IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JENNFER J. TAYLOR Plaintiff, v. REPUBLIC SERVICES, INC., *et al.* Defendants.	CA No. 1:12cv523 (GBL/IDD)

PLAINTIFF'S REQUEST FOR CONSIDERATION OF TWO RECENT DECISIONS *EVERGREEN SPORTS, LLC V. SC CHRISTMAS, INC., ET AL.*, AND *BOZAR V. MCAFEE* THAT SUPPORT HER PETITION FOR ATTORNEYS' FEES AND COSTS

Plaintiff, Jennifer J. Taylor ("Ms. Taylor") hereby requests leave to submit and offers this Addendum in Support of her Petition for Attorneys' Fees and Costs to the Court based on two relevant decisions issued in December 2013, which is after the time Ms. Taylor filed her initial Petition for Fees and Costs on September 30, 3013 and her Reply in Support of her Petition for Attorneys' Fees and Costs filed on October 21, 2013.

I. *EVERGREEN SPORTS v. SC CHRISTMAS* SUPPORTS THE REASONABLENESS OF HOURLY RATES SOUGHT BY PLAINTIFF'S COUNSEL

On December 20, 2013, in *Evergreen Sports, LLC v. SC Christmas, Inc., et al.*, 2013 U.S. Dist. LEXIS 179252 (E.D. Virginia, Hudson, J.), **Attachment 1**, the Court awarded attorney's fees and costs to a plaintiff for hourly rates that exceed those sought by counsel in the instant matter.

In *Evergreen Sports*, Evergreen Enterprises purchased a warehouse from SC Christmas, Inc., and found the products inside were damaged, defective, and unsalable. *Id.* at 1-2. Claiming breach of contract, plaintiff sued and won summary judgment and damages, and sought

indemnification of legal fees. *Id.* Plaintiff's attorneys sought compensation for 692 hours of legal services performed by five attorneys ($330,272.00), as well as 28.7 hours for work performed by paralegals ($6,671.50). *Id.* at 22.

The court awarded fees for 600 of the 692 attorney hours of worked. *Id.* at 24. Finding that rates for the fees sought were reasonable and consistent with the prevailing rates in Richmond, Virginia, the court calculated the total award based on the attorneys' hourly rates, the percentage of time they worked on the case based on their time sheets, and the new 600 hour determination. *Id.* at 24-25. The total amount was $293,550. *Id.* at 25-26. For work done by the paralegals, 19.4 hours were billed at $260 an hour, and 9.3 hours at $175.

Taylor v. Republic, et al. ***Fees Requested***	***Evergreen Sports v SC Christmas*** ***Fees Awarded***
Elaine Charlson Bredehoft (28 years) $550-600 per hour requested	David Barger (32 years) - $690 per hour Herbert Finn (22 years*) - $675 per hour (*Less than Elaine Charlson Bredehoft)
Carla D. Brown (13 years) $475 per hour requested	Paul J. Ferak (13 years) - $550 per hour Jeffrey Mote (15 years) - $620 per hour Chad Striker (15 years) - $650 per hour
Brian A. Scotti (9 years) $425 per hour requested	
Heather Austin Jones (11 years) $450 per hour requested	Paul J. Ferak (13 years) - $550 per hour
Kathleen Z. Quill (17 years) $400 per hour requested	Paul J. Ferak (13 years) - $550 per hour Jeffrey Mote (15 years) - $620 per hour Chad Striker (15 years) - $650 per hour
Daphne Shih Gebauer (6 years) $375 per hour requested	
Aseil Abu-Baker (3 years) $325 per hour requested	Caitlyn Jones (1.5 years) - $275 per hour
Senior Paralegals ($250 per hour requested):	Maria Scavo (20 years) - $260 per hour

Leslie A. Hoff (23 years) Kathy Baker (30+ years)	
Paralegals ($135 per hour requested) 1-8 years	Judith Hopkins (less than 2 years) $175 per hour

*Years of experience are as of date of Petition filings.

II. *BOCZAR V. MCAFEE* SUPPORTS THAT THE HOURLY RATES AND AMOUNT OF FEES SOUGHT BY PLAINTIFF'S COUNSEL ARE REASONABLE

In *McAfee v. Boczar*, 2013 U.S. App. LEXIS 24709, **Attachment 2,** the Fourth Circuit directed that an attorneys' fee award of $100,000 (reduced from $322,340.50) be entered on a judgment amount of $2,943.60. *Id.* at 1-2 (McAfee prevailed in a suit against sheriff, Christine Boczar, alleging arrest without probable cause).

In addition, McAfee's lead counsel charged an hourly rate of $585 and his senior associate charged $365 per hour. *Id.* at 22. The Fourth Circuit ultimately determined that the District Court's finding that the hourly rates were appropriate was entitled to deference. *Id.* at 23-24 (the District Court's findings were premised upon affidavits of other local lawyers who are familiar both with the skills of the fee applicants and affidavits of two experts substantiate the hourly rates).

The rates awarded in the above cases and the amount of recovery in comparison to the fees in *Boczar* support that the hourly rates and fees sought by Plaintiff's counsel in this matter are reasonable.

CONCLUSION

Prevailing Plaintiff Jennifer J. Taylor requests that this Court award her $1,119,144 in attorneys' fees, $86,314.61 in non-taxable costs, and $36,160.12 in taxable costs, for a total amount of $1,258,327.73 in favor of the Plaintiff, Jennifer J. Taylor, and against the Defendant, Republic Services, Inc.

January 23, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on the 23rd day of January 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notification of such filing to the following:

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ATTACHMENT 1

2 of 4 DOCUMENTS

EVERGREEN SPORTS, LLC, Plaintiff, v. SC CHRISTMAS, INC., et al., Defendants.

Civil Action No. 3:12CV911-HEH

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

2013 U.S. Dist. LEXIS 179252

December 20, 2013, Decided
December 20, 2013, Filed

PRIOR HISTORY: *Evergreen Sports, LLC v. SC Christmas, Inc., 2013 U.S. Dist. LEXIS 38753 (E.D. Va., Mar. 19, 2013)*

COUNSEL: [*1] For Evergreen Sports, LLC, a Delaware Limited Liability Company, Plaintiff, Counter Defendant: David Glenn Barger, LEAD ATTORNEY, Greenberg Traurig LLP, McLean, VA; Paul Joseph Ferak, PRO HAC VICE, Greenberg Traurig LLP (IL-NA), Chicago, IL.

For SC Christmas, Inc., Stan Aldridge, Defendants, Counter Claimants: John Kenneth Byrum, Jr., LEAD ATTORNEY, Woods Rogers PLC (Richmond), Richmond, VA; Anthony H. Monioudis, Woods Rogers PLC, Danville, VA; David Binkley, PRO HAC VICE, Giarmarco Mullins & Horton, Troy, MI.

JUDGES: Henry E. Hudson, United States District Judge.

OPINION BY: Henry E. Hudson

OPINION

MEMORANDUM OPINION

(Awarding Damages after Bench Trial)

This is a contract dispute involving the purchase of a warehouse in Pocahontas, Arkansas, which is not at issue, and the majority of its contents. The inventory, which consisted of almost three million items, included products with professional and college sports team logos, such as programmable pens, Christmas wreaths, football and helmet pens, super balls, nutcracker musicals, acrylic ornaments, desk sets, and an item referred to as a flying monkey. The inventory, purchased in bulk and intended for resale, was acquired by the Plaintiff under an Asset Purchase Agreement [*2] (the "Purchase Agreement"). Plaintiff's core claim is that the products purchased were nonconforming, in that they were damaged, defective, or otherwise unsalable in the normal course of business. Other items were either not licensed for commercial sale or were subject to licenses which had expired. Plaintiffs contract claim turns on Section 11(f)(i) of the Purchase Agreement, which warrants that the inventory purchased from Defendants is "free from defects in materials and workmanship." (Defs.' Mem. Support Mot. Summ. J., Ex. A at 6, ECF No. 35 (hereinafter "Purchase Agreement").)

After reviewing memoranda filed by each party with accompanying exhibits, and hearing oral argument on September 25, 2013, this Court granted Plaintiffs Motion for Summary Judgment as to liability. Finding the record inadequate to assess damages, this Court heard evidence on damages and Plaintiff's claim for indemnification on October 29, 2013. The bulk of Plaintiff's claim for indemnification consists of attorneys' fees and related litigation expenses. Each party was afforded an opportunity to submit additional memoranda addressing those issues.

