(ORAL ARGUMENT NOT YET SCHEDULED)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 11-7048

THE ARMENIAN GENOCIDE MUSEUM AND MEMORIAL, INC., *et al.*
Plaintiffs/Appellants/Cross-Appellees

v.

GERARD L. CAFESJIAN, *et al.*
Defendants/Appellees/Cross-Appellants

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

FINAL SUPPLEMENTAL BRIEF OF APPELLEES / CROSS-APPELLANTS

John B. Williams
Ronald F. Wick
Catherine R. Reilly
COZEN O'CONNOR
1627 I Street, NW
Washington, D.C. 20006-4007
Telephone: (202) 912-4800
Facsimile: (202) 478-4830

Counsel for Appellees/Cross-Appellants

Dated: October 29, 2013

APPELLEES' / CROSS-APPELLANTS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND *AMICI*

All parties, intervenors, and amici appearing before the United States District Court for the District of Columbia in the underlying civil action or who have appeared in this appeal are listed in the Supplemental Brief for Appellants.

B. RULINGS UNDER REVIEW

The rulings under review are: (1) the district court's (Kollar-Kotelly, J.) May 9, 2011 entry of final judgment as to all claims in the case, save Count VII of Defendants' Streamlined Counterclaims, which relates to opinions published at 772 F. Supp. 2d 20 and 772 F. Supp. 2d 129; (2) the district court's (Kollar-Kotelly, J.) May 9, 2011denial of Plaintiffs' motion for new trial, which is published at 783 F.Supp. 2d 78; (3) the district court's (Kollar-Kotelly, J.) September 12, 2011 denial of Defendants' post-judgment Motion to Enforce Judgment and For Amended Findings And Judgment pursuant to Federal Rules of Civil Procedure 52, 59 and 70, which is published at 811 F. Supp. 2d 120; (4) the district court's (Kollar-Kotelly, J.) February 20, 2013 denial of Plaintiffs' Rule 60 Motion, which is published at 924 F. Supp. 2d 183; and (5) the district court's (Kollar-Kotelly, J.) March 7, 2013 order entering final judgment for Defendants on Count VII of their Streamlined Counterclaims regarding indemnification for

attorneys' fees, which encompasses an opinion that is published at 924 F. Supp. 2d 204. This supplemental brief relates to Rulings (4) and (5).

C. RELATED CASES

This case is a consolidation of appeal nos. 11-7049, 11-7054, 11-7055, 11-7056, 11-7057, 11-7110, 11-7111, 11-7112, 13-7050, and 13-7051. The following related case was previously before this Court: The Armenian Genocide Museum and Memorial, Inc. v. John J. Waters, Sr., USCA Case #10-7042. This case is also related to *Cafesjian v. Armenian Genocide Museum & Memorial, Inc., et al.,* Civil File No. 0004450-11 (D.C. Super. Ct.).

CORPORATE DISCLOSURE STATEMENT

Appellee/Cross-Appellant, Cafesjian Family, Foundation, Inc., hereby discloses that it has no corporate parents or affiliates that are publicly traded, and that no publicly traded corporation owns 10% or more of its respective stock, if any.

TABLE OF CONTENTS

Page

APPELLEES' / CROSS-APPELLANTS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

GLOSSARY ix

STATEMENT OF THE ISSUES 1

COUNTER-STATEMENT OF FACTS 1

A. Facts Underlying Cafesjian's Indemnification Claim 1

B. Facts Underlying AGM&M's New Trial Motion 5

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE TRIAL COURT CORRECTLY QUANTIFIED CAFESJIAN'S INDEMNIFICATION CLAIM. 10

A. Standard of Review 10

B. The AGM&M By-Laws Do Not Provide That Indemnified Fees Be Reasonable. 10

C. The Trial Court Correctly Determined That The Indemnification Award Was Reasonable. 10

D. In Quantifying The Indemnification Claim, The Trial Court Was Not Obligated To Consider Extrinsic Evidence Of Reasonableness. 11

E. Cafesjian Introduced Ample Extrinsic Evidence Supporting the Reasonableness of His Indemnification Request. 12

1. The Hourly Rates of Cafesjian's Attorneys Were Reasonable. 12

2. The *Laffey* Matrix Does Not Apply. 14

3. The Trial Court's Award of 50% of Cafesjian's Blended Time Entries Was Reasonable. 15

F. Cafesjian's Attorneys' Fees Were Not Otherwise Excessive. 18

II. THE COURT PROPERLY DENIED AGM&M'S NEW TRIAL MOTION. .20

A. Standard of Review..20

B. AGM&M Has Not Demonstrated Any Extraordinary Circumstances Requiring A New Trial..20

C. The Trial Court's Holding That AGM&M Waived Aspects Of Their New Trial Motion Was Appropriate..23

1. In The Absence Of Any Showing of Prejudice, The New Trial Motion Was Properly Denied Under All Subsections of Rule 60(b). 23

2. Whether the Trial Court Considered Waters' November 24, 2010 Testimony Was Immaterial. 25

CERTIFICATE OF SERVICE 27

CERTIFICATE OF COMPLIANCE..28

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Agapito v. District of Columbia,
525 F. Supp. 2d 150 (D.D.C. 2007)....................11

**Alpo Petfoods, Inc. v. Ralston Purina Co.*,
No. 86-Civ-2728, 1991 WL 1292963 (D.D.C. Dec. 4, 1991)....................2, 16

Am. Wildlands v. Kempthorne,
530 F.3d 991 (D.C. Cir. 2008)....................25

Baloch v. Norton,
517 F. Supp. 2d 345 (D.D.C. 2007)....................25

Baloch. v. Kempthorne,
550 F.3d 1191 (D.C. Cir. 2008)....................25

Chappell-Johnson v. Powell,
440 F.3d 484 (D.C. Cir. 2006)....................18

Chrapliwy v. Uniroyal, Inc.,
670 F.2d 760 (7th Cir. 1982)....................13

Covington v. District of Columbia,
57 F.3d 1101 (D.C. Cir. 1995)....................15

Dickens v. Friendship-Edison PCS,
724 F. Supp. 2d 113 (D.D.C. 2010)....................19

**FDIC v. Bender*,
127 F.3d 58 (D.C. Cir. 1997)....................12

Harris v. Howard Univ., Inc.,
28 F. Supp. 2d 1 (D.D.C. 1998)....................16

* Authorities upon which we chiefly rely are marked with an asterisks.

Heller v. District of Columbia,
832 F. Supp. 2d 32 (D.D.C. 2011)..14

**Hensley v. Eckherhart*,
461 U.S. 424 (1983)...15, 16

**Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.,*
129 F.3d 143 (D.C. Cir. 1997)..10, 11

Liberty Mut. Ins. Co. v. Continental Cas. Co.,
771 F.2d 579 (1st Cir. 1985)...13

Lightfoot v. District of Columbia,
555 F. Supp. 2d 61 (D.D.C. 2008)..24

Miller v. Holzmann,
575 F. Supp. 2d 2 (D.D.C. 2008)...11, 14

Moffett v. Prudential Life Ins. Co. of Am.,
No. 09–cv–1915 (RLW), 2012 WL 5989931 (D.D.C. Nov. 30, 2012).............24

Nat'l Assoc. of Concerned Veterans v. Sec'y of Defense¸
675 F.2d 1319 (D.C. Cir. 1982)..18

Ramos v. U.S. Dep't of Justice,
588 F. Supp. 2d 38 (D.D.C. 2008)..24

Summers v. Howard Univ.,
374 F.3d 1188 (D.C. Cir. 2004)..20

Thomas v. Nat'l Football League Players Assoc.,
273 F.3d 1124 (D.C. Cir. 2001)..2

Twelve John Does v. District of Columbia,
841 F.2d 1133 (D.C. Cir. 1988)..20

Waters v. Cafesjian,
--- F. Supp. 2d ---, Civ. No. 12–648, 2013 WL 2278016 (D. Minn. May
9, 2013) 6

**Wilcox v. Sisson*,
No. Civ. A. 02-1455, 2006 WL 1443981 (D.D.C. May 25, 2006)...............12, 14

STATE CASES

Campbell-Crane & Assocs. v. Stamenkovic,
44 A.3d 924 (D.C. 2010) 15

Rivers & Bryan, Inc. v. HBE Corp.,
628 A.2d 631 (D.C. 1993) 15

OTHER AUTHORITIES

*Fed. R. Civ. P. 60(b) *et seq*. 1, 6, 23, 24, 25

GLOSSARY

AGM&M	The Armenian Genocide Museum and Memorial, Inc.
Assembly	The Armenian Assembly of America
CFF	The Cafesjian Family Foundation, Inc.
Cafesjian	Gerard L. Cafesjian, head of CFF and former AGM&M chairman
FBI	Federal Bureau of Investigation
JA	Joint Appendix
HPRB	District of Columbia Historic Preservation Review Board
PX	Plaintiffs' Trial Exhibit
Waters	John J. Waters, Jr., former AGM&M trustee and Secretary/Treasurer

Appellees Gerard L. Cafesjian, the Cafesjian Family Foundation, and John Waters, Jr. submit this supplemental brief in opposition to Appellant Armenian Genocide Museum and Memorial's ("AGM&M's") appeal of the district court's award of attorneys' fees and its denial of AGM&M's second motion for new trial.[1]

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in ruling that Cafesjian and Waters[2] are entitled to indemnification in the amount of $1,447,974.15.

2. Whether the district court abused its discretion in denying AGM&M's Rule 60(b) motion for new trial based upon Cafesjian's alleged 2007 promise of a bonus to Waters.

COUNTER-STATEMENT OF FACTS

A. Facts Underlying Cafesjian's Indemnification Claim

In its January 26, 2011 Order, the district court ruled that AGM&M was responsible for indemnifying a portion of Cafesjian's legal fees and expenses pursuant to Section 4.1 of AGM&M's by-laws, which provides that AGM&M "shall indemnify" any present or former trustee or officer "in connection with any claim, action, suit or proceeding . . . in which he or she is or may be made a party

---

[1] AGM&M's first new trial motion sought to disqualify Judge Kollar-Kotelly because she and Cafesjian had a "shared interest in glass art." The denial of that motion is currently before this Court on appeal.

[2] The legal fees and expenses relevant to this appeal were paid by Cafesjian. Accordingly, for the purposes of this portion of the brief we will refer only to Cafesjian.

by reason of having been such Trustee, officer." (PX-122, § 4.1; Dkt. 248,[3] at 184)(JA-498; JA-1247).

Cafesjian submitted an application for $2,875,058.23 attributable to the indemnified fiduciary breach claim, (Dkt. 275), including fees solely attributable to the indemnified claim and fees which were attributable to both indemnified and non-indemnified claims (so-called "blended time"). With respect to fees to defend these latter claims, Cafesjian estimated that 67% of these fees were attributable to the indemnified fiduciary breach claim. This estimate was based on methodology that has been approved by courts in this Circuit. *Alpo Petfoods, Inc. v. Ralston Purina Co.*, No. 86-Civ-2728, 1991 WL 1292963, at *12 (D.D.C. Dec. 4, 1991) (approving fee applicant's methodology that involved "estimat[ing] the percentage of time in each category [of time entries] which could fairly be attributed to a successful result"); *see also Thomas v. Nat'l Football League Players Assoc.*, 273 F.3d 1124, 1128–29 (D.C. Cir. 2001) (upholding the award of attorneys' fees for fees which related to both plaintiff's successful and unsuccessful claims).

AGM&M opposed the application, arguing: (1) any indemnification was inappropriate; (2) the requested fees were excessive; (3) the hourly rates of Cafesjian's counsel were too high; and (4) the fiduciary breach allegations were a

[3] All Docket Entry numbers are to the lead case below, No. 07-cv-1259.

minor part of the case, and therefore the 67% blended time allocation to those claims was excessive.[4]

Cafesjian provided specific and detailed support for his application. In response to AGM&M's continued insistence that it had no obligation to indemnify Cafesjian in any amount, Cafesjian explained why AGM&M's status as a private foundation and the fact that he had filed the initial lawsuit did not affect his indemnification rights.[5] As to the contention that individual billing entries were excessive, Cafesjian demonstrated why each entry was necessarily incurred. (Dkt. 348, at 3-22).

Regarding hourly rates, Cafesjian submitted the most recent *National Law Journal* survey of law firm billing rates showing that the rates of partners at large District of Columbia firms were above, and often significantly above, the rate charged by Cafesjian's lead trial counsel, who has over 35 years of trial experience involving complicated cases. The survey further showed that the rates charged by the associates on the defense team were well within the average for attorneys of similar experience at other firms. *See* Dkt. 348, Exhibit D (JA-1543-1547).

---

[4] AGM&M also objected to the fee request because some of Cafesjian's legal bills had been paid by the Cafesjian Family Foundation ("CFF"). On the basis of this objection, Cafesjian subtracted $907,055.50 from his request. (Dkt. 286, at 14) (JA-1401).

[5] *See also,* Brief of Appellees/Cross-Appellants at 40-43.

More significant, however, was the fact that the rates charged by *every professional* on the winning defendants' team (Jones Day) were *lower* than those of their counterparts on the losing plaintiff's team (K&L Gates).

Jones Day	**K&L Gates**
J.B. Williams, partner and lead counsel: $750	M. De Marco, partner and lead counsel: $800
D.M. Hohos, associate: $475	M.D. Ricciuti, partner: $660
W.G. Laxton, Jr, associate.: $325	J.J. Nagle, associate: $355
O.T. Conroy, associate: $325	N.D. Newman, associate: $330
Project Assistants (A.L. Clair, J.M. Yee): $175	Paralegal (J.E. Nilan): $300

Compare Dkt. 348, Exhibit E, Attachment 2 *with* Dkt. 348, Exhibit C (JA-1540-1542).

With respect to the significance of the fiduciary breach claim, and the resultant 67% allocation of blended time to those claims, Cafesjian reminded the court of the obvious: the fiduciary breach allegations constituted the lion's share of the proof in this case. AGM&M had thrown the kitchen sink at the defendants and had accused them of 22 separate categories of breach (many including multiple

subsets), all of which took days upon days of testimony to rebut. (Dkt. 348, at 26-27).

The district court held that the defendants were entitled to be indemnified, and referred the matter to Magistrate Judge Kay for a quantification of the amount. (Dkt. 309) (JA-1430-1432). Before the Magistrate Judge, AGM&M re-registered its objections to many of the specific time entries, and in order to attempt to reach an agreed upon amount, Cafesjian reduced his fee request on two separate occasions. (Dkt. 348 and 351).

On April 24, 2012, Magistrate Judge Kay issued his report and recommendation, finding that Jones Day's hourly rates were reasonable and that Cafesjian was entitled to indemnification for 50% of blended time, resulting in an indemnification award of $1,461,658.54. (Dkt. 352) (JA-1548-1559).

AGM&M filed objections to the report and recommendation with the trial court. (Dkt. 358). The court rejected all of these objections, revised the award by another reduction Cafesjian had agreed to, and quantified the award at $1,447.974.14. (Dkt. 372) (JA-1706-1719).

B. Facts Underlying AGM&M's New Trial Motion

After Waters left Cafesjian's employ, Cafesjian's chief financial officer became concerned that Waters may have made unauthorized withdrawals from certain Cafesjian bank accounts. Cafesjian hired counsel to investigate and

ultimately referred the matter to the Federal Bureau of Investigation. Subsequently, Waters was indicted on charges that he had embezzled millions of dollars from Cafesjian. *See* Indictment, *United States v. Waters*, No. 13-cr-00203 (D. Minn. filed Aug. 5, 2013).

After the referral to the FBI, on March 13, 2012 Waters filed a lawsuit in Minnesota against Cafesjian alleging that the money at issue had been earned and that, in fact, additional money was due and owing from Cafesjian. Waters made a number of allegations as to why he was owed additional money, and one of these was that Cafesjian had allegedly promised him a "significant bonus" in the event of a positive outcome in this lawsuit—i.e., Cafesjian's gaining control over the museum project or the properties at issue. On May 9, 2013, the Minnesota district court granted summary judgment to Cafesjian as to all of Waters' claims, finding there he had not proven the existence of an incentive compensation agreement or that Cafesjian had promised Waters any bonus for the successful outcome of this litigation. *See generally, Waters v. Cafesjian*, --- F. Supp. 2d ---, Civ. No. 12–648, 2013 WL 2278016 (D. Minn. May 9, 2013).

On April 30, 2012, on the basis of the Minnesota complaint alone, and with no additional investigation, AGM&M filed a Rule 60(b) motion in this litigation, arguing that it was entitled to a new trial because Waters had committed perjury when he failed to disclose the alleged incentive compensation and special bonus

agreement during his testimony on November 15, 2010. AGM&M's position in its new trial motion was that the court's opinion "hinged" upon Waters' credibility, and that his alleged perjury undermined the foundation of the opinion, such that a new trial was warranted. (Dkt. 354).

In response, Cafesjian conducted an exhaustive analysis of the Waters testimony and its effect upon the court's opinion. This analysis showed that the court credited the testimony of Waters over the testimony of the AGM&M witnesses in only one instance, and with respect to that one claim, the court found against Cafesjian on other grounds (that the enforcement of the promissory note was barred by the statute of limitations). (Dkt. 362, at 29-37). The court conducted its own analysis of the Waters testimony, similarly concluding that the Waters testimony was not critical to any of its factual findings and that it did not rely on Waters' credibility in rejecting AGM&M's claims. (Dkt. 370, at 18-30) (JA-1688-1700). The court rejected the new trial motion on four grounds: (1) there was no verified proof that Cafesjian actually promised Waters a litigation bonus; (2) AGM&M had a full and fair opportunity to present its case at trial; (3) Waters' testimony was not dispositive of or critical to any of the court's

conclusions; and (4) AGM&M had failed to demonstrate any actual prejudice from Waters' conduct. (Dkt. 370, at 33) (JA-1703).[6]

The court also addressed an argument raised for the first time in AGM&M's reply brief, which asserted that the alleged litigation bonus provided Waters with an undisclosed financial stake in the failure of the museum project, thus calling into question the court's finding that Waters acted in good faith when he managed the museum project. But given that Waters had resigned from any management role in 2006 and that the bonus was not supposedly promised until 2007 (when the litigation was filed), the court rejected this belated claim as "nonsensical." (Dkt. 370, at 29) (JA-1699).

SUMMARY OF ARGUMENT

The indemnification award was reasonable. The magistrate judge in his report and recommendation, and the trial court in its adoption of that report and recommendation, specifically and properly addressed all of AGM&M's objections to the hourly rates charged by Cafesjian's attorneys and to the methodology by which the tasks undertaken in defending the indemnified claim were calculated. The simple fact that the hourly rates charged by Cafesjian's winning team were *lower* than the rates charged by AGM&M's losing team provides presumptive and

---

[6] The court also considered and rejected AGM&M's alternative argument, not raised on appeal, that the litigation bonus amounted to the improper payment of a fact witness for testimony. (Dkt. 370, at 14-18) (JA-1684-1688).

overwhelming support for the reasonableness of that aspect of the indemnification award—a fact noted by both the magistrate judge and the trial court. The award also reflected a proper allocation of attorney billing entries to the indemnified claim, using approved methodology. Any supposed excessiveness in connection with specific tasks was addressed in the court's reduction of the amount of blended time attributable to the indemnified claim from 67 percent to 50 percent.

The new trial motion was properly denied. As the court held, it did not rely on the testimony of Waters, or the credibility of Waters, in rejecting AGM&M's claims against Cafesjian. Moreover, none of the instances of the alleged perjury went to any of the issues tried below. And AGM&M's belatedly raised argument that the alleged litigation bonus provided Waters with an incentive to scuttle the museum project was, as the court noted, "nonsensical." What AGM&M still fails to grasp is that Waters and Cafesjian resigned from the management of AGM&M in 2006—and the litigation incentive was not allegedly promised until 2007. In any event, the court analyzed each one of the alleged fiduciary breaches, finding virtually all to have been undertaken in good faith—and none to have caused AGM&M any harm.

ARGUMENT

I. THE TRIAL COURT CORRECTLY QUANTIFIED CAFESJIAN'S INDEMNIFICATION CLAIM.

A. Standard of Review

"[T]he reasonableness of an attorney's fees award is within the sound discretion of the trial court and is reviewed only for abuse of discretion." *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.,* 129 F.3d 143, 150 (D.C. Cir. 1997).

B. The AGM&M By-Laws Do Not Provide That Indemnified Fees Be Reasonable.

AGM&M's challenge to the indemnification award in its supplemental brief is directed entirely to the reasonableness of that award. As a preliminary matter, the AGM&M By-Laws do not require any award to be "reasonable." Rather, the relevant provision states that AGM&M shall indemnify "any and all expenses and liabilities actually and necessarily incurred by" a fiduciary. (PX-122) (JA-490-499). As the trial court observed, this is a matter of contract; AGM&M could have made the award contingent on a showing of reasonableness, but did not.

C. The Trial Court Correctly Determined That The Indemnification Award Was Reasonable.

Even if there was a requirement that the award be reasonable, the court clearly made that determination, contrary to AGM&M's argument that it did not. The standard of reasonableness permeates the report and recommendation adopted by the court. Magistrate Judge Kay noted how the Jones Day rates were

consistently lower than the K&L Gates rates, and settled on the 50% blended time assessment to address any alleged excessiveness in the amount of time expended on certain tasks. (Dkt. 352, at 9) (JA-1556). The trial court adopted the report and recommendation specifically because the award was "reasonable": "[the] proposed methodology sufficiently accounts for any potentially excessive billing entries, ensuring the overall award is reasonable." (Dkt. 372, at 5) (JA-1710).

D. In Quantifying The Indemnification Claim, The Trial Court Was Not Obligated To Consider Extrinsic Evidence Of Reasonableness.

AGM&M's next challenge to the award is that Cafesjian failed to make the required evidentiary showings regarding the reasonableness of his fees. (Appellants' Supplemental Brief "Br." at 14). But all of AGM&M's support for this argument is in the context of statutory fee-shifting statutes, where additional proof is often required, and is therefore irrelevant. *See, e.g., Miller v. Holzmann*, 575 F. Supp. 2d 2 (D.D.C. 2008); *Agapito v. District of Columbia*, 525 F. Supp. 2d 150 (D.D.C. 2007). Here, where a contractual right to attorneys' fees is at issue, the trial court may make an award of fees even when the requesting party puts in no evidence on this point. "[O]nce a contractual entitlement to attorney's fees has been ascertained, the determination of a reasonable fee award is for the trial court in light of the relevant circumstances." *Ideal Elec.*, 129 F. 3d at 150. A trial court has discretion to determine the nature and amount of proof necessary to determine

reasonableness, and may fix the amount of the fee *without hearing any evidence at all*. *FDIC v. Bender*, 127 F.3d 58, 64 (D.C. Cir. 1997). 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. *Id.*

E. Cafesjian Introduced Ample Extrinsic Evidence Supporting the Reasonableness of His Indemnification Request.

In any event, all of AGM&M's hoorah about a "required showing" is irrelevant in view of Cafesjian's proof of reasonableness. Cafesjian provided extrinsic evidence that the hourly rates of his lawyers were reasonable and used a reasonable and approved methodology to quantify the amount of fees attributable to tasks incurred in defending the indemnified fiduciary breach claim.

1. <u>The Hourly Rates of Cafesjian's Attorneys Were Reasonable.</u>

As discussed above, Cafesjian introduced proof through a survey in the *National Law Journal* that his lawyers' rates were below those of comparable firms. He also demonstrated that, in this case, the AGM&M lawyers charged their client higher rates than he was requesting in his fee application.

In its effort to discount the *National Law Journal* survey, AGM&M says that it "proves nothing." Why? According to AGM&M, because (1) it is a "generic" study of partner and associate rates; (2) neither Jones Day nor K&L Gates participated in the study; and (3) the study fails to address the rates charged by the particular lawyers retained by Cafesjian in this case. All of these objections

are meritless. First, other courts have relied on the *National Law Journal*'s survey as an indicator of market rates. *See Wilcox v. Sisson*, No. Civ. A. 02-1455, 2006 WL 1443981, at *3 (D.D.C. May 25, 2006). Second, whether Jones Day or K&L Gates responded to the survey is immaterial; the study sets forth market rates in this area, by which any firm's rates may be measured.

Third, while the survey did not address the rates of the particular lawyers retained by Cafesjian, that matter is easily addressed by the comparison of the Jones Day rates to the K&L Gates rates.[7] Yet according to AGM&M, this comparison is irrelevant because its lawyers were from Boston and Cafesjian's lawyers were from the District of Columbia, and because there was "no evidence" that the attorneys were of "comparable reputation, skill, and experience." First, as a procedural matter, these arguments were never raised below. Second, as a legal matter, it is entirely appropriate in assessing fee awards to review the rates charged by opposing counsel. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 n.18 (7th Cir. 1982) (rejecting argument that comparing rates charged by opposing counsel was improper, and noting that "rates charged by defendant's attorneys provide a useful guide to rates customarily charged in this type of case"); *Liberty Mut. Ins.*

[7] AGM&M ignores evidence in the record that in a fee dispute in another case several years before this lawsuit, a fee examiner found that the rates charged by Cafesjian's lead trial counsel were "consistent with what other lawyers with his level of experience charge in the DC area." *See* Dkt. 348, Exhibit B, at 6 § III (JA-1530).

Co. v. Continental Cas. Co., 771 F.2d 579, 588 (1st Cir. 1985) (comparing fee request to fees incurred by opposition to support reasonableness). Third, it has been held that the rates charged by the winning counsel are "presumptively reasonable if they are the same rates that counsel customarily charge other fee-paying clients for similar work." *Wilcox,* 2006 WL 1443981, at *2. Fourth, there is no proof for the (unlikely) proposition that lawyers in Boston command higher rates than lawyers in the District of Columbia for this type of work. Fifth, AGM&M's Boston lawyers were, in this case, practicing in the District of Columbia, and thus their fees should have reflected the rate for services provided in this area. And sixth, with respect to AGM&M's assertion regarding the "reputation, skill, and experience" of the lawyers, all that need be said is that the trial court had the unique opportunity to observe both legal teams in action, and could make its own determination of their comparative worth.

