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 BRIEF

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Dated: October 29, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The following is a complete list of all parties who have appeared before the United States District Court for the District of Columbia in the underlying civil action or who have appeared in this appeal:

Armenian Genocide Museum & Memorial, Inc.

Armenian Assembly of America, Inc.

Cafesjian Family Foundation, Inc.

Gerard L. Cafesjian

John J. Waters, Jr.

John J. Waters, Sr.

K&L Gates LLP

TomKat Limited Partnership

Stephen G. Mehallis

Hirair Hovnanian

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.) 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; (3) the district court's (Kollar-Kotelly, J.) February 20, 2013 denial of Plaintiffs' Rule 60 Motion, which will be published at --- F. Supp. 2d ---, and is available electronically at 2013 WL 619570; and (4) 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 will be published at --- F. Supp. 2d ---, and is available electronically at 2013 WL 619609. This supplemental brief relates to Rulings (3) and (4).

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. It is related to appeal No. 10-742, which was previously before this Court. It is also related to *Cafesjian v. Armenian Genocide Museum & Memorial, Inc., et al.*, Civil File No. 0004450-11 (D.C. Super. Ct.), which was filed on June 7, 2011, and seeks the involuntary dissolution of AGM&M.

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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

JURISDICTIONAL STATEMENT

The jurisdictional basis for the main appeal is set forth in the principal briefs. On May 9, 2011, the district court entered judgment on all claims other than Count VII of Defendants' Streamlined Counterclaims and certified that judgment for appeal. On April 30, 2012, while the appeal was pending, Plaintiffs sought relief from judgment under Federal Rule of Civil Procedure 60, which the district court denied in a final, appealable order on February 20, 2013. On March 7, 2013, the district court entered final judgment for Defendants on Count VII. On March 20, 2013, plaintiffs filed notices of appeal from both judgments. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES TO BE DECIDED

1. Whether the district court erred in ruling that Cafesjian and Waters are entitled to indemnification for $1,447,974.15 in attorneys' fees without determining that such sum represented the reasonable cost of defending against a single claim for relief.

2. Whether the district court erred in denying Plaintiffs' Rule 60(b) motion given post-trial revelations concerning Waters's conduct during the relevant timeframe, including Waters's belief that he possessed an undisclosed personal financial stake in the failure of the Museum Project.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included in the addendum to Plaintiffs' opening brief.

STATEMENT OF FACTS

A. Defendants' Claim For Indemnification Of Attorneys' Fees

Defendants sought indemnification for Cafesjian and Waters under Section 4.1 of the AGM&M bylaws, which provides:

> Unless otherwise prohibited by law or sections 4.3 and 4.4 of these By-Laws, the Corporation shall indemnify any Trustee or officer of the Corporation, any former Trustee or officer of the Corporation … against any and all expenses and liabilities actually and necessarily incurred by him or her or imposed on him or her in connection with any claim, action, suit or proceeding … in which he or she is or may be made a party by reason of having been such Trustee, officer, person, employee or agent; subject to the limitation, however, that there shall be no indemnification in relation to matters as to which he or she shall be adjudged in such claim, action, suit or proceeding to be guilty of a criminal offense or liable to the Corporation for damages arising out of his or her own negligence or misconduct in the performance of a duty to the Corporation.

PX-122, § 4.1 (JA-498); Dkt. 156-1 (¶¶ 98-100) (July 22, 2010) (JA-121).

The district court held that because Defendants were not liable to AGM&M for damages, they were entitled to indemnification "for expenses related to their defense of claims brought by Plaintiffs," Dkt. 248 at 184-85 (Jan. 26, 2011) (JA-1247-48), and referred consideration of the amount of indemnification to Magistrate Judge Kay.

Cafesjian and Waters sought $2,875,058.23 in attorneys' fees. Dkt. 275 at 4 (Mar. 24, 2011). AGM&M opposed, arguing: (1) indemnification is inappropriate for bills paid by the Cafesjian Family Foundation ("CFF")); (2) indemnification is only proper for time that Cafesjian and Waters spent defending against AGM&M's fiduciary-duty claim; (3) the hourly rates were not reasonable; and (4) many of the time entries were unreasonable. Dkt. 283 (Apr. 4, 2011). Cafesjian and Waters conceded that bills paid by CFF were excludable, Dkt. 286 (Apr. 8, 2011), and reduced the request to $1,934,932.89, Dkt. 348 (Mar. 9, 2012).