Before awarding damages, it is important to provide some context [*3] for Plaintiff's entitlement to summary judgment on liability, particularly because Plaintiff seeks damages for the entire unsold inventory of items acquired from the Defendants. At both summary judgment and trial, the Defendants contend that Plaintiff is unable

to identify what specific items of inventory, if any, were in a damaged condition prior to delivery. Furthermore, Defendants maintain that even if a portion of the inventory was damaged, Plaintiff's evidence fails to demonstrate that it was sufficient to warrant discontinuation of resale of the entire balance of remaining inventory. Plaintiff maintained at summary judgment and at trial that aside from a de minimis number of salable items, the vast majority of the inventory was defective or unlicensed for resale. Based on the number of items returned as defective, and to protect the goodwill of its business, Plaintiff elected to cease all sales of products acquired from the Defendants.

In awarding summary judgment on the issue of liability, this Court found that Plaintiff had proffered evidence supporting its allegation that a significant but unquantified portion of the inventory was damaged prior to delivery. This Court articulated [*4] the following conclusion:

> Despite Defendants' contention to the contrary, Plaintiff proffers in its Motion for Summary Judgment virtually unrebutted evidence that Defendants were aware of the defective nature of the inventory prior to sale. Two prior managerial employees of Defendants who transitioned to Plaintiff after the warehouse in which they were employed was conveyed under the Purchase Agreement, confirm Plaintiff's claim. Derrick Difani ("Difani"), manager of the Pocahontas Warehouse under SC Christmas, and David Futrell ("Futrell"), the former assistant manager, have filed sworn declarations describing Defendants' inability to sell the inoperable, defective and damaged sports inventory prior to entering into the Purchase Agreement with Plaintiff.

(Mem. Op. 9-10, ECF No. 54.)

> [I]n July 2013, Futrell, assistant manager of the Pocahontas Warehouse, was tasked by Plaintiff with examining and testing the remaining inventory for defects and functionality. The majority were found by Futrell to be too defective for resale. (Pl.'s Mem. Support Mot. Summ. J. Ex. 4 at 4-10.) Futrell determined that helmet and football pens failed to light even with new batteries (*id.* at 4.); the Christmas [*5] wreaths were infested with bugs and had berries and garland missing (*id.* at 7); musical nutcrackers did not function (*id.* at 8); acrylic ornaments had corroded batteries (*id.* at 9); and the desk sets were damaged at the base and bore defective paint (*id.* at 10). Both Difani and Futrell concluded that due to its condition, the inventory purchased from Defendants could not be sold in the ordinary course of business.

(*Id.* at 10-11.)

Therefore, in awarding Plaintiff partial summary judgment as to liability, this Court necessarily found that at least portions of the inventory were in a damaged, nonconforming condition prior to delivery. The Court, however, reserved judgment on what portion of the inventory was in fact "merchantable, usable and salable in the ordinary course of business" and was "free from defects in materials and workmanship" as warranted in Section 11 COCO of the Purchase Agreement. (Purchase Agreement at 6.)

The standard of measure for assessing damages in nonconforming goods cases is well settled. The defendant is entitled to the difference between the value of the goods as represented at the time of purchase, and the value of the inventory as delivered.[1] *See Neilson Bus. Equip. Ctr., Inc. v. Italo V. Monteleone, M.D., 524 A.2d 1172, 1176 (Del. 1987)*; [*6] *McLachlan v. Wilmington Dry Goods Co., 41 Del. 378, 384, 2 Terry 378, 22 A.2d 851 (Del. Super. Ct. 1941)*. "Contract damages are designed to place the injured party in an action for breach of contract in the same place as he would have been if the contract had been performed." *Paul v. Deloitte & Touche, LLP, 974 A.2d 140, 146 (Del. 2009)* (internal quotation marks omitted).

> 1 Under Section 19(f) of the Purchase Agreement, its enforcement, interpretation and construction is governed by the laws of the State of Delaware. (Purchase Agreement at 14-15.)

Although the total number of items purchased from Defendants was 2,826,938 at a cost of $5,060,926,[2] Plaintiff only seeks reimbursement for approximately 350,000 defective items. In part, the figure reflects the fact that some items purchased were resold.

> 2 John Toler, Chief Operating Officer of Evergreen Enterprises, Inc., estimated that the inventory had a wholesale value of approximately $12,000,000. (Hr'g Tr. 49, ECF No. 72.) He based this valuation on a couple of factors. First, he relied on his experience in the wholesale market for similar goods. (*Id.* at 141-42.) Second, he

considered the prices for comparable items contained in Defendants' own catalog. (*Id.* at 85.)

John [*7] Toler ("Toler") Chief Operating Officer of Evergreen Enterprises, Inc.,[3] testified at trial that the approximate wholesale value of the 350,000 remaining items was about $1,600,000. (Hr'g Tr. 84-85.) Toler, who has seventeen years of experience in marketing sports logo goods, testified that distressed inventory typically sells at approximately 50-70 percent of wholesale value. Toler, who was involved in the acquisition of the goods presently at issue, estimated that the remaining inventory had a fair market value of 50 percent of its wholesale worth. Accordingly, Toler testified that Evergreen was seeking $827,585 for unsalable goods and $439, 499 in associated costs, fees and chargebacks. The latter figure includes the cost of resolving the patent infringement claim involving the flying monkey. Toler conceded that the volume of goods and the marketability of individual items in each category complicated the damage calculation process.[4]

3 Evergreen Enterprises, Inc. is the holding company for the constellation of Evergreen companies, including Plaintiff Evergreen Sports, LLC. Toler explained that Evergreen Sports was specifically established for the acquisition of SC Christmas.

4 Damages [*8] need not be proven with mathematical certainty as long as the court has a basis to make a reasonable estimate. *Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 466 (Del. Ch. 2011). See also Greenstar, LLC v Heller, 934 F. Supp. 2d 672, 694 (D. Del. 2013).*

Toler also explained that the defective nature of the goods, in most cases, was not readily detectable from the exterior of the packaging. The scale of defects was not apparent until items were removed from boxes at a trade show several months after the deal closed. Even after discovery, there was no reasonable means to segregate defective products. Detailed inspection required breaking the outer wrapping, rendering the item unsalable. Retailers would not accept taped up packages for resale. (Hr'g Tr. 60-61.) Toler was also aware of the defects revealed during the tests performed by Evergreen's employees, Difani and Futrell. (*Id.* at 56.) Toler further opined that repair, such as replacement of batteries and removal of mold from wreaths, was neither practical nor economically feasible.[5] He stated that Evergreen did not have sufficient personnel to perform such repairs. Moreover, in his opinion, it would not be cost effective given [*9] the nature of their business and value of the goods. That is why, Toler indicated, Evergreen relied on the representations and warranties contained in Section 11(f)(i) of the Purchase Agreement. The need for such refurbishing was not contemplated in negotiating the deal, according to Toler. (*Id.* at 62.) "[I]t's not feasible for us to rework, touch, repair 350,000 pieces of inventory ... given [the] low wholesale value of the product." (*Id.* at 67-68.) Furthermore, Toler explained that such remedial steps would "erode" the profit margin anticipated on the deal. (*Id.* at 70.)

5 Toler testified that even after replacing batteries in the programmable pens, they still would not function (Hr'g Tr. 112); the super balls would not bounce and were too opaque to clearly reveal the team logo (*Id.* at 63); the helmet and football pens needed batteries and ink (*Id.*); and The Olde World Wreaths had mold, bugs and pieces falling off (*Id.* at 64).

Prior to discontinuing sales, Toler solicited the assistance of Defendants in repairing some of the items or locating a buyer. Defendants declined to do so and refused to adjust the purchase price, rescind the deal or accept return of the inventory. (*Id.* at 73, 76.) [*10] This litigation ensued.

Turning to the claim for indemnification,[6] Toler admitted on cross examination that Evergreen had not been formally named as a party in the patent infringement litigation involving an item known as a flying monkey. The lawsuit, filed in the U.S. District Court for the Northern District of Illinois, named the National Football League ("NFL"), Major League Baseball ("MLB"), National Hockey League ("NHL") and other sports organizations. Evergreen acquired over 4,700 flying monkeys as part of the inventory purchased from the Defendants. Unbeknown to Evergreen, they were not properly licensed for commercial distribution. Evergreen, however, was able to sell the vast majority. Therefore, Evergreen does not seek reimbursement for the remaining 229, only the costs associated with settling the litigation. This included $60,000 in damages, plus attorneys' fees and expenses, totaling $88,249.50. The $60,000 in damages was paid by Evergreen Enterprises, Inc., the holding company, with intercorporate reimbursement by Evergreen Sports (*Id.* at 170). Evergreen was unaware of the patent problem at the time they purchased the goods. (*Id.* at 99.)

6 Paragraph 17 of the Purchase Agreement [*11] required the seller to "defend, indemnify, save and keep harmless Purchaser and its officers, directors,... and permitted assigns against and from all Damages sustained or incurred ... from or arising out of... any ... breach of any representation and warranty made by Seller...."

In settling the patent claim, Toler explained that Evergreen was advised by the NFL that it was their respon-

sibility to resolve. Evergreen had an obligation, according to Toler, to cover their partners, the NFL, MLB and NHL, under their license agreement to sell products bearing the logo of teams affiliated with those organizations. Aside from a contractual responsibility, Toler added that Evergreen did not want to jeopardize a valuable business relationship. Therefore, Evergreen elected to settle the dispute and seek indemnification from Defendants, who contest both the amount of the settlement and the attorneys' fees. Toler indicated that the original demand from the patent holder was either $350,000 or $300,000--they settled for $60,000. (*Id.* at 99-100.)

The second and last witness called by Plaintiff was Christopher Wornom ("Wornom"). Wornom serves as the Business Development and Acquisitions Manager at Evergreen [*12] Enterprises, Inc. He testified that he had previous experience with mergers and acquisitions. One of his responsibilities in his present capacity with Evergreen is the valuation and pricing of sports logo products. He prepared Plaintiff's Trial Exhibit 101, which details their damages and indemnification calculation. (*Id.* at 164.)

Wornom was directly involved in negotiating the purchase of the inventory from SC Christmas at issue in this case. As part of that process, he evaluated the inventory and assessed its retail value. Based on Evergreen's sale of similar products, he concurred with Toler that the remaining inventory on hand was probably worth 50 percent of its wholesale value. He also indicated that attempts to resolve disputes over defective items with Defendants proved to be unavailing.

Wornom confirmed that Evergreen received what he described to be a substantial number of claims of defects in all categories of products purchased from Defendants. Some of these items were returned by the purchaser to Evergreen with the vendor receiving either a refund or credit.[7] Although Wornom admitted on cross examination that he had no personal knowledge of the exact number of the remaining [*13] items in each category that were defective, in his opinion, further marketing of those products would have been commercially risky.[8] (*Id.* at 182, 186.)

> 7 The vendor who purchased the bulk of the desk sets, Closeouts with Class, demanded a chargeback on their account, but did not return the items to Evergreen's warehouse. (Hr'g Tr. 236.) This is the basis for Evergreen's claim of $30,418. (Pl.'s Tr. Ex. 101.) Exhibit 101 also reflects a chargeback of $2,051 by David Adams Card World for defective helmet pens, which were not returned to Evergreen. All returned inventory was restored to the Quantity On Hand column of Exhibit 101. (Hr'g Tr. 177.)

> 8 Wornom acknowledged that Evergreen's records reflected that in less than five categories of product, 50 or more individual items had been returned by vendors. However, Wornom hastened to add that the records do not reflect the number of nonconforming or defective items reimbursed but not returned to the warehouse.

Turning next to the unlicensed products, Wornom indicated that administering license agreements with sports organizations was part of his responsibility. The items of this type for which Evergreen is seeking damages fall into three broad [*14] categories--items the Defendants were not licensed to sell, items bearing expired logos, and items for which Defendants' licenses had expired. Some items, according to Wornom, had been created by SC Christmas without proper authority from league officials. (*Id.* at 219.)

With respect to the items bearing expired sports team logos, Evergreen seeks damages of $55,657, representing 50 percent of the wholesale value of the 21,577 items on hand.[9] As to the logo products that Defendants were never licensed to sell, of which 9,890 items were not sold, Evergreen claims damages of $17,468, again representing 50 percent of wholesale value. In addition, Evergreen seeks to recover $140,925 for sports logo products for which Evergreen itself was never licensed to sell. There were 50,467 items in this category. Wornom stated that Evergreen was able to find a purchaser for a limited number of items with outdated logos.

> 9 Wornom testified that under the standard licensing agreement, leagues reserved the right to order discontinuation of sales of certain items if teams abolished or revised their logos. Typically, vendors are afforded a 60-day window to sell off inventory. This grace period, however, did [*15] not apply in this case. (Hr'g Tr. 212-219.)

Evergreen was also able to augment its existing licenses to include some logo products acquired from SC Christmas. These were not included in Evergreen's calculation of damages. The balance of inventory in this category, in Wornom's opinion, were unsalable. (*Id.* at 186.) SC Christmas disagrees maintaining that Evergreen either had or could have acquired the necessary license to sell these products. While SC Christmas pointed to documentary exhibits suggesting this possibility, it offered no evidence to support this contention.

Also among the unlicensed inventory were various NASCAR products of which Evergreen was aware at the time of purchase. Toler testified that Evergreen made no effort to obtain a license from NASCAR and had no desire to acquire one. (Hr'g Tr. 126, 130.) According to Plaintiff's Trial Exhibit 101, Evergreen acquired 38,237

NASCAR items with a 50 percent discounted wholesale value of $99,251. Since Evergreen took possession with knowledge that the NASCAR items could not be resold, no damages will be awarded for this category of product.[10]

10 Although Plaintiff appears to imply that it is not seeking damages for the NASCAR logo [*16] products, 38,237 such items are included in their calculation of damages. (Pl.'s Trial Ex. 101.)

Wornom was specifically asked on cross examination why Evergreen was unable to identify the various unlicensed items prior to accepting delivery from the Defendants. In response, Wornom explained that he would have been unable to recognize specific unauthorized items on casual inspection without unsealing packages. (*Id.* at 245.) He also concluded that in his opinion, the unlicensed sports logo items were not salable in the ordinary course of business at the time of delivery, as warranted in Section 11(f) of the Purchase Agreement.

Aside from a number of documents, the Defendants offered no additional affirmative evidence to counter the testimony of Toler and Wornom.

In the final analysis, this Court is of the opinion that Plaintiff has demonstrated by a preponderance of the evidence that a significant portion of the inventory acquired from SC Christmas was defective or nonconforming at the time of delivery, in violation of the warranty provided in Section 11(f)(i) of the Purchase Agreement. The Court is similarly persuaded that the number of defects encountered by Plaintiff, coupled with complaints [*17] and returns by purchasers, made Plaintiff's decision to cease further sales of all products justified and commercially reasonable. Therefore, Plaintiff is entitled to recover damages for all unsold inventory in most categories of products claimed.

The Court further finds that the damages reflected on Plaintiff's Trial Exhibit 101, under "Value on Hand @ 50% Wholesale" ($827,585), is reasonable and supported by the evidence, with the exception of $99,251 for NASCAR logo products. In addition, the Court finds that Plaintiff is entitled to $32,469, representing credit for items either returned or for which payment was refused. This results in a subtotal of $760,803.

Turning next to Plaintiff's claim for indemnification, the Court finds by a preponderance of the evidence that it is appropriate in this case under Paragraph 17 of the Purchase Agreement. Categorically, Plaintiff's claim encompasses the cost of the immediate litigation, coupled with the expenses and payment necessary to resolve the flying monkey patent litigation. Initially, this Court finds that the $60,000 payment to settle the flying monkey patent litigation was reasonable and necessary to fulfill Plaintiff's contractual [*18] obligations to sports logo licensing authorities.[11]

11 In addition, Plaintiff also seeks attorneys' fees in the amount of $88,249.50 in connection with the flying monkey patent infringement litigation.

The next element of damages sought by Plaintiff is indemnification under Section 17 of the Purchase Agreement. At trial, Plaintiff limited its evidence to legal fees and expenses billed through September 30, 2013. This figure totaled $435,283.50, consisting of $330,272.50 in attorneys' fees in connection with this litigation, $88,249.50 associated with the patent litigation, and $16,761.50 in expenses. Approximately one month following the trial on damages and indemnification, Plaintiff filed a "Motion to Supplement the Record to Include Fees and Expenses Incurred Since the October 29, 2013 Hearing" (ECF No. 75). In this pleading, Plaintiff requested over $208,000 in additional fees for preparation and representation at trial. Because Defendants object to this filing as untimely, this claim will be dealt with separately.

The Complaint in this case was filed on December 31, 2012. The Defendants, SC Christmas and Stan Aldridge, filed a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* [*19] on February 25, 2013. Both parties filed supporting memoranda. That motion was denied without oral argument. Subsequently, in April, the attorneys participated in a brief pretrial conference at which a trial date was set and a discovery schedule established. Cross motions for summary judgment were filed in August, and the Court heard oral argument on September 25, 2013. In the interim, counsel participated in settlement conferences with Magistrate Judge Novak. Judge Novak conferred with counsel in person on August 12 and 13, and conducted brief follow up conference calls on August 19, 23, 29 and October 1. This process proved to be unavailing.

Following an award of summary judgment by this Court on the issue of liability, a bench trial was held on October 29 on the issues of damages and indemnification. This hearing required approximately six hours. In preparation for the bench trial on damages, each side submitted notebooks containing voluminous documents, a portion of which were admitted into evidence. Each side also tendered memoranda explaining their respective positions. As mentioned above, Plaintiff's claim for attorneys' fees and expenses relating to the October 29, 2013 trial [*20] will be considered in a separate memorandum opinion following supplemental briefing.

The Defendants counter that the attorneys' fees and expenses claimed by Plaintiff are excessive. They con-

tend, in essence, that the litigation expenses Plaintiff claims are disproportionate to the complexity of the case and the reasonable time necessary to provide appropriate representation. The Defendants, however, fail to particularize the specific contested expenses or offer any evidence to discount Plaintiff's claimed amount.

Although Plaintiff's claim for attorneys' fees is pursued under a contractual indemnification theory, the same analysis informs the Court's decision as any other award of attorneys' fees. Typically, courts begin the computational process by calculating a lodestar figure. *Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 243 (4th Cir. 2009)*. This methodology entails the multiplication of hours reasonably expended times a reasonable rate, the product of which yields a presumably reasonable fee. *Pa. v. Del. Valley Citizens Council for Clean Air, 478 U.S. 546, 564, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)*. In determining a reasonable amount to award in attorneys' fees, it is well within the discretion of the district [*21] court to adjust the lodestar figure upward or downward as it deems appropriate. However, "this must be done on a principled basis, clearly explained by the court." *Lyle v. Food Lion, Inc., 954 F.2d 984, 989 (4th Cir. 1992)*.

In assessing the reasonableness of the lodestar figure, the Fourth Circuit in *Robinson* suggests consideration of the following factors:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the out-set of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Robinson, 560 F.3d 235 at 243-44 (citing *Johnson v. Georgia Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974)*).[12]

12 Delaware [*22] courts have adopted a similar computational methodology governed by analogous factual considerations. *See Mahani v. EDIX Media Group, Inc., 935 A.2d 242, 245-46 (Del. 2007)*.

Collectively, the attorneys representing the Plaintiff seek compensation through September 30, 2013 for approximately 692 hours of legal services rendered by five attorneys. They also ask for reimbursement of 28.7 hours of time utilized by paralegals. This includes 19.4 hours of paraprofessional time, at $260 an hour, and 9.3 hours at $175, for a total of $6,671.50. While this figure for paralegal services appears to be on the high side, it seems to be supported by a review of the timesheets. The Court will therefore find it to be reasonable and will award paraprofessional fees in the amount of $6,671.50 for services through September 30, 2013.

Focusing on services rendered by attorneys, Plaintiff seeks compensation for approximately 692 hours through September 30, 2013. This results in a total of approximately $330,272 claimed as attorneys' fees at this point. It also appears that Plaintiff is requesting $88,249.50 in legal fees for representation in connection with the Illinois flying monkey patent litigation.

Although [*23] this Court is aware that much of a trial attorney's time is devoted to investigation, research, analysis and trial preparation, the amount of time expended by counsel in this case appears to be more than typically necessary for a case of limited complexity. Counsel for the Plaintiff filed memoranda opposing Defendants' motion to dismiss and later seeking summary judgment. Plaintiff prevailed on the motion to dismiss and was partially successful on its cross motion for summary judgment. Neither motion, however, involved atypically complex legal issues or factual analysis. The governing law was well established and largely undisputed. Although the inventory at issue encompassed a large number of individual items, for expediency they were divided into approximately one dozen broad categories.

Counsel participated in a two day settlement conference conducted by a U.S. Magistrate Judge, with four follow up telephone calls. The bench trial, limited in scope to damages and indemnification, required only about six hours and two witnesses. Trial exhibits did include several hundred documents, but only a portion were actually placed into evidence or referred to at trial. This is not to imply, [*24] however, that Plaintiff's case was not capably prosecuted. To the contrary, Mr. Ferak and Mr. Barger served their client well and prevailed on most issues. After carefully reviewing the timesheets filed by all five of the attorneys representing Evergreen, and weighing it against the case history, this Court is of

the opinion that the number of reasonable hours for which fees should be awarded is 600, exclusive of the flying monkey patent litigation. Because of the billing format employed, it is difficult to determine the precise tasks performed. But collectively viewed, the time expended is difficult to square with the complexity of the case.

After determining a reasonable number of hours to perform the necessary legal services, the Court must next identify a reasonable rate of compensation. Although the Defendants contend that the hourly rates charged by Plaintiff's counsel are excessive, they neither offer alternative rates nor evidence challenging specific services rendered. In this Court's opinion, the hourly rates suggested by Plaintiff's counsel are reasonable and consistent with prevailing rates in the Richmond, Virginia area. The hourly rates claimed also adequately reflect [*25] the "novelty and difficulty of the questions raised," "the skill required to properly perform the legal services rendered" in this case, the "customary fee for like work," "awards in similar cases," "the amount in controversy and the results obtained" and "the experience, reputation and ability of the attorney." *See Robinson, 560 F.3d at 243.*

Given the record at hand and the billing format, the number of hours apportionable to each attorney, within the 600 hours allowed, cannot be determined with mathematical precision. Relying on the time records submitted by Plaintiff,[13] the Court will therefore calculate the fee award based on the percentage of total hours initially billed by each attorney. The results of this calculation are as follows:

Ferak: 56% of 600 hours = 336 hours at $550 per hour = $184,800

Barger: 10% of 600 hours = 60 hours at $690 per hour = $ 41,400

Jones: 29% of 600 hours = 174 hours at $275 per hour = $ 47,850

Striker: 5% of 600 hours = 30 hours at $650 per hour = $ 19,500

Total: $293,550

13 The time records consist of Plaintiff's Trial Exs. 42-50.

With respect to the attorneys, the fee awarded for services rendered in the immediate lawsuit, through September 30, 2013, is [*26] therefore $293,550, based on 600 allowable billable hours. In addition, the Court will award Plaintiff $88,249.50 for representation in connection with the flying monkey patent litigation.[14] This results in attorneys' fees of $381,799.50, plus $6,671.50 for paraprofessional services, equaling a total award of $388,471.

14 The parties have directed the Court's attention to minimal information concerning this figure, which may include expenses.

In calculating the appropriate award of attorneys' fees in this case, the Court has considered all the factors articulated by the Fourth Circuit in *Robinson*, which are applicable in this case. Because these fees are being awarded under an indemnification, or fee shifting provision, the Court has also weighed the factors articulated by the Supreme Court of Delaware in *Mahani.*

The Plaintiff also seeks approximately $16,750 in expenses. This sum includes third party copying fees, postage and courier fees, airfare and travel fees, research charges, and transcript and trial related expenses. Most of Plaintiffs attorneys are based in their Chicago, Illinois office. After reviewing the exhibits filed by Plaintiff in support of these fees, the Court is of [*27] the opinion that an award of $15,000 is reasonable and appropriate in this case. This figure is based on the complexity of the litigation, the documents and pleadings submitted to the Court, and expenses awarded in similar cases.

Therefore, based on the foregoing, the Court will award Plaintiff damages in the amount of $760,803, attorneys' fees of $388,471, and litigation expenses totaling $15,000, plus interest from December 31, 2012, the date the suit was filed.[15]

15 The Defendants argue that invoices for legal services in this case were directed to Evergreen Enterprises, Inc. and not the Plaintiff entity Evergreen Sports, LLC. The evidence at trial clearly established that Evergreen Enterprises, Inc. is a holding company for all Evergreen entities, which include Evergreen Sports, LLC.

Plaintiff has also filed a post-trial motion seeking fees and costs for the period of October 1, 2013 through November 30, 2013. The Defendants have objected to these additional fees and expenses because they were neither disclosed nor proven as an element of damages during trial. Defendants' argument is premised on the fact that attorneys' fees and expenses are being awarded as damages under a contractual [*28] indemnification provision, not by the Court pursuant to statute or as a post-trial sanction. The Court will address Plaintiff's entitlement to additional fees and expenses after both sides have been afforded an opportunity to brief the issue.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry E. Hudson

Henry E. Hudson

United States District Judge

Date: December 20, 2013
Richmond, VA$

ATTACHMENT 2

1 of 1 DOCUMENT

EILEEN MCAFEE, Plaintiff - Appellee, v. CHRISTINE M. BOCZAR, Defendant - Appellant, and JOHN DOE 1; JOHN DOE 2; JOHN DOE 3, Defendants.

No. 12-2481, No. 13-1088, No. 13-1356

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2013 U.S. App. LEXIS 24709

October 30, 2013, Argued
December 12, 2013, Decided

PRIOR HISTORY: [*1]

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. (3:11-cv-00646-REP-MHL). Robert E. Payne, Senior District Judge.

McAfee v. Boczar, 906 F. Supp. 2d 484, 2012 U.S. Dist. LEXIS 157796 (E.D. Va., 2012)

McAfee v. Boczar, 2012 U.S. Dist. LEXIS 115323 (E.D. Va. Aug. 15, 2012)

DISPOSITION: No. 13-1356 AFFIRMED. No. 13-1088 AFFIRMED. No. 12-2481 VACATED AND REMANDED WITH INSTRUCTIONS.

COUNSEL: ARGUED: Henry Keuling-Stout, KEULING-STOUT, PC, Big Stone Gap, Virginia, for Appellant.

William H. Hurd, TROUTMAN SANDERS LLP, Richmond, Virginia, for Appellee.

ON BRIEF: Michael R. Ward, MORRIS & MORRIS, PC, Richmond, Virginia, for Appellant.

Stephen C. Piepgrass, TROUTMAN SANDERS LLP, Richmond, Virginia, for Appellee.

JUDGES: Before NIEMEYER, KING, and DUNCAN, Circuit Judges. Judge King wrote the opinion, in which Judge Niemeyer and Judge Duncan joined.

OPINION BY: KING

OPINION

KING, Circuit Judge:

Defendant Christine Boczar, a deputy sheriff of Powhatan County, Virginia, appeals the judgment of damages plus attorney's fees entered against her in the Eastern District of Virginia in this *42 U.S.C. § 1983* proceeding. Boczar presents two appellate issues: First, she contends that she is entitled to qualified immunity such that a trial should not have been conducted; and, second, she maintains that, even should the jury's verdict stand, the district court's award of [*2] $322,340.50 in attorney's fees to plaintiff Eileen McAfee is contrary to law. As explained below, we reject Boczar's qualified immunity contention and affirm the verdict of damages totalling $2943.60. We vacate the attorney's fee award, however, and remand for an award of $100,000, exclusive of costs.

I.

A.

On December 26, 2010, Eileen McAfee accompanied a friend to a residence in Powhatan County, Virginia, to inspect a dog that appeared to be in distress.[1] After securing permission from the owner, McAfee examined the dog and concluded that it lacked appropriate shelter but was otherwise in good condition. McAfee then bought the animal a new doghouse and, on January 7, 2011, delivered it to the dog and its owner. While setting up the doghouse, McAfee sought to feed the pet a treat. Unfortunately, in its eagerness to eat the treat, the dog accidentally bit McAfee's hand, causing McAfee to seek medical treatment at a local hospital. The hospital reported McAfee's dog bite to the animal control authorities in Powhatan County.

1 Insofar as they relate to the qualified immunity issue, we recite the facts in the light most favorable to McAfee. *Henry v. Purnell, 501 F.3d 374, 377 (4th Cir. 2007)*. [*3] With respect to facts relating solely to the attorney's fee award, we accept the facts -- unless clearly wrong -- as they were set forth by the district court. See *Plyler v. Evatt, 902 F.2d 273, 278 (4th Cir. 1990)*.

Deputy Boczar, an animal control officer with the Powhatan County Sheriff's Office, received notification of McAfee's dog bite and began an investigation. On January 10, 2011, she inquired by telephone about the incident, asking McAfee where the dog was housed. McAfee, who was unfamiliar with Powhatan County, replied that she did not know the owner's address but could lead Boczar to the dog's location. Boczar declined McAfee's offer and ended the conversation, which was apparently the only exchange Boczar ever had with McAfee. Boczar thereafter contacted two other persons, further seeking to locate the dog. Both of those persons had spoken to McAfee about the dog bite incident, but neither had sought to ascertain from McAfee the location of the dog.

Predicated on these conversations, Boczar determined that McAfee had refused to disclose to the authorities the location of the dog, in violation of *Virginia Code § 18.2-313.1*, which prohibits the withholding of information about [*4] possibly rabid animals. As a result, on January 13, 2011, Boczar secured an arrest warrant for McAfee from a state court magistrate. Boczar then arrested McAfee on the warrant and transported her to the County Sheriff's Office. The magistrate thereafter released McAfee on bond, and a one-day jury trial was conducted in magistrate court on May 27, 2011. At its conclusion, McAfee was acquitted.

B.

On September 28, 2011, the underlying complaint was filed in the Eastern District of Virginia, alleging that Boczar had arrested McAfee without probable cause. The complaint made three separate claims: first, a claim under *42 U.S.C. § 1983* for violation of McAfee's *Fourth Amendment* rights (Count I); second, a claim for malicious prosecution under state law (Count II); and, third, a false imprisonment claim under state law (Count III). In responding to McAfee's complaint, Boczar moved for summary judgment on the basis of qualified immunity, which the court promptly denied. Boczar also sought the dismissal of Count III under *Rule 50 of the Federal Rules of Civil Procedure*, which the court granted. A jury trial was thereafter conducted in Richmond on the allegations in the first two counts of the [*5] complaint.

At the trial's conclusion on July 6, 2012, the jury returned a verdict for McAfee on the *§ 1983* claim and in favor of Boczar on Count II. At trial, McAfee requested both compensatory and punitive damages as "determined by the evidence." *McAfee v. Boczar, 906 F. Supp. 2d 484, 488 (E.D. Va. 2012)* (the "Opinion"). In closing argument to the jury, counsel for McAfee summed up her claims thusly: "[M]oney can never really compensate for what has been done here, but money is the only remedy the law has to offer. So what is the right number to compensate Ms. McAfee? Is it $50,000? Is it $500,000? Something else? Is it something more? You decide." J.A. 339.[2] The jury verdict found that McAfee was entitled to recover $2943.60 in stipulated out-of-pocket expenses relating to her state court defense, which the jury awarded on her *§ 1983* claim. The jury declined to otherwise award McAfee additional compensatory or any punitive damages.

2 Our citations herein to "J.A. " refer to the contents of the Joint Appendix filed by the parties in this appeal. As it pertains to the issues herein, the published Opinion addressed and disposed of McAfee's *§ 1988* fee petition without revisiting the [*6] district court's decision to deny Boczar qualified immunity.

After the jury returned its verdict, Boczar made a renewed motion for qualified immunity on the *§ 1983* claim. The district court again denied the motion, explaining that Boczar's conduct in arresting McAfee lacked probable cause and "fails to meet the test of objective reasonableness" required for the protection of qualified immunity. *McAfee v. Boczar, No. 3:11-cv-00646, 2012 U.S. Dist. LEXIS 115323, 2012 WL 3525619, at *2 (E.D. Va. Aug. 15, 2012)*. In so ruling, the court focused on Boczar having secured McAfee's arrest warrant on the basis of false statements. Indeed, Boczar represented to the magistrate that McAfee "refuse[d]" to give any information about the dog's whereabouts. *2012 U.S. Dist. LEXIS 115323, [WL] at *3*. At trial, however, it was established that this statement was untrue. Boczar testified that, in her only conversation with McAfee, Boczar had explained that she could locate the dog, though she did not have the address where it lived. Neither of the other two persons Boczar interviewed about the dog bite incident told Boczar that McAfee had refused to give the location of the dog. As a result, the court concluded that Boczar lied to the magistrate to secure the arrest [*7] warrant, and that such conduct "does not give rise to qualified immunity." Id.

After the court accepted the verdict and entered judgment thereon, McAfee filed a petition pursuant to *42 U.S.C. § 1988*, seeking a total of $365,027 in attorney fees, plus $10,305.51 in costs (the "Fee Petition").

Though acceding to the full amount of the documented costs, Boczar complained that the requested fees were unreasonable and countered with a fee proposal awarding $15,000. The district court then referred the Fee Petition to a federal magistrate judge for settlement negotiations. A settlement conference was conducted on September 19, 2012, but the parties were unable to reach an accord. The magistrate judge reported to the district court that the state's Division of Risk Management, which was responsible for the damages award, had refused to negotiate in good faith.

Because the settlement negotiations failed, the district court independently evaluated the Fee Petition to determine whether the request was reasonable under *42 U.S.C. § 1988*, which provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee" with respect to a [*8] claim, inter alia, made pursuant to *§ 1983*. Applying the familiar "lodestar" method, the court granted the Fee Petition in part. By its Opinion, the court determined that the hourly rates of McAfee's lawyers were reasonable and that, applying a ten percent reduction in the hours logged to account for "block billing," the amount of time devoted to the case by counsel was also reasonable. As a result, the court awarded McAfee $322,340.50 in attorney's fees, plus the $10,305.51 in agreed costs. See *McAfee, 906 F. Supp. 2d at 505*.

Boczar has timely appealed, challenging the district court's denial of qualified immunity and its related decision to conduct a trial, and also seeking to vacate the attorney's fee award. We possess jurisdiction pursuant to *28 U.S.C. § 1291*.[3]

> 3 Boczar filed three notices of appeal. The first (No. 12-2481) was from the district court's November 2, 2012 Order granting McAfee's initial fee petition and awarding her $332,646.01. The second (No. 13-1088) was from the court's Order filed December 19, 2012, disposing of McAfee's supplemental petition in which she requested an additional $59,021.00 in attorney's fees incurred post-trial, including fees for preparation of [*9] the initial fee petition. The court granted the supplemental petition, but, after substantial reductions in the amount claimed, awarded only $12,628. The supplemental award has gone virtually unchallenged here, and we therefore affirm it. The third notice of appeal (No. 13-1356) was from the court's judgment of February 22, 2013, awarding McAfee $2943.60 in damages. The court had delayed its entry of judgment pending final resolution of Boczar's renewed qualified immunity defense.

II.

A.

McAfee alleged that Boczar violated her *Fourth Amendment* rights by subjecting her to arrest without probable cause. In seeking relief from McAfee's allegations of liability pursuant to *42 U.S.C. § 1983*, Boczar unsuccessfully asserted qualified immunity. We review de novo a district court's denial of qualified immunity. *Merchant v. Bauer, 677 F.3d 656, 661 (4th Cir. 2012)*.[4]

> 4 Boczar has proceeded with her qualified immunity argument in an arguably unconventional manner. She first asserted qualified immunity in a motion for summary judgment under *Rule 56*. After the district court denied the motion, McAfee's case proceeded to trial. Boczar did not raise qualified immunity again until after the jury verdict. [*10] Although a post-verdict motion for judgment as a matter of law is acceptable under *Rule 50(b)*, it is usually preceded by one or more motions under *Rule 50(a)*, typically made at the close of the plaintiff's case-in-chief and again after all the evidence has been presented. See *Fed. R. Civ. P. 50(a)* (authorizing a party to seek judgment as a matter of law at any time before the case is submitted to the jury). A party is permitted to renew a *Rule 50(a)* motion after trial. See *Fed. R. Civ. P. 50(b)*.

In this case, Boczar invoked qualified immunity in the district court prior to trial by way of a summary judgment request. In some circuits, a defendant's failure to follow the procedures set forth in *Rule 50* -- beginning with a *Rule 50(a)* motion and then renewing the contention under *Rule 50(b)* -- constitutes a waiver of the qualified immunity claim. See, e.g., *Parker v. Gerrish, 547 F.3d 1, 12 (1st Cir. 2008)* ("[W]e have held that even if a defendant raises qualified immunity at summary judgment, the issue is waived on appeal if not pressed in a *Rule 50(a)* motion."); *Sykes v. Anderson, 625 F.3d 294, 304 (9th Cir. 2010)* ("The Defendants' failure to make a pre-verdict motion for judgment as a [*11] matter of law under *Rule 50(a)* on the grounds of qualified immunity precluded them from making a post-verdict motion under *Rule 50(b)* on that ground."). Here, however, we need not decide whether Boczar's unusual approach has worked a waiver of qualified immunity, because we are amply satisfied that no such immunity was warranted.

Qualified immunity serves to protect a government official from liability for civil damages unless the facts alleged show a violation of a clearly established constitutional right. *Merchant, 677 F.3d at 662*. Here, McAfee asserts her right under the *Fourth Amendment* to be free

from arrest absent probable cause to believe that she had committed a crime. We have consistently explained that probable cause has been shown "when the facts and circumstances within an officer's knowledge -- or of which he possesses reasonably trustworthy information -- are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed." *Wadkins v. Arnold, 214 F.3d 535, 539 (4th Cir. 2000)*.

In this situation, it is clear that Boczar lacked sufficient knowledge about McAfee's dog bite to reasonably believe that McAfee contravened Virginia [*12] law. Boczar had interviewed only three persons, and none had suggested that McAfee was refusing to disclose the dog's location. With such limited knowledge, a law officer of reasonable caution would not believe that McAfee had violated *§ 18.2-313.1*. Indeed, that Boczar made false statements to the state magistrate in seeking McAfee's arrest suggests that Boczar understood that the evidence failed the probable cause standard.

By securing a warrant that lacked adequate evidentiary support, Boczar infringed McAfee's *Fourth Amendment* right to be free from capricious arrest. And this constitutional right is clearly established. See *Miller v. Prince George's Cnty., 475 F.3d 621, 627 (4th Cir. 2007)* ("Unquestionably, [t]he *Fourth Amendment* prohibits law enforcement officers from making unreasonable seizures, and seizure of an individual effected without probable cause is unreasonable." (internal quotation marks omitted)). Therefore, Boczar cannot shield herself from damages liability by invoking qualified immunity.

B.

The more difficult issue in this appeal is whether the district court's *§ 1988* attorney's fee award is "reasonable." The threshold requirement for such an award is, of course, [*13] that the *§ 1983* plaintiff be a "prevailing party." *Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*. The designation of a party as "prevailing" is a legal question that we review de novo. See *Grissom v. The Mills Corp., 549 F.3d 313, 318 (4th Cir. 2008)*. For purposes of *§ 1988*, "a party in whose favor a judgment is rendered, regardless of the amount of damages awarded," is the prevailing party. Id. More specifically, a party has prevailed if there has been a "material alteration of the legal relationship of the parties," and there is a "judicial imprimatur on the change." Id.

Neither party disputes the proposition that McAfee was the prevailing party on the *§ 1983* claim. The jury's verdict of $2943.60 created a material alteration of the legal relationship between McAfee and Boczar, and the district court's power to enforce that award provides the requisite judicial imprimatur. Because McAfee is a prevailing party under *§ 1988*, we must determine whether the attorney's fee award is a reasonable one.

C.

We review for abuse of discretion a district court's award of attorney's fees, but, we will only reverse such an award if the district court is "clearly wrong" or has committed an "error of [*14] law." *Brodziak v. Runyon, 145 F.3d 194, 196 (4th Cir. 1998)*. The proper calculation of an attorney's fee award involves a three-step process. First, the court must "determine the lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." *Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 243 (4th Cir. 2009)*. To ascertain what is reasonable in terms of hours expended and the rate charged, the court is bound to apply the factors set forth in *Johnson v. Georgia Highway Express Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)*.[5] *Id. at 243-44*. Next, the court must "subtract fees for hours spent on unsuccessful claims unrelated to successful ones." *Id. at 244*. Finally, the court should award "some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff." Id. Although the district court in this case adequately performed the first two steps, it erred on the third. That is, it overstated McAfee's success.[6]

5 Our Court has characterized the twelve Johnson factors as follows:

> (1) The time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services [*15] rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

See *Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978)* (adopting twelve factors for determining the reasonableness of attorney's fees that Fifth Circuit identified in Johnson).

6 Boczar argues on appeal that McAfee secured only a "nominal" award from the jury, and so the district court should not have awarded an attorney's fee at all. This contention fails, however, because the damages award, though small in dollar amount, is not nominal. An award of nominal damages signifies that a plaintiff has established a violation of his right but has not proved actual loss. See *Farrar v. Hobby, 506 U.S. 103, 112, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)*. [*16] Here, the damages awarded represented the "entirety of McAfee's out-of-pocket expenses." *McAfee, 906 F. Supp. 2d at 503*. As such, the jury's award cannot be classified as nominal.

1.

The Supreme Court has indulged a "strong presumption" that the lodestar number represents a reasonable attorney's fee. The Court recently explained that this presumption can only be overcome "in those rare circumstances where the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." See *Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 130 S. Ct. 1662, 1673, 176 L. Ed. 2d 494 (2010)*. Consistent with the prescribed methodology, the district court addressed the attorney's fee issue by calculating the lodestar number. In so doing, the court relied on the Johnson factors to determine the applicable multipliers.

The Opinion's application of the Johnson factors warrants a brief discussion. As the district court recognized, we have reviewed attorney's fee awards primarily by use of the lodestar method, with "substantial reliance" on the Johnson factors, "sometimes to inform the calculation of the lodestar, sometimes to make upward or downward adjustments to it, and sometimes for both [*17] purposes." *906 F. Supp. 2d at 490*. The Opinion explained, however, that unquestioning reliance on Johnson is not justified in the post-Perdue world because that Supreme Court decision "teaches so clearly that departures from the lodestar figure are to occur rarely and only in extraordinary cases." *Id. at 491*. Moreover, as the Opinion relates, the Perdue Court emphasized that "an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." Id. (quoting *Perdue, 130 S. Ct. at 1673*). Accordingly, the court determined that its consideration of certain of the Johnson factors was foreclosed by the lodestar calculation. See *id. at 490*.

At the outset, the district court decided that the number of hours reasonably expended by McAfee's lawyers -- the first multiplier in the lodestar calculation -- encompasses at least three Johnson factors -- Factor 1 (time and labor expended), Factor 2 (novelty and difficulty of question raised), and Factor 7 (time limitations imposed by the client or circumstances). See *id. at 492*. As such, those three factors did not warrant further consideration in calculating the attorney's fee award. The court then explained that the reasonable [*18] hourly rate -- the second multiplier in the lodestar calculation -- subsumes five additional Johnson factors: Factor 3 (skill required to properly perform legal services); Factor 4 (attorney's opportunity cost); Factor 5 (customary fee); Factor 6 (attorney's expectations at outset of litigation); and Factor 9 (experience, reputation, and ability of attorney). See id. As a result, according to the court, those five factors also collapse into the lodestar calculation. Ultimately, pursuant to the court's lodestar analysis, Perdue reserved four Johnson factors for use in adjusting the lodestar fee amount: Factor 8 (amount in controversy and results obtained); Factor 10 (undesirability of case within legal community); Factor 11 (nature and length of professional relationship between attorney and client); and Factor 12 (attorneys' fee awards in similar cases). See id.

We have indeed recognized that, consistent with the district court's analysis, "to the extent that any of [the Johnson factors] has already been incorporated into the lodestar analysis, we do not consider [those factors] a second time." *E. Associated Coal Corp. v. Dir., OWCP, 724 F.3d 561, 570 (4th Cir. 2013)* (citing *Perdue, 130 S. Ct. at 1673*). [*19] We have never ruled, however, that when certain Johnson factors have merged into the lodestar calculation, they are not to be otherwise considered to adjust the lodestar amount. Although some of our sister circuits agree that any Johnson factor subsumed in the lodestar calculation should in no other way affect the determination of an attorney's fee award, few have explicitly identified specific factors to which such a principle might apply.[7] For example, the Fifth Circuit has held that a bankruptcy court abused its discretion in using four of the Johnson factors "to justify its substantial upward departure from the lodestar" because the lodestar amount already accounted for those factors. See *Matter of Fender, 12 F.3d 480, 488 (5th Cir. 1994)*. And the Second Circuit recently held that a district court erred in adjusting the initial lodestar figure on the basis of Johnson factors already included. See *Millea v. Metro-N. R.R. Co., 658 F.3d 154, 167-68 (2d Cir. 2011)*.

7 At least three of our sister circuits have also evaluated the relationship between Perdue and Johnson. See, e.g., *Black v. SettlePou, P.C., 732 F.3d 492, 502 (5th Cir. 2013)* ("The lodestar may

not be adjusted due to a Johnson [*20] factor that was already taken into account during the initial calculation of the lodestar."); *Millea v. Metro-N. R.R. Co., 658 F.3d 154, 167 (2d Cir. 2011)* ("[A] court may not adjust the lodestar based on factors already included in the lodestar calculation itself because doing so effectively double-counts those factors."); *Anchondo v. Anderson, Crenshaw & Assocs., L.L.C., 616 F.3d 1098, 1103 (10th Cir. 2010)* (determining that Perdue "appears to significantly marginalize the twelve-factor Johnson analysis").

In any event, we need not further assess or identify which of the Johnson factors might be subsumed by the lodestar calculations. In its Perdue decision, the Supreme Court was addressing the enhancement of a lodestar attorney's fee. *130 S. Ct. at 1673*. In this case, however, the district court did not enhance the lodestar fee calculation -- it simply reduced that calculation by $42,600. Predicated on these distinctions, we limit our analysis to ensuring that the court's application of the Johnson factors was a reasonable one and that it did not inappropriately weigh any particular factor.

Returning to step one -- calculation of the lodestar fee amount -- we will not disturb the district [*21] court's determination of the lodestar multipliers. We explain further below.

a.

In her Fee Petition, McAfee requested an award for 996.7 hours of legal work by her lawyers. *McAfee, 906 F. Supp. 2d at 496*. The district court reduced the hours of her two lead attorneys by ten percent each, because they had used a "block billing" system (lumping tasks together in time entries rather than making such entries task-by-task). *Id. at 500*. The court also eliminated the hours recorded by the "client originator" because his time overlapped that of the lead attorneys. *Id. at 501*. Neither of the parties disputes these calculations, and they are not further addressed.

In determining whether the time expended by McAfee's lawyers was reasonable, the Opinion referred to Boczar's unwillingness to entertain settlement on the attorney's fee issues. See *McAfee, 906 F. Supp. 2d at 502*. The court observed that failure to contemplate a settlement strategy "makes for expensive litigation," and the defendant must bear the consequences. *Id. at 501-02*. Boczar asserts that the court, by taking her settlement position into account, abused its discretion and punished Boczar for her recalcitrance. Boczar's argument [*22] falls short in two respects. First, a district court "has discretion to consider settlement negotiations in determining the reasonableness of fees but it is not required to do so." *Thomas v. Nat'l Football League Players Ass'n, 273 F.3d 1124, 1130 n.9, 348 U.S. App. D.C. 220 (D.C. Cir. 2001)*; see also *Sands v. Runyon, 28 F.3d 1323, 1334 (2d Cir. 1994)* (concluding that a district court can consider settlement offers in making a fee award). Second, although the court expressed disapproval of Boczar's apparent failure to seriously engage in settlement negotiations, the court did not alter its lodestar calculations to reflect that disapproval. The court simply observed that any prolonged litigation caused by a failure to settle would be "subsumed" in the time component of the lodestar calculation. *McAfee, 906 F. Supp. 2d at 502 n.17*. In other words, the court's assessment of the settlement negotiations could not have had a measurable impact on the lodestar calculation. In these circumstances, the court did not abuse its discretion in calculating the hours expended by McAfee's lawyers.

b.

McAfee's lead counsel charged an hourly rate of $585, and his senior associate charged $365 per hour. *McAfee, 906 F. Supp. 2d at 496*. [*23] As the fee applicant, McAfee bore the burden of establishing the reasonableness of those hourly rates. See *Plyler v. Evatt, 902 F.2d 273, 277 (4th Cir. 1990)*. A fee applicant is obliged to show that the requested hourly rates are consistent with "the prevailing market rates in the relevant community for the type of work for which [s]he seeks an award." Id. The evidence we have deemed competent to show prevailing market rates includes "affidavits of other local lawyers who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community." *Robinson, 560 F.3d at 245*.

Boczar contends that McAfee failed to provide the essential evidence on the hourly rate issue. The opinion, however, concluded that the affidavits of two experts were sufficient to substantiate the hourly rates of McAfee's lawyers, and so "McAfee has more than met her burden of establishing the reasonable hourly rate for her counsel." *McAfee, 906 F. Supp. 2d at 496*. Although those rates would appear excessive to almost any lay observer, and some members of the judiciary would deem them exorbitant, the district court's findings to the contrary are entitled to our deference. [*24] As a result, we are unable to disturb its finding that the requested hourly rates are reasonable.[8]

8 We observe that the hourly rates of court-appointed counsel in federal criminal cases are substantially less than those being sought here. Compensation paid to appointed counsel for time expended in or out of court or before a magistrate judge may not exceed $125 per hour. See 7A Admin. Office of U.S. Courts, Guide to Judi-

ciary Policy § 230.16(a) (2013). Furthermore, the maximums for representation of a criminal defendant in a federal felony case are $9700 for the trial court level and $6900 for the appeal. Id. § 230.23.20. Viewed from that perspective, McAfee's lawyers may be said to have received a hefty premium for their legal services.

2.

After determining that the hours expended and the attendant rates requested by a lawyer for a prevailing party are reasonable, a court is obliged to "subtract fees for hours spent on unsuccessful claims unrelated to the successful ones." *Grissom, 549 F.3d at 321*. Of the three counts alleged, McAfee prevailed on solely her *§ 1983* claim, and then only with respect to a single category of damages, that is, general damages reimbursing McAfee for her out-of-pocket [*25] expenses. The other two categories of damages McAfee sought in connection with her *§ 1983* claim -- special damages plus punitive damages -- were wholly rejected.[9]

9 See *Slaughter v. Valleydale Packers, Inc., of Bristol, 198 Va. 339, 94 S.E.2d 260, 266 (Va. 1956)* (reciting that "there are two general classes of compensatory damages . . . : (1) general damages, or those which the law presumes to be the natural, proximate, and necessary result of the [tort]; and (2) special damages, or those which, although a natural and probable consequence thereof, are not assumed to be necessary or inevitable, and must be shown by allegation and proof" (citation and internal quotation marks omitted)). McAfee's complaint and contentions at trial identified three categories of damages being sought under *§ 1983*: (1) general compensatory damages for out-of-pocket expenses incurred in defending state criminal charges; (2) special compensatory damages for deprivation of liberty, humiliation and embarrassment, inconvenience, and mental anguish; and (3) punitive damages. See J.A. 28-29 & 338-39. The jury instructions conveyed these categories of potential damages to the jury. *See id. at 353*.

By its Opinion, the district court [*26] agreed with McAfee's lawyers that a six percent reduction for prevailing on one of three counts in the complaint was a reasonable reduction because McAfee's counsel "identified the work that was performed in furtherance of the unsuccessful counts" and "deducted those hours, on a line-by-line basis, from the work performed." *McAfee, 906 F. Supp. 2d at 497*. Moreover, the Opinion explained that the three counts in the complaint involved a common core of facts, and therefore "[m]uch of counsel's time [was] devoted generally to the litigation as a whole." *Id. at 502* (quoting *Hensley, 461 U.S. at 435*). Reducing the number of hours expended by six percent and multiplying it by the hourly rate, the court calculated McAfee's lodestar fee as $322,340.50.