2. The *Laffey* Matrix Does Not Apply.

AGM&M also contends that the *Laffey* Matrix shows the unreasonableness of Jones Day's rates. But the *Laffey* Matrix, as well as the cases cited by AGM&M, all deal with the award of attorneys' fees where a federal statute grants "reasonable attorney's fees" under a fee shifting statute. *See, e.g., Heller v. District of Columbia*, 832 F. Supp. 2d 32, 48 (D.D.C. 2011) (considering reasonableness of attorneys' fees sought pursuant to 42 U.S.C. § 1988); *Miller v.*

Holzmann, 575 F. Supp. 2d 2 (D.D.C. 2008) (awarding fees in *Qui Tam* action brought under False Claims Act); *Campbell-Crane & Assocs. v. Stamenkovic*, 44 A.3d 924 (D.C. 2010) (considering award of attorneys' fees pursuant to District of Columbia Human Rights Act). Further, as both Magistrate Judge Kay and Judge Kollar-Kotelly noted, it is difficult to comprehend how AGM&M could argue that the *Laffey* Matrix applies here when their own lawyers charged a higher rate than Cafesijian's.[8] (Dkt. 352, at 4-5; Dkt. 372, at 2) (JA-1551-1552; JA-1714)).

3. The Trial Court's Award of 50% of Cafesjian's Blended Time Entries Was Reasonable.

AGM&M argues that Cafesjian should not be indemnified for any time entries he cannot discretely tie to the defense of the fiduciary duty claim. (Br. at 15). But there is no legal authority to support the contention that the court may not award attorneys' fees for time attributed to two different claims ("blended time"). And the cases cited by AGM&M are clearly inapposite. They address whether an indemnification claim is appropriate in the first instance, and not the method used to calculate the amount of indemnification. *See Rivers & Bryan, Inc.*

[8] Even if the *Laffey* Matrix were to apply in this case, the court was not required to blindly apply the generic listed rates regardless of the context of the litigation. While a fee matrix can be "a useful starting point," this Court has called it a "crude" method of analyzing fees. *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995). The appropriate comparison is "the prevailing market rates in the relevant community for attorneys of reasonably comparable skill, experience, and reputation." *Id.* at 1108.

v. HBE Corp., 628 A.2d 631, 637 (D.C. 1993); *Harris v. Howard Univ., Inc.*, 28 F. Supp. 2d 1, 24 (D.D.C. 1998).

Rather, 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. *Hensley v. Eckherhart*, 461 U.S. 424, 435 (1983). As a result, courts permit a fee applicant to apply a reasonable methodology to separate out indemnifiable time similar to the one offered by defendants. *Id.*; *see also Alpo Petfoods,* 1991 WL 1292963, at *12. That is exactly what occurred here and is wholly reasonable.

AGM&M then makes the conclusory assertion that the court "clearly erred" in finding that 50% of Cafesjian's blended time was devoted to the defense of the indemnifiable claim. (Br. at 16). In proposing 67%, Cafesjian set forth three separate metrics: (1) the division of the counts in the parties' Streamlined Complaints (leading to 62%); (2) the amount of pages spent by the parties on the various claims in their closing arguments at trial (leading to 72%); and (3) the relative amount of time spent addressing the various claims by the court in the legal section of its January 26, 2011 Memorandum Opinion (leading to 67%). Cafesjian then averaged those metrics and suggested an estimate of 67%. This percentage properly reflects the fact that AGM&M's breach of fiduciary duty claim was the driving force throughout the litigation, and was the major focus at trial.

Rather than explain why Cafesjian's proposed percentage is unreasonable, AGM&M proposes a metric of 19%, and even argues that an estimate closer to 9% is appropriate, on the ground that Cafesjian is entitled to indemnification for only one of the eleven claims litigated at trial. But no reasonable observer of the proceedings could remotely conclude that AGM&M's fiduciary claims accounted for 19%—let alone 9%—of the time spent in the proceedings. The fiduciary breach allegations dominated the trial. AGM&M accused Cafesjian of 22 separate categories of breach, from leadership issues, to accounting irregularities, to staffing deficiencies, to maintenance issues, to budgetary issues, to architectural issues, to planning issues, to publicity issues, to zoning issues, and on and on. The slate of fiduciary breaches even included the legal steps Cafesjian took to protect himself after one of AGM&M's trustees vowed to destroy him. (Dkt. 248, at 96) (JA-1159). The prominence of AGM&M's fiduciary breach allegations in this case cannot be overstated.

And in this regard, who else but the trial judge, who presided over the 12 day trial and the five years of litigation, would be in the best position to determine a reasonable percentage of the blended time. The court properly considered both parties' proposed metrics for the indemnification of blended time. In its sound discretion, and in view of its knowledge of the totality of the litigation and the prominence of the fiduciary duty claims, the trial judge concluded that the 50%

figure "reflect[s] the complexity and importance of the AGM&M breach of fiduciary duty claim while acknowledging that the other three claims regarding the Assembly were also litigated." (Dkt. 372, at 7) (JA-1712) (internal citation omitted). That ruling is hardly arbitrary.

F. Cafesjian's Attorneys' Fees Were Not Otherwise Excessive.

In its final argument that the indemnification award was unreasonable, AGM&M argues that the hours worked by Cafesjian's attorneys were "excessive, redundant, or otherwise unnecessary."[9] (Br. at 17). This argument is not only procedurally insufficient; it ignores the compensating factors arrived at below. Procedurally, once the party seeking fees submits an application accompanied by sufficiently detailed supporting documentation, "[t]he burden of proceeding then shifts to the party opposing the fee award, who must submit facts and detailed affidavits to show why the applicant's request should be denied." *Nat'l Assoc. of Concerned Veterans v. Sec'y of Defense*¸ 675 F.2d 1319, 1337-38 (D.C. Cir. 1982) (Tamm, J. concurring). The opposing party "does not meet his burden merely by asserting broad challenges to the application," such as stating "that the hours claimed are excessive and the rates submitted too high." *Id.* at 1338. Rather, the

---

[9] Appellants also make the new argument that the fee award should have been reduced by a further 10% because the majority of Appellee counsel's time entries were kept in block billing format. (Br. at 18-19). This argument was never raised below and has been waived. *See Chappell-Johnson v. Powell*, 440 F.3d 484, 489 (D.C. Cir. 2006).

opponent must "provide specific and contrary evidence to rebut the presumption of reasonableness." *Dickens v. Friendship-Edison PCS,* 724 F. Supp. 2d 113, 118 (D.D.C. 2010). AGM&M has failed to satisfy this burden.

