UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Case No. 10-CV-457 (GLS/DRH)

-against-

McGINN, SMITH & CO., INC., *et al.*,

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS AGAINST JILL A. DUNN, ESQ.

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Introduction

Plaintiff Securities and Exchange Commission ("SEC") moves for sanctions against Jill A. Dunn, Esq. ("Dunn"), former attorney for the David L. and Lynn A. Smith Irrevocable Trust U/A 8/4/04 (the "Trust"), three other individuals and the Trust, pursuant to Rule 11, Fed. R. Civ. P., 28 U.S.C. § 1927, and the court's inherent authority. Dkt. No. 261. The SEC seeks the return of funds disbursed by the Trust between July 7, 2010, when this Court denied the SEC's motion for a preliminary injunction as against the Trust and vacated an asset freeze previously in effect, and August 3, 2010, when the asset freeze was reimposed (including "disgorgement" of $101,096.40 in fees and expenses paid to Dunn on July 9 and July 31, 2010), plus $164,000 in attorneys' fees and costs which the SEC claims to have incurred as a result of allegedly wrongful acts of Dunn and others. Memorandum of Law in Support of Motion for Sanctions ("SEC Memo"), p. 2.[1]

The crux of the SEC's motion is an Annuity Agreement dated August 31, 2004 (Dkt. No. 103-3), between David and Lynn Smith and the Trust, under which the Smiths sold stock to the Trust in exchange for the Trust's agreement to make annuity payments to the Smiths beginning in September 2015, thereby establishing a "Private Annuity Trust." According to the SEC, Dunn, Lynn Smith, Thomas Urbelis (the original trustee of the Trust) and David Wojeski (Urbelis's successor) concealed the existence of the Annuity Agreement in order to extricate the Trust from an asset freeze imposed in April 2010. SEC Memo, p. 1.

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1 The SEC also seeks discovery and an evidentiary hearing to aid in determining whether sanctions should be imposed against James Featherstonhaugh, Esq., Lynn Smith's attorney. SEC Memo, pp. 21-23. Dunn takes no position regarding this branch of the SEC's motion.

This Memorandum of Law is submitted on Dunn's behalf in opposition to the SEC's motion. First, and most important, the SEC fails to show, by clear and convincing evidence, that Dunn knew of the existence of the Annuity Agreement prior to this Court's July 7, 2010, ruling on the SEC's motion for a preliminary injunction and the Trust's motion to unfreeze the Trust's investment account; therefore, sanctions are not warranted and disgorgement of legal fees earned before July 7, 2010, are not justified. Second, whether Dunn referred to a private annuity "agreement"—as opposed to a private annuity "trust"—during a telephone conversation with SEC attorneys on July 22, 2010, did not make a *material* difference in the course of the case; by the time the conversation took place, the SEC had already engaged a tax expert, and was preparing to amend its complaint and to move to reimpose the asset freeze. Third, the SEC's claim for attorney's fees and costs is unsupported by competent evidence and is seriously inflated. Finally, this Court lacks jurisdiction to render a binding decision on the SEC's motion because Dunn has not consented to a magistrate judge's jurisdiction.

Statement of Facts

For the most part, the underlying facts can be gleaned from this Court's Memorandum–Decisions and Orders dated July 7 (Dkt. No. 86; "July 7 Decision") (Dunn Ex. 1) and November 22, 2010 (Dkt. No. 194; "November 22 Decision") (Dunn Ex. 2), and January 11, 2011 (Dkt. No. 254; "January 11 Decision") (Dunn Ex. 3).[2] To the extent necessary, additional facts appear from the other documents annexed to the Zelermyer Declaration.

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2 References to "Dunn Ex." are to exhibits annexed to the Declaration of Benjamin Zelermyer, Esq., dated March 21, 2011 ("Zelermyer Dec."). References to "SEC Ex." are to the exhibits annexed to the Declaration of Lara Shalov Mehraban, Esq. dated January 31, 2011 ("Mehraban Dec.").

The SEC's Motion for a Preliminary Injunction

The SEC commenced this action on April 20, 2010, alleging violations of the federal securities laws. Dunn Ex. 1, pp. 6-7. Simultaneously, the SEC obtained a Temporary Restraining Order appointing a receiver to take possession of the defendants' assets and freezing specified property. Dunn Ex. 4 (Dkt. No. 5). Although the Trust was not named in the complaint, the property frozen included an investment account in its name. Dunn Ex. 5 (Dkt. No. 5-2), p. 6. At about the same time, law enforcement authorities executed search warrants relating to the defendants. Dunn Ex. 1, p. 6, n. 10. It appears that the Annuity Agreement was seized at that time, but was not turned over to the SEC until October 2010. Dunn Ex. 6 (Transcript of November 16, 2010, Hearing), pp. 44-45.

On May 28, 2010, the Trust was granted leave to intervene for the limited purpose of opposing the SEC's motion for a preliminary injunction continuing the freeze of the Trust's account. Dunn Ex. 7 (Dkt. No. 39). All parties consented to the reference of the motion to this Court. Dunn. Exs. 8 (Dkt. No. 12), 9 (Dkt. No. 59). All but two of the parties (Lynn Smith and the Trust) consented to the preliminary injunction and the asset freeze. Dunn Ex. 1, p. 7.

This Court conducted an evidentiary hearing on June 9, 10 and 11, 2010. Dunn Ex. 1, p. 7.[3] On July 7, 2010, this Court found that "the SEC has not established that the Trust was created with ill-gotten gains" (Dunn Ex. 1, pp. 37-38); "[t]he SEC has also failed to demonstrate that David Smith was an equitable owner in the Trust Account" and "there is no likelihood that the SEC will prove that David Smith was the beneficial owner of the Trust" (Dunn Ex. 1, pp. 39,

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3 The dates appearing on the transcripts as filed, *July* 9, 10 and 11, are incorrect. Dunn Ex. 10 (Dkt. Nos. 87, 88, 89).

41). Accordingly, this Court denied the SEC's motion for a preliminary injunction continuing the freeze of the Trust's account. Dunn Ex. 1, pp. 42-43. Thereafter, the Trust disbursed approximately $1,000,000 from the account, including payment of legal fees and expenses to Dunn on July 9 ($95,741.00) and July 31 ($5,355.00). SEC Ex. G (Dkt. No. 261-6), p. 6-7.

The SEC's Second Motion

On July 22, 2010, SEC attorneys arranged a telephone conference with this Court for the purpose of requesting that the Trust's account be re-frozen, having been advised by its tax expert that the Smiths owed (but failed to pay) gift taxes when the Trust was formed in 2004. Dunn Ex. 6, pp. 4-5.[4] During the conference call, Dunn stated that no such taxes were due. Dunn Ex. 2, p. 9; Dunn Ex. 6, pp. 5, 58. After this Court denied the SEC's informal request (Dunn Ex.11; Dkt. No. 95), the SEC attorneys called Dunn to ask why she said no taxes were due. Dunn Ex. 6, p. 5. According to SEC attorney David Stoelting ("Stoelting"), Dunn said, "It's a private annuity agreement." Dunn Ex. 6, p. 6. According to Dunn, she said "that it was [her] understanding that because this was a private annuity trust, no gains were realized and no gift tax returns were required to be filed." Dunn Ex. 6, pp. 58-59; Dunn Ex. 12 (Dkt. No. 134), ¶ 44. The SEC attorneys consulted their tax expert again, who said that if there was an irrevocable trust *and* an annuity agreement, no gift tax would be due. Dunn Ex. 6, p. 11. The SEC then contacted Thomas Urbelis, the original trustee ("Urbelis"); on July 27, 2010, Urbelis produced a copy of the Annuity Agreement. Dunn Ex. 2, pp. 3, 10; Dunn Ex. 13 (Dkt. No. 103-3).

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4 The SEC retained its tax expert between July 7 and the July 22nd telephone conference with this Court. Dunn Ex. 6, p. 17.

On August 2, 2010, the SEC filed an Amended Complaint (Dunn Ex. 14; Dkt No. 100), adding a few paragraphs concerning the Annuity Agreement (Dunn Ex. 14, ¶¶ 120-21, 131, 133) and a new Eighth Claim for Relief, alleging, *inter alia,* that the transfer of stock to the Trust in 2004 was a fraudulent conveyance under the New York Debtor and Creditor Law. Dunn Ex. 14, p. 41. The next day, the SEC filed a motion requesting that the July 7 Decision be "revised" pursuant to Rule 54(b), Fed. R. Civ. P., principally on the ground that the Annuity Agreement established defendant David Smith's interest in the assets of the Trust, thereby justifying reimposition of the asset freeze. Dunn Ex. 15 (Dkt. No. 103-1), p. 11. The SEC contended that Lynn Smith and Urbelis failed to produce the Annuity Agreement despite numerous requests and repeated questioning (Dunn Ex. 15, pp. 5-6), and that David Wojeski failed to mention the Annuity Agreement during his testimony at the hearing in June (Dunn Ex. 15, p. 6).

The SEC also contended that during her closing argument at the June hearing, Dunn, the Trust's counsel, "represented categorically that when Lynn Smith transferred the Charter One stock into the Trust account 'all title, ownership, control, beneficial, equitable, actual, or legal any interest whatsoever in that stock was gone from [Lynn Smith's] hands the moment she transferred it.'" Dunn Ex. 15, p. 6, citing Stoelting's Declaration dated August 3, 2010 (Dkt. No. 103-2), ¶ 34, citing the Transcript of the June hearing at p. 625.[5] This Court issued an Order to

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5 What appears at page 625 of the Transcript is not a *representation* by Dunn, but *argument* based on Lynn Smith's testimony:

> The money that Mrs. Smith used to invest in this trust was her rightful money. *She testified* that she—and it's never been contradicted, *that she believes* at all times that when she transferred that stock into the trust account, she relinquished all title, ownership, control, beneficial, equitable, actual, or legal any interest whatsoever in that stock was gone from her hands the moment she transferred it. Dunn Ex. 16 (Dkt. No. 89), p. 157 (Tr. p. 625) (emphasis added).

Show Cause reimposing the freeze on the Trust's account. Dunn Ex. 17 (Dkt. No. 104). Despite the 14-day time limitation set forth in Local Rule 7.1(g), which had expired, this Court "deemed" the SEC's motion to be a motion for reconsideration of its July 7 Decision. Dunn Ex. 17, p. 5.

The Trust opposed the SEC's new motion on numerous grounds. The most significant, for the purposes of the present motion, was that the Annuity Agreement was not "newly-discovered" evidence because the SEC, in the exercise of due diligence, could have discovered it earlier (Dunn Ex. 2, pp. 8-9), an argument based principally on an August 2004 letter from David Smith to Urbelis which described the Trust as a "Private Annuity Trust." Dunn Ex. 2, pp. 10, 14-15. Finding "a clear question of credibility on the material issue raised by the Trust whether Dunn disclosed the existence of the Annuity Agreement in the July 22, 2010 telephone conversation" (Dunn Ex. 2, p. 9), this Court held an evidentiary hearing on November 16, 2010. Dunn Ex. 6. In its November 22 Decision, this Court rejected Dunn's hearing testimony as "not credible" (Dunn Ex. 2, p. 9); found that the SEC did not discover the Annuity Agreement until Dunn disclosed its existence in the July 22 telephone conversation (Dunn Ex. 2, p. 13); and ruled that the Annuity Agreement demonstrated David Smith's "substantial interest" in the Trust (Dunn Ex. 2, pp. 21-22). Based on these conclusions, this Court granted the SEC's motion and reimposed a freeze on the Trust's account. Dunn Ex. 2, pp. 22-23.

In addition, this Court, *sua sponte,* granted the SEC leave to move for sanctions against the Trust, Urbelis, Wojeski, Dunn, Lynn Smith and James Featherstonhaugh. Dunn Ex. 2, p. 24.

Argument

I

THIS COURT LACKS JURISDICTION TO RENDER A BINDING DECISION ON THE SEC'S MOTION FOR SANCTIONS

Under 28 U.S.C. § 636 and Rule 73, Fed. R. Civ. P., consent of *all* parties is a prerequisite to a magistrate judge's jurisdiction to enter a binding judgment. *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.,* 996 F.2d 21, 23-24 (2nd Cir. 1993). When a new party enters a case after the existing parties have consented to the matter being decided by a magistrate judge, the new party's consent is also required. *New York Chinese TV Programs, Inc. v. U.S., Enterprises, Inc.,* 996 F.2d at 24, *citing Guess v. Chenault,* 108 F.R.D. 446, 449-50 (N.D. Ind. 1985); *Stackhouse v. McKnight,* 168 Fed. Appx. 464, 466 (2nd Cir. 2006).[6] Consistent with this principle, Local Rule 72.2(b)(4) requires the Clerk of the Court to notify parties who are added to an action after consent and reference to a magistrate judge of their right to consent; if an added party does not consent, the action is returned to the referring judge. Dunn has not consented to a reference of any part of the case to this Court.

A challenge to due process is inherent when the accuser, fact finder and sentencing officer are one and the same person. *See Eisemann v. Greene,* 204 F.3d 393, 396 (2nd Cir. 2000), *quoting Mackler Productions, Inc. v. Cohen,* 146 F.3d 126, 128 (2nd Cir. 1998). The right to consent—or decline to consent—is particularly important in connection with a motion for sanctions which is suggested, as here, by the court. In the absence of Dunn's consent, this Court lacks jurisdiction to render a binding decision on the SEC's motion.

