UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GUGGENHEIM CAPITAL, LLC, *et al.*, *Plaintiffs*, - *vs.* - CATARINA PIETRA TOUMEI, *et al.*, *Defendants*.	CIVIL ACTION NO. 10 cv 8830 (PGG)

MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFFS' SUBMISSION IN SUPPORT OF ITS PETITION FOR ATTORNEYS' FEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES …….. iii

PRELIMINARY STATEMENT ……..…. 1

LEGAL ARGUMENT ……..... 2

I. PLAINTIFFS' SUBMISSION IN SUPPORT OF THEIR PETITION FOR ATTORNEYS' FEES WAS SUBMITTED PAST THE DEADLINE SET AT THEIR REQUEST BY THE COURT AND WITHOUT EVEN AN ATTEMPT AT DEMONSTRATING EXCUSABLE NEGLECT. …….. 2

II. PLAINTIFFS' SUBMISSION IN SUPPORT OF THEIR PETITION FOR ATTORNEYS' FEES FAILS TO PROVIDE AN ADEQUATE BASIS FOR THE COURT TO MAKE ANY DETERMINATION OF THE AMOUNT OF FEES AND COSTS TO BE AWARDED. ……. 8

III. NO ADDITIONAL DETERRENT OR PUNITIVE PURPOSES WOULD BE SERVED BY AN AWARD OF ATTORNEYS' FEES IN LIGHT OF THE COURT'S AWARD OF SUBSTANTIAL STATUTORY DAMAGES AND IN THE ABSENCE OF A FINDING OF EITHER ACTUAL HARM TO PLAINTIFFS OR WRONGFUL BENEFIT ACRRUING TO DEFENDANTS. ……..……..... 14

CONCLUSION ……..….. 16

TABLE OF AUTHORITIES

CASES

All-Star Mktg. Group, LLC v. Media Brands Co., Ltd., 775 F. Supp. 2d 613 (S.D.N.Y. 2011)	6
Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182 (2d Cir. 2008)	12
C.I.T. Leasing Corp. v. Brasmex - Brasil Minas Express LTDA., 03 CIV. 5077, 2007 WL 840287 (S.D.N.Y. Mar. 20, 2007)	13
Canfield v. Van Atta Buick/GMC Truck, Inc., 127 F.3d 248 (2d Cir. 1997)	7
Cartier v. Symbolix Inc., 544 F. Supp. 2d 316 (S.D.N.Y. 2008)	14
Cruz v. Local Union No. 3 of Int'l Broth. of Elec. Workers, 34 F.3d 1148 (2d Cir. 1994).	9
Dennett v. C.I.A., 252 F. App'x. 343 (2d Cir. 2007)	7, 8
Derechin v. State University of New York, 138 F.R.D. 362 (W.D.N.Y. 1991)	3, 4, 6, 9, 13
DiFilippo v. Morizio, 759 F.2d 231 (2d Cir. 1985)	8
Gucci Am., Inc. v. Duty Free Apparel, Ltd., 315 F. Supp. 2d 511, *amended in part*, 328 F. Supp. 2d 439 (S.D.N.Y. 2004)	15
In re Arbitration Between P.M.I. Trading Ltd. v. Farstad Oil, 160 F.Supp.2d 613 (S.D.N.Y. 2001)	12
Kingvision Pay-Per-View, Ltd. v. Body Shop, 00 CIV 1089 LTS, 2002 WL 393091 (S.D.N.Y. Mar. 13, 2002)	13
Lewis v. Coughlin, 801 F.2d 570 (2d Cir. 1986)	12
Mattel, Inc. v. Radio City Entm't, 210 F.R.D. 504, 505 (S.D.N.Y. 2002)	7
Mikes v. Straus, 274 F.3d 687, 706 (2d Cir. 2001);	12
New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2d Cir. 1983)	9
Puglisi v. Underhill Park Taxpayer Ass'n, 964 F.Supp. 811 (S.D.N.Y. 1997)	12
Sara Lee . Bags of N.Y., Inc.], 36 F.Supp.2d [161,] 170 [(S.D.N.Y.1999)]	15

Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667 (S.D.N.Y. 1995)	7
Tancredi v. Metropolitan Life Ins. Co., 378 F.3d 220 (2d Cir. 2004)	4, 5, 6, 7, 9
Whitfield v. Scully, 241 F.3d 264 (2d Cir. 2001)	12

STATUTES AND RULES

15 § 1117	6, 11, 15
28 U.S.C. § 1920	11
42 U.S.C. § 1983	4
42 U.S.C. § 1988	5
Fed. R. Civ. P. 54	5, 7
Fed. R. Civ. P. 6	5
Local Civil Rule 5.2	3
Local Civil Rule 54.1(c)	11

PRELIMINARY STATEMENT

Defendants David Birnbaum and Dabir International, Ltd. ("defendants") submit this response by way of opposition to the submission by plaintiffs in support of their petition for attorneys' fees filed on August 10, 2011, namely the Declaration of John J. Dabney, Esq. (the "Dabney Declaration" or "Dabney ¶__.").

As demonstrated below, notwithstanding the Court's award of attorneys' fees in its Orders of July 17, 2011, defendants submit that plaintiffs have not provided a valid basis for the award of any particular quantum of fees whatsoever. Plaintiffs' submission was untimely, submitted after the date set by the Court at their request and without permission, explanation or excuse. Moreover, the Dabney Declaration falls far short of providing the legally required level of detail and support for plaintiff's extraordinary request to be awarded $619,233.75 in attorneys' fees and $44,513.05 in supposed costs to in a case where the award of a seven figures in statutory damages, and where there is no proof of actual damages or wrongful benefit retained by defendants, already provides more than adequate compensation to defendants.

LEGAL ARGUMENT

I. PLAINTIFFS' SUBMISSION IN SUPPORT OF THEIR PETITION FOR ATTORNEYS' FEES WAS SUBMITTED PAST THE DEADLINE SET AT THEIR REQUEST BY THE COURT AND WITHOUT EVEN AN ATTEMPT AT DEMONSTRATING EXCUSABLE NEGLECT.

As acknowledged in the Dabney Declaration, the deadline for plaintiffs to "file a declaration and documentation concerning their requested attorneys' fees and costs" was originally set by the Court as July 22, 2011. By memo endorsement, that deadline was extended by the Court, at plaintiffs' request, to Friday, August 5, 2011. (Dabney ¶ 2.)

No "declaration and documentation," however, was filed on August 5th. Nor does the record indicate any subsequent request for an extension of time by plaintiffs, upon consent or otherwise. Not until five days later, on August 10, 2011, did plaintiffs file the Dabney Declaration.[1]

There is little to argue on this point. The Court set a date; plaintiffs requested a later date; the Court granted the request; and ultimately plaintiffs simply submitted their papers when it suited them to do so, and without any attempt at justification. A submission made in support of an application for attorneys' fees must be timely, however, and where it is not, a court should not consider it. See, *Derechin v. State*

[1] The Docket for this case includes the following entry, not designated with a docket number, for August 9, 2011:

> ***REJECTION OF ATTEMPTED PAPER FILING IN ECF CASE. The following document(s) Declaration Of John J. Dabney, ESQ. In Support Of Petition For Attorneys' Fees John J. Dabney, was rejected by the Clerk's Office and must be FILED ELECTRONICALLY on the Court's ECF System. (jab) (Entered: 08/10/2011).

Regardless of the explanation for this puzzling entry, even a paper submitted to the clerk in paper form for filing in contravention of Local Civil Rule 5.2 on August 9th would have been four days late if accepted for filing.

