UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GUGGENHEIM CAPITAL, LLC, and GUGGENHEIM PARTNERS, LLC,

Plaintiffs,

- against -

CATARINA PIETRA TOUMEI, A/K/A LADY CATARINA PIETRA TOUMEI, A/K/A CATARINA FREDERICK; VLADIMIR ZURAVEL, A/K/A VLADIMIR GUGGENHEIM, A/K/A VLADIMIR Z. GUGGENHEIM, A/K/A VLADIMIR Z. GUGGENHEIM BANK; DAVID BIRNBAUM, A/K/A DAVID B. GUGGENHEIM; ELI PICHEL; and JOHN DOES 1-10,

Defendants.

**ORDER**

10 Civ. 8830 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

This Court previously granted: (1) a default judgment against Defendants Catarina Pietra Toumei, Vladimir Zuravel, Eli Pichel[1] (Dkt. No. 40); (2) Plaintiffs' motion for statutory damages, costs, and attorneys' fees against Toumei, Zuravel, and Pichel (Dkt. No. 102); (3) a default judgment against Defendants David Birnbaum and Dabir International, Ltd. ("Dabir") (Dkt. No. 103); and (4) Plaintiffs' motion for an award of reasonable attorneys' fees and costs against Birnbaum and Dabir. (Id.) On August 11, 2011, Defendants Birnbaum and Dabir International appealed this Court's July 15, 2011 order granting a default judgment against them. (Dkt. No. 109)

[1] A default judgment was also entered against Theodor Pardo, but was later vacated in light of this Court's order granting Pardo's motion to quash service. (Dkt. No. 68)

The Court must now determine the appropriate amount of an attorneys' fee and costs award against Toumei, Zuravel, Pichel, Birnbaum and Dabir, and must also consider Plaintiffs' motion for an order requiring Birnbaum and Dabir to post a $100,000 bond in connection with their appeal. (Dkt. No. 115).

Plaintiffs have filed a declaration and contemporaneous time records in support of their attorneys' fee and costs application. (Dkt. Nos. 107, 111) Toumei, Zuravel, and Pichel have not submitted any opposition to Plaintiffs' motion. Birnbaum and Dabir oppose Plaintiffs' application, arguing that:

1. Plaintiffs' declaration in support of their motion was untimely filed;
2. Plaintiffs' declaration does not provide an adequate basis for the Court to determine the proper amount of attorneys' fees;
3. in light of the statutory damages awarded to Plaintiffs, and the absence of any actual harm to Plaintiffs or financial benefit to Defendants, an award of attorneys' fees would serve no legitimate deterrent or punitive purpose; and
4. the attorneys' fees and costs sought are unreasonable and excessive.

(Def. Opp. Atty. Fees[2] 2; Def. Sur-Reply 2-4)

Birnbaum and Dabir also oppose Plaintiffs' motion for an order requiring them to post a $100,000 appeal bond, arguing that:

1. Birnbaum and Dabir lack the financial resources to post a $100,000 bond;
2. their appeal is meritorious; and
3. the amount of the bond sought by Plaintiffs is excessive.

(See generally Def. Opp. Bond[3])

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[2] "Def. Opp. Atty. Fees" refers to Defendants' Opposition to Plaintiffs' motion for attorneys' fees and costs filed on August 18, 2011.

[3] "Def. Opp. Bond" refers to Defendants' Opposition to Plaintiffs' October 12, 2011 motion for an order requiring Defendants to post a bond for costs on appeal.

For the reasons stated below, the Court awards Plaintiffs $405,901.75 in attorneys' fees and $42,967.92 in costs. Plaintiffs' motion for an order requiring Birnbaum and Dabir to post an appeal bond will be denied.

## DISCUSSION

### I. COMPUTATION OF ATTORNEYS' FEE AND COSTS AWARD

Generally, "[f]ee awards in the Second Circuit are computed under the lodestar method" – sometimes referred to as the "presumptively reasonable fee" method, see Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 183 (2d Cir. 2008) – "'which multiplies hours reasonably spent by counsel times a reasonable hourly rate.'" ACE Ltd. v. CIGNA Corp., No. 00 CIV. 9423(WK), 2001 WL 1286247, at *2 (S.D.N.Y. Oct. 22, 2001) (quoting Gen. Elec. Co. v. Compagnie Euralair, S.A., No. 96 Civ. 0884, 1997 WL 397627, at *4 (S.D.N.Y. July 3, 1997)). "Both the evaluation of reasonable attorneys' fees and the reduction of such fees lies within the sound discretion of the Court." Id. (citing Shannon v. Fireman's Fund Ins. Co., 156 F. Supp. 2d 279, 298 (S.D.N.Y. 2001)); see also Suchodolski Assocs., Inc. v. Cardell Fin. Corp., Nos. 03 Civ. 4148(WHP), 04 Civ. 5732(WHP), 2008 WL 5539688, at *2 (S.D.N.Y. Dec. 18, 2008) ("[t]he question of how much to award as attorneys' fees and costs is entrusted to the sound discretion of the court.") (citing Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170, 1183 (2d Cir. 1996)).