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6 A motion for sanctions frequently involves parties who are different from the original parties (*see Kiobel v. Millson,* 592 F.3d 78, 87 [2nd Cir. 2010], Cabranes, *J., concurring*).

II

RULE 11 DOES NOT PROVIDE A BASIS FOR SANCTIONS IN THIS CASE; THE STANDARD APPLICABLE HERE IS SUBJECTIVE BAD FAITH

The SEC contends that sanctions may be imposed under the court's inherent authority, under 28 U.S.C. § 1927, and under Rule 11, Fed. R. Civ. P. SEC Memo, pp. 15-17. A motion for sanctions under Rule 11 must be made separately from all other motions and served 21 days before it is filed, *Martens v. Thomann,* 273 F.3d 159, 178 (2nd Cir. 2001), and before the matter at issue has been decided. *In re Pennie & Edmonds LLP,* 323 F.3d 86, 89 (2nd Cir. 2003); *Langdon v. County of Columbia,* 321 F. Supp. 2d 481, 484-85 (N.D.N.Y. 2004). The SEC did not satisfy these requirements. Dunn Ex. 18 (Docket No. 262). Implicitly recognizing this defect, the SEC asserts that "the Court initiated the sanction process" by giving the SEC leave to move for sanctions. SEC Memo, p. 17. To satisfy Rule 11, the court must enter an order describing the specific conduct that appears to violate the rule and the standard by which that conduct will be judged. *Martens v. Thomann, supra,* 273 F.3d at 177-78; *Nuwesra v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 174 F.3d 87, 92 (2nd Cir. 1999). This Court's November 22 Decision did neither. Since neither the SEC nor the court complied with the procedural requirements set forth in Rule 11, sanctions may not be imposed under that rule.

In any event, as discussed in detail below, the SEC's motion is not based on the conduct addressed by this Court's November 22 Decision, which focused on the July 22nd telephone conversation between two SEC attorneys and Dunn and *subsequent* events leading up to the evidentiary hearing held on November 16.[7] Rather, the SEC tries to show that Dunn was aware

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7 The November 16 Hearing was limited to testimony concerning the July 22 telephone conversation. Dunn Ex. 2, p. 9; Dunn Ex. 6, pp. 2-3, 28, 42.

of the Annuity Agreement *before* this Court's July 7 Decision denying the SEC's motion to freeze the Trust's account. The reason underlying the SEC's shift in focus is evident: only conduct that *caused* the unfreezing of the Trust's assets under the July 7 Decision—*i.e.,* wrongful acts that occurred *before* July 7—could justify disgorgement of the funds disbursed by the Trust after July 7 and before the freeze was reimposed on August 3. *See* Point IV(A) below.

Whether considered under the court's inherent authority or under section 1927, in order to grant sanctions, the court must find that an attorney against whom sanctions are sought acted with "subjective bad faith" (SEC Memo, pp. 16-17), as shown by "clear and convincing evidence." *See* cases collected in *McMunn v. Memorial Sloan-Kettering Cancer Center,* 191 F. Supp. 2d 440, 445 (S.D.N.Y. 2002). The attorney's actions must be "so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Schlaifer Nance & Co., Inc. v. Estate of Warhol,* 194 F.3d 323, 336 (2nd Cir. 1999), *quoting Shafii v. British Airways, PLC,* 83 F.3d 566, 571 (2nd Cir. 1996); *Oliveri v. Thompson,* 803 F.2d 1265, 1272 (2nd Cir. 1986), *cert. denied,* 480 U.S. 918 (1987). The SEC's motion does not begin to meet this standard.

III

DUNN DID NOT ACT IN BAD FAITH

The Trust intervened in this action for the limited purpose of opposing the SEC's motion for a preliminary injunction continuing the freeze of the Trust's account. Dunn Ex. 7; Dkt. No. 39. Dunn's arguments for the Trust—which this Court sustained in its July 7 Decision—were that the Trust was properly formed in 2004 and was funded with legitimately obtained assets that were unquestionably the property of Lynn Smith, rather than ill-gotten gains of David

Smith, and that there was no evidence that David Smith controlled or had a beneficial interest in the assets of the Trust. Dunn Ex. 16, pp. 148-67 (Tr. pp. 616-35). While this Court found, in its November 22 Decision, that the Annuity Agreement created contract rights which were sufficient to show that Smith possessed a "substantial interest in the Trust" (Dunn Ex. 2, pp. 21-22), this Court did *not* find that Dunn *knew* of the existence of the Annuity Agreement prior to July 7, 2010, and the SEC has produced no evidence showing otherwise.

Nor is there any evidence showing that Dunn learned of the existence of the Annuity Agreement before July 21, when she received an e-mail from Wojeski attaching a fax he received from David Smith the day before (July 20), which included a summary of the terms of the Annuity Agreement. Dunn Ex. 19; Dkt No. 188-1. According to the SEC, on July 22, the very next day, Dunn *disclosed* the existence of the Annuity Agreement during a telephone conversation with two SEC attorneys, and within a few more days, Dunn and the SEC were in possession of the Agreement itself. These facts are not in dispute. By the time of the July 22nd telephone conversation, the SEC had already engaged a tax expert, had already prepared an amended complaint, and was in the process of preparing a motion seeking to re-freeze the Trust's account. The SEC does not even argue, must less demonstrate, that it would have done anything substantively different if Dunn had simply forwarded a copy of the e-mail she received from her client on July 21 at any time between its receipt and July 27, when Urbelis produced the Annuity Agreement.

After July 27, in opposing the SEC's second motion to freeze the Trust's account, Dunn may have made an error in judgment in emphasizing her different recollection of the July 22nd telephone conversation, which had the dual effects of exaggerating the importance of the

difference between her recollection and Stoelting's and putting her own credibility in issue. She could have argued that the difference in recollections was *not* important because (as discussed below) what caught the SEC's attention was not the word "agreement" as opposed to the word "trust," but the recognition of a linkage between "private annuity" and tax consequences. Equally important, Dunn still could have argued in good faith, as she did, that the SEC failed to act diligently and that, if it had, it could have discovered the Annuity Agreement sooner. Such an error in judgment is not "subjective bad faith."[8]

A. Dunn was unaware of the Annuity Agreement prior to this Court's July 7 Decision.

The SEC begins its discussion of the underlying facts by reciting what it describes as "The Court's Findings Warranting Sanctions," listing 15 such "findings." SEC Memo, pp. 3-4. Only three of the 15 findings refer to Dunn: that her testimony at the November 16 Hearing regarding the July 22nd telephone conversation and discovery of the Annuity Agreement "ha[s] been inconsistent and contradictory" (SEC Memo, p. 4, *quoting* the November 22 Decision at p. 10); that the "timing, sequence and character of these [post-July 22] events undermine the credibility of Dunn's assertions" (SEC Memo, p. 4, quoting the November 22 Decision at p. 11); and "Dunn thus possesses a financial interest in avoiding an order restraining the Trust's assets" (SEC Memo at 4, quoting the November 22 Decision at p. 13).

While this Court found that Dunn's testimony at the November 16 hearing was not credible, electing to accept the SEC's version of the July 22nd telephone conversation, it did *not*

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8 This Court's comparison of Dunn's due diligence and the SEC's (Dunn Ex. 2, pp. 18-19) is not pertinent to the present motion. If the SEC did not act reasonably, the Annuity Agreement was not "newly-discovered" evidence. As discussed above, however, subjective bad faith, not reasonableness, is the standard applicable to the SEC's motion for sanctions.

find that Dunn had any knowledge of the Annuity Agreement *before* the June 2010 hearing on the SEC's initial motion to freeze the Trust's assets or at any time prior to the filing of the July 7 Decision. Dunn Ex. 2, pp. 5-8. To the contrary, this Court found that despite her efforts, Dunn did not learn of the Agreement's existence until *after* July 7. Dunn Ex. 2, pp. 18-19.

But this finding will not support—indeed, contradicts—the SEC's contention that Dunn's supposed wrongdoing is responsible for the court's July 7 ruling that the SEC failed to establish a basis for freezing the assets of the Trust.

B. Whether Dunn said Private Annuity "Agreement" or Private Annuity "Trust" made no *material* difference in the SEC's conduct of the case.

The term "Private Annuity Trust" was used in the case *before* July 22nd. *See* Dunn Ex. 2, p. 10. A transmittal letter from David Smith to Thomas Urbelis dated August 4, 2004, described the Trust as a "Private Annuity Trust." Dunn Ex.21 (Dkt. No. 46-7), p. 2. The SEC questioned Urbelis about the letter at his deposition on June 1, 2010, but did not ask him what that term meant. Dunn Ex. 20 (Dkt No. 46-6), pp. 18-19. Failing to grasp the term's significance, the SEC *assumed* it was a mistake: "David Smith's one reference to a private annuity 'trust' was most reasonably understood to be either a misunderstanding or mischaracterization by him." Dunn Exs. 22 (Dkt. No. 142), p. 7; 6, pp. 39-40. The SEC did not explain when (or *why*) it made that assumption, nor what effort it made—before the June hearing—to learn what the term meant from Bruce Hoover or Daniel Blake, who were identified in Smith's letter as having "researched" the concept and "drawn" the Trust. Dunn Ex. 21.[9]

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9 This Court's conclusion that the reference to a "'private annuity trust' ['Private Annuity Trust' in the original] was reasonably read by the SEC as a reference to the Declaration of Trust" (Dunn Ex. 2, p. 15) is contradicted by the record. Dunn Exs. 22, p. 7; 6, pp. 39-40.

Stoelting testified that during the court conference that preceded the telephone call to Dunn, he—Stoelting—stated that while the SEC intended to offer evidence that the Smiths paid no gift tax upon the formation of the Trust, he did not provide Smith's letter or the Declaration of Trust to the SEC's tax expert until *after* July 7 (Dunn Ex. 6, p. 24), and never considered whether a gift tax return was required in connection with formation of a private annuity trust. Dunn Ex. 6, pp. 5, 16-17. As Dunn's research revealed, a properly constructed Private Annuity Trust would have the effect of *deferring* capital gains and gift taxes; accordingly, she said (during the telephone conference with this Court) that no gift tax was due. Dunn Ex. 6, p. 5. After the conference call, Stoelting called Dunn to ask *why* she said no gift tax was due. Whether Dunn said "Private Annuity *Agreement*" or "Private Annuity *Trust*," the result—raising the SEC's consciousness— would have been the same. As the SEC's tax expert explained to Stoelting, if there was an irrevocable trust and *also* an annuity agreement, no capital gains or gift tax would be due. Dunn Ex. 6, p. 11.[10]

This is not to say that the Annuity Agreement is not a relevant or important document in determining the relationship between the Smiths and the Trust, but only that the SEC would have recognized the significance of the connection between the characterization of the Trust as a private annuity trust and gift and capital gains taxes whether or not the word "agreement" was uttered. In any event, the SEC's course of conduct was unchanged. Even before the July 22nd telephone conversation took place, the SEC had engaged a tax expert, and was preparing to amend its complaint and to move to reimpose the asset freeze.

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10 This is the "plausible explanation" for the SEC's subsequent call to Urbelis that this Court found to be missing. Dunn Ex. 2, p. 10.

This Court's evaluation of Dunn's credibility (on the sole issue whether she said "private annuity trust" or "private annuity agreement") was not only unnecessary, but was based, at least in part, upon important factual errors. First, contrary to this Court's observation (Dunn Ex. 2, pp. 18-19), and as the SEC concedes (Dunn Ex. 3, p. 4, n. 1), Dunn *never* represented Urbelis, the original trustee of the Trust, and there is no reason to believe that the SEC had any less access to Urbelis than Dunn had.

Second, Dunn did not breach any ethical or statutory duty with respect to production of the July 21st e-mail from Wojeski (Dunn Ex. 2, pp. 11-12) because the SEC never served a discovery notice on Dunn or Wojeski until September 17, 2010, long *after* the preliminary injunction hearing (Dunn Ex. 25), the court's denial of a freeze of the Trust's account, and the July 22nd telephone conversation. Dunn Ex. 3, pp. 4-5. While this Court's January 11 Decision states that correction of these factual errors does *not* alter its conclusions regarding Dunn's credibility (Dunn Ex. 3, pp. 3-5), it is clear from the November 22 Decision that they played a significant role. *See* Dunn Ex. 2, pp. 12-13, 18-19. When a decision rests on multiple factors, some of which cannot be sustained, the conclusion cannot stand. *Mackler Productions, Inc. v. Cohen, supra,* 146 F.3d at 130-31.

C. The SEC's accusations against Dunn are unsupportable

The SEC contends that Dunn knew or must have known of the Annuity Agreement prior to July 7, 2010, offering a litany of pre- and post-July 7 events. SEC Memo, pp. 6-14. Fatally, the SEC's contentions do not rest on *evidence*, but on surmise, innuendo and distortion.

- SEC Memo, p. 5: "Dunn knew that the Trust was a 'private annuity trust' rather than a typical irrevocable trust even before filing her appearance on May 26, 2010."

Dunn's "knowledge" was initially based on how the Trust "was characterized" to her when first mentioned (Dunn Ex. 6, p. 61); more important, the Trust was described as a "Private Annuity Trust" in the August 4, 2004, letter from David Smith to Urbelis (Dunn Ex. 21). Since the SEC was aware of the letter prior to the June hearing, and examined Urbelis about it at his deposition (Dunn Ex. 20), it possessed exactly the same "knowledge." There is no basis for the SEC's suggestion that "private annuity trusts" and "irrevocable trusts" are mutually exclusive. One characteristic of a private annuity trust is that it *is* an irrevocable trust. As Stoelting testified, he learned (from the SEC's tax expert) that

> [Y]ou could have the irrevocable trust agreement like we had in our case and you would *also* have a separate annuity agreement, and that somehow the effect of the trust agreement with the annuity agreement would mean two things: One, that there would be no gift tax due because it was not a gift, it was a purchase and sale—in other words, a purchase by the trust and a sale by the donors; and the trust would also take the asset that's transferred at the donor's basis so you would avoid gift tax and you would avoid capital gains tax. Dunn Ex. 6, p. 11 (emphasis added).

- SEC Memo, p. 6: "Dunn, who had access to the three parties to the Annuity Agreement, also understood the significance of the private annuity trust."

The SEC's statement is pure innuendo, since the SEC fails to offer any factual information that Dunn acquired as a result of her supposed "access." The Court is left to speculate. Dunn's understanding of private annuity trusts resulted from the research she performed (Dunn Ex. 6, pp. 63-68) but, apparently, the SEC did not, until it heard *from Dunn* that no gift tax was required to be paid when the Trust was formed. The SEC's failure and Dunn's diligence provide no ground for sanctions. Moreover, there is no evidence that the SEC enjoyed any less "access" than Dunn had. Urbelis, for example, testified that he sent the SEC

"exactly what [he] sent to Dunn." Dunn Ex. 20, pp. 8-9. Like the SEC, Dunn had no reason to believe that the materials she received from Urbelis were incomplete.

- SEC Memo, p. 6: "Dunn also spoke with [Lynn] Smith and Urbelis, who were parties to the Annuity Agreement."

More innuendo. The SEC offers no evidence of anything Lynn Smith and Urbelis actually *said* to Dunn. The Court is left to speculate.

- SEC Memo, p. 6: "Dunn knew that the Declaration of Trust did not create a private annuity and she admitted that there 'had to be some other form or document' that created the private annuity."

Based on her research, Dunn learned that in order to create a private annuity trust that would satisfy the tax laws, several steps were required, one of which was *something* that established an annuity. Dunn did not *admit* that there "had to be some other form or document," as the SEC misrepresents her testimony. Rather, Dunn testified:

> *I did not know whether or not all of the steps that would be necessary to truly make it a private annuity trust had been undertaken.* I received in May, from Tom Urbelis, a declaration of trust. . . . That declaration of trust, that document that I was working from, . . . did not have a private annuity agreement attached. I wondered in my mind what form, if there was an annuity affiliated with it, what form that annuity would take. In my mind, I didn't know if it would take the form of some type of external document, such as something purchased from like a Metropolitan Life, some external annuity company, or if it would just be a certificate issued or if it would be a letter or an agreement. I had no idea. And *the thought crossed my mind that all of the steps might not have been taken to effectuate the entire plan,* step one, step two, step three. I was working from a declaration of trust.
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> I *expected* that there had to be some other form or document. I didn't know whether it would take the form of an agreement, of a certificate, of a letter or some other written

obligation, or if it would take the form of a purchase of an annuity from an external source. Dunn Ex. 6, pp. 62, 63 (emphasis added).[11]

Dunn's "expectation" that some other document would be necessary in order to satisfy the IRS is not *knowledge* that such a document existed in fact.

- SEC Memo, p. 6: "Dunn elicited testimony from Wojeski, [Lynn] Smith, Geoffrey Smith and John D'Aleo that was *tailored* to conceal the truth. Each witness used the *purposefully ambiguous* term 'transfer' to describe the Trust's purchase of stock from the Smiths, and the 'transfer' was never described as a purchase and sale." (Emphasis added.)

This loaded language, with no evidentiary support, simply begs the question. Unless Dunn *knew* of the Annuity Agreement, she did not "tailor" the testimony by using a "purposefully ambiguous" term.

- SEC Memo, pp. 10-11: "D'Aleo testified that he had *numerous conversations* with Ron Simons, the accountant at Piaker who helped David Smith create the Annuity Agreement. . . . It is *reasonable to assume* that Simons, *who was also accessible to Dunn* and Featherstonhaugh, told D'Aleo about the private annuity.

  "Dunn and Featherstonhaugh were both *in a position to know* that D'Aleo provided false and misleading testimony on behalf of their clients." (Emphasis added; citations omitted.)

Innuendo piled on conjecture. The SEC provides no evidence of anything that was said in the "numerous conversations" between D'Aleo and Simons, that Dunn had any access to or communicated with or received any information from Simons (or that the SEC had any *less*

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11 Geiger, the SEC's expert, had an even higher level of expectation. He told Stoelting, "[T]here must be an annuity agreement out there somewhere." Dunn Ex. 6, pp. 11, 55.

access to Simons), or that Dunn *knew* that D'Aleo's testimony was false—assuming that it was false, which the SEC has not shown.

- SEC Memo, p. 11: "Dunn's phone conversation with the SEC on July 22, 2010, occurred at a time when she and Wojeski *appear to have had discussions* about the Annuity Agreement. On July 20, 2010, Wojeski received a fax from David Smith and forwarded that fax in an e-mail to Dunn on July 21, 2010. . . . That e-mail included several documents containing the terms of the 'Private Annuity Contract' . . . . According to his time records, on July 20, 21 and 22, 2010, after receiving this e-mail, Wojeski spent several hours reviewing and researching private annuities. . . . Wojeski and Dunn *talked* on each of these three days." (Emphasis added; citations omitted.)

If, as the SEC suggests, Dunn and Wojeski already knew of the existence and significance of the Annuity Agreement *before* the June hearing, then *why* did Wojeski spend time on July 20 and 21 "reviewing and researching private annuities"? Even if Wojeski and Dunn "talked" on July 20, 21 and 22, there is no basis for the SEC's insinuation that Dunn and Wojeski "*appear* to have had discussions about the Annuity Agreement."

- SEC Memo, p. 12: "Dunn also concealed the e-mail and her knowledge when she received a document request from the SEC on July 27, 2010, and another document request served on the Trustee on September 17, 2010, asking for any and all documents regarding the Annuity Agreement. . . . Dunn continued to conceal the fax and the email until hours before the evidentiary hearing on November 16, 2010." (Citations omitted.)

Dunn did not "conceal" anything in response to the SEC's letter request dated July 27, 2010 (Dunn Ex. 23; Dkt. No. 134-2, p. 2). Dunn *refused* to produce *any* documents because, among other things, the SEC had never served a document request on the Trust (Dunn Ex. 24; Dkt. No. 134-2, pp. 4-5), as confirmed by the SEC's "First" document request dated

September 17, 2010, served nearly two months later (Dunn Ex. 25; Dkt. No. 261-5, pp. 10-14), and by this Court in ruling on the Trust's motion to reconsider its ruling re-freezing the Trust's account (Dunn Ex. 3, pp. 4-5). As Dunn explained, this Court's July 7 Decision ended the Trust's involvement in the action. Dunn Ex. 24.

If, as the SEC claims, Dunn *disclosed* the existence of the Annuity Agreement on July 22, that was hardly an act of concealment. While Dunn may have belatedly disclosed her receipt of the July 21 e-mail from Wojeski on November 15, 2010 (Dunn Ex. 26; Dkt. No. 188), that too was an act of disclosure, not concealment.

- SEC Memo, p. 12: "Dunn testified that she did not review the e-mail she received from Wojeski on July 21 and that she did not discuss the terms of the private annuity with her client prior to the phone call with the SEC on the afternoon of July 22, 2010. . . . Dunn further testified that Wojeski did not even mention receiving the e-mail from David Smith. . . . Wojeski's time records, however, undermine these assertions. In fact, as *the redactions on his time records appear to reflect conversations* between Dunn and Wojeski, *it appears that they discussed* the terms of the contract reflected in the email from David Smith on July 20, 21 and 22." (Citations omitted.)

Somehow, the SEC is able to infer the content of conversations which it infers took place from the fact that Wojeski's time records do *not* reflect them. This may be worthy of Lewis Carroll or Joseph Heller, but does not provide clear and convincing evidence of fraud.

- SEC Memo, p. 13: "Dunn claimed that it was a 'coincidence' that this indemnity agreement, in which the Smiths released Wojeski from liability for all claims, was drafted days after Wojeski and Dunn received documents concerning the 'Annuity Contract' and Wojeski spent time researching private annuities. . . ."

Dunn did *not* claim that the timing of her preparation of the Wojeski Indemnity Agreement (Dunn Ex. 27; Dkt. No. 261-5, p. 6) and her receipt of the e-mail from Wojeski was a "coincidence." Dunn prepared the Wojeski Indemnity Agreement in conjunction with a real estate closing on July 22; after being asked repeatedly whether the timing was a coincidence, Dunn said, "[T]he real estate closing was underway and the indemnification agreement was prepared and signed in conjunction with the real estate closing. That an e-mail was sent to me the day before that I didn't see at that time is of no moment, and *if you want to call it a coincidence*, I have no quibble with that." Dunn Ex. 6, pp. 74-77 (emphasis added).

- SEC Memo, p. 13: "Dunn also testified that she essentially copied the language from a 2008 release given to Urbelis . . . but the earlier release was far narrower in scope. The Wojeski release dated July 22, 2010, is broader and covers claims regarding 'obligations or distributions, and the potential tax consequences thereof, relating to said Trust, its donors and its beneficiaries, and any and all financial institutions, third parties and government and quasi government authorities.' . . . Contrary to Dunn's testimony at the November 16 hearing, the broader language appears specifically directed to issues that might arise related to discovery of the Annuity Agreement." (Citations omitted.)

The Wojeski Indemnity Agreement is *not* broader than the Urbelis Indemnity Agreement (Dunn Ex. 28; Dkt. No. 261-6, p. 16). The scope of the two agreements is identical. Both protect the trustee "of and from any and all claims, actions, compensation, obligations, tax assessments, liabilities, demands, contracts, agreements, judgments, at law and in equity, whether in existence now or which may accrue in the future, arising out of or related to the David L. Smith and Lynn A. Smith Irrevocable Trust dated August 2, 2004, *including but not limited to* . . ." (emphasis added). The *only* difference between the two indemnity agreements is the language that *follows* the phrase, "including but not limited to," which does not define the *scope* of the indemnity, but merely provides illustrations for the sake of clarity.

- SEC Memo, p. 13: "The fax to Wojeski on July 20 containing the annuity documents, and his email of those documents to Dunn on July 21, proves that the *earlier declarations* filed by Dunn and Wojeski were *intentionally* false." (Emphasis added.)

Once again, the SEC begs the question. The fax and e-mail may show that Dunn's and Wojeski's *subsequent* declarations that they learned of the existence of the Annuity Agreement on *July 27*—six days later—were incorrect. However, the fax and e-mail (which did not "*contain[]* the annuity documents"; Dunn Ex. 19; emphasis added) cannot show that Dunn's and Wojeski's "earlier declarations" were *known to be false when they were made.* The SEC offers *no* evidence that Dunn knew of the existence of the Annuity Agreement before July 21, 2010.

In any event, none of these post-July 7 events has any bearing on whether Dunn *knew* of the existence of the Annuity Agreement *before July 7, 2010.*

Stoelting was aware of the raid conducted by the FBI and the IRS in April 2010. Dunn Ex. 6, p. 42. Prior to the hearing in June, an unnamed SEC "colleague" requested files relating to the Trust; "all files relating to the trust were produced," but *not* the Annuity Agreement. Dunn Ex. 6, pp. 44-45. In October 2010, another inquiry was made and the SEC learned that "another file, not the trust files," contained a copy of the Annuity Agreement, which was then produced to the SEC. Dunn Ex. 6, pp. 42-43, 45. The SEC did not disclose that a copy of the Annuity Agreement was already in the possession of the IRS, in a file labelled, "Private Annuity," which was produced to the SEC in October, until November 12, 2010, just a few days before the November 16 hearing. Dunn Ex. 29; Dkt. No. 184. The parallels between the SEC's non-disclosures and those it ascribes to Dunn are uncanny.

IV

THE RELIEF SOUGHT BY THE SEC IS UNJUSTIFIED

A. Dunn's legal fees and expenses are not "ill-gotten" gains

Disgorgement is a *non-punitive* remedy whose purpose is to deprive wrongdoers from their "ill-gotten" gains. *S.E.C. v. Cavanagh*, 445 F.3d 105, 117 (2nd Cir. 2006); *C.F.T.C. v. Vartuli,* 228 F.3d 94, 113 (2nd Cir. 2000). "Because the remedy is remedial rather than punitive, the court may not order disgorgement above [the] amount" acquired through wrongdoing. *S.E.C. v. Cavanagh*, 445 F.3d at116, n. 25.[12]

The SEC seeks to recover amounts disbursed after July 7, which, as to Dunn, amounts to $101,096.40 in legal fees and expenses (SEC Ex. G, pp. 6-7). However, as shown above, there is no evidence to support the SEC's assertion that Dunn knew of or concealed the existence of Annuity Agreement *before July 7*; thus, Dunn received no "ill-gotten" gains, but only fees earned and expenses incurred before she learned of—and disclosed, according to the SEC—the Annuity Agreement. Accordingly, there is no basis for ordering Dunn to "disgorge" anything.

B. The SEC's claim for attorney's fees and expenses is undocumented and inflated

The SEC offers no evidence that the hours its attorneys claim to have expended were reasonable. Because SEC attorneys do not maintain contemporaneous billing records, the SEC provides only a generalized summary of tasks performed during several time periods and an

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12 The imposition of punitive sanctions may invoke the protections applicable in criminal cases: "in addition to notice and an opportunity to be heard, the right to a public trial, assistance of counsel, presumption of innocence, the privilege against self-incrimination, and the requirement of proof beyond a reasonable doubt." *Mackler Productions, Inc. v. Cohen, supra,* 146 F.3d at 128.

undetailed estimate of the time expended by the four attorneys who performed services during those periods. Mehraban Dec. ¶ 8. *Cf. Luessenhop v. Clinton County, N.Y.,* 558 F. Supp. 2d 247, 267-71 (N.D.N.Y. 2008), *aff'd,* 324 Fed. Appx. 125 (2009), and *Gollomp v. Spitzer,* 2009 WL 104194 at *1-2 (N.D.N.Y. Jan. 14, 2009), *aff'd,* 568 F.3d 355 (2nd Cir. 2009), where an Assistant Attorney General in the New York State Department of Law began keeping time records in order to be able to make a proper showing to the court.

It is impossible to determine from the SEC's broad strokes whether its attorneys' time was excessive, redundant or even necessary. As discussed above, prior to the July 22nd telephone call with Dunn, the SEC had already engaged a tax expert, prepared an amended complaint and prepared to file a second motion to restrain the Trust's account. It is also impossible to determine whether it was necessary to staff this matter with multiple senior attorneys. For example, the SEC's estimates show that four attorneys—three of whom are claimed to be worth $500 per hour, and two of whom were present as witnesses—devoted four hours each—a total of 16 hours (Mehraban Dec. ¶ 8)—to a hearing which "involved only three witnesses, lasted only two hours, and concerned only one brief telephone call." Dunn Ex. 31, p. 6, n. 2.

The SEC cites *Porzig v. Dresdner, Kleinwort, Benson, North America, LLC,* 497 F.3d 133, 141 (2nd Cir. 2007), for the general proposition that multiplying the "appropriate hourly rate" for each attorney by the "reasonable number of hours expended" yields a "presumptively reasonable fee award." SEC Memo, p. 19.[13] However, in addition to failing to show that its time

13 The decision in *Porzig v. Dresdner, Kleinwort, Benson, North America, LLC,* speaks of a "reasonable hourly rate," 497 F.3d at 141, not an "appropriate hourly rate." SEC Memo, p. 19.

was reasonable, the SEC fails to provide any evidence of a reasonable hourly rate. The SEC simply asks the court to apply the rates ($500 and $325 per hour; Mehraban Dec., ¶ 3) sought by the firm which represented the Trust at the November 16 hearing, in that firm's application to permit the Trust to pay its bill—an application which the SEC opposed as "unreasonable and excessive" (Dunn Ex. 30; Dkt. No. 248, pp. 6-7), and which this Court rejected (Dunn Ex. 31, Dkt. No. 277).

In *Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany and Albany County Board of Elections,* 522 F.3d 182 (2nd Cir. 2008), the Court of Appeals explained the "forum rule": the "presumptively reasonable rate" is the rate a reasonable, paying client would pay, *i.e.,* the "prevailing rate" in the community—the District—unless a reasonable, paying client would have paid higher rates to counsel from outside the District. 522 F.3d at 190-91.[14] The rates which the SEC seeks are far higher than the prevailing rates in this District. *See, e.g., B.R. v. Lake Placid Central School District,* 2009 WL 667453 at *2-4 (N.D.N.Y. March 10, 2009): $235 per hour, following the "very thorough analysis concerning rates for attorneys in this geographical area" in *Luessenhop v. Clinton County, N.Y., supra,* 558 F. Supp. 2d at 257, 267 (N.D.N.Y. 2008); *Aretakis v. Durivage,* 2009 WL 2567781 at *6-7 (N.D.N.Y. Aug. 17, 2009): $235 to $275 per hour; *Gollomp v. Spitzer, supra,* 2009 WL 104194 at *1-2: $210 per hour; *Overcash v. United Abstract Group, Inc.,* 549 F. Supp. 2d 193, 197 (N.D.N.Y. 2008): $250 per hour; *Hoblock v. Albany County Board of Elections,* 2006 WL 3248402 at *3 (N.D.N.Y. Nov. 7, 2006): $225 per for the most experienced attorney.

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14 The SEC does not attempt to show that rates higher than those prevailing in this District were necessary.

The SEC offers *no* support at all for the fees charged by its tax expert, Brit Geiger; the SEC states only that "Geiger's fees totaled $10,800." Mehraban Dec. ¶ 11. While the SEC contends that the "fraud" required hiring an expert (SEC Memo, p. 19), the SEC hired Geiger *before* the July 22nd telephone call. There is no description of the work Geiger performed, the time he devoted to that work, no explanation of the necessity or relation of Geiger's work to the underlying issues, no hourly rate or any other indication of the basis for the amount sought.

Finally, prior to the entry of an order awarding sanctions against Dunn, a hearing should be held to consider the extent to which she can afford to pay them. *Johnson v. N.Y. City Transit Authority,* 823 F.2d 31, 32-33 (2nd Cir. 1987); *Oliveri v. Thompson, supra,* 803 F.2d at 1281; *Faraci v. Hickey-Freeman Co., Inc.,* 607 F.2d 1025, 1028 (2nd Cir. 1979).

Conclusion

For the reasons appearing above, the SEC's motion for sanctions against Jill A. Dunn, Esq. should be denied in all respects.

March 21, 2011

Respectfully submitted,

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United States District Court,
N.D. New York.
John A. ARETAKIS, Plaintiff,
v.
Robert DURIVAGE, Timothy Nugent, Town of North Greenbush, and Robert D. Wells, Defendants.

Civ. No. 1:07-CV-1273 (RFT).
Aug. 17, 2009.

John A. Aretakis, Esq., New York, NY, pro se.

Napierski, Vandenburgh Law Firm, Thomas J. O'Connor, Esq., of Counsel, Albany, NY, for Defendant Timothy Nugent.

AMENDED MEMORANDUM-DECISION and ORDER

RANDOLPH F. TREECE, United States Magistrate Judge.

***1** On February 3, 2009, this Court issued a Memorandum-Decision and Order (MDO) granting, *inter alia*, Defendant Nugent's Motion to Dismiss and/or for Summary Judgment, and dismissing Aretakis's causes of action against him. Dkt. No. 69; *Aretakis v. Durivage*, 2009 WL 249781 (N.D.N.Y. Feb.3, 2009). In addition to seeking dismissal of this legal action against him, Nugent further requested that he be awarded attorneys' fees as a prevailing party pursuant to 42 U.S.C. § 1983 on the grounds that this lawsuit against him was "frivolous, unreasonable, and groundless and was continued by Plaintiff after it clearly became so." Dkt. No. 53, Def. Nugent's Notice of Mot., dated Mar. 14, 2008, at p. 2. The predicate for Nugent's Motion for Attorneys' Fees is firmly rooted in the legal principle of absolute prosecutorial immunity, insofar as Nugent was acting as a special prosecutor in the mater of the *State of New York v. John A. Aretakis*. *See generally* Dkt. No. 53. The MDO addressed in considerable detail Nugent's role as special prosecutor, the defense of absolute prosecutorial immunity, the multiple causes of action lodged against him, and whether Aretakis's causes of action against Nugent were frivolous, unreasonable, and groundless. *Aretakis v. Durivage*, 2009 WL 249781, at ----3, 15-19, 26-28, 31-32, & 33-34 (Parts I.C, II.E, II.G.1, II.H, & II.I). In addition to dismissing this legal action against Nugent, this Court found Nugent to be a prevailing party and declared that the Amended Complaint, as it related to Nugent, was frivolous, unreasonable, and groundless. The Court further directed Nugent to serve and file an application for reasonable attorneys' fees pursuant to 42 U.S.C. § 1988. *Id.* at *34. After a telephone conference held on March 2, 2009, this Court issued another Order establishing a timetable when Defendant Nugent's application for attorneys' fees and Aretakis's response thereto would be due. Dkt. No. 73, Text Order, dated Mar. 2, 2009.

Complying with the Court's directive, Defendant Nugent's Attorney, Thomas J. O'Connor, Esq., filed an Affidavit, dated March 6, 2009, along with detailed billing invoices, seeking an award of attorneys' fees in the amount of $24,741.39. Dkt. No. 76. Initially, it appeared that Aretakis did not want to pursue the remainder of this litigation and forwarded to the Court a Letter Motion, dated February 10, 2009, seeking to discontinue, with prejudice, this case. Dkt. No. 70. But, Aretakis's position rapidly changed upon Defendant Nugent's notice to the Court that he declined to waive or negotiate any portion of the attorneys' fees being sought, Dkt. No. 74, and, on April 13, 2009, Aretakis filed a Cross Motion for Reconsideration and Opposition to Nugent's Motion for Attorneys' Fees, Dkt. No. 79. In support of his Motion for Reconsideration, Aretakis complains that Nugent's Motion is procedurally defective, asks this Court to reconsider our finding of frivolousness, vacate the dismissal of his causes of action, and deny the Application for Attorneys' Fees. Likewise, Nugent filed a Response in Opposition to Aretakis's Motion for Reconsideration. Dkt. No. 80.

I. The Filing of Nugent's Application for Attorneys' Fees

***2** Aretakis's first challenge to Nugent's Application is procedural. He complains that Attorney O'Connor's Affidavit was not accompanied by a Notice of Motion as required by the Federal Rules of Civil Procedure, and furthermore, incorrectly lists the venue and court in the heading. Dkt. No. 79-2, John A. Aretakis's Aff., dated Apr. 8, 2009, at ¶¶ 5-9. Because of these defects, Aretakis proposes that this Court disregard Nugent's Application. *Id.* For the following reasons, the Court rejects Aretakis's plea petition.

What Aretakis fails to recognize is that Nugent's Notice of Motion for Attorneys' fees was filed on March 14, 2008, as an aspect of his Motion to Dismiss/Summary Judgment. Dkt. No. 53. After this Court found that Nugent was a prevailing party entitled to attorneys' fees, all that was required from Nugent was to complete his Application and identify those critical factors that would help the Court

determine what would constitute reasonable attorneys' fees under these circumstances. In completing this obligation, Nugent only had to delineate the hours spent defending this action, describe the legal tasks performed, and inform the Court of the proper hourly rates-functions that can be comfortably completed by an affidavit and exhibits. In this context, a Notice of Motion would be superfluous.

As a general proposition, notice of motions are required to advise a court and opposing party of the when, where, and what of a prospective motion, the most critical dates being the return date of the motion and when opposition is due. Prejudice would be visited upon a party if he did not receive proper notice of the motion. However, this is not an issue in this case. Aretakis was keenly aware when and how this Application would be filed. On March 2, 2009, the Court convened a telephone conference in which a timetable for the filing of and the opposition to this Application was clearly announced by the Court. That Conference was immediately followed by a Text Order stating that Nugent shall "file his application within fifteen (15) days of the date of this Order [and] Plaintiff Aretakis shall respond to Nugent's motion within twenty-one (21) days of being served with the Motion." Dkt. No. 73. Therefore, there was no element of surprise nor prejudice imposed upon Aretakis and he responded to the Application. And, any typographical error in the case heading is immaterial inasmuch as the parties should be fully aware that the issue of reasonable attorneys' fees falls squarely before this Court and no other.

The beauty of the Federal Rules of Civil Procedure is that they anticipate the fallibility of lawyers and the court and recognize the possibility of clerical errors. Congress granted courts the ability "to correct a clerical mistake or mistake arising from oversight whenever one is found in a judgment, order, or **other part of the record.**" FED. R. CIV. P. 60(a) (emphasis added). Moreover, the courts have the authority to "disregard all errors and defects that do not affect any party's substantial rights." FED. R. CIV. P. 61. The Second Circuit instructs us "never to exalt form over substance ... as long as [the technical pleading irregularities] neither undermine the purpose of notice pleading nor prejudice the adverse party. *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 343 (2d Cir.2006) (quoting *Phillips v. Girdich*, 408 F.3d 124, 128 (2d Cir.2005)).

***3** Here Nugent's faux pas are trivial, easily corrected, and just as easily ignored, inasmuch as Aretakis's substantial rights were neither derogated nor trampled upon. As will become quite evident below, Aretakis was able to contest this Application. Accordingly, this procedural challenge by Aretakis is declined.

II. Motion for Reconsideration

Next, Aretakis asks this Court to reconsider our determination that the Amended Complaint as it pertains to Nugent is frivolous, unreasonable, and groundless. In doing so, Aretakis replicates the host of arguments he previously proffered to the Court in opposition to Defendant Nugent's Motion to Dismiss and/or for Summary Judgment. Dkt. No. 79 at ¶ 11(a)-(g). Nugent highlights that Aretakis's Motion for Reconsideration is untimely and lacks legal support. Dkt. No. 80.

This District's Local Rule 7.1(g) mandates that "unless Fed.R.Civ.P. 60 otherwise governs, a party may file and serve a motion for reconsideration or reargument no later than **TEN CALENDAR DAYS** after the entry of the challenged judgment, order, or decree." (emphasis in original). When applying this Local Rule to our case, Aretakis's Motion should have been filed on or before February 13, 2009, and not April 13, 2009.[FN1] Nevertheless, based upon the March 2nd telephone conference, the Court anticipated, as should have Nugent, that Aretakis would file a Motion for Reconsideration in tandem with his opposition to the Application for Attorneys' Fees, and thus his failure to fully comply with the mandates of our Local Rules is thus waived.

