UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	)	Civil Action No. 78-322 & 78-420 (Consolidated)

DEFENDANT'S REPLY MEMORANDUM
IN SUPPORT OF AN AWARD OF ATTORNEYS' FEES
PURSUANT TO RULE 37 OF THE FEDERAL
RULES OF CIVIL PROCEDURE

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TABLE OF AUTHORITIES

Cases: Page(s)

Cases marked with an asterisk are primarily relied upon in this memorandum.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	78-322 & 78-420
	)	
FEDERAL BUREAU OF INVESTIGATION,	)	(Consolidated)
	)	
Defendant.	)	
	)	
	)	

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF AN AWARD OF ATTORNEYS' FEES PURSUANT TO RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE

INTRODUCTION

This memorandum is in reply to the May 28th memoranda filed by Mssrs. Weisberg and Lesar in opposition to defendant's petitions for attorneys' fees as a sanction for violation of Rule 37 of the Federal Rules of Civil Procedure. Several issues raised by Mssrs. Weisberg and Lesar will be responded to below; however, two major issues have not been disputed. First, that $53 per hour is a reasonable and justifiable hourly rate for both Mr. LaHaie's and Ms. Whittaker's work, and, second, that the amount of time billed for by Mr. LaHaie was neither excessive nor unreasonable.

The Court of Appeals has affirmed the "ultimate sanction" of dismissal in this case and rejected all of Weisberg's and Lesar's arguments on the merits of discovery issues. Indeed, the court declared that this Court "amply supported its imposition of sanctions against Weisberg in its memorandum of 18

November 1983." Weisberg v. Webster, et al., 749 F.2d 864, 873 (1984). The reasons for the Court of Appeals' remand were to apportion liability as between Weisberg and his attorney, and to resolve an issue first raised on appeal -- whether Mr. LaHaie's timekeeping records were contemporaneous.

In the April 29th memorandum, the defendant showed that both Mr. LaHaie's and Ms. Whittaker's records satisfy this circuit's standard for award of fees as set out in National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982)("NACV").[1] That was further substantiated in depositions taken by separate counsel for Weisberg and Lesar of Henry LaHaie, trial attorney, and Christine Whittaker and Leonard Schaitman of the Department of Justice Civil Division Appellate Staff. All that is now required are findings by the Court that the defendant's timekeeping records are adequate, and

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[1] Concerned Veterans, supra, did not involve the review of an attorneys' fee award as a Rule 37 punitive sanction, but was instead a review of three fees awards under statutes intended to compensate plaintiffs in their efforts to litigate their statutory rights against the government -- two FOIA awards, and one Title VII award. Although the Court of Appeals has remanded this case in part to determine whether the government's documentation satisfies the Concerned Veterans standard, here, unlike the circumstances in NACV , attorneys' fees were sought as a sanction for violation of Court orders. To the extent the Appeals Court applied the NACV test, it was to be used to determine the adequacy of timekeeping records only and not to integrate the legal standards of other fee-shifting statutes into a Rule 37 case in order to assign liability for fees based on the merits of the arguments.

this Court's written analysis for the "well-founded conclusion" that fees are recoverable against Mr. Lesar. op cit., 749 F.2d at 874.

I. DOCUMENTATION PROVIDED IN SUPPORT OF MR LAHAIE'S ATTORNEY'S FEES PETITIONS SATISFIES THE "CONCERNED VETERANS" TEST.

Mr. Weisberg argues at page 3 of his memoranda that Mr. LaHaie should be denied fees pursuant to Rule 37 because his records are "neither contemporaneous, complete, nor standardized." That isolated reference from NACV, supra, neither accurately reflects the requirements established by that case nor is it true. NACV requires that timekeeping records be "sufficiently detailed to permit the District Court to make an independent determination whether or not the hours are justified." NACV, supra, 675 F.2d at 1327. The requirement that records be contemporaneous is to avoid "casual after-the-fact" guesses about time spent which are made long afterwards and thus can lead to unfair billing. Id. In situations where there is a current recall by the attorney and a great deal of billing judgment exercised, such as in this case, a court can easily conclude, consistent with the dictates of NACV, that Mr. LaHaie's hours are justified.

Both of Mr. LaHaie's applications for fees in this case were prepared very soon after the time for which he sought those fees. The documents provided along with Mr. LaHaie's declarations, as well as the pertinent filing dates and

certificates of service from the record, further served to confirm Mr. LaHaie's distinct recollection of the time spent. See Exhibit A, LaHaie Deposition Transcript. For example, as he testified during his deposition, Mr. LaHaie still recalls that he spent more than the two hours that he billed on April 7th for a moot court, more than two hours on April 8th in preparation and at the hearing before this Court, and more than the fifteen minutes billed for conferences with his client on March 14th. See, Exhibit A. Detailed breakdowns of time spent were attached to both declarations--they are complete descriptions of work done with time allocated to precisely described tasks.

Moreover, the federal government only seeks fees in very rare instances such as in this case where the plaintiff and his attorney violated at least two Court orders. It would be ill-advised to require government attorneys to keep the kind of billing records required for private attorneys to bill their clients for their time. Indeed, such a requirement would unfairly preclude the government from the award of sanctions merely because its timekeeping system is not geared to billing clients. It would provide a windfall for parties, like Mssrs. Lesar and Weisberg, who violate Court orders and federal rules, as well as providing incentive to oppose the government on discovery orders without justification.

II. MS. WHITTAKER'S ATTORNEY'S FEES PETITION SHOULD BE GRANTED.

Mr. Weisberg and Mr. Lesar have argued that the defendant should not be granted an award of attorneys' fees for time spent on the appeal of this case. Mr. Weisberg, at pages 6-14, argues that Ms. Whittaker's fees are beyond the terms of the remand, that because the government allegedly did not win on all the issues on appeal it is not due appellate fees, and that Ms. Whittaker's fee request is excessive and inadequately documented. Mr. Lesar argues that because he sought a remand for further findings as an alternative to the complete denial of a sanction against him he prevailed on appeal and no fees are justified.

Both memoranda conveniently gloss over the fact that the Court of Appeals found for the government on the substantive issue which was the basis of the case and the cause for appeal. The Court of Appeals rejected Mr. Weisberg's argument that the government could not get discovery in a FOIA case. The Appeals Court instead ruled that Weisberg had committed sanctionable violations of discovery rules and this Court's orders that Weisberg was not justified in his opposition to discovery. Those findings satisfy the Rule 37 requirement for award of fees incurred by the government in the litigation of this matter. In short, the government was forced to defend its position in appellate court even though this Court found that the plaintiff and his attorney were unjustified in their refusal

to comply with discovery; the cost of that defense is now owed to the government from Weisberg and Lesar pursuant to Rule 37. See Tamari v. Bache & Co., 729 F.2d 469, 475 (7th Cir. 1984).

Mr. Weisberg's attempts to assign fees only for the issues upon which he claims the government prevailed on appeal are misguided. The fees in this case were sanctions for failure to comply with orders to produce discovery, and the question of who ultimately "prevails" in the case or any issue is irrelevant to the award of fees once it is found that refusal to comply with discovery was unjustified. 4A Moore's Federal Practice Digest ¶37.03[2]. Rule 37 requires that fees be awarded when it is shown that the offending party was not substantially justified in opposing discovery. 4A Moore's Federal Practice Digest §37.02 (10.-2); Federal Advisory Committee Notes.[2] The defendant proved that the plaintiff and his attorney were not substantially justified in refusing to produce discovery and this Court as well as the Court of Appeals so found.

Moreover, such an argument is belied by the Court of Appeals' remand for a determination of "whether documentation submitted and to be submitted by the government...satisfies our test in Concerned Veterans." Weisberg v. Webster et al.,

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[2] Mr. Weisberg concedes at page six of his memorandum that an award of fees is not authorized under Rule 37 if the position of the losing party is justified. The Court of Appeals found that Weisberg's position was not justified and so it follows by Weisberg's own admission that fees are due from him here.

supra, 749 F.2d at 874-75.[3] Obviously, the Court of Appeals is referencing all of the work performed by the government counsel and was providing a renewed opportunity for the government to provide any documentation available.

