

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	:	CHAPTER 13
	:	
ANGELINA JOHNSON	:	
	:	
DEBTOR	:	BANKRUPTCY No. 01-17153 SR
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ANGELINA JOHNSON	:	
	:	
PLAINTIFF	:	
	:	
V.	:	
	:	
EMC MORTGAGE CORPORATION	:	
	:	
DEFENDANT	:	ADV. No. 02-0030
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OPINION

By: Stephen Raslavich, United States Bankruptcy Judge.

Introduction

Before the Court is the question of the fees to be awarded to Plaintiff's counsel pursuant to the Order and Opinion of August 4, 2004. The parties will recall that the August 4 ruling altered the decision of March 5 on that limited point. The August 4 ruling did not liquidate the fee award but set out the parameters for which compensation would be awarded. The parties were then instructed to meet and attempt to reach an agreement on the amount of fees and costs. They could not and so an evidentiary hearing occurred on January 27, 2005. See Transcript (T-). The matter was next taken under advisement.¹

Scope of the Sanction

¹Because the underlying Complaint sought to avoid a secured interest in the Debtor's property, it is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(K). That subparagraph includes among core proceedings "determinations of the validity, extent, or priority of liens."

The fee sanction was entered pursuant to Federal Rule of Civil Procedure 37(b) and (d).² See August 4 Opinion, p.15-16. The operative, identical language from both subrules provides that a party who fails to obey a discovery order (Rule 37(b)) or otherwise fails to respond to a discovery request (Rule 37(d)) must “*pay the reasonable expenses, including attorney's fees, caused by the failure*, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” F.R.C.P. 37(b)(2)(E), (d) (emphasis added). See *Martin v. Brown*, 63 F.3d 1252, 1263-64 (3d Cir. 1995) (explaining that, absent contempt, the only sanctions authorized are reasonable expenses resulting from the failure to allow discovery). To ensure that a fee award is reasonable, the Court has the discretion to make certain adjustments to the fee requested. See *Lanni v New Jersey*, 259 F.3d 146, 149 (3d Cir.2001). Any award, whether adjusted or not, must articulate the basis for the amount of the sanction. See 7 *Moore's Federal Practice* § 37.51[10] (Matthew Bender 3d ed.); see also *Martin, id.* (holding that failure to relate grounds for sanctions to wrongful conduct necessitated remand).

Implicit in the analysis then is the finding of some causal connection between the violation and expense. See *Cobell v. Babbitt*, 188 F.R.D. 122, 127 (D.C.D.C.1999) (“[T]he causal connection is not to be taken lightly.”) A near "but for" relationship must exist between the Rule 37 violation and the activity for which fees and expenses are awarded. See *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179 (D.C.Cir.1985) (requiring fees and expenses awarded to be "incurred because of" the sanctioned

²Incorporated by Bankruptcy Rule 7037.

violation). Accordingly, this Court decided that Plaintiff's counsel would be compensated for all work caused by Defendant's failure to produce documents. That included the following: the three motions to compel responses to discovery (April 2002, August 2003, and January 2004³); her cross-motion for summary judgment and the hearing on damages assessed; the appeal and cross appeal of the summary judgment ruling; and her response to the motion for stay pending appeal. See August 4 Opinion, 23-24. The Court will expand the foregoing scope of recovery (per *Martin, supra*) only to include costs and fees associated with pursuing this fee award.

Liquidation of the Award

Courts have held that the lodestar method of calculating reasonable attorney's fees is applicable to fees awarded under Rule 37. See e.g., *Watkins & Son Pet Supplies v. The Iams Company*, 197 F.Supp.2d 1030, 1032-33 (S.D.Ohio 2002); *CoStar Group, Inc. v. LoopNet, Inc.*, 106 F.Supp.2d 780, 787 (D.Md.2000); *Envirosource, Inc. v. Horsehead Resource Dev. Co.*, 981 F.Supp. 876, 881 (S.D.N.Y.1998); *Trbovich v. Ritz-Carlton Hotel Co.*, 166 F.R.D. 30, 32 (E.D.Mo.1996); *Bowne of New York City, Inc. v. AmBase Corp.*, 161 F.R.D. 258, 266 (S.D.N.Y.1995) ; see also *Kranzendorf v. Green*, 1986 WL 8267 *5 n.1 (E.D.Pa.) (noting that lodestar analysis is used in various fee award contexts, including Rule 37). The Third Circuit has defined the lodestar as "the 'initial estimate of a reasonable attorney's fee ... properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" *Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436,