In determining the appropriate amount of the award, the district court "should look to what a 'reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively' would be willing to pay." Nature's Enter., Inc. v. Pearson, No. 08 Civ. 8549(JGK), 2010 WL 447377, at *9 (S.D.N.Y. Feb. 9, 2010) (quoting Arbor Hill, 522 F.3d at 184, 190). "In determining a reasonable fee, the Court examines both the reasonableness of

the hourly rates of a plaintiff's attorneys, and the reasonableness of the number of hours for which fees are sought." GAKM Res. LLC v. Jaylyn Sales Inc., No. 08 Civ. 6030(GEL), 2009 WL 2150891, at *7 (S.D.N.Y. July 20, 2009) (citing Homkow v. Musika Records, Inc., No. 04 Civ. 3587(KMW)(THK), 2009 WL 721732, at *25 (S.D.N.Y. Mar. 18, 2009)).

Here, Plaintiffs seek attorneys' fees in the amount of $618,520.00 for the work of McDermott Will & Emery LLP ("McDermott") attorneys John J. Dabney, Robert Zelnick, Michael Shanahan, Rita Weeks, Alison Levin, Katie Bukrinsky, Richard Kim, Jason Han Yu, and Whitney Brown, and managing clerk Amelia Crowley, as well as costs in the amount of $58,090.65. In support of their motion, Plaintiffs have submitted invoices they received on a monthly basis from McDermott, which provide contemporaneous time records entered by each attorney and non-attorney professional working on the case (Sept. 1, 2011 Dabney Decl., Ex. 1), biographical information concerning each attorney and non-attorney professional (Aug. 5, 2011 Dabney Decl. ¶ 9-15; Sept. 1, 2011 Dabney Decl. ¶ 6), and invoices from third-party vendors (Sept. 1, 2011 Dabney Decl., Ex. 3-5). Plaintiffs have also submitted, for purposes of comparison, excerpts from a 2009 "Economic Survey" prepared by the American Intellectual Property Law Association ("AIPLA") listing average hourly billing rates for various geographical regions. (Sept. 1, 2011 Dabney Decl., Ex. 2)

**A. Timeliness of Plaintiffs' Attorneys' Fees Declaration**

Birnbaum and Dabir argue that Plaintiffs' attorneys' fees declaration was untimely filed. (Def. Opp. Atty. Fees 3-8) In an order dated July 16, 2011, this Court extended Plaintiffs' deadline for filing a declaration in support of Plaintiffs' motion for attorneys' fees and costs to August 5, 2011. (Dkt. No. 104) Birnbaum and Dabir maintain that Plaintiffs' declaration was not filed until August 10, 2011, the date on which the document appeared on the

ECF system. (Def. Opp. Atty. Fees at 3) However, Plaintiffs have produced a time-stamped copy of the August 5, 2011 declaration of John Dabney clearly indicating that the document was received by the Court on August 5, 2011.[4] (Sept. 1, 2011 Weeks Decl., Ex. 1) Accordingly, Plaintiffs' declaration was timely filed and will be considered by this Court.

Birnbaum and Dabir further contend that the Court should not consider Plaintiffs' reply brief (Dkt. No. 111), because the Court granted Plaintiffs' request to submit a reply brief before Birnbaum and Dabir received a copy of Plaintiffs' request. (Def. Sur-Reply at 5) It is within the Court's discretion to permit Plaintiffs to submit a reply brief with supporting documentation. See Derechin v. State Univ. of New York, 138 F.R.D. 362, 365 (W.D.N.Y. 1991) ("[h]ad the affidavit been timely submitted, this Court would direct the plaintiff's counsel to resubmit same – with an itemization of time spent, by whom and at what rate"). Moreover, the Court granted Birnbaum and Dabir permission to submit a sur-reply, thus giving them an opportunity to address Plaintiffs' reply brief. Accordingly, the Court will consider Plaintiffs' reply brief and annexed documentation.

Birnbaum and Dabir also argue that Plaintiffs' declaration does not provide an adequate basis for the Court to make a determination as to an appropriate attorneys' fee award. (Def. Opp. Atty. Fees at 8-14) However, as noted above, Plaintiffs submitted invoices and other documentation supporting their motion for attorneys' fees and costs. These materials provide an adequate basis for an attorneys' fee award.

