ORAL ARGUMENT NOT YET SCHEDULED
No. 11-7048

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE ARMENIAN GENOCIDE MUSEUM & MEMORIAL, INC., ET AL.,

Appellants/Cross-Appellees,

v.

GERARD L. CAFESJIAN, ET AL.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' FINAL SUPPLEMENTAL REPLY BRIEF

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GLOSSARY

Adjacent Properties	1334-36, 1338, 1340, and 1342 G Street, adjacent to the Bank Building
Assembly	The Armenian Assembly of America
Adalian	Rouben Adalian
AGM&M	The Armenian Genocide Museum & Memorial, Inc.
ANI	Armenian National Institute
Bank Building	National Bank of Washington Building
BOC	The AGM&M Building and Operations Committee
Cafesjian	Gerard L. Cafesjian
CFF	Cafesjian Family Foundation, Inc.
DX	Defendants' Trial Exhibit
Families USA building	Building at 1334-36 G Street, one of the Adjacent Properties
Grant Agreement	Grant Agreement dated November 1, 2003 between Cafesjian, CFF, and the Assembly
Grant Property	Bank Building and Adjacent Properties
HPRB	District of Columbia Historic Preservation Review Board
Hovnanian	Hirair Hovnanian
IRS	Internal Revenue Service
Krikorian	Van Krikorian

Mathevosian	Anoush Mathevosian
Met	Metropolitan Museum of Art
MOA	Memorandum of Agreement
Museum Project	A planned museum and memorial in Washington, D.C. to commemorate the Armenian Genocide
PX	Plaintiffs' Trial Exhibit
TomKat	TomKat Limited Partnership, a company controlled by Cafesjian
Transfer Agreement	Transfer Agreement dated November 1, 2003 between the Assembly and AGM&M
Unanimous Written Consent	One of the documents creating AGM&M
USAPAC	United States-Armenian Public Affairs Committee
Vartian	Ross Vartian
Waters	John J. Waters

SUMMARY OF ARGUMENT

As explained in Plaintiffs' (the Armenian Genocide Museum & Memorial, Inc. ("AGM&M") and Armenian Assembly of America ("Assembly")) Supplemental Brief ("Supp. Br."), the district court erred by indemnifying Gerard L. Cafesjian[1] and John J. Waters, Jr. ("Defendants") in the amount of $1,447,974.15 for their defense of the AGM&M fiduciary duty claim and denying Plaintiffs' Rule 60(b) motion for a new trial. Defendants' Supplemental Opposition ("Supp. Opp.") does not dispel the multitude of problems with that ruling. If anything, it confirms that the serious legal errors below require the judgment and fee award to be reversed or, at a minimum, vacated and remanded.

ARGUMENT

I. DEFENDANTS' BELATED ATTEMPT TO DEMONSTRATE THE REASONABLENESS OF THE INDEMNIFICATION AWARD FALLS FAR SHORT.

A. District of Columbia Law Required The Indemnification Award To Be Reasonable.

The district court's holding that the indemnification award need not even be "reasonable" is unsustainable. Supp. Br. 10-12. Under District of Columbia law, indemnification "provisions are sustained 'only as an indemnity for the reasonable fees necessarily and properly paid or incurred[.]'" *FDIC v. Bender*, 127 F.3d 58,

[1] Mr. Cafesjian died on September 15, 2013. *See* Suggestion of Death, Doc. # 1459730 (Oct. 4, 2013).

63 (D.C. Cir. 1997) (citation omitted). The indemnification award must be overturned for this reason alone. Supp. Br. 12.

Notably, Defendants can barely bring themselves to defend the district court's decision on this score. Supp. Opp. 10. They devote one paragraph to this issue and, even then, offer no precedent to support their position. Like the district court, Defendants merely quote the AGM&M Bylaws, which require indemnification for "any and all expenses and liabilities actually *and necessarily incurred*…." PX-122, § 4.1 (emphasis added) (JA-498). But that language imposes a stricter standard—not a more lenient one. Supp. Br. 11-12. Defendants' unwillingness or inability seriously to dispute the correct legal standard is a tacit concession that the decision below cannot be defended.[2] The only question, then, is whether the award is reasonable under District of Columbia law. As explained below, it is not.

B. Defendants Failed To Demonstrate That Counsel's Hourly Rates Were Reasonable.

For the award to be lawful, counsel's hourly rates must be reasonable. But Defendants presented the district court with no competent evidence showing the reasonableness of their counsel's rates; indeed, the evidence shows that counsel's

[2] AGM&M's status as a private foundation for tax purposes also limits indemnification to a reasonable amount. Supp. Br. 12. Defendants did not respond to this argument.

rates far exceed what is reasonable under this Court's precedent. Supp. Br. 10-15. Defendants' attempts to rehabilitate their claim all fail.

