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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE, et al., Plaintiffs, v. HONORABLE BARRY G. LAWRENCE, et al., Defendants, LYNN D. BECKER Plaintiff, v. UTE INDIAN TRIBE, et al., Defendants.	**UTE INDIAN TRIBE'S OBJECTION TO MR. JURRIUS' APPLICATION FOR AN AWARD OF ATTORNEY FEES** CASE Nos. 2:16-cv-00579 2:16-cv-00958 Judge Clark Waddoups

COMES NOW the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe") to object to the reasonableness and total amount of attorney fees sought by Mr. Jurrius in his application of April 12, 2021. As grounds, the Tribe states:

1. On April 12, 2021, Messrs. Becker and Jurrius submitted attorney fee applications to the Court, requesting attorney fees totaling $330,895.25—more than a third of a million dollars. Of that total amount, Mr. Jurrius' counsel is seeking fees totaling $94,502.50. ECF No. 263-1 in case number 2:16-cv-958 at 8.

2. On April 14, 2021, the Tribe filed a motion requesting production of the attorney retainer agreements for Messrs. Becker and Jurrius. The Tribe also requested that the Tribe be granted 30 days following production of the retainer agreements for the Tribe to file an objection to the reasonableness of the attorney fee submittals.

3. On April 15, 2021, the Court entered an order denying the Tribe's request for production of the attorney retainer agreements and requiring the Tribe to submit its objections by May 6, 2021.

4. The Tribe's objection includes declarations from Brent R. Baker, Esq., and Jonathan D. Bletzacker, Esq., shareholders at Parsons Behle and Latimer in Salt Lake City, Utah. Attorneys Baker and Bletzacker opine that the hourly fee rates identified by the attorneys for Messrs. Lynn Becker and John Jurrius are "above the range of rates for similar attorneys located and practicing in Salt Lake City." *See* Attachments A and B.

5. The Tribe objects to Mr. Jurrius' fee submittal on the ground that Mr. Jurrius has failed to meet his burden of establishing that the hourly rates he seeks are reasonable.

6. The Tribe further objects to Mr. Jurrius' fee submittal on the ground that Mr. Jurrius has failed to meet his burden of establishing that the hours claimed under his fee submittal represents attorney time that was reasonably expended.

7. Finally, the Tribe contends that an attorney fee award to Mr. Jurrius under the circumstances of this case contravenes the limitations recently reaffirmed by the U.S. Supreme Court when it reversed an award of attorney fees as a litigation sanction in *Goodyear Tire & Rubber Co. v. Haeger*, ___ U.S. ___, 137 S. Ct. 1178, 197 L.Ed.2d 585 (2017).

LEGAL ARGUMENT

Attorney fees are a permissible sanction for bad faith actions in litigation. However, "[t]his Court has made clear that such a sanction, when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature." *Goodyear*, 137 S. Ct. at 1186 (citing *Mine Workers v. Bagwell*, 512 U.S. 821, 826-830 (1994) (distinguishing compensatory from punitive sanctions and specifying the procedures needed to impose each kind). "When (as in this case) … criminal-type protections are missing, a court's shifting of fees is limited to reimbursing the victim." *Id.*

In determining a reasonable attorneys fee, the district court "must arrive at a 'lodestar' figure" by multiplying the hours the applicant's counsel "reasonably spent on the litigation by a reasonable hourly rate." *Case v. Unified School Dist. No. 233, Johnson County, Kan.,* 157 F.3d 1243, 1249 (10th Cir.1998) (quoting *Jane L. v. Bangerter,* 61 F.3d 1505, 1509 (10th Cir.1995)). "[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Mares v. Credit Bureau of Raton,* 801 F.2d 1197, 1201 (10th Cir.1986) (quoting

Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

> "Once the district court has adequate time records before it,"
>
> it must then ensure that the winning attorneys have exercised "'billing judgment.'" *Ramos,* 713 F.2d at 553 (quoting *Copeland,* 641 F.2d at 891). Billing judgment consists of winnowing the hours actually expended down to the hours reasonably expended. *See id.* Hours that an attorney would not properly bill to his or her client cannot reasonably be billed to the adverse party, making certain time presumptively unreasonable. *See id.* at 553–54 (giving as an example time spent doing background research).
>
> After examining the specific tasks and whether they are properly chargeable, the district court should look at the hours expended on each task to determine if they are reasonable.

Id. (quoting *Ramos v. Lamm,* 713 F.2d 546, 553–54 (10th Cir.1983)). In determining what is a reasonable time in which to perform a given task,

> the court should consider that what is reasonable in a particular case can depend upon facts such as the complexity of the case, the number of reasonable strategies pursued, and the responses necessitated by the maneuvering of the other side. Another factor the court should examine in determining the reasonableness of hours expended is the potential duplication of services. "For example, [if] three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." ... The court can look to how many lawyers the other side utilized in similar situations as an indication of the effort required.

