

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PETER DENTON, ET AL.,

Plaintiffs,

V.

RUDOLF SUTER,

Defendant.

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No. 3:11-cv-2559-N

ORDER AWARDING ATTORNEYS' FEES ON MOTION TO COMPEL

Background

In a November 4, 2013 Order [Dkt. No. 94], the Court granted in part and denied in part the Motion to Compel [Dkt. No. 24] filed by Plaintiffs Peter Denton and Harvest Investors, L.P. The Court further noted that Federal Rule of Civil Procedure 37(a)(5) mandates an award of fees and expenses against any party that necessitates a motion to compel where, as here, the motion is granted in part and was caused by the responding party's failure to produce documents responsive to discovery requests but that the Court will not award fees and expenses if (a) the motion was filed without the moving party having made a good faith effort to obtain the discovery without court action, (b) the Court determines that the response of the non-moving party was substantially justified, or (c) if other circumstances make an award of expenses unjust. *See* Dkt. No. 94 at 20. The Court held that none of these exceptions are present here and therefore ordered, pursuant to Rule 37(a)(5)(A), that Plaintiffs' request for attorneys' fees and costs in connection with their Motion to Compel is granted. *See id.*

But the Court noted that Plaintiffs have not provided adequate evidence of the reasonable hourly rate requested or reasonable number of hours billed and ordered Plaintiffs to advise the Court of the amount of expenses and attorneys' fees incurred in preparing and filing the motion to compel by filing a memorandum accompanied by admissible evidence setting forth the number of hours expended in connection with the motion to compel as well as the reasonable rate(s) requested. *See id.* at 20-21. The Court also granted Defendant 14 days to file a response, if any, to the amount requested by Plaintiffs. *See id.* at 21.

On December 5, 2013, Plaintiffs filed their Memorandum in Support of Attorneys Fees Award [Dkt. No. 108], accompanied by the Affidavit of Robert D. Allen in Support of Attorneys Fees Awarded in Court's November 4, 2013 Order [Dkt. No. 109]. Although the Court afforded Defendant an opportunity to respond, he has not done so, and his time to do so has long since passed. *See* Dkt. No. 94 at 20.

Legal Standards and Analysis

The Amount of Reasonable Attorneys' Fees to be Awarded Under Rule 37(a)(5)(A)

The undersigned has authority to enter a nondispositive order granting attorneys' fees as a sanction under Federal Rule of Civil Procedure 37. *See* Dkt. No. 27; 28 U.S.C. § 636(b); *Merritt v. Int'l Bhd. of Boilermakers*, 649 F.2d 1013, 1016-17 (5th Cir. Unit A 1981) (per curiam).

"This Court uses the 'lodestar' method to calculate attorney's fees." *Heidtman v. Cnty. of El Paso*, 171 F.3d 1038, 1043 (5th Cir. 1999) (citing *Fender v. Zapata Partnership, Ltd.*, 12 F.3d 480, 487 (5th Cir.1994); *Saizan v. Delta Concrete Prods.*,

Inc., 448 F.3d 795, 800 (5th Cir. 2006). The lodestar is calculated by multiplying the number of hours an attorney reasonably spent on the case by an appropriate hourly rate, which is the market rate in the community for this work. *See Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 490 (5th Cir. 2012). The party seeking reimbursement of attorneys' fees bears the burden of establishing the number of hours expended through the presentation of adequately recorded time records as evidence. *See Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). The Court should use this time as a benchmark and then exclude any time that is excessive, duplicative, unnecessary, or inadequately documented. *See id.* The hours remaining are those reasonably expended. There is a strong presumption of the reasonableness of the lodestar amount. *See Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010); *Saizan*, 448 F.3d at 800.