Equally misguided is Weisberg's argument that because Ms. Whittaker allegedly spent seven percent of her brief on the denial of the protective order and whether failure to provide discovery was substantially justified, her fee award should be reduced to seven percent of the fees petition. That argument violates the Supreme Court's rule in Hensley v. Eckerhart, 103 S.Ct. 1933(1983) that courts award fees for all reasonably related matters upon which a party substantially prevails. Clearly, the denial of the protective order was only the beginning of the conflict over the granting of discovery, which was the issue upon which Ms. Whittaker prevailed and upon which all other arguments hinged. In any event, Mr. Weisberg and his counsel surely are not arguing that a flat percentage rule should be applied in all cases where attorneys' fees are awarded based on the number of pages devoted to issues won or lost. Not

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[3] Mr. Weisberg further argues that because Ms. Whittaker's fees were not before the Court of Appeals, this Court is precluded from awarding fees on remand because her fees would be beyond the terms of the remand. That is incorrect. To the extent Ms. Whittaker's fees were not addressed by the Court of Appeals, this Court is not limited to the terms of a remand order when there are issues left open by the remand order, particularly because the award of attorneys' fees is a secondary issue and any error could be corrected later by the Court of Appeals. See, 9 Moore's Federal Practice Digest, ¶110.25[2].

only is that entirely unworkable, but it does not recognize the obvious fact that the merit of an argument is unrelated to its length.

Finally, Mr. Weisberg argues that Ms. Whittaker's fees are not adequately documented and are excessive. She has testified that her timkeeping records which have been provided to the Court were contemporaneously recorded each night or the following morning of every workday. See Exhibit B, Whittaker Deposition Transcript. Attempting to discredit Ms. Whittaker's petition for fees, Weisberg argues that Department of Justice timekeeping system is not intended to be used for billing and therefore does not justify an award of fees. What that system is intended for is irrelevant, because Ms. Whittaker's records upon which the fees in this case are partly based, satisfy the NACV standard.

Amazingly, Weisberg criticizes the uniformity and completeness of Ms. Whittaker's records arguing that they do not account for time spent each day on other tasks and free time. At the same time he argues that just such uniform records are required to justify an award of fees. See, Weisberg Memorandum at pp. 2, 9-10. Certainly, Mr. Weisberg cannot dispute the degree of care Ms. Whittaker took in recording her time, as she testified:

> Q. So were your timekeeping practices in this case with respect to the appeal more careful than in other cases?

A. I believe, if anything, I was particularly careful that I did not attribute to this case any hours that were not absolutely spent entirely on the prosecution of this appeal.

See Exhibit B, Whittaker Deposition Transcript, p. 22.

Whether those hours were spent on more specific activity than "research," "brief writing," or one of the other categories of Ms. Whittaker's work is irrelevant -- the contemporaneous records prove that the NACV requirements were met.

Weisberg argues that Ms. Whittaker's hours should be limited to the same amount of time spent by his attorney, Mr. Lynch. That contention is ridiculous. There is absolutely no authority for such an argument. First, plaintiff has given no rational basis for the contention that Mr. Lynch should provide the standard for what constitutes a reasonable amount of time to be expended in this case. Moreover, it is not unreasonable that the defendant would require a different amount of time than plaintiff given the different arguments that must be made. Furthermore, Ms. Whittaker was opposing both Mr. Weisberg and his attorney, Mr. Lesar on appeal, so that Ms. Whittaker was forced to spend significantly more time because she had to answer two appellate memoranda.

