UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,	:	Case No. 2:13-cv-00953
Plaintiffs,	:	Judge Watson
-vs-	:	Magistrate Judge Kemp
JON HUSTED, in his Official Capacity as Ohio Secretary of State,	:	
Defendant,	:	
-and-	:	
STATE OF OHIO, et al.,	:	
Intervenor-Defendants.	:	

MEMORANDUM OF INTERVENING DEFENDANT FELSOCI IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER TO QUASH SUBPOENAS DUCES TECUM

I. Introduction

"An applicant for attorney's fees bears the burden of establishing entitlement to an attorney fee award and documenting the appropriate hours expended and hourly rates." *Boost Worldwide, Inc., v. Cell Station Wireless, Inc.*, 2013 WL 6255695 at *1 (S.D. Ohio 2013). To discharge this burden, "[t]he key requirement … is that 'the documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation.'" *Imwalle v. Reliance Medical Products, Inc.*, 515 F.3d 531, 553 (6th Cir. 2008), *quoting United Slate v. G&M Roofing and Sheet Metal Co.*, 732 F.2d 495, 502 (6th Cir. 1984). Preferably, this documentation should be **original, contemporaneous time records**, not after-the-fact compilations. *Imwalle, supra* at 553 ("[c]ourts in this circuit have

reduced attorney fees on the basis of insufficient billing descriptions where the attorney did not 'maintain contemporaneous records of his time or the nature of his work'"), *quoting Keener v. Dept. of Army*, 136 F.R.D. 140, 147 (M.D. Tenn. 1991), *affirmed*, 1992 WL 34580 (6th Cir. 1992). *Accord*: *Healthcall of Detroit, Inc. v. State Farm Mut. Auto. Ins. Co.*, 632 F.Supp.2d 676, 685 (E.D. Mich. 2009) (reducing attorney fee award by 40% where the attorney provided a post hoc summary of time spent without contemporaneous billing records).[1]

By moving for an award of attorney fees, Plaintiffs put their attorneys' hours and rates squarely at issue. *Imwalle, supra* at 553 ("the party seeking fees has 'the burden of providing for the court's perusal a particularized billing record'"), *quoting Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991). But Plaintiffs failed to support their motion with any original, contemporaneous time records; instead, they only offered what appear to be after-the-fact compilations. Therefore, before serving the subpoenas, Felsoci asked Plaintiffs' counsel, three times, voluntarily to produce their original, contemporaneous records. Each time, they refused. *Cf. National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) ("once the reasonableness of the hours claimed becomes an issue, the applicant [for attorney fees] should voluntarily make his time charges available for inspection by … opposing counsel on request"). That's the only reason why Felsoci then subpoenaed their time records.

II. Felsoci Already Offered Plaintiffs An Extension Of Time To Respond To The Subpoenas

Plaintiffs' motion to quash repeatedly complains that seven days is not enough to compile and produce the records that have been requested. But, on August 22, 2014 – two days before Plaintiffs filed the motion – Felsoci's counsel told Mr. Brown: "If you or Mr. Kafantaris need

[1] *See also National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) ("Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees. Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney.").

more time to respond to the subpoenas, just let me know and we can discuss an appropriate extension." [Doc. No. 173-3 at pg. 1] Neither Mr. Brown nor Mr. Kafantaris responded.

Our offer to provide a reasonable extension of time to Plaintiffs stands; all they need to do is state how much more time they want and, assuming it is within the range of reason (consistent with the new briefing schedule on Plaintiffs' fee motion, *see* Doc. 175), we will agree.

III. Mr. Kafantaris' "Time Sheets"

Plaintiffs contend that Mr. Kafantaris has already produced "copies of the only time sheets he possesses relating to these motions." [Doc. No. 173 at pg. 5] Although Plaintiffs refer to Mr. Kafantaris' "time sheets" in the plural, Mr. Kafantaris actually only produced two one-page summaries, one of which purports to compile his time from June 16 through July 24 relating to Felsoci's document production, and the other of which compiles his time from July 8 through August 15 relating to Felsoci's deposition [Doc. No. 170-3 at pg. 3] [Doc. No. 170-5 at pg. 3]

These summaries appear to be after-the-fact compilations, not original, contemporaneous time records. For example, both "time sheets" purport to reflect time worked on July 24, 2014. It is doubtful that Mr. Kafantaris contemporaneously recorded his separate tasks for that day in multiple places. Instead, it is much more likely that these "time sheets" are summaries that have been pulled from some larger database or billing record of all of Mr. Kafantaris' time on this case, so there must be other, original contemporaneous entries or records.