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[4] As detailed in the September 1, 2011 declaration of Rita Weeks, a McDermott attorney, Weeks called the Court to inquire whether the August 5, 2011 declaration should be filed by hand or electronically and was told that the document should be filed by hand. (Sept. 1, 2011 Weeks Decl. ¶ 6) Accordingly, Weeks arranged for the document to be filed by hand on August 5, 2011. (Id. ¶ 7-8) Then, on August 10, 2011, Weeks received a notification from ECF indicating that the Clerk's Office had rejected the by-hand filing and directing Plaintiffs to file the declaration electronically via ECF. (Id. ¶ 9, Ex. 2) Weeks then promptly filed the declaration electronically on August 10, 2011. (Id. ¶ 10; Dkt. No. 107)

**B. Hourly Rates**

Plaintiffs seek a fee award reflecting the following hourly billing rates:

$620 to $640 for senior partner John J. Dabney;

$770 to $795 for senior partner Robert Zelnick;

$720 to $740 for senior partner Michael Shanahan;

$620 to $640 for senior partner Richard Kim;

$535 to $550 for partner Jason Han Yu;

$400 to $445 for senior associate Rita Weeks;

$360 to $435 for senior associate Alison Levin;

$295 to $320 for associate Katie Bukrinsky;

$295 to $320 for associate Whitney Brown; and

$170 for managing clerk Amelia Crowley.

(Sept. 1, 2011 Dabney Decl. ¶ 8) The invoices total $834,384.66[5] for 1,600.50[6] hours of work.

Plaintiffs propose that $713.75 be subtracted from the total invoiced amount, reflecting fees charged for "work performed for Plaintiffs that did not directly relate to this litigation, such as audit assistance and file management." (Sept. 1, 2011 Dabney Decl. ¶ 7 n.1) After this deduction is taken, Plaintiffs seek 75% of the total sum, which they assert amounts to $618,520.00, but which this Court has determined totals $625,253.18. Plaintiffs suggest that a 25% reduction is appropriate because "[s]ome of the tasks performed in connection with this case were not associated with Defendants, or involved work that was performed in connection

[5] Plaintiffs claim that the invoices total $837,423.75. (Sept. 1, 2011 Dabney Decl. ¶ 5) The time records that have been submitted indicate that the correct figure is $834,384.66.

[6] The chart included in the September 1, 2011 Dabney declaration indicates that 1,635 hours were expended on this matter. (Sept. 1, 2011 Dabney Decl. ¶ 8) However, the Court's calculations, based on the invoices provided, indicate that the correct figure is 1,600.50. (Id., Ex. 1)

with legal research and the drafting of motions that ultimately were not required to be filed." (Aug. 5, 2011 Dabney Decl. ¶ 17-18)

Birnbaum and Dabir argue generally that Plaintiffs' fee request is unreasonably high (Def. Sur-Reply at 8-11), but do not challenge the reasonableness of Plaintiffs' counsel's hourly rates.

In support of their hourly rates, Plaintiffs cite several cases approving comparable rates in similar cases in this District. (Sept. 1, 2011 Dabney Decl. ¶ 9) For example, in Union of Orthodox Jewish Congregations of Am. v. Am. Food & Beverage, Inc., 704 F. Supp. 2d 288 (S.D.N.Y. 2010), a trademark infringement action, the court approved an attorneys' fees request which included hourly rates of $735 for a partner, $400 for an associate, and $275 for a junior associate. Id. at 293. Similarly, in Therapy Prods., Inc. v. Bissoon, 07 Civ. 8696(DLC)(THK), 2010 WL 2404317 (S.D.N.Y. Mar. 31, 2010), the court found that hourly rates of $750 for "senior counsel," $430 for a fourth-year associate, $295 for a second-year associate, and $170 to $200 for a paralegal were reasonable. Id. at *5. Moreover, McDermott's hourly rates are generally in line with the range of rates for New York City reported in the AIPLA survey. (Sept. 1, 2011 Dabney Decl., Ex. 2)

The determination of reasonable hourly rates is a factual issue committed to the court's discretion, and is typically defined as the market rate a "reasonable, paying client would be willing to pay." Arbor Hill, 522 F.3d at 184. In determining what rates are reasonable, a court should rely on "its own knowledge of comparable rates charged by lawyers in the district." Morris v. Eversley, 343 F. Supp. 2d 234, 245 (S.D.N.Y. 2004) (citing Ramirez v. N.Y. City Off-Track Betting Corp., No. 93 Civ. 682 (LAP), 1997 WL 160369, at *2 (S.D.N.Y. Apr. 3, 1997)). The size of the firm may also be considered as a factor if it would affect the hourly rate,

"primarily due to varying overhead costs." Cioffi v. N.Y. Cmty. Bank, 465 F. Supp. 2d 202, 219 (E.D.N.Y. 2006).

"A reasonable starting point for determining the hourly rate for purposes of a [presumptively reasonable fee] calculation is the attorney's customary rate." Parrish v. Sollecito, 280 F. Supp. 2d 145, 169-170 (S.D.N.Y. 2003). Courts are also instructed to look to market rates "'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Gierlinger v. Gleason, 160 F.3d 858, 882 (2d Cir. 1998) (quoting Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984)). The relevant community in this case is the Southern District of New York. See In re Agent Orange Prod. Liab. Litig., 818 F.2d 226, 232 (2d Cir. 1987).

