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DISTRICT OF COLUMBIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' STATEMENT OF FEES AND EXPENSES FILED APRIL 29, 2002

Defendants state the following objections to the Plaintiffs' Statement of Fees and Expenses Related to the Sanctionable Conduct of Defendants and Their Counsel ("Plaintiffs' Statement") filed on April 29, 2002.

Introduction

Plaintiffs overreach in claiming over $409,000 in fees and expenses for opposing two short discovery motions. Plaintiffs include in their request extensive time spent on other motions for which the Court has not allowed them recovery, they claim unreasonable amounts of time for the work they did, and, with regard to several of the time-billers, they claim unreasonable hourly rates.

Because they unreasonably include a large amount of work on motions for which they could not reasonably believe that the Court has allowed them recovery of fees and expenses, their entire application should be denied, consistent with established D.C. Circuit case law discussed below. Alternatively, their total claim should be substantially reduced to no more than

$25,098.16 – which is more than reasonable compensation for the limited matters for which the Court has allowed recovery.

Argument

I. Plaintiffs Are Entitled to Seek Recovery Only for Work "Arising From" and "Incurred As a Result of" Opposing the Two Specific Motions Covered by the Court's Orders of March 29, 2002

This proceeding involves two orders entered on March 29, 2002, by which the Court allowed Plaintiffs to recover fees for opposing two specific motions of Defendants. The first Memorandum and Order provides that Defendants pay "plaintiffs' reasonable expenses, including attorneys' fees, arising from their opposition to defendants' motion for protective order clarifying duty to produce e-mail records," and required that plaintiffs submit "an appropriate filing detailing the amount of reasonable expenses, including attorneys' fees, incurred as a result of opposing defendants' motion for order clarifying duty to produce e-mail records." The Court's order (at 1) directly and specifically identifies the particular motion as to which it awarded fees: "defendants' motion for protective order clarifying duty to produce e-mail records [538], filed August 2, 2000." That motion (the "EMail Motion") asked the Court to clarify and perhaps limit the Defendants' obligation to search for and produce certain email communications.

The second Memorandum and Order contains similar provisions, except that it requires Defendants to pay only 75% of reasonable expenses, including attorneys' fees, arising from Plaintiffs' opposition to "defendants' motion for a protective order filed January 21, 2000." (March 29, 2002 order at 1). Thus, that order also specifically identifies the motion on which it allows recovery. That motion (the "Trade Secrets Motion") sought to limit Defendants' production of documents, based upon the Trade Secrets Act (18 U.S.C. § 1905), regulations of

the Department of the Interior, and other matters.

The Court's two orders of March 29, 2002, thus establish the boundaries for recovery. Each provides the standard for what is recoverable: Plaintiffs' "reasonable expenses, including attorneys' fees, arising from their opposition" and "incurred as a result" of opposing the Email Motion and the Trade Secrets Motion – nothing else. (Emphasis added). Neither order allows recovery for work merely related to the subject matter of those motions.

As noted by this Court in its prior evaluation of Plaintiffs' claim for recovery of fees and expenses arising from the 1999 contempt finding, "a near 'but for' relationship must exist between the Rule 37 violation and the activity for which fees and expenses are awarded." Cobell v. Babbitt, 188 F.R.D. 122, 127 (D.D.C. 1999) (citing Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985)(requiring fees and expenses awarded to be "incurred because of" the violation); citing Turnbull v. Wilcken, 893 F.2d 256, 258 (10th Cir. 1990)).

In connection with that prior fee application by Plaintiffs, this Court stated the exacting standards that are to be applied in reviewing fee applications: "The D.C. Circuit has admonished . . . that 'where a fee is sought from the United States, which has infinite ability to pay, the court must scrutinize the claim with particular care.'" Cobell v. Babbitt, 188 F.R.D. at 125 (quoting Copeland v. Marshall, 641 F.2d 880, 888 (D.C. Cir. 1980)).

II. Because Plaintiffs Improperly Claim Fees and Expenses on Work for Which They Have Not Been Awarded Recovery, Their Entire Claim Should Be Disallowed

A. Settled Precedent Permits Disallowance of Entire Fee Applications

Plaintiffs' Statement presents one of the admittedly unusual instances in which a fee application is so outlandish in its request that it should be denied entirely. In Environmental

Defense Fund v. Reilly, 1 F.3d 1254, 1258 (D.C. Cir. 1993), the court stated the following with regard to fee applications:

> We may deny in its entirety a request for an "outrageously unreasonable" amount, lest claimants feel free to make "unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place."

(quoting Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980), and citing Jordan v. Dep't of Justice, 691 F.2d 514, 518 (D.C. Cir. 1982); Trichilo v. Sec'y of Health and Human Services, 823 F.2d 702, 708 (2d Cir. 1987)). In Environmental Defense Fund v. Reilly, the court disallowed the entire fee claimed by one of the attorneys for the applicant (but not the others), because of an excessive amount of time claimed on certain tasks. 1 F.3d at 1258. The court also noted that, as an alternative to disallowance of the entire fee request, a court may "impose a lesser sanction, such as awarding a fee below what a 'reasonable' fee would have been in order to discourage fee petitioners from submitting an excessive request." Id.

Plaintiffs' Statement fits within the "outrageously unreasonable" standard described in Environmental Defense Fund v. Reilly. Even putting aside the fact that the overall amount claimed by Plaintiffs (1,292.962 hours, with fees and expenses totaling $409,038.82) is grossly excessive in light of the matters at issue, Plaintiffs' Statement is outrageously unreasonable because Plaintiffs have claimed substantial amounts for work on motions other than those for which they were awarded fees. Plaintiffs had no basis to believe, and could not reasonably have believed, that they were entitled to include that work in their present application. Their conduct is aggravated by the fact that they have tried this before.[1] A substantial sanction is appropriate to

[1] Following the 1999 contempt proceeding, Plaintiffs submitted an application for over $2.3 million, which the Court reduced to under $625,000, finding that Plaintiffs included in their

ensure that this does not happen again.

B. Over 40% of the Time Included in Plaintiffs' Statement Pertains to Motions and Proceedings Other Than Those Covered by the Court's Orders of March 29, 2002

Based upon the dates and descriptions of work contained in the fee statements attached to Plaintiffs' Statement, Plaintiffs seek recovery for a substantial amount of time (at least 538 hours, which is 42% of the 1292.962 total hours for which they seek recovery) for work pertaining to motions other than those for which the Court's March 29, 2002 orders allowed recovery.[2] Plaintiffs seek recovery for motions that the Court has not even ruled upon on the merits (let alone awarded fees) or as to which the Court or Special Master have reserved (and not yet ruled upon) the questions of whether fees will be awarded.

The Court ordered that Plaintiffs submit a filing detailing such expenses "incurred as a result" of opposing the motions identified by the Court. Plaintiffs failed to heed that order. Plaintiffs have included work so far afield from "opposing" the motions specified by the Court, that Plaintiffs could not reasonably have believed that their claim is proper. Such efforts at overreaching should not be countenanced. Because the Plaintiffs' Statement contains time for so many clearly non-recoverable tasks, we respectfully request that, as a sanction, the Court disallow Plaintiffs' request for recovery in its entirety. As recognized by the D.C. Circuit in Environmental Defense Fund v. Reilly, 1 F.3d at 1258, that is the only effective way to deter such wrongful conduct.

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application much work on matters beyond the scope of what the Court's decision stated they could recover at that time. Cobell v. Babbitt, 188 F.R.D. at 123, 139-40.

[2] The actual quantity of inappropriately claimed time may be higher; many of Plaintiffs' time entries are too vague to identify clearly which motions they involve.

1. Plaintiffs Have No Basis for Including Work on Contempt Motions Regarding Email or Other Matters

At least 44% of the time (347 hours out of 789 hours claimed) that Plaintiffs claim for "Email Matters" pertain to motions other than those for which the Court's March 29, 2002, orders allow recovery. Plaintiffs' Statement claims over 347 hours of work that, for all that appears in the Plaintiffs' Statement, pertains to Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Contempt for Destroying E-Mail, filed March 20, 2002 (the "3/20/02 Contempt Motion"), or, in a few instances, other "show cause" motions. The 3/20/02 Contempt Motion (which has not even been ruled upon, let alone fees awarded) alleges that Defendants and others destroyed e-mail (by overwriting email backup tapes) and/or covered that up. That motion is not the Email Motion as to which the Court's March 29, 2002 Order awarded fees, nor can one reasonably believe that they are the same. In the Email Motion, the Defendants asked the Court, on August 2, 2000, to clarify and limit their obligations to search for and produce email. In the 3/20/02 Contempt Motion, Plaintiffs ask the Court to find contempt for the alleged destruction of email and a coverup of that. Thus, the 3/20/02 Contempt Motion does not "arise from" Plaintiffs' opposition to the Email Motion.