University of New York, 138 F.R.D. 362 (W.D.N.Y. 1991). In *Derechin*, the court invited the plaintiff's counsel to submit an affidavit of fees and costs incurred in bringing a motion for sanctions within twenty days of its ruling on the application. The affidavit of fees and costs, which like the Dabney Declaration was also deficient by virtue of its failure to include supporting documentation for the charges claimed, was filed one day late. The court ruled it untimely, writing as follows:

> Had the affidavit been timely submitted, this Court would direct the plaintiff's counsel to resubmit same – with an itemization of time spent, by whom and at what rate. However, because the affidavit was submitted outside the mandated time period, it will not be accepted for consideration. In circumstances like these – where counsel is invited to submit an affidavit within a reasonable time period and yet fails to so abide – this Court sees no reason to indulge counsel's disregard for its prior mandate.

Id. at 365. The reasoning of *Derechin* court is entirely applicable here.

That a deadline to file a submission for attorneys' fees is not merely a suggestion is demonstrated, as the Second Circuit explained, by the fact that "the Law Reporters bristle with decisions routinely applying the 'excusable neglect' standard to untimely motions for attorneys' fees." *Tancredi v. Metropolitan Life Ins. Co*., 378 F.3d 220, 226 (2d Cir. 2004). *Tancredi* is particularly useful here, because plaintiffs will doubtless respond in the vein of "no harm, no foul" and ask the Court to deem the deadline for their filing extended *nunc pro tunc*. As explained below, the law does not support such a casual approach to deadlines in factual situations such as this.

In *Tancredi*, an action brought under 42 U.S.C. § 1983, there was, as there is here, a final order followed by a timely filing of a notice of appeal. That in turn was followed by a motion for attorneys' fees by MetLife, the prevailing party. On appeal, the Second Circuit upheld the Southern District's resolution of the attorneys' fees application despite the filing of the appeal, on the ground that it was a collateral matter over which the

district court retained jurisdiction. *Id.* at 225. The Court went on to rule, however, that absent a finding of excusable neglect the Southern District had erred in considering the attorneys' fees submission even though it was filed out of time. The Court explained:

> As the prevailing party, MetLife moved on August 2, 2001 for attorneys' fees in the district court pursuant to 42 U.S.C. § 1988(b). This was seven days beyond the fourteen day deadline set by Fed. R. Civ. P. 54(d)(2)(B). MetLife did not make a formal showing of "excusable neglect" under Fed. R. Civ. P. 6(b)(2) to justify the extension of time. On October 15, 2001, the district court denied the fee motion without prejudice to renewing the motion after the disposition of the then-pending appeal on the merits. The court conceded that MetLife's motion was untimely, but directed that "[a]ny such renewed motion shall be filed no later than fourteen calendar days following the entry of the appellate mandate on this Court's [i.e., the district court's] docket." . . .
>
> Many jurisdictions have local rules that preempt Rule 54 by allowing fee motions thirty or more days after entry of judgment. (The Southern District of New York has no such rule.) Where such rules have been adopted, every circuit that has considered the question has held that such local rules qualify as "order[s] of the court," and hence are an exception to the limitations period in Rule 54. . . .
>
> None of these cases, however, suggest that "order of the court" confers on district courts untrammeled discretion to extend the time to file a fee motion. Based on the reasoning of these cases and the text of Rule 54 itself, we are persuaded that reading "order of the court" to mean an individual judge's order extending the deadline, as MetLife urges, would threaten the concept of a uniform deadline-even at the local district level – and fly in the face of the rationales underlying the deadline.

Id. at 223, 227. Noting that among these rationales were "(1) to provide notice of the fee motion to the non-movant before the time to appeal expires; (2) to encourage a prompt ruling on fees to facilitate a consolidated appeal on both the merits and the attorneys' fee issue," the Court went on to rule that "Allowing district judges to extend the deadline for filing a motion for attorneys' fees without any showing of 'excusable neglect' would impede these efficiency and fairness goals." *Id*. at 227.