To the extent Mr. Kafantaris' summaries are print-outs from a larger electronic database, Felsoci requested their production in native format, with document histories and metadata, in order to determine when the data was originally entered and whether they were changed after-

the-fact.[2] As the Sixth Circuit emphasized in *Imwalle, supra* at 553, whether there are "contemporaneous records of … [an attorney's] time or the nature of his work" is an important inquiry in matters like this. Therefore, we respectfully request that Mr. Kafantaris be required to produce either his original, contemporaneous time records or his summaries in their native electronic format with document histories and metadata.

IV. Mr. Brown's Failure To Produce Any Time Records

Unlike Mr. Kafantaris, Mr. Brown did not produce any separate time records. Instead, his declaration contains a day-by-day list of the hours he allegedly worked on the Felsoci discovery motions. Even after Felsoci asked him, three times, for his original time records, he still did not include any contemporaneous records to substantiate the time claimed in the fee motion. In fact, he did not even acknowledge that he possessed original time records. [Doc. No. 170-2 at pgs. 2-3]

In a footnote in the motion to quash, Mr. Brown now acknowledges that he has "original time logs which remain in his possession." [Doc. No. 173 at pg. 5] He also states that he has "no objection to delivering copies of these original time logs (and other relevant fee documents) to Felsoci within 30 days." [Id.] This being so, why didn't he simply provide them when he was asked to do so voluntarily?

Here again, Felsoci has no objection to providing Mr. Brown with additional time to produce his original time logs. But Felsoci is clearly entitled to see these original records in order to defend against Plaintiffs' motion. *Imwalle, supra* at 553. Indeed, it was Plaintiffs' burden in the first place to support their motion with original, contemporaneous records so, quite frankly,

[2] One of Mr. Kafantaris' summaries we received was provided in a Microsoft Excel electronic format; however, this file appears to be excerpts of a larger electronic time record database and it does not contain document history or data entry logs that would show when each time entry was entered or edited. If that type of electronically stored information exists, it should be produced.

we do not understand Plaintiffs' recalcitrance in producing these records or even acknowledging their existence.[3]

V. Hourly Rates To Other Clients

Plaintiffs also object to Item No. 8 in the subpoena, which requests "[a]ll documents showing the hourly rate(s) you have charged other clients in 2014." Plaintiffs contend this would require them "to cull through a year's worth of billing statements for hundreds of clients…" [Doc. No. 173 at pg. 15]

As an initial matter, the information sought by Item No. 8 is clearly relevant to Plaintiffs' motion for a fee award. As Plaintiffs themselves point out, a lodestar rate is a "market-based question." [Doc. No. 173 at pg. 13] In this Circuit, the starting point for such a market analysis, and often the best evidence of the lodestar rate, is the rate actually charged by the lawyer. *See, e.g.,Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir. 1995) ("normal billing rates usually provide an efficient and fair shortcut for determining the market rate"); *West v. AK Steel Corp. Retirement Plan*, 657 F. Supp. 2d 914, 932 (S.D. Ohio 2009) ("an attorney's customary billing rate is one reliable indicia of that attorney's prevailing market rate"); *United States v. Touchstone Research Lab, Ltd.*, 2009 WL 3150385 at *3 (S.D. Ohio 2009) ("[i]n many instances, the normal billing rate for an attorney will reflect the prevailing market rate"); *Wasniewski v. Grzelak-Johannsen*,