The Special Master's July 27, 2001 Report and Recommendation, adopted by this Court on March 29, 2002, also is perfectly clear as to the matters on which it recommended the awarded of attorneys' fees and other expenses. The Special Master stated (at 14):

> The issues surrounding defendants' obligations to produce documents responsive to the Third Request have been raised on two other occasions – once before the Court and once before the Special Master. In the first instance, defendant was justified in airing its concerns over the potential burden of producing these documents. In light of the Court's summary denial, defendant was

> arguably within its rights to seek clarification of the contours of the Court's ruling and articulate its position regarding important issues of privilege. In this third and latest instance, there can be no "genuine dispute" that Interior's attempt again to seek clarification under the guise of changing conditions was inappropriate. [Citation omitted.] Plaintiffs are entitled to be reimbursed for those expenses they incurred in defending this latest salvo. [Citations omitted; emphasis added.]

Thus, the Special Master recommended an award to Plaintiffs for defending against the Defendants' motion – the Email Motion – and nothing else. The Report and Recommendation went on, in a new section, separately numbered V, entitled, "Failure to Preserve Backup Tapes," to discuss certain offices' overwriting of email backup tapes. In their 3/20/02 Contempt Motion, Plaintiffs rely upon such remarks. But, significantly, that Report and Recommendation says nothing about awarding fees or expenses regarding overwriting or other alleged destruction of email. Nor do this Court's Memoranda and Orders of March 29, 2002, offer any basis for claiming recovery regarding such matters. Plaintiffs have no basis to include within their present application any work pertaining to the 3/20/02 Contempt Motion or the allegations upon which it is based, nor any other contempt motions.

Attached hereto as Exhibit A is a tabulation of the hours within Plaintiffs' Statement that, based upon their dates and descriptions, appear to have been spent preparing for and drafting the 3/20/02 Contempt Motion or, in a few instances, other contempt-related motions. Such work includes Plaintiffs' efforts to develop allegations or strategies for their contempt motion, or, eventually, to draft it.

Exhibit A shows 347.732 hours that appear to have been spent on work pertaining to the 3/20/02 Contempt Motion, or other contempt motions. This calculation is based upon the dates

and descriptions offered by Plaintiffs. Our calculation probably understates the amount time spent on contempt motions in Plaintiffs' Statement. Many of the time entries that we did not include in Exhibit A contain descriptions too vague to be sure of what "email" work they reflect.[3]

We offer a few examples of the time entries reflected on Exhibit A hereto, showing work on the 3/20/02 Contempt Motion or other contempt motions, although the time entries cited on Exhibit A speak for themselves. The putative time records of Dennis Gingold (attached to his Affidavit) reflect at least 132.8 hours that appear to have been spent on matters surrounding the 3/20/02 Contempt Motion, beginning with time entries in May, 1999 – more than a year before the Defendants filed the Email Motion. The descriptions within those time entries obviously pertain to developing allegations for or preparing the 3/20/02 Contempt Motion. [4]

As further tabulated on Exhibit A, Geoffrey Rempel's records (attached to his Affidavit) suggest at least 193.9 hours spent on matters pertaining to the 3/20/02 Contempt Motion, beginning in April, 2000 – months before the Email Motion was even filed. Indeed, although

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[3] See, e.g., Babby's time entries (in Harper Affidavit Exhibit 2) for 9/30/99 ("solicitor's office email issue"), 4/13/00 ("sol email & doi network"), 4/18/00 and 4/19/00 ("sol email issue"); 9/11/00 ("DG re email"); 7/10/01 ("DG r e-mail issues and Treasury purge issues").

[4] See, for example, Gingold's "billing statements" (attached to his Affidavit) for May, 1999, referring to "retrieval of overwritten DOI Solicitor's Office e-mail," and a "hearing on e-mail destruction"; August, 1999, referring to working on "destruction of Solicitor's e-mail"; September, 1999, referring to "DOJ and DOI representations re e-mail preservation"; November, 1999, referring to "e-mail overwrite"; December, 1999, referring to "e-mail destruction issues"; May, 2000, referring to "compare representations of counsel made at 3/7/00 TRO hearing re protection of electronic records"; July, 2000, referring to "continuing e-mail overwriting"; August, 2000, referring to "e-mail contempt issues" (8/28/00); October, 2000, referring to "e-mail destruction," and the "contempt option." Similar entries appear in the months following. In August, 2001, he records many hours of "work on e-mail motion," but the E-Mail Motion for which this Court has allowed recovery was already concluded in July by the Special Master's Report and Recommendation issued on July 27, 2001. Thus, Gingold's work apparently was on his future 3/20/02 Contempt Motion.

Rempel's "Schedule A" of time entries (attached to his Affidavit) is labeled "Sanctionable E-Mail", the numerous references to work on "e-mail contempt" in virtually every month of that schedule reveal that he was really working on the 3/20/02 Contempt Motion most of the time.

Similar examples appear in the time claimed by attorney Mark Brown, whose time records (attached to his Affdiavit) refer to "email destruction" (8/21/00), "destruction of evidence/email tapes" (11/21/00), and "email destruction" (11/29/00).

Keith Harper Affidavit Exhibit 2, shows that attorney Lorna Babby claims recovery for time on "plf's motion re: document destruction" (Emphasis added) (1/25/01), and "motion for show cause why defendants should not be held in criminal contempt" (7/16/01). Babby's time also includes references to "2nd show cause motion" (10/6/99), "preparation of show cause motion" (11/19/99), "motion for show cause" (11/30/99, 8/8/00 and 8/15/00)," and "motion for show cause re: retaliation" (8/11/00).[5] As shown on Exhibit A, Babby's time entries that seem to refer to work pertaining to contempt issues totals 11 hours.

Finally, the Keith Harper Affidavit Exhibit 2 also shows that Harper claims recovery for at least 5.2 hours he spent on "solicitor's e-mail destruction developments" (4/13/00) and "e-mail issues and structure argument for show cause" (8/16/00).

Because Plaintiffs included a massive quantity of time on matters so clearly outside the scope of their allowed recovery, their request is "outrageously unreasonable" (Environmental

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[5] The 8/11/00 entry, and perhaps others, might refer to allegations of retaliation against employees such as Mona Infield, which allegations or related motions also are not the subject of allowed recovery under the Court's March 29, 2002 orders. Even Plaintiffs acknowledge that time spent on the matters involving Mona Infield are not compensable under the orders involved here. See Affidavit of Mark Brown at 4, ¶ 5 (acknowledging that he excluded time regarding the Mona Infield matters from this application).

Defense Fund, 1 F.3d at 1258), and should be denied entirely.

2. Plaintiffs Have No Basis for Including Work on Motions to Modify or Vacate a March 29, 2000 Discovery Order

Over 60% of the time (191.261 hours out of 311.845 hours) that Plaintiffs claim for "Trade Secrets/IMDA Matters" actually reflects work not on the Trade Secrets Motion, but on an entirely separate series of motions as to which the Court's March 29, 2002 orders do not allow recovery. The second Memorandum and Order entered on March 29, 2002, allowed recovery for fees and expenses arising from Plaintiffs' opposition to the Trade Secrets Motion. The Defendants filed the Trade Secrets Motion on January 21, 2000. It was fully briefed by February 14, 2000, and the Special Master issued his Report and Recommendation on March 2, 2000, recommending denial of the Trade Secrets Motion. The Court accepted that Report and Recommendation, and, accordingly, entered an order on March 29, 2000 (the "March, 2000 Discovery Order"), directing Defendants to produce certain information.

On May 16, 2000, the Special Master issued a Report and Recommendation Concerning Plaintiffs' Request for Sanctions Pursuant to Federal Rule of Civil Procedure 37(A)(4). This was superseded by an amended Report and Recommendation dated June 28, 2000. In those papers, the Special Master recommended awarding Plaintiffs 75% of their reasonable fees and expenses "arising from their opposition to" the Trade Secrets Motion. This Court adopted that recommendation in its March 29, 2002 Memorandum and Order.

But Plaintiffs seek recovery for work on an entirely separate spate of motions that followed, and sought to modify or vacate, the March, 2000 Discovery Order. On December 22, 2000, Defendants filed "Interior's Motion for Modification of the Protective Order Entered on March 29, 2000 and Memorandum in Support Thereof." On January 16, 2001, Plaintiffs filed an

opposition and cross-motion to vacate the March, 2000 Discovery Order, and for the award of sanctions.[6]

The resulting flurry of briefs resulted in a Report and Recommendation of the Special Master (dated May 16, 2001; filed July 25, 2001) that recommended that part of the relief sought by Defendants be granted (at 3), that the cross-motion of Plaintiffs be denied, and stated (at 8) that the "basis for plaintiffs' request for sanctions is not wholly clear from the filings." The Special Master stated that "plaintiffs' request for sanctions is premature" and that he might revisit that question at another time, depending upon information later shown. (at 9). Defendants filed objections.

On July 25, 2001, the May 16, 2001 Report and Recommendation was filed and fiated. See Court's docket entry number 767. Thus, the motion, cross-motion, and related briefs that followed the March, 2000 Discovery Order were entirely separate from the Trade Secrets Motion (which preceded the March, 2000 Discovery Order), and the Special Master expressly reserved the question of whether sanctions should be awarded on those post-March, 2000 motions.

