UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-21418-CIV-MOORE/TORRES

RAFAEL "RAFA" VERGARA HERMOSILLA,

Plaintiff,

v.

THE COCA-COLA COMPANY,

Defendant.

_____/

REPORT AND RECOMMENDATION ON DEFENDANT'S VERIFIED MOTION FOR ATTORNEY'S FEES AND FULL COSTS

This matter is before the Court on Defendant The Coca-Cola Company's ("Coca-Cola") Verified Motion for Attorney's Fees and Full Costs ("Defendant's Motion") [D.E. 188] filed May 5, 2011; Plaintiff Rafael "Rafa" Vergara Hermosilla's ("Vergara") Response in Opposition ("Plaintiff's Response") thereto [D.E. 190] filed May 23, 2011; and Defendant's Reply [D.E. 193] filed June 9, 2011. The Court has reviewed the motion, the response, the reply, related authorities submitted by the parties, and the record in this case. For the following reasons, the Verified Motion for Attorney's Fees and Full Costs should be granted in part and denied in part.

I. BACKGROUND [1]

In 2009, Vergara was hired by Coca-Cola to adapt the song "Wavin' Flag" by performer K'naan to include a verse of Spanish language lyrics in Coca-Cola's worldwide 2010 World Cup marketing campaign. These lyrics were to be sung by David Bisbal ("Bisbal"), a Spanish language performer. Vergara's dealings were primarily with Jose Puig ("Puig"), the Vice-President of Marketing at Universal Music Latin America, who was working with Coca-Cola for the campaign. Around this time, Vergara, Puig, and others discussed the possibility of Vergara receiving an adaptor's share of the profits derived from the adaptation.

On November 17, 2009, Vergara adapted the lyrics to Spanish. While in some places the adaptation was a literal translation, in other places Vergara altered the words significantly while attempting to respect the concept, rhythm, and melody of the existing song. Over the following months, a version of "Wavin' Flag" was produced using both the Spanish language lyrics and some of the original English lyrics. A video promoting Coca-Cola was also made using the new version of the song.

On February 26, 2010, Vergara's request for an adaptor's share was denied. At that time, Vergara threatened to file a lawsuit to enforce his copyright of the lyrics. On March 4, 2010, Vergara told Coca-Cola that it could not use the adapted lyrics in his song unless he received an adaptor's share. That day, Puig and Vergara spoke on the phone regarding this dispute. During this conversation Puig

[1] The facts in this section are taken from the District Court's Order granting summary judgment to Defendants in this case [D.E. 170] (all internal citations omitted).

asked Vergara to agree to relinquish any copyright interest in the work. Later that day, Vergara wrote an email to Puig seeking to resolve the dispute which stated in part:

> [B]ecause I am a man of my word and honor, that is not moved by economic motives, my only request is that my credits are respected as producer and adapter of the Spanish version (that every time the name of any composer of this version appears, my name appears as adapter), and obviously the credits for the production that are detailed in the invoice sent for this production, which I have detailed below.
>
> For the adaptation, you may consider it a work for hire with no economic compensation to that respect. I believe what's legal is a dollar.
>
> I hope that this leaves clear what my work was and what my good intentions were from the beginning.

Puig responded to this email the next day with an email stating, "Rafa, we are aware of your goodwill from the beginning, and most of all, we are aware of how hard you had to work given the little time we gave you. You can count on the credits on the track. I am resending you the contract." Also that day, Puig sent draft agreements to Vergara that did not contain a provision for Vergara receiving credit.

On March 8, 2010, Vergara sent another email to Puig, stating,

> I appreciate your sending me the contracts. However, my proposal was clear and it was just that, a proposal, since you requested my help because you knew things had not been done right. My only request regarding said proposal was a series of things that are not included in what you send me. Moreover, nothing of what I proposed to you is included in the contracts.
>
> I want you to know I'm very upset and rather disappointed, because my proposal was based more on our friendship than anything else, and what I got does not honor the agreements.

> Taking into account the above, I hereby inform you that the proposal of last Friday from which the contracts would supposedly derive is revoked as of now and without effect.

Also that day, Puig responded in an email stating, "I did not review the contracts. I will review them with the attorney right away and make any necessary changes. I'm sorry."

From this back and forth, litigation ensued. Vergara sued Coca-Cola for federal copyright infringement and other claims. Coca-Cola claimed that Vergara had been contracted to write the lyrics for Coca-Cola and had in turn impliedly licensed the lyrics to Coca-Cola. Moreover, Coca-Cola argued that the lyrics were a derivative work from a work already owned by Coca-Cola and thus immunized against an infringement action against Coca-Cola.

After extensive discovery and pretrial motion practice, on February 23, 2011, the Court entered its order granting Defendant's Renewed Motion for Summary Judgment. The Court found that the Plaintiff had failed to establish that he, in fact, had not assigned the rights to "Wavin' Flag" to Coca-Cola via the March 4-5, 2010, email exchange between Vergara and Puig. The Court held that those emails constituted a valid offer and acceptance for the purposes of satisfying 17 U.S.C. § 204. Thus, "because Coca-Cola cannot be sued based on a copyright interest it owns," the Court granted Coca-Cola summary judgment on all counts. [D.E. 170]

The pending motion followed. Coca-Cola, as the prevailing party, moved pursuant to 17 U.S.C. § 505 for recovery of $1,576,852.48 in attorneys' fees plus costs in the amount of $125,285.78, for a total award of $1,702,138.26. [D.E. 188] 11-13. Section 505 allows this Court, in its discretion, to allow the recovery of a

reasonable attorney's fees and full costs to the prevailing party. Pursuant to this statute Coca-Cola contends that, though attorney's fees under this section are awarded only in the discretion of the trial court, an award is the rule rather than the exception. As the prevailing party Coca-Cola is presumptively entitled to an award of attorney's fees. In support of its motion, Coca-Cola relies on the following factors: (1) it achieved complete success on Vergara's claims; (2) Vergara's claims were, at a minimum, objectively unreasonable; (3) Vergara's motivation in filing and pursuing this case was improper; and (4) a fee award would advance considerations of compensation and deterrence.

Coca-Cola further argues that Vergara litigated this case without regard to the financial consequences, without regard to any actual harm he suffered, and without regard to the facts or the law, as he was aware that he had assigned the rights to his copyright interest before he initiated this lawsuit. Coca-Cola concludes that its requested attorneys' fees were reasonably incurred to defend the action, and that the hourly rates requested were customary, reasonable, and fair. Coca-Cola further requests an award of its full costs, also pursuant to section 505 and 28 U.S.C. § 1920. [D.E. 188]

Vergara contends that Coca-Cola should not be awarded attorneys' fees because (1) his claims were objectively reasonable; (2) the action was not commenced for an anti-competitive purpose or to minimize public exposure to copyrightable works; and (3) Coca-Cola's motion seeks to punish him for raising his objectively reasonable claims, which does not further the interests of the Copyright Act.

Vergara also contends that the fee application is deficient and that Coca-Cola's invoices are insufficient to support an award of attorneys' fees. Vergara complains of block billing, duplication, inadequate description, excessive or improper redaction, improper tasks, an unsuccessful appeal, and an overall lack of billing judgment on behalf of Defendant's counsel.

Vergara also contends that Coca-Cola should only be awarded costs pursuant to 28 U.S.C. § 1920, and that Coca-Cola's Motion should be denied with leave to re-file pending the determination of his appeal of the Order presently pending before the Eleventh Circuit Court of Appeals. [D.E. 190]

II. ANALYSIS

A. Legal Standard

Coca-Cola seeks to recover its reasonable attorneys' fees and costs as the prevailing party under the Copyright Act. 17 U.S.C. § 505. Section 505 of the Copyright Act authorizes an award of fees in the discretion of the court and provides:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. The Copyright Act gives the Court broad discretion to determine whether a party is the prevailing party and whether the amount of the fees are reasonable. *See Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 155-56 (3d Cir. 1986). In *Fogerty, v. Fantasy, Inc.*, 510 U.S. 517, 526 (1986), the Supreme Court approved the following boundaries for the exercise of discretion in awarding fees under the

Copyright Act set by the Third Circuit in *Lieb*: (1) a finding of bad faith is not required for an award; (2) an award is not mandated in every case; and (3) the exercise of discretion should be applied evenhandedly. *Fogerty*, 510 U.S. at 526 (citing with approval *Lieb*, 788 F.2d at 155).

The *Lieb* factors have been endorsed in this Circuit. *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 198 F.3d 840, 842 (11th Cir. 1999), *aff'g*, *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 864 F. Supp. 1568 (S.D. Fla. 1994) (Moore, J.). While the award of attorneys' fees under Section 505 lies within the discretion of the District Court, where a defendant is the prevailing party in a copyright case, the presumption in favor of awarding fees is very strong. *See Lil' Joe Wein Music, Inc. v. Jackson*, No. 06-20079-CIV, 2008 WL 2688117, at *4 (S.D. July 1, 2008); *see also Woodhaven Homes & Realty, Inc. v. Hotz*, 396 F.3d 822, 824 (7th Cir. 2005).

B. Entitlement to Fees

Certain factors should be considered in the decision to award attorneys' fees, including, but not limited to: "frivolousness, motivation, objective unreasonableness (both in factual and the legal components of the case), and the need in particular circumstances to advance considerations of compensation and deterrence." *Lieb*, 788 F.2d at 156; *see Fogerty*, 510 U.S. at 535 n. 19 (adopting *Lieb* factors). "There is no precise rule or formula for making these determinations," "but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" *Fogerty*, 510 U.S. at 534 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983)). The Supreme Court cautioned that these factors should guide a court's

discretion "as long as such factors are faithful to the purposes of the Copyright Act." *Fogerty*, 510 U.S. at 535 n.19.

Vergara argues as an initial matter that his case was objectively reasonable because he established a valid prima facie case of copyright infringement. [D.E. 190 at 5]. In order to establish infringement "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Vergara relies on *Utopia Provider Systems, Inc. v. Pro-Med Clinical Systems, L.L.C.*, which states that:

> [T]he copyright claim that Plaintiff was suing over had the benefit of a facially valid copyright registration. This registration was, of course, issued by the one body that had the authority to issue the registration and the one body, other than the Court, that is considered expert in this area of law—the United States Copyright Office. Though the Court invalidated the copyright (a decision that remains pending on appeal), Plaintiff's reliance on its registration was not frivolous or unreasonable.

No. 07-60654-CIV, 2009 WL 1210998, at *2 (S.D. Fla. May 1, 2009).

The problem is that this reasoning was called into question on appeal, when the Eleventh Circuit agreed that "[a] certificate of registration from the United States Copyright Office, such as the certificate [the plaintiff] possessed, is prima facie evidence of the copyrightability of a work," *Utopia Provider Systems, Inc. v. Pro-Med Clinical Systems, L.L.C.*, 596 F.3d 1313, 1319 (11th Cir. 2010) (citing *Southern Bell Telephone & Telephone Co. v. Associated Telephone Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985)), but cautioning that "[w]here other

evidence in the record casts doubt on the question, validity will not be assumed." *Id.* (quoting *Durham Indus. Inc. v. Tomy Corp.*, 630 F.2d 905, 908 (2d Cir. 1980)).

The "other evidence" in this case would be the emails sent between Vergara and Puig on March 4 and 5, 2010, that Judge Moore ruled constituted a valid offer and acceptance for the purposes of transferring a copyright interest under 17 U.S.C. § 204(a).[2] This ties directly into Vergara's claim—which Coca-Cola calls a "hypertechnicality"—that "the issue of whether an email constitutes a signed writing for purposes of the Copyright Act was not previously addressed by the Eleventh Circuit or its District Courts." [D.E. 190] Vergara assumes that this was a novel issue—mentioning that Judge Moore cited only one case from the Federal Circuit as an example of this concept—and goes on to state that "at very worst [his] claim was premised (however erroneously) on a point of law unsettled in this Circuit—which favors a denial of attorneys' fees." *Id.* (citing *Thompkins v. Lil' Joe Records*, No. 02-61161-CIV, 2008 U.S. Dist. LEXIS 29423, at **17-18 (S.D. Fla. March 4, 2008) (declining to award fees to defendant who prevailed on summary judgment on issue of first impression in the circuit); *Charles Garnier, Paris v. Andin Int'l, Inc.*, 884 F. Supp. 58 (D.R.I. 1995) (denying attorneys' fees to defendant prevailing at summary judgment finding that although plaintiff's suit was premised "on an erroneous view of the law," plaintiffs claims were reasonable)).

[2] 17 U.S.C. § 204(a) states: "A transfer of a copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."

We are initially inclined to agree with Coca-Cola that Vergara's claim is a "hypertechnicality." It is true that, at the time the claim was filed, no Eleventh Circuit court had ruled on the *specific* issue of an email transfer of copyright interests. Yet, Vergara's argument that his claim was objectively reasonable still fails.

The Court reviewed the relevant precedents in this Circuit, which Vergara was bound by before his claim was filed, to determine whether at the time the suit was filed his claim was objectively reasonable. In 1995—fifteen years before the emails at issue here—the Eleventh Circuit stated that "[t]he chief purpose of section 204(a), (like the Statute of Frauds), is to resolve disputes between copyright owners and transferees and to protect copyright holders from persons mistakenly or fraudulently claiming oral licenses or copyright ownership." *Imperial Residential Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995). Thus the Eleventh Circuit explicitly linked § 204(a) with the requirements of state statutes of frauds. Vergara himself stated in his Opposition to Coca-Cola's Motion for Summary Judgment that "[a]s a general rule, state law governs the interpretation of copyright contracts." [D.E. 147] (quoting *Jacob Maxwell, Inc. v. Veeck*, 110 F.2d 749, 752 n.2 (11th Cir. 1997)).

So, at Vergara's behest, the Court looked to Florida law. This District ruled in 2009 (again, prior to the filing of this suit and the underlying transfer of copyright interest) that "[i]n Florida, signed emails meet the writing requirement of the statute of frauds." *U.S. Distrib., Inc. v. Block*, No. 09-21625-CIV, 2009 WL 3295099, at *5 (S.D. Fla. Oct. 13 2009) (citing Fla. Stat. § 668.004 ("Unless

otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature.")); *see also Kolski v. Kolski*, 731 So. 2d 169, 171 (Fla. 3d DCA 1999) ("[t]o satisfy the statute, a note or memorandum may take almost any possible form").

This is further supported by the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7000(a) which states, in pertinent part, that:

> Notwithstanding any statute, regulation, or other rule of law . . . with respect to any transaction in or affecting interstate or foreign commerce—
>
> (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
> (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

Taking all this into account (Eleventh Circuit precedent linking the § 204(a) to state statutes of frauds, Vergara's own assertion that state law governs the interpretation of copyright contracts, the ruling in this District that signed emails satisfies the Florida statute of frauds, a Florida statute specifically stating that electronic signatures have the same force as written signatures, a Florida case stating that a memorandum may take almost any possible form in order to satisfy the statute of frauds, and the text of the Electronic Signatures in Global and National Commerce Act) Vergara's entitlement defense crumbles. It is neither objective nor reasonable for Vergara to have believed, despite the fact that a case on this extremely specific issue had not appeared before a court in this District, that any court in this District would rule any other way than that his email assignment

of copyright interest was valid. Vergara in no way "took a reasonable stand on an unsettled principle of law." *Garnier*, 884 F. Supp. at 62.