Here, Plaintiffs have provided three examples of court-approved rates for New York firms of comparable size and reputation. Although the evidence shows that the billing rates of attorneys with similar experience at comparable firms cover a range, McDermott's rates fall within that range. Moreover, Birnbaum and Dabir have offered nothing that "rebut[s] [Plaintiffs'] assertion that these rates are reasonable." Therapy Prods., 2010 WL 2404317, at *6. Accordingly, the Court finds that the hourly rates sought by Plaintiffs are reasonable in light of the evidence offered by the parties.[7]

### C. Number of Hours

After determining appropriate hourly rates, courts must calculate the reasonable number of hours billed in order to determine the presumptively reasonable fee. See Arbor Hill, 522 F.3d at 189-90. As with the determination of a reasonable rate, the court must look to

[7] Plaintiffs have offered a rate range for each attorney. For example, Dabney's rate is listed as $620 to $640. Plaintiffs have provided no explanation as to when each rate applied. Accordingly, the Court will award attorneys' fees based on the lower figure in each range.

"contemporaneous time records . . . [that] specify, for each attorney, the date, the hours expended, and the nature of the work done," New York State Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983), and also "to 'its own familiarity with the case . . . and its experience generally. . . .'" Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992) (quoting Di Filippo v. Morizio, 759 F.2d 231, 236 (2d Cir. 1985)). Where a party submits deficient or incomplete billing records, courts should reduce the requested fee award. See Hensley v. Eckerhart, 461 U.S. 424, 437 n.12 (1983) (attorney seeking fee award must, at least, "identify the general subject matter of his time expenditures").

Courts may also exclude "excessive, redundant or otherwise unnecessary hours" from the calculation, Quarantino v. Tiffany & Co., 166 F.3d 422, 425 (2d Cir. 1999), or make an across-the-board reduction reflecting excessive or unnecessary hours. See Luciano v. Olsten Corp., 109 F.3d 111, 117 (2d Cir. 1997). "In assessing the number of hours for which compensation should be awarded, '[t]he court's role is not to determine whether the number of hours worked by [the movant's] attorneys represents the most efficient use of resources, but rather whether the number is reasonable.'" Malletier v. Apex Creative Int'l Corp., 687 F. Supp. 2d 347, 362 (S.D.N.Y. 2010) (quoting In re Arbitration Between P.M.I. Trading Ltd. v. Farstad Oil, 160 F. Supp. 2d 613, 616 (S.D.N.Y. 2001)). The time analysis turns not on what appears necessary in hindsight, but on whether "at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." Grant v. Martinez, 973 F.2d 96, 99 (2d Cir. 1992).

Here, Plaintiffs have submitted invoices that specify "for each attorney, the date, hours expended, and nature of the work done." (Sept. 1, 2011 Dabney Decl., Ex. 1; see New York State Ass'n for Retarded Children, 711 F.2d at 1148) Plaintiffs seek a fee award for

1,600.50 hours worked over a one-year period: 290.5 hours of partner John J. Dabney's time; 135.75 hours of partner Robert Zelnick's time; 270.5 hours of partner Michael Shanahan's time; 8.75 hours of partner Richard Kim's time; 2.5 hours of partner Jason Han Yu's time; 596 hours of senior associate Rita Weeks's time; 25.5 hours of senior associate Alison Levin's time; 204.25 hours of associate Katie Bukrinsky's time; 15.25 hours of associate Whitney Brown's time; and 51.5 hours of managing clerk Amelia Crowley's time.[8] (Sept. 1, 2011 Dabney Decl., Ex. 1)

Birnbaum and Dabir contend that "the number of lawyers . . . and the gargantuan number of hours billed to a financial institution that suffered no economic loss from David Birnbaum's conduct . . . were way out of proportion from the 'harm' sought to be relieved or the result achieved for any client here." (Def. Sur-Reply at 11) In support of their argument, Birnbaum and Dabir cite New York State Soc. of Certified Pub. Accountants v. Eric Louis Assocs., Inc., 79 F. Supp. 2d 331, 354 (S.D.N.Y. 1999), in which the court noted that "courts should not award legal fees that are disproportionate to the result achieved or, better, reasonably achievable." Birnbaum and Dabir also cite to Am. Honda Motor Co., Inc. v. Two Wheel Corp., 918 F.2d 1060 (2d Cir. 1990), in which the Second Circuit upheld a reduction in attorneys' fees and costs from $200,000 to $16,760.49, finding that "[t]he records submitted by counsel clearly indicate that they overlitigated this case both by expending time that was not reasonably required to obtain an injunction and by expending yet more time pursuing a negligible trademark claim." Id. at 1064.