As an initial matter, Defendants argue that they need not offer *any* evidence of reasonableness because "[a] trial judge who monitors the case is considered an expert on the value of legal services and therefore can determine the fee without hearing any evidence on the matter." Supp. Opp. 11 (citing *Bender*, 127 F.3d at 64). Whatever the merit of this argument, it has no application here. The magistrate judge who evaluated the fee petition and made the award had *no* involvement in the case. And, as noted above, the district court found that the award need not be reasonable and thus abused any discretion it may have had to fix the amount of reimbursement. The district court cannot be defended as an "expert" in determining the reasonableness of a fee award when it refused to consider the issue and merely sustained the magistrate judge's resolution as not "clearly erroneous." Dkt. 294 at 9.

Defendants alternatively argue that they provided "specific and detailed support" supporting the reasonableness of Jones Day's rates, Supp. Opp. 3, but the argument is meritless, Supp. Br. 10, 13-14. The evidence upon which Defendants mainly rely—a *National Law Journal* survey and a comparison of K&L Gates's rates with Jones Day's rates (the same evidence they relied upon in the district court)—is insufficient. Supp. Opp. 3-4, 12-13.

First, the *National Law Journal* survey is useless. It provides high, low, average, and median billing rates in two categories—"partner" and "associate"—for 108 of the nation's largest law firms. Dkt. 348-4 at 2-4 (JA-1544-46). While each firm's "principal or largest office" is listed, rates are not broken down by legal market. *Id.* It is therefore impossible to tell what the customary billing rate is for *any* partner or associate in the Washington, DC market, let alone partners and associates with the relevant skills and experience.

Defendants misleadingly claim that the district court has "relied on the *National Law Journal*'s survey as an indicator of market rates." Supp. Opp. 12 (citing *Wilcox v. Sisson*, No. 02-1455, 2006 WL 1443981 (D.D.C. May 25, 2006)). The party in *Wilcox* presented a *NJL* survey *in addition to* another formal billing rate survey that together permitted the court to determine that only 8.6% of partners at large firms charged more than the partner at issue, and "allow[ed] one to focus on law firms located in the District of Columbia." *Wilcox*, 2006 WL 1443981, at *3. Defendants' survey lacks that detail. Dkt. 348-4 at 2 (JA-1544).

Second, Defendants' reliance on a comparison to the rates charged by Plaintiffs' attorneys is similarly useless. There is no evidence that these attorneys, who were from a different legal market, are of comparable skill, experience, or reputation. Supp. Br. 13. Defendants' assertion that the comparison is apt because the rates are similar adds nothing. Defendants could not contend, for example, that

had Plaintiffs hired counsel at the rate of $5,000 per hour, they could do the same and expect the rate to be deemed "reasonable". Defendants must prove that *their* counsel's rates are reasonable. They failed to do so.

Defendants rely on two out-of-circuit cases to demonstrate that a comparison to opposing counsel is appropriate, yet those cases are distinguishable. Supp. Opp. 13. In *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), the court explained that the comparison was useful "in this kind of case" and the party seeking fees had demonstrated "that the nature of the case required the skills of out of town specialists," *id*. at 768 n.18. The Seventh Circuit made clear that its ruling was an exception to the general rule that "determining the plaintiff's fee based on the fees charged by the defendant's attorney may have little relevance to the value which the plaintiff's attorney provided in the case." *Id*. No similar circumstance is presented here. The other case also is inapposite, as the First Circuit specifically compared the experience and skill of the parties' attorneys. *See Liberty Mut. Ins. Co. v. Cont'l Cas. Co.*, 771 F.2d 579, 588-89 (1st Cir. 1985). That is precisely the kind of analysis that is lacking here.

Finally, Defendants point to a fee examiner's finding in 2005 that their lead counsel's hourly rates from 2003-2005 were "consistent with what other lawyers with his level of experience charge in the DC area." Supp. Opp. 13 n.7 (citing Dkt. 348-2 at 7). But this assessment of lead counsel's rates was from nearly a decade

ago, and accordingly offers no insight into the "reasonableness" of his rates today, which are markedly higher. Further, this finding has no bearing on the reasonableness of the rates of the rest of the Jones Day team. A stale finding from one fee examiner with respect to one member of a litigation team falls far short of the evidentiary foundation needed to sustain the award.[3]

At base, Defendants rely on a series of suppositions as to why their counsel's rates are reasonable. But supposition is no substitute for evidence. Absent proof on this critical issue, the district court could well have refused to make any fee award at all. *See Agapito v. District of Columbia*, 525 F. Supp. 2d 150, 154 (D.D.C. 2007).