Substantively, AGM&M conveniently fails to inform this Court of the months-long winnowing process engaged in by Magistrate Judge Kay and the parties in arriving at the final number of reimbursable hours. In their briefing below, AGM&M pointed to numerous specific entries that it alleged were excessive or otherwise non-indemnifiable.[10] While maintaining his disagreement with AGM&M's criticisms, but in an effort to eliminate disputes, Cafesjian agreed to deduct various entries, and did so on two separate occasions. (Dkt. 352, at 10-12) (JA-1557-1559).

Furthermore, any alleged excessiveness was more than adequately addressed in the report and recommendation. Rather than focus on specific time entries, Magistrate Judge Kay noted that his quantification at 50% accounted for any assertions regarding excessive time. (*Id.* at 8-9) (JA-1555-1556). Simply put, the award addressed any supposedly excessive billing.

[10] For example, AGM&M complained that Cafesjian had one or more attorneys billing for attending depositions or trial. In response, Cafesjian noted that AGM&M staffed depositions in the same manner and had the same number of attorneys at trial (including double the number of partners).

II. THE COURT PROPERLY DENIED AGM&M'S NEW TRIAL MOTION.

A. Standard of Review.

Rule 60(b) motions are directed to the sound discretion of the district court, and the denial of relief will be set aside on appeal only for an abuse of discretion. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988).

B. AGM&M Has Not Demonstrated Any Extraordinary Circumstances Requiring A New Trial.

As set forth above, the principal issue presented below was that Waters' supposed perjury regarding his compensation agreements undermined the credibility of all his testimony and that a new trial was therefore warranted. In an exhaustive analysis of the significance of Waters' testimony, the trial court correctly determined that "Waters' testimony and reliability as a witness was not dispositive of or critical to any of the Court's legal conclusions in this case . . . and [AGM&M was] not actually prejudiced by Waters' conduct." (Dkt. 370, at 29) (JA-1699). Similarly, the court considered whether evidence of Waters' supposed bonus would have had any effect on its decision, and found that it would not. (*Id.* at 16-18) (JA-1686-1688). In a bench trial, when the court has assessed the information supposedly withheld at trial and determined that this information would not have altered its conclusion, there is no reason to upset the final judgment. *See Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004) ("Misconduct alone, however, is not sufficient to justify the setting aside of a final

judgment . . . the victim of misconduct . . . [must] demonstrate actual prejudice.") (citations omitted). AGM&M failed entirely to show how any reliance on any of Waters' testimony was material to the court's findings and conclusions.

In any event, this argument has now been abandoned by AGM&M. In its place, AGM&M posits that the failure of Waters to disclose the supposed bonus demonstrates he did not act in good faith because he had an undisclosed incentive to "scuttle" the project so that it would not be completed by the 2010 reversionary date. And had the court known this, the argument goes, it would not have found that Waters (and by some unexplained extension, Cafesjian) had acted in good faith with respect to the museum project.

AGM&M did not raise this argument in its opening brief in support of its new trial motion.[11] Further, as the trial court noted, this argument is "nonsensical." (Dkt. 370, at 29) (JA-1699). Waters and Cafesjian stepped down from the management of AGM&M in 2006—yet the litigation bonus was not purportedly made until 2007. There is simply no way the litigation bonus could have affected anything Waters did while he was involved in the management of the museum project. And any actions Waters took with respect to the project after

[11] *See* Dkt. 370, at 30 (JA-1700) ("The extensive discussion of Waters' and Cafesjian's fiduciary duties on pages 14-18 is entirely new in Plaintiffs' Reply, as is the assertion that Cafesjian somehow induced Waters' purported breach of fiduciary duties.").

2007 were made while he was a litigant, and all were fully disclosed and transparent.

Although Waters remained a titular member of the board (although shut out of any meetings of the Buildings and Operations Committee, the only functioning AGM&M entity after 2007), the only alleged fiduciary breaches that occurred during this time period were his participation as a litigant in this lawsuit, his publication of articles in the *Armenian Reporter,* and his contact with the Historic Preservation Review Board ("HPRB"), asking it to suspend approval of plans for the museum project pending the litigation. The trial court specifically held that Waters acted in good faith and was justified in filing the lawsuit to protect Cafesjian's legal interests, and that he similarly acted in good faith in connection with the publication of the articles in the *Armenian Reporter* and his contacts with the HPRB. Moreover, neither the articles nor the HPRB contact caused one iota of damage to AGM&M. (Dkt. 248, at 164, 166) (JA-1227, 1229). In its brief on appeal, AGM&M is completely silent on these points and is unable to point to one act on the part of Waters that was affected by his supposed financial incentive to scuttle the project.

As the trial court also noted, the only "evidence" that AGM&M advances for the proposition that an incentive bonus even existed was the unverified (and subsequently dismissed) complaint. This is a far cry from the clear and convincing

evidence required to set aside a final judgment. Nevertheless, in a tortured attempt to try to avoid these inconvenient facts, AGM&M asserts that even if there is no objective reason to believe Waters' claims regarding his incentive bonus, what really matters is his subjective belief that he would gain financially if Cafesjian prevailed at trial. But again, as the trial court noted, there was no clear and convincing evidence that Waters believed the allegations in his complaint to be true, given its unverified nature. (Dkt. 370, at 7) (JA-1677).

Finally, AGM&M's argument that the subsequent indictment of Waters underscores the need for a new trial is also nonsensical. There is no connection between the substance of the allegations in the indictment and Waters' activities with respect to the museum project.

C. The Trial Court's Holding That AGM&M Waived Aspects Of Their New Trial Motion Was Appropriate.

1. In The Absence Of Any Showing of Prejudice, The New Trial Motion Was Properly Denied Under All Subsections of Rule 60(b).

AGM&M argues that the trial court incorrectly ruled that it had waived its ability to pursue relief under Rules 60(b)(1) (mistake, inadvertence, neglect or surprise), 60(b)(2) (newly discovered evidence), and 60(b)(6) (catch-all provision). (Br. at 20-22). In opposition to the new trial motion, Cafesjian argued that because the motion hinged upon purported perjury by Waters, the motion was properly viewed under Rule 60(b)(3) alone. (Dkt. 362, at 22). In its reply brief,

AGM&M did not contest this argument; therefore, any reliance on any other provision was waived. *See Moffett v. Prudential Life Ins. Co. of Am.*, No. 09–cv–1915 (RLW), 2012 WL 5989931, at *5 n.5 (D.D.C. Nov. 30, 2012) (plaintiff conceded arguments related to Rule 60 when it failed to address those arguments in its reply brief).

AGM&M's argument in this regard is much ado about nothing. As the court also noted, "the disposition of the [AGM&M's] motion would not change even if considered under the rubric of the other subsections of Rule 60(b) because the Plaintiffs failed to demonstrate actual prejudice from Waters' conduct." (Dkt. 370, at 5 n.5) (JA-1675). In the absence of any showing of any prejudice resulting from the application of any procedural rule, AGM&M's new trial motion fails. *See Lightfoot v. District of Columbia*, 555 F. Supp. 2d 61, 68 (D.D.C. 2008) (citations omitted).

And in this regard, it goes without saying that AGM&M cannot satisfy the heavy burden placed upon the proponent of a motion for a new trial. *See Ramos v. U.S. Dep't of Justice*, 588 F. Supp. 2d 38, 42 (D.D.C. 2008) (standards required for the granting of a new trial motion are stringent). Again, AGM&M is simply unable to show how any of the allegations made by Waters in his Minnesota complaint would have changed the outcome of this case.

Finally, AGM&M's argument that the trial court should have deemed their Rule 60(b)(1), (2), and (6) motion as "conceded" is absurd. AGM&M is incorrect that Cafesjian addressed only Rule 60(b)(3) in his opposition to the new trial motion. Faced with a new trial motion that predominantly, if not exclusively, argued that a new trial was warranted based upon Waters supposed perjury, Cafesjian reasonably argued that the motion was properly viewed only as a motion based upon fraud. And as the court recognized, Cafesjian noted that no matter which portion of Rule 60(b) the court considered, a new trial was not warranted. (Dkt. 362, at 22).

2. Whether the Trial Court Considered Waters' November 24, 2010 Testimony Was Immaterial.

Finally, AGM&M argues that the court erred in "ignoring" Waters' November 24, 2010 testimony. First, the trial court acted well within its discretion in failing to address this testimony, given that it was not raised until AGM&M's reply brief. *See Baloch v. Norton*, 517 F. Supp. 2d 345, 348 (D.D.C. 2007), *aff'd sub nom. Baloch. v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008); *see also Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) ("We need not consider this argument because plaintiffs … raised it for the first time in their reply brief.").

Second, the November 24 testimony adds nothing that was not covered in the earlier testimony already addressed by the court. All it covers, at most, was

another opportunity for Waters to disclose his alleged compensation arrangements, which was also the topic of the earlier testimony addressed by the court. More to the point, the court specifically held that even if it had considered this testimony, it still would have denied AGM&M's new trial motion. (Dkt. 370, at 10-11) (JA-1680-1681). Again, AGM&M can point to no prejudice as a result of the court's waiver holding.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court affirm the court's award of attorney's fees and its denial of the new trial motion.

DATE: October 29, 2013

Respectfully submitted,

/s/ John B. Williams

John B. Williams
Ronald F. Wick
Catherine R. Reilly
COZEN O'CONNOR
1627 I Street, NW, Suite 1100
Washington, DC 20006-4007
Telephone: (202) 912-4800
Facsimile: (202) 861-1905

Counsel for Appellees/Cross-Appellants

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 the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

Further, I hereby certify that on this 29th day of October 2013, copies of the foregoing document were emailed, mailed First Class, postage Prepaid and served electronically via the Court's ECF system to:

Helgi C. Walker
GIBSON DUNN & CRUTCHER
1050 Connecticut Avenue, NW
Washington, DC 20036

William S. Consovoy
Brendan J. Morrissey
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

Eric I. Abraham
Christina L. Saveriano
HILL WALLACK, LLP
202 Carnegie Center
Princeton, NJ 08543

/s/ John B. Williams
John B. Williams

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 5,986 words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

Further, I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

/s/ John B. Williams
John B. Williams

ADDENDUM

INDEX TO ADDENDUM

	Page
Federal Rule of Civil Procedure 60	A1

Rule 60: Relief from a judgment or order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.