Birnbaum and Dabir argue that the fees sought by Plaintiffs are excessive because the "case . . . took nine months; . . . no discovery whatsoever was propounded by the defendants; . . . there were a total of three depositions – mainly abortive – of one deponent, and none of any

[8] As noted above, Plaintiffs concede that a 25% reduction is appropriate concerning the fees associated with the total number of hours worked.

plaintiff witness; there was some miscellaneous motion practice before defendants ceased to be represented or to proffer a defense [ ] at all; and the case was resolved on an unopposed motion for default." (Def. Sur-Reply at 9) (emphasis in original) Plaintiffs contend that "the volume of hours expended by McDermott attorneys was reasonable in light of the complexity of this case and the significant amount of time required to address Defendants' numerous and continuing violations of nearly all of the Court's Orders." (Pltf. Reply Atty. Fees at 6)

Although Defendants' repeated failures to obey court orders undoubtedly increased the amount of time Plaintiffs' counsel was required to spend on this matter, the Court cannot ignore the fact that (1) most of the defendants never appeared; (2) the case was resolved on the basis of default judgments; and (3) almost no discovery was taken. Given these circumstances, invoices totaling $834,384.66 for 1,600.50 hours worked are not reasonable. The number of hours billed to this matter is excessive, as is the number of attorneys who performed this work.

Courts have imposed fee reductions where, as here, counsel overstaffed a case. See Orchano v. Advanced Recovery, Inc., 107 F.3d 94, 98 (2d Cir. 1997) (courts must "determine the number of hours reasonably spent on the litigation and . . . exclude hours that '[we]re excessive, redundant, or otherwise unnecessary' due to, for example, 'overstaff[ing]'" (quoting Hensley, 461 U.S. at 434); In re Agent Orange Product Liability Litig., 818 F.2d at 237 ("[i]n determining which hours were beneficial, we note that there 'are no hard-and-fast rules,' but that '[a]mple authority supports reduction in the lodestar figure for overstaffing as well as for other forms of duplicative or inefficient work'" (quoting Seigal v. Merrick, 619 F.2d 160, 164 n.9 (2d Cir. 1980)).

Plaintiffs have not explained why it was necessary to assign five partners, two senior associates, and one junior associate to this matter, given that this case was resolved on the basis of default judgments and no discovery was taken.[9] The Court finds that the number of attorneys and the number of hours expended on this case was significantly in excess of what was necessary to achieve the same results. Accordingly, the Court will permit Plaintiffs to recover only for the hours worked by the primary attorneys on this case – 290.5 hours of partner John J. Dabney's time and 596 hours of senior associate Rita Weeks's time – as well as the 51.5 hours worked by the managing clerk.

**D. Billing Practices**

Turning to the reasonableness of McDermott's billing practices, the Court notes that the firm "records its attorneys' time only in quarter-hour segments, a practice that tends substantially to overstate the amount of time spent when many tasks require only a short time span to complete, and that adds an upward bias in virtually all cases." Lucky Brand Dungarees, Inc. v. Ally Apparel Res., LLC, No. 05 Civ. 6757(LTS)(MHD), 2009 WL 466136, at *4 (S.D.N.Y. Feb. 25, 2009). The practice of billing in quarter-hour segments, "which deviates from the use of tenth-of-an-hour increments utilized by many firms, has repeatedly been found improper and justifies some further conservatism in calculating the amount of compensable time." Id. (citing Spalluto v. Trump Int'l Hotel & Tower, No. 04 Civ. 7497(RJS)(HBP), 2008 WL 4525372, at *10 (S.D.N.Y. Oct. 2, 2008) (finding that a reduction in attorneys' fees was warranted where "the inability to assess the reasonableness of [the attorney's] hours is compounded by the fact that the smallest increment [the attorney] used to bill his time was one-quarter of an hour"); Cowan v. Ernest Codelia, P.C., No. 98 Civ. 5548(JGK), 2001 WL 30501, at

[9] Although Plaintiffs attempted to depose Birnbaum and Dabir, Birnbaum asserted his Fifth Amendment privilege. (See Dkt. No. 106 at 4; 4/18/11 Dabney Decl., Ex. B)

*8 (S.D.N.Y. Jan. 12, 2001) ("[t]he excessiveness of counsel's charges is compounded by their billing practices. Each attorney recorded time in increments no smaller than one-quarter hour . . . . The use of such large billing increments is inappropriate"); Oxford Ventures Fund Ltd. P'ship v. CIT Group/Equip. Fin., No. 89 Civ. 1836(SWK), 1990 WL 176102, at *2 (S.D.N.Y. Nov. 5, 1990)). In such circumstances, "[a]n across-the-board reduction in compensable hours is warranted." Cowan, 2001 WL 30501, at *8 (citing Luciano, 109 F.3d at 117 ("a district court can exclude excessive and unreasonable hours from its fee computation by making an across-the-board reduction in the amount of hours."); Pascuiti v. New York Yankees, 108 F. Supp. 2d 258, 267-68 (S.D.N.Y. 2000) (across the board reductions in fees are appropriate to ensure that the overall fee was reasonable)); see also Thomas v. United States, No. 02 Civ. 5746(HBP), 2011 WL 6057898, at *7 (S.D.N.Y. Dec. 5, 2011) ("I find that the hours for which compensation should be awarded should be reduced by an additional 10% to compensate for [plaintiff's attorney's] block billing and use of quarter-hour increments to record his time.").