This Court has already found that at the time Puig sent his email to Vergara, "the deal was made and irrevocable." Order at 6. Vergara, as a participant in that irrevocable email deal, should reasonably have known that his assignment would be determined to be valid prior to filing the suit. Even assuming *arguendo* that Vergara was unaware of these facts at the time the emails were sent, as soon it became clear during discovery that his claim would lose, based on the incontrovertible evidence and the binding law in this Circuit, it became improper for him to continue litigating this objectively unreasonable suit.

Subsequent to *Fogerty*, several other circuits have accorded the objective reasonableness factor substantial weight in determining to award attorneys fees. *See, e.g.*, *Matthew Bender & Co. v. West Publ'g Co.*, 240 F.2d 116, 121-22 (2d Cir. 2001); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 140 F.3d 70, 74 (1st Cir. 1998) (affirming denial of fees because copyright holder's "claims were neither frivolous nor objectively unreasonable"); *Harris Custom Builders, Inc. v. Hoffmeyer*, 140 F.3d 728- 730-31 (7th Cir. 1998) (vacating award of fees because, *inter alia*, losing party's claims were objectively reasonable); *Budget Cinema, Inc. v. Watertower Assocs.*, 81 F.3d 729, 733 (7th Cir. 1996) (holding that "the district court abused its discretion by failing to award attorney's fees based on the objective unreasonableness of [plaintiff's] complaint"); *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 890 (9th Cir. 1996) (awarding fees because, *inter alia*, plaintiff's claims were "factually unreasonable"); *Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503,

506 (4th Cir. 1994) (affirming award of fees because, *inter alia*, "the objective reasonableness factor strongly weigh[ed] in favor of awarding attorney's fees and costs").

The same is true of the district courts in this Circuit. *See, e.g.*, *Jenkins v. Jury*, No. 5:07-cv-133, 2009 WL 248232, at *3 (M.D. Fla. Feb. 2, 2009) (awarding attorney's fees to defendant because, *inter alia*, there was a "lack of merit" in the claims); *Amadasun v. Dreamworks, LLC*, 359 F. Supp. 2d 1367, 1375-76 (N.D. Ga. 2005) (awarding attorney's fees to defendant because, *inter alia*, the plaintiff "[made] it impossible for the Court to conclude that plaintiff ever subjectively believed his positions were reasonable" and because there was a "lack of evidentiary support" for plaintiff's claims); *Jackson*, 2008 WL 2688117, at *7 (S.D. Fla. July 1, 2008) (finding that "the questionable motivation" of the plaintiff in bringing and continuing the lawsuit is a factor that "militates in favor of" an award).

As one court outside this Circuit put it, "[P]laintiff caused defendant considerable expense and trouble in plaintiff's losing cause. In other words, plaintiff lost and deserved to lose and there is no reason why the discretion of the Court should not be exercised to award fees in accordance with the provisions of the statute." *Cohen v. Va. Elec. & Power Co.*, 617 F. Supp. 619, 623 (E.D. Va. 1985).

We are not required by *Fogerty* to explore the remainder of the enumerated factors from *Lieb*, but when we do in an abundance of caution it appears that not one of them would weigh in Vergara's favor to defeat the "presumption" that Coca-Cola as the prevailing party is entitled to a fee award. That is especially the case in light of the objective unreasonableness of Vergara's claim. *See Jackson*, 2008 WL

2688117, at *4. Thus, the Court concludes that Coca-Cola, as the prevailing party on all of Vergara's copyright claims, should be entitled to recover reasonable attorneys' fees from Vergara.

C. Calculation of Fees

The Supreme Court recently stressed that the determination of fees "should not result in a second major litigation." *Fox v. Vice*, 563 U.S. ___, ___ (2011) (slip op., at 11) (quoting *Hensley*, 461 U.S. at 437). Fee applicants must submit appropriate documentation to meet "the burden of establishing entitlement to an award." *Hensley*, 461 U.S. at 437. "But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) *is to do rough justice, not to achieve auditing perfection*. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Fox*, 563 U.S. at ___ (slip op., at 11) (emphasis added).

With that in mind, coupled with existing settled law in this Circuit, we calculate a reasonable attorney's fee by using the lodestar method, which requires this Court to multiply Coca-Cola's counsel's reasonable hourly rate by the reasonable hours expended. *See Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988); *Cuban Museum of Arts & Culture v. City of Miami*, 771 F. Supp. 1190, 1191 (S.D. Fla. 1991). Coca-Cola here bears the burden of documenting reasonable hourly rates and reasonable hours expended. *See ACLU of Ga. v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999); *Norman*, 836 F.2d at 1303.

1. Reasonable Hourly Rates

We turn then to the first lodestar consideration, which asks whether the hourly rates requested by Coca-Cola's counsel is reasonable. "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman*, 836 F.2d at 1299. A reasonable hourly rate is one that is adequate to attract competent counsel in the relevant legal market, but yet does not produce a windfall to that attorney. *See Blum v. Stenson*, 465 U.S. 886, 894-95 (1984).[3] With respect to the issue of hourly rates, this Court "is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." *Norman*, 836 F.2d at 1303. Several well established factors may be considered in arriving at that prevailing market rate, as set forth in *Johnson v. Georgia Highway Express, Inc.*[4]

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[3] *Blum* involved efforts to recoup attorneys' fees pursuant to 42 U.S.C. § 1988, not the Copyright Act. 465 U.S. at 888. But case law construing what constitutes a "reasonable" fee applies uniformly across federal fee-shifting statutes that employ this language, including the Copyright Act. *See, e.g.*, *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (applying *Blum* and its progeny to fee awards under Solid Waste Disposal Act and Federal Water Pollution Control Act); *Kenna A. ex rel. Winn v. Perdue*, 547 F.3d 1319, 1338 (11th Cir. 2008) (applying *Blum* and specifically listing the Copyright Act of 1976 under a "Partial List of Federal Statutes Providing for the Prevailing Party To Recover a Reasonable Attorney's Fee").

[4] The 12 *Johnson* factors are as follows:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment;
(5) the customary fee;
(6) whether the fee is fixed or contingent;

Generally, "the 'relevant market' for purposes of determining the reasonable hourly rate for an attorney's services is 'the place where the case is filed.'" *ACLU of Ga.,* 168 F.3d at 437 (citing *Cullens v. Georgia Dep't of Transp.,* 29 F.3d 1489, 1494 (11th Cir. 1994)). The relevant market for purposes of this case, therefore, is the South Florida legal community. To arrive at a reasonable hourly rate in this legal market, the "fee applicant bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates." *ACLU of Ga.,* 168 F.3d at 427 (quoting *Norman,* 836 F.2d at 1303). That requires that the applicant bear the burden of "supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate." *Id.*

The Court reviewed the information and materials submitted by Coca-Cola's counsel to determine the prevailing market rate in this legal community for "similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman,* 836 F.2d at 1299.

(a) Holland & Knight

Coca-Cola was primarily represented in this case by a very reputable national law firm, Holland & Knight ("H&K"), and its cadre of attorneys located up

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(7) the time limitations imposed by the client or circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation and ability of the attorneys;
(10) the undesirability of the case;
(11) the nature and length of the professional relationship with the client; and
(12) the awards in similar cases.