As far as we have been able to determine, the Special Master has not recommended, and the Court has not ordered, recovery of fees with regard to the motions to modify or vacate the March, 2000 Discovery Order. Certainly, neither of this Court's March 29, 2002 Memoranda and Orders pertain to that series of motions. They make no mention of the various motions (filed in December, 2000 and later) to modify the March 20 Discovery Order, and no award of fees on

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[6] See , Interior's Motion for Modification of the Protective Order Entered on March 29, 2000 and Memorandum in Support Thereof (filed December 22, 2000); Plaintiffs' Consolidated Opposition to Defendants' Motion to Expand the Protective Order Entered March 29, 2000 and Plaintiffs' Cross-Motion to Vacate the March 29, 2000 Protective Order and request for Further Sanctions" (filed January 16, 2001).

those matters could reasonably be inferred. Thus, Plaintiffs have no basis to claim, nor to reasonably believe that they could claim, fees and expenses pertaining to the motions to modify the March, 2000 Discovery Order.

Yet, Plaintiffs' Statement includes over 191 hours that, based upon the dates and descriptions, appear to relate to disputes and motions following the March, 2000 Discovery Order, not the Trade Secrets Motion. That is almost two-thirds of the 311 hours that Plaintiffs claim pertaining to "Trade Secrets/IMDA" matters. See Plaintiffs' Statement at 2-3. Exhibit B hereto tabulates that time, which was spent in early 2001.[7] Plaintiffs fail to show how work performed about a year after the Special Master issued his Report and Recommendation on the Trade Secrets Motion (in March, 2000) could have been "arising from" or "incurred as a result of" their opposing that motion.

Plaintiffs' inclusion of such a large amount of inappropriate time warrants denial of their

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[7] For example, the Gingold billing statements (attached to Gingold Affidavit) purportedly for "Trade Secrets Sanctions," beginning in January, 2001, contain numerous entries for work on matters such as "defs' motion to amend protective order" (1/9/01) or "defendants' motion to expand protective order" (1/10/01), "defendants' motion to vacate 3/29/00 protective order" (2/1/01), "work on Trade Secrets /IMDA issues re scope of Defs' protective order" (3/26/01).

Similarly, Mark Brown's schedule of time entries (attached to his Affidavit) reveals work in early 2001 on matters including "Revise Opposition to Motion to Expand Protective Order/IMDA" (1/15 and 1/16/01) and "Revise Reply re Motion to Vacate Protective Order of 3/29/00" (2/03/01).

Rempel's time entries (see Rempel's Schedule B, attached to his Affidavit) includes early 2001 entries for "response to defendants' motion to modify March 29, 2000 Protective Order" (1/10/01) and other, similar entries throughout January and February, 2001.

Harper's time entries in January, 2001 (Harper's Affidavit Exhibit 1, at 5) refer to, e.g., "Def's protective order trade secrets," "motion to amend order re: protective order" (1/9/01), "motion to amend (IMDA) and cross motion" (1/11/01).

claim in its entirety.

III. Alternatively, Plaintiffs' Statement Includes a Grossly Excessive Amount of Time for Opposing the Two Motions, and Should Be Substantially Reduced

Alternatively, if the Court does not disallow Plaintiffs' entire application, the amounts allowed should be reduced substantially.

A. Plaintiffs Claim Excessive Time and Fees Regarding the Email Motion

1. Most of Plaintiffs Claimed Work Regarding the Email Motion Did Not "Arise From" and Was Not "Incurred As a Result" of Their Opposition to That Motion

The briefing and argument on the Email Motion covered only a short period and amount of time, and a relatively discrete scope of work. The Email Motion (court docket number 538) was filed on August 2, 2000. The Defendants' supporting memorandum contained 26 pages of text. Plaintiffs filed their opposition on August 17, 2000, consisting of 24 pages of text. Defendants filed a 14-page reply on September 8, 2000. Although Plaintiffs sought leave to file a surreply on September 12, 2000, the Special Master denied them leave on October 24, 2000. The Special Master held a short hearing on October 27, 2000. On July 27, 2001, he rendered his Opinion that the Email Motion be denied.

Thus, the only work that seemingly was reasonably needed "as a result" of opposing the Email Motion consisted of counsel's review of the Email Motion beginning on August 2, 2000, preparation and filing of Plaintiffs' opposition on August 17, 2000 (and perhaps reasonable research associated with it), review of Defendants' reply on or about September 8, 2000, preparation for and argument at the hearing on October 27, 2000 (which only lasted about 1-1/2 hours), and review of the Special Master's Opinion on or about July 27, 2001.

Yet, Plaintiffs' Statement (at 2) seeks recovery for 789.938 hours of work, totaling

$231,684.80, supposedly related to "E-mail Matters." The services include attorney time as early as May, 1999[8] (more than a year before the Email Motion even was filed) and as late as September 2001[9] (a year after briefing was complete, and months after the Special Master issued his Opinion on the matter). Despite counsels' conclusory statements that they believe their claimed work was, e.g., "fairly allocable"[10] to the matters covered by the Court's Orders, the facts suggest otherwise.

First, as discussed in part II, above, fully 44% of the time claimed for "Email Matters" (i.e., 347 hours out of the 789 hours claimed) pertained not to the Email Motion, but to the 3/20/02 Contempt Motion or other contempt motions, and thus is not recoverable in this fee proceeding. Second, much of the remaining claimed work[11] pertained to the September 12, 2000 Surreply that the Special Master denied leave to file because Defendants' reply had raised no new material that would justify a surreply by Plaintiffs.[12] The Special Master stated that the reply had raised no new evidence or legal theories, so "there is no need for further argument." See Report and Recommendation dated October 18, 2000 (filed October 24, 2000) at 4. Because that

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[8] See Plaintiffs' Statement, Affidavit of Dennis Gingold, Exhibit 1. See also Affidavit of Geoffrey Rempel, Schedule A (including time beginning in April, 2000).

[9] Id.

[10] See Affidavit of Dennis Gingold at 2 (par. 4).

[11] See time entries for work on briefs after the Plaintiffs filed their opposition brief on August 17, 2000, including extensive time claimed by Dennis Gingold on "email brief" after August 17, 2000, all of which should be presumed to have been on the surreply; time claimed by Mark Brown on "email surreply" in September, 2000; time claimed by Geoffrey Rempel on "e-mail surreply" after August 17, 2000; time claimed by Lorna Babby regarding "surreply brief" in September, 2000; and time claimed by Keith Harper regarding "surreply brief" in September, 2000.

[12] See Special Master's Opinion and Order filed October 24, 2000 at 4.

surreply was unwarranted and not allowed to be filed, Plaintiffs should not be allowed to recover for work on it.[13] See Board of Trustees v. JPR, Inc., 136 F.3d 794, 800 (D.C. Cir. 1998)("[t]he weaker the apparent need for a particular activity, the higher the evidentiary hurdle a clamant must cross in order to demonstrate that it was in fact performed in a reasonable effort to pursue the litigation").

2. Only Reasonable Work to Oppose the Email Motion Is Compensable

This Court's March 29, 2002 Memorandum and Order (at 2 and 3) expressly limits Plaintiffs' recovery to "reasonable" attorneys' fees and other expenses. This is consistent with settled precedent that fee awards should include compensation only for "the number of hours reasonably expended on the litigation." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Environmental Defense Fund v. Reilly, 1 F.3d at 1258. Thus, "hours that are excessive, redundant, or otherwise unnecessary" are not compensable time in a fee application. Board of Trustees v. JPR, 136 F.3d at 800.

When applicants claim excessive amounts of time to perform their tasks, the courts readily reduce the allowed hours. See Michigan v. Environmental Protection Agency, 254 F.3d 1087, 1093 (D.C. Cir. 2001)(20 hours for reply brief was reasonable; but court reduced by 50% a claim for 90 hours for an opening brief); In re Mullins, 84 F.3d 459, 467 (D.C. Cir. 1996)(court reduced by 50% a claim for 130 hours to prepare a reply brief on a motion to quash, finding 65 hours would have been reasonable); American Petroleum Inst. v. EPA, 72 F.3d 907, 917 (D.C.

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[13] Curiously, Rempel apparently began working on Plaintiffs' ill-fated surreply on August 21, 2000, only a few days after they filed their opposition brief, and weeks before the Defendants filed the reply. This demonstrates, as found by the Special Master, that Plaintiffs' effort to file a surreply was not a genuine effort to respond to new matters raised in Defendants' reply brief.

Cir. 1996)(court reduced by 50% a claim for 120 hours on a reply brief, finding 60 hours reasonable); Masonry Masters, Inc. v. Barr, No. 86-201, 1992 WL 13208, at *4 (D.D.C. Jan. 9, 1992)(court reduced by over 70% a claim for 68.1 hours on a reply brief); see also Salazar v. District of Columbia, 123 F. Supp. 2d 8, 16 (D.D.C. 2000)(court reduced by 50% a claim for 44 hours on a legal memorandum); Martini v. Federal Nat'l Mortgage Ass'n., 977 F. Supp. 482, 489 (D.D.C. 1997)(court reduced by 50% a claim for 58.67 hours to prepare a pretrial statement); Donovan v. Local 6, Washington Teachers Union, 665 F. Supp. 1, 4 (D.D.C. 1986)(court reduced by 50% a claim for 44.9 hours on a fee application, finding 20 hours would be reasonable).