Because McDermott's practice of quarter-hour billing likely overstates the amount of time spent litigating this case, this Court finds that an additional five percent reduction of the fees sought by Plaintiffs is warranted.

Accordingly, this Court will enter an attorneys' fee award in the amount of $405,901.75. This award represents 290.5 hours of Dabney's time at an hourly rate of $620, 596 hours of Weeks's time at an hourly rate of $400, and 51.5 hours of Crowley's time at an hourly rate of $170, reduced by 5% as a result of McDermott's quarter-hour billing practices.

**E. Costs**

Plaintiffs seek $58,090.65 in costs for the following disbursements:

Court filing fees and good standing certificate fees: $440

Electronic legal research: $3,564.30

Deposition and court transcript expenses: $15,141.34

Document reproduction, facsimile, and telephone expenses: $3,542.75

Process server and investigator expenses: $21,146.69

Courier and postage expenses: $2,457.00

Travel expenses: $11,798.57

(Sept. 1, 2011 Dabney Decl. ¶ 11-28, Ex. 1) "'[A]ttorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients.'" Suchodolski Assocs., 2008 WL 5539688, at *2 (quoting LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998)).

Litigants are entitled to recover court filing fees under the Lanham Act. See, e.g., Chanel, Inc. v. Gardner, No. 07 Civ. 6679(GBD)(MHD), 2011 WL 204911, at *6 (S.D.N.Y. Jan. 21, 2011) ("plaintiff adequately supported its request for $575 in costs. Consequently, Plaintiff's $350.00 filing fee for this federal action and $225 process server fees are recoverable costs.") (internal citations omitted); Artemide Inc. v. Spero Elec. Corp., No. CV 09-1110(DRH)(ARL), 2010 WL 5452075, at *4 (E.D.N.Y. Nov. 23, 2010) ("[c]ourt filing fees, process server, photocopies, and other '[o]ut of pocket litigation costs are generally recoverable if they are necessary for the representation of the client'") (quoting AW Indus. Inc. v. Sleep Well Mattress, Inc., No. 07 Civ. 3969(SLT)(JMA), 2009 WL 485186 (E.D.N.Y. Feb. 26, 2009)).

Here, Plaintiffs have provided sufficient documentation to support an award of $425 in court filing fees.[10] (Sept. 1, 2011 Dabney Decl., Ex. 1) Nothing in the Lanham Act

[10] Exhibit 1 indicates that the following filing fees were paid: $350 on November 1, 2010, $50 on December 9, 2010 (in two payments of $25), and $25 on January 10, 2011. (Sept. 1, 2011 Dabney Decl., Ex. 1)

suggests that Plaintiffs may recover the cost of obtaining good standing certificates, however, and Plaintiffs have cited no case law to support their request. See V-Formation, Inc. v. Benetton Group Spa, No. 01 Civ. 610(HB), 2003 WL 21403326, at *3 (S.D.N.Y. June 17, 2003) (denying recovery for certificates of good standing fees). Therefore, Plaintiffs are entitled to recover $425 in filing fees, but may not recover fees paid to obtain good standing certificates.

"[C]omputer research fees are compensable on a fee application if the firm regularly bills its clients for them." Lucky Brand Dungarees, 2009 WL 466136, at *7. However, compensation has been denied when "defendants fail to document adequately the legal-research charges for which they seek compensation," such as by not providing "invoices from the computer research service." Id. Here, Plaintiffs have submitted the relevant invoices from Lexis.[11] (Sept. 1, 2011 Dabney Decl., Ex. 3) Accordingly, they are entitled to recover $3,564.30 in electronic legal research fees.

Litigants may also recover deposition and court transcript costs, provided the costs incurred were "necessary to the litigation." See, e.g., Therapy Prods., 2010 WL 2404317, at *8 (permitting recovery of deposition transcripts and deposition-related travel expenses where the costs incurred were necessary to the litigation and defendants "submit both invoices from third-party vendors who provided these services, and counsel's invoices to its client for these amounts"). Plaintiffs have provided sufficient documentation, in the form of invoices from third-party vendors and invoices sent by McDermott to Plaintiffs, of their deposition and court transcript costs. (Sept. 1, 2011 Dabney Decl., Ex 1, Ex. 4) Plaintiffs are entitled to $15,140.59 in deposition and transcript costs.