Johnson v. Georgia Highway Express, Inc. 488 F.2d 714, 717-719 (5th Cir. 1974).

and down the East Coast. Coca-Cola requested the following hourly rates for the H&K lawyers who worked on the case:

> Partner S. Bohrer (Miami)—$680 (163.7 hrs);
> Partner C. Bellows (Miami)—$625 (208.4 hrs);
> Partner G. Katz (Boston)—$605 (923.8 hrs);
> Partner B. Newberg (McLean, Va.)—$520 (186.7 hrs);
> Partner K. Williford (Washington, D.C.)—$440 (106.6 hrs);
> Associate B. Briz (Miami)—$385 (337.3 hrs);
> Associate Monica Vila (Miami)—$360 (164.3 hrs); and
> Associate Vernon M. Strickland (Atlanta)—$320 (731.9 hrs). [5]

Vergara argues that the hourly rates of the H&K attorneys is "excessive and unsupported." [D.E. 190 at 14]. He states that Coca-Cola does not attempt to substantiate the rates for attorneys practicing in Boston, Washington, D.C., or Atlanta; establish the credentials of fourteen attorneys or justify their billing rate (the vast majority of whom made no appearance in this action); or provide an expert's affidavit regarding reasonable hourly rates, as it only proffered Mr. Katz's opinion who was admitted *pro hac vice* and is based out of Boston. *Id.*

The Court agrees in part with Vergara. We find as an initial matter that many of the hourly rates requested by the H&K attorneys are excessive for the South Florida legal community for the types of legal services that were required in this case. *See ACLU of Ga.,* 168 F.3d at 437-38; *Norman*, 835 F.2d at 1299. "Even if a party chooses to employ counsel of unusual skill and experience, the court awards only the fee necessary to secure reasonably competent counsel." *Orenshtyn v. Citrix Systems, Inc.,* 558 F. Supp. 2d 1251, 1257 (S.D. Fla. 2007) (quoting *Yahoo*

[5] Eleven more H&K attorneys billed on the file, as well as eight paralegals and four litigation support staff, but for only lesser or minimal hours. The Court has listed by name only those attorneys who billed for more than 100 hours throughout the course of the litigation.

Inc! v. Net Games, Inc., 329 F. Supp. 2d 1179, 1183 (N.D. Cal. 2004)), *vacated and remanded on other grounds,* 341 Fed. Appx. 621 (Fed. Cir. 2009). As a result, it is entirely appropriate for a court to reduce those rates to a more reasonable amount, reflective of what would be appropriate to secure competent legal counsel in the relevant legal community in South Florida.

With respect to this issue this Circuit's precedent in *ACLU of Ga.* squarely applies. The Court of Appeals reversed a district court's award of New York legal fees to counsel who prosecuted a civil rights case in the Northern District of Georgia. The Court reaffirmed the principle that "the 'relevant market' for purposes of determining the reasonable hourly rate for an attorney's services is 'the place where the case is filed.'" *ACLU of Ga.,* 168 F.3d at 437 (quoting *Cullen,* 29 F.3d at 1494). Consequently, if a fee applicant seeks to recover non-local rates for an attorney who is not from the place where the case was filed, "he must show a lack of attorneys practicing in that place who are willing and able to handle his claims." *Id.* The Court thus reversed the district court for awarding non-local rates without finding that the plaintiffs had carried their burden of showing that there were no attorneys in the area who were willing and able to handle the case.

For the same reason, we find that it would be error for us to award extraordinary rates for Boston, Washington D.C. or Atlanta lawyers in a copyright infringement case filed in this district that did not involve any issues so complex or unusual that a plethora of local intellectual property lawyers would not have been able to handle. The experience and prominence of these lawyers is not in question. But we have no doubt that highly competent lawyers in the South Florida

community could make equal contributions to the defense of this case at materially reduced billing rates.

To be fair, the record shows that various Florida lawyers were indeed involved and billed extensively on the file, including highly experienced and respected lawyers like Sandy Bohrer and Chris Bellows, who are seeking even higher rates. But that then leads to the question whether their billable rates are necessary to attract competent counsel in this community to represent Coca-Cola. Clearly they are not. Coca-Cola primarily relies on the argument that all the lawyers involved here had special expertise in this area of law that justified the hourly rates requested. But, again, that issue was addressed and rejected in *ACLU of Ga.* where the Court held that a "prevailing plaintiff is not entitled to have the losing party pay for an attorney with the most expertise on a given legal issue, regardless of price, but only for one with reasonable expertise at the market rate." *Id.* at 437.

Ultimately what Judge Carnes was referring to is the principle that "reasonable" fee applications are not designed to compensate for premium billing and premium-level services. They are designed to provide adequate compensation that is reasonable to bill to one's adversary irrespective of the skill, reputation or experience of counsel. *See Norman,* 836 F.2d at 1301. In other words, one can drive from point A to point B in a Ferrari, a BMW, or a Ford Fusion. Which car one chooses is ordinarily a matter of personal style coupled with financial freedom. The successful personal injury or criminal defense lawyer may choose the Ferrari. The average corporate defense lawyer will wisely choose the BMW. But a successful

attorney fee applicant can only choose the Ford Fusion. It is quite reliable, consistent, and effective for the task at hand, and will not break the bank. And because of that only the cost of a Ford Fusion is compensable under an attorneys' fee statute based on the American Rule that governs federal litigation.

To understand why, one must consider that when a multi-national, publicly held corporation like Coca-Cola chooses counsel to represent its interests, the "competent" and "reasonable" lawyer who quotes a market rate is not enough. Coca-Cola's shareholders expect a lot more than that. And, more importantly, Coca-Cola's officers and directors require a lot more than that to assure that no one can raise a breach of fiduciary duty challenge if litigation turns sour. That is why premium-rate lawyers who work at large high-powered law firms like H&K exist. They are lawyers who graduated from the best law schools like Georgetown, at the top of their classes at schools like Columbia or the University of Miami, who clerked for distinguished federal judges, who work night and day, 365 days a year, in the interest of that corporate client that demands perfection 100 percent of the time. These lawyers are (in very rare cases) the Ferraris and (in most cases) the BMWs of their profession who would never market themselves as merely "competent" or "average" or "reasonably priced." These lawyers market premium legal service, which carries with it premium hourly rates.

As a result, when Coca-Cola retains a law firm like H&K it knowingly contracts for those premium services in exchange for premium hourly rates. It bargains for an army of lawyers like the *nineteen* partners and associates who worked on this case. It knowingly pays for the highly paid staff, the posh offices

and the extensive library and technical resources that a law firm like that can bring to bear. And it understands that the intellectual fire power it retains is not limited to one office or physical location. A law firm that size has lawyers an email or plane-flight away who can add to the team working on Coca-Cola's case, as evidenced by the lawyers who worked on this case from four different jurisdictions. As H&K itself describes it, "[a]t Holland & Knight, we are able to tap the intellectual resources of more than 1,000 attorneys in the U.S. and abroad to address client interests spread across the scope of the United States and international marketplace. In addition, we have over 600 alums of our foreign training program practicing in 40 countries around the world. Within this global network, we are able to manage and direct multi-jurisdictional transactions and address your business interests - anywhere in the world - with complete confidence."[6]

Coca-Cola certainly received the benefit of its bargain, but a non-prevailing litigant like Vergara never bargained for so much. That is why federal law requires him to only compensate a prevailing party like Coca-Cola for a competent and reasonably priced lawyer in a given market. Hence the hourly rate a court can award Coca-Cola here must be materially less than what Coca-Cola bargained for when it hired these lawyers at H&K. Cases from this jurisdiction and elsewhere routinely make this point. *See, e.g., ACLU of Ga.,* 126 F.3d at 437; *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d 182, 184, 190 (2d Cir. 2008) (court must "step[ ] into the shoes of the reasonable, paying client,

[6] http://www.hklaw.com/id10/

who wishes to pay the least amount necessary to litigate the case effectively"); *Daggett v. Kimmelman,* 811 F.2d 793, 799 (3d Cir. 1987) (there "comes a point where a lawyer's historic rate, which private clients are willing to pay, cannot be imposed on his or her adversaries"); *Coulter v. Tennessee,* 805 F.2d 146, 149 (6th Cir. 1986) (a reasonable fee is "different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region").