> FN1. The MDO was filed on February 3, 2009, Dkt. No. 69, and this Motion was filed on April 13, 2009, Dkt. No. 79. Even though the Court is accepting the belated filing of the Cross Motion for Reconsideration, as required by the Local Rules, it has not gone unnoticed that Aretakis even failed to file the Motion timely pursuant to the March 2, 2009 Order. Dkt. No. 73.

Generally, reconsideration of a court's prior decision is warranted only where the moving party demonstrates "(1) an intervening change of controlling law; (2) the availability of new evidence; and/or (3) the need to correct a clear error or prevent manifest injustice." *Caidor v. Harrington*, 2009 WL 799954, at *1 (N.D.N.Y. Mar.24, 2009) (Suddaby, J.) (quoting *United States v. Sanchez*, 35 F.3d 673, 677 (2d Cir.), *cert. denied*, 514 U.S. 1038, 115 S.Ct. 1404, 131 L.Ed.2d 291 (1995); *Bartz v. Agway, Inc.*, 849 F.Supp. 166, 167 (N.D.N.Y.1994) (McAvoy, C.J.) (citing *Wilson v. Consol. Rail Corp.*, 815 F.Supp. 585 (N.D.N.Y.1993); *McLaughlin v. New York Governor's Office of Employee Relations*, 784 F.Supp. 961, 965

(N.D.N.Y.1992)); *see also Delaney v. Selsky*, 899 F.Supp. 923, 925 (N.D.N.Y.1995) (citing *Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983)). Thus, the moving party must "point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995) (citations omitted).

"[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Id.* at 257. "[A]ny litigant considering bringing a motion for reconsideration must evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant." *Gaston v. Coughlin*, 102 F.Supp.2d 81, 83 (N.D.N.Y.2000) (citation omitted). Of significance here, "[a] motion for reconsideration is not an opportunity for a losing party to advance new arguments to supplant those that failed in the prior briefing of the issue," *Fredericks v. Chemipal, Ltd.*, 2007 WL 1975441, at *1 (S.D.N.Y. July 6, 2007). In other words, it is not an opportunity to take a "second bite at the apple." *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir.1998). *See In re Health Mgmt. Sys., Inc. Sec. Litig.*, 113 F.Supp.2d 613, 614 (S.D.N.Y.2000) ("[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.") (quotation marks and citations omitted); *In re Bird*, 222 B.R. 229, 235 (Bankr.S.D.N.Y.1998) ("A motion for reconsideration is not a forum for new theories or for plugging the gaps of a lost motion with additional matters.") (internal quotation marks and citation omitted).

***4** Aretakis's Motion fails to allege any of the above proper grounds for reconsideration. Instead, Aretakis merely attempts to relitigate the Court's MDO, without providing any data or law that would have this Court re-evaluate or alter the decision that was rendered. All that he has accomplished is to reiterate each and every argument he previously made in opposition to Nugent's Motion to Dismiss, and only adds that those causes of actions were made with "good faith allegations." Although it is not a basis for reconsideration, but now that he has interjected this element of "good faith" into the discussion in order to countermand the Court's finding that his lawsuit against Nugent was frivolous, unreasonable, and groundless, the Court takes this opportunity to highlight the error in his reasoning. It is not his belief that he had a "good faith" basis for making allegations against Nugent that is controlling; what is controlling is that he had *no legal basis* at all to pursue his action against Nugent, the special prosecutor at his criminal trial.

It is not incumbent upon this Court to recapitulate the comprehensive analysis of the prosecutorial absolute immunity doctrine and its applicability to the record before the Court, and we decline to do so. *See Aretakis v. Durivage*, 2009 WL 249781, at ----3, 15-19, 26-28, 31-32, & 33-34 (Parts I.C, II.E, II.G.1, II.H, & II.I). Nonetheless, the Court is compelled to spotlight what appears to be profoundly lost upon Aretakis. In addition to the entrenched and seminal nature of the absolute immunity doctrine, Aretakis was forewarned by Nugent and then the Court that pursuing this action against Nugent, in the manner that he did, was fraught with great peril to him. First, the pleading of the affirmative defense of a prosecutor's absolute immunity should have given Aretakis great pause in pursuing this action against Nugent, or at least sparked some curiosity as to how this affirmative defense could impact his case. And, at least as early as November 19, 2007, and prior to any motions, Nugent served a letter upon Aretakis citing, *inter alia,* numerous precedents, including *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) for the proposition that he enjoyed absolute immunity in this case. *See* Dkt. No. 76, Ex. A, Nugent Lt., dated Nov. 19, 2007, at p. 2. Even though it was not recorded, during the Rule 16 Conference held on January 10, 2008, there was an extensive debate as to the utility of pursuing this lawsuit against Nugent in light of the long-held doctrine of absolute immunity for prosecutors. So it should not have come as a surprise to Aretakis that his causes of action against Nugent were treading in deep and troubling waters.

Actually, then Chief Judge Learned Hand held more than "[a] half century ago" that prosecutors were immune from liability in § 1983 actions. *Van De Kamp v. Goldstein*, --- U.S. ----, 129 S.Ct. 855, 859, 172 L.Ed.2d 706 (2009) (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir.1949)). And more than forty years ago, the Supreme Court made it crystal clear when establishing its functional analysis test that a prosecutor is absolutely immune from civil prosecution even if he used false testimony at trial as long as he was acting in his quasi-judicial advocacy role. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128. This is clearly established, "hornbook" common law. The fatalism in continuing to argue in support of his claims that Nugent used false testimony at trial, in the face of the long standing *Imbler* decision which

was brought to Aretakis's attention long before any motions were filed against him, is beyond disputation.

***5** *Imbler* also instructs litigants that a prosecutor is immune for initiating and prosecuting a case, which may entail preparation such as obtaining, reviewing and evaluating testimonial evidence. 424 U.S. at 431 n. 33. Now the Court agrees with Aretakis that, generally speaking, there is no bright line demarcation between quasi-judicial functions as opposed to investigative and administrative, *see Powers v. Coe*, 728 F.2d 97, 104 (2d Cir.1984), however that problem never bedeviled our case. The investigation and the filing of criminal complaints in this matter were completed before Nugent was appointed special prosecutor and thus he never participated in an investigatory role similar to law enforcement. It is reasonably expected, and goes without saying, that a prosecutor would directly or indirectly attempt to determine the nature of an eyewitness's testimony before trial. To do otherwise would fall woefully short of the objective norms of any litigator. Hence, such an attempt would not fall outside a common understanding of quasi-judicial function. *Imbler*, 424 U.S. at 431 n. 33 These facts were well known by all parties prior to the commencement of this action and it is inexcusable to ignore these facts and principles when contemplating a lawsuit against a prosecutor.

Further, it has been well-settled law within this Circuit for more than twenty-five years that a prosecutor's ability to offer a plea bargain is firmly embedded within the absolute immunity doctrine. *Powers v. Coe*, 728 F.2d at 103-04; *Taylor v. Kavanagh*, 640 F.2d 450, 453 (2d Cir.1981); *see also Lawson v. Abrams*, 863 F.2d 260, 263 (2d Cir.1988) (noting that *Powers* is settled law of the Second Circuit). Common sense would dictate that result as well. To withhold a plea bargain, as Aretakis complains Nugent did in his criminal case, falls unequivocally within Nugent's quasi-judicial function as a prosecutor, which is, once again, secured by absolute immunity. To argue otherwise in the face of this well-settled law is mere sophistry.

"Yet, try as he might," to argue that an out of court conspiracy may have occurred in an attempt to avoid the defense of absolute prosecutorial immunity was poorly conceived and not supported by the record one iota. *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1148 (2d Cir.1995); *Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir.1987). As an affront to the clear and unencumbered record presented to the Court, Aretakis still clings to conclusions that defy any reasonable inference that could inure to his benefit. For example, Aretakis's continued persistence in arguing that a telephone conference between Attorney Robert Roche, who was representing Nugent on a civil case, and the trial judge was a part of a grand conspiracy designed by Nugent, when the record clearly evinces that the criminal trial judge categorically denied that anything was said about Aretakis's criminal trial or indecorously against Aretakis, is manifestly facetious and lends credence to the Court's finding of frivolousness and groundlessness.

***6** Having given due consideration to the previous Order, there is nothing plausibly proffered by Plaintiff that would deter us from adhering to our previous finding that

> Nugent's task in support of his application for reasonable attorney fees from Aretakis is to show that the action, as to him was frivolous, unreasonable, groundless, or that the plaintiff continued to litigate after it became obviously so. We find that Nugent has met this burden. It is seminal law that a prosecutor acting within his quasi-judicial capacity is entitled to absolute immunity. Not only is this apparent from facts of the case, but the Court made this rule of law evidently clear during the Rule 16 Conference. In order to frame a set of circumstances outside the contours of absolute immunity, Aretakis unreasonably contorted the boundaries of Nugent's actions in prosecuting this matter so that they may fall within an administrative or investigatory function. Both Aretakis and Cholakis, who both claim to be experienced lawyers, made unfounded, even scurrilous, accusations about Nugent's conduct and proposed that Nugent's *raison d'etre* was to uphold the Catholic Church's conspiracy against him and to injure him. Without any foundation whatsoever, especially in the face of Judge Toomey's on-the-record denial that Attorney Roche made any negative comments about Aretakis, he nonetheless cleaved to the spurious supposition that Roche was assigned the telephone task by Nugent in order to prejudice Aretakis. Not one iota of fact was alleged to support this specious argument, only a mere coincidence.
>
> Under these circumstances, we find that Nugent is entitled to reasonable attorney fees. He is directed to submit a more detailed application for attorney fees and costs.
>
> *Aretakis v. Durivage*, 2009 WL 249781, at *33.

Accordingly, Aretakis's Motion for Reconsideration is denied.

III. Reasonable Attorneys' Fees

Surprisingly, Aretakis does not confront Nugent's Application for Attorneys' Fees as being excessive or applying an unreasonable presumptive hourly rate. Rather, he notes that other federal courts have determined that a defendant prosecutor was entitled to absolute immunity without imposing attorneys' fees on the plaintiff,[FN2] and further importunes the Court to consider his limited financial resources and the financial hardship that would be imposed upon him should the requested fees be approved. Dkt. No. 79 at ¶ 12(b) & (c).

FN2. This postulation was rendered without the benefit of legal citation.

Since the Court has already found Nugent to be the prevailing party and entitled to attorneys' fees, *Aretakis*, 2009 WL 249781, at *33, we must next determine a presumptively reasonable rate. Recently, courts within the Northern District have found the reasonable hourly rate to be between $235 and $275. *B.R. v. Lake Placid Central Sch. Dist.*, 2009 WL 667453, at *3-4 (N.D.N.Y. Mar.10, 2009) (Sharpe, J.) (citing *Lussenhop v. Clinton County*, 558 F.Supp.2d 247, 266-67 (N.D.N.Y.2008) for holding the hourly rate of $235/hr was reasonable in this District) (Treece, M.J.)); *Martinez v. Thompson*, 2008 WL 5157395, at *13-14 (N.D.N.Y. Dec.8, 2008) (Peebles, M.J.) ($275/hr); *Overcash v. United Abstract Group, Inc.*, 549 F.Supp.2d 193, 197 (N.D.N.Y.2008) (Sharpe, J.) ($250/hr). However, Nugent's Attorneys are seeking rates far below those already found to be reasonable within this District: (a) Partners-$145/hr; (b) Associates-$125/hr; and (c) Paralegals-$80/hr. Dkt. No. 76 at ¶ 26. Accepting that these rates would be the type that a reasonable paying client would be willing to pay, the Court will next multiply the number of hours expended by Nugents' Attorneys.

*7 Attorney O'Connor, who has been practicing law and litigating for more than four decades, is the partner seeking the hourly rate of $145. Assisting O'Connor at various times throughout this litigation were his associates Asa Neff, Scott Peterson, and Shawn Nash, who are billed at the rate of $125/hr. Lastly, Star F. Donovan, a paralegal, briefly aided O'Connor in this matter. *See* Dkt. No. 76 at ¶¶ 26-31, Exs. B-G. The breakdown on the time expended is reflected in the chart below:

NAME	RATE	HOURS	FEES	TOTAL
O'Connor	145.00	158	$ 22,910.00	
Neff	125.00	11.8	1,475.00	
Peterson	125.00	.20	25.00	
Nash	125.00	.60	75.00	
Donovan	80.00	.50	40.00	
Total Fee			**$ 24,525.00**	**$ 24,525.00**
Total Expenses				**216.39**
Total Fee and Expenses	*$ 24,741.39*			

The Court finds that all of the hours expended by Nugent's attorneys are well documented and reasonable. Accordingly, the Court awards the Defendant Nugent the sum of $24,741.39.[FN3]

FN3. Initially Nugent forswore any effort to recover attorneys' fees for the filing of this current Application. Dkt. No. 76 at ¶ 29 ("We are requesting neither compensation nor reimbursement for the preparation of this application."). However, because Nugent had to respond to Aretakis's opposition and Motion for Reconsideration, Nugent has changed his mind and now wishes to be compensated for preparing a response to Aretakis's Motion for Reconsideration. Dkt. No. 80-2, Tom J. O'Connor, Esq., Aff., dated Apr. 17, 2009, at ¶ 9. Based upon Nugent's view that even the Motion for Reconsideration is frivolous, unreasonable, and groundless, he argues that consequently that he is entitled to costs and attorneys' fees in the amount of $3,003.52. With the exception of legal citations regarding the filing of motions for reconsideration and a brief discussion thereof, Nugent has essentially repeated his stance already reflected in initial Application for Attorneys' Fees. Therefore, in many

> respects, Nugent's positions taken in his Memorandum of Law in Opposition to Aretakis's Motion for Reconsideration are redundant, and this Court, in the interest of justice, exercises its discretion to decline granting this additional amount.

Based upon all of the foregoing, it is hereby

ORDERED, that Aretakis's Motion for Reconsideration, Dkt. No. 79, is **denied;** and it is further

ORDERED, that Defendant Nugent's Motion for Attorneys' Fees and Cost, Dkt. No. 76, is **granted.** Nugent's attorneys are awarded fees in the amount of $24,525.00 and costs in the amount of $216.39.

IT IS SO ORDERED.

N.D.N.Y.,2009.
Aretakis v. Durivage
Slip Copy, 2009 WL 2567781 (N.D.N.Y.)

END OF DOCUMENT

Slip Copy, 2009 WL 667453 (N.D.N.Y.)
(Cite as: 2009 WL 667453 (N.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.
B.R., a child with a disability, individually and by his parent and next friend, R.R., Plaintiffs,
v.
LAKE PLACID CENTRAL SCHOOL DISTRICT, Defendant.

No. 07-CV-1195.
March 10, 2009.

West KeySummary**Schools 345 155.5(5)**

345 Schools
345II Public Schools
345II(L) Pupils
345k155.5 Handicapped Children, Proceedings to Enforce Rights
345k155.5(5) k. Judgment and Relief; Damages, Injunction, and Costs. Most Cited Cases

A student was entitled to attorney fees after obtaining relief which was more favorable than the school district's Offer of Settlement, on his claim under the Individuals with Disabilities Education Act. The Consent Decree gave the parents more input on the student's care than the Offer of Settlement provided. The Offer of Settlement provided that the district would maintain an expert with knowledge of bi-polar disorder, but the Consent Decree gave the parents input in the selection of this expert. The Offer of Settlement provided for a six-hour school day, but the Consent Decree guaranteed that the student would start and end his school day at the same time as non-disabled students in school. Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.

Office of Andrew K. Cuddy, Jason H. Sterne, Esq., Williamsville, NY, for the Plaintiff.

Stafford, Owens Law Firm, Thomas W. Plimpton, Esq., Plattsburgh, NY, for the defendant.

DECISION AND ORDER

GARY L. SHARPE, District Judge.

***1** Following the execution of an agreement with the Lake Placid Central School District ("the School District"), B.R., through his parent R.R. (collectively referred as the "Plaintiffs"), filed this motion for summary judgment seeking attorneys fees pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq.[FN1] The School District responded with its own motion for summary judgment. After reviewing the parties' motions, briefs in support thereof, responses, and the record on the matter, the court grants the plaintiffs' motion and denies the School District's motion.

FN1. B.R. is a child with a disability within the meaning of the IDEA.

BACKGROUND

The following relevant facts are undisputed. On July 24, 2006, the plaintiffs initiated an administrative proceeding requesting a Demand for a Due Process Hearing (the "hearing") because they were dissatisfied with the Individualized Education Plan ("IEP") B.R. was receiving at the School District. (Ex. A to Cuddy's Affirmation) More than ten days prior to the commencement of the hearing, the School District submitted an Offer of Settlement. (Ex. B to Cuddy's Affirmation, Offer of Settlement) However, the plaintiffs did not respond to such offer. (School District's Memorandum of Law at p. 1.) The plaintiffs proceeded to the hearing and the parties, on September 6, 2006, settled the matter signing a "Consent Decree." (Ex. B to Cuddy's Affirmation, Consent Decree)

On November 9, 2008, the plaintiffs filed the instant action seeking attorneys fees. The School District responded with its own motion for summary judgment arguing, among other things, that plaintiffs are not entitled to recover attorneys fees due to their failure to comply with the Local Rule 7.1 and for not being the prevailing party under the IDEA.

DISCUSSION

To defeat a summary judgment motion, the nonmoving party must show sufficient evidence to create a genuine issue of material fact. *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir.2004). The nonmoving party must provide more than a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In other words, the party must present sufficient evidence to permit a reasonable juror to find in its favor, but the nonmoving party cannot simply rely on unsupported allegations in attempting to survive a summary

judgment motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).[FN2]

> FN2. The court notes that within the Second Circuit, many sister district courts recognize that "IDEA actions in federal court generally are resolved by examination of the administrative record in a summary judgment procedural posture." *J.R. v. Board of Educ. of the City of Rye*, 345 F.Supp.2d 386, 394 (S.D.N.Y.2004); *see also A.S. ex rel. Mr. and Mrs. S v. Norwalk Bd. of Educ.*, 183 F.Supp.2d 534, 539 (D.Conn.2002); and *Wall v. Mattituck-Cutchogue Sch. Dist.*, 945 F.Supp. 501, 508 (E.D.N.Y.1996).

"The IDEA's central mandate is to provide disabled students with a free appropriate public education in the least restrictive environment suitable for their needs." *Cave v. East Meadow Union Free School Dist.*, 514 F.3d 240, 245 (2d Cir.2008) (quotations and citation omitted). "Under the educational scheme of the IDEA, parents of students with disabling conditions are guaranteed both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Id.* (parenthesis omitted). "Parents are specifically entitled to request a due process hearing in order to present complaints as to any matter relating to the identification, evaluation, or educational placement of the child, or to the provision of a free appropriate public education." *Id.* (citations omitted). "New York has opted for a two-tier administrative system for review of [Individual Education Plans]." *Id.* "First, an impartial hearing officer is selected from a list of certified officers and appointed by the local board of education or the competent state agency to conduct the initial hearing and issue a written decision." *Id.* That decision can then be appealed to a state review officer of the New York Education Department. *Id.*

***2** The "IDEA expressly provides that any party aggrieved by the final state decision shall have the right to bring a civil action challenging the decision in any State court of competent jurisdiction or in a district court of the United States." *Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 732 (2d Cir.2007) (quotations and citation omitted). A district court may in its discretion award attorneys fees to a prevailing party in an IDEA proceeding or action. 20 U.S.C. § 1415(i)(3)(B)(i)(I); see also *Mr. B. v. East Granby Bd. of Educ.*, 201 F.App'x. 834, *2 (2d Cir.2006). Under the IDEA, attorneys fees may not be awarded if the court determines that the relief obtained by the parents is not more favorable to the parents than the offer of settlement. 20 U.S.C. § 1415(i)(3)(D)(III). The IDEA also indicates attorneys fees should be reduced if the court finds that the parent has unreasonably protracted the final resolution of the controversy, the hourly rate unreasonably exceeds the applicable prevailing rate, or time expended is excessive. 20 U.S.C. § 1415(i)(3)(F)(i)-(iii).

The parties' disputes are: (1) whether the plaintiffs are prevailing parties within the meaning of the IDEA for the purpose of recovering attorneys' fees; and (2) the amount of attorneys fees, if any.[FN3]

> FN3. The court notes that the School District asked the court to dismiss the plaintiffs' motion under the IDEA because they failed to comply with Local Rule 7.1(a)(3), which requires that a statement of material facts accompanies a typical summary judgment motion. The court, however, will deny such request because the statement of material facts will not aid the court in its independent review of the record in deciding whether plaintiffs are the prevailing party and, if so, whether they are entitled to attorneys fees. *See Student X v. New York City Dept. of Educ.*, 2008 WL 4890440, at *11 (E.D.N.Y.2008) (citing *Lillbask ex rel. Mauclaire v. State of Conn.*, 397 F.3d 77, 83 n. 3 (2d Cir.2005).

Prevailing Party

The Second Circuit has recognized that an individual can be the prevailing party by virtue of having obtained IDEA relief through a settlement or consent decree. *See A.R. v. N.Y.C. Dep't of Educ.*, 407 F.3d 65, 78 (2d Cir.2005). In *A.R.*, the Second Circuit stated dispositive administrative orders incorporating the terms of settlements affords a party prevailing status. *Id.* at 77. The Court noted, "[w]e think that [administrative consent decrees] evidence the same combination of administrative imprimatur, change in the legal relationship of the parties, and judicial enforceability that renders the winner on the merits in an [Impartial Hearing Officer ("IHO")] decision .... a "prevailing party" under the IDEA [ ]." *Id.*

Here, the parties proceeded to a hearing before an IHO and agreed to, and signed, a Consent Decree which incorporated almost every item plaintiffs requested in their demand for a due process hearing. The IHO signed and ordered the decree. This gave rise to the "combination of administrative imprimatur, a change in the legal relationship of the parties, and judicial enforceability" rendering plaintiffs the prevailing party status for IDEA purposes. *Id; see also V.G. v. Auburn Enlarged Cent. School Dist.*, 2008 WL 5191703 (N.D.N.Y.2008).

Attorneys Fees

With respect to the issue of attorneys fees, the School District's main contention is that plaintiffs are not entitled to attorneys fees because plaintiffs obtained relief which is not more favorable than the School District's offer of settlement. The court disagrees.

The Consent Decree gives the parents more input on B.R.'s care than the Offer of Settlement provides. For example, Paragraph 1 of the Offer of Settlement provides for an evaluation by the Traumatic Brain Injury Center ("TBI"). (Ex. E to Cuddy's Affirmation, Offer of Settlement at ¶ 1) However, the Consent Decree adds that the parents also have the right to request an independent evaluation if they disagree with TBI's report or recommendation. (Ex. B to Cuddy's Affirmation, Consent Decree at ¶ 12) Paragraph 2 of the Offer of Settlement provides that the district shall maintain an expert with knowledge of bi-polar disorder, but the Consent Decree gives the parents input in the selection of this expert, i.e., by mutual agreement. (Ex. E to Cuddy's Affirmation, Offer of Settlement at ¶ 2 and Ex. B to Cuddy's Affirmation, Consent Decree at ¶ 2) Paragraph 3 of the Offer of Settlement indicates the district will incorporate the results of the expert's evaluation, but the Consent Decree gives the expert, who the parents agreed upon, an opportunity to participate more directly in the implementation of his evaluations. (Ex. E to Cuddy's Affirmation, Offer of Settlement at ¶ 3 and Ex. B to Cuddy's Affirmation, Consent Decree at ¶ 2) The Offer of Settlement provides for a six-hour school day, but the Consent Decree guarantees B.R. will start and end his school day at the same time as non-disabled students in school. (Ex. E to Cuddy's Affirmation, Offer of Settlement at ¶ 10 and Ex. B to Cuddy's Affirmation, Consent Decree at ¶ 7)

***3** The Consent Decree is also more specific than the Offer of Settlement regarding the benefits for B.R. For example, paragraph 4 of the Offer of Settlement provides for an unspecified amount of compensatory education, but the Consent Decree sets forth the exact number of compensatory sessions B.R. should receive. (Ex. E to Cuddy's Affirmation, Offer of Settlement at ¶ 4 and Ex. B to Cuddy's Affirmation, Consent Decree at ¶ 11) Paragraph 9 of the Offer of Settlement vaguely states the School District shall continue supporting B.R.'s social development and integration, and shall seek opportunities to allow integrated learning, but the Consent Decree specifically refers to those integration activities stating "interaction with his peers, including homeroom, lunch and recess." (Ex. E to Cuddy's Affirmation, Offer of Settlement at ¶ 9 and Ex. B to Cuddy's Affirmation, Consent Decree at ¶ 1) "Push-in social skills services shall be provided to support and address socialization goals during these times." (Ex. B to Cuddy's Affirmation, Consent Decree at ¶ 1) The Offer of Settlement provides no information regarding physical restraint of B.R. (undoubtedly a very important issue for B.R. and his parents), but the Consent Decree provides detailed instructions with respect to this issue. (Ex. B to Cuddy's Affirmation, Consent Decree at ¶ 6)

Viewing the Offer of Settlement and the Consent Decree in their entirety, the court determines plaintiffs obtained substantially more favorable relief with the Consent Decree. The School District contends plaintiffs failed in their primary goal which, according to the School District, was to revamp B.R.'s program in its entirety. However, this argument misses the mark. The record shows that out of the seventeen points the plaintiffs sought in their demand for a due process hearing, they obtained fifteen in the Consent Decree. The School District also vaguely contends plaintiffs were already receiving the benefits they obtained in the Consent Decree. However, as the plaintiffs noted, if this was the case, the School District could have asked for a dismissal at the hearing.

Anticipating the logical rejection of its arguments against a grant of attorneys fees, the School District contends attorneys fees should be reduced. The School District vaguely contends the plaintiffs protracted the resolution of the controversy, thus, the fees should be reduced. In support of this argument, the School Dis-

trict states that failing to settle constitutes protraction. But, as the plaintiffs note, this case was settled, as manifested by the Consent Decree. The School District's argument for a reduction of attorneys fees based on the plaintiffs' protraction of the case lacks merit. [FN4]

> FN4. The court rejects the School District's argument that it is entitled to costs pursuant to Federal Rule of Civil Procedure 68 because plaintiffs refused to settle this matter in a manner which the School District considers appropriate. *See* School District's brief at 24. In this case, plaintiffs, upon the conclusion of the administrative proceedings, were entitled to file a motion for attorneys fees pursuant to the IDEA.