These considerations all apply to the situation here, notwithstanding that the Court's original July 15th orders actually "awarded" the fees. That is because the Court

set short deadlines for plaintiffs to demonstrate entitlement to a specific amount of fees, just as in *Derechin* the deadline applied to the submission of an affidavit in support of a fee award. Indeed, the Court's original deadline met the concerns addressed in *Tancredi* as the substantive basis for the enforcement of deadlines for fee applications: It left time for the submission of a response by defendants, the non-movants, to the submission in support of the fee application.[2] And it left time for the Court, if it so chose, to rule on a fee award prior to the deadline for the filing of a notice of appeal and allowing for consolidation of the appeal issues.[3] The August 5th deadline requested by plaintiffs and granted by the Court tightened these time periods, but still left intact the parties' and the Court's ability to resolve all issues which could be appealed prior to the deadline for filing the notice of appeal.

The unilateral extension of time taken by plaintiffs, however, has thrown all these considerations to the wind. This is prejudice, as well as affront to the Court and to the litigation process. The only escape route for plaintiffs is a finding by this Court of excusable neglect. But plaintiffs neither requested an extension of time, submitted a

[2] Notwithstanding the Proof of Service filed by defendants as page 8 of the Dabney Declaration, which states that that document was served on defendants by regular mail on August 5, 2011, just as plaintiff failed to file the document on that date, by all indication it was not served either: Defendants never received it at their Brooklyn address. Affirmation of Miriam Birnbaum ¶ 4. In fact, ultimately the paper was served by Federal Express and received on August 10, 2011, *id*. at ¶ 5, which would be inexplicable if the service claimed had actually taken place. No proof of service reflecting this transmission by Federal Express has been filed.

[3] One example of the interplay of a pending appeal and the resolution of ancillary matters still before a district court raised by *Tancredi* is the risk of waiver or other complications that are implicated by the timing issues . Although the Court's order granting attorneys' fees is not the subject of this submission, defendants do not intend by anything submitted herein to waive any defenses relating to that ruling. In particular, we note the observation, in dictum, of *All-Star Mktg. Group, LLC v. Media Brands Co., Ltd.*, 775 F. Supp. 2d 613 (S.D.N.Y. 2011), that "This Court has previously noted that there is some question as to the availability of attorneys' fees for trademark infringement where statutory damages are awarded under § 1117(c) as opposed to actual charges damages under § 1117(a) or (b)." See Section III of this Memorandum of Law. Defendants respectfully reserve any rights they may have at this stage of the proceedings regarding this question as well any others implicated by its coming appeal.

factual basis on which this Court could base a finding of excusable neglect, nor submitted legal argumentation on the subject. Arguments may not be made for the first time in a reply brief, *see*, *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 677 n. 5 (S.D.N.Y. 1995), but even if this Court were to consider a submission positing minimal prejudice to defendants and urging the requisite finding of excusable neglect, it is hard to conceive how plaintiffs could fare better than MetLife did in *Tancredi*:

> Although MetLife's seven-day delay was minimal and it seems unlikely that plaintiffs suffered any prejudice, we are unable to review the district court's finding of "excusable neglect" because of the paucity of the record. Indeed, the reason for the delay is entirely unclear. See *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 249-51 (2d Cir. 1997) (construing narrowly the "excusable neglect" standard set forth in Pioneer); *Mattel, Inc. v. Radio City Entm't*, 210 F.R.D. 504, 505 (S.D.N.Y. 2002) (rejecting claim of "excusable neglect" where the reason for the late filing was that the movant merely "overlooked or forgot[ ] about Rule 54(d)(2)(B)"). . . . MetLife would face a great hurdle in demonstrating "excusable neglect" on these facts. Absent a sufficient reason for its delay, the fact that the delay and prejudice were minimal would not excuse MetLife's mere inadvertence.

Tancredi, 378 F.2nd at 228. The excusable neglect standard is indeed a demanding one. In *Dennett v. C.I.A.*, 252 F. App'x. 343, 344 (2d Cir. 2007), for example, the Second Circuit upheld a district court finding that although the appellant "timely moved for an extension of time to file a notice of appeal, her excuse for the late filing – that she mailed the notice of appeal to the wrong address – did not constitute excusable neglect." Here an extension of time was also sought in a timely fashion, and unlike in *Dennett*, it was granted. Yet plaintiffs then missed that deadline and unilaterally filed late. It cannot even be said that plaintiffs relied on the homey, if not equitable, axiom that it is sometimes better to ask for forgiveness than permission, for they did not even submit an explanation for their late filing or seek retroactive authorization as was granted, erroneously, by the Court in *Tancredi*.

Moreover, the appellant in *Dennett*, whose mailing error was deemed insufficient grounds for a finding of excusable neglect, was representing herself *pro se*; even still, the Second Circuit declined to find excusable neglect. In contrast, plaintiffs here are represented by a world-renowned law firm which, as set out in the Dabney Declaration, allocated responsibility for this litigation among no fewer than six elite lawyers located in two cities along with "a managing clerk" (see Dabney ¶ 5) tasked solely with responsibility for "fil[ing] pleadings and briefings in this matter in accordance with S.D.N.Y. requirements, including complex filings" of a wide range of types. Given the standard applied to humble parties such as tardy filer in *Dennett*, it is inconceivable that a litigation juggernaut such as the one representing plaintiff could "excuse" not only its "neglect," but its failure at any point up to now even to acknowledge that its filing – seeking to recover no less than $600,000 in fees for its client – is untimely.

II. PLAINTIFFS' SUBMISSION IN SUPPORT OF THEIR PETITION FOR ATTORNEYS' FEES FAILS TO PROVIDE AN ADEQUATE BASIS FOR THE COURT TO MAKE ANY DETERMINATION OF THE AMOUNT OF FEES AND COSTS TO BE AWARDED.

Plaintiffs' casual attitude about when to submit their affirmation in support of their attorneys' fees application may take a second place to their view of what they deemed sufficient to submit. Their preposterous submission utterly ignores the standards governing attorneys' fees awards in this Circuit: "In ruling on applications for fees, district courts must examine the hours expended by counsel and the value of the work product of the particular expenditures to the client's case." *DiFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985). A fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly

rates. *Cruz v. Local Union No. 3 of Int'l Broth. of Elec. Workers*, 34 F.3d 1148, 1160 (2d Cir. 1994). Thus applications for attorneys' fees must include contemporaneous time records, for each attorney, describing the nature of the work done. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir. 1983). Plaintiffs, however, have submitted no such documentation. They have provided no data whatsoever that would allow the Court to evaluate the number of hours spent doing what, and by whom. On these grounds alone, they are not entitled to any award of attorneys' fees.

As stated above, the Court made an award of attorneys' fees in its July 15th orders and then required – really, to use the language of the court in *Derechin*, "invited" – plaintiffs to "file a declaration and documentation concerning their requested attorneys' fees and costs" (emphasis added) by a certain date. Plaintiffs opted, however, merely to file a **declaration**, with **no documentation** whatsoever, in support of an attorneys' fees application for over $600,000. In addition, they offered to "file . . . *in camera*" redacted copies[4] of the relevant invoices "should the Court require true and accurate copies" of them. (Dabney ¶ 20.)

But the Court, in its two July 15th Orders, **has already "required" documentation**. Plaintiffs' submission plainly fails to comply with the Court's orders, which mandated the submission of **documentation**, not an **offer** of documentation. Plaintiffs' non-compliance, moreover, is once again not a mere technicality. *See*, *Tancredi*, 378 F.3d 220, 227 (14-day deadline for post-trial attorney fee applications

[4] This appears to be an error, for it does not stand to reason that plaintiffs mean to provide redacted invoices for the Court's *in camera* consideration. Presumably plaintiffs intended to offer to file redacted invoices such that defendants would have at least some access to the relevant information and to offer the Court the opportunity for *in camera* inspection of the redacted material.

meant to provide notice before time to appeal expires, encourage prompt fees ruling to facilitate consolidated appeals, and to resolve fee disputes efficiently "while the services performed are freshly in mind"). Nearly a week after their deadline to submit documentation of their fees, defendants provided nothing but an affirmation and a promise of, at best, redacted invoices "should the Court require" them, with the expectation that the Court be satisfied by the following astonishing statements in the Dabney Declaration:

> 16. Based on my review of the invoices in this mater dated November 11, 2010, December 8, 2010, January 27, 2011, February 17, 2011, March 23, 2011, April 28, 2011, and May 18, 2011, the total amount of legal fees that Plaintiffs expended in this matter is $825,645.00. Based on my review of the same invoices, the costs that Plaintiffs incurred in this action are $44,513.05.
>
> 17. The invoices in this mater consist of many hundreds of discrete time entries and over 40 pages of detail on the specific tasks performed. Some of the tasks performed in connection with this case were not associated with Defendants, or involved work that was performed in connection with legal research and the drafting of motions that ultimately were not required to be fled.
>
> 18. In order to account for the work that is referred to in Paragraph 17, above, Plaintiffs request that the Court award Plaintiffs $619,233.75 in attorney's fees. This amount reflects a 25% reduction in the attorney fees that were incurred by Plaintiffs in this case.
>
> 19. Plaintiffs also request that the Court award Plaintiffs $44,513.05 in costs.

It should not have to be said how woefully short, as a matter of law, this submission falls as grounds on which any court could award any quantum of fees whatsoever, much less the gargantuan fees sought by plaintiffs here. The submission describes six lawyers of impeccable credentials and experience who worked on the case. Out of 23 paragraphs meant to provide a basis for a request for over $650,000 in fees and costs, eight are devoted to detailing the credentials of the five attorneys and the filing

clerk who "worked the file" and one is dedicated to justifying their hourly rates. The Dabney Declaration provides not the slightest guidance as to what percentage of the original **$825,645** in legal fees claimed to have been incurred is attributable to which of them, much less when they were incurred and with respect to what tasks. It not only fails to specify the number of hours expended by each attorney, it does not even reveal the number of hours expended by all attorneys combined, much less by task, claim or any other criterion. Counsel for plaintiffs simply declares, under penalty of perjury, that he has personally "reviewed" the invoices, presents an undocumented "grand total" of $825,645 in legal fees; and then generously reduces this amount by 25% – a figure whose basis is not revealed – based on criteria both chosen and applied by him.

Moreover, on the strength of this Declaration, plaintiffs also request that the Court tax defendants with completely unspecified "costs" of $44,513.05. By "completely unspecified" it should be clear: Not a **single** disbursement comprising this $44,513.05 is identified by amount, date, vendor, description or even category. Plaintiffs, represented by one of the most sophisticated law firms in the world, could not even be troubled to submit and authenticate an automated printout of disbursements associated with the matter. But 15 U.S.C. 1117(a) and 28 U.S.C. § 1920 limit the list of recoverable costs in federal court, and a district court does not have discretion to tax as costs expenses incurred beyond those specified as taxable by Congress. *See Whitfield v. Scully,* 241 F.3d 264, 269 (2d Cir.2001); Local Civil Rule 54.1(c). Given that not a single cost was identified, much less documented, in the Dabney Declaration, as a matter of law not a penny identified in it as "costs" may be awarded to plaintiffs.

Ultimately, the Dabney Declaration provides the sort of gross fee and disbursements numbers that might be generated by practice management software on – or

perhaps "on or about" – the due date for the affirmation of a phenomenally accomplished law firm partner whose time is in great demand, as set out at Dabney ¶ 9, and who has not found the time to get around to the wearisome task of getting around to all the "backup." It is the kind of filing made by parties who perhaps expect that they will be awarded as many chances and as much time as they need to get the ball in the hoop. Whether or not this was the situation plaintiffs and the expectations they held when Mr. Dabney's signature was typed onto the Declaration that was filed on August 10, 2011, however, there is no basis in the law to justify such expectations.

