

DENIED in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Court entered an original Order Appointing Receiver (ECF No. 10), Amended Order Appointing Receiver (ECF No. 47), and Order Reappointing Receiver (ECF No. 155), each of which directed and authorized the Receiver to enter into agreements with professionals that were necessary for the Receiver to execute his responsibilities. *See* ECF Nos. 10, 47, 155 at ¶ 5 (h). Such professionals were to be compensated from the Receivership Assets, subject to approval by the Court. *Id.* In furtherance of his mandate to marshal assets for the Receivership, the Receiver enlisted the professional services of attorneys, forensic accountants, and others to locate and seize assets and real and tangible property of the Ponzi defendants, and to help in the liquidation thereof. *See generally* Receiver's Third Mot. Approval Interim Fee Application ("Mot."), ECF No. 191; Status Report, ECF No. 191-1. The Receiver now seeks approval for interim payment of fees incurred as a result of these efforts.

The Receiver seeks approval of his total fees incurred in this case in the amount of \$34,290.25 (\$33,600.00 in fees and \$690.25 in expenses) for the period from September 1, 2010 through December 31, 2011. *See* Mot. 17, ECF No. 191. The Receiver also seeks authorization for payment in the amount of \$384,005.27 (\$354,410.30 in fees and \$29,594.97 in expenses) to Thompson & Knight, LLP, the law firm representing the Receiver during the same time period. *See id.* at 20. The Receiver additionally requests approval for payment in the amount of \$1,688.00 (\$2,110.00 in fees, discounted by 20%) to LSS&M, LLP ("LSS&M"), an accounting and insolvency consulting services firm. *See id.* at 21. Finally, the Receiver seeks authorization for payment of \$6,142.14 (\$5,979.89 in fees and \$162.25 in expenses) to Bingham Greenebaum Doll LLP ("BGD"),

a Kentucky law firm that represented Receiver as local counsel with regard to Kentucky bankruptcy litigation.¹ *See id.* Totaling these fees, the motion requests authority to disperse payment in the amount of \$426,125.66. *See id.* at 23. The Receiver has presented billing records and invoices evidencing the services rendered in order to justify the claim for compensation. *See generally* App. Supp. Mot., ECF No. 191. The tasks and challenges presented to the Receiver have been numerous and, in many instances, complex and time-consuming. The primary work of the Receiver's accountants and counsel, which comprises the bulk of fees sought in Receiver's Application, have revolved around the accounting and analysis necessary to detail how money was spent through the course of the Millennium scheme. This process was undertaken with significant obstacles and difficulty, due to the inaccuracy and lack of internal record-keeping of the Defendant entities. In addition, the Receiver and his counsel have continued their efforts to communicate with investors and consider the hundreds of claims made by the defrauded victims in this matter.

Thompson & Knight LLP, the law firm representing the Receiver, has provided daily assistance in seizing and liquidating assets of the Estate. In addition, LSS&M, a forensic accounting firm, was retained by Receiver to assist with the data entry and analysis necessary to develop a forensic picture of the Defendants' cash flow. Because the record-keeping of the Defendants was exceedingly poor, the tasks presented to Thompson & Knight and LSS&M were extremely significant to the Receiver's ability to carry out his obligations. Additionally, BGD served as the Receiver's local counsel in Kentucky bankruptcy court when David Jones ("Jones"), one of the primary brokers who sold Millennium CDs, filed for bankruptcy. BGD assisted the Receiver in the

¹ In his motion, Receiver states that "BGD has performed work for total fees of \$5,987.68." Mot. 21, ECF No. 191. This number, however, is in error as BGD's invoice reflects charges of \$5,979.89. *See* App. Supp. Mot. (BGD Invoice) Ex. E, at 2-3, ