IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

MUSLIM COMMUNITY ASSOCIATION OF ANN ARBOR AND VICINITY, a/k/a MCA, Michigan Islamic Academy, a/k/a MIA,

Plaintiff,

v.

PITTSFIELD TOWNSHIP; *et al.*,

Defendants.

No. 2:12-cv-10803-PJD-DRG

NON-PARTY ZABA DAVIS' PETITION FOR ATTORNEYS' FEES AND COSTS

Magistrate Judge David R. Grand

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Pursuant to this Court's Supplemental Order on Non-Party Zaba Davis' Motion to Quash and for Protective Order (Doc. No. 223) ("Supplemental Order"), Ms. Davis, through counsel, hereby files this petition for recovery of the costs and fees she reasonably incurred in connection with her Motion to Quash and for Protective Order (Doc. No. 89).

Upon receipt of this Court's Supplemental Order on April 24, 2015, Ms. Davis' counsel promptly contacted counsel for the Muslim Community Association of Ann Arbor ("MCA") via email requesting a "meet and confer" per the Court's order in an effort to resolve this fee issue without having to incur the additional costs and time associated with filing this petition. Efforts to resolve this issue failed after multiple attempts, repeated delays by opposing counsel, and even after Ms. Davis agreed to take a 50% cut in her actual fees incurred.

Indeed, following a telephonic "meet and confer" on May 13, 2015, Ms. Davis' counsel sent the following email to counsel for the MCA:

> During our meet-and-confer conducted this morning at 9:30 am, you took the position that your "last and best offer"—in fact your only offer—of settlement for attorney's fees is $5,000. You rationalized your offer by informing us that you were confident the court would sustain your objections to the most recent ruling of the magistrate judge (the ruling in which the court upheld the earlier award of attorney's fees). Further, you asserted without authority that the sanction award could not as a matter of law include any of the attorney's fees incurred as a direct result of your various objections to the award of attorney's fees—notwithstanding the fact that we offered to meet-and-confer to settle the attorney's fees immediately following the magistrate judge's first ruling awarding fees and well before you

> filed your first round of objections. In other words, all of the legal work following the magistrate judge's original ruling is due to the fact that you have refused to meet-and-confer and preferred instead to game the system by filing objections that resulted in several more rounds of briefings—all of which have led us right back to where we were after the first ruling.
>
> Indeed, this entire discussion of sanctions and attorney's fees would be moot had you bothered to conduct a meaningful meet-and-confer following your "service" of the subpoenas—that is before we even filed our motion to quash/protective order. We attempted on more than one occasion to talk you off your self-created ledge and to explain to you the abusive nature of your discovery demands—but alas, with no effect.
>
> Be that as it may, our fees and costs for work performed from our retention following your abusive discovery demands through the magistrate judge's initial ruling (*i.e.*, up until the filing of your first round of objections) total $19,656. This is the timeframe for the work even you accept falls within the magistrate judge's ruling.
>
> In the spirit of compromise, we are prepared to discount this number to $15,000. That is a 50% discount to total fees and costs and an approximately 25% discount for the work you agree falls within the magistrate judge's ruling.
>
> You have until 5:00 PM EDT today to accept this offer without reservations or conditions. If you do not accept this offer by the deadline, consider it withdrawn.

The offer was not accepted.

In short, no agreement could be reached, thereby necessitating the filing of this petition. (*See* Muise Decl. ¶¶ 2-4, Ex. A at Ex. 1 [setting forth the communications between counsel]).

As stated by the Supreme Court, "Rule 37 sanctions must be applied diligently both '*to penalize* those whose conduct may be deemed to warrant such a sanction, [and] *to deter* those who might be tempted to such conduct in the absence of such a deterrent.'"[1] *Roadway Express v. Piper*, 447 U.S. 752, 763-64 (1980) (quoting *NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976)) (emphasis added).

And "[w]hile a court has authority to apportion a fee award, it has discretion not to do so and instead to simply award the entire fee. [*Coleman v. Dydula*, 175 F.R.D. 177, 182 (W.D.N.Y. 1997)]. Rule 37(a)(4)(C) allows the Court to fashion a fee 'in a just manner' in order to account for the relative strength of the parties' positions."[2] *Twigg v. Pilgrim's Pride Corp.*, No. 3:05-CV-40, 2007 U.S. Dist. LEXIS 14669, 72 (N.D. W. Va. Feb. 28, 2007).

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[1] Consequently, the MCA's effort to vilify Ms. Davis and her counsel for seeking this fee award is wrongheaded and misapprehends the *primary* purposes (*i.e.*, to penalize and deter abusive conduct) of imposing fee award sanctions in cases such as this. (*See* Pl.'s Objection to Magistrate's Supplemental Order at 1-2 [Doc. No. 225] [stating, *inter alia*, "It is almost certain that these fees and costs, rather than reimburse Ms. Davis for what appear to be pro bono services provided to her, will simply go directly to the attorneys who litigated on her behalf, *which does not appear to be the aim of either Rule 37 or Rule 45's sanctions provision*"]) (emphasis added).

[2] It is also common for a court to award fees for having to go through the process of filing a fee application. *See, e.g., Weisenberger v. Huecker*, 593 F.2d 49, 53-54 (6th Cir. 1979) (awarding fees under § 1988). Indeed, when opposing counsel is unwilling to negotiate a reasonable fee award and forces the filing of a fee application, as in this case, it would seem most appropriate that a full fee award, which would include compensation for having to prepare and file a fee application, is warranted.

This Court's Supplemental Order makes clear the strength of Ms. Davis' position in this matter relative to the position taken by the MCA:[3]

> The Court concludes that a "reasonable person" would have recognized this impermissible infringement on Davis' First Amendment rights, and therefore finds that in serving the subpoenas and then opposing Davis' motion to quash and for protective order, MCA's actions were not "substantially justified."
>
> * * *
>
> [F]or all of the reasons previously articulated, the Court concludes that an award of costs and fees is equally appropriate under Rule 45(d)(1) because MCA failed to take reasonable steps to avoid imposing an undue burden on Davis in issuing the underlying subpoenas, which led to the instant third-party motion practice.

(Supplemental Order at 5-6 [Doc. No. 223]). Consequently, it would be well within this Court's discretion to award Ms. Davis her "entire fee."

To determine what fee is reasonable, the Court should apply the lodestar calculation. That is, the Court should calculate "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

As set forth in the declarations of Attorneys Robert J. Muise and David Yerushalmi, they have expended a <u>*total*</u> of 90.9567 hours on this matter at a discounted and reasonable rate of $350 per hour for a total of $31,834.84 in fees

[3] The MCA's recently filed objections to this Court's Supplemental Order are without merit. (*See* Pl.'s Objection to Magistrate's Supplemental Order at 1-2 [Doc. No. 225]). Ms. Davis will be responding to those objections within the time allowed. Consequently, Ms. Davis would request an opportunity to update her fee request upon resolution of the latest objections before the district court.

incurred as a result of the litigation ***caused by the MCA***.[4] (Muise Decl. ¶¶ 15-21, Ex. B, at Ex. 1; Yerushalmi Decl. ¶¶ 7-10, Ex. A, at Ex. 2). Out of that total, the number of hours expended on this matter related solely to the initial motion resulting in this Court's order to quash and for a protective order (*i.e.*, prior to the MCA filing its first round of objections) is 56.16 hours at a discounted and reasonable rate of $350 per hour for a total of $19,656 in fees incurred. (Muise Decl. ¶ 22, Ex. C, at Ex. 1). Moreover, as noted above, Ms. Davis was willing to further discount those fees by nearly 25% to $15,000. (Muise Decl. ¶¶ 2-4, Ex. A, at Ex. 1). However, the MCA rejected that offer following our "meet and confer" on the fee issue. (Muise Decl. ¶ 3, Ex. A, at Ex. 1).

In sum, Ms. Davis is asking this Court to exercise its discretion and award her fees in an amount that will serve as a proper sanction in light of Rule 37's primary purpose "to penalize" and "to deter" abusive discovery practices such as those engaged in by the MCA.[5] *See Roadway Express v. Piper*, 447 U.S. at 763-64.

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[4] This includes time expended to respond to the MCA's first set of objections, to prepare the supplemental briefing requested by this Court, and to prepare this properly-supported fee petition.

[5] Ms. Davis would like to remind the Court that she was not the only private citizen to receive burdensome discovery demands from MCA's counsel. Ms. Davis' counsel is representing six other non-party, Township residents who received the ***very same*** requests for documents from the MCA. (*See* Muise Decl. ¶ 2 [Doc. No. 101-2]). Thus, there are multiple victims of the MCA's discovery abuses, demonstrating a pattern of abuse that must be deterred. Indeed, the fact that the

CONCLUSION

Ms. Davis respectfully requests that the Court award her attorneys' fees in an amount it deems appropriate in light of the facts and the purposes of awarding sanctions in this matter.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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Counsel for Non-Party Ms. Zaba Davis

MCA engaged in this pattern of abuse undermines any legitimate claim that its actions were innocent and reasonable—claims that it is now advancing in its current objections filed with the district court. (*See* Pl.'s Objection to Magistrate's Supplemental Order [Doc. No. 225]).

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

AMERICAN FREEDOM LAW CENTER

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