[11] Exhibit 3 sets forth $5,483.50 in electronic legal research fees. (Sept. 1, 2011 Dabney Decl., Ex. 3), but Plaintiffs only seek recovery of $3,564.30. (Id. ¶ 16)

Litigants also may recover photocopying costs, "but . . . must make clear what[] documents were copied, how many copies were made, the cost per page charged for copying, and why the copies were necessary." Lucky Brand Dungarees, Inc., 2009 WL 466136, at *8 (citing United States for Use and Benefit of Evergreen Pipeline Const. Co. v. Merritt-Meridian Const. Corp., 95 F.3d 153, 173 (2d Cir. 1996)). Here, although Plaintiffs submitted the cost-per-page of in-house photocopies, they did not explain what documents were copied, how many copies were made, and why the copies were necessary to the litigation. Id. (citing Evergreen, 95 F.3d at 173). Because Plaintiff's document reproduction costs are not sufficiently supported, they are not entitled to recover these costs.

Costs related to facsimiles and telephone calls are generally recoverable, provided that the litigants "provide the billing practices associated with telephone and facsimile charges." Id. (citing Kuzma v. I.R.S., 821 F.2d 930, 933-34 (2d Cir. 1987); Ayres v. SGS Control Servs. Inc., No. 03 Civ. 9078(RMB), 06 Civ. 7111(RMB), 2008 WL 4185813, at *9 (S.D.N.Y. Sept. 9, 2008)). Here, Plaintiffs provided the billing practices for facsimiles (Sept. 1, 2011 Dabney Decl. ¶ 18), but did not provide sufficient documentation of billing practices for telephone charges. In addition, it is not clear whether the telephone calls and facsimiles listed in the invoices were placed to local or long distance numbers. Calls to local numbers are regularly incorporated into the overhead of a law firm and therefore not compensable in an award of costs. Lucky Brand Dungarees, Inc., 2009 WL 466136, at *8 (citation omitted). Plaintiffs' failure to sufficiently document their facsimile and telephone costs precludes an award of these expenses.

Process server costs are recoverable where properly supported. Empire State Carpenters Welfare v. M.V.M. Contracting Corp., No. Civ. 10-1801(ADS)(WDW), 2011 WL 887726, at *3 (E.D.N.Y. Jan. 31, 2011) ("Although plaintiffs are entitled to recover the filing

fees and process server costs, they have not provided any documentation in support of their request."). Here, Plaintiffs have provided invoices totaling $20,571.08. (Sept. 1, 2011 Dabney Decl., Ex. 5) They will recover that amount.

Plaintiffs also seek to recover $809.95 in fees paid for investigative services. Several courts in this District have permitted parties to recover investigator fees in trademark cases. See, e.g., Silhouette Int'l Schmied AG v. Chakhbazian, No. 04 Civ. 3613(RJH)(ADP), 2004 WL 2211660, at *4 (S.D.N.Y. Oct. 4, 2004) ("While the cost of an investigator is not a 'traditional' recoverable cost (nor could it be recovered as a cost if attorneys' fees were not awarded), the Court believes it appropriate here. . . .") (citing Levi Strauss & Co. v. Shilon, 121 F.3d 1309, 1314 (9th Cir. 1997) (in an action brought under the Lanham Act, "the district court did not abuse its discretion when it found no extenuating circumstances and granted Levi Strauss attorney's fees and investigation costs"); Ahava (USA), Inc. v. J.W.G., Ltd., 286 F. Supp. 2d 321, 325 (S.D.N.Y. 2003) (plaintiff's "law firm retained an outside investigator to investigate [defendant's] actions and conduct trademark searches, incurring a cost of $1,410.61. . . . This Court will allow the fee."); Brown v. Party Poopers, Inc., 00 Civ. 4799(JSM), 2001 WL 1380536, at *7 (S.D.N.Y. July 9, 2001) ("Plaintiffs' law firm retained [an outside investigator] to investigate [defendants] . . . . The fee of $1,373 seems a bit high, but I will allow it."). Plaintiffs have provided sufficient documentation of the investigator fees they paid, and are entitled to recover $809.95. (Sept. 1, 2011 Dabney Decl., Ex. 5)

Litigants may also recover necessary mailing costs. Therapy Prods., 2010 WL 2404317, at *4 ("a prevailing party in a motion for fees may also recover [o]ut of pocket litigation costs . . . if they are necessary for the representation of the client. These costs typically include those items denoted in 28 U.S.C. §1920 and Rule 54(d) of the Federal Rules of Civil

Procedure, such as filing fees, fees for service of process, mailing costs, copying costs, transcription fees, and witness fees.") (internal quotations and citations omitted). "Mailing costs" includes postage and messenger expenses. Peer Int'l Corp. v. Max Music & Entm't, No. 03 Civ. 0996(KMW)(DF), 2004 WL 1542253, at *6 (S.D.N.Y. July 9, 2004) ("Plaintiffs can also recover their claimed costs for filing fees, postage, messenger expenses, telephone charges, legal research, and other documented expenditures, either as allowed costs under the general cost recovery statute, or as counsel's reasonable out-of-pocket expenses as part of the attorneys' fee recovery.") (internal citations omitted). Here, Plaintiffs have provided adequate documentation of their courier and postage expenses (Sept. 1, 2011 Dabney Decl., Ex. 1), and are entitled to recover $2,457.00.