If any rate should apply, however, it is a rate derived from the *Laffey* Matrix, which has widespread acceptance as the benchmark for reasonable fees in the district court and D.C. Court of Appeals. Supp. Br. 14-15. Defendants contend that the *Laffey* Matrix is typically used to award "attorneys' fees where a federal statute grants 'reasonable attorney's fees' under a fee-shifting statute." Supp. Opp. 14. They ignore that District of Columbia courts rely on this benchmark outside the federal statutory setting. *See, e.g., Campbell-Crane & Assocs., Inc. v.*

[3] Defendants' attempt to bolster their argument by asserting for the first time that lead counsel "has over 35 years of trial experience involving complicated cases," Supp. Opp. 3, must be ignored as it was not presented to the district court. Regardless, whatever his experience, there is still no way to compare it to the experience and reputation of others in that market.

Stamenkovic, 44 A.3d 924, 947-48 (D.C. 2012); *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988-91 (D.C. 2007). Having offered no other argument as to why the *Laffey* rate is inapplicable, Defendants' claim that it is not the proper measure of reasonableness must fail.

C. The District Court Awarded Fees For More Than A Reasonable Number Of Hours.

The number of hours attributed to the defense of the *single* indemnifiable claim also was unreasonable. Supp. Br. 15-17. Defendants readily admit that they "cannot discretely tie" most of the time entries submitted for indemnification to the defense of the fiduciary duty claim. Supp. Opp. 15. Instead, they argue that "in litigation with more than one claim at issue, it is necessarily the case that billable time cannot be neatly divided on a claim-by-claim basis," Supp. Opp. 15 (citing *Hensley v. Eckherhart*, 461 U.S. 424, 440 (1983)), and that Plaintiffs bear the burden of disproving the reasonableness of counsel's billing practices, Supp. Opp. 18. But *Hensley* and the other decisions they cite involved fees awarded under a "prevailing party" theory, rather than as a result of contractual indemnification. Here, Defendants pursued indemnification as an affirmative claim in the lawsuit and thus shouldered the burden of keeping their time in a way that would justify the number of hours billed for that single claim. *See Rivers & Bryan, Inc. v. HBE Corp.*, 628 A.2d 631, 637 (D.C. 1993).

Awarding fees under these circumstances also would be inequitable. Defendants' counsel knew from the outset of this litigation that indemnification would be an issue; they filed a claim seeking it. Defendants should not be able to benefit from their attorneys' failure to properly maintain the evidence they knew would be needed to prove the claim, which was solely within their control. *Cf. Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 170-71 (D.C. Cir. 2013) (finding that a duty to preserve arises when a "party has notice that the evidence is relevant to litigation," including "when a party should have known that the evidence may be relevant to future litigation") (citation and internal quotation marks omitted)).

But even if it were permissible to award fees for some portion of "blended" time, the district court clearly erred in attributing 50% of that time to the defense of one claim. Supp. Br. 16-17. Only *half* the case consisted of affirmative claims by Plaintiffs, and the AGM&M fiduciary duty claim was but one of those four claims. It thus represented some portion of half of the case—not half of the case all on its own. No matter how Defendants try to inflate that one claim's role in the litigation, the conclusion below that it took approximately ten times as much effort to litigate as did each of the other claims is unsupportable.[4]

[4] Defendants again argue that the figure should be considered presumptively correct because the trial judge is in the best position to determine the percentage of time and effort devoted to the indemnifiable claim. Supp. Opp. 17. That argument is meritless for reasons set forth above. *See supra* at 3.

Finally, Defendants have not rebutted Plaintiff's showing that the district court erred further by failing to take any account of myriad inefficiencies and improper time entries. Supp Br. 17-20. Instead of squarely confronting the issue, they argue that Plaintiffs did not satisfy their burden of pointing to specific problematic time entries. Supp. Opp. 18. That is untrue. Plaintiffs pointed to a multitude of specific entries, Dkt. 283 at 9-17 (JA-1372-80), which the district court recognized when it criticized several specific instances of excessive billing and billing for clerical tasks, Dkt. 352 at 8-9 (JA-1555-56).

Moreover, the error below was more fundamental than just crediting specific entries that should have been disregarded: the district court declared that the 50% figure it had already adopted as representing the portion of the litigation devoted to defense of the indemnifiable claim *also* accounted for these inefficiencies. Supp. Br. 18-19. Defendants offer no defense of that decision at all. The district court abused its discretion by awarding fees and expenses that were neither "reasonable" nor "necessarily incurred."

II. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' RULE 60(B) MOTION FOR A NEW TRIAL.

A. Defendants Cannot Defend the District Court's Finding of Waiver.

Defendants attempt to defend the indefensible: the district court's conclusion that Plaintiffs waived an argument by failing to address an issue in their *reply* brief,

even though Plaintiffs had fully briefed the issue in their *opening* brief. Supp. Opp. 23-24. In Defendants' view, Plaintiffs had a duty to respond to each and every contention Defendants made in their opposition brief, on pain of waiver. That cannot be the law. Supp. Br. 20-21. Defendants offer an unpublished district court decision, *Moffett v. Prudential Life Insurance Co. of America*, No. 09-cv-1915, 2012 WL 5989931 (D.D.C. Nov. 30, 2012), in support of their position. But *Moffett* turned on the fact that the plaintiffs had failed to develop a particular argument in his *opening* brief; the fact that they did not mention it further in their reply was corroborating evidence that they were in fact not pressing the argument at all. *See id.* at *5 & n.5. That is not the case here.