We will not dispute the district court's six percent reduction to account for the commonality of effort expended on unsuccessful Counts II and III. We are concerned, however, that the court failed to properly consider McAfee's failure to receive an award on her *§ 1983* claim, except for her undisputed out-of-pocket expenses. We will further explain those concerns.

3.

In the final step before making an attorney's fee award under *§ 1988*, a district [*27] court must "consider the relationship between the extent of success and the amount of the fee award." The court will reduce the award if "the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley, 461 U.S. at 439-40*. Indeed, the Supreme Court has recognized that the extent of a plaintiff's success is "the most critical factor" in determining a reasonable attorney's fee under *42 U.S.C. § 1988. Id. at 436*. What the court must ask is whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Id. at 434*.

Although McAfee's success in recovering her general out-of-pocket expenses must be accorded respect, it does not justify a fee award of over $300,000 -- approximately 109 times the verdict -- when McAfee's failure to recover any special compensatory damages, or any punitive damages at all, is taken into account. Though Congress intended *§ 1988* fee awards to be "adequate to attract competent counsel," it also wanted to avoid "produc[ing] windfalls to attorneys." *City of Riverside v. Rivera, 477 U.S. 561, 580, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986)*. The district court's erroneous view of McAfee's [*28] success -- best illustrated by comparing McAfee's lofty expectations with the jury's paltry damages award -- produced an excessive fee award that would, in our view, constitute a windfall.

a.

We have recognized that, "[w]hen considering the extent of the relief obtained, we must compare the amount of damages sought to the amount awarded." *Mercer v. Duke Univ., 401 F.3d 199, 204 (4th Cir. 2005)*. If a *§ 1983* plaintiff achieves only part of the success she sought, the lodestar amount may be excessive. See *Farrar v. Hobby, 506 U.S. 103, 114, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)*. For example, in Farrar, the

plaintiffs sought $17 million in compensatory damages, but the jury awarded only the meager sum of one dollar. Id. Because the district court failed to compare the plaintiff's damages request with the nominal jury verdict, the Court reversed a fee award of *$280,000. Id. at 115-16.* In her concurrence, Justice O'Connor elaborated: "[A] substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical." *Id. at 121* (O'Connor, J., concurring) (emphasis added). In Farrar, the plaintiff "asked for a bundle" ($17 million) and "got a pittance" *($1). Id. at 120.* [*29] As such, the Court ruled that any award of attorney's fees was unjustified. *Id. at 116.*

To accurately gauge McAfee's success, the district court, in accordance with *Mercer* and *Farrar*, should have compared what she sought with what was awarded. Although McAfee downplays her attempts to recover anything beyond her out-of-pocket expenses, the record below suggests her pursuit of a bigger payday was sincere, even pointed. Indeed, McAfee conceded at trial that "[t]here are out-of-pocket expenses[, b]ut that's not what this case is really about." J.A. 338. In particular, McAfee requested special compensatory damages for "deprivation of liberty," "great inconvenience," "great insult and humiliation," and "mental anguish." Id. at 338-39. Counsel for McAfee rhetorically inquired of the jury, "What is the right number to compensate Ms. McAfee? Is it $50,000? Is it $500,000? Something else? Is it something more?" Id. at 339 (emphasis added). McAfee's arrest, according to her lawyers, caused her to lose weight and forgo sleeping, diminishing her energy. See id. McAfee's lawyers therefore strongly encouraged the jury to compensate her for these special injuries. See id. In the face of McAfee's effort [*30] to secure a damages verdict of $500,000 or even "something more," the jury awarded only $2943.60.

It is also important to our analysis that McAfee strongly advocated for a punitive damages award. At trial, McAfee's lawyer supported the effort by stressing that "deprivation of [her] liberty" calls for "some punishment upon the wrongdoer." J.A. 338-39 (emphasis added). And the jury fully understood that it could award punitive damages, for both punishment and deterrence. See J.A. 355-56. But, as Justice Powell explained in a *§ 1988* setting, "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Rivera, 477 U.S. at 585* (Powell, J., concurring). Put simply, the jury verdict was puritanically modest, and the attorney's fee award fails to reflect that reality.

b.

In justifying its award of attorney's fees, the Opinion accorded great weight to the deterrent effect of the judgment and the verdict's reaffirmation of McAfee's *Fourth Amendment* rights. See *McAfee, 906 F. Supp. 2d at 505.* According to the Opinion, the verdict "vindicated [*31] important civil and constitutional rights that cannot be valued solely in monetary terms." *Id. at 503* (quoting *Rivera, 477 U.S. at 574).* In so ruling, the court explained that "the hours expended were reasonable and necessary to vindicate, for McAfee and other citizens of Virginia, a most important right secured by the *Fourth Amendment of the United States Constitution.*" Id.

The jury's forbearance of a punitive damages award, however, reveals that deterrence and vindication may not be so important here. The point of punitive relief is to "punish what has occurred and to deter its repetition." *Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).* Because the jury did not approve punitive damages, the court's reliance on deterrence and vindication in its calculation of McAfee's success is substantially undermined.[10] Cf. *Rivera, 477 U.S. at 595* (Rehnquist, J., dissenting) ("In short, this case shares none of the special aspects of certain civil rights litigation [that] would justify an award of attorney's fees totally divorced from the amount of damages awarded by the jury.").

10 In *Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991),* the plaintiff sought $300,000 in damages and only recovered [*32] *$1000. Id. at 951.* The plaintiff initially requested $132,778 in attorney's fees, *id. at 951 n.1,* of which the district court awarded *$49,685.90. Id. at 951.* The court of appeals rejected the fee award, concluding that "[t]o turn a single wrongful arrest into a half year's work, and seek payment therefor, with costs, amounting to 140 times the worth of the injury, is, to use a benign word, inexcusable." *Id. at 956.* The Court conceded, however, that "had there been punitive damages found," attorney's fees "would have been another matter." *Id. at 954.*

The Supreme Court has rejected the proposition that a *§ 1988* fee award must invariably be proportionate to the amount of damages a civil rights plaintiff actually recovers. See *Rivera, 477 U.S. at 574.* In Rivera, the Court affirmed an attorney's fee award of $245,456, which was slightly in excess of seven times the plaintiff's recovery of compensatory and punitive damages, amounting to $33,350. See *id. at 565-67.* In this case, however, we cannot ignore the pronounced disproportionality between the verdict for less than $3000, and the fee award more than 100 times that amount. Such a disparity may well be unprecedented in this Circuit, notwithstanding [*33] Mercer, which affirmed an award of

attorney's fees amounting to almost $350,000 on a verdict for nominal compensatory damages of just $1. The plaintiff in Mercer, though, was also found entitled to $2,000,000 in punitive damages, see *401 F.3d at 202*, rendering the fee award a fraction -- not a multiple -- of the damages obtained.[11]

> 11 The punitive damages award in Mercer was later vacated on the basis of *Barnes v. Gorman, 536 U.S. 181, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002)*, because punitive damages are not legally available for private actions under Title IX. *Mercer, 401 F.3d at 202*.

Although a substantial disproportionality between a fee award and a verdict, standing alone, may not justify a reduction in attorney's fees, a lack of litigation success will. In short, the limited success achieved by McAfee -- reflected by the jury's decision not to award anything for deprivation of liberty, great inconvenience, great insult and humiliation, and mental anguish, or make an award of punitive damages -- undermines the attorney's fee award being appealed.

D.

Because the district court overstated McAfee's degree of success, it erred in not making an attorney's fee award that would properly reflect her success in this case. Under [*34] such circumstances, we typically would remand this case for further work by the district court and the lawyers. We have also recognized, however, that "[a] request for attorney's fees should not result in a 'second major litigation.'" *Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 181 (4th Cir. 1994)* (citing *Hensley, 461 U.S. at 437 n.12*). Consistent with *Rum Creek*, and to avoid further expense and the nonessential use of judicial resources associated with remand proceedings and other appeals, we are satisfied to vacate the attorney's fee award and direct that it be reduced by approximately two-thirds, that is, to $100,000, exclusive of costs. See id. (modifying award of attorney's fees "[t]o avoid further litigation expenses that would follow a remand and the risk of yet a fourth appeal").

III.

Pursuant to the foregoing, we affirm the judgment with respect to the verdict, vacate the attorney's fee award, and direct that an attorney's fee award of $100,000, exclusive of costs, be entered by the district court on remand.

No. 13-1356 AFFIRMED

No. 13-1088 AFFIRMED

No. 12-2481 VACATED AND REMANDED WITH INSTRUCTIONS