These cases do not indicate that excessive hours always are to be reduced by a fixed percentage. Rather, the courts apply their own judgment as to how much time was appropriate for the work product that resulted. See American Petroleum Institute, 72 F.3d at 917 ("[b]ased on our review of the reply brief, we conclude that it would have been reasonable for an experienced partner to have spent 60 hours" preparing it); Masonry Masters, Inc., 1992 WL 13208, at *4 (court relied upon its prior experience and knowledge of the legal marketplace to determine how many hours were appropriate).

While some of the affidavits submitted by Plaintiffs assert the conclusions that the timekeepers removed, e.g., "duplicative or redundant" time (Gingold Affidavit at 4, ¶ 13) or "duplicative or unproductive" time (Brown Affidavit at 3, ¶ 3), this does not establish that the remaining time is reasonable in amount. First, the key problem is that Plaintiffs simply claim far too much time for the relatively simple tasks at hand, regardless of whether they already reduced the time claimed. They should not be permitted to charge the Government for such overkill, even if they subjectively view their claimed time as "productive." See Oklahoma Aerotronics,

Inc. v. United States, 943 F.2d 1344, 1347 (D.C. Cir. 1991) ("there is a point at which thorough and diligent litigation efforts become overkill," for which the Government should not be charged in a fee application).

Second, even if Plaintiffs deducted some time from their claim, this does not mean that the resulting figures are appropriate, and Plaintiffs' self-serving representations in that regard are not determinative. See Orson, Inc. v. Miramax Film, Corp., 14 F. Supp. 2d 721, 724, n.1 and 725, n.3 (E.D. Penn. 1998)(court reduced the time claimed, beyond any voluntary reductions by claimant). Third, not all of Plaintiffs' timekeepers (i.e., Rempel) even purport to have removed non-productive and wasteful time. Fourth, Plaintiffs fail to specify how much time they supposedly deducted, leaving the Court unable to assess the judgments they made in excluding time entries. See Cobell v. Babbitt, 188 F.R.D. at 130.

3. No More Than 60 Hours Should Be Allowed as a Reasonable Amount of Time for Opposing the Email Motion

Even after deducting all of the time for the tasks that clearly should have been excluded from Plaintiffs' Statement, as discussed above, the remaining quantity of time in Plaintiffs' Statement is not reasonable for the relatively straightforward task of opposing the Email Motion. In order to comply with the Court's dictates that the allowable expenses are those "arising from" or "as a result of" Plaintiffs' opposition to the Email Motion, the only allowable expenses should be those for preparing the 25-page opposition brief, including reasonable research (time between August 2 and 17, 2000, inclusive), and ancillary work such as reviewing the 26-page Email Motion (time on or about its filing date, August 2, 2000), reviewing Defendants' 14-page reply brief (time on or about its filing date, September 8, 2000), preparing for and participating in argument on the motion (the time on or just before 1-1/2 hours hearing on October 27, 2000),

and reviewing the ultimate 19-page decision on it (time on or about July 27, 2001). Even then, only the reasonable fees for such efforts should be recoverable. We can conceive of no reasonable scenario or set of circumstances under which the 789 hours, with fees totaling over $231,000, claimed by Plaintiffs would have been a reasonable amount of time to spend "as a result" of or "arising from" such work to oppose the Email Motion.

As a first step in attempting to cull out potentially recoverable expenses, Defendants have attempted to segregate the time claimed by Plaintiffs' attorneys that at least fits within the time parameters described in the preceding paragraph. Exhibit C reveals that Plaintiffs' counsel claim 250.175 hours of time fitting within the time parameters described above, excluding time entries that clearly fall outside the proper scope of opposing the Email Motion.[14] Using the adjusted maximum hourly rates discussed in part VI, below (e.g., $230 per hour for Dennis Gingold), this leads to corresponding fees totaling $61,035.25.[15] Certainly, Plaintiffs cannot recover more than that, but even that amount is grossly excessive and must be substantially reduced.

The facts and circumstances surrounding the Email Motion show no basis for a large quantity of work to oppose it. First, the factual and legal issues involved in the Email Motion were not excessively complicated, as revealed by the fact that each side's opening brief was far

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[14] For example, Rempel's time entries in August, 2000 that refer to "email contempt" are not included, nor are time entries referring to work on the "surreply" that Plaintiffs were not allowed to file.

[15] Alternatively, as shown on Exhibit C, if Gingold were allowed a rate of $350 per hour (see part VI, below), the fees would be $64,299.25, which also is a grossly excessive amount that needs to be significantly reduced. Also, although we use $350 per hour for Mark Brown, as shown in part VI, below, he fails to establish that he is entitled to that rate. Thus, this figure may have to be adjusted, depending on whether the Court allows him to recover at $350 per hour or some other figure.

below the court's 45-page limit, and the Special Master's Opinion deciding the issue was only 19 pages long.

Second, the principal piece of work involved in opposing the Email Motion was Plaintiffs' 24-page (of text) opposition brief, which they put together in about two weeks. Yet their claimed time during that period (from August 2 through 17, 2000) includes over 213 hours.[16] That is an unreasonable amount of time for the end product of 24 pages of text. Perhaps it results from inefficient use of time, or from having too many personnel (e.g., Dennis Gingold, Mark Brown, Geoffrey Rempel, Lorna Babby and Keith Harper), or excessive duplication of efforts. Five workers (four attorneys, one non-attorney) are more than reasonably needed to handle a relatively short discovery motion. See Davis County Solid Waste Mgt. and Energy Recovery Special Service District v. Environmental Protection Agency, 169 F.3d 755, 761 (D.C. Cir. 1999)(claimed hours in fee application were excessive because, for example, multiple attorneys performed the same tasks, such as drafting, reviewing and editing briefs). Plaintiffs' Statement reveals, for example, that multiple personnel worked on drafting, legal research, and reviewing briefs.[17] Further, Plaintiffs' counsel's time conferring with each other was excessive, considering the nature of the motion involved.[18]

Third, opposition to the Email Motion did not require substantial new work, but involved

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[16] See Exhibit C, time listed between August 2 and 17, 2000.

[17] See time entries for reviewing on 8/3/00 by Mark Brown (5.416 hours), Lorna Babby (9.1 hours) and Geoffrey Rempel (1.5 hours); legal research on 8/10/00 by Mark Brown and Lorna Babby; and research on 8/14/00 by Mark Brown and Lorna Babby.

[18] See, e.g., time entries for Babby and Harper, reflecting numerous conferences and phone calls among counsel – some lasting hours.

mostly revisiting prior arguments. The key reason why the Special Master recommended awarding fees for opposing the Email Motion was that, in his determination, the issues involved in the Email Motion had been raised and decided twice before, in prior motions before the Court and the Special Master. See page 14 of Report and Recommendation dated July 27, 2001 and filed July 30, 2001 (quoted in part II.B.1, above). No fees have been awarded for work regarding those prior motions, but Plaintiffs should have been able to use their work product from those prior, non-compensable motions in order to prepare their opposition to the final Email Motion. For the reasons stated, little work should have been needed to oppose the Email Motion.

Based upon the limited work reasonably necessary to oppose the Email Motion, 60 hours seems a reasonable allowance of time for drafting the opposition brief and all of the other ancillary work described above. Therefore, Plaintiffs should be allowed no more than 60 hours worth of time for opposing the Email Motion. One method of determining the appropriate recovery would be to calculate the ratio of 60 (reasonable hours) to 250.175 hours shown on Exhibit C hereto, for a ratio of .24. Applying that ratio to the $61,035.25 in fees shown on Exhibit C results in a figure of $14,648.46.[19] That is the maximum amount of fees that should be awarded for opposing the Email Motion.[20] That figure assumes a reasonable amount of time (60

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[19] That assumes a $230 per hour rate for Dennis Gingold (see below). If the Court were to allow a $350 per hour rate for late 2000 - 2001 work (also shown on Exhibit C), the calculation of a reasonable fee would be as follows: Applying the .24 ratio to the $64,299.25 in fees shown on Exhibit C results in a figure of $15,431.82, as the maximum recovery for opposing the Email Motion.

[20] Even if one determined the ratio of 60 (reasonable hours) to the 789.938 hours claimed in Plaintiffs' Statement regarding the Email Motion, it would yield a ratio of .075955. If one applied that to Plaintiffs' claimed fees of $231,684.80 regarding "E-mail Matters," the result is $17,597.63. That figure, while more in line with reason than the figure claimed by Plaintiffs, is still too high because it assumes the excessive hourly rates charged by Dennis Gingold and

hours) and effectively uses the maximum appropriate hourly rates that we discuss in part VI, below.[21]

B. Plaintiffs Claim Excessive Time and Fees Regarding the Trade Secrets Motion

1. Much of Plaintiffs' Claimed Work Regarding the Trade Secrets Motion Did Not "Arise From" and Was Not "Incurred as a Result" of Their Opposition to that Motion

Much of the work claimed with regard to the Trade Secrets Motion also cannot fairly be said to be "arising from" or "incurred as a result" of Plaintiffs' opposition. Defendants filed the 13-page Trade Secrets Motion on January 21, 2000. Plaintiffs filed their opposition (17 pages of text) on February 7, 2000, and Defendants filed their nine-page reply on February 14, 2000. The Special Master conducted a 2-1/2 hour hearing on February 29, 2000, with regard to the Trade Secrets Motion and other matters. The Special Master issued his Report and Recommendation that the motion be denied on March 2, 2000. On May 16, 2000, the Special Master issued a Report and Recommendation that Plaintiffs be awarded 75% of reasonable fees and expenses arising from their opposition to the Trade Secrets Motion. The Special Master issued an Amended Report and Recommendation on June 28, 2000, which only amended certain findings not pertinent here. For opposing the Trade Secrets Motion, Plaintiffs claim 311.845 hours, for fees totaling $86,763.08. See Plaintiffs' Statement at 2-3.