³The January 2004 motion requested a contempt finding and sanctions. However, it operated from the same premise: EMC had still not produced the requested document.

1441 (3d Cir.1988) quoting *Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 1544, 79 L.Ed.2d 891 (1984) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983))). Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 434, 104 S.Ct. at 1939-40. The Court will employ that analysis here.

The Fee Itemization

As the party seeking fees, Plaintiff has the burden of proof as to a reasonable award. See *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939. Her counsel has submitted an itemization for a total award of fees and costs of \$38,861.58. See Ex. MJ-1. The Court has reproduced that itemization below. It has been amended to include – in separate columns – amounts which Defendant agrees are compensable and those which the Court will award. A final column is added (on the right-hand side) which explains how the Court concludes that a particular fee or cost was caused by the sanctionable conduct.

Date	Description	Time Spent/ Costs	EMC's itemization	Charges and costs awardable	Relation to Which Pleading/Caused by Failure to Produce
4-8-02	t/c Romilini re discovery	0.1		0.1	Motion to Compel #1
4-8-02	t/c Romilini re discovery	0.1		0.1	Motion to Compel #1
4-8-02	draft motion to compel	0.4	√	0.4	Motion to Compel #1
4-8-02	postage	\$0.57	√	\$0.57	Motion to Compel #1
4-8-02	photocopying 27@.25	\$6.75	√	\$6.75	Motion to Compel #1
4-9-02	review correspondence to Judge Raslavich from Heidi Spivak	0.1		0.1	Motion to Compel #1

5-7-02	prep for hearing on Motion to Compel;	0.1	√	0.1	Motion to Compel #1
5-7-02	hearing on Motion to Compel	1.2	√	1.2	Motion to Compel #1
5-9-02	draft stipulation of facts re MFSJ; review Order re Motion to Compel	1.2		0.1	Motion to Compel #1
5-10-02	review Heidi Spivak comments to Stipulation of Facts	0.5			
5-13-02	review Amended Pre-Trial Order	0.1			
5-30-02	prepare and file Rule 26(a)(3) disclosure	0.6			
5-30-02	photocopying 4@.25	\$1.00			
5-30-02	Postage	\$0.34			
6-1-02	draft Joint Pre-trial Statement	1.7			
6-2-02	review Defendant's Motion for Summary Judgment	0.6			
6-4-02	review Heidi Spivak comments re Pre-Trial Statement	0.1			
6-6-02	prepare and serve subpoena	0.3			
6-7-02	revise Joint Pre-trial Statement and send to Heidi Spivak	0.6			
6-7-02	draft Motion for Summary Judgment and answer defendants' Motion for Summary Judgment	1.1		1.1	Cross Motion for Summary Judgment
6-7-02	photocopying 15 @ .25	\$3.75		\$3.75	Cross Motion for Summary Judgment
6-7-02	postage	\$.56		\$0.56	Cross Motion for Summary Judgment

