

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

VICTOR STANLEY, INC. *

Plaintiff *

vs. * CIVIL ACTION NO. MJG-06-2662

CREATIVE PIPE, INC., et al. *

Defendants *

* * * * *

MEMORANDUM AND ORDER RE: SANCTION AWARD

The Court has before it the Memorandum and Order of Magistrate Judge Grimm [Re: Fees and Costs] [Document 448] ("the Magistrate Judge's Decision") and the materials submitted relating thereto. The Court has held a hearing and has had the benefit of the arguments of counsel.

I. BACKGROUND

In the Order Re: Spoliation Sanctions [Document 398] the Court stated:

1. Pursuant to Fed. R. Civ. P. 37(b)(2)(A)(vii), Defendant Pappas's acts of spoliation shall be treated as contempt of this Court.
2. Pursuant to Fed. R. Civ. P. 37(b)(2)(C), Defendants Mark Pappas and Creative Pipe, Inc. shall pay monetary sanctions equivalent to Plaintiff's attorney's fees and costs associated with all discovery that would not have been un[der]taken but for Defendants' spoliation, as well as the briefings and

hearings regarding Plaintiff's Motion for Sanctions.

3. The Court shall, by separate Order and Judgment, impose on said Defendants the obligation to pay, by the end of this week, the agreed minimum amount of \$337,796.37 of such sanctions.
4. The Court refers to Magistrate Judge [Grimm] the matter of providing a report and recommendation regarding determining any additional amount that should be payable by virtue of a supplemental Order and Judgment.

The Magistrate Judge's Decision stated that Defendants were required to pay a total of \$1,049,850.04¹ in attorney's fees and costs as the monetary sanction for spoliation. Defendants have, to date, paid a total of \$478,409.92,² leaving a balance of \$571,440.12 in dispute.

II. STANDARD OF REVIEW

The Magistrate Judge's Decision was issued in response to a referral for a report and recommendation regarding the amount of sanctions to be imposed on Defendants.

A party's objection to a magistrate judge's report and recommendation must be specific and particularized, as the statute directs the district court to "make a de novo

¹ Attorneys' fee award of \$901,553.00 and costs of \$148,297.04.

² The "agreed minimum" of \$337,796.37 plus an additional \$140,613.55 to which Defendants did not object.

determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); United States v. Midgette, 478 F.3d 616, 621-22 (4th Cir. 2007); see also Jones v. Price, 696 F. Supp. 2d 618 (N.D. W. Va. 2010)("In reviewing a magistrate judge's report and recommendation, the district court reviews de novo any portions thereof to which a specific objection is made, but may adopt, without explanation, any of the magistrate judge's recommendations to which no objections are filed."); Thomas v. Arn, 474 U.S. 140, 149 (1985)(noting that the failure to object releases the court from its duty to independently review the magistrate judge's report).

III. DISCUSSION

Defendants contend that the Magistrate Judge's Decision recommended award:

1. Exceeded the standard set forth by this Court, and
2. Included fees and costs completely unrelated to Defendants' spoliation.

A. THE STANDARD

The Court awarded sanctions equivalent to Plaintiff's fees and costs "associated with all discovery that would not have been un[der]taken but for Defendants' spoliation, as well as the briefings and hearings regarding Plaintiff's Motion for Sanctions." Order Re: Spoliation Sanctions [Document 398].

Defendants contend that the Magistrate Judge's Decision encompasses "all discovery," including all motions and hearings, that Plaintiff undertook during the litigation. Defs.' Opp'n 2 [Document 461]. Defendants, in particular, object to including fees and costs incurred before November 12, 2008, the first date on which there is a mention of deleted ESI in Plaintiff's counsel's billing records and after June 24, 2010, the final hearing on spoliation. Id. at 4-5.

The Court's stated standard for includible fees and costs is consistent with the purpose of designing a sanction that will "restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 534 (D. Md. 2010)(citing West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)).

Well before November 12, 2008, Plaintiffs expended time discovering the spoliation and compensating for its effects.

This Court has found that Defendants' spoliation commenced as early as October 11, 2006 and Plaintiffs earliest submitted billings are from November 17, 2006, the date of the first set of depositions, which were impacted by the destruction of evidence. Victor Stanley, 269 F.R.D. at 506; Pl's Reply 5. The Court agrees with the Magistrate Judge's Decision that it was appropriate to include fees and costs incurred on and after November 17, 2006.

The Court also provided for fees and costs for briefings and hearings regarding Plaintiff's Motion for Sanctions. There is no basis to dispute that the professional time spent on the fee petition after the June 24, 2010 hearing should be included. See Pl's Resp. 6-7, Attach. A [Document 467]. The Court agrees with the Magistrate Judge's Decision that it was appropriate to include fees and costs incurred related to preparing the fee petition in September 2010.

The Court finds, consistently with the Magistrate Judge's Decision, that Plaintiff's counsel made a good faith effort conservatively to allocate billings to the spoliation and provided a list of fourteen categories that were explicitly excluded as mostly isolated from the impact of Defendants' misconduct. See Pl's Reply 3. The Court agrees that the Plaintiff's submitted billings reflected reasonable time charges

at reasonable hourly rates³ and does not find a reason to vary from the adjustments to hours and rates in the Magistrate Judge's Decision.

B. UNRELATED FEES AND COSTS

Defendants cite eleven examples of fees and costs that they contend are unrelated to spoliation. These include such things as time spent on opposing Defendants' motions, drafting document requests, review of paper documents and ESI, subpoenaing and reviewing documents from third parties, preparing for and taking depositions, research, and regular communications between the Plaintiff and counsel. While Defendants do not detail specific hours or dollar amounts being objected to, the Court has considered the general objections and reviewed them in the context of Plaintiff's detailed responses. See Pl's Reply 14-23.

The Court agrees with the Magistrate Judge's Decision and finds that the recommended award is only for those fees and costs reasonably flowing from the abuse of the discovery

³ Referred to as the "lodestar" amount, defined as a "reasonable hourly rate multiplied by hours reasonably expended." Grissom v. The Mills Corp., 549 F.3d 313, 320-21 (4th Cir. 2008). The lodestar method is the appropriate starting point for a court's initial estimate of reasonable attorney's fees under Rule 37 sanctions. Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 512 (D. Md. 2005).

process. Plaintiff provided sufficient detail to support its claim, and Defendants have not met their burden to demonstrate that the fees and expenses outside their suggested time period are unrelated to the spoliation. See Thompson v. HUD, No. MJG-95-309, 2002 WL 31777631, at *9-10 (D. Md. Nov. 21, 2002) (describing the respective burdens that each party bears in establishing and challenging fees).

IV. CONCLUSION

For the foregoing reasons:

1. The Court adopts the Memorandum and Order of Magistrate Judge Grimm [Re: Fees and Costs] [Document 448] as the decision of the Court.
2. Defendants shall, by July 15, 2011, pay Plaintiff \$571,440.12, constituting the balance due of a total sanction award of \$1,049,850.04.

SO ORDERED, on Tuesday, June 14, 2011.

/s/ _____
Marvin J. Garbis
United States District Judge