Plaintiffs' Statement includes substantial work beyond opposing the Trade Secrets

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Geoffrey Rempel (see below).

[21] However, as discussed in part VI, below, and as noted throughout this brief, although we use $350 per hour for Mark Brown, he fails to establish that he is entitled to it. If the Court reduces his hourly rate, the figures stated herein would have to be adjusted.

Motion. First, as discussed in part II, above, over 60% of the time claimed by Plaintiffs actually pertained to other motions involving the March, 2000 Discovery Order, for which no compensation has been ordered. Second, Plaintiffs incorrectly include various other items of work not part of their opposition to the Trade Secrets Motion. For example, Lorna Babby's time includes clearly non-recoverable items such as work on matters pertaining to the "appeal" (Keith Harper Affidavit Exhibit 1, Babby time entry for 12/23/99), "treasury report on measures taken" (id., entry for 1/27/00), "supplemental responses to discovery requests" (id.), "case strategy and scheduling" (id., entry for 2/25/00), "waiver from tribes pursuant to Indian Mineral Development Act (id., entry for 4/18/00), and "motion for show cause" (id., entry for 5/18/00).

2. No More Than 60 Hours Should Be Allowed as a Reasonable Amount of Time for Opposing the Trade Secrets Motion

The Court's order of March 29, 2002 regarding the Trade Secrets Motion allowed only "reasonable" attorneys' fees and other expenses. Even after deducting the tasks described above that did not genuinely arise from their opposition to the Trade Secrets Motion, the remaining time claimed by Plaintiffs is unreasonable in amount and, therefore, should be significantly reduced. The only work reasonably "arising from their opposition" to the Trade Secrets Motion would be reasonable time spent to review the Trade Secrets Motion (in approximately December, 1999[22] and January, 2000), preparation of the opposition brief (filed February 7, 2000), including reasonable research time, review of Defendants' reply (February 14, 2000), preparation for and argument at the hearing before the Special Master on February 29, 2000, review of the Special

[22] Although the Trade Secrets Motion was filed in January, 2000, the parties apparently began discussing it beforehand, in late December, 1999.

Master's Report and Recommendation (around March 2, 2000), and review of the Reports and Recommendations regarding sanctions (around May 16 and June 28, 2000).

Defendants have attempted to segregate the portion of the time claimed by Plaintiffs' attorneys that – at least based upon the dates of counsel's time entries – appears within the time parameters described in the preceding paragraph. Exhibit D hereto shows that time fitting that description totals 204.20 hours (75% of which is 153.15 hours), although even that appears to include time spent on non-recoverable matters.[23] Using the adjusted maximum rates discussed in part VI, below (e.g., $230 per hour for Dennis Gingold), this leads to corresponding fees totaling $27,699.[24] Plaintiffs cannot recover more than that, but even that amount is grossly excessive and must be substantially reduced.

Nothing about the Trade Secrets Motion justifies a large amount of time to oppose it. The Trade Secrets Motion was not unduly complicated. Plaintiffs' opposition brief contains less than 17 pages of text. About half of their brief consists of reciting the background of the dispute, but nothing in that discussion appears to have needed an inordinate amount of time to prepare. Fewer than ten pages contain legal analysis. Defendants' briefs were fairly short (the opening brief was about 13 pages, the reply brief was nine pages). The oral argument (February 29, 2000) appears to have lasted only two-and-one-half hours (including argument on at least one other

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[23] For example, Babby's time entry on 12/23/99 includes discussing "appeal" of the Court's 12/21/99 opinion; her time entry on 2/25/00 reflects a meeting to discuss "case strategy and scheduling," and her time entry on 5/18/00 includes "motion to show cause."

[24] Alternatively, if Gingold were allowed the higher hourly rates of $340 per hour in early 2000 (pursuant to the Laffey matrix attached as Exhibit 3 to the Mark Brown Affidavit, and discussed in part VI, below), then, as shown in Exhibit D attached hereto, the 204.2 hours of counsel's time fitting within appropriate dates would yield fees of $30,825.75.

issue).

Yet, between the time that the parties apparently started discussing the Trade Secrets Motion in December, 1999, and the time that briefing and argument were finished at the end of February, 2000, Exhibit D hereto shows that Plaintiffs claim over 187 hours.[25] That is far too much time, considering that the principal product of their work was a 17-page (of text) opposition brief.

Sixty hours is a reasonable amount of time for opposing this motion. The briefs on the Trade Secrets Motion were shorter than on the Email Motion, although the Email Motion involved issues covered in previous motions. Thus, 60 hours seems more than enough time for this matter.

Accordingly, one way of calculating a reasonable recovery would be to determine the ratio of 60 hours to the 204.20 hours shown on Exhibit D hereto, for a ratio of .30. Applying that ratio to the fees of $27,699 shown on Exhibit D yields $8,309.70.[26] That is the maximum amount that would be reasonable to recover for opposing the Trade Secrets Motion.[27]

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[25] See Exhibit D hereto, adding time from December, 1999 through February, 2000, for Dennis Gingold, Geoffrey Rempel, Lorna Babby and Keith Harper.

[26] Even if one determined the ratio of 60 (reasonable hours) to the 311.845 hours claimed in Plaintiffs' Statement regarding the Trade Secrets Motion, it would yield a ratio of .19240. If one applied that to Plaintiffs' claimed fees of $86,763.08, the result is $16,693.22. That figure, while more in line with reason than the amount claimed by Plaintiffs, is still too high because it assumes the excessive hourly rates charged by, e.g., Dennis Gingold and Geoffrey Rempel (see below).

[27] Alternatively, if the Court were to allow Gingold the higher hourly rates of $340 per hour (in early 2000) (see note 23, above), then one would apply the ratio of .30 to the $30,825.75 shown on Exhibit D, for a result of $9,247.73. Further, as discussed in part VI, below, the rate of $350 claimed by Mark Brown is not sufficiently supported, so the figures stated herein would have to be adjusted if the Court reduces Brown's hourly rate.

IV. Plaintiffs Claim Excessive Fees for Preparation of Plaintiffs' Statement

Plaintiffs claim 191.179 hours, for fees totaling $56,890.15, simply to prepare their statement of time and charges for which they seek recovery. See Plaintiffs' Statement at 3. This is an unreasonable amount of time and fees.

First, part of the reason for Plaintiffs' excess appears to be that, as counsel Dennis Gingold states in his Affidavit (at 2, ¶ 4), "[l]ike my co-counsel and our experts, I have not maintained separate records for the matters" at issue. Attorney Mark Brown also admits, "[i]t took considerable time and effort to prepare the attached schedules because, like my co-counsel and our experts, I have not maintained segregated records for the matters dealt with . . . ." Affidavit of Mark Brown at 2 (¶ 3).

To the extent that counsel failed to keep separate time records contemporaneously, and thus may have had to recreate, reclassify, or re-package records of their time, that is their own fault.[28] Plaintiffs' oppositions to the Email Motion and the Trade Secrets Motion asked for imposition of sanctions. Thus, Plaintiffs knew or should have known then – while they were performing their work opposing the motions – that they should have been keeping contemporaneous, separate tallies of the time spent specifically opposing the motions that would have been sufficient to support their fee application. To the extent that they failed to do so, they unjustifiably created the need for extra work to calculate now how much time they spent on these tasks. That extra work was not incurred "as a result of" their opposition to the motions; it was incurred because of Plaintiffs' lack of contemporaneous attention to their request for sanctions.

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[28] To quote Plaintiffs, "This burden is wholly self-inflicted. Had [they] kept adequate records, there would have been no need for the allegedly expensive restoration process." Plaintiffs' Opposition to the Email Motion, filed August 17, 2000.

Had Plaintiffs kept separate, contemporaneous allocations of their time to the subject tasks, a lower-paid administrative assistant could quickly have prepared the necessary tabulations and tables. Thus, the appropriate amount of time for compensation would be de minimus.

Second, much of the time spent preparing the statement pertained to calculating the non-compensable time spent on the other motions described in part II, above. See, e.g., Keith Harper Affidavit Exhibit 3, which contains numerous entries for preparing the fees and expenses statement for "email destruction." Work on the motions described in part II, above, is non-compensable in this proceeding, so preparation of a fee statement about it is non-compensable too.