The cases demonstrating the legal insufficiency of this submission, in addition to those cited at the beginning of this section, are legion. Fundamentally, plaintiffs have ignored the seemingly obvious proposition that "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d 182, 186 (2d Cir. 2008). In assessing the number of hours for which compensation should be awarded, the court's role "is not to determine whether the number of hours worked by [the movant's] attorneys represents the most efficient use of resources, but rather whether the number is reasonable." *In re Arbitration Between P.M.I. Trading Ltd. v. Farstad Oil,* 160 F.Supp.2d 613, 616 (S.D.N.Y. 2001). The basis for making that determination is examination of properly authenticated reports that identify the attorneys who did the work, the dates on which services were performed, the hours spent and what was achieved by the expenditure of that time. *See*, *Mikes v. Straus*, 274 F.3d 687, 706 (2d Cir. 2001); *Lewis v. Coughlin*, 801 F.2d 570, 577 (2d Cir. 1986); *Puglisi v. Underhill Park Taxpayer Ass'n*, 964 F. Supp. 811, 817 (S.D.N.Y. 1997). But plaintiffs have submitted not a single datum to the Court

on which these assessments can be made; no contemporaneous records are before the Court at all. Rather, plaintiffs ask this Court to order an astronomical attorneys' fees award based on one omnibus paragraph merely listing tasks (Dabney ¶ 7) and a statement that the gross number of top-drawer attorney hours expended times their premium billing rates is based on "many hundreds of discrete time entries" (Dabney ¶17).

On these grounds, the Court should not merely reduce the fee amount sought, for it has no objective or empirical starting point from which even to do that. Rather, the appropriate outcome is outright rejection of the fee application. "Failure to support a fee application with [the required] records generally results in denial of any award." *Kingvision Pay-Per-View, Ltd. v. Body Shop*, 00 CIV 1089 LTS KNF, 2002 WL 393091 (S.D.N.Y. Mar. 13, 2002); *see also*, *C.I.T. Leasing Corp. v. Brasmex - Brasil Minas Express LTDA.*, 03 CIV. 5077, 2007 WL 840287 (S.D.N.Y. Mar. 20, 2007) (invoices submitted in camera containing time entries for which no work description furnished insufficient to warrant award of attorneys' fees). One case already cited here, *Derechin v. State University of New York,* also considered an affidavit of fees and costs submitted by prevailing counsel. Unlike the plaintiffs here, counsel in *Derechin* actually did provide, it appears, some form of bill for services rendered. This bill, however, was deemed insufficient as a basis on which to award fees. As the court explained,

> [Defendant] . . . objects to the affidavit's form because it fails to include contemporaneous time records. . .
>
> Plaintiff's counsel's affidavit of fees and costs was filed May 14, 1991 . . . [with an] attached bill for legal services submitted as proof of fees and costs . . . No other records of time spent, by whom and at what hourly rate, were submitted. This Court agrees that the affidavit is untimely and that the bill for services is insufficient for this Court to accurately evaluate the reasonableness of the stated fees. Had the affidavit been timely submitted, this Court would direct the plaintiff's counsel to resubmit same-with an itemization of time spent, by whom and at what rate.

138 F.R.D. at 365. Because, like the fee application in this case, the one in *Derechin* was submitted out of time, it was instead not considered at all, and no fees were awarded. *Id*. That is the appropriate outcome, and the proper reward for plaintiffs' high-handed gamesmanship, here.

III. NO ADDITIONAL DETERRENT OR PUNITIVE PURPOSES WOULD BE SERVED BY AN AWARD OF ATTORNEYS' FEES IN LIGHT OF THE COURT'S AWARD OF SUBSTANTIAL STATUTORY DAMAGES AND IN THE ABSENCE OF A FINDING OF EITHER ACTUAL HARM TO PLAINTIFFS OR WRONGFUL BENEFIT ACRRUING TO DEFENDANTS.

