IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DYAMONE WHITE; DERRICK SIMMONS; TY PINKINS; CONSTANCE OLIVIA SLAUGHTER HARVEY-BURWELL,
Plaintiffs,
vs.
STATE BOARD OF ELECTION COMMISSIONERS; TATE REEVES *in his official capacity as Governor of Mississippi*; LYNN FITCH *in her official capacity as Attorney General of Mississippi*; MICHAEL WATSON *in his official capacity as Secretary of State of Mississippi*.
Defendants.

4:22-cv-00062-SA-JMV

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO AND APPEAL OF MAGISTRATE JUDGE'S ORDER ON DEFENDANTS' MOTION FOR FEES

Plaintiffs file this Reply Memorandum in Support of their Objections to and Appeal of Magistrate Judge Virden's Order on Defendants' Motion for Fees. For the reasons stated herein, as well as those set forth in Plaintiffs' Memorandum of Law in Support of their Objections and Appeal (ECF No. 178, the "Appeal"), the Court should grant Plaintiffs' requested relief and reduce the fee award to a total of $44,829.54.

INTRODUCTION

Plaintiffs stipulated to the payment of "reasonable expert fees and costs actually incurred" by the defense experts' preparation of sur-rebuttal reports. ECF No. 143 at 3 (Plaintiffs' Stipulation); ECF No. 177 (Order) at 3. And Plaintiffs have never objected to paying reasonable fees. In fact, on March 1, 2024, Counsel for the Parties conferred and agreed to the following settlement pending resolution of Plaintiffs' Appeal: Plaintiffs will pay Defendants the undisputed amount of $44,829.54 via check to Wise Carter Child & Caraway, P.A., within 60 days. But beyond that undisputed reasonable fee award, Plaintiffs object to the $400 hourly rate and excessive number of hours billed by Dr. Swanson and Mr. Bryan, which are not reasonable.

In addition to impermissibly seeking nearly $30,000 in *attorney's* fees from Plaintiffs, which the Magistrate Judge rightly rejected, Defendants would read reasonableness entirely out of the stipulation and the legal standard governing expert fee awards in this district. *See* ECF No. 179 ("Opposition"). First, Defendants insist that the Magistrate Judge already considered the reasonableness of the fees sought, but there is no evidence of any such consideration in the Order. Indeed, Defendants' fee motion never even attempted to substantiate their requested rate of $400 an hour, making it virtually impossible for the Magistrate Judge to find that rate reasonable. Second, Defendants discuss *why* Dr. Swanson performed EI analysis in preparing his sur-rebuttal report, but they neither dispute Plaintiffs' assertion that Dr. Swanson is not an expert in EI, nor explain why he should nevertheless be compensated at an expert rate for such work despite his

lack of expertise. Finally, Defendants concede that the Magistrate Judge committed error in misidentifying non-expert Mr. Bryan as expert witness Dr. Bonneau, but they nonetheless insist that the error was harmless because "[i]t is not atypical for demographers to employ quantitative analysts to provide data computations." Opp. at 7. Defendants ignore altogether Plaintiffs' argument that a "quantitative analyst" to whom "data computations" are delegated is not entitled to compensation under the parties' stipulation at all, let alone at the expert rate of $400 an hour, and they cite no case law to support their contrary position.

The Magistrate Judge committed clear error by failing entirely to consider Plaintiffs' well-founded arguments that Dr. Swanson and his *assistant*, Mr. Bryan, are not reasonably entitled to $400 an hour for non-expert work. This Court should vacate the Order and reduce the fee award accordingly.

ARGUMENT

Defendants "bear[] the burden of proving that the number of hours *and the hourly rate for which compensation is requested* is reasonable." *Riley v. City of Jackson, Miss*., 99 F.3d 757, 760 (5th Cir. 1996) (emphasis added). Here, the Magistrate Judge did not hold Defendants to their burden, failing to engage with Plaintiffs' challenge to the hourly rate charged by Dr. Swanson and Mr. Bryan. Applying the correct legal standard, it is clear that Defendants never even attempted to establish the reasonableness of the hourly rate Dr. Swanson and Mr. Bryan have billed for non-expert work at the expert rate of $400 an hour. The Magistrate Judge clearly erred in failing to apply that standard. Defendants' contrary arguments fail.

First, Defendants argue that the Magistrate Judge "did in fact consider the reasonableness of the fees/expenses for which Defendants sought recovery," even though they concede she did not consider or discuss *any* of the factors concerning reasonableness set forth in *Duke v. Performance Food Grp., Inc.*, No. 1:11-CV-220, 2014 WL 370442, at *6 (N.D. Miss. Feb. 3,

2014). *See* Opp. at 4. Defendants contend that *Duke* does not mandate consideration of specific factors and is only a guide. Even assuming Defendants are correct about the discretionary nature of the *Duke* factors, the overwhelming weight of precedent favors application of the *Duke* factors in deciding fees disputes. *See* Appeal at 6 n.2 (listing cases). Indeed, Defendants fail to cite a single case where, as here, a court awarded fees without so much as *mentioning* the reasonableness of the hourly rate charged by experts in the face of vigorous challenge by the opposing party.

Furthermore, the absence of any discussion of even a single factor relevant to the reasonableness of the requested hourly rate indicates the Magistrate Judge failed to scrutinize the Defendants' requested rate. To the extent the Magistrate Judge analyzed the reasonableness of the fees sought for Dr. Swanson and Mr. Bryan at all, she only analyzed the reasonableness of the *number of hours* they billed. *See, e.g.*, Order at 7 ("Plaintiffs take issue with Dr. Swanson's six hours and Dr. Bonneau's three hours charged to prepare to have their depositions taken."); *id.* at 8 (finding it unreasonable for Dr. Swanson to charge eight hours to review the transcript of a seven-hour deposition). There is not a single sentence in the Order to support Defendants' assertion that the Magistrate Judge "did in fact consider the reasonableness" of the hourly rates billed by Dr. Swanson and Mr. Bryan. *See* Opp. at 4. Defendants' failure to identify a single quote from the Magistrate Judge's order to support their position is telling. *Id.* The Magistrate Judge's failure to do so was clear error for the reasons set forth in Plaintiffs' Appeal. *See, e.g.*, *Frew v. Traylor*, 688 F. App'x 249, 258 (5th Cir. 2017) (reversible error where lower court did not engage in "full reasonableness review" of fees), *as revised* (Apr. 28, 2017); *Pride Ford Lincoln Mercury Inc. v. Motors Ins. Corp.*, 80 F. App'x 329, 332 (5th Cir. 2003) (similar).

Defendants next seek to bolster the reasonableness of Dr. Swanson's billing $400 an hour for work on topics in which he is concededly not an expert by undertaking a lengthy and irrelevant

explanation of why Dr. Swanson engaged in such work and why he needed to educate himself on the subject. The reasons why Defendants would want a surrebuttal report on EI analysis for their case are of no moment. The issue is whether it is reasonable under the circumstances to pay Dr. Swanson $400 an hour for his work on that analysis even though he is not an expert on the subject. Even assuming that it was "the most reasonable course . . . to have Dr. Swanson educate himself on" EI to prepare his sur-rebuttal report rather than use another expert, Opp. at 7, it does not follow that Dr. Swanson is entitled to full expert fees at the rate of $400 an hour for his non-expert work. The Magistrate Judge did not ever state that a uniform rate of $400 an hour was reasonable for Dr. Swanson for a mix of expert and non-expert work. Rather, the Order is silent both on the *Duke* factors and on whether Dr. Swanson can charge the same rate for work in areas in which he is an expert as for work on a subject on which he needed to "educate himself" and thus is concededly not an expert. Meanwhile, consideration of the *Duke* factors makes clear that $400 an hour is *not* reasonable for Dr. Swanson's non-expert work and continuing education. *See* Appeal at 7-8. The parties' stipulation is limited to "reasonable" fees incurred by an "expert," which excludes Dr. Swanson's EI work. *Id.* at 12-13. Even if this Court sees fit to compensate Dr. Swanson's non-expert work, it should reduce the compensable hourly rate to no more than $120 an hour.

Finally, with respect to Mr. Bryan's non-expert work done in support of Dr. Swanson, Defendants' Opposition offers nothing to justify his billable rate of $400 an hour. Defendants concede that the Magistrate Judge was in error when she repeatedly referred to Mr. Bryan as "Dr. Bonneau" throughout the Order, apparently conflating Mr. Bryan with one of Defendants' noticed experts in this case. *See* Opp. at 7. But Defendants maintain that this error was harmless because "Plaintiffs knew or reasonably should have known . . . that Defendants' surrebuttal . . . would require additional work by Bryan GeoDemographics." *Id.* at 8. Notably, Defendants' Opposition

only addresses Plaintiffs' Appeal to the extent Plaintiffs argued that Mr. Bryan is not entitled to any compensation at all. It makes no effort to counter Plaintiffs' argument that, even if entitled to some compensation, Mr. Bryan cannot reasonably bill at the same $400 hourly rate as Defendants' expert, Dr. Swanson, when Mr. Bryan admittedly only performed "some computational work" delegated to him by Dr. Swanson. *See id.* at 7-8. Plaintiffs have argued consistently since Defendants first moved to recover fees that Mr. Bryan is not an expert, and that he is therefore not entitled to expert-tier compensation. ECF No. 174 (Pls' Opp. to Defs' Mot. for Fees) at 35-39; Appeal at 8-9. Defendants have never submitted any evidence in response as to why Mr. Bryan should be reimbursed as an expert, nor does the Order even acknowledge, let alone consider, Plaintiffs' strenuous argument that he should not be. This was clear error, and the fees attributable to Mr. Bryan must be eliminated or reduced.

CONCLUSION

For the reasons stated herein, this Court should GRANT Plaintiffs' Appeal, reverse the Magistrate Judge's Order, and reduce the fee award accordingly.

DATED: March 7, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joshua Tom, hereby certify that on March 7, 2024, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all parties on file with the Court.

/s/ *Joshua Tom*
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