Third, the overall amount of time and fees claimed for preparing their claim for fees and expenses is unreasonably high on its face, and Plaintiffs offer no justification for it. The more than 191 hours claimed by Plaintiffs amounts to the equivalent of one person working full time (40 hours) for over four-and-three-quarters weeks. As discussed above, the opposition to the subject motions needed only limited work that was spread out over a short period of time. Even if Plaintiffs had been justified in not keeping careful contemporaneous records at the time of their opposition work, only a small amount of time would have been reasonable and justifiable to gather and formulate information about the hours spent during those brief time periods.

Nor do the drafting of Plaintiffs' Statement and its supporting affidavits justify 191 hours of time spent. The Statement itself is less than four pages, and the only legal discussion consists of two short footnotes. All four of the supporting affidavits are less than five pages each. They contain only fairly simple descriptions of record-keeping and billing practices. Preparation of such materials cannot reasonably justify significant time; allowing for two hours for each of

those documents (the Statement and four declarations), for a total of ten hours, appears to be the outside limit of a reasonable sum.

Using the maximum hourly rates we suggest in part VI, below, the following is the maximum amount that should be allowed for preparation of Plaintiffs' Statement (assuming that Dennis Gingold prepared the text of the statement, and each of the affiants prepared his own Affidavit):

Preparation of text of statement by Dennis Gingold:	2 hours @ 230/hr	=	$ 460.00
Affidavit by Gingold:	2 hours @ 230/hr	=	460.00
Affidavit by Brown:	2 hours @ 350/hr[29]	=	700.00
Affidavit by Rempel:	2 hours @ 90/hr	=	180.00
Affidavit by Harper:	2 hours @ 170/hr	=	340.00
		total	$ 2,140.00

V. Plaintiffs Claim an Unreasonable Amount for Expenses

Plaintiffs claim $33,690.79 in expenses. That figure apparently was determined by simply computing 15% of the hourly fees of Dennis Gingold and the NARF attorneys. See Plaintiffs' Statement at 3. That figure is excessive and the method insupportable.

The 15% add-on for "overhead" or "expenses" is unsupported by the present record. Plaintiffs suggest that, in connection with this Court's order regarding the 1999 contempt proceedings,[30] the Court "accepted" a formula by which they may simply tack on an extra 15% to counsel's fees, supposedly to cover "overhead." Gingold Affidavit at 2. But Plaintiffs misread the Court's decision. This Court observed that the rates that attorneys Gingold and Holt actually

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[29] Although we use $350 per hour for Mark Brown, we show in part VI, below, that he fails to establish that he is entitled to that rate. Thus, this figure may have to be adjusted, depending on whether the Court allows him to recover at $350 per hour or some other figure.

[30] See Cobell v. Babbitt, 188 F.R.D. at 126.

charged to their clients included that 15% amount.[31] Thus, the Court stated, the overall hourly rates were either objectionable as a whole or they were not. 188 F.R.D. at 126. Because the Court found that the Defendants had not contested the overall rates (188 F.R.D. at 125), they could not pick apart aspects of those rates. 188 F.R.D. at 126. Thus, the Court allowed the claimed rates to stand.

Plaintiffs' Statement does not support the same outcome. Gingold's Affidavit (at 2) states that prior to January 1, 2000, his "billing rate had been $325.00 an hour, plus 15% for overhead." But he then states that, "on January 1, 2000, I changed my billing rate to . . . $425.00 per hour generally, and $475 for trial, hearing or deposition time." Id. Significantly, that statement does not say that his post-January 1, 2000 rates add another 15% on top of the $425 or $475 per hour, which would bring his hourly rates to a very high figure of $488.75 or $546.25 per hour. In a different part of his Affidavit (¶ 8), he refers cryptically to "the 15% factor denominated 'overhead' in my fee arrangement," but, again, he does not say that his agreement with his clients in 2000 and 2001 provided for adding that amount on top of his alleged $425 or $475 per hour. Instead, his affidavit seems to indicate that his total hourly rate is $425 or $475. Yet, Plaintiffs' Statement simply tacks on another 15% to those rates, supposedly to cover overhead expenses. See Plaintiffs' Statement at 3.

Alternatively, if Gingold's position were that his hourly rates in 2000 and 2001 included another 15% (for a total of $488.75 or $546.25), Defendants object to them as being unreasonable and unsupported. Gingold offers no basis for concluding that he could command

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[31] Thus, Gingold's hourly rates were $373.75 per hour (pre-6/5/98) and $230 per hour (post-6/5/98). 188 F.R.D. at 126.

such extraordinary rates in the marketplace. Such rates greatly exceed those shown on the Laffey matrix (Exhibit 3 to the Mark Brown Affidavit).

Similarly, the NARF attorney fees add 15% for "expenses," or $8,359.54. See Plaintiffs' Statement at 3. Keith Harper's Affidavit (at 2, ¶ 7) states, "in lieu of detailed and separate 'expenses' other than attorneys fees, I am including 15% (of the attorneys fees) as an 'overhead' charge." Harper does not state that this is a normal part of his firm's hourly rates (which he claims are $170 per hour). Indeed, in the 1999 fee proceedings, NARF separately claimed expenses, rather than adding on a fixed percentage to their $170 per hour rates. See the April 2, 1999 statement of fees and expenses. But in the present Plaintiffs' Statement, NARF, like Gingold, simply tacks on an additional 15% to the normal hourly rates.

We do not read the Court's 1999 order to endorse the automatic addition of 15% for overhead, over and above the rates otherwise charged to counsel's clients. Plaintiffs fail to offer authority or justification for automatically adding a percentage of fees to cover expenses, rather than providing a detailed item-by-item listing of reasonable and necessary expenses.

Moreover, the facts do not warrant the use of an automatic percentage add-on here. Gingold's Affidavit (at 3, ¶ 8) and Harper's Affidavit (at 2,¶ 7) indicate that such "overhead" includes items such as "travel," "lodging," and "food." Plaintiffs make no showing that expenditures for such items were necessary or appropriate for opposing the two discovery motions.

Further, given the limited effort that, as discussed above, was reasonably necessary for opposing the two motions, the amount of expenses claimed – totaling $33,690.79 – appears grossly excessive. Plaintiffs have the burden of establishing their reasonable expenses, and they

have failed to do so. Therefore, no expenses should be allowed.

VI. Plaintiffs Claim Unreasonable and Insufficiently Supported Hourly Rates

The hourly rates claimed by Dennis Gingold, Mark Brown and Geoffrey Rempel are unreasonably high and insufficiently supported.[32]

A. Dennis Gingold's Rates Should Be Limited to $230 Per Hour

Dennis Gingold's hourly rates of $425 and $475 (for trials, hearings and depositions) are excessive. Plaintiffs have endorsed the use of the so-called Laffey matrix, as evidenced by the fact that Plaintiffs' counsel Mark Brown cites and relies upon it in his Affidavit (at 5), and attaches it as Exhibit 3 to his Affidavit. That Laffey matrix indicates that the market rate for attorneys with 20 or more years of the requisite experience was from $340 to $350 per hour in 2000. Gingold claims to have 20 or more years of experience. Although his evidence falls short of showing that he has the appropriate type of experience,[33] $340 to $350 would be the outside limit for his hourly rates.

Gingold offers insufficient proof that his $425-$475 rates are fair market rates for his work. Gingold's self-serving Affidavit falls short. First, as this Court has indicated, "the court generally prefers stronger evidence [than the claimant's own affidavit] of a particular rate, including personal affidavits, past billing agreements, and records of previous fees." Cobell v. Babbitt, 188 F.R.D. at 126, n.2; see also Nat'l Assoc. of Concerned Veterans v. Sec'y of Defense, 675 F.2d 1319, 1326 (D.C. Cir. 1982).

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[32] For purposes of this fee proceeding only, Defendants do not contest the $170 per hour rates suggested for the NARF attorneys, Lorna Babby and Keith Harper.

[33] As proof of his expertise, Gingold relies upon a 20-year old rating by the National Law Journal.

Second, Gingold's Affidavit suffers from several problems, not the least of which is that it contradicts his own prior affidavit in connection with the 1999 award of fees. His April 2, 1999 Affidavit states (at 3, ¶ 7):

> Through June 5, 1998, my billing rate was $325.00 an hour, plus 15% for overhead. This is the same rate I have billed since 1989. . . . One hundred and twenty-five dollars of that amount was deferred, so that on a current basis I billed at $200 per hour plus 15% overhead. After June 5, 1998, my fee arrangement was for $200 per hour plus 15% overhead, with no deferred fee and instead, as the Court was advised last summer, a fee to be applied to an appropriate time under the 'common fund' doctrine.

(Emphasis added.) Thus, in the prior fee proceedings, Gingold was allowed recovery at a rate of $230 per hour for services after June 5, 1998. Cobell v. Babbitt, 188 F.R.D. at 126.