Ramos, 713 F.2d at 554 (quoting *Copeland v. Marshall,* 641 F.2d 880, 891 (D.C.Cir.1980) (en banc)). "The district court may also reduce the reasonable hours awarded if 'the number [of compensable hours] claimed by counsel include[s] hours that were unnecessary, irrelevant and duplicative.'" *Case,* 157 F.3d at 1250 (quoting *Carter v. Sedgwick County, Kan.,* 36 F.3d 952, 956 (10th Cir.1994)).

A. Mr. Jurrius Has Incurred No Attorney Fees That Would Not Have Been Incurred But For the Ute Tribe's Conduct.

When a court imposes attorney fees as a litigation sanction pursuant to the court's inherent powers, "the fee award may go no further than to redress the wronged party 'for losses sustained'; it may not impose an additional amount as punishment for the sanctioned party's misbehavior." *Goodyear*, 137 S. Ct. at 1186. That is precisely what an attorney fee award to Mr. Jurrius would constitute here. In *Goodyear*, the Court explained "the need for a court, when using its inherent sanctioning authority (and civil procedures), to establish a causal link—between the litigant's misbehavior and legal fees paid by the opposing party." *Id.* The Supreme Court characterized the causal link in terms of a "but for" inquiry:

> "That kind of causal connection … is appropriately framed as a but-for test: The complaining party … may recover "only the portion of his fees that he would not have paid but for" the misconduct.

Id. at 1187. Here, there is no such causal link. To begin with, Mr. Jurrius is not a party to this action. The Court's show cause order directed the Tribe to file a response. It then stated,

> "Mr Becker shall have" fourteen (14) days "to respond to the Tribe's filing and … to … present to the court what he believes an appropriate sanction against the Tribe should be.[1]

Thereupon, on September 29, 2020, Mr. Jurrius filed a motion seeking leave from the Court to file his own separate response to the Tribe's filing. *See* ECF No. 229 in case number 2:16-cv-958. Thus, Mr. Jurrius, of his own volition, affirmatively sought leave

[1] Show Cause Order, ECF No. 182 at 3 in case number 2:16-cv-579, and ECF No. 221 at 3 in case number 2:16-cv-958.

from the Court to undertake the attorney fees that he incurred in this case; there is no causal link between the Ute Tribe's conduct and Mr. Jurrius' attorney fees beyond that date. Nor is there any causal connection between the Tribe's conduct and Mr. Jurrius' attorney fees *before* that date. As the Tribe emphasized in its reply memorandum on the show cause order, neither Mr. Becker nor Mr. Jurrius presented any evidence to this Court that the Tribe's institution of its arbitration action against Mr. Jurrius interfered with, or affected to any extent, either Mr. Jurrius' production of documents *or* his testimony in open court in the remand proceeding. "[I]ndeed, the arbitration was initiated after Mr. Jurrius testified." Tribe's Reply, ECF No. 243 at 7 in case number 2:16-cv-958. Therefore, the causal connection that is required under *Goodyear* is altogether missing here.

B. Alternatively, Mr. Jurrius Has Failed to Establish that the Hourly Rates are Reasonable.

A party seeking an attorney fee award bears the burden of proving that the claimed hourly rate is reasonable. *Parker v. Citimortgage, Inc.*, 987 F. Supp. 2d 1224, 1235 (Utah 2012) (citing *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1078 (10th Cir. 2002). A reasonable rate is the prevailing market rate in the relevant community. *Id.* To meet this burden, the claimant must:

> Produce satisfactory evidence—**in addition to the attorney's own affidavits**—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable and is referred to—for convenience as the prevailing market rate.

Id. (emphasis added). Here, Mr. Jurrius doesn't even feign an attempt to meet this burden of proof. The only evidence Mr. Jurrius has produced is Attorney Rodney Parker's

own affidavit. And it contains only Attorney Parker's self-serving and foundationless speculation that:

> I believe that the hourly rates charged are consistent with the prevailing hourly rates in the community for similar services, and that such fees are reasonable.

ECF No. 263 at 2.

Against this evidence vacuum, the Ute Tribe's evidence is that the prevailing market rate for attorneys of reasonably comparable skill, experience and reputation is between $250 to $350 per hour. *See* Attachments A and B, Declarations of Brent R. Baker, Esq., and Jonathan D. Bletzacker, Esq. Because there is no evidence to justify an hourly rate at the higher end of the range attested to by Attorneys Baker and Bletzacker, the Ute Tribe urges the Court to adopt the lower rate of $250 per hour to use in its lodestar calculation. *Guides*, 295 F.3d at 1079 (applicant for attorney fees failed to show that the requested rates were reasonable).