Without much explanation, clarity or case law, the School District also states attorneys fees should be limited to the hourly rate of $210 instead of the $250 hourly rate the plaintiffs' attorneys seek. This rate was established one year ago by this district in *J.S. by D.S. v. Crown Point Central Sch. Dist.*, 2007 WL 475418 (N.D.N.Y.2007). The court, however, declines to follow that case for purposes of setting a reasonable rate in this case and, instead, will follow the most recent case of *Luessenhop v. Clinton County N.Y.*, 558 F.Supp.2d 247 (N.D.N.Y.2008). In *Luessenhop,* Magistrate Judge Treece, in a very thorough analysis concerning rates for attorneys fees in this geographical area [FN5] for these types of cases, observed:

> FN5. In the Second Circuit, it is presumed "that a reasonable, paying client would in most cases hire counsel whose rates are consistent with those charged locally." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections*, 522 F.3d 182, 191 (2d Cir.2008).

> ***4** [B]ased upon the rates currently set by the Court, the billing rates of civil rights litigators in this geographical district, and our experiences with the hourly rate a reasonable, paying client is willing to pay, and being further mindful of the relevant factors and that the rate should be sufficient to attract competent counsel without generating a windfall, we find the reasonable hourly rate to be $235.
> *Luessenhop*, 558 F.Supp.2d at 266-67. In arriving at this reasonable hourly rate, this court, as in *Luessenhop,* adheres to the directives of the Second Circuit and takes into consideration several factors which include: (1) the complexity and difficulty of the case, (2) the available expertise and capacity of the client's other counsel, (3) the resources required to prosecute the case effectively, (4) the timing demands of the case, and (5) whether an attorney might have an interest in achieving the ends of the litigation. *Arbor Hill*, 522 F.3d at 184.

In addition, the court considers factors like: (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 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. *Id.* at 186 n. 3 (citation omitted).

In exercising its considerable discretion and considering the relevant factors mentioned above, and keeping in mind that plaintiffs' team of counsel includes a very experienced attorney in the field, plus the fact that the case demanded out of town travel, and the attendance and preparation for certain administrative proceedings, the complexity of IDEA cases as well as the fact that *reasonable paying clients wish to spend the minimum necessary to litigate the case effectively and could have the opportunity to negotiate the fees with their attorneys, Id.* at 184 (emphasis added), the court, as in *Luessenhop,* finds that an hourly rate of $235 is reasonable in this case.

Multiplying the hourly rate of $235 by the number of hours reasonably expended by the two attorneys in this case (70.6 hours as indicated by plaintiffs' attorneys in their Exhibit D),[FN6] and not being able to discern that this number of hours is excessive despite the School Districts' vague assertions of unreasonableness due to the plaintiffs' counsels' request of B.R.'s records, and keeping in mind the Second Circuit's caution that "attorney fees are to be awarded with an eye to moderation, seeking to avoid either the reality or the appearance of awarding windfall fees," *New York State Assoc. for Retarded Children v. Carey*, 711

F.2d 1136, 1139 (2d Cir.1983), results in a total fee recovery of $18,874.00 [FN7]

FN6. Attorney Cuddy billed 51 hours and attorney Sterne billed 19.6 hours. *See* Plaintiffs' Ex. D.

FN7. This amount includes paralegal fees of $3,288 (41.1 hours at $80.00) and other expenses totaling $870.00 for mileage, overnight fees, filing fees, and also takes into consideration the reduction of $1,875 for travel hours that plaintiffs' attorneys include in their Ex. D at p. 7.

CONCLUSION

***5 WHEREFORE,** for the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for an award of attorneys' fees (Dkt. No. 15) is **GRANTED** in the amount of $18,874.00 and defendant's cross-motion for summary judgment (Dtk No. 16) is **DENIED;** and it is further

ORDERED that the Clerk provide copies of this Decision and Order to the parties.

IT IS SO ORDERED.

N.D.N.Y.,2009.
B.R. v. Lake Placid Central School Dist.
Slip Copy, 2009 WL 667453 (N.D.N.Y.)

END OF DOCUMENT

Slip Copy, 2009 WL 104194 (N.D.N.Y.)
(Cite as: 2009 WL 104194 (N.D.N.Y.))

United States District Court,
N.D. New York.
Bernard P. GOLLOMP, Plaintiff,
v.
Eliot SPITZER, individually and in his official capacity as Attorney General of the State of New York; State of New York; Unified Court System of the State of New York; Bruce Muldoon, Esq., individually and in his official capacity as law clerk; Town of Orangetown; Thom Kleiner, individually and in his official capacity as Supervisor of the Town of Orangetown; Eric Dubbs; Michele Dubbs; and Seymour Dubbs, Esq., Defendants.

No. 1:06-CV-802 (FJS/RFT).
Jan. 14, 2009.

West KeySummary **Federal Civil Procedure 170A** ⚷2655

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2655 k. Further Evidence or Argument. Most Cited Cases

A plaintiff's motion for reconsideration of a decision granting state government officials' motion to dismiss and motion for **sanctions** was denied. The plaintiff did not indicate there had been a change in controlling law, new evidence, or that the decision rested on clear error. Rather, he appeared to be attempting to relitigate the merits of his claim. Fed.Rules Civ.Proc.Rule 60, 28 U.S.C.A.

Galvin and Morgan, James E. Morgan, Esq., Madeline Sheila Galvin, Esq., of Counsel, Delmar, NY, for Plaintiff.

Office of the New York, State Attorney General, Morgan A. Costello, AAG, of Counsel, Albany, NY, for Defendants Eliot Spitzer, State of New York, Unified Court System of the State of New York and Bruce Muldoon.

MEMORANDUM-DECISION AND ORDER
SCULLIN, Senior District Judge.

I. INTRODUCTION

***1** Currently before the Court are the State Defendants' proposed order for reimbursement of costs and **attorney's fees**, which they filed pursuant to this Court's instructions, and Plaintiff's motion for reconsideration of this Court's February 5, 2007 Memorandum-Decision and Order pursuant to Rule 60 of the Federal Rules of Civil Procedure.[FN1]

FN1. In her Affidavit, Plaintiff's counsel states that "Plaintiff respectfully requests that this Court reconsider its decision of **January 5, 2007,** entered **January 6, 2007** ...." *See* Affidavit of Madeline Sheila Galvin, sworn to February 13, 2007 ("Galvin Aff."), at ¶ 2 (emphasis added). The Court assumes that Plaintiff's counsel intended to state that Plaintiff is seeking reconsideration of this Court's February 5, 2007 Memorandum-Decision and Order, *see* Dkt. No. 78. The Court did not entertain oral argument on the motions at issue until January 26, 2007. *See* Dkt. No. 76.

II. BACKGROUND

In its February 5, 2007 Memorandum-Decision and Order, the Court, among other things, granted the State Defendants' motion to dismiss and their motion for **sanctions** pursuant to 28 U.S.C. § 1927. *See* Dkt. No. 78 at 19-20. The Court also instructed the State Defendants to "file a proposed order for reimbursement of the costs and **attorney's fees** that they incurred with respect to the filing of their motion to dismiss and their motion for **sanctions** pursuant to § 1927." *See id.* at 20. The State Defendants submitted the requested information on February 2, 2007.[FN2] *See* Dkt. No. 77. Although the Court instructed Plaintiff to file any papers in opposition to the State Defendants' proposed order by February 9, 2007, *see* Dkt. No. 78 at 20, he did not do so. However, Plaintiff did file a motion for reconsideration of all aspects of the Court's February 5, 2007 Memorandum-Decision and Order on February 15, 2007, *see* Dkt. No. 83, and subsequently filed a Notice of Appeal on February 23, 2007, *see* Dkt. No. 89.

FN2. The Court heard oral argument regarding the State Defendants' motion to dismiss and their motion for **sanctions** on January 26, 2007. At that time, the Court provided the State Defendants with one week

to submit a proposed order and supporting documentation, which they did on February 2, 2007. *See* Dkt. No. 77. In addition, on February 9, 2007, the State Defendants filed a supplemental letter, in which they informed the Court that they were "willing to accept the prevailing market rates for **attorneys' fees** in the Northern District as established in ... *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, No. 03-CV-502, 2005 U.S. Dist. LEXIS 4362, 2005 WL 670307, ----18-19 (Mar. 22, 2005)...." *See* Dkt. No. 80.

III. DISCUSSION

A. Reimbursement of attorney's fees and costs as a sanction pursuant to 28 U.S.C. § 1927

"[T]he court determines reasonable **attorney's fees** by using the lodestar method, which involves multiplying the number of hours that the [party's] attorney spends on the matter by a reasonable hourly rate." *Paramount Pictures Corp. v. Hopkins*, No. 5:07-CV-593, 2008 WL 314541, *4 (N.D.N.Y. Feb.4, 2008) (citation omitted). In *Hopkins*, this Court recently reiterated that, based upon the relevant factors for determining such an award, "the reasonable **hourly rates** in this District, i.e., what a reasonable, paying client would be willing to pay, were $210 per hour for an experienced attorney, $150 per hour for an attorney with four or more years experience, $120 per hour for an attorney with less than four years experience, and $80 per hour for paralegals." *Id.* at 5 (citation omitted).

The State Defendants submitted their counsel's contemporaneous time records, which set forth the amount of time that she expended and a description of the work she performed pertaining to their motion to dismiss and their motion for **sanctions**. *See* Dkt. No. 77.[FN3] They also submitted an invoice showing that they incurred costs in the amount of $130.20, for the "court reporter fee for a stenographic transcript of the November 8, 2006 telephone court conference before Magistrate Judge Randolph F. Treece...." *See* Declaration of Morgan A. Costello dated February 2, 2007 ("Costello Decl."), at ¶ 10 & Exhibit "B" attached thereto.[FN4]

FN3. Counsel for the State Defendants noted that, "[u]nlike in private practice, as an Assistant Attorney General in the New York State Department of Law, [she was] not required to record [her] time for billing purposes. However, given the apparent frivolous nature of this lawsuit, beginning in June 2006, [she] began to record and describe the time [she] spent litigating this matter." *See* Declaration of Morgan A. Costello, dated February 2, 2007, at ¶ 7.

FN4. Counsel for the State Defendants explained that, during this telephone conference, "James E. Morgan, Esq. [Plaintiff's counsel] misrepresented to the Court that plaintiff's counsel in this case 'were not sanctioned in the past.' " *See* Costello Decl. at ¶ 10. Counsel further stated that "[i]t was necessary for [the] State Defendants to obtain such transcript in this case as documentary proof of Mr. Morgan's misrepresentation to the Court." *See id.*

***2** The contemporaneous time records of counsel for the State Defendants indicate that she expended 127.6 hours on the relevant matters. *See id.* at ¶ 8 & Exhibit "A" attached thereto. The Court has reviewed these records and finds that the hours that counsel expended are reasonable. Counsel also indicates that she has "nine and a half years of litigation experience in various federal and state courts." *See id.* at ¶ 6. Therefore, the Court finds that counsel is an experienced attorney, for whom a reasonable hourly rate is $210. Accordingly, the Court directs Plaintiff's counsel to reimburse the State Defendants in the amount of **$26,796 .00** for reasonable **attorney's fees** and **$130.20** for costs pursuant to 28 U.S.C. § 1927.[FN5]

FN5. In his motion for reconsideration, Plaintiff takes issue with the State Defendants' counsel's contemporaneous time records and a portion of the costs associated with the stenographer's fees. The Court has reviewed Plaintiff's arguments and concludes that they provide no basis for reconsidering the Court's decision regarding the appropriate amount of **attorney's fees** and costs that the State Defendants should recover pursuant to 28 U.S.C. § 1927.

B. Plaintiff's motion for reconsideration

Plaintiff moves for reconsideration pursuant to Rule 60 of the Federal Rules of Civil Procedure.[FN6] In

this district, a court should only grant a motion for reconsideration in three limited circumstances: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) a need to correct clear error of law or prevent manifest injustice." *Taormina v. Int'l Bus. Machs. Corp.*, No. 1:04-CV-1508, 2006 WL 3717338, *1 (N.D.N.Y. Dec. 14, 2006) (citing *New York ex rel. Vacco v. RAC Holding, Inc.*, 135 F.Supp.2d 359, 362 (N.D.N.Y.2001)). Courts strictly apply this standard and generally deny motions for reconsideration "unless the moving party presents 'controlling decisions or data that the court overlooked....' " *Id.* (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995)). Finally, if a party seeks reconsideration based on an error of law, "the court has broad discretion and should not disregard the law of the case unless it has a 'clear conviction of error.' " *Id.* (quoting *RAC Holding, Inc.*, 135 F.Supp.2d at 362).

> FN6. Pursuant to Rule 60, Plaintiff requests that the Court grant his motion for reconsideration and "Vacate the **Judgment** of this Court...." *See* Galvin Aff. at "Wherefore Clause" (emphasis added); *see also* Plaintiff's Memorandum of Law at 19. The Court, however, has not entered a judgment in this matter; and, thus, Rule 60, which applies only to final judgments or orders is not applicable to this motion. Rather, Plaintiff's motion is best characterized as a motion for reconsideration under Rule 7.1(g) of this District's Local Rules.

Plaintiff has not presented an intervening change in controlling law or any new evidence, therefore, the Court assumes that Plaintiff seeks reconsideration on the ground that there is "a need to correct clear error of law or prevent manifest injustice." *Id.*

Having reviewed Plaintiff's counsel's 179-paragraph Affidavit and its attachments, as well as Plaintiff's memorandum of law, the Court concludes that there is nothing in those documents to even suggest that the Court's decision rested on any error of law, let alone a clear error of law. Rather, it appears that Plaintiff is attempting to relitigate the merits of his claim based upon many of the same arguments that he previously made. Therefore, the Court denies Plaintiff's motion for reconsideration.