6-11-02	review comments of Heidi Spivak to Pre-trial Statement	0.2			
6-12-02	file plaintiff's Pre-trial statement and serve Heidi Spivak	0.6			
6-12-02	postage	\$0.56			
6-12-02	photocopying 15 @ .25	\$3.75			
6-14-02	review Defendant's PreTrial Statement and review file	0.4			
6-15-02	review defendant's memorandum of law in support of motion for summary judgment and research	2.7			
6-25-02	review transcript and record at clerk's office re Motion for Summary Judgment	2.1		2.1	Cross Motion for Summary Judgment
7-15-02	research re memorandum of law in support of plaintiff's Motion for summary judgment	4.2		4.2	Cross Motion for Summary Judgment
7-15-02	library fee	\$10.00		\$10.00	Cross Motion for Summary Judgment
7-17-02	redraft and file memorandum of law in support of Motion for Summary Judgment	0.8		0.8	Cross Motion for Summary Judgment
7-17-02	postage	\$0.75		\$0.75	Cross Motion for Summary Judgment
7-17-02	photocopying 42 @ .25	\$10.50		\$10.50	Cross Motion for Summary Judgment
7-29-02	prep for oral argument	1.6		1.6	Cross Motion for Summary Judgment
7-30-02	attend hearing re oral argument	0.9		0.9	Cross Motion for Summary Judgment
8-5-02	review defendant's reply to Plaintiff's Memorandum of Law	0.2		0.2	Cross Motion for Summary Judgment

10-15-02	review Opinion and Order and review case	1.4		1.4	Cross Motion for Summary Judgment
10-16-02	t/c client re Opinion	0.2		0.2	Cross Motion for Summary Judgment
10-23-02	review file, legal research and compute damages calculation	1.8	√	1.8	Damages per summary judgment
11-15-02	letter to Heidi Spivak re settlement	0.2			
11-27-02	t/c to client re hearing 12-3-02	0.7		0.7	Damages per Summary Judgment
12-2-02	review correspondence re hearing 12-3-02	0.1		0.1	Damages per Summary Judgment
1-13-03	t/c to Lorraine Romilini re hearing 1-14-02 [sic]	0.1		0.1	Damages per Summary Judgment
1-15-03	t/c client re facts and damages	1.0	0.5	1.0	Damages per Summary Judgment
1-15-03	review damages calculation	0.3	√	0.3	Damages per Summary Judgment
1-15-03	t/c to Lorraine Doyle re damages	0.1	√	0.1	Damages per Summary Judgment
2-18-03	court appearance re snow continuance	0.5		0.5	Damages per Summary Judgment
2-28-03	review fax from Lorraine Doyle re payments	0.1	√	0.1	Damages per Summary Judgment
2-28-03	fax to Lorraine Doyle to respond	0.1	√	0.1	Damages per Summary Judgment
2-28-03	tc Lorraine Doyle re Payments	0.3	√	0.3	Damages per Summary Judgment
3-4-03	tc from Lorraine Doyle re payments	0.3	√	0.3	Damages per Summary Judgment
3-5-03	draft attorneys fees and costs update	0.4		0.4	Damages per Summary Judgment
3-5-03	prep for trial	2.5	√	2.5	Damages per Summary Judgment
3-5-03	photocopying 98@ .25	\$24.50	√	\$24.50	Damages per Summary Judgment
3-6-03	trial on damages	3.8	√	3.8	Damages per Summary Judgment

3-6-03	cabfare	\$12.00	√	\$12.00	Damages per Summary Judgment
5-13-03	read decision	0.8		0.8	Damages per Summary Judgment
5-13-03	t/c to clt re decision	0.2		0.2	Damages per Summary Judgment
5-13-03	re-draft Chapter 13 Plan	0.4		0.4	Damages per Summary Judgment
5-20-03	review corresp from Doyle re Notice of Appeal	0.1			
5-22-03	t/c from re settlement and file	0.1			
5-29-03	prep and serve Notice of Cross Appeal	0.1		0.1	Response to Appeal and Cross Appeal
5-29-03	review EMC's Designation of Issues on Appeal	0.1		0.1	Response to Appeal and Cross Appeal
5-29-03	tc clerk re record	0.1		0.1	Response to Appeal and Cross Appeal
5-29-03	Review file and Opinion re EMC's 18 issues on appeal	2.1		2.1	Response to Appeal and Cross Appeal
5-30-03	t/c from Clerk re record	0.1		0.1	Response to Appeal and Cross Appeal
6-5-03	file review re designation of record.	1.7		1.7	Response to Appeal and Cross Appeal
6-6-03	rev corresp from Doyle re documents re record	0.1		0.1	Response to Appeal and Cross Appeal
6-6-03	prep designation of record and issues on Cross appeal with file review	1.2		1.2	Response to Appeal and Cross Appeal
6-27-03	review brief on Appeal by EMC	1.4		1.4	Response to Appeal and Cross Appeal
6-27-03	review Appendix and compare with original complete Filings	2.6		2.6	Response to Appeal and Cross Appeal
7-1-03	legal research re EMC's brief and cross appeal	2.4		2.4	Response to Appeal and Cross Appeal
7-1-03	Library fee	\$10.00		\$10.00	Response to Appeal and Cross Appeal

