UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:13-cv-21604-WILLIAMS/BECERRA

FLORIDA INTERNATIONAL UNIVERSITY
BOARD OF TRUSTEES,

Plaintiff,

v.

FLORIDA NATIONAL UNIVERSITY, INC.
d/b/a FLORIDA NATIONAL UNIVERSITY
ONLINE LEARNING CAMPUS,

Defendant.
_____/

REPORT AND RECOMMENDATION[1]
ON MOTION FOR ATTORNEYS' FEES AND COSTS

THIS MATTER is before the Court on Defendant Florida National University, Inc.'s ("Defendant" or "FNU") Motion for Attorneys' Fees and Costs ("FNU's Motion"). ECF No. [134]. Plaintiff Florida International University Board of Trustees ("Plaintiff" or "FIU") has filed its Response ("FIU's Response"), ECF No. [137], and FNU has filed its Reply, ECF No. [141]. On May 2, 2019, the parties also presented oral argument to the Court in this matter. ECF No. [146]. After due consideration of the briefing, the oral argument, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby **RECOMMENDED** that FNU's Motion, ECF No. [134], be **GRANTED in part** and **DENIED in part**. FNU should be awarded a total of **$1,158,934.60** in fees.

[1] The Honorable Kathleen M. Williams, United States District Judge, referred this case for all necessary and proper action as required by law, with respect to all post-judgment matters. ECF No. [95].

I. BACKGROUND

On May 3, 2013, FIU filed a six-count Complaint that included the following claims: (1) federal trademark infringement, (2) federal unfair competition, (3) trademark dilution and injury to business reputation in violation of Florida law, (4) trademark infringement in violation of Florida law, (5) trademark infringement and unfair competition in violation of Florida common law, and (6) cancellation of Florida trademark registration. ECF No. [1] at 9–15. In general, FIU claimed that FNU, in its use of a similar name, infringed on its trademarks. On March 4, 2015, the District Court granted summary judgment in favor of FNU. ECF No. [68]. On May 27, 2015, the Honorable Andrea M. Simonton, Chief United States Magistrate Judge, abated FNU's Bill of Costs, ECF No. [77], and granted FNU leave to re-file within thirty days of the issuance of a mandate by the Eleventh Circuit. ECF No. [88]. FIU appealed the District Court's ruling, ECF No. [74], and on July 26, 2016, the Eleventh Circuit affirmed the decision, ECF No. [90].

Following the Eleventh Circuit's decision, FNU filed a Motion for Attorneys' Fees and Costs requesting a determination that the instant case qualified as "exceptional" under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and thus, entitling FNU to its reasonable attorneys' fees and costs. ECF Nos. [98], [99]. On August 11, 2017, Judge Simonton issued two Reports and Recommendations outlining the reasons which justified a finding that FNU is entitled to its fees and costs expended at the trial court level and on appeal. ECF Nos. [109], [110]. In support of the Reports and Recommendations, Judge Simonton noted that "[i]n nearly every instance when the District Court made a finding that could marginally be considered favorable to the Plaintiff, the District Court explained that either those factors did not merit significant weight, or found them to be irrelevant to the District Court's overall analysis." ECF No. [109] at 11. Judge Simonton further observed "that the case at bar is exceptional due to the disparity between the parties'

litigation positions." *Id.* at 12. Moreover, Judge Simonton concluded that FIU had "failed to re-evaluate the strength of its case as discovery continued." *Id.* at 13. Judge Simonton noted that, in its argument against FNU's entitlement to fees and costs, FIU relied on misleading citations to case law and the Court's findings. *Id.* at 9, 11. After FIU filed its objections, the District Court adopted and affirmed Judge Simonton's Reports and Recommendations, finding that FNU is entitled to its attorneys' fees and costs. ECF No. [128].

Following this Court's Order, FNU filed the instant Motion for Attorneys' Fees and Costs, requesting a total fees and costs award of $1,646,141.72[2] in connection with litigating this case at the trial level and on appeal. ECF No. [134] at 2. FNU did not re-file its Bill of Costs within thirty days of the Eleventh Circuit's decision as instructed by Judge Simonton, nor did FNU seek leave to file it out of time. FIU filed a Response in Opposition, arguing that FNU is entitled to no more than $701,881.50[3] in fees and $4,705.00 in non-taxable costs. ECF No. [137] at 1. Because the Court, as stated above, has already adjudged that FNU is entitled to its reasonable fees and costs, the undersigned need only determine the reasonable amount.

II. ANALYSIS

A. The Reasonable Amount Of Attorneys' Fees To Be Awarded FNU Is $1,158,934.60.

The Eleventh Circuit has adopted the lodestar method to determine the reasonableness of an award of attorneys' fees. *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1299

[2] This amount excludes $10,341.00, which was excised from the fee petition following a conference between the parties. ECF No. [134-2] at 268. FNU also asserts that this amount does not include, and that it is not seeking, approximately $6,500.00 in fees incurred in this case. ECF No. [134] at 9.

[3] Elsewhere in its Response, FIU asserts that FNU should be awarded no more than $706,593.50. ECF No. [137] at 20. This is likely a scrivener's error given that the amount only appears once in FIU's papers.

(11th Cir. 1988); *see also Domond v. PeopleNetwork APS*, 750 F. App'x 844, 847 (11th Cir. 2018). To determine the lodestar amount, a court must ascertain a reasonable hourly rate and multiply it by the number of hours an attorney reasonably expended on the litigation. *Norman*, 836 F.2d at 1299. Where the time or fees claimed appear excessive, or there is a lack of support for the fees claimed, "the court may make the award on its own experience." *Id.* at 1303. The burden of establishing that the fee request is reasonable rests with the fee applicant who must submit evidence regarding the number of hours expended and the hourly rate claimed. *Id.* Evidence in support of the fee applicant's request requires "sufficient particularity so that the district court can assess the time claimed for each activity." *Id.* The party seeking fees must supply the Court with "'specific and detailed evidence' in an organized fashion." *Machado v. DaVittorio, LLC*, No. 09–23069–CIV, 2010 WL 2949618, at *1 (S.D. Fla. July 26, 2010) (quoting *Norman*, 836 F.2d at 1303).

Notably, courts are not permitted "to be generous with the money of others, and it is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded." *Am. Civil Liberties Union of Ga. v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999). Courts need not become "green-eyeshade accountants." *Fox v. Vice*, 563 U.S. 826, 838 (2011). Instead, the essential goal for a court is to "do rough justice, not to achieve auditing perfection." *Id.*

1. FNU Is Entitled To The Hourly Rates It Paid Its Attorneys.

A reasonable hourly rate is defined as the "prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman*, 836 F.2d at 1299. Under a fee-shifting statute, a prevailing party is entitled only to have the losing party pay for an attorney with reasonable expertise at the market rate, not

for the most experienced attorney. *See Am. Civil Liberties Union of Ga.*, 168 F.3d at 437. The relevant legal community for purposes of determining the reasonable hourly rate for an attorney's service is "the place where the case is filed." *Cullens v. Ga. Dep't of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994). The fee applicant bears the burden of submitting satisfactory evidence to establish that the requested rates accurately reflect the prevailing market rate. *Norman*, 836 F.2d at 1299. Proof of the market rate may include direct evidence from other legal practitioners in the relevant legal community familiar with the type of legal service provided and the prevailing market rate for such work. *Id.*

In determining reasonable South Florida hourly rates, a court may consider certain factors, including "the attorney's customary fee, the skill required to perform the legal services, the attorney's experience, reputation and ability, the time constraints involved, preclusion of other employment, contingency, the undesirability of the case, the attorney's relationship to the client, and awards in similar cases." *Mallory v. Harkness*, 923 F. Supp. 1546, 1555 (S.D. Fla. 1996) (citing factors articulated in *Johnson v. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). In the end, however, the Court remains an expert on the issue of attorneys' fees and "may consider its own knowledge and experience concerning reasonable and proper fees." *Norman*, 836 F.2d at 1303 (quoting *Campbell v. Green*, 112 F.2d 143, 144 (5th Cir. 1940)).

FNU was represented by six attorneys and one paralegal. ECF Nos. [134-2] ¶¶ 4–9, 11, [134-3] ¶¶ 2, 4, 8. Their experience and rates[4] are as follows:

> (1) Steven I. Peretz has practiced trademark law for over thirty-five years and is a graduate of the University of Chicago Law School. Mr. Peretz is a partner at the law firm Peretz, Chesal, & Herrmann, P.L. ("PCH") and billed FNU at an hourly

[4] The undersigned notes that there is a small discrepancy in the hourly rates cited by Mr. Higer. ECF No. [134-4] ¶ 11. For purposes of its analysis, the Court utilized the numbers cited in FNU's brief, the billing records, and in Mr. Peretz's declaration. ECF Nos. [134] at 8, [134-2] at 172–212.

rate of $480.00 in the district court case. Mr. Peretz billed at an hourly rate of $494.13 for work on the appellate case.

(2) Michael B. Chesal has practiced intellectual property law for twenty-nine years and is a graduate of the University of Miami School of Law. Mr. Chesal is a partner at PCH and billed at an hourly rate of $456.44. Mr. Chesal billed at an hourly rate of $475.00 for work on the appellate case.

(3) Moish E. Peltz has practiced intellectual property law for over six years and is a graduate of the University of Florida Levin College of Law. Mr. Peltz was the lead associate in this case and billed at an hourly rate of $185.43. Mr. Peltz billed at an hourly rate of $204.28 for work on the appellate case.

(4) Josh E. Saltz has been a member of the Florida Bar since 2009 and is a graduate of Florida Coastal School of Law. Mr. Saltz was an associate (now a partner) at PCH during the time he performed the majority of his work in this case and billed at an hourly rate of $221.91. Mr. Saltz billed at an hourly rate of $251.68 for work on the appellate case.

(5) Albert Alvarez has been a member of the Florida Bar since 2013 and is a graduate of St. Thomas University School of Law. Mr. Alvarez is an associate at PCH and billed at an hourly rate of $262.00. Mr. Alvarez billed at an hourly rate of $219.52 for work on the appellate case.

(6) Joel S. Perwin is an appellate lawyer with more than thirty-five years of experience. Mr. Perwin is a graduate of Harvard Law School and billed at an hourly rate of $650.00 for work on the appellate case.

(7) Paralegal Erika Montane has been a legal assistant for fourteen years. Specifically, Ms. Montane has worked in intellectual property law for six years and billed at an hourly rate of $125.00. Ms. Montane billed the same amount for work on the appellate case.

Accordingly, the hourly partner rates charged for the district court case ranged from $456.44 to $480.00, and the associate hourly rates ranged from $185.43 to $262.00. For the appellate case, the partner rates ranged from $475.00 to $650.00, and the associate rates ranged from $204.28 to $251.86.

In the Motion, FNU's attorneys request hourly rates greater than what they actually billed to FNU. ECF No. [134] at 18. As an initial matter, counsel points out that FNU was charged at a discounted rate due to its status as an educational institution. ECF Nos. [134] at 11, [134-2] ¶ 14.

FNU, however, is not seeking their counsel's undiscounted rate, it is seeking an even higher hourly rate. For example, Mr. Peretz was paid $480.00 per hour in this case, even though his regular rate is $525.00. *Id.* FNU now argues that Mr. Peretz's hourly rate should be set at $600.00 for purposes of this fee request ECF Nos. [134] at 11–12, [134-2] ¶ 15. FNU asserts that the higher requested hourly rates more reasonably reflect the prevailing market rates than the discounted rates FNU actually paid. ECF No. [134] at 13. In support, FNU's counsel cites to the respective market rates of other intellectual property lawyers in South Florida. ECF Nos. [134] at 11–13, [134-2] ¶ 15. In support of its fee petition, FNU engaged Michael Higer, a partner at a local firm, "to provide expert testimony as to the prevailing market rate." ECF No. [134] at 10. In his declaration, Mr. Higer provided the hourly rates of several local intellectual property practitioners. ECF No. [134-4] ¶ 21. The hourly rates range from $520.00 to $750.00, depending on years of experience. *Id.* For appellate attorneys with over thirty years of experience, the hourly rates start at $750.00. *Id.* ¶ 25. Mr. Higer contends that the discounted rates actually charged are below the prevailing market rates. *Id.* ¶ 19.

In response, FIU lodges several objections to FNU's fee petition. The underlying theme of FIU's objections is its contention that FNU is requesting compensation for top-of-the-line lawyering, when the case did not require "top-of-the-line" lawyers. ECF No. [137] at 3–6. In support of its arguments, FIU retained the services of an expert, James Stepan. *Id.* at 1. In his declaration, Mr. Stepan cites to several local intellectual property practitioners whose hourly rates range from $250.00 per hour to $460.00. ECF No. [137-2] ¶ 39. Specifically, FIU asserts, that FNU is entitled to compensation only for lawyers who provide "reliable, consistent, and effective" services, not those offering "premium legal service[s]." *Id.* at 6 (citing *Hermosilla v. Coca-Cola Co.*, No. 10-21418-CIV, 2011 WL 9364952, at *10 (S.D. Fla. July 15, 2011), *subsequently aff'd*,

492 F. App'x 73 (11th Cir. 2012)). FIU also challenges FNU's suggestion that its fee agreement does not cap the fees that may be awarded. *Id.* at 7. FIU notes that the cases in this Circuit allowing for fees higher than those billed are cases with contingency fee arrangements. *Id.* Finally, FIU submits its own billing rates as indicative of the apparent unreasonableness of FNU's request. *Id.* at 4. Specifically, FIU notes that its two primary timekeepers billed at $367.50 and $262.50 for both the district court case and the appeal. *Id.*

Although FNU contends that its fee agreement does not cap its potential award, and that it should be awarded rates higher than those paid, it has not cited to any case law, outside of a contingency fee context, for support. Indeed, the *Olivas* and *Garcia* cases cited by FNU involve contingency fee agreements. *See Olivas v. A Little Havana Check Cash, Inc.*, No. 05-22599-CIV-JORDAN/TORRES, 2008 WL 11333098, at *4 (S.D. Fla. Feb. 29, 2008) (finding, in an FLSA case, that an award of hourly rates is not bound to those set out in a contingency fee arrangement), *report and recommendation adopted*, No. 05-22599-CIV-JORDAN, 2008 WL 11333106 (S.D. Fla. July 16, 2008); *Garcia v. Mast Biosurgery U.S.A., Inc.*, No. 12-60166-CIV-WILLIAMS/SIMONTON, 2015 WL 11438493, at *9 (S.D. Fla. Sept. 14, 2015) (awarding, in a breach of contract case, an hourly rate of $450.00, although the plaintiffs had executed an alternative fee enhancement arrangement whereby the hourly rate would increase from $250.00 to $650.00 per hour if plaintiffs prevailed), *report and recommendation adopted*, No. 12-CV-60166-WILLIAMS, 2015 WL 11438634 (S.D. Fla. Sept. 29, 2015). The fee agreement in this case did not involve a contingency fee and, therefore, *Olivas* and *Garcia* are distinguishable. Indeed, the nature of contingency agreements make the possibility of recovering at higher than charged rates reasonable given that the fees billed in those cases are often low due to the fact that the fees are usually recovered as a percentage of the total award.

FNU also relies on an Eleventh Circuit case to support its contention that a fee agreement does not place a cap on the hourly rates this Court may award. In *Tire Kingdom*, the Court held that the district court did not abuse its discretion when it awarded hourly rates higher than those agreed-upon. *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332, 1337 (11th Cir. 2001). Specifically, the Eleventh Circuit recounted the Supreme Court's observation "that, at least in the context of contingent fee arrangements, a fee agreement should not place a strict limit on a fee award . . . [i]nstead, the reasonable hourly rate should be determined based on the reasonable worth of services rendered, so long as the rate results in no windfall . . . ." *Id.* (citations omitted). Although appellate briefs in *Tire Kingdom* indicate that the case may not have involved a contingency fee agreement, *see* Appellant's Reply Brief at 24–25, 253 F.3d at 1337 (No. 00–11190), the "difference between the negotiated rate and the historical rate [was] less than $1000." *Tire Kingdom*, 253 F.3d at 1337. Given the difference, the Eleventh Circuit found that no "abuse of discretion" had occurred by the District Court in granting the higher rates. *Id.* Here, the difference between the agreed-upon rates and the requested rates is hundreds of thousands of dollars. To grant FNU its requested rates, without any other authority, would be unwise.

FIU contends that even the discounted rates actually charged by FNU are too high. FIU argues that FNU is not entitled to compensation for top-of-the-line counsel. That assertion reflects a misunderstanding of the case law. For support, FIU relies on *Hermosilla*. 2011 WL 9364952, at *9–10. In *Hermosilla*, the court awarded a fee lower than the one billed to the client. *Id.* In that case, however, the client in question was the Coca-Cola Company, that the court found had officers and shareholders who expected top law firms be hired regardless of the complexity of the matter. *Id.* at 10. As such, the court decreased the fee because it found that the matter did not require lawyers of the caliber that the client chose. Here, both FNU and FIU hired law firms of

similar expertise and experience, capable of handling cases with significant implications like the instant one. In fact, FIU's own expert, Mr. Stepan, acknowledged the parity between both sets of attorneys. ECF No. [137-2] ¶¶ 35, 38. FIU's contention that FNU chose lawyers that were overly skilled or experienced is not persuasive.

The Court has examined the evidence provided by the parties' experts, as well as reviewed cases from this District regarding the reasonable rate for intellectual property attorneys and appellate specialists.[5] In addition, the Court has reviewed all of the biographical information provided for FNU's attorneys and legal assistant and considered its own knowledge of the billing rates charged by other intellectual property and appellate lawyers in South Florida. As the Eleventh Circuit has clearly stated, and FIU concedes, "agreed-upon billing rate[s] [are] a strong indication of [ ] reasonable rate[s]." *Tire Kingdom, Inc.*, 253 F.3d at 1337; ECF No. [137] at 9. The undersigned finds no reason to depart from the presumed reasonableness of the agreed-upon rates, especially given that the rates charged by FNU's attorneys are firmly within the range set out by cases in this District. In conclusion, although the Court finds that there is insufficient

[5] *See Suzuki Motor Corp. v. Juijiang Hison Motor Boat Mfg. Co.*, No. 12-CV-20626, 2013 WL 4516042, at *2 (S.D. Fla. Aug. 21, 2013) (finding, in a Lanham Act case, hourly rates of $425.00 to $495.00 reasonable, for attorneys with over twenty years of experience); *Tobinick v. Novella*, No. 14-80781-CV-ROSENBERG/HOPKINS, 2017 WL 8809365, at *6 (S.D. Fla. Nov. 29, 2017) (in a Lanham Act case, approving a $650.00 hourly rate reasonable for an appellate attorney), *report and recommendation adopted*, No. 9:14-CV-80781, 2017 WL 8809110 (S.D. Fla. Dec. 18, 2017); *Key W. Tourist Dev. Ass'n v. Zazzle, Inc.*, No. 10-10100-CIV-KING/MCALILEY, 2013 WL 12248141, at *6 (S.D. Fla. Jan. 9, 2013) (in a Lanham Act case, finding an hourly rate of $350.00 reasonable for an attorney with over forty years of experience), *report and recommendation adopted*, No. 4:10-10100-CIV, 2013 WL 12248227 (S.D. Fla. Mar. 12, 2013); *Schmidt v. Versacomp, Inc.*, No. 08-60084-CIV-MOORE/TORRES, 2012 WL 12947144, at *6 (S.D. Fla. July 31, 2012) (in a Lanham Act case, finding hourly rates ranging from $200.00 to $350.00 to be reasonable); *Domond v. PeopleNetwork APS*, No. 16-24026-CIV-MORENO, 2017 WL 5642463, at *3 (S.D. Fla. Nov. 14, 2017), *aff'd*, 750 F. App'x 844 (11th Cir. 2018) (in a Lanham Act case, approving an hourly rate between $645.00 and $675.00 for a lawyer with over twenty-one years of experience).

support in the case law to award FNU more than it actually paid in fees, there is no support in the facts or the case law to decrease the award. Based on the above, the Court finds the hourly rates actually paid by FNU to its counsel to be reasonable.

2. Hours Expended

The next step in the computation of the lodestar is a determination of the reasonable hours expended on the litigation. A fee applicant must set out the general subject matter of the time expended by the attorney "with sufficient particularity so that the court can assess the time claimed for each activity." *Norman*, 836 F.2d at 1303. A fee applicant must exercise billing judgment by excluding "excessive, redundant or otherwise unnecessary [hours]." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Where a fee applicant does not exercise billing judgment, "courts are obligated to do it for them." *Am. Civil Liberties Union of Ga.*, 168 F.3d at 428. When a request for attorneys' fees is unreasonably high, a court may "conduct an hour-by-hour analysis or it may reduce the requested hours with an across-the-board cut." *Bivins v. Wrap it Up Inc.*, 548 F.3d 1348, 1350 (11th Cir. 2008). Although courts may apply either method, they cannot apply both. *Id.* at 1351. In deciding between the two options available to the Court, an hour-by-hour approach is sometimes preferable, but the "fee documentation can be so voluminous as to render an hour-by-hour review impractical." *Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994). Additionally, the party opposing the fee application should satisfy his obligation to provide specific objections concerning hours that should be included. *Norman*, 836 F.2d at 1301.

In this case, FNU seeks to recover fees for 2,818.75 hours billed for the district court case, and 692.83 hours expended on the appeal. ECF No. [134] at 17. In support, FNU highlights the unreasonable prosecution of this case by FIU and notes its complete success at every stage of this litigation. *Id.* at 13–17. Two FNU attorneys, Steven I. Peretz and Moish E. Peltz, billed most of

the hours expended at the district court level and on appeal. *Id.* at 17. As discussed *supra*, FNU engaged the services of Mr. Higer to review all of the time entries billed in this case. *Id.* Mr. Higer concluded that a 7.5% reduction was appropriate given that there was some overlap in the work performed by FNU's attorneys. ECF No. [134-4] ¶ 53. The 7.5% hours reduction results in the following hour totals for the district court case: (1) 1,117.22 hours by Steven I. Peretz; (2) 161.51 hours by Michael B. Chesal; (3) 1,031.24 by Moish E. Peltz; (4) 175.89 hours by Josh E. Saltz; (5) 81.77 hours by Albert Alvarez; and (6) 39.73 hours by Erika Montane. And for the appellate case: (1) 278.61 hours by Mr. Peretz; (2) 12.03 hours by Mr. Chesal; (3) 250.91 hours by Mr. Peltz; (4) 16.51 hours by Mr. Saltz; (5) 68.73 hours by Mr. Alvarez; (6) 14.09 hours by Ms. Montane; and (7) 117.94 hours by Joel S. Perwin.

FIU, on the other hand, argues that a 40% across-the-board cut in the hours requested by FNU is warranted. ECF No. [137] at 11. As justification for the 40% reduction, FIU cites to the findings of its fee expert, Mr. Stepan. Mr. Stepan proposes the reduction on the grounds that FNU's fee petition includes: (a) block billing, (b) duplicative and excessive billing, (c) billing for clerical tasks, and (d) fees for litigating the state law claims. *Id.* at 17.

In its reply, FNU makes a number of arguments challenging FIU's request for a 40% reduction. Specifically, FNU observes that the voluminous billing in this case was prompted by FIU's insistence on litigating every single aspect of this case, even as it became apparent that its claims were without merit. ECF No. [141] at 6–8. FNU argues that it was forced to constantly defend itself against meritless claims and arguments, and given the high stakes for FNU, it is no surprise that the number of hours spent by FNU's attorneys was significant. ECF No. [141] at 7–8.

As an initial matter, the declaration provided by FIU's expert is insufficient. Mr. Stepan's declaration is a spreadsheet of FNU's billing record whose time entries include little more than various labels such as "block billing," "excessive," "clerical," or "duplicative." ECF No. [137-2]. These objections fall well short of what is required by the Local Rules. S.D. Fla. L.R. 7.3(a); *see also Domond*, 2017 WL 5642463, at *3 ("[m]erely stating that an entry is duplicative or excessive does not suffice under the 'reasonable particularity' requirement of the Local Rule."). The Court will now review the particular objections.

a. Block Billing

First, FIU contends that FNU improperly block billed and that this Court should, therefore, reduce the number of requested hours. ECF No. [137] at 11–13. FNU notes that FIU has only provided a few examples of alleged block billing and has failed to support its other two objections with any *particular* evidence. ECF No. [141] at 6. Specifically, FIU cites to a small, about eighty-five hours, sample of block billing it argues justifies a reduction. In a proper fee application, "the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity." *Am. Civil Liberties Union of Ga.*, 168 F.3d at 427. "[T]he mere fact that an attorney has included more than one task in a single billing entry is not, in itself, evidence of [impermissible] block-billing. When those tasks are intertwined, including a thorough description of the activities performed clarifies, rather than obscures, the record." *Williams v. R.W. Cannon, Inc.*, 657 F. Supp. 2d 1302, 1312 (S.D. Fla. 2009); *see also Home Design Servs., Inc. v. Turner Heritage Homes, Inc.*, No. 4:08-cv-355-MCR-GRJ, 2018 WL 4381294, at *6 (N.D. Fla. May 29, 2018) ("As a general proposition block billing is not prohibited so long as the Court can determine from the time entry the services that were performed."); *Langford v. Hale Cty. Alabama Comm'n*, No. 2:14-00070-

KD-M, 2016 WL 4976859, at *7 (S.D. Ala. Sept. 16, 2016) ("Although block billing is present, the descriptions are generally sufficient for the Court to reasonably ascertain the division of work among the hours."). Here, although the entries cited by FIU were not broken down into individual tasks, they included a thorough description of the activities performed. Such that the Court can ascertain the division of work. Moreover, the individual tasks included in the "block billed" entries were reasonable such that block billing alone is not sufficient to deny or reduce the award.

b. Duplicative and Excessive Billing

Second, FIU asserts that FNU should not be permitted to recover for excessive hours billed. ECF No. [137] at 14. Specifically, FIU notes that multiple FNU attorneys worked on the same tasks, such as on the Motion for Summary Judgment. *Id.* at 14–15; *See Am. Civil Liberties Union of Ga.*, 168 F.3d at 432 ("Redundant hours must be excluded from the reasonable hours claimed by the fee applicant."); *see also Perkins v. Mobile Hous. Bd.*, 847 F.2d 735, 738 (11th Cir. 1988) ("[A] court may reduce excessive, redundant or otherwise unnecessary hours in the exercise of billing judgment."). Upon review of the time entries, the undersigned agrees with FIU, and FNU's own expert,[6] that there are instances of duplicative billing. For example, six separate attorneys billed for work incurred litigating this case at the appellate stage. ECF No. [134-4] ¶ 53. While this fact, in itself, does not indicate unreasonableness, the undersigned is unable to determine the unique contributions of each individual. *Norman*, 836 F.2d at 1302. Therefore, the Court finds that a 7.5% reduction in compensable hours for each of FNU's attorneys is warranted on this basis.

[6] FNU contends that the 7.5% reduction should apply to all of its attorneys except Mr. Perwin. ECF No. [134] at 17–18. Because six separate FNU attorneys worked on the appeal, including Mr. Perwin, the undersigned finds that the 7.5% reduction should also apply to Mr. Perwin's hours. The reduction of Mr. Perwin's hours results in a difference of about $6,200.00.

c. Billing for Clerical Tasks

Third, FIU objects to the fee petition based on FNU's alleged billing for clerical tasks. ECF No. [137] at 16–17; *see Munoz v. Kobi Karp Arch. & Interior*, No. 09-21273-CIV, 2010 WL 2243795, at *6 (S.D. Fla. May 13, 2010) ("Plaintiff's counsel is not entitled to recover attorney's fees for the performance of clerical tasks."); *Miller v. Kenworth of Dothan, Inc.*, 117 F. Supp. 2d 1247, 1261 (M.D. Ala. 2000) (regarding clerical work, "attorneys should not receive full compensation for performing services that should have been delegated to non-lawyers."). In support, FIU offers little more than conclusory arguments suggesting that FNU's attorneys engaged in "simple administrative or clerical in nature" tasks and alleging that some of the billing entries were for the training of Mr. Peltz. ECF No. [137] at 16. While FIU is correct that FNU may not recover for hours billed on clerical tasks, FIU's Response does not provide any example where this, in fact, occurred.[7] The Court, having conducted its own review of the time entries, will not reduce the number of hours on this basis.

d. Fees for State Law Claims

Finally, FIU argues that FNU is not entitled to recover all the fees incurred litigating its fee petition because attorneys' fees for litigating fee petitions are not permitted for Florida state law claims. ECF No. [137] at 16–17. While it is true that FNU is not entitled to fees incurred on the state law claims, the litigation of the federal claims is indivisible from the state law claims. *See Gracie v. Gracie*, 217 F.3d 1060, 1069 (9th Cir. 2000) ("In an award of 'reasonable attorney fees' pursuant to the Lanham Act, a party cannot recover legal fees incurred in litigating non-Lanham Act claims *unless* 'the Lanham Act claims and non-Lanham Act claims are so

[7] Mr. Stepan's declaration does make a brief, one-sentence reference to an alleged example of hours billed for training purposes. ECF No. [137-2] ¶ 62. The undersigned finds this to be insufficient to lower the number of hours expended.

intertwined that it is *impossible to differentiate* between work done on [the separate] claims.'") (emphasis in original) (quotations and citations omitted). In this case, Judge Simonton already found that FNU's entitlement to attorneys' fees under the federal claims is "inextricably intertwined" with the state law claims. ECF No. [109] at 14 n.5. Given the previous findings in this case, FIU's position is simply without any merit. The claims were so intertwined that FNU is entitled to recover reasonable fees incurred litigating the entire case, as no reasonable distinction can be made between the federal claims and the state claims for purposes of this award.

3. Total Fees Award

For the reasons set forth above, the undersigned recommends that FNU be awarded a total of **$1,158,934.60** in attorneys' fees. This total represents a 7.5% reduction in the number of hours expended (2,607.36 hours for the district court case, and 758.82 hours for the appellate case) multiplied by the effective hourly rates billed to FNU. The total amount of compensable fees for the district court case is $866,629.80, and $292,304.80 for the appellate case.

B. FNU Is Not Entitled To Its Costs.

1. Non-Taxable Costs Are Not Recoverable In A Lanham Act Case.

FNU requests $173,022.22 in non-taxable costs. ECF No. [134] at 20. In support of its request, FNU claims $153,132.95 in expert witness costs,[8] and $19,889.27 in other non-taxable costs. ECF No. [134-2] ¶¶ 25–26. FNU contends that these costs are compensable under the Lanham Act as non-taxable costs and buttresses its argument with a case from another circuit. *See Dropbox, Inc. v. Thru Inc.*, No. 15-cv-01741-EMC, 2017 WL 914273, at *6 (N.D. Cal. Mar. 8, 2017) (awarding, in a Lanham Act case, the prevailing party $419,610.41 in non-taxable costs,

[8] FNU provides an explanation of the relevance of the expert witnesses in the materials attached to its Motion. ECF No. [134-2] at 257–58.

including $162,936.00 in expert witness costs), *aff'd*, 728 F. App'x 717 (9th Cir. 2018). In addition to the expert witness costs, FNU requests compensation for costs associated with travel for depositions, mediations, and trial graphics. ECF No. [134] at 20.

FIU objects and argues that FNU should be awarded no more than $4,705.00 in non-taxable costs. ECF No. [137] at 20. In support of its position, FIU cites to two cases from this District where the courts refused to award expert witness costs as non-taxable costs. *Id.* at 19; *see Glob. Van Lines, Inc. v. Glob. Van Lines, Inc.*, No. 05-61410CIV-UNGARO/O'SULLIVAN, 2007 WL 9698319, at *4 (S.D. Fla. Apr. 23, 2007) (in a Lanham Act case, refusing to award costs, including expert witness costs, beyond those outlined in 28 U.S.C. § 1920), *report and recommendation adopted*, No. 05-61410-CIV, 2007 WL 9698320 (S.D. Fla. May 16, 2007); *see also Bennett Marine, Inc. v. Lenco Marine, Inc.*, No. 04-60326-CIV-MARRA, 2013 WL 12198482, at *3 (S.D. Fla. Mar. 18, 2013) (refusing to award expert witness costs as non-taxable costs "without a showing of vexatious conduct, fraud on the court or abuse of judicial process."). FIU argues that FNU should not be allowed to recover the other requested non-taxable costs because it failed to provide any supporting documentation. ECF No. [137] at 20. Lastly, FIU specifically challenges FNU's request for Mr. Higer's fees. *Id.* at 20 n.13. FIU contends that because the Local Rules no longer require attorneys' fees experts, Mr. Higer's fees are not compensable.

The Court finds that non-taxable costs are not recoverable. In *Global Van Lines*, the court held that "because 15 U.S.C. § 1117(a) does not specify which costs are recoverable, the Court is bound by the limitations set out in 28 U.S.C. §§ 1821 and 1920 . . . [a] court may only tax those costs which are specifically authorized by statute." 2007 WL 9698319, at *3 (citations and quotations omitted). Similarly, in *Bennett*, the court refused to award expert witness costs "without

a showing of vexatious conduct, fraud on the court or abuse of judicial process." 2013 WL 12198482, at *3.

The matter was further clarified by the Supreme Court in March of this year. *See Rimini St., Inc. v. Oracle USA, Inc.*, 586 U.S. __, __ (2019) (slip op., at 1). In *Rimini Street*, the Supreme Court considered whether a prevailing party may recover non-taxable costs such as expert witnesses, e-discovery, and jury consulting. *Id.* at 2. The Court unanimously held that such costs were not recoverable given the Copyright Act's text. *Id.* at 1. In so holding, the Court announced "a clear rule: [a] statute awarding 'costs' will not be construed as authorizing an award of litigation expenses beyond the six categories listed in §§ 1821 and 1920, absent an explicit statutory instruction to that effect." *Id.* at 5–6; *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U. S. 291, 297 (2006) (explaining that "costs" is "a term of art that generally does not include expert fees.").

Here, the Lanham Act does not *explicitly* authorize the awarding of costs beyond those set out in the general cost statutes. *See* 28 U. S. C. §§ 1821, 1920. Under the Lanham Act, a successful party "subject to the principles of equity" may recover: "(1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." 15 U.S.C. § 1117(a). Indeed, "[i]f, for particular kinds of cases, Congress wants to authorize awards of expenses beyond the six categories specified in the general costs statute, Congress may do so." *Rimini St.*, 586 U.S. __, __ (slip op., at 4). In fact, Congress has done exactly that on a number of occasions. *See* 42 U.S.C. § 6972(e) ("costs of litigation (including reasonable attorney and expert witness fees)"); 15 U.S.C. §§ 2618(d), 2619(c)(2) (providing that a prevailing party may recover the costs of suit and reasonable fees for attorneys and expert witnesses).

Based on the cases in this District, as well as the recent pronouncement by the Supreme Court, the undersigned recommends that FNU's request for non-taxable costs be denied. The Court will next consider whether FNU is entitled to the requested taxable costs.

2. Taxable Costs

FNU requests $23,442.00[9] in taxable costs. ECF No. [134] at 21. While FIU does not directly challenge FNU's entitlement to costs under 28 U.S.C. § 1920, FIU does correctly point out that FNU's Bill of Costs was not included as part of its instant fee petition.

Indeed, FNU submitted its Bill of Costs on April 15, 2015. ECF No. [77]. On May 27, 2015, Judge Simonton abated the Bill of Costs, and granted FNU leave to file it again within thirty days of the issuance of a mandate by the appellate court. ECF No. [88] at 2. FNU never re-filed its Bill of Costs and has provided no good cause as to why the Court should consider it given that it was not re-filed as ordered by Judge Simonton. Given FNU's failure to comply with this Court's instructions, FNU's request for taxable costs is denied as untimely.

III. CONCLUSION

Based on a thorough review of the record, and for the forgoing reasons, it is hereby **RECOMMENDED** that FNU's Motion for Attorneys' Fees and Costs be **GRANTED in part** and **DENIED in part**. FNU should be awarded a total of **$1,158,934.60**.

IV. OBJECTIONS

Pursuant to Local Magistrate Rule 4(b) and Federal Rule of Civil Procedure 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Any request for an extension of this deadline

[9] FNU's Bill of Costs set out costs totaling $23,442.82, but FNU's Motion requests only $23,442.00. ECF No. [77].

must be made within seven (7) calendar days from the date of this Order. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any factual or legal conclusions included in this Report to which the parties failed to object. 28 U.S.C. § 636(b)(1); *R.T.C. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED in Chambers at Miami, Florida, on June 17, 2019.

JACQUELINE BECERRA
United States Magistrate Judge