Finally, Plaintiffs seek $11,798.57 in travel expenses. (Sept. 1, 2011 Dabney Decl., Ex. 6) Courts have permitted the recovery of travel expenses related to a litigation. Therapy Prods., 2010 WL 2404317 at *8 (permitting defendants to recover deposition-related travel expenses); Bobrow Palumbo Sales, Inc. v. Broan-Nutone, LLC, 549 F. Supp. 2d 274, 287 (E.D.N.Y. 2008) ("expenses relating to travel, including transportation and meals, are routinely recoverable") (citing cases). Here, Plaintiffs' primary lawyer apparently traveled from the District of Columbia to New York on a number of occasions. The air or train expenses associated with this travel are not broken out, nor is the nature of the $11,798.57 explained in any fashion. Accordingly, these costs will not be allowed.

Accordingly, Plaintiffs will be awarded $42,967.92 in costs.

## II. MOTION FOR APPEAL BOND

Fed. R. App. P. 7 provides that "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure

payment of costs on appeal." "The objective of Rule 7 is to 'protect an appellee from the risk of nonpayment by the appellant, if the appellee wins the appeal.'" Paladino v. DHL Express (USA), Inc., No. 07 CV 1579(DRH)(ARL), 2011 WL 1344009, at *1 (E.D.N.Y. Apr. 8, 2011) (quoting In re Currency Conversion Fee Antitrust Litig., No. 04 Civ. 5723(WHP), 2010 U.S. Dist. Lexis 27605, *2-3, 2010 WL 305448 (S.D.N.Y. 2010)).

"In evaluating whether to grant a motion for an appeal bond, the Court must consider the following nonexclusive factors: '(1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct.'" Paladino, 2011 WL 1344009, at *1 (quoting Baker v. Urban Outfitters, Inc., No. 01 CV 5440(LAP), 2006 WL 1234966, at *1 (S.D.N.Y. Dec. 12, 2006)).

Here, the Court – on the basis of a financial affidavit – granted Birnbaum's application to proceed in forma pauperis. (Dkt. No. 95) In connection with Plaintiffs' motion for an appeal bond, Birnbaum submitted a declaration asserting "that neither Dabir nor myself could possibly post a $100,000 bond."[12] (Birnbaum Decl. ¶ 3) Birnbaum further states: "I have no assets besides the home I share with my wife, who since the time we filed our IFP Affidavit has lost one of the part-time jobs she had at the time. Our current income is barely at the subsistence level; I am not employed and my wife's income, which is derived from her remaining part-time jobs, will be under $10,000 over the next three months." (Id. ¶ 10) Birnbaum also asserts that he is the sole shareholder in Dabir and that Dabir has no assets. (Id. ¶¶ 2, 9)

[12] Birnbaum was assigned counsel in a companion criminal case under the Criminal Justice Act, 18 U.S.C. § 3006A. (Birnbaum Decl. ¶ 6, Ex. B)

Given this record, the Court cannot find that Birnbaum and Dabir have the ability to post an appeal bond. While the remaining factors discussed in Paladino all strongly weigh in Plaintiffs' favor,[13] requiring Birnbaum and Dabir to post $100,000 bond would effectively foreclose their right to appeal. See Taylor v. Horizon Distributors, Inc., No. CV-07-1984(PHX)(DGC), 2010 WL 334628 (D. Ariz. Jan. 22, 2010) (appellant "was granted in forma pauperis status because he demonstrated that he could not afford the modest filing fee in this case. Requiring him to post a bond of $10,000 would effectively foreclose his right to appeal. The Court will not exercise its discretion to require that Taylor post a bond he cannot afford.")

Plaintiffs' motion for an order requiring Birnbaum and Dabir to post an appeal bond will be denied.

**CONCLUSION**

For the reasons stated above, Plaintiffs are awarded $405,901.75 in attorneys' fees and $42,967.92 in costs. Plaintiffs' motion for an order requiring Birnbaum and Dabir to post an appeal bond is denied. The Clerk of the Court is directed to terminate the motions (Dkt. Nos. 98, 115) and to close this case.

Dated: New York, New York
January 30, 2012

SO ORDERED.

Paul G. Gardephe
United States District Judge

[13] Birnbaum has violated numerous court orders during this litigation and has acted in bad faith throughout (see Dkt. No. 103 at 2-6, 9, 23), and there is no reason to believe that he or Dabir will pay an award of costs. Given their behavior in the district court, it is unlikely that Birnbaum and Dabir will present any meritorious issues on appeal.