Magistrate Judge Kay found that only time spent defending against the fiduciary duty claim was indemnifiable. He concluded that Cafesjian and Waters should be indemnified for 50% of fees generated from "blended" time entries (*i.e.*, those not attached to any particular claim), as opposed to the 19% AGM&M proposed. Dkt. 352 at 8 (Apr. 24, 2012) (JA-1555). He further found that Cafesjian and Waters could be indemnified for Jones Day's full rates and that a lower rate, such as the D.C. United States Attorney's Office *Laffey* Matrix, was inappropriate because "[t]he indemnification provision does not cap hourly rates at which a trustee will be indemnified," it "does not use language that would signal a desire to follow the *Laffey* Matrix, for example, that AGM&M would indemnify counsel for trustees at a 'reasonable hourly rate,'" and Plaintiff's attorneys' higher rates "suggest[ed] that a trustee's indemnification pursuant to the bylaws would not

be limited to *Laffey* rates." *Id.* at 4-5 (JA-1551-52). He recommended indemnification in the amount of $1,461,658.54. *Id.* at 12 (JA-1559).

AGM&M timely filed objections to the recommendation, Dkt. 358 (May 11, 2012), which the district court denied, Dkt. 372 (Feb. 20, 2013) (JA-1706). The district court determined that the 50% metric was not clearly erroneous or contrary to law and that using Jones Day's full rates is acceptable because the Bylaws do not indicate that only "reasonable" rates would be indemnified. *Id.* at 8-9 (JA-1713-14). It also refused to make further reductions for inefficiencies and similar problems with time entries. *Id.* at 13 (JA-1718). After making minor adjustments not pertinent here, the court awarded $1,447,974.15. *Id.* at 14 (JA-1719).

B. Plaintiffs' Motion For A New Trial

At trial, Waters testified that he was no longer employed by Cafesjian and was asked about any remaining financial ties between them:

> Q. Now, are you being paid to be here today?
> A. No.
> Q. Have you been paid by Mr. Cafesjian since you departed his employ?
> A. I guess -- yes, would be the short answer.
> Q. How much have you been paid?
> A. My compensation is generally in the form of reimbursement of a minor expenses.
> Q. So whatever travel expense and accommodations?
> A. Some.
> Q. But not all?
> A. No, most of them I pay on my own.
> Q. And you receive no other compensation from him?
> A. No.

11/15 AM Tr. 34-35 (JA-353-54).

On November 24, 2010, Waters was again questioned on this topic:

> Q. I think – I'm not going to go over anything we went through last week. I'll just try to establish a few points for clarification. I think you told us last week that you were no longer employed by Cafesjian, correct?
> A. Yes.
> ...
> Q. You were also working in connection with the litigation that continued on after your departure from Cafesjian with regard to the claims against them?
> A. Yes.
> Q. And you have an arrangement or some sort of agreement to continue on as a representative or consultant in connection with the litigation against them?
> A. Yes.
> Q. And what is the -- can you just tell us what the arrangement is, other than to cooperate and assist?
> A. Basically I'm volunteering my time and effort to Mr. Cafesjian, but obviously expending time and energy on my own behalf.

11/24 AM Tr. 23-24 (JA-453-54).

On March 13, 2012, Waters filed a *pro se* complaint against Cafesjian in the United States District Court for the District of Minnesota seeking, *inter alia*, special pay arising from the termination of his employment. Dkt. 354-1 (Apr. 30, 2012) (JA-1561). Waters alleged that, in 2007, Cafesjian

> first promised and thereafter made repeated promises to Waters of a "significant bonus" in the event of a positive outcome in the AGM&M Litigation. Cafesjian led Waters to believe that "significant" would be 1% to 2% of the value of the assets recovered by Cafesjian in the AGM&M Litigation. Cafesjian defined a positive outcome of the AGM&M Litigation as Cafesjian gaining control over

> the museum and memorial project, either through Cafesjian control of the AGM&M or by the transfer of assets from the AGM&M to the CFF.

Id. (¶ 78) (JA-1581). Waters further alleged that he had acted "in reliance on Cafesjian's promise" since "the outset of the AGM&M Litigation in 2007," *id.* (¶ 79) (JA-1581), and that, due to his work, "assets valued in excess of $40,000,000.00 have been transferred from AGM&M to the CFF," *id.* (¶ 80) (JA-1581). Cafesjian denied Waters's allegations and counterclaimed that "Waters created bank accounts using Cafesjian's personal funds and used them to embezzle at least $2.9 million over the course of his employment." *Waters v. Cafesjian*, No. 12-648, 2013 WL 2278016, at *2 (D. Minn. May 9, 2013).

