, including attorney fees" pursuant to Section 1447(c). This determination requires a legal interpretation and analysis of whether

contingency fee agreements should be considered "actual expenses, including attorney fees" as contemplated by Congress when it amended Section 1447(c) in 1988. While Plaintiffs are correct that a court's decision to grant fees is reviewed for an abuse of discretion, the underlying legal analysis is reviewed *de novo*. *Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1248 (10th Cir. 2005); *see also White v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993) ("We review *de novo* whether the district court correctly interpreted [a] statute."). A claim that there was no basis in law or fact for an award of attorney fees is subject to *do novo* review. *Mautner v. Hirsch*, 32 F.3d 37, 39 (2d Cir. 1994).

B. DISCUSSION.

The Second Circuit has never addressed the issue of what is meant by "actual expenses, including attorney fees" in Section 1447(c). A split panel of the Ninth Circuit is the only federal appeals court to have dealt with this specific issue. *See Gotro v. R & B Realty Group*, 69 F.3d 1485 (9th Cir. 1995). Thus, Plaintiffs' claim that a decision from this Court finding that contingency based attorney fees are not recoverable pursuant to Section 1447(c) would "overrule sound precedent from sister circuits" is incorrect. *See* Appellees' Brief at 35. While such a ruling could be considered a disagreement with a divided panel of the Ninth Circuit, this would certainly not be the first time that sister circuits have disagreed when interpreting a statute, rule or regulation. Removing Defendants respectfully

request that this Court follow the well-reasoned dissent by Judge O'Scannlain in *Gotro* and find that hypothetical legal fees are not recoverable as "actual" fees incurred pursuant to Section 1447(c). *Id.* at 1489.

In support of Plaintiffs' reliance on *Gotro*, they cite to *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407 (7th Cir. 2000). However, there is absolutely no reference to a contingency fee arrangement in *Garbie*, only defendant's objection that, "an award of $7,500 is too high, because not adequately documented." *Id.* at 411. Therefore, Appellees' argument is solely supported by two judges of the Ninth Circuit, while Appellants' urging of a better rule to this Court is supported one judge of the Ninth Circuit and by the reasoning of other sister circuits.

In *Wisconsin v. Hotline Industries*, 236 F.3d 363 (7th Cir. 2000), the Seventh Circuit explained the nature of the fee-shifting provision in Section 1447(c):

> Section 1447(c) is unusual among fee-shifting statutes. Unlike the numerous statutes that authorize recovery of "reasonable" attorney's fees, § 1447(c) expressly limits fee awards to actual outlays – specifically, to "any *actual* expenses, including attorney fees, *incurred*." The mention of "actual" and "incurred" is significant. Neither word appeared in the statute's earlier version that authorized only "the payment of costs." As amended in 1988, § 1447(c) now explicitly includes "attorney fees" among the "actual expenses" that can be awarded. The statutory change makes clear that § 1447(c) constitutes

> an alternative means to reimburse the victorious party without resorting to Rule 11.

Id. at 366-67 (internal citations omitted).

In *Gotro*, 69 F.3d at 1486, the majority held that the words in the statute did not limit the court's discretion to award fees to an attorney operating on a contingency basis. *Id.* at 1488. However, the dissent by Judge O'Scannlain offers the sounder reasoning. In terms of contingency fees, Judge O'Scannlain points out that a plaintiff who is being represented on a contingency fee agreement is in a different position than parties paying their attorneys on an hourly basis:

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

Id. at 1490.

Finally, the Tenth Circuit addressed the interpretation of Section 1447(c) in *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128 (10th Cir. 2001). In *Huffman*, the Tenth Circuit looked to the decisions in *Hotline* and *Gotro* and held that:

> We have concluded that the phrase "incurred as a result of removal" informs and narrows the meaning of "actual

> expenses, including attorney fees." Nothing in *Hotline* or *Gotro* suggests that courts are compelled to award unreasonable, if actual, fees to plaintiffs who successfully obtain an order of remand. To be compensable, their fees must be actually "incurred," that is, they must reflect efforts expended to resist removal.

Id. at 1135.

In a contingency fee scenario, a plaintiff has incurred no actual attorney fees as a result of an improper removal. A plaintiff and his counsel contract for legal services. The fee arrangement is a primary component of the retention agreement. Typically, in a contingency setting, if plaintiff loses, he owes no fee; while if he financially recovers, he owes a pre-determined percentage of any such amount. Counsel does not get a higher or lower percentage depending upon how many hours are spent prosecuting the case, as such, removal and subsequent remand have had absolutely no effect in terms of Plaintiffs' ultimate legal bill in this case. To date, Plaintiffs have incurred no actual legal fees.

Moreover, if the Court were to sustain the fee award by the District Court, the rule of unintended consequences could create further litigation and proceedings, most likely between counsel and client. First, who is entitled to benefit from such an award, counsel or client? Counsel did the work, but the rule is directed to compensate the party. If the party is entitled to the award, not only is this an unjust windfall, but what are the tax ramifications? Presumably, a payment as reimbursement would not be taxable, but to call this a reimbursement could be

considered a fraud by the IRS if viewed in conjunction with the retainer agreement? Finally, if the Court directs payment to counsel, what would be the proper fee allocation at the conclusion of the case? For example, if the Court were to sustain a fee award of $10,000 pursuant to Section 1447(c), and ultimately Plaintiffs obtained a judgment for $30,000 in the state court, what would be the proper fee allocation? Traditionally, counsel would be entitled to one-third, or $10,000. However, counsel already would have recovered $10,000 in legal fees. Would Plaintiffs be entitled to the full $30,000? That would not be in line with the contingency fee agreement. In awarding fees to Plaintiffs, the District Court failed to address the issue of whether they would be payable to Plaintiffs or to their attorneys. The District Court similarly failed to address whether the Removing Defendants would be jointly and severally liable for the fees, or only liable for a proportionate share.

The plain language of Section 1447(c) supports the holdings in *Huffman*, *Hotline*, and the dissent in *Gotro*, which all stand for the proposition that attorney fees and costs should only be awarded for "actual outlays" and fees "actually incurred." *See* 28 U.S.C. § 1447(c). Moreover, interpreting the fee provision of Section 1447(c) to mean that any "reasonable fees" may be awarded regardless of whether fees were actually incurred is inconsistent with the longstanding principle of statutory interpretation that all parts of a statute should be read so as to give

effect to all the words utilized. *See TRW v. Andrews*, 534 U.S. 19, 31 (2001). Not only would interpreting Section 1447(c) to permit "reasonable" attorney fees render the words "actual" and "incurred" void, but such an interpretation also has the potential to create more confusion when district courts are faced with a fee request pursuant to Section 1447(c), and could create a myriad of issues related to contingency fee retainer contracts entered into between counsel and their clients.

IV. THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES AND COSTS RELATED TO THE PRIOR APPEAL.

Whether by a *de novo* review or an analysis to see if the District Court's decision was contrary to the law, there is no basis to award fees related to Removing Defendants' prior appeal. Unlike the cases where appellate fees were awarded, *see, e.g.*, *Garbie*, 211 F.3d at 410, in this case, Removing Defendants did not improvidently seek appellate review of a remand order, nor was the appeal contrary to established law. In fact, it was the District Court's error in treating a remand motion as non-dispositive, which Plaintiffs defended in response to Removing Defendants' objections to the Magistrate Judge's decision, that led to the prior appeal, not the removal. Furthermore, while bad faith is not a required element to award fees, clearly the court in *Garbie* was not pleased with defendant's conduct throughout the removal process, both in that case and in others pending in various district courts. *Id.* at 410-11. Rather, in this case, Removing Defendants *successfully* appealed to this Court to obtain a determination that the District Court

had used an improper standard of review when it evaluated and adopted the Magistrate Judge's report and recommendation as to remand. It is counterintuitive to award fees and costs to Plaintiffs associated with an appeal which was solely the "result" of the District Court's error, not Defendants' removal, particularly when Plaintiffs could have avoided the prior appeal by conceding that a motion to remand is dispositive.

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

Defendants do not challenge the rates conferred by the District Court but, rather, challenge the amount of the award in light of the excessive amount of hours billed; the reliance upon billing records that were not contemporaneously maintained; and the use of impermissibly inadequate billing records.

Excessive, redundant or unnecessary hours are to be excluded from a fee award. *Anderson v. Genesee Reg'l Transp. Auth.*, 388 F. Supp. 2d 159, 163 (W.D.N.Y. 2005). Additionally, a court may apply a reasonable percentage reduction to an award of attorneys' fees. *See Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998) (stating that applying a reasonable percentage reduction is "a practical means of trimming fat from the fee application"). In this case, the District Court's fee award is unreasonable and an abuse of discretion.

In this case, Plaintiffs requested the District Court for $83,479.89 in costs and fees pursuant to Section 1447(c). The District Court awarded $53,531.36.

From a global perspective, $50,000 at $200 per hour would amount to 250 hours. 250 hours equals approximately six weeks of work for one attorney. It is not reasonable to conclude that filing a motion to remand and a reply in support of such motion could take six weeks to complete. Removal and remand do not entail unique legal issues that require extensive research or briefing. While this case ultimately involved much more than the motion to remand and a reply, no other filings were the result of removal. The remaining issues in this case were the result of circumstances outside the control of the Removing Defendants, namely the District Court's application of erroneous legal standards, first with regard to whether a motion to remand is dispositive, and then with regard to the applicable standard for awarding fees pursuant to 28 U.S.C. § 1447(c), both of which were supported by Plaintiffs.

CONCLUSION

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

Dated: White Plains, New York
December 21, 2010

Respectfully submitted,

/s/ Jeffrey M. Malsch

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CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains **6,399** words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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

Dated: White Plains, New York
December 21, 2010

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL WILLIAMS, EDWARD WILLIAMS,

Plaintiffs-Appellees-Cross-Appellants,

– v. –

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

Defendants,

BEEMILLER, INC. d/b/a HI-POINT, CHARLES BROWN, MKS SUPPLY, INC.,

Defendants-Appellants-Cross-Appellees.

AFFIDAVIT OF SERVICE

Docket No.:
10-1339-cv(L), 10-1599-cv(CON)

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

I, Danny C. Lallis, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age. I hereby certify that on December 21, 2010, I served a true and correct copy of the within Reply Brief for Defendants-Appellants-Cross-Appellees via the CM/ECF Case Filing System (as all counsel of record in this case are registered CM/ECF users) and that I served two (2) copies of same via first-class U.S. mail, postage prepaid, upon:

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Additionally, I certify that on December 21, 2010, I served the original and six (6) copies of the within Reply Brief for Defendants-Appellants-Cross-Appellees via first-class U.S. mail, postage prepaid upon:

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December 21, 2010

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Sworn to before me on this
21st day of December 2010

/s/ Jeffrey M. Malsch
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