7-1-03	Photocopying fee	\$4.25		\$4.25	Response to Appeal and Cross Appeal
7-7-03	review Appendix/record and draft brief	7.2		7.2	Response to Appeal and Cross Appeal
7-8-03	draft brief appeal and cross appeal	8.7		8.7	Response to Appeal and Cross Appeal
7-9-03	finalize brief and Appendix	9.6		9.6	Response to Appeal and Cross Appeal
7-10-03	serve brief and Appendix	0.4		0.4	Response to Appeal and Cross Appeal
7-10-03	Photo and binding	\$72.37		\$72.37	Response to Appeal and Cross Appeal I
7-10-03	Postage	\$3.95		\$3.95	Response to Appeal and Cross Appeal
7-10-03	review reply brief of EMC	0.8		0.8	Response to Appeal and Cross Appeal
7-10-03	Research and draft reply to EMC's brief	6.8		1.7	Response to Appeal and Cross Appeal
7-10-03	Postage	\$2.95		\$2.95	Response to Appeal and Cross Appeal
7-10-03	Photocopying 45 @ .25	\$11.25		\$11.25	Response to Appeal and Cross Appeal
7-14-03	Review Motion for Stay and Answer	0.9		0.9	Motion for Stay Pending Appeal
7-16-03	library re legal research re standard for stay	2.6		1.0	Motion for Stay Pending Appeal
7-17-03	file and serve answer to motion for stay	0.4		0.3	Motion for Stay Pending Appeal
7-17-03	Postage	\$2.95		\$2.95	Motion for Stay Pending Appeal
7-17-03	Photocopying 87 @ .25	\$21.75		\$21.75	Motion for Stay Pending Appeal
8-5-03	hearing on Motion for stay	1.8		1.8	Motion for Stay Pending Appeal
8-6-03	review Motion for relief from Judgment	0.3			
8-6-03	Review file re discovery	0.3			

8-18-03	library re legal research re Motion for Relief	4.1			
8-18-03	library re legal research re motion for sanctions	1.1	√	1.1	Motion to Compel #2
8-19-03	draft Answer to Motion for Relief from Judgment	0.3			
8-19-03	draft Motion for Sanctions with file review	0.9	√	0.9	Motion to Compel #2
8-20-03	draft memorandum of law in response to Motion for Relief	2.8			
8-20-03	draft memorandum of law re sanctions	0.9	√	0.9	Motion to Compel #2
8-21-03	file and serve answer and cross motion for sanctions	0.7	.30	0.30	Motion to Compel #2
8-21-03	Postage	\$2.95	√	\$2.95	Motion to Compel #2
8-21-03	Photocopying 99@.25	\$24.75	√	\$24.75	Motion to Compel #2
8-29-03	review reply to cross motion for sanctions and research	2.2	√	2.2	Motion to Compel #2
9-2-03	library research re supplemental mem of law	2.1			
9-2-03	draft memorandum of law	0.9			
9-2-03	t/c from Doyle re hrg on 9-4-03	0.2		0.2	Motion to Compel #2
9-3-03	file and serve supplemental memorandum of law	0.6			
9-3-03	postage	\$0.57			
9-3-03	Photocopying 9 @.25	\$2.25			
9-3-03	t/c from Winig re hrg on 9-4-03	0.5		0.5	Motion to Compel #2
9-4-03	hearing on Motion for Relief from Judgment and sanctions	1.5		1.5	Motion to Compel #2