IV. CONCLUSION

After reviewing the entire file in this case, the parties' submissions and the applicable law, and for the reasons stated herein, the Court hereby

ORDERS that Plaintiff's counsel shall reimburse the State Defendants in the amount of **$26,796.00** for reasonable **attorney's fees** and **$130.20** for costs pursuant to 28 U.S.C. § 1927; and the Court further

***3 ORDERS** that Plaintiff's motion for reconsideration is **DENIED;** and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Defendants' favor and close this case in accordance with this Court's February 5, 2007 Memorandum-Decision and Order and this Memorandum-Decision and Order.[FN7]

> FN7. The Court also notes that the judgment should reflect that this Court "so-ordered" the Dubbs Defendants' letter in which they stated that they had "decided to withdraw the counterclaims set forth in [their] answers to the complaint and amended complaints without prejudice to reinstating same in any subsequent action or proceeding that may follow this Court's Order." *See* Dkt. No. 81.

IT IS SO ORDERED.

N.D.N.Y.,2009.
Gollomp v. Spitzer
Slip Copy, 2009 WL 104194 (N.D.N.Y.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2006 WL 3248402 (N.D.N.Y.)
(Cite as: 2006 WL 3248402 (N.D.N.Y.))

H Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.
William M. HOBLOCK, candidate for Albany County Legislator for the 26th District; Lee R. Carman, candidate for Albany County Legislator for the 29th District, Plaintiffs-Intervenors,
and
Philip and Patricia Sgarlata; John and Carol Stewart; John and Mary Maybee; Ellen Graziano; and other voters similarly situated, Plaintiffs,
v.
The ALBANY COUNTY BOARD OF ELECTIONS; Richard A. Gross, candidate for Albany County Legislator for the 26th District; and Gene Messercola, candidate for Albany County Legislator for the 29th District, Defendants.

No. 1:04-CV-1205 (LEK/DRH).
Nov. 7, 2006.

Thomas Marcelle, Office of Thomas Marcelle, Albany, NY, for Plaintiffs.

Paul Derohannesian, II, Derohannesian, Derohannesian Law Firm, Albany, NY, for Plaintiffs-Intervenors.

Thomas J. O'Connor, Shawn T. Nash, Napierski, Vandenburgh Law Firm, Albany, NY, for Defendants.

DECISION AND ORDER

LAWRENCE E. KAHN, District Judge.

I. Background

***1** Plaintiffs-Intervenors and Plaintiffs-Voters have submitted Motions and supporting papers seeking awards of **attorneys' fees** and costs, as a result of their having prevailed in this civil rights matter pursuant to earlier decisions of this Court. *See* Plntfs-Intervens' Motion (Dkt.Nos.66-73); Plntfs-Voters' Motion (Dkt. No. 74). Defendants have opposed Plaintiffs' Motions. *See* Defts' Opp. (Dkt.Nos.78-81). And, Plaintiffs have submitted reply papers. *See* Plntfs-Intervens' Reply (Dkt. No. 84); Plntfs-Voters' Reply (Dkt. No. 86).

The facts of this matter and the procedural background have been set out extensively in the various submissions of the parties, as well as in the prior Orders of this Court and the Second Circuit Court of Appeals-familiarity with which is presumed. *See, inter alia, Hoblock v. Albany County Bd. of Elections,* 422 F.3d 77 (2d Cir.2005) (Walker, C.J.); *Hoblock v. Albany County Bd. of Elections,* No. 1:04-CV-1205 (LEK/DRH), 2006 WL 1650746 (N.D.N.Y. June 14, 2006) (Kahn, D.J.); *Hoblock v. Albany County Bd. of Elections,* No. 1:04-CV-1205(LEK/DRH), 2006 WL 1509967 (N.D.N.Y. May 24, 2006) (Kahn, D.J.); *Hoblock v. Albany County Bd. of Elections,* 233 F.R.D. 95 (N.D.N.Y.2005) (Kahn, D.J.); *Hoblock v. Albany County Bd. of Elections,* 341 F.Supp.2d 169 (N.D.N.Y.2004) (Kahn, D.J.). This Court has also previously addressed the standard of law concerning the awarding of **attorney's fees** to prevailing parties. *See Hoblock,* 2006 WL 1509967.

II. Discussion

The Court has reviewed all of the submissions of the parties, and the relevant law, and specifically addresses herein what the Court finds to be the most contentious of the issues.

First, as to the issue of Plaintiff-Intervenors' argument that they have prevailed overall in this matter, and have made significant, non-duplicative contributions to constitutional remedies of civil rights violations in Plaintiffs' lawsuit, the Court finds in favor of Plaintiffs-Intervenors. [FN1] The Court finds that Plaintiffs-Intervenors' counsel did, indeed, contribute significant, non-duplicative materials and knowledge-expending energy and resources that would have been expended regardless of the Plaintiff party to ultimately do so-to Plaintiffs-Voters (and their attorney), who were also prevailing parties in this litigation. *See, generally, Wilder v. Bernstein,* 965 F.2d 1196 (2d Cir.1992); *United States v. Bd. of Educ. of Waterbury,* 605 F.2d 573 (2d Cir.1979); *People ex rel. Vacco v. RAC Holding, Inc.,* 135 F.Supp.2d 359 (N.D.N.Y.2001) (Kahn, D.J.).

FN1. *See Quaratino v. Tiffany & Co.,* 166 F.3d 422, 425 (2d Cir.1999) ("**Attorney's fees** may be awarded for unsuccessful claims as well as successful ones, however, where they are ' "inextricably intertwined" and "involve a common core of facts or are based on related legal theories." ' ") (citing and quoting, *inter alia, Reed v. A.W. Lawrence & Co.,* 95 F.3d 1170, 1183 (2d Cir.1996)).

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Second, as to Defendants' contention that the contempt motion was unnecessary, and therefore Plaintiffs-Intervenors' and Plaintiffs-Voters' **attorneys' fees** should not be granted as to work on that Motion, the Court finds in favor of Plaintiffs-Intervenors and Plaintiffs-Voters. This case concerned an election for the Albany County Legislature. During the pendency of litigation, the contested seats were held by the incumbents. *See* Hoblock, 2006 WL 1509967, at *3 n. 4. *See also* Plntfs-Intervens' Letter Brief (Dkt. No. 50) at 1. However, these individuals were not the duly elected representatives from the 2004 election. Furthermore, the Court's Order to count the ballots and certify winners was issued on May 24, 2006, *see* May 2006 Order (Dkt. No. 55); Judgment (Dkt. No. 56), and a meeting of the Legislature was scheduled to be held on June 12, 2006, *see* Albany County Legislature website *at* http://www.albanycounty.com/departments/legislature/default. asp?id=1288 (last visited November 2, 2006); *see also* Affirmation of Marcelle (Dkt. No. 57, Attach.2) at ¶ 16; Plntfs' Mem. of Law in Support (Dkt. No. 57, Attach.3) at 2-3. Time and speed in counting the ballots was at issue following this Court's issuance of the May 2006 Order.

***2** In addition, it is noted that this Court is not divested of the authority to enforce its orders either before or after a Notice of Appeal is filed. The Court may enforce its lawful Order and directive, and its findings under the law, until the orderly review of the appellate court ultimately affirms or reverses the finding. *See* Red Ball Interior Demolition Corp. v. Palmadessa, 947 F.Supp. 116, 120-121 (S.D.N.Y.1996) (Sweet, D.J.).

> [T]his Court has jurisdiction to impose contempt **sanctions** for disobedience of an order currently on appeal. The filing of a notice of appeal "only divest [s] the district court of jurisdiction respecting the questions raised and decided in the order appealed from."... In a contempt proceeding, the questions relate solely to the directives in the order and the refusal of the party to comply with them, issues that are entirely distinct from the issues decided in the order itself.... Thus, a district court remains vested with the ability to enforce an order, even while the order is *sub judice* before the reviewing court.... Long ago, the Supreme Court ruled that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." ... Such orders are "to be obeyed until they expir[e] or [a]re set aside by appropriate proceedings, appellate or otherwise...." ... Our Court of Appeals has held similarly that "[i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

Id. (citing, *inter alia*, New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1350 (2d Cir.1989); United States v. United Mine Workers of Am., 330 U.S. 258, 293 (1947); Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir.1930)). Thus, this Court's May 24, 2006 Order was enforceable, and Defendants' delayed compliance with the terms of the Order warranted Plaintiffs' filing of the Motion for contempt.

Upon consideration and evaluation of the remaining issues contained in the parties' submissions, the Court finds in favor of Plaintiffs-Intervenors and Plaintiffs-Voters.

Attorney DerOhannesian billed the following hours of work: 35.75 hours. *See* Dkt. No. 72, Attach. 7; Dkt. No. 84 at 4 n. 1. Attorney Zegarelli billed the following hours of work: 84.75 hours. *See* Dkt. No. 72, Attach. 8; Dkt. No. 84 at 4 n. 1. Attorney Marcelle billed the following hours of work: 199.7 hours, and the following hours of travel time: 5.7 hours (which are billed at a one-half rate, *see* Baim v. Notto, 316 F.Supp.2d 113, 119 (N.D.N.Y.2003) (Hurd, D.J.)). *See* Dkt. No. 86 & Exh. B. thereto. All of said time is found to have been reasonable in this case, and the Court will not exclude any of it from the award calculation.

***3** However, while this Court herein ultimately finds in favor of Plaintiffs-Intervenors and Plaintiffs-Voters on the currently pending Motions for **attorneys' fees**, the Court now addresses its lone concern regarding the **hourly rates** requested by the attorneys for Plaintiffs-Intervenors and Plaintiffs-Voters. The Court has considered the decisions of other judges within this District, and has considered both the geographic area of practice and the relative

skill-level of Plaintiffs' counsel. *See, inter alia, Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, No. 03-CV-502, 2005 WL 670307, at *6 (N.D.N.Y. Mar. 22, 2005) (Homer, M.J.), *adopted in full*, 419 F.Supp.2d 206 (N.D.N.Y.2005) (Mordue, D.J.). *See also Farbotko v. Clinton County of New* York, 433 F.3d 204 (2d Cir.2005). Given that some time has passed since Judge Homer's and Judge Mordue's decisions in *Arbor Hill,* and given that Attorneys DerOhannesian and Marcelle have some unique experience in the fields of law at issue in this matter here in the Northern District, the Court finds it reasonable to allow for increased awarded rates. But, cutting the other way and considering the geographic area and legal market in which the attorneys practice-Upstate New York-and the prevailing rates in that geographic area, with which this Court is familiar, the requested rates of $275.00 per hour for Attorney DerOhannesian, $245.00 per hour for Attorney Marcelle, and $135.00 per hour for Attorney Zegarelli are high. *See, generally, RAC Holding*, 135 F.Supp.2d at 363 ("The hourly rate to be used 'should be "in line with those [rates]" prevailing in the community for similar services of lawyers of reasonably comparable skills, experience, and reputation.' ") (citing *Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1159 (2d Cir.1994)). In addition, Plaintiffs' counsel's requested rates are those that they claim are paid by private clients, but do not appear to be those ordered by other District and Magistrate Judges sitting in this District. *See Arbor Hill*, 419 F.Supp.2d at 211. And, it appears to this Court that Plaintiffs' attorneys have offered little case law or objective support for the argument that attorneys with the experience and qualifications that Plaintiffs' attorneys claim to have specifically warrant comparable rates of $275.00, $245.00, and $135.00 per hour in the Northern District of New York. *See Baim*, 316 F.Supp.2d at 119.

Therefore, upon evaluation of the factors discussed above, as well as the submissions of the parties (including their billing sheets and *curricula vitae),* the Court finds that Plaintiffs-Intervenors' Attorney Paul DerOhannesian II, Esq., is awarded an hourly rate of $225.00 per hour, and Plaintiffs-Intervenors' Attorney Jennifer C. Zegarelli, Esq., is awarded an hourly rate of $125.00 per hour. Plaintiffs-Voters' Attorney Thomas Marcelle, Esq., is awarded an hourly rate of $225.00 per hour. After calculation of the "lodestar" rates, and after the discussion above, the Court finds no reason to either increase or reduce said rates in any other way in this matter. Therefore, Plaintiffs-Intervenors are awarded **attorney's fees** of $18,637.50; and Plaintiffs-Voters are awarded **attorney's fees** of $45,573.75.

***4** In addition, the Court awards all of the costs claimed by Plaintiffs-Intervenors ($892.00) and Plaintiffs-Voters ($464.93). Thus, the total award of **attorney's fees** and costs to Plaintiffs-Intervenors is $19,529.50; and the total award of **attorney's fees** and costs to Plaintiffs-Voters is $46,038.68.

III. Conclusion

Based upon the foregoing, it is hereby

ORDERED, that Plaintiffs-Intervenors' Motion for **Attorney's Fees** with Exhibits and Supporting Documents, (Dkt.Nos.66-73, 84)-as **MODIFIED** by the Court in the Discussion above-is **GRANTED,** and **Plaintiffs-Intervenors are awarded attorney's fees and costs totaling $19,529.50;** and it is further

ORDERED, that Plaintiffs-Voters' Motion for **Attorney's Fees** with Exhibits and Supporting Documents, (Dkt.Nos.74, 86)-as **MODIFIED** by the Court in the Discussion above-is **GRANTED,** and **Plaintiffs-Voters are awarded attorney's fees and costs totaling $46,038.68;** and it is further

ORDERED, that the Clerk serve copies of this Order on all parties.

IT IS SO ORDERED.

N.D.N.Y.,2006.
Hoblock v. Albany County Bd. of Elections
Not Reported in F.Supp.2d, 2006 WL 3248402 (N.D.N.Y.)

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