C. Mr. Jurrius Has Failed to Establish that the Total Work Hours Claimed are Reasonable, Related to this Case, and Not Duplicative.

The attorney fee applicant bears the burden of proving that the time and labor for which he seeks compensation are reasonable and that "they relate to a claim for which fees are recoverable." *Harold Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1553 (10th Cir. 1996). A party may not recover attorney's fees for tasks that are easily delegated to a non-professional assistant or that are duplicative. *New Mexico Citizens For Clean Air And Water v. Espanola Mercantile Co., Inc.*, 72 F.3d 830, 834 (10th Cir. 1996) (reversing and directing the district court to consider, *inter alia*, whether attorney conferences with one another constituted duplicate billing). To prevent paying "a

Michelangelo … Sistine Chapel rates for painting a farmer's barn," the court must scrutinize the records and weed out non-professional and excessive tasks. *Id.* (quoting *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983).

Here, there is obvious duplication of attorney hours billed and charges for work that has no causal connection to the Tribe's conduct. All of the time billed by the Snow Christensen & Martineau ("SCM") attorneys in August 2020, that are related to the drafting of a motion for protective order relates not to the Ute Tribe's conduct, but rather, to Mr. Becker's service of a subpoena duces tecum on SCM. See ECF No. 263-1. And the fees enumerated in the SCM billing record include multiple conferences among the SCM attorneys themselves which obviously are duplicative. All fees for duplicative attorney hours in conferences should be disallowed.

The Court should also disallow all the fees related to the SCM attorneys work in the Tribe arbitration action against Mr. Jurrius. As noted in the Tribe's reply memorandum on the order to show cause, "the Court has no authority to exercise … its inherent power … to sanction a party for conduct that occurred before another court." *In re Gaigano*, 358 B.R. 90, 104 (Bankr. S.D.N.Y. 2007). The attorney fees Mr. Jurrius incurred in the arbitration action are *not* "reasonable" sanction fees in this case. And the attorney fee submission Mr. Jurrius has submitted, ECF No. 263-1, makes no attempt to exclude or segregate out attorney fees incurred by the SCM attorneys in the arbitration action. Mr. Jurrius filed his response to the Tribe's response to the show cause order on October 9, 2020. *See* ECF Nos. 239 and 239-1 in case number 2:16-cv-958. Nearly all the time after that date—October 9, 2020—and March 8, 2021, is work the SCM attorneys expended in the arbitration case, not this case. Among the instances of improper

inclusion of those fees are (1) Attorney Rodney Parker's meet and confer with the Tribe's attorneys on August 28, 2020—this is work time incurred by Mr. Parker in the arbitration case, not the case at bar, and it is not causally related to the Tribe's conduct in this case; (2) Attorney Slaughter's conference with Attorney Parker on September 30, 2020, related to "discovery issues" in the arbitration; (3) Attorney Parker's conferences with other SCM attorneys on October 9, 2020, on a motion to compel in the arbitration action; (4) Attorney Parker's work on a motion to stay the arbitration on October 28, 2020, (5) all work by the SCM attorneys after the filing of their response memorandum on October 9, 2020, and (6) the meeting of SCM attorneys on 3/31/2021 to discuss "strategy in [the] arbitration in light of [district] court's findings and order."

Mr. Jurrius is also seeking fees totaling $770.00 for the work of an assistant at the rate of $175 per hour. *See* ECF No. 263-1 in case number 2:16-cv-958 (fees for J. Archibeque). All of these fees should be disallowed. First, because there is no evidence that $175/hour is a reasonable rate for legal assistants in Salt Lake City; nor has Mr. Jurrius presented any evidence as to the education and qualifications possessed by the SCM legal assistant. Further, each of the entries for this assistant are for work tasks that the Tenth Circuit has said should be "weeded out" because they easily could have been delegated to a non-professional assistant.

CONCLUSION

There is no basis for awarding attorney fees to Mr. Jurrius as a sanction in this case. Not only does the Court lack authority to compensate Mr. Jurrius for attorney fees he incurred in the arbitration action, but there also is no evidence that Mr. Jurrius would have incurred attorney fees in *this* case but for misconduct on the part of the Tribe. There

is no evidence that the Tribe's institution of its arbitration action against Mr. Jurrius—weeks after his testimony in this case—interfered with, or affected to any extent, either Mr. Jurrius' production of documents *or* his testimony in open court in this case. Alternatively, if the Court does award Mr. Jurrius' attorney fees, there is no evidence that the hourly rates sought by Mr. Jurrius' attorneys are reasonable, or that the work the SMC attorneys are requesting compensation for are reasonable, or are related to their work in this case.

Respectfully submitted this 6th day of May, 2021.

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