In light of these revelations, Plaintiffs filed a motion for relief from judgment and for a new trial pursuant to Federal Rule of Civil Procedure 60(b)(1), (2), (3), and (6). Dkt. 354 (Apr. 30, 2012). Cafesjian and Waters separately opposed. Case No. 08-cv-1254, Dkt. 283 (May 25, 2012) (Waters); Case No. 08-cv-1254, Dkt. 362 (May 25, 2012) (Cafesjian). The district court denied the motion, finding that Plaintiffs had waived all grounds except under Rule 60(b)(3) by not addressing them on reply, and, therefore, viewing the issue exclusively through the lens of "fraud, misrepresentation, or misconduct." Dkt. 370 at 33 (Feb. 20, 2013) (JA-1703). On May 9, 2013, the District of Minnesota granted summary judgment to Cafesjian on Waters's claims. *Waters*, 2013 WL 2278016, at *4-8.

On August 5, 2013, Waters was indicted on 26 counts of mail and wire fraud, income tax evasion, and false income tax returns. *See* Indictment, *United States v. Waters*, No. 13-cr-00203 (D. Minn. filed Aug. 5, 2013).

SUMMARY OF ARGUMENT

Both the award of attorneys' fees and denial of the Rule 60(b) motion should be reversed. AGM&M has no obligation to indemnify Cafesjian and Waters because they breached their fiduciary duties to AGM&M. Br. 61-64; Reply 48; PX-122, § 4.3 (JA-498-99). Even setting that aside, the award was excessive. The district court incorrectly refused to determine whether the fee petition was "reasonable" because, in its view, AGM&M's Bylaws did not so limit the right to indemnification. Irrespective of the Bylaws, D.C. law holds *all* fee petitions—including those arising from contractual indemnification—to a reasonableness standard. Moreover, the Bylaws require the fees to be "necessarily incurred," which arguably imposes an even higher bar to indemnification.

Under the correct standard, the award is unsustainable as a matter of both rates and hours. First, Cafesjian and Waters made no showing that Jones Day's full rates were reasonable, offering only a self-serving affidavit and an irrelevant magazine article as support. The court instead should have used the respected *Laffey* Matrix as the benchmark. Had it done so, the fee award would have been substantially lower.

Second, the fee award was unreasonable in terms of hours. Instead of segregating time spent defending the fiduciary duty claim, the entries were "blended"—*i.e.*, they included time spent on other activities. That should render all such entries excludable. Regardless, the determination that 50% of "blended" time is attributable to defending *one* of *eleven* claims is without foundation. The award also should be reduced because of "block billing" and other serious inefficiencies that the district court acknowledged. The conclusion that the 50% figure already accounted for this concern confused how much "blended" time was attributable to the indemnifiable claim with whether the amount of time spent defending *that* claim was reasonable.

The district court also erred in rejecting the Rule 60(b) motion. Finding that Plaintiffs waived reliance on Rule 60(b)(1), (2), and (6) by relying on them in the motion but not addressing them on reply is obviously incorrect. The conclusion that Plaintiffs waived reliance on certain testimony by not discussing it until reply is equally flawed. That testimony merely buttressed the argument made in the motion that new information regarding Waters's financial motivation warranted Rule 60(b) relief and, in any event, Defendants were not prejudiced as they filed a surreply.

On the merits, there is clear and convincing evidence that Rule 60(b) relief is warranted. Waters has now acknowledged his belief that scuttling the Museum

Project would inure to his financial benefit and is now under federal indictment for embezzling from Cafesjian during the relevant timeframe. *See* Indictment ¶ 9 (alleging conduct from 1999-2012). Waters's concealment of these crucial facts at trial bears directly on the (incorrect) conclusion that he acted in "good faith" to protect Cafesjian's interests—not to frustrate the Museum Project for his own ulterior reasons—and thus prejudiced Plaintiffs' ability to prosecute their breach of fiduciary duty claim.

ARGUMENT

I. THE DISTRICT COURT ERRED BY INDEMNIFYING CAFESJIAN AND WATERS FOR ATTORNEYS' FEES NOT REASONABLY OR NECESSARILY INCURRED.

A. Standard of Review

The district court's interpretation of D.C. law regarding indemnification is reviewed *de novo*. *FDIC v. Bender*, 127 F.3d 58, 63 (D.C. Cir. 1997). The "reasonableness of an attorneys' fees award" is reviewed "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 District Court's Fee Award Was Unreasonable.

Under D.C. law, which governs here, courts employ the lodestar method, which "involves multiplying the number of hours reasonably expended by a reasonable hourly rate," in calculating a fee award pursuant to contractual indemnification. *Bender*, 127 F.3d at 66 n.5. The district court erred as a matter of

D.C. law by failing to limit indemnification to "reasonable" fees. This legal error resulted in a patently unreasonable fee award.

1. The District Court Erred In Failing To Adopt A "Reasonable" Rate For Its Lodestar Calculation.

a. The District Court Erroneously Found That The Hourly Rates Included In The Lodestar Calculation Need Not Be Reasonable.

Cafesjian and Waters proposed using Jones Day's full hourly rates as part of the lodestar calculation. But they submitted no evidence that those rates are "reasonable"—*i.e.*, that they are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995). They based the fee request on the bare fact that Jones Day's bills were calculated using that firm's standard rates. Dkt. 275, 275-1.

After Plaintiffs countered that the *Laffey* Matrix rates should be used instead, Cafesjian and Waters switched gears and argued that the rates *need not be reasonable* because the Bylaws allows for recovery of all fees "actually incurred." Dkt. 286 at 11 (JA-1398). The district court agreed, finding that the Bylaws "d[id] not use language … that AGM&M would indemnify counsel for trustees at a 'reasonable hourly rate,'" and that "the indemnification provision does not cap hourly rates at which a trustee will be indemnified for legal representation." Dkt. 352 at 4 (JA-1551); Dkt. 372 at 9 (JA-1714). The court found cases AGM&M

cited "inapposite" because they addressed the award of "reasonable' attorney's fees to the prevailing party." Dkt. 372 at 9 (JA-1714). The court erred under both D.C. law and the Bylaws.

First, the ruling conflicts with D.C. law. Indemnification "provisions are sustained '*only* as an indemnity for the *reasonable* fees necessarily and properly paid or incurred[.]'" *Bender*, 127 F.3d at 63 (citation omitted) (emphasis added). Irrespective of the Bylaws, the court had a duty under D.C. law to ensure the fees were reasonable. *Ideal Electric*, 129 F.3d at 150. If the district court held that D.C. law lacks a reasonableness command, it legally erred; if it declined to evaluate the reasonableness of the rates notwithstanding D.C. law, it abused its discretion. Either way, the decision must be reversed.

Second, the district court misinterpreted the Bylaws, which allow for indemnification "against any and all expenses and liabilities actually *and necessarily* incurred." PX-122, § 4.1 (JA-498) (emphasis added). The district court effectively ignored the word "necessarily" and considered only whether the fees were "actually" incurred. But all words must be given effect. *Hunt Constr. Grp., Inc. v. Nat'l Wrecking Corp.*, 587 F.3d 1119, 1121 (D.C. Cir. 2009). The ordinary definition of "necessarily" means "of necessity" or "inevitable." Webster's II New College Dictionary 748 (3d ed. 2005). The district court never

considered whether Cafesjian and Waters had shown that Jones Day's full rates were a "necessity" or "inevitable"—let alone "reasonable."

Moreover, the Bylaws prohibit indemnification if, at the time payment is to be made, AGM&M is "deemed to be a private foundation" and making a payment would "constitute an act of self-dealing or a taxable expenditure" under the Internal Revenue Code. PX-122, § 4.3 (JA-498-99). AGM&M became a private foundation as of January 1, 2010. Dkt. 372 at 3 (JA-1708); Dkt. 368-1 (E. Hovnanian Declaration) (July 10, 2012) (JA-1668). Under the pertinent Treasury regulations, AGM&M's indemnification of fees not "*reasonably* incurred" would be self-dealing and prohibited. 26 C.F.R. § 53.4941(d)-(2)(f)(3) (emphasis added).

b. Jones Day's Rates Are Not "Reasonable."

The reasonableness of fees "is to be determined by the trial judge 'on an individual basis.'" *Bender*, 127 F.3d at 63 (citation omitted). The fee petitioner must "produce satisfactory evidence—in addition to the attorneys' own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Covington*, 57 F.3d at 1109.

One court-approved method of demonstrating a "reasonable" rate is the *Laffey* Matrix. *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988); *Covington*, 57 F.3d at 1105 & n.14, 1109. This matrix is based

on the rates allowed by the District Court in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), updated to present by the D.C. United States Attorney's office. At a minimum, it provides "a useful starting point" that can be supplemented with "surveys to update the matrix; affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases." *Covington*, 57 F.3d at 1109. Once that evidence is presented, the court determines the "reasonable" rate in light of all circumstances. *Bender*, 127 F.3d at 66.

Cafesjian and Waters made only the slightest attempt to show that their rates are reasonable. Only after Plaintiffs opposed their unsupported motion and proposed using the *Laffey* Matrix did they belatedly attempt to justify Jones Day's rates as reasonable, comparing them to those charged by Plaintiffs' counsel (K&L Gates) and appending a National Law Journal survey to their reply brief. Dkt. 286 at 12-13 (JA-1399-1400). But the rates charged by Plaintiffs' counsel are of little use here because they are not based in this legal market and because Waters and Cafesjian presented *no* evidence that the attorneys at the two firms are of comparable reputation, skill, and experience. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); *Covington*, 57 F.3d at 1108. The survey also proves nothing. It

appears that neither Jones Day nor K&L Gates participated in it and, in any event, it is a generic study of "partner" and "associate" rates offering no insight into the pertinent issues: rates for *these* services, by attorneys with *this* experience, in *this* market. Tellingly, Cafesjian and Waters declined to provide any additional context for the survey and merely stapled it to their brief. Dkt. 348-4 (JA-1544).

This evidence pales in comparison to the showing required to accept full rates as "reasonable." *Compare Miller v. Holzmann*, 575 F. Supp. 2d 2, 11-21 (D.D.C. 2008), *amended in part and vacated in part on other grounds by U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 786 F. Supp. 2d 110 (D.D.C. 2011), *with Martini v. Fed. Nat'l Mortg. Ass'n*, 977 F. Supp. 482, 486 (D.D.C. 1997). In fact, the district court could have declined to make any award here given the failure to present *any* evidence of reasonableness. *Agapito v. District of Columbia*, 525 F. Supp. 2d 150, 154 (D.D.C. 2007).

In any event, the *Laffey* Matrix, which has "widespread acceptance" as "the benchmark for reasonable fees" in the district court, *Miller*, 575 F. Supp. 2d at 18 n.29; *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 48 (D.D.C. 2011), and the D.C. Court of Appeals, *Campbell-Crane & Associates, Inc. v. Stamenkovic*, 44 A.3d 924, 947-48 (D.C. 2012), shows the unreasonableness of Jones Day's rates. The associate rates were $100 to $200 per hour higher than their class year; Mr. Williams's rate was about $300 per hour higher than the *highest* rate. *Compare*

Dkt. 283 at 22 (*Laffey* rates) (JA-1385), *with* Dkt. 286 at 13 (Jones Day rates) (JA-1400). Absent evidence that these higher rates are attributable to the novelty, difficulty, or skill needed to handle this case, the *Laffey* Matrix is not only "a useful starting point," *Covington*, 57 F.3d at 1109, but the ending point, *Heller*, 832 F. Supp. 2d at 48-49; *Miller*, 575 F. Supp. 2d at 18.

2. The District Court Erred In Failing To Adjust The Lodestar To Include Only A "Reasonable" Number Of Hours.

a. The District Court Erroneously Concluded That 50% Of All "Blended" Time Entries Is Indemnifiable.

Although Cafesjian and Waters pled indemnification of attorneys' fees under the AGM&M Bylaws as an affirmative counterclaim, counsel failed to maintain records in a way that would have allowed for much of the time spent in defense of that claim to be distinguished from time spent on other activities. They then sought to capitalize on that failure by seeking indemnification for 67% of the fees generated from these "blended" time entries, Dkt. 275 at 12, which the district court reduced to 50%, *supra* at 3-4.

But Cafesjian and Waters should not be indemnified for *any* time entries they cannot discretely tie to defense of the fiduciary duty claim. "[T]he burden of proof [is] on the party seeking indemnification," *Rivers & Bryan, Inc. v. HBE Corp.*, 628 A.2d 631, 637 (D.C. 1993); *Harris v. Howard Univ., Inc.*, 28 F. Supp. 2d 1, 15 (D.D.C. 1998), and Cafesjian and Waters cannot meet that burden. They

tacitly admitted that the "blended" time entries are not readily attributable to any particular claim—including defense of the fiduciary duty claim—by placing them into the "blended" category in the first place.

Even if Cafesjian and Waters are entitled to some reimbursement for "blended" entries, the court clearly erred by finding that 50% of such time was devoted to defense of the sole indemnifiable claim. Magistrate Judge Kay reasoned that 67% "overstates" the importance of the claim,[*] and 19% "understates" it, whereas "50 percent is closer to an optimum and reasonable percentage" because it "reflects 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. 352 at 8 (JA-1555). But that reasoning is plainly arbitrary; it could have supported a 66% figure, a 20% figure, or any figure in between. The ruling provides no factual basis to which this Court might reasonably defer.

AGM&M's proposed metric of 19% is far more consistent with the role of the fiduciary duty claim played in the overall litigation. At best, Cafesjian and Waters may be entitled to indemnification for defending against *one* of the *eleven*

[*] Cafesjian and Waters declined to object to the Magistrate Judge's adoption of the 50% figure, and consequently have not preserved any argument that some higher metric—including their proposed 67% figure—is appropriate. Notice, Dkt. 355 (May 8, 2012).

claims litigated to trial; a metric closer to 9% is therefore presumptively appropriate. Moreover, half the litigation focused on Plaintiffs' narrative that Cafesjian and Waters mismanaged AGM&M and committed wrongful acts, while the other half focused on Defendants' narrative that AGM&M and the Assembly failed to honor their obligations to Cafesjian. The half dealing with Plaintiffs' claims consisted of four counts: (I) breach of fiduciary duties owed to AGM&M; (II) breach of fiduciary duties owed to the Assembly; (III) breach of the duty of good faith and fair dealing; and (IV) misappropriation of trade secrets. Of the four, Counts I and III clearly predominated, but they also overlapped each other. Reply 8-14, 39-44; Dkt. 162, ¶¶ 290-298 (Aug. 18, 2010) (JA-184-87). Because of the overlap, it is difficult to say that counsel expended *any* extra effort to specifically to defend against the breach of fiduciary duty claim. If anything, then, the conclusion that about one-fifth of the total effort expended in this case was devoted exclusively to the defense of the fiduciary duty claim is generous.

b. The District Court Erroneously Failed To Adjust For Block Billing And Inefficiencies.

Because "excessive, redundant, or otherwise unnecessary" hours are not reimbursable, *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), a party must submit "sufficiently detailed information about the hours logged and the work done" so the court may "make an independent determination whether or not the hours claimed are justified." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675

F.2d 1319, 1327 (D.C. Cir. 1982); *Bender*, 127 F.3d at 66 n.5. When the supporting documents fall short, fixed deductions on a percentage basis are appropriate. *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 973-74 (D.C. Cir. 2004).

Cafesjian and Waters submitted hundreds of pages of time entries, nearly all of which are kept in block-billing format. Dkt. 275-3, 275-4 (Mar. 24, 2011) (JA-1288, 1324). AGM&M detailed how the fee petition sought indemnification for more than the "reasonable" number of hours spent defending one claim. Dkt. 283 at 9-17 (JA-1372-80). The court agreed with many of these criticisms. For example, it criticized billing 50 hours to draft a six-page surreply; summer associates researching "legal standards for damages for summary judgment motion" for 15.5 hours and observing a deposition; hours spent making deliveries to and retrieving documents from the district court; and time spent by Minnesota counsel unnecessarily familiarizing themselves with proceedings in this forum. Dkt. 352 at 8-9 (JA-1555-56).

Yet the district court declined to reduce its award by even one dollar. Instead, it found that the 50% figure already accounted for these issues, as it "reflect[ed] that in the context of years of litigation, with thousands of hours of fees billed by Defendants' counsel, not every time entry is reasonable." *Id.* at 8 (JA-1555); Dkt. 372 at 13 (JA-1718). This was legal error. The 50% figure was

used (albeit incorrectly) to determine what percentage of the blocked-billed time represented time spent defending against the AGM&M fiduciary duty claim. But having resolved that issue, the district court still needed to decide how much of the *indemnifiable* time was reasonably charged for defending against *that* claim. The court confused distinct issues.

Once this legal error is corrected, there is no question that the 50% figure should be reduced to account for "excessive, redundant, or otherwise unnecessary" billing. The use of block billing is reason enough to impose a substantial reduction given the strain it imposes on the court. *Role Models Am., Inc.*, 353 F.3d at 971. The district court should have reduced any award by at least 10% for block billing. *Miller*, 575 F. Supp. 2d at 37-38.

The other issues that the district court and Plaintiffs identified also warrant reductions. Of particular note are the many time entries in which attorneys and paralegals billed for work that is administrative or clerical in nature. Filing documents through the ECF system, correspondence regarding electronic logins, placing calls to the court clerk regarding ECF issues, and sending attorneys and paralegals to court to deliver or retrieve documents is not legal work and should be treated as an overhead expense. *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989). Yet tasks like these appear throughout the bills. Dkt. 283 at 17 (citing Dkt. 275-3 at 18, 22, 23, 43, 52, 53, 87, 242, 243, 250, 257, 334) (JA-1380). The

Court should deduct an additional 5% from the bills because of these and other improper expenditures.

II. THE DISTRICT COURT ERRONEOUSLY DENIED THE MOTION FOR A NEW TRIAL GIVEN THAT WATERS HAD A PREVIOUSLY UNDISCLOSED PERSONAL STAKE IN THE FAILURE OF THE MUSEUM PROJECT.

A. Standard of Review

The denial of a Rule 60(b) motion is reviewed for abuse of discretion. *Summers v. Howard Univ.*, 374 F.3d 1188, 1192 (D.C. Cir. 2004). Nevertheless, if the "decision to deny relief under Rule 60(b) was 'rooted in an error of law,'" the Court "must remand for the court to consider anew whether to exercise its discretion under the correct legal standard." *Marino v. DEA*, 685 F.3d 1076, 1080 (D.C. Cir. 2012).

B. The District Court Legally Erred By Holding That Plaintiffs Waived Key Aspects Of Their New Trial Motion.

The district court found that although Plaintiffs had clearly raised, argued, and relied upon Rule 60(b)(1), (2) and (6) in their motion, Dkt. 275 at 25-27, 33-34, they waived their ability to pursue relief under those provisions by failing to address them on reply, Dkt. 370 at 4 (citing *Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003)) (JA-1674). That decision is incorrect as a matter of law. The motion and supporting memorandum preserved those grounds for relief; Plaintiffs were not required to reiterate them on reply to preserve them. Indeed, Plaintiffs were under no obligation to file a reply

at all. *See* D.D.C. Local Rule 7(d) ("Within seven days after service of the memorandum in opposition the moving party *may* serve and file a reply memorandum.") (emphasis added).

If anything, Defendants have the waiver problem. Plaintiffs only addressed Rule 60(b)(3) in their reply because it was the sole argument Defendants addressed in the body of their opposition. After all, a reply brief's function is to "respond to the respondent's arguments or explain a position in the initial brief that the respondent has refuted." *Elizabethtown Water Co. v. Hartford Cas. Ins. Co.*, 998 F. Supp. 447, 458 (D.N.J. 1998). Defendants' discussion of Rule 60(b)(1), (2) and (6) was relegated to a footnote, Case No. 08-cv-1254, Dkt. 284 at 22 n.1, which is insufficient to preserve the argument, *Pardo-Kronemann v. Donovan*, 601 F.3d 599, 606-07 (D.C. Cir. 2010). The district court thus should have deemed the Rule 60(b) motion conceded under Local Rule 7(b).

The district court's reliance on *Hopkins* proves the point. That decision correctly reiterated that "when a plaintiff files an *opposition* to a dispositive motion and addresses only certain arguments …, a court may treat those arguments that the [party] failed to address as conceded." 284 F. Supp. 2d at 25 (emphasis added). *Hopkins* is problematic for Defendants—not Plaintiffs.

The district court also erred in finding that Plaintiffs' failure specifically to reference Waters's November 24, 2010 testimony in their motion precluded

reliance on it. Dkt. 370 at 10, 12-13 (JA-1680, 1682-83). The motion argued that Rule 60(b) relief was warranted because facts discovered after trial undermined the conclusion that Cafesjian and Waters discharged their duties as officers and directors of AGM&M in good faith. The November 24 testimony was merely *additional support* for that argument—not a new "argument."

In any event, there is no reason to ignore the November 24 testimony, as Defendants were not prejudiced. The basis for the rule that a court does not ordinarily entertain arguments raised for the first time on reply is that it is unfair to do so where the other side has not had an opportunity to respond. *Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 196 (D.C. Cir. 1992). Here, however, Defendants filed a surreply and thus had a full and fair opportunity to respond. Because Defendants were not prejudiced, the district court should have considered the November 24 testimony. *Goodrich v. Teets*, 510 F. Supp. 2d 130, 143 (D.D.C. 2007).