III. LESAR IS NOT EXCUSED FROM LIABILITY BECAUSE OF THE COURT OF APPEALS RULING.

Mr. Lesar argues that because the Court of Appeals remanded the case and did not itself award fees against him, this Court is now precluded from so doing. That is not a correct reading of the mandate from the Court of Appeals. By its ruling, the

Court of Appeals kept both Mr. Lesar and Mr. Weisberg in the case and ordered this Court to make the necessary findings to apportion fees. Weisberg v. Webster, et al., supra, 749 F.2d at 874-75. Lesar's argument to the Court of Appeals that no fees be awarded against him, or in the alternative, that the case be remanded, does not now relieve him of liability for fees. Clearly, the Court of Appeals did not relieve him of liability for fees. The Court of Appeals stated that it was necessary to have further findings regarding the award of fees against Lesar. Therefore, the Court of Appeals could not award fees in light of its opinion that more findings were needed. The only alternative was to remand to this Court for further findings, but that does not mean that no appellate fees can be awarded against Lesar.

The Court of Appeals affirmed that the defense Lesar presented for his client was unjustified, and the court also ruled that it was up to the trial court to judge how much "responsibility is due to the client's recalcitrance and how much to the lawyer's condonance or participation in the client's disobedience." Id. at 874. The finding was made that the defense was unjustified, and after this Court makes a specific finding as to the degree Mr. Lesar was responsible, Mr. Lesar is responsible for a comensurate share of all the fees in the government's litigation of the matter in trial court as well as appellate court.

To adopt Mr. Lesar's reasoning, the Court would create a loophole to escape liability for many attorneys who commit sanctionable violations. Attorneys could argue in the alternative to the appellate court that if they do not succeed on the merits the case should be remanded to the trial court for further action, and then argue that appellate fees are not due because they achieved the remand sought on appeal. Such a circuitous argument should be rejected.[4]

In addition, it is beyond question that a remand is a procedural ruling only, and not a judgment on the merits. Therefore, it is incorrect to say that Mr. Lesar prevailed on the issue of remand on appeal. The Supreme Court has stated that a party has not prevailed until he "has established his entitlement to some relief on the merits of his claims." Hanrahan v. Hampton, 446 U.S. 754, 756-57.(1980). Obviously, the Court of Appeals did not vindicate Mr. Lesar in this case, but sent his claim back to this Court for further findings.

Mr. Lesar makes arguments about his "powerlessness" to act other than he did and asks the Court to do what is "just" and relieve him of liability. He does not refute the fact that the Code of Professional Responsibility, cited in the government's memorandum, makes provision for attorneys to excuse themselves

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[4] Had findings been made originally by this Court and affirmed by the Court of Appeals, as it has affirmed the other aspects of the government's position, there would be no question that appellate fees were appropriate. Simply because the Court of Appeals remanded for specific findings by this Court should not alter that result.

from their responsibility to a client when the client insists on presenting a claim which is unwarranted under existing law or seeks to pursue an illegal course of action. See, Defendant's Memorandum, pp.13-16.

Cases cited by Mr. Lesar suggesting that much more egregious activity tolerated by other courts warrant leniency by this Court in the award of fees are not persuasive. In Humphreys Exterminating Co. Inc. v. Poulker, 62 F.R.D. 392 (D.Md. 1974), the court cited no authority for its own opinion that an attorney is not subject to a sanction of attorneys' fees unless discovery was opposed at his instigation. The 1970 Amendments to Rule 37 have been universally interpreted to require broader application of sanctions for violation of discovery any time a discovery order is violated. See 4A Moore's Federal Practice Digest § 37.02. In Charron v. Meux, 66 F.R.D. 64 (S.D.N.Y. 1975), fee sanctions against the attorney were apparently never sought from the court. Although the court may grant sanctions sua sponte in some cases, it is not up to the court to award fees if they are not sought by a party. Thus, Lesar's arguments should be rejected and fees should be awarded to be shared jointly by Weisberg and Lesar.

CONCLUSION

For the reasons stated above, and in the Defendant's Supplemental Memorandum Of Points And Authorities In Support Of An Award Of Attorneys' Fees Pursuant To Rule 37 Of The Federal Rules Of Civil Procedure, which is incorporated herein by

reference, the sanction of attorneys fees should be granted against both Mssrs. Weisberg and Lesar as detailed in defendant's earlier memorandum.