9-9-03	review corres from Doyle re subpoenas of EMC employees	0.1			
9-25-03	t/c to Doyle re status of discovery	0.2		0.2	Motion to Compel #2
10-14-03	review corresp from Doyle	0.1			
10-16-03	meet with Doyle re microfiche in NJ	3.5		3.5	Motion to Compel #2

10-16-03	Toll	\$3.00		\$3.00	Motion to Compel #2
10-16-03	Mileage 37@.33	\$12.21		\$12.21	Motion to Compel #2
10-16-03	Photocopying at library	\$1.50		\$1.50	Motion to Compel #2
10-23-03	meet with Doyle re microfiche review in PA	2.2		2.2	Motion to Compel #2
10-23-03	Photocopying at library	\$2.50		\$2.50	Motion to Compel #2
10-29-03	prep for hearing on October 30, 2003	3.4	1.7	3.4	Motion to Compel #2
10-29-03	Photocopying 528@.25	\$132		\$132	Motion to Compel #2
10-30-03	hearing on Motion for relief from judgment and cross motion for sanctions	4.2	2.1	4.2	Motion to Compel #2
10-30-03	Cabfare 2@\$5	\$10.	√	\$10.00	Motion to Compel #2
11-25-03	review transcript 10-30-03 hearing	2.4		2.4	Motion to Compel #2
11-25-03	Pacer charge	\$6.09		\$6.09	Motion to Compel #2
12-1-03	send letter to Doyle re compliance	0.1		0.1	Motion to Compel #2
12-1-03	Postage	\$0.37		\$0.37	Motion to Compel #2
12-1-03	Photocopying	.25		\$0.25	Motion to Compel #2

12-4-03	review letter from Doyle re compliance with Order	0.1		0.1	Motion to Compel #2
12-22-03	review corresp from Doyle re foreclosure fees	0.1			
1-5-04	t/c to Doyle re settlement and document production	0.3		0.3	Motion to Compel #2
1-5-04	file review and draft letter to Doyle re settlement	1.1			
1-8-04	t/c to Doyle re settlement and document production	0.2		0.2	Motion to Compel #2
1-13-04	docket review and motion for sanctions and contempt	1.3	√	1.3	Motion to Compel #3
1-13-04	Postage	\$0.60	√	\$0.60	Motion to Compel #3
1-13-04	Photocopying [sic] 18 @ .25	\$4.50	√	\$4.50	Motion to Compel #3
1-13-04	docket costs 12 @ .07	.84	√	\$0.84	Motion to Compel #3
2-9-04	review reply to Motion for sanctions, file review, and pre for hearing	1.3	√	1.3	Motion to Compel #3
2-10-04	hearing on motion for sanctions	1.8	√	1.8	Motion to Compel #3
2-10-04	Docket 10 @ .07	.70		\$0.70	Motion to Compel #3
2-13-04	t/c from Doyle re found paper file	0.4		0.40	Motion to Compel #3
2-18-04	letter fax from Doyle re paper file	0.1		0.1	Motion to Compel #3
2-18-04	t/c from Doyle re file	0.1		0.1	Motion to Compel #3
2-19-04	letter fax from doyle re paper file	0.1		0.1	Motion to Compel #3
2-20-04	t/c to Doyle re online and appt to review paper file	0.1		0.1	Motion to Compel #3
2-20-04	t/c clt re appt to review file	0.1		0.1	Motion to Compel #3