[3] Mr. Brown also suggests that he has not been served with the subpoena because he has not been "personally served." Rule 45(b)(1) only requires "delivering a copy to the named person" and, while there is a split of authority on the issue, the more recent trend appears to be for courts to hold that "service of a subpoena is effective so long as it reasonably insures actual receipt." *Compare Powell v. Time Warner Cable, Inc.*, 2010 WL 5464895, at *3 (S.D. Ohio 2010) (Deavors, M.J.) ("Citing Rule 4(e)'s explicit personal service requirement, these courts also assert that the drafters knew how to indicate a personal service requirement, but chose not to do so in Rule 45. These courts have held that service is effective so long as it reasonably insures actual receipt of the subpoena."); *with McClendon v. TelOhio Credit Union, Inc.*, 2006 WL 2380601, at *2-3 (S.D. Ohio 2006) (Kemp, M.J.) (noting "in passing" that "Rule 45(b)(1) requires personal service" but ultimately considering the merits of the discovery motion because no prejudice from the fact that "there may have been some technical violation of Rule 45(b)").

As set forth in the attached declaration of Felsoci's process server, Felsoci has taken several steps to ensure that Mr. Brown received the subpoena, but Mr. Brown has not been cooperative. [*See also* Felsoci's Notice of Subpoenas, Doc. No. 171] In any event, it is clear that Mr. Brown actually received the subpoena and he does not argue that he was prejudiced by the method of service.

549 F. Supp. 2d 965, 973 (N.D. Ohio 2008) ("[c]ounsel's normal billing rates are generally 'a focal point' in determining the correct hourly rate and this rate provides the 'reasonable point of the departure' for determining the market value hourly rate"), *quoting James v. Runyon*, 868 F. Supp. 911, 913 (S.D. Ohio 1994); *Disabled Patriots v. Romulus Knights, Inc.*, 2005 WL 3132206 at *2 (E.D. Mich. 2005) ("[g]enerally, an attorney's customary billing rate is the starting point for calculating fees").

In addition, Plaintiffs' objection to Item No. 8 appears to be overstated. In an e-mail on August 18, 2014, Mr. Brown represented: "I never charge clients anything." [Doc. No. 173-2 at pg. 1] So, he shouldn't need to "cull through" anything because, by his own admission, he should have no responsive documents.

That leaves Mr. Kafantaris. Even assuming he has worked for "hundreds of clients" in the past eight months, that does not mean he needs to produce all of those billing records; a summary of the different rates charged to different clients would be sufficient.[4] And, presumably, this type of summary should be readily available on an electronic billing program. For example, on the two summary sheets that Mr. Kafantaris produced, there is a line entry for "hourly rate." A search on the electronic billing program for this "hourly rate" line for the relevant time period should show any different rates that were used.

VI. Rule 34 vs. Rule 45

Plaintiffs also complain that Felsoci used a subpoena duces tecum under Rule 45, rather than a Rule 34 document request, to seek the records in question. The obvious reason for this choice is that some of the records requested – specifically, documents showing the hourly rate(s)

[4] It appears that Mr. Kafantaris has not charged *any client* an hourly rate in 2014. Mr. Kafantaris's website (kafantaris.com) identifies four practice areas and states that Mr. Kafantaris charges flat fees for representation in two of these practice areas and contingency fees for representation in the other two practice areas.

charged to other clients in 2014 – would not fall within Plaintiffs' possession, custody or control and thus would not be obtainable by a Rule 34 request. So, to avoid this problem, Felsoci used to a subpoena duces tecum (but only after he asked three times for voluntary cooperation and was snubbed).

VII. Overhead Costs

Plaintiffs' motion to quash also complains that the subpoenas sought information regarding overhead costs. But, on August 22, 2014 – two days before Plaintiffs filed the motion to quash – Felsoci advised Plaintiffs that this item could be deferred and possibly avoided altogether: "Finally, as to Item 9 on the exhibit to the subpoena (relating to overhead costs), we are agreeable to withdrawing this item for the time being. Following our review of the rest of the subpoena records, we can discuss this item further, if necessary." [Doc. No. 173-3 at pg. 1] Given that we already agreed to withdraw this document request, we are at a loss as to why Plaintiffs spend several pages of their motion discussing overhead costs.

VIII. Conclusion

For all these reasons, Plaintiffs' motion to quash the subpoenas should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2014, the foregoing document was filed electronically with the Clerk of Court using CM/ECF system, and notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Steven W. Tigges
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