Courts in our district have routinely applied these principles and entered fee awards that reduced the hourly rates charged by well respected firms like H&K. *See, e.g., Tiara Condominium Ass'n, Inc. v. Marsh USA, Inc.,* 697 F. Supp. 2d 1349 (S.D. Fla. 2010) (reducing hourly rates charged by premium New York law firm by 19 to 25 percent); *Global Horizons Inc. v. Del Monte Fresh Produce N.A., Inc.,* 2009 WL 855970 (S.D. Fla. Mar. 31, 2009) (awarding discounted hourly rates for premium South Florida law firm of $300-475 per hour (partners); $185-310 (associates); and $160 (paralegals)); *Red Bull GMBH v. Spacefuel Corp.,* No. 06-20948-Civ-Jordan/Torres (S.D. Fla. June 20, 2007) (awarding reduced blended hourly rates for premium Washington D.C. and South Florida law firm of $400 for partners and $250 for associates).

The cases from even the most expensive legal market – New York – are also illustrative. *See, e.g., Pugach v. M & T Mortg. Corp.,* 564 F. Supp. 2d 153, 157 (E.D.N.Y. 2008) (court reduced charged rates at DLA Piper of $725 - $640 for partners and $330 for associates and approved rates of $250 for partners and $150 for associate); *Ass'n of Holocaust Victims for Restitution of Artwork and Masterpieces v. Bank Austria Creditanstalt AG,* 2005 WL 3099592, *5 (S.D.N.Y.

Nov. 17, 2005) (court reduced charged rates at Strook & Strook & Lavan and approved rates of $350 for partners and $225 for associates); *Auscape Int'l v. Nat'l Geographic Soc.,* 2003 WL 21976400, at *5 (S.D.N.Y. Aug. 19, 2003) (court reduced charged rates at Latham & Watkins LLP and approved rates ranging from $215 to $495 per hour); *Weil v. Long Island Sav. Bank,* 188 F. Supp. 2d 265, 269 (E.D.N.Y. 2002) (court reduced charged rates at Hogan & Hartson and approved rates ranging from $370 to $450 per hour).

What this all boils down to is that the hourly rates requested in this H&K fee application, which range from $680 to $440 for partners, $385 to $320 for associates, and $230 to $145 for paralegals and "litigation support" personnel (whatever that means), must be materially reduced as well. Though the analysis certainly begins with the charged rates summarized above, *Dillard v. City of Greensboro,* 213 F.3d 1347, 1354-55 (11th Cir. 2000), application of the remaining *Johnson* factors in this case when measured by the South Florida legal market compels a substantial downward reduction in the hourly rates. Almost all the relevant factors point against an award of the requested hourly rates here.

Specifically, the time and labor required were not extraordinary and were, instead, customary for federal intellectual property litigation that revolved on a contractual issue. The issues were not novel or difficult (as evidenced by the Court's finding above that entitles Coca-Cola to an award of fees in this case). The skill required was certainly substantial, but not extraordinary. There is no evidence in the record that any of the lawyers involved here could not work on other cases because of this case, or were working on the case on a contingent basis. There

is no record evidence of any unique time limitations imposed in the case. The experience and ability of the lawyers certainly had to be substantial, but again not extraordinary. Many competent federal court practitioners could have handled this matter quite competently at lesser hourly rates. The case was by no means undesirable. And awards in similar cases also illustrate that a reduction in the charged rate is appropriate.

In particular, Coca-Cola's position is undermined by the fact this case was resolved on basic copyright, contract and statute of frauds principles that are well worn in federal litigation in this district. And because, as the prior discussion explains, Vergara's legal position was objectively unreasonable thus entitling Coca-Cola to fees in the first place, it is hard to find that only these particular lawyers (at their charged rates) could have handled such a case. The contrary is true. Furthermore, it is not surprising that Coca-Cola chose not to submit an expert affidavit supporting its charged hourly rates. It would be quite difficult for any lawyer familiar with the South Florida market to opine under oath that only lawyers charging at the rates charged here could competently represent Coca-Cola in a case like this. That expert would have to acknowledge what this Court knows full well, which is that many competent lawyers can achieve similar results at far lesser billable rates.

That leads then to the Court's ultimate determination as to the particular hourly rates to approve. For this purpose we take particular note of the comparison between the South Florida legal market and the New York market. Clearly, it is undisputed that the New York legal market is one of the most expensive, yet

comparably skilled lawyers have received reduced rates substantially below what is claimed here. The South Florida cases cited above and others also show that a $500-$600 hourly rate is indeed extraordinary. Consequently, an award that includes such extraordinary rates is not possible. Like we have in the past, a blended hourly rate of $425.00 for all the partners who billed on the case is a suitable alternative that most closely approximates a rate for a competent and reasonably priced partner in this market who could successfully handle a case of this magnitude.

The associate rates charged are even more unreasonable than the partners. Especially given the state of the legal employment market during the course of this litigation, which is at best weak or at worst depressed, hourly rates of $250 for the most junior and $385 for the most senior are bewildering. A blended associate rate of $225 is the most the Court can award under the circumstances.

The Court will also award paralegal or "litigation support" time, but clearly not at a rate of $145-$230 per hour. A blended rate of $125.00 is the most that we can award to obtain competent paralegal services in the case in the Southern District of Florida.

(b) *Jeffer Mangels Butler & Mitchell*

In December 2010, the firm of Jeffer Mangles Butler & Mitchell LLP ("JMBM"), based out of Los Angeles, was asked to assist H&K in this matter. One would think that nineteen lawyers working on the case would be enough. But because of particular depositions necessary in the Los Angeles area, and assistance needed in the preparation of the motion for summary judgment, it was apparently

decided to outsource those particular matters to this California firm. That firm had already been litigating against Vergara in another matter pending in California. Coca-Cola thus requests the following hourly rates for JMBM:

> Partner J. Goldman—$540 (34.6 hrs), $565 (70.3 hrs);
> Associate B. Yates—$345 (81.9 hrs), $365 (115.8 hrs); and
> Paralegal S. Lawrence—$195 (17.7 hrs).

Attorney Goldman asserted in his affidavit accompanying this Motion that these rates are customary and reasonable in this jurisdiction and that they are consistent with, if not lower than, the prevailing hourly rate in Los Angeles for attorneys with comparable skills and experience. *See* [D.E. 188-5].

But as we know from the prior discussion, the reasonableness of those rates in the Los Angeles area is utterly irrelevant to this fee application. And apart from that, Attorney Goldman's affidavit is quite unpersuasive on a broader point. The question is whether it is reasonable to award any fees for the work incurred by this additional law firm, on top of the work of the primary law firm engaged in representing Coca-Cola through the work of nineteen lawyers. The particular projects cited in the affidavit may indeed have been necessary. These lawyers may also indeed have materially contributed to the summary judgment motion. But to retain another law firm to handle or participate in these projects is the type of premium-level service that an attorneys' fee application should not include. After all, many of the hours consumed by this partner and associate related to case review and preparation that should have been unnecessary for a lawyer already handling the case. Though we do not doubt that Coca-Cola believed it necessary for

its purposes to retain the Los Angeles firm to handle the projects based out of that area, especially given their existing knowledge of litigation involving Vergara, the Court's review of the record shows quite clearly that the time incurred cannot be possibly be charged to a non-prevailing party like Vergara. The efficiencies gained by using a local lawyer for this work is counterbalanced by the inefficiencies that resulted from having to get up-to-speed on a case that was already well underway.[7]

In short, we do not discount the substantive contributions these experienced intellectual property lawyers at JMBM may have made to the conclusion of the case. But those contributions are a luxury that are not compensable on a fee application. Though the Court could certainly address this issue in the section that follows, related to the hours reasonably expended, we address it here because we see little basis to arrive at an hourly rate at all for premium services that cannot be awarded in any event.

[7] For instance, a review of JMBM's billing records showed that many of the issues that plagued the H&K bills—excessive redaction, block billing, and duplicative work—were plentiful in JMBM's. This included instances of triple billing when it cross-checked billing entries between JMBM and H&K. For example, on December 13, 2010, Mr. Goldman at JMBM billed for tasks including "telephone conference with G. Katz, B. Yates, B. Briz re summary judgment motion and declarations." Mr. Yates similarly billed for "telephone conferences with J. Goldman, G. Katz, and B. Briz re [summary judgment motion, separate statement of material facts and supporting declarations]." Mr. Goldman at H&K also billed for "[l]engthy conference call and multiple e-mails to and from J. Goldman and B. Yates regarding motion for summary judgment." Finally, Mr. Briz billed for "telephone conference with team re same." In just this one instance, counsel for Coca-Cola collectively billed their client approximately $2,000 for, all told, one phone call and a few supplementary e-mails related to the same objective. That illustrates what we mean by premium level service that is not compensable in a fee application.

2. Hours Reasonably Expended

After determining the reasonableness of the hourly rates we will approve in this case, we must next determine the reasonableness of the hours expended. *Norman*, 836 F.2d at 1301. Defendant's counsel must use "billing judgment" and exclude unnecessary hours, "irrespective of the skill, reputation, or experience of counsel." *ACLU of Ga.,* 168 F.3d at 427. Furthermore, if Defendant's counsel satisfies the burden of showing that the time spent reflects the distinct contribution of each lawyer, and the customary practice of multiple-lawyer litigation, Defendant's counsel is entitled to recover for the hours expended by multiple attorneys. *Id.* at 432. The reasonable hourly rate should already reflect the skill demonstrated by Defendant's counsel. *Norman*, 836 F.2d at 1302, *Cuban Museum of Arts*, 771 F. Supp. at 1192.

A party seeking to recover attorneys' fees bears the burden of providing specific and detailed evidence so that a determination can be made of the necessity of the action and the reasonableness of the time claimed for the action. *ACLU of Ga.,* 168 F.3d at 427, 432-33. "A well-prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case." *Id.* at 427.

At the same time, the party opposing the fee application must satisfy his obligation to provide specific and reasonably precise objections concerning hours that should be excluded. *Id.* In the final analysis, however, "exclusions for excessive or unnecessary work on given tasks must be left to the discretion of the district court." *Norman,* 836 F.2d at 1306.

The Court has thoroughly examined the voluminous H&K billing records provided in support of its motion. H&K claims a total of 3,358.1 hours. Due to the voluminous fee documentation and the large number of hours claimed, the Court will not set out in this Report and Recommendation an hour-by-hour analysis of nearly a year of billing. *See Jackson*, 2008 WL 2688117, at *11; *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1311 (11th Cir. 2011); *accord Trujillo v. Banco Central del Ecuador*, 229 F. Supp. 2d 1369, 1375-76 (S.D. Fla. 2002). But having conducted an extensive review of those records, it is clear that many of the hours billed by the Defendant's counsel are reasonable and compensable.

But, the combination of extensive block billing, combined with excessive (often bordering on extreme) redaction and so many attorneys working on duplicative tasks makes it impossible to find that all the time spent on individual tasks are reasonable. As a result, the billing statements submitted by H&K are a far cry from being a "well-prepared fee petition" that the Eleventh Circuit suggests in *ACLU of Ga.,* 168 F.3d at 427.

For an example of block billing, on May 12, 2010, attorney Katz block billed 9.80 hours for:

> Multiple conference calls with Coke Team and Holland & Knight Team regarding **[REDACTION]** response to motion for preliminary injunction, and **[REDACTION]**; conference call with S. Bohrer and Jim Kaplan (Vergara's counsel) regarding **[REDACTION]** review newly filed motion for preliminary injunction and multiple telephone conferences and e-mails to and from B. Newberg regarding **[REDACTION]**; conference call with Carla Miller (Universal) and S. Thome regarding **[REDACTION]** e-mails to and from S. Thome regarding **[REDACTION]** exclusive license argument, obtaining proper Coke affidavit witness; multiple additional e-mails to Holland &

> Knight Team regarding **[REDACTION]** multiple e-mails to C. Miller regarding **[REDACTION]**.

The conclusion one reaches from this is that 9.8 hours of time were billed for compensable work as well as work that cannot be ascertained. We have no doubt from personal experience that the billing lawyer worked in good faith on projects that he attributed to this case. But on a fee application, the Court must be able to verify the need or relatedness of those projects before it can approve the time incurred. We clearly cannot fully do so when block billing like this is coupled with extensive redactions.

To illustrate this point, the Court thoroughly reviewed a sampling of H&K's billing affidavits (specifically, those covering January 1 through 31, 2011) in order to get "an overall sense of the suit" and determine the reasonableness of H&K's hours billed. *Fox*, 563 U.S. at ___ (slip op., at 11). H&K billed 426.1 total hours for the month of January. In reviewing the affidavit, however, due in part to excessive and unnecessary redaction, the Court found that only approximately 205 of those hours are defensible.

By way of example, on January 6, 2011, attorney Briz billed for the following projects (annotated by the Court):

> Strategy considerations and exchange emails with team re **[REDACTION]** (0.5)—**non-compensable.**
> Telephone conferences with Gordy Katz re **[REDACTION]** and re **[REDACTION]** (0.4)—**non-compensable.**
> Research **[REDACTION]** (0.3)—**non-compensable.**
> Strategy conference re **[REDACTION]** (0.6)—**non-compensable.**
> Review **[REDACTION]** (0.4)—**non-compensable.**
> Edit and revise motion for enlargement of time to comply with discovery order (0.7)—**compensable.**

> Strategy considerations with team re preparing document production and attend telephonic conference with client re same (1.3)—**compensable.**
> Review documents received for production (0.3)—**compensable.**

So, in this example, for the 4.5 hours that attorney Briz billed, the Court finds that only 2.3 of those hours are defensible as reasonable, as counsel has given the Court no way to determine what, in fact, took place during those other 2.2 redacted hours of activity in order to determine whether those tasks are reasonable. The H&K billing statements are replete with blacked out lists of tasks such as the one enumerated above (most notably, attorney Strickland billing 3.5 hours on January 31, 2011, for "Complete" followed by 14 lines of redaction).

An even bigger problem with H&K's application is the duplication of effort involved in having nineteen lawyers contribute in large or small part to the defense of the case. While there is nothing inherently unreasonable about a client relying on multiple attorneys, the fee applicant must establish that the time spent reflects the distinct contribution of each lawyer to the case and is the customary practice of multiple lawyer litigation. *ACLU of Ga.,* 168 F.3d at 432; *see also Johnson v. University College of Univ. of Ala.,* 706 F.2d 1205, 1208 (11th Cir. 1983). Here, based on the descriptions of the work performed by the various attorneys at H&K, this Court not only found multiple attorneys billing for completing the same tasks, but also each attorney repeatedly billing multiple hours for those same tasks. The Court must thus eliminate the redundant and repetitive hours in the application keeping in mind that "the measure of reasonable hours is determined by the

profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done." *Norman,* 836 F.2d at 1306.

Apart from duplication, the Court's review of the time entries reveals many instances of excessive billing. That is a particular problem considering the billable rates also being charged by the partners and associates who billed time on the case. Given the premium-level rates involved, the Court would expect the time required for completion of various tasks to be far less than those actually charged in the case. After all, the use of multiple attorneys is reasonable in instances when a partner merely supervises the work product of an associate who bills more hours at a lower rate. The Court's review of many of these time entries shows the opposite. Partners at high level rates billed extensive hours to various projects, for instance the preparation of the motion for summary judgment, which might be appropriate except for the fact that as many or more hours were being billed by multiple associates also working on the same motion. That, naturally, results in a very high bill that cannot be entirely compensable in a fee application. That is especially the case when one considers that, as Coca-Cola demonstrated, Vergara's claim was objectively unreasonable to begin with.