2-20-04	letter to Doyle re online file and review original paper file	0.1		0.1	Motion to Compel #3
3-8-04	review Order and decision re Motion for sanctions and for contempt	0.2		0.2	Motion to Compel #3
3-8-04	Review transcript of 10-30-03 hearing re 3-5-04 Order	3.5			
3-8-04	review Rules of Procedure re 3-5-04 Order	0.1		0.1	Motion to Compel #3
3-8-04	review file re 3-5-04 Order	1.8		1.8	Motion to Compel #3
3-9-04	Review transcript of 2-10-04 hearing	0.1		0.1	Motion to Compel #3
3-9-04	Pacer 7 @ .07	.49		\$0.49	Motion to Compel #3
3-10-04	file review and prep fee applications re 3-5-04	3.2		3.2	Motion to Compel #3
3-10-04	draft certificate of fees	1.2		1.2	Motion to Compel #3
3-10-04	fax re Doyle re fees	0.1		0.1	Motion to Compel #3
3-10-04	t/c to Doyle re fax re fees	0.1		0.1	Motion to Compel #3
3-16-04	t/c to Doyle re setting Conference with court	0.1		0.1	Motion to Compel #3
3-17-04	review from Doyle reply to sanctions demand	0.2	√	0.2	Motion to Compel #3
3-17-04	t/c to chambers re joint conference re 3-5-04 Order	0.1	√	0.1	Motion to Compel #3
3-17-04	t/c from chambers re hrg set for 3-23-04 re sanctions trial	0.1	√	0.1	Motion to Compel #3
3-17-04	t/c to Doyle re sanctions hearing	0.1	√	0.1	Motion to Compel #3
3-17-04	t/c to Doyle re sanctions position	0.2	√	0.2	Motion to Compel #3
3-23-04	hearing on sanctions amount	1.4	√	1.4	Motion to Compel #3
8-9-04	review Opinion dated 8-4-04 re sanctions	0.3		0.3	Motion to Compel #3

8-9-04	file review re Opinion on sanctions	0.6		0.6	Motion to Compel #3
8-10-04	fee certification	3.7		3.7	Motion to Compel #3

Which Charges Relate to the Fee Sanction?

In reviewing Plaintiff's Counsel's fee request, the Court observes that, for the most part, it is congruous with the parameters for compensable work as stated in the August 4 Opinion. The extent that a fee is compensable is in the fifth column; an explanation why is found in the sixth. Fees not compensable are blank in the three columns to the right. Those fees are related to the Joint PreTrial Statement and Amended Pre Trial Order (5-9-02 (1st entry), 5-10-02, 5-13-02, 5-30-02, 6-1-02, 6-4-02, 6-7-02, 6-11-02, 6-12-02, 6-14-02), EMC's motion for summary judgment (6-2-02, 6-15-02), and its motion relief from summary judgment (8-6-03, 8-18-03, 8-19-03, 8-20-03, 9-2-03 (first 2 entries), and 9-3-03 (first 3 entries)). Charges for what are described as settlement discussions will likewise not be recovered. See 11-15-02, 5-22-03, and 1-5-04. Other entries will be disallowed because they are so vaguely described as to make it impossible for the Court to determine how they relate to the sanction. See 6-6-02, 5-20-03, 6-6-03, 8-6-03 (2d entry), 9-9-03, 10-14-03, and 12-22-03. EMC, however, maintains that other deductions are warranted.

EMC's Opposition to Certain Charges

Defendant has both specific and general objections to counsel's itemization. It maintains that some charges are outside the scope of the fees recoverable, others were

given too much time, the same work was billed twice, and still others bill clerical work at a professional rate. On a general level, it is implied that the credibility of Plaintiff's Counsel is undermined by previous fee submissions. As the party seeking adjustment to the fees requested, EMC has the burden of proving that it is necessary. *Lanni, supra*, 259 F.3d at 149.

*Was Excessive Time
Devoted to the Fee Statement?*

EMC first challenges the amount of time devoted to preparing the fee statement. T-11. To EMC, 8.5 hours for such a task is simply excessive. T-25. Counsel's response was that by this time, the file in this case had become voluminous. T-11 Implicitly, she maintains that a lengthy file review was required.

The Court recalls that the August 4 Opinion expanded the scope of the fee sanction. This necessitated a thorough review of the file to determine which additional fees are compensable. Because this was not an award of *all* fees and costs incurred, discernment was required here. Counsel was required to eliminate those charges outside the scope of the sanction. On this record, the Court cannot say that 8.5 hours was too much time for the fee itemization.

*Does the Itemization Include
Other Unrelated Work?*

At the hearing, EMC asked Plaintiff's counsel why she included 5.9 hours for reviewing a transcript.⁴ T-14,15. Counsel maintains that the transcript review "was part of the discovery process in this matter on both occasions." T-15. That, she continues,

⁴This figure is the total of the two entries dated 11-25-03 and 3-8-04 on which dates Counsel reviewed the transcript of the hearing dated 10-30-04.

was related to Plaintiff's opposition of the Rule 60(b) motion. *Id.* While Counsel has misread the Court's ruling with regard to recoverable costs related to EMC's Motion for Relief from the Summary Judgment – that motion was granted – her Motion to Compel filed in response was also granted. And her Motion for Sanctions was taken under advisement pending outcome of the trial. See 11/20/03 Order and Opinion. Her first review of the transcript would occur five days later. She reviewed her file to see if EMC had complied with the directive to produce documents related to the HOEPA notice. T-16. And as the record reflects, EMC had not, as of that time, yet fully complied. That would result in a third motion to compel. On that basis the Court concludes that Counsel's review of the 10-30-03 transcript on 11-25-03 relates to the fee sanction.

But the same cannot be said for review of the transcript on 3-8-04. That occurred 3 days after the March 5 Opinion which ruled on Plaintiff's third discovery motion (Motion to Compel #3). Plaintiff sought reconsideration of that Opinion and, as it turned out, it was altered in her favor. But nothing in that transcript caused the Court to reconsider the ruling. Rather, it was the Court's reassessment of *all* of the consequences ensuing from EMC's failure to produce documents in its possession for almost two years that provided the rationale. For that reason, the charge on 3-8-04 for transcript review will not be recoverable.

*Charges Related to the
Appeal and Cross-Appeal*

EMC's next line of questioning went to those fees charged in relation to the appeal of the summary judgment ruling. T-17,18. EMC maintains that compensation is

limited solely to Plaintiff's Cross Appeal and nothing else. The cross appeal does not, in EMC's estimation, warrant the amount of time charged. T-25; Ex. R-5.

In analyzing EMC's argument, the Court now sees that it misidentified the work compensable. The Court meant to include the work associated with the *Response to Appeal* as well as the Cross Appeal. And the text of the Opinion demonstrates this. It states that "[a]ll of the issues in Plaintiff's Cross Appeal from the Summary Judgment Order were predicted on a HOEPA violation." August 4 Opinion, p.22. Although the Cross Appeal raised but one issue, it was Plaintiff's Counter Statement of Issues on Appeal that raised four issues three of which were premised on HOEPA. That explains why Plaintiff's Appeal Brief consists of 38 pages most of which relates to the HOEPA violation. EMC's characterization of the germane part of the appeal as consisting of no more than two pages (see T-25) is simply inaccurate. Plaintiff's Counsel shall be compensated for all fees and costs associated with her Response to the Appeal and her Cross Appeal. The sole exception is for the fifth entry dated 7-10-03. It involves her draft and response to EMC's reply brief. Her argument consists of 10 pages only one of which relates to the HOEPA claim. Accordingly, that charge will be allowed to the extent of 25%.

*Charges Related to
the Motion for Stay*

EMC asserts that it is being asked to pay twice for the same legal research. It maintains that the research which supported the opposition to the stay pending appeal is entirely extracted from the brief on the cross appeal. T-26. The Court's review of Plaintiff's Response confirms this. The Summary of Argument attached to the

Response recites verbatim what is in the appeal brief. See Docket #59. And it does not help counsel in this regard that she described the work in her fee itemization as “research re: standard for stay.” See MJ-1, entry dated 7-16-03. Nothing in her Response cites the law on granting a stay pending appeal. Compare this to what is alleged in EMC’s corresponding motion. See Docket #56. So while the Court would not characterize counsel’s conduct as double-charging, it would consider the research to be largely unearned: Plaintiff’s argument does not reflect any research of the type described in the itemization. She will be allowed no more than 1 hour compensable for research relating to the opposition of the stay motion.

*Did Counsel Bill
For Clerical Tasks?*

Defendant maintains that counsel billed her full professional rate for what are clerical tasks. T-16,17. Counsel replies that she does not charge whatsoever for any clerical functions. *Id.* As to whether clerical work was billed at a lawyer’s rate, there appear only two entries guilty of that. The 7-17-03 charge of 0.4 hours for filing and service of the answer to motion for stay and the 8-21-03 charge of 0.70 hours for filing and serving the cross motion for sanctions will be reduced to 0.30 apiece. See *In re Busy Beaver*, 19 F.3d 833, 855 (3d Cir. 1994) (“When an experienced attorney does clerk’s work, he or she should be paid clerk’s wages”).

*The Existence of
Earlier Fee Itemizations*

EMC’s last line of questioning sought to impeach the credibility of Plaintiff’s counsel generally. EMC asked counsel to identify the two prior fee itemizations marked as Exhibits R-1 and R-2. T-19, 20. The first exhibit was the itemization of *all* fees

submitted by counsel after summary judgment including fees was entered in her client's favor. See R-1. That occurred in March 2003. The second exhibit consisted of fees *related to the sanctions* award of March 5, 2004. See R-2. EMC would ask counsel why certain fees on R-2⁵ were not on R-1. T-20. Is not R-2, the argument implies, merely a subset of R-1?

Counsel's answer to that question is no. T-20,21. She recalls, for example, that the Court denied her Motion to Compel #1 (April 2002). T-21. Therefore, she did not ask for those fees at the damages hearing. *Id.* The Court finds this to be a credible explanation. But more to the point, EMC never explains what all this has to do with the itemization that is before the Court: Exhibit MJ-1. The mere fact that prior fee itemizations are not completely consistent *inter se* or with the present one is of little probative value here.

In summary, after all deductions, the Court finds that 115.6 hours of work from the itemization warrant compensation. The Court now turns to Counsel's hourly rate.

The Hourly Rate

After determining the number of hours reasonably expended, the Court must examine whether the requested hourly rate is reasonable. Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984); *Smith v. PHA*, 107 F.3d 223, 225 (3d Cir. 1997). Thus, the court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the

⁵For example, the 4-8-02 charge for a telephone call to Heidi Spivak appears on R-2, but not on R-1.

rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 1447 (3d Cir. 1988).

Debtor is charging \$250/hour. She maintains that such is the prevailing rate in this locale for practitioners with her level of experience. T-6; Ex. MJ-1. The Defendant does not contest this. On that basis then the Court finds the hourly rate charged to be appropriate. Multiplying that rate by the number of hours allowed yields a total fee award of \$28,900.

Costs Incurred

Plaintiff's counsel requests reimbursement of \$436.58 in costs. These costs will be included in the fee award if, like the time spent, the particular cost relates to compensable work. The Court, therefore, will disallow the costs dated 5-30-02, 6-12-02, 7-10-02, and 9-3-03. That yields total reimbursable costs of \$401.60.

Summary

For the reasons set forth above, Plaintiff's Counsel shall be awarded \$29,301.60 in fees and costs. An appropriate order follows.

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: February 14, 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	:	CHAPTER 13
	:	
ANGELINA JOHNSON	:	
	:	
DEBTOR	:	BANKRUPTCY No. 01-17153 SR
<hr/>		
ANGELINA JOHNSON	:	
	:	
PLAINTIFF	:	
	:	
	:	
EMC MORTGAGE CORPORATION	:	
	:	
DEFENDANT	:	ADV. No. 02-0030
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ORDER

AND NOW upon consideration of the evidence offered at the hearing on the amount of fees and costs awardable to Plaintiff's Counsel pursuant to the Opinion and Order of August 4, 2004, and for the reasons stated in the attached Opinion, it is hereby

ORDERED that EMC shall pay Plaintiff's counsel fees and costs in the amount of \$29,301.60 within ten (10) of the date of this Order.

By the Court:

STEPHEN RASLAVICH,
United States Bankruptcy Judge

Dated: February 14, 2005

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