Defendants also offer no valid justification for why the district court did not (or this Court should not) consider whether Waters offered misleading testimony when he testified that he had no financial arrangement with Cafesjian and that he was "volunteering [his] time and effort to Mr. Cafesjian, but obviously expending time and energy on [his] own behalf." 11/24 AM Tr. 23-24 (JA-453-54). Instead of countering Plaintiffs' arguments that citing this testimony in their reply brief was not a "new argument," but rather additional support for an argument made in the opening brief, or that Defendants had an opportunity to respond in their surreply, Supp. Br. 21-22 (citing *Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 196 (D.C. Cir. 1992); *Goodrich v. Teets*, 510 F. Supp. 2d 130, 143 (D.D.C. 2007)),

they merely parrot the district court's statement that the issue was not raised until reply, Supp. Opp. 25. That is entirely non-responsive. The district court abused its discretion by not considering this testimony.

B. Defendants' Reasons For Sustaining the Denial of the Rule 60(b) Motion Are Without Merit.

There can be no dispute that although Waters testified that he had no ulterior motive to undermine the Museum Project, he in fact believed that he stood to profit—to the tune of hundreds of thousands of dollars—from the Museum Project's demise. After trial, Waters admitted in a public document that, in 2007, Cafesjian promised to pay him a "'significant bonus' in the event of a positive outcome" in this litigation. Dkt. 354-1 (¶ 78) (JA-1581). This gave Waters a significant incentive to keep the Museum Project from being completed by the 2010 deadline. This revelation, which Waters subsequently reaffirmed in sworn deposition testimony, Dkt. 362, warrants a new trial under Rule 60(b), Supp. Br. 23-24, especially given the district court's mistaken finding that Cafesjian and Waters acted in "good faith" between 2006 and 2010.[5]

Defendants contend that this argument is "nonsensical" because "Waters and Cafesjian stepped down from the management of AGM&M in 2006—yet the

[5] For the reasons set forth in Plaintiffs' briefing in the principal appeal, "good faith" is not the correct legal test for either claim and, even if it were, Cafesjian and Waters failed to meet that standard. Reply 31-36, 39-44.

litigation bonus was not purportedly made until 2007." Supp. Opp. 21. The thrust of the argument seems to be that Waters and Cafesjian did not owe fiduciary duties to AGM&M at the time. Supp. Opp. 21-22. That is wrong. As the district court correctly found, Waters and Cafesjian *did* owe fiduciary duties to AGM&M up through the termination of their service on the AGM&M Board of Trustees. Dkt. 248 at 143-44 (Jan. 26, 2011) (JA-1206-07). Moreover, the issue is not, as Defendants contend, whether Cafesjian *actually promised* the bonus or any other disputes between the two of them. Supp. Opp. 22-23. The issue is Waters's *belief* that the bonus was promised. Supp. Br. 25.

Waters's actions between 2007, when he believed he was promised the bonus, and March 19, 2009, when his Board service ended, thus are highly relevant: he surreptitiously filed a Memorandum of Agreement with the D.C. Recorder of Deeds, filed a *lis pendens*, asked the D.C. HPRB to suspend approval of plans, discouraged investment in the project by warning against participation in the project, and published dozens of articles in Cafesjian's newspaper that unceasingly publicized AGM&M's infighting. Defendants' suggestion that the trier of fact, had it known the full story, would have ignored Waters's belief that he was financially motivated to scuttle the Museum Project when assessing his "good faith" during this period is unsustainable. That "good faith" finding formed the foundation of a district court ruling that handed a windfall recovery to Cafesjian at

the expense of AGM&M, a non-profit organization engaged in charitable work for the public good. It was precisely for that reason that the Rule 60(b) motion should have been granted.

CONCLUSION

For the reasons set forth above and in the briefing in the principal appeal, the district court's judgment should be reversed. Alternatively, the judgment should be vacated and the case remanded for a new trial.

Respectfully submitted,

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Dated: October 29, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1(e)(3), 32(a)(7)(C), and this Court's order of June 20, 2013, I certify the following:

This brief complies with the type-volume limitation set forth in this Court's order of June 20, 2013 because this brief contains 2,998 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14-point Times New Roman.

/s/ Helgi C. Walker

Helgi C. Walker

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October 2013, a copy of the foregoing document was filed electronically with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that a copy of the foregoing document was served electronically on the following counsel:

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