In this case, plaintiffs were awarded a judgment of statutory damages in the amount of $1,250,000 upon the entry of default along with a finding that "there is no evidence that defendants reaped any profit from their infringing conduct." Order dated July 15, 2011 (Docket No. 102) at 6. They now seek essentially half-again that amount more in the form of attorneys' fees and costs. Defendants submit that, because the Court's award of damages, as set out in that opinion, was, in the absence of any proof of either wrongful benefit or actual harm, premised primarily on deterrence and sanction arising from the conduct of the litigation, an award of attorneys' fees would be redundant and unduly punitive. Moreover, the quantum of fees sought by defendants, besides lacking any legally cognizable basis in the record, is patently unreasonable by virtue of its magnitude in this case.

The approach that considers an award of attorneys' fees in light of their relationship to statutory damages is warranted under *Cartier v. Symbolix Inc*., 544 F. Supp. 2d 316, 319-20 (S.D.N.Y. 2008), which acknowledges the interrelationship between statutory damages and attorneys' fees. That case, in turn, cites, without either

approval or disapproval, this Court's holding in *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 315 F. Supp. 2d 511, 522-23, *amended in part*, 328 F. Supp. 2d 439 (S.D.N.Y. 2004), that the presumption of entitlement to attorneys' fees falls away where, as here, plaintiffs elect statutory damages:

> [T]he presumption of attorney's fees does not apply here (except to the extent that actual damages are a persuasive measure towards determining statutory damages), and any such application is simply another factor in the mix of the Court's broad discretion to award statutory damages. *Cf. Sara Lee* [*v. Bags of N.Y., Inc.*], 36 F.Supp.2d [161,] 170 [(S.D.N.Y. 1999)] (holding that the trebling provision of 15 U.S.C. § 1117(b) is not automatically applicable to the statutory damages calculation of § 1117(c)).
>
> The Court concludes that attorney's fees are not appropriate in this case because the Court's $2 million statutory damages award – in addition to the Court's now five-month old blanket injunction and its award of attorney's fees in connection with the contempt hearing – more than sufficiently advances the goals of deterrence and compensation in this case. *Cf. Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n. 19 (1994) (noting that compensation and deterrence are two factors for courts to consider in awarding a prevailing party discretionary awards of attorney's fees). First, by trebling the Court's calculation of DFA's Gucci-related profits, the Court's award likely overcompensates whatever lost profits Gucci actually suffered. Second, the substantial award will likely have a material, if not fatal, effect on DFA's business, thereby more than advancing the goals of deterrence. The Court concludes that any additional damages award would increase the punishment to DFA without materially advancing any deterrent effect. *Cf. TVT Records v. Island Def Jam Music Group*, 288 F.Supp.2d 506, 511 (S.D.N.Y. 2003) (declining to award attorney's fees where such an award would duplicate factors already accounted for in punitive damages award).[10]

Here, too, there would be no added purpose to the award sought by defendants, even if they would have met the basic requirements of demonstrating their entitlement to any specific amount of fees. Having proved no financial harm to themselves and no wrongful monetary benefit to plaintiffs, the award of $1,250,000 is more than adequate to compensate plaintiffs even for the excessive and unsupportable fees they have agreed to pay their attorneys. There is no basis in law or policy for awarding them a windfall. *See*,

K & N Eng'g, Inc. v. Bulat, 510 F.3d 1079, 1083 (9th Cir. 2007) (an election to receive statutory damages under § 1117(c) precludes an award of attorney's fees under § 1117(b)).

CONCLUSION

For the foregoing reasons, defendants David Birnbaum and Dabir International, Ltd. urge the Court to make no award of attorneys fees' or costs to plaintiffs.

Respectfully submitted,

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