Yet, Gingold's current Affidavit[34] (at 2, ¶ 6) states, "[t]hrough December 31, 1999, my billing rate had been $325.00 an hour, plus 15% for overhead (a formula accepted by this Court in its decision on fees and expenses in the First Contempt Opinion). This is the same rate that I had billed for my time since 1989." Gingold inexplicably – and misleadingly – leaves out his prior sworn representation that, since June 5, 1998, his actual fee arrangement with Plaintiffs allegedly was for "$200 per hour plus 15% overhead" (see above), with a further amount that he might seek under the so-called common fund doctrine.[35]

In light of the contradictory affidavits submitted by Gingold, he should be limited to the

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[34] Gingold's Affidavit within Plaintiffs' Statement recites that it was executed on "April 29, 2001." Presumably that is a typographical error, and it actually was executed on April 29, 2002.

[35] Notwithstanding whatever Gingold and his clients might agree to among themselves, the Government does not concede that recovery under the so-called "common fund" doctrine is appropriate in this case.

lower of the rates ($230) that he has sworn were in place. Because of the misleading nature of his explanation of his rates, he should be limited to $230 per hour at all times.

The remaining support cited by Gingold for his $425 - $475 per hour rates is unpersuasive. He claims that Plaintiffs agreed to his rates, but that should carry little weight, particularly because they no doubt expect to recover fees from the Government at the end of the case,[36] so their agreement hardly reflects what he could receive in the open marketplace.

Gingold admits (Affidavit at 3,¶ 6) that he has "few other clients" besides Plaintiffs, and that he provides "limited professional services" to them, so their agreement to pay a particular rate is of little significance regarding what Gingold's rate in the open marketplace might be.

Moreover, Gingold now alleges that, through 1999, his hourly rate was $325, plus 15%. Even if that were so, he offers insufficient justification for the abrupt increase to $425 or $475 on January 1, 2000. In the absence of stronger proof to support the high rates of $425 to $475 per hour, and because those rates far exceed the rates indicated by the Laffey matrix, they should be rejected. See Blackman v. District of Columbia, 59 F. Supp. 2d 37, 43 (D.D.C. 1999)(rates from the Laffey matrix were the maximum allowable rates in a § 1983 case).

Therefore, even if the Court decided to allow Gingold more than the $230 per hour described above, the maximum hourly rate allowed to Gingold should be $340 (in early 2000) to $350 (in later 2000), as per the Laffey matrix.

B. Mark Brown Fails to Show That He Qualified for the Rate He Claims

Mark Brown claims an hourly rate of $350. See Brown Affidavit at 4 (¶ 7). He also

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[36] See Transcript of Status Conference, August 18, 1998, at 3. Regardless of what Plaintiffs might anticipate, however, Defendants do not concede that Plaintiffs would be entitled to such recovery.

admits to having "few other clients." Id. at 5. Thus, he fails to offer convincing proof that he is able to command such a rate in the open marketplace. Although he claims a rate supported by the Laffey matrix for a lawyer with 20 or more years of the requisite experience, he fails to show that he qualifies for that rate. His Affidavit claims that he has been "specializing in litigation" for the last 22 years, but fails to specify what type of litigation, and whether it involved complex federal cases. Brown thus fails to show he qualifies for the top rates in the Laffey matrix. See Griffin v. Washington Convention Center, 172 F. Supp. 193, 199 (D.D.C. 2001)("there is nothing automatic about the application of 'Laffey' rates"; counsel was denied recovery at those rates where he failed to show that he had experience in particular cases that qualify as "complicated, federal litigation").

C. Geoffrey Rempel, a Non-Lawyer, Is Not Entitled to $225 Per Hour

Geoffrey Rempel apparently is not a lawyer, yet he claims an hourly rate of $225. He attempts to justify this by pointing to an expert witness agreement between his former firm (PricewaterhouseCoopers ("PwC")) and Plaintiffs, but that fails to prove he is entitled to any such amount. First, the PwC agreement applies to expert witness work. But most of the work performed by Rempel in connection with opposing the two motions at issue now appears to have been more in the nature of clerical work, much as a paralegal might perform.[37] Plaintiffs fail to

[37] For example, Rempel's time entries include reviewing correspondence files and recording specific representations that were made (4/18/00), photocopying pleadings (4/19/00), highlighting passages in pleadings (4/19/00), "attempting" to pull court's orders off internet (6/6/00), delivering an "email opposition" (8/17/00), drafting statements of facts (8/21/00, 8/22/00, 8/23/00, 8/24/00, 8/28/00, 8/30/00, 5/22/01, 5/23/01, 5/24/01, 5/25/01, 5/26/01, 5/28/01, 5/29/01,7/31/01, 8/1/01, 8/11/01, 8/13/01, 8/14/01, 8/15/01,8/16/01, 8/17/01, 8/19/01, 9/23/01), reviewing transcripts (9/4/00, 9/5/00, 9/6/00, 9/7/00), reviewing, editing and preparing exhibits (9/11/00, 9/12/00), "citation check" (9/12/00), filing papers at the courthouse and faxing them to DOJ (9/12/00), research and reviewing pleadings at the clerk's office (12/14/00), "go[ing] to

show that any expert work was needed (or that Rempel performed any) to oppose the two discovery motions at issue.

Merely because PwC might have charged $225 per hour for legitimate expert work does not prove that every task performed by one of its former employees is compensable at that rate. Plaintiffs do not show any justification for using that rate for Rempel to, e.g., file papers at the courthouse, or for him to fax and email copies to counsel. Even the PwC agreement (in paragraph 4) states a fee of $75 per hour for actual paraprofessional or other (i.e., non-expert) work. The Laffey matrix states a $90 per hour fee for "paralegal/law clerk." That is the maximum appropriate figure for the actual tasks performed by Rempel in connection with the two motions at issue (and, in fact, is too generous a rate for many of the purely clerical tasks he performed). See Browning v. Peyton, 123 F.R.D. 75, 79 (S.D.N.Y. 1988)(rates should be based upon "the litigation task performed," not the position of the person performing it; thus, e.g., "delivery work may ony be valued at delivery service rates" no matter who performed it).

Second, the PwC agreement does not prove that a solo worker – without the resources of PwC behind him – could command the same rate as an international accounting or consulting firm. Rempel offers no proof of what he could obtain in the open marketplace.

Conclusion

Because Plaintiffs have submitted an "outrageously unreasonable" (Environmental Defense Fund v. Reilly, 1 F.3d at 1258) request for fees by including substantial amounts for work on matters as to which the Court clearly has not ordered recovery, the entire request should

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courthouse to retrieve Bakaly Grand Jury Investigation material" (1/5/01), and distributing papers via fax and email (5/16/00) .

be denied. That may be the only way to deter such conduct in the future. Alternatively, the award to Plaintiffs should be reduced to the following amounts:

Opposing the Email Motion:	$ 14,648.46
Opposing the Trade Secrets Motion:	$ 8,309.70
Preparation of statement of fees:	$ 2,140.00
Total	$ 25,098.16

Respectfully submitted,

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OF COUNSEL:

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Department of the Interior
Office of the Solicitor

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 13, 2002 I served the Foregoing *Defendants' Objections to Plaintiffs' Statement of Fees and Expenses Filed April 29, 2002*, by facsimile in accordance with their written request of October 31, 2001 upon:

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By Hand Delivery on May 14, 2002:

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By U.S. Mail upon:

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Courtesy Copy by U.S Mail:

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Court Monitor
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K. P. Kingston

Kevin P. Kingston

EXHIBIT A

Time Entries Regarding 3/20/2002 E-Mail Contempt Motion or Other Contempt Motions, For Which Recovery Has Not Been Allowed		
Timekeeper	**Month and Dates**	**Hours**
Gingold	05/99 (All)	21.70
	06/99 (All)	17.60
	08/99 (All)	1.80
	09/99 (All)	4.80
	10/99 (All)	.50
	11/99 (All)	.20
	12/99 (All)	.30
	01/00 (All)	5.20
	04/00 (All)	2.30
	05/00 (All)	16.00
	07/00 (All)	.30
	10/14/00	.70
	10/17/00	.50
	10/23/00	.70
	10/24/00	.70
	11/14/00	2.10
	12/04/00	11.00
	12/6/00	.50
	12/10/00	1.00
	12/11/00	.30
	01/05/01	.60
	05/03/01	.60

EXHIBIT A

Time Entries Regarding 3/20/2002 E-Mail Contempt Motion or Other Contempt Motions, For Which Recovery Has Not Been Allowed		
Timekeeper	**Month and Dates**	**Hours**
Gingold (cont.)	05/26/01	.50
	05/28/01	.40
	05/29/01	.60
	07/01/01	.40
	08/01/01	.20
	08/02/01	.10
	08/10/01	3.80
	08/11/01	8.30
	08/12/01	6.70
	08/13/01	10.70
	08/14/01	11.30
	09/12/01	.40
Total Hours for Gingold		**132.80**
Timekeeper	**Month and Dates**	**Hours**
Brown	08/21/00	1.583
	11/21/00	1.000
	11/29/00	0.416
	05/03/01	1.833
Total Hours for Brown		**4.832**
Timekeeper	**Month and Dates**	**Hours**
Rempel	04/18/00	8.00
	04/18/00	1.40