Again, this is not unexpected when premium-level legal services are at play. The partners are working just as many hours as the associates to ensure top-quality work product. That is what Coca-Cola expects. But on a fee application, the Court cannot just pass that high-priced bill onto the non-prevailing party. The non-prevailing party is responsible only for those hours that are reasonable under the circumstances. The Court must thus eliminate the redundant and repetitive hours

in the application keeping in mind that "the measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done." *Norman,* 836 F.2d at 1306.

In that analysis, to be fair, the Court has kept in mind that much of the legal work incurred in the case was not just in prosecution of the ultimately successful defenses raised by Coca-Cola. A considerable number of hours were incurred by partners and associates dealing with extensive discovery issues and discovery requests prompted by Vergara and his counsel. As is often regrettably the case in complex litigation, parties often put the cart before the horse. Discovery is not just a means to end, but becomes the end in itself. So much time was incurred here in evaluating the damage claims in this case, at Vergara's behest, which in all likelihood should have been devoted to the analysis of the weakness of Vergara's liability claim. A speedy and less expensive resolution would then have been possible, as contemplated by Fed. R. Civ. P. 1. But Vergara pursued a different route, which again is customary in cases like this. But that customary strategy carries a material cost if a fee-shifting statute applies, as in this case. Vergara should and will be responsible for an extensive number of legal hours spent responding to his shotgun discovery efforts. The Court agrees in this respect with Coca-Cola that Vergara cannot be heard to complain about extensive legal bills when Vergara himself contributed to the necessity of those bills.

Notwithstanding, Vergara argues lastly in his opposition that the motion for fees and costs should be denied without prejudice pending the outcome of his appeal

from the summary judgment Order. Coca-Cola objects. The Court's practice in those circumstances is not to stay resolution of a fees and costs motion when the parties are not in agreement or unless extraordinary cause exists. No such showing of extraordinary cause has been made here. Indeed, at the conclusion of the case a prevailing party is legally entitled under Rule 54 to a determination of fees and costs. To simply stay that entitlement determination because an appeal is pending is tantamount to an unsecured stay of a monetary judgment that the prevailing party is entitled to. Vergara can certainly seek a secured stay of execution of the judgment pending his appeal, as is his right under Rule 62. But an unsecured stay, absent agreement, is inappropriate in most circumstances.

Finally, we turn to the calculation of the adjusted number of hours that may be awarded in this case. The Court usually has two options. The Court can decide to follow the usual course of engaging in a task-by-task examination of the hours billed to excise excessive or redundant hours. *E.g., ACLU of Ga.,* 168 F.3d at 429. Or, when the number of hours involved is very high, the Court can conclude that an hour-by-hour analysis is impractical. *See, e.g., St. Fleur v. City of Fort Lauderdale,* 2005 WL 2077742, *4 (11th Cir. August 29, 2005) (given that Plaintiff's counsel claimed over 1,500 hours in compensation, the district court did not abuse its discretion by failing to engage in a more detailed, task-by-task analysis of fees it was disallowing; affirming thirty percent across the board reduction); *Villano v. City of Boynton Beach,* 254 F.3d 1302, 1311 (11th Cir. 2001) (determining that 569.30 hours submitted for compensation "are extensive enough that we do not expect the district court or magistrate judge to conduct an hour-by-hour analysis in

this case"; affirming twenty-five percent across the board reduction); *see also Evans v. City of Evanston,* 941 F.2d 473, 476-77 (7th Cir. 1991) (affirming sampling methodology as a means for managing fee litigation and facilitating review).

Upon reviewing the record as a whole and the substantial number of hours requested here, which exceeds 3300 hours for partner, associate and paralegal time, the Court readily concludes that a material across-the-board percentage reduction is most appropriate to arrive at a reasonable fee amount in this case. Having conducted a line-by-line sampling of a very active period of time, the ratio of compensable to non-compensable hours turns out to be 40 to 50%. When one examines that ratio in connection with all the relevant time entries in this application, that same ratio consistently emerges.

Therefore, the Court's review of the record as a whole reveals that a 50% across-the-board reduction is both reasonable and necessary in order for the Court to meet its obligation under the law – "to exclude from this initial fee calculation hours that were not 'reasonably expended.'" *Hensley,* 461 U.S. at 434. This calculation, we believe, results in a fair and just assessment given our overall sense of this lawsuit. *See Fox,* 563 U.S. at ___ (slip op., at 11).

3. Conclusion as to Attorneys' Fees

The Court concludes that Coca-Cola should be entitled to recover reasonable attorneys' fees in the amount of **$535,135.00** from Vergara. That results from the materially reduced blended hourly rates that are recoverable in the case, times the hours included in the application reasonably reduced by 50 percent. A table

specifying the Court's calculations for each timekeeper in the H&K fee application is attached to this Report and Recommendation.

D. Costs

Coca-Cola's application also requests an award for all its costs incurred in the litigation. The total amount requested is $125,285.78, including court reporter fees, service of process fees, photocopying costs, long distance telephone charges, court charges, travel expenses, expert witness fees, translation services, and mediation support services.

The breakdown of Coca-Cola's requested costs is as follows:

Category	Total
Telephone	$289.35
Delivery services/messengers	$1,250.54
Court fees	$1,510.00
Copying	$2,713.10
Travel	$12,218.59
Meals	$1,230.55
Postage	$14.70
Translation services	$6,253.07
Mediation	$5,255.00
Litigation support services	$56,136.43
Process servers	$360.00
Court reporters/video	$8,358.45
Expert witness fees	$29,656.00
Other	$40.00

There is no dispute that Coca-Cola's process server, photocopying and court reporter fees related to depositions necessary in the case are automatically awarded pursuant to 28 U.S.C. § 1920. Vergara takes issue, however, with Coca-Cola's other litigation expenses that are being sought as part of the attorneys' fees award.

The authority to award a reasonable attorneys' fee under 17 U.S.C. § 505 includes the authority to award out-of-pocket expenses incurred by the attorney

which are typically charged to a client in the course of providing legal services, such as photocopying, paralegal expenses, travel costs and telephone costs. This Court has held that "[w]hen a court makes an award of attorney's fees it can also award the prevailing party reasonable out of-pocket expenses incurred by the attorney and which are normally charged to fee-paying clients, so long as these costs are incidental and necessary to the litigation." *Jackson*, 2008 WL 2688117, at *14 (internal punctuation omitted) (quoting *Arthur Kaplan Co. v. Panaria Int'l, Inc.*, 1999 WL 253646, at *2-4 (S.D.N.Y. 1999) (costs awarded to a prevailing plaintiff in a copyright infringement action include process server charges, investigator fees, local counsel costs, witness expenses, computer research expenses, travel expenses, and administrative expenses)); *see also Invessys, Inc. v. McGraw-Hill Cos.*, 369 F.3d 16, 22 (1st Cir. 2004) (attorney's fees awarded to a prevailing defendant in a copyright infringement action included out-of-pocket expenses normally charged by attorneys to clients, such as costs for computer assisted research); *Pinkham v. Camex, Inc.*, 84 F.3d 292, 294-95 (8th Cir. 1996) (attorneys' fees awarded to a prevailing party in a copyright infringement action included out-of-pocket expenses normally charged by attorneys to clients, such as costs for long distance and fax and for messengers and express mail).

As these cases illustrate, Coca-Cola is entitled to, as part of their attorneys' fees award, many of its litigation expenses, which include reasonable out-of-pocket expenses incurred by the attorney and which are normally charged to fee-paying clients, so long as these costs are incidental and necessary to the litigation. Defendant's counsel has included these expenses in their bills to Coca-Cola,

attached to the Declaration of attorney Katz. [D.E. 188-1]. Katz has opined that these requested costs were necessary incurred in the defense of this matter and are normally charged to and paid by clients.