Respectfully submitted,

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TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Civil Action Nos. 78-322 and 78-420 (Consolidated)

Deposition of HENRY LaWALL

Washington, D. C.
May 6, 1985

Pages 1 thru 34

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EXHIBIT A

my recollection.

Q What leads you to say that you had such a consultation on the 14th was the fact that on the 11th you made a note to yourself to do it on the 14th?

A That, in addition to the fact that I recall calling Mr. Newton and talking with him, and also Mr. Welby. Bill Welby, who is another FBI personnel.

I have a distinct recollection that I did talk with them, as I did on many occasions when I was drafting this declaration.

In terms of what to actually bill something, I used that notation in conjunction with my recollection that the call did take place and that it lasted, as I stated here, at least 15 minutes.

Q And your recollection that it lasted 15 minutes was a recollection that took place around the time, around April 25th when you signed your recommendation; is that correct?

A I would say that even now I recall that the consultation was telephone calls that day with the different FBI personnel and lasted more than 15 minutes.

But to answer your question directly, I also had a

saying can you come over here such and such a time for a hearing.

In terms of disputing whether I spent two hours on that particular day, I mean I find it a little hard to believe that anyone could dispute that. I mean in terms of my affidavit that was then drawn --

Q Let's take April 7th and April 8th, for example, the moot court and the hearing.

The recollection of the time spent was a recollection made on April 25th or shortly before April 25th when you signed this declaration; is that correct?

A Well, that is when I signed the declaration, and that is when I would be recalling what I did on those days and how much time I spent.

But in terms of -- like I put down two hours for the preparation of the moot court and that the moot court itself lasted an hour and a half.

I mean I recall right now spending the entire day, as I'm sure I did on April 25th, in preparation for that moot court. And I recall that the moot court lasted more than an hour and a half.

One of the reasons I put these times down is that I

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IN THE UNITED STATES DISTRICT COURT

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Deposition of CHRISTINE WHITTAKER.

Washington, D.C.
May 9, 1985

Pages 1 thru 28

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EXHIBIT B

anticipate that you would be making an application for attorney's fees if the government prevailed?

MS. WOHLENHAUS: Objection. It calls for a conclusion of the witness. It assumes an inappropiate conclusion of the witness.

Q The answer to the question?

A I recall thinking that I should record my time carefully because I was aware of a recent seventh circuit case in which the court had upheld an award of attorney's fees for an appeal of a motion to compel and I thought that precedent would apply in our case.

Q So were your timekeeping practices in this case with respect to this appeal more careful than in other cases?

A I believe, if anything, I was particularly careful that I did not attribute to this case any hours that were not absolutely spent entirely on the prosecution of this appeal.

Q If I could direct your attention to your handwritten notes for your time again, and particularly, the week of October 21--the Weisberg appeal was argued on October 25, 1984; is that correct?

A That is my recollection.

A I do not recall filing a Bill of Costs in this case.

Q Could you describe your timekeeping practices to us.

A As I described in my declaration, my practice each day is to record the amount of time that I spent either that day or the previous day on each case that I have worked on.

Q And where do you record the amount of time

A I record these amounts of time on a note pad. I believe you were provided with copies of the relevant pages.

Q You make the entries on the note pad at the end of the day or the following morning?

A Sometimes I make them at the end of the day. Other times I make them the following morning.

Q In making these entries, how do you take into account the inevitable interruptions that occur during the course of the day?

A They are taken into account by the fact ~~bill for the total~~. I do not enter down a number of hours which represents the total amount of time that I was in the office.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 1985, I served a copy of Defendant's Reply Memorandum In Support Of An Award Of Attorneys' Fees Pursuant To Rule 37 Of The Federal Rules Of Civil Procedure on following persons by mailing copies in a sealed envelope, postage pre-paid, to the following addresses:

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