EXHIBIT A

Time Entries Regarding 3/20/2002 E-Mail Contempt Motion or Other Contempt Motions, For Which Recovery Has Not Been Allowed		
Timekeeper	**Month and Dates**	**Hours**
Rempel (cont.)	04/19/00	3.00
	04/19/00	2.00
	04/19/00	.80
	04/20/00	4.00
	04/20/00	.20
	04/21/00	.70
	06/06/00	.20
	06/27/00	.50
	08/04/00	6.00
	08/05/00	.80
	08/05/00	.20
	08/07/00	1.00
	08/08/00	2.20
	08/09/00	4.20
	08/15/00	2.20
	08/21/00	8.40
	08/22/00	2.60
	08/22/00	5.50
	08/23/00	3.60
	08/24/00	2.00
	08/25/00	3.50
	08/25/00	.50

EXHIBIT A

Time Entries Regarding 3/20/2002 E-Mail Contempt Motion or Other Contempt Motions, For Which Recovery Has Not Been Allowed		
Timekeeper	**Month and Dates**	**Hours**
Rempel (cont.)	08/28/00	2.50
	08/28/00	.20
	08/29/00	.10
	08/29/00	4.00
	08/30/00	4.80
	08/31/00	4.20
	09/01/00	.10
	09/03/00	4.20
	09/04/00	.50
	09/04/00	1.80
	09/05/00	2.40
	09/08/00	2.00
	10/13/00	2.00
	10/14/00	1.50
	10/16/00	1.80
	10/17/00	.50
	10/23/00	.70
	11/08/00	.50
	12/14/00	2.50
	01/05/01	1.30
	01/10/01	2.50
	01/11/01	3.50

EXHIBIT A

Time Entries Regarding 3/20/2002 E-Mail Contempt Motion or Other Contempt Motions, For Which Recovery Has Not Been Allowed		
Timekeeper	**Month and Dates**	**Hours**
Rempel (cont.)	03/29/01	2.50
	03/30/01	2.00
	04/08/00	2.50
	05/22/01	1.40
	05/23/01	5.50
	05/24/01	5.00
	05/25/01	3.00
	05/26/01	2.80
	05/28/01	5.10
	05/28/01	.40
	05/29/01	3.40
	05/29/01	.60
	07/30/01	1.70
	07/31/01	4.00
	07/31/01	1.00
	08/01/01	.20
	08/01/01	3.00
	08/11/01	5.90
	08/12/01	5.50
	08/13/01	5.50
	08/14/01	3.70
	08/15/01	4.70

EXHIBIT A

Time Entries Regarding 3/20/2002 E-Mail Contempt Motion or Other Contempt Motions, For Which Recovery Has Not Been Allowed		
Timekeeper	**Month and Dates**	**Hours**
	08/16/01	7.90
	08/17/01	6.00
	08/19/01	1.90
	09/23/01	1.60
Total Hours Rempel		**193.90**
Timekeeper	**Month and Dates**	**Hours**
Babby	10/06/99	4.30
	11/19/99	2.30
	11/30/99	.80
	08/08/00	.40
	08/08/00	.60
	08/11/00	.50
	08/15/00	.50
	01/25/01	1.40
	07/16/01	.20
Total Hours Babby		**11.00**
Timekeeper	**Month and Dates**	**Hours**
Harper	09/29/99	3.00
	04/13/00	.80
	08/16/00	1.40
Total Hours Harper		**5.20**
Total Hours All Timekeepers		**347.732**

EXHIBIT B

Time Entries Regarding Motions to Amend or Vacate The March, 2000 Discovery Order, For Which Recovery Has Not Been Allowed

Timekeeper	**Month and Dates**	**Hours**
Gingold	01/01 (All)	42.9
	02/01 (All)	48.3
	03/01 (All)	3.0
Total For Gingold		**94.2**
Timekeeper	**Month and Dates**	**Hours**
Brown	01/01 (All)	16.915
	02/01 (All)	1.333
	03/01 (All)	24.413
Total For Brown		**42.661**
Timekeeper	**Month and Dates**	**Hours**
Harper	01/01(All)	37.5
	2/01(All)	0.8
Total For Harper		**38.3**
Timekeeper	**Month and Dates**	**Hours**
Rempel	01/01 (All)	10.3
	02/01 (All)	5.8
Total For Rempel		**16.1**
Total Hours All Timekeepers		191.261

EXHIBIT C

Time* Claimed By Plaintiffs During Time Periods Relevant to E-Mail Motion (and Fees Computed at Adjusted Rates)			
Timekeeper	**Hours**	**Hours x Rates**	**Hours x Rates**
Gingold	**Hours**	**$230/hour**	**$350/hour**
August 5-17, 2000	5.600	$1,288.00	$1,960.00
September 8, 2000	1.900	$437.00	$665.00
September 9, 2000	5.100	$1,173.00	$1,785.00
October 26-27, 2000	13.100	$3,013.00	$4,585.00
July 27-31, 2001	1.500	$345.00	$525.00
Brown	**Hours**	**$350/hour**	**$350/hour**
August 3-17, 2000	110.909	$38,818.15	$38,818.15
September 11, 2000	0.916	$320.60	$320.60
October 27, 2000	3.250	$1,137.50	$1,137.50
Rempel	**Hours**	**$90/hour**	**$90/hour**
August 1-17, 2000 **	41.700	$3,753.00	$3,753.00
September 9, 2000	1.000	$90.00	$90.00
October 27, 2000	3.600	$324.00	$324.00
July 27, 2001	1.700	$153.00	$153.00
Babby	**Hours**	**$170/hour**	**$170/hour**
August 2-15, 2000	45.100	$7,667.00	$7,667.00
Harper	**Hours**	**$170/hour**	**$170/hour**
August 2-17, 2000	9.900	$1,683.00	$1,683.00
September 8, 2000	2.500	$425.00	$425.00
October 27, 2000	1.200	$204.00	$204.00
August 1, 2001	1.200	$204.00	$204.00
Total all Timekeepers	**250.175**	**$61,035.25**	**$64,299.25**

* Includes Time entries between: 8/1/00 and 8/17/00, 9/8 - 9/11/00, 10/26 - 10/27/00, and 7/27-7/31/01, except for entries with descriptions referring to matters outside the proper scope of opposing the E-Mail Motion

** Includes Time entries of: 8/01/00 (.7); 8/03/00 (1.5); 8/05/00 (.1); 8/06/00 (1.7); 8/07/00 (.3); 8/10/00 (5.0), (5.5); 8/11/00 (2.0),(1.5),(1.0); 8/12/00 (2.0); 8/13 (2.1); 8/16 (10.9) and 8/17 (.8),(.6),(6.0)

EXHIBIT D

Time Claimed by Plaintiffs During Time Period Relevant to Trade Secrets Motion
(and Fees Computed at Adjusted Rates)

Timekeeper	Time	Hours X Rate	Adjustment	Hours X Rate	Adjustment
Gingold	Hours	$230*Hours	X 75%	$340*Hours	X 75%
December, 1999	5	$1,150.00	$862.50	$1,700.00	$1,275.00
January, 2000	4	$920.00	$690.00	$1,360.00	$1,020.00
February, 2000	27.9	$6,417.00	$4,812.75	$9,486.00	$7,114.50
March, 2000	1.0	$230.00	$172.50	$340.00	$255.00
Total For Gingold	**37.9**	**$8,717.00**	**$6,537.75**	**$12,886.00**	**$9,664.50**
Brown	0	$0.00	$0.00	$0.00	$0.00
Total For Brown	**0**	**$0.00**	**$0.00**	**$0.00**	**$0.00**
Rempel	Hours	$90*Hours	X 75%	$90 *Hours	X 75%
May, 2000	0.4	$36.00	$27.00	$36.00	$27.00
June, 2000	0.3	$27.00	$20.25	$27.00	$20.25
Total for Rempel	**0.7**	**$63.00**	**$47.25**	**$63.00**	**$47.25**
Babby	Hours	$170*Hours	X 75%	$170*Hours	X 75%
December, 1999	2.7	$459.00	$344.25	$459.00	$344.25
January, 2000	2.9	$493.00	$369.75	$493.00	$369.75
February, 2000	31.0	$5,270.00	$3,952.50	$5,270.00	$3,952.50
March, 2000	1.7	$289.00	$216.75	$289.00	$216.75
May, 2000	1.8	$306.00	$229.50	$306.00	$229.50
Total for Babby	**40.1**	**$6,817.00**	**$5,112.75**	**$6,817.00**	**$5,112.75**
Harper	Hours	$170*Hours	X 75%	$170*Hours	X 75%
December, 1999	6	$1,020.00	$765.00	$1,020.00	$765.00
January, 2000	25.7	$4,369.00	$3,276.75	$4,369.00	$3,276.75
February, 2000	82.2	$13,974.00	$10,480.50	$13,974.00	$10,480.50
March, 2000	6.6	$1,122.00	$841.50	$1,122.00	$841.50
May, 2000	5	$850.00	$637.50	$850.00	$637.50
Total for Harper	**125.5**	**$21,335.00**	**$16,001.25**	**$21,335.00**	**$16,001.25**
Totals for All Timekeepers	**Hours***				
	204.2	**$36,932.00**	**$27,699.00**	**$41,101.00**	**$30,825.75**

* when multiplied by .75% Hours = 153.15