C. The District Court Should Have Granted The Rule 60(b) Motion.

The district court held that Plaintiffs' contractual and fiduciary duty claims failed principally because Cafesjian and Waters acted in "good faith." Jan. Op. 145-46, 159-60, 161-67, 173 (JA-1208-09, 1222-23, 1224-30, 1236). That 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. But setting that aside, critical

evidence withheld during trial shows that Waters did not act in "good faith." This important revelation warrants relief under Rule 60(b).

Waters testified that he had no ulterior motive to undermine the Museum Project; he was simply a dutiful agent protecting Cafesjian's interests. To that end, Waters testified at trial that Cafesjian was not paying him and that he was "volunteering [his] time and effort to Mr. Cafesjian" without disclosing his belief that he possessed a contingent interest in the Museum Project's failure. 11/15 AM Tr. 34-35 (JA-353-54); 11/24 AM Tr. 23-24 (JA-453-54). But we now know, by clear and convincing evidence, that since 2007 Waters has believed that he stood to profit. In his complaint, Waters claims he was promised a "'significant bonus' in the event of a positive outcome" in this litigation. Dkt. 354-1 (¶ 78) (JA-1581). Waters understood "significant" to mean 1% to 2% of the value of assets Cafesjian stood to recover. *Id.* In other words, Waters has publicly acknowledged that Cafesjian promised him hundreds of thousands of dollars if he could keep the Museum Project from being completed by the 2010 deadline.

No matter how this revelation is framed, Plaintiffs are entitled to relief. The trial was infected by "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1) because the risk of prejudice to Plaintiffs is high, Plaintiffs filed their motion as soon as they became aware of the information, and the error was not of their making. *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447

F.3d 835, 838 (D.C. Cir. 2006). Alternatively, it should be considered "newly discovered evidence" or "fraud, misrepresentation, or misconduct" under Rule 60(b)(2) or (b)(3), respectively. Waters is an adverse party; he has harbored his belief regarding the arrangement with Cafesjian since 2007; he concealed it from Plaintiffs and it thus could not be uncovered at trial; the new fact effects a substantive change in the factual narrative underpinning two of Plaintiffs' claims; and the fact's absence from the original proceeding prejudiced Plaintiffs' ability to present a full and fair factual picture of Waters's activities between 2007 and 2010. *Lans v. Digital Equip. Corp.*, 252 F.3d 1320, 1325-26 (Fed. Cir. 2001); *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995).

Finally, relief is warranted under Rule 60(b)(6). Despite Plaintiffs' attempts to extract information from Waters concerning his possible motivations for aiding the Cafesjian "side," Waters did not disclose until *after* trial that he believed that he had a significant financial incentive to do everything he could to see that the Museum Project did not come to fruition. The importance of the absence of that fact to the district court's "good faith" finding cannot be overstated. These circumstances, particularly in light of the district court's other serious legal errors, are sufficiently "extraordinary" to warrant relief. *Salazar ex rel. Salazar v. District of Columbia*, 633 F.3d 1110, 1120 (D.C. Cir. 2008).

The district court rejected the Rule 60(b) motion because, *inter alia*, there was not clear and convincing evidence that Cafesjian *actually* promised the "special bonus" and because it did not base any of its factual or legal conclusions on Waters's credibility. Dkt. 370 at 6-7 (JA-1676-77). The Minnesota court has since found against Waters on his claims. *Supra* at 7. But focusing on whether Cafesjian actually made these promises and credibility determinations misapprehends the issue; what matters—at least under the district court's erroneous "good faith" standard—is Waters's *belief* that he would gain financially by scuttling the Museum Project. Had Waters's motivations been known at trial, it would have severely undermined his claim that he was at all times acting in good faith to protect Cafesjian's interests.

That Waters has now been indicted for the commission of financial crimes *against* Cafesjian throughout the relevant timeframe only serves to underscore the need for a new trial. These revelations, which also were not known at the time of trial, further call into doubt the district court's conclusion that Waters' actions to undermine the Museum Project—ostensibly undertaken as Cafesjian's agent—were a "good faith" effort to protect the interests of his principal. *See* 11/19 AM Tr. 82-83 (JA-406-07). By strategically hiding all of this important information, Waters clearly prejudiced AGM&M's ability to prove that Waters and Cafesjian

were trying to make it impossible for AGM&M to perform and breached fiduciary duties to AGM&M by doing so. Br. 33-36; Reply 8-14.

CONCLUSION

For these reasons, the district court's ruling regarding attorneys' fees and Plaintiffs' Rule 60(b) motion should be reversed.

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 6,000 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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