We agree generally that Coca-Cola should be awarded, as part of its attorney's fees award, litigation costs that include reasonable out-of-pocket expenses incurred by the attorney and that are normally charged to fee-paying clients, so long as these costs are incidental and necessary to the litigation. This includes service of process fees, photocopying, facsimiles, long distance telephone charges, federal express charges, computer research charges, translation services, and court charges, which are hereby awarded as part of the attorney's fees award. Again, these expenses would be recovered in addition to those specified by 28 U.S.C. § 1920 that are per se recoverable.

1. Costs to be Reduced

That then leads to the specific question whether all these expenses were indeed reasonably incidental and necessary in this litigation. We will address in detail the reasonableness of the three "big-ticket" items that Coca-Cola claims are part of its costs: litigation support services (totaling $56,136.43), travel (totaling $12,218.59), and expert witness fees (totaling $29,656.00). The Court finds, for the following reasons, that those costs should be reduced.

(a) Litigation support services

The application includes a $56,136.43 charge for Coca-Cola's "litigation support services." This is composed primarily of a $50,000 retainer fee for "OTHER—Trial Tech, Inc. Retainer for litigation consultant." [D.E. 175-1 at 41].

The rationale for this charge is not supported, nor even mentioned, in either Coca-Cola's Motion or its Reply. Nor has there been any authority cited that such premium services are recoverable as against a non-prevailing party.

Therefore, the Court finds that it falls outside the scope of compensable costs under § 505, as it was not reasonably incurred as part of the litigation. Such litigation support is unnecessary in a case at this stage that did not survive summary judgment. The amount of costs for litigation support services that Coca-Cola recovers should thus be reduced by the $50,000 retainer fee, resulting in a total of $6,136.43.

(b) *Travel*

Coca-Cola seeks over $12,000 for travel, mostly as a result of the fact that Coca-Cola had attorneys working from Boston to Miami on this case. In fact, the two attorneys who billed the most hours on this case were admitted *pro hac vice* and were located in Boston and Atlanta. As discussed earlier, the Court finds little reason why, in a case as objectively unreasonable as we have ruled this one to be, this action could not have been adequately defended by counsel located in Miami. Thus, the amount of travel charged by Coca-Cola is unreasonable, and the Court finds it reasonable to reduce the amount of travel costs incurred by 50%, resulting in a total of $6,109.30. We do not reduce the cost of travel entirely based upon the need for certain travel costs related to depositions that may not have been taken in this District.

(c) Expert Witnesses

Coca-Cola requests $29,656 to reimburse its retention of Dr. Gerard Tellis as an expert witness. He was to provide expert testimony "to refute and rebut the damages analysis and testimony offered by Mr. Vergara's expert." [D.E. 188-4 at 44].

28 U.S.C. § 1821 provides that, "[e]xcept as otherwise provided by law," witness fees and allowances are limited to that set forth in the statute ($40 per day). The Supreme Court held in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (citations omitted):

> We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees. As always "'[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment'" . . . . Any argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede those sections ignores our longstanding practice of construing statutes *in pari materia*.

See also West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 86, 96 (1991) (explicit statutory authority to contrary is necessary to exclude witness from § 1821(b) limits; expert witness fees not attorneys fees under 42 U.S.C. § 1988), *superseded by* Pub. L 102-166 § 113 (adding the following text to 42 U.S.C. § 1988: "In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee.").

The Eighth Circuit held in *Pinkham* that the "full costs" language in 17 U.S.C. § 505 does not "clearly," "explicitly," or "plainly" evidence congressional

intent to treat 17 U.S.C. § 505 costs differently from costs authorized in other statutes. *See Pinkham*, 84 F.3d at 295. The Eleventh Circuit has followed the Eighth Circuit's ruling and held that "costs that may be assessed to reimburse a prevailing party for its expert witness fees are limited to the $40 limit provided for in 28 U.S.C. § 1821(b). Section 505 makes no clear reference to witness fees, nor otherwise evinces a clear congressional intent to supersede the limitations imposed by § 1821." *Artisan Contractors Ass'n of America, Inc. v. Frontier Ins. Co.*, 275 F.3d 1038, 1040 (11th Cir. 2001). Therefore, the amount of costs recoverable by Coca-Cola for expert witnesses must be reduced to $40.

2. Final Cost Calculation

The Court concludes that Coca-Cola should be entitled to recover costs totaling **$43,011.99** from Vergara. These costs are recoverable as part of the attorneys' fee award and as per § 1920. Vergara has not shown why any of the remaining costs should be deemed unreasonable or otherwise disallowed. The Court's review of the record indeed shows these costs, with appropriate reductions, are compensable.

III. CONCLUSION

For the foregoing reasons, it is hereby **RECOMMENDED** as follows:

1. Defendant's Verified Motion for Attorney's Fees and Full Costs should be **GRANTED in part** and **DENIED in part**.

2. Coca-Cola should recover from Plaintiff $535,135.00 in attorneys' fees and $43,011.99 in costs, for a total fee award of **$578,146.99**.

3. The Court should enter a fee and cost judgment, pursuant to Fed. R. Civ. P. 58, for that amount.

Pursuant to Local Magistrate Rule 4(b), the parties have fourteen (14) days from the date of this Report and Recommendation to serve and file written objections, if any, with the Honorable K. Michael Moore, United States District Judge. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the report and bar the parties from attacking on appeal the factual findings contained herein. *R.T.C. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc); 28 U.S.C. § 636(b)(1).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 15th day of July, 2011.

EDWIN G. TORRES
United States Magistrate Judge

APPENDIX
HOLLAND & KNIGHT ADJUSTED BILLING RATES

Name	Reasonable Hourly Rate	Hours Billed	Reasonable Hours Billed	Total Fee
Gordon Katz	$425	923.8	461.9	$ 196,307.50
Christopher Bellows	$425	208.4	104.2	$ 44,285.00
Brad Newberg	$425	186.7	93.4	$ 39,695.00
Sanford Bohrer	$425	163.7	81.9	$ 34,807.50
Kwamina Williford	$425	106.6	53.3	$ 22,652.50
Stephen Wright	$425	51.7	25.9	$ 11,007.50
Scott Ponce	$425	25.0	12.5	$ 5,312.50
Thomas Brooke	$425	1.0	0.5	$ 212.50
Vernon Strickland	$225	731.9	366.0	$ 82,350.00
Brian Briz	$225	337.3	168.7	$ 37,957.50
Monica Vila	$225	164.3	82.2	$ 18,495.00
Paul Vranicar	$225	80.0	40.0	$ 9,000.00
Rebecca Argudin	$225	51.6	25.8	$ 5,805.00
Elizabeth Burkhard	$225	26.5	13.3	$ 2,992.50
Charles McLaurin	$225	16.1	8.1	$ 1,822.50
Jennifer Nowak	$225	13.6	6.8	$ 1,530.00
Jorge Lima	$225	7.4	3.7	$ 832.50
Birte Hoehne	$225	5.5	2.8	$ 630.00
Michael Stromsnes	$225	2.7	1.4	$ 315.00
Sharon O'Dowd	$150	95.1	47.6	$ 7,140.00
Nili Yavin	$150	46.6	23.3	$ 3,495.00
Jacques Maltais	$150	46.0	23.0	$ 3,450.00
Delia Hayes	$150	23.8	11.9	$ 1,785.00
LaTora Williams	$150	12.7	6.4	$ 960.00
Elizabeth Rockwood	$150	12.0	6.0	$ 900.00
Luis Perez	$150	10.7	5.4	$ 810.00
Jennifer Paul	$150	2.3	1.2	$ 180.00
Kristen Wiwczar	$150	1.7	0.9	$ 135.00
Katie Payne	$150	1.2	0.6	$ 90.00
Michael Delulis	$150	0.9	0.5	$ 75.00
Joan Washburn	$150	0.8	0.4	$ 60.00
Emily Heckman	$150	0.5	0.3	$ 45.00
TOTAL			1679.9	$ 535,135.00