After calculating the lodestar, the Court may either (1) accept the lodestar figure or (2) decrease or enhance it based on the circumstances of the case, taking into account what are referred to as the *Johnson* factors. *See La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324, 329 (5th Cir. 1995); *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *overruled on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 90 (1989). The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the legal issues; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney as a result of taking the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) the monetary amount involved and the results obtained; (9) the experience,

reputation, and ability of the attorneys; (10) whether the case is undesirable; (11) the nature and duration of the professional relationship with the client; and (12) awards in similar cases. *See Johnson*, 448 F.2d at 717-19; *see also Saizan*, 448 F.3d at 800. Because the lodestar is presumed to be reasonable, it should be modified only in exceptional cases. *See Watkins*, 7 F.3d at 457.

Additionally, a party seeking attorneys' fees may only recover for time spent in preparing the actual discovery matter – that is, the “reasonable expenses incurred in making the motion, including attorney’s fees.” FED. R. CIV. P. 37(a)(5)(A). This can include fees for a paralegal’s time. *See Compass Bank v. Villarreal*, Civ. A. No. L-10-8, 2011 WL 1740270, at *15 (S.D. Tex. May 5, 2011) (“To the extent they are not recoverable as costs or attorneys’ fees, the paralegal fees listed in Davis’s declarations are recoverable as litigation expenses under Rule 37.”).

The undersigned recognizes that the analysis set forth above, and particularly the interplay of the lodestar analysis and the *Johnson* factors, has recently been called into question. *See Perdue*, 559 U.S. at 552-53; *S&H Indus., Inc. v. Selander*, No. 3:11-cv-2988-M-BH, 2013 WL 6332993, at *2-*3 (N.D. Tex. Dec. 5, 2013). But in a recent opinion, the United States Court of Appeals for the Fifth Circuit, without comment or reference to the United States Supreme Court’s decision in *Perdue*, continued to utilize the approach laid out by this Court. *See Black v. SettlePou, P.C.*, 732 F.3d 492, 502-03 (5th Cir. 2013). *But see In re Pilgrim’s Pride Corp.*, 690 F.3d 650, 663-64 (5th Cir. 2012) (analyzing whether any changes brought about by *Perdue* apply to bankruptcy attorneys’ fees calculations); *but see also In re ASARCO, L.L.C.*, 751 F.3d 291, 296 (5th

Cir. 2014) (following *Pilgrim's Pride*).

In *Perdue*, the Supreme Court was ultimately considering the appropriateness of an enhancement of an award of attorneys' fees, and Defendants here have not requested such an enhancement. *See* Dkt. No. 49 at 5. Other factors also distinguish this case from *Perdue*, including the fact that *Perdue* involved a 42 U.S.C. § 1988 claim and the fees were therefore paid by state and local taxpayers. *See Perdue*, 559 U.S. at 558. Moreover, after the lodestar amount is determined, it may not be adjusted due to a *Johnson* factor that was already taken into account during the initial calculation of the lodestar, *see Saizen*, 448 F.3d at 800, and the lodestar calculation may take into account several *Johnson* factors, *see Black*, 732 F.3d at 503 n.8.

In light of the circumstances in this case – where there is no request for enhancement and no Section 1988 claim – this Court will not address whether *Perdue* changed the landscape of calculating attorneys' fees awards in the Fifth Circuit. Rather, it will take into account the necessary factors when determining the appropriate amount of attorneys' fees.

Plaintiffs seek \$27,605.00 in reasonable and necessary attorneys' fees incurred in connection with the subject discovery disputes and motions to compel and for protective order at issue in this Court's November 4, 2013 order. *See* Dkt. No. 108 at 2-3. This amount is made up of 28.2 hours at \$325 an hour (\$9,165.00), 33.2 hours at \$275 an hour (\$9,130.00), and 37.6 hours at \$225 an hour (\$8,460.00) for the work performed by attorneys Robert D. Allen and Abel A. Leal and 6.8 hours at \$125 an hour (\$850.00) for the work performed by legal assistant Lori A. Black. *See id.* at 3.

Plaintiffs seek no other award of expenses. *See id.* at 2.

Plaintiffs' application for attorneys' fees is supported by the Affidavit of Robert D. Allen in Support of Attorneys Fees Awarded in Court's November 4, 2013 Order [Dkt. No. 109]. Mr. Allen declares that he is an experienced attorney primarily engaged in litigation matters who has handled many cases in both state and federal court in Texas. He declares that the work that he, Mr. Leal, and Ms. Black performed for which Plaintiffs seek an award of attorneys' fees is limited to work performed on behalf of Plaintiff in connection with their Motion to Compel and Defendant's corresponding Motion for Protective Order [Dkt. No. 18] as well as the hearing related to those matters, and the Court finds that that is the appropriate universe of billing entries for this Rule 37(a)(5) award. The billing records submitted by Mr. Allen reflect the work performed by each attorney or paralegal with a narrative description of the work done and the number of hours that it took to complete the work. *See* Dkt. No. 109-1. Mr. Allen further declares, and the Court finds, that the attorneys and legal assistant performing this work possessed the requisite skill and experience to properly perform the legal services rendered.

Mr. Allen declares that the rates charged by Mr. Allen, Mr. Leal, and Ms. Black are consistent with, if not lower than, rates customarily charged in Dallas for similar legal services. *See* Dkt. No. 109. The Court finds that the prevailing rate in Dallas County for attorneys with the experience, skill, and ability of Defendants' attorneys and legal assistant is, if anything, higher than the rates and fees charged by these timekeepers. The Court finds, based on the information and record before the Court,

including Mr. Allen's affidavit, that the requested hourly rates in this case are reasonable and are within the market rate for attorneys and paralegals handling this type of litigation in the Dallas area. *See generally Vanliner Ins. Co. v. DerMargosian*, No. 3:12-cv-5074-D, 2014 WL 1632181, at *2 (N.D. Tex. Apr. 24, 2014) (noting that the Court is an expert on the reasonableness of attorneys' fees).

The Court finds the appropriate lodestar here to be calculated as 28.2 hours at \$325 an hour (\$9,165.00), 33.2 hours at \$275 an hour (\$9,130.00), and 37.6 hours at \$225 an hour (\$8,460.00) for the work performed by attorneys Robert D. Allen and Abel A. Leal and 6.8 hours at \$125 an hour (\$850.00) for the work performed by legal assistant Lori A. Black, for a total of \$27,605.00. The Court has considered the *Johnson* factors but notes that the lodestar is presumed to be reasonable and should only be modified in exceptional cases. Here, Plaintiffs do not seek an enhancement of their attorneys' fees, Defendant did not file a response to the application for attorneys' fees, and there are no other exceptional circumstances.

Defendant Should Pay the Attorneys' Fees Award to Plaintiffs

Plaintiffs do not take a position on whether Defendant, his attorney, or both should pay the attorneys' fees award under Rule 37(a)(5)(A). Under Rule 37(a)(5), "the party ... whose conduct necessitated the motion" to compel or the "attorney advising that conduct, or both" may be required "to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." FED. R. CIV. P. 37(a)(5)(A).

The Court finds that, given the conduct of postjudgment discovery in this matter and the role that Defendant himself played in these matters, as reflected in the record

and based on the undersigned's experience in presiding over the subject discovery disputes, an award of attorneys' fees to be paid by Defendant Rudolf Suter, and not his attorneys, is a more appropriate sanction under Rule 37(a)(5)(A) than an award of fees to be paid by only Defendant's counsel or by both Defendant's counsel and Defendant.

Conclusion

Plaintiffs' application for attorneys' fees [Dkt. No. 108] is GRANTED under Federal Rule of Civil Procedure 37(a)(5)(A). Defendant Rudolf Suter must pay Plaintiffs Peter Denton and Harvest Investors, L.P. the amount of \$27,605.00 for payment of reasonable and necessary attorneys' fees under Rule 37(a)(5)(A) by **February 22, 2015**.

SO ORDERED.

DATED: December 24, 2014

A handwritten signature in black ink, appearing to read 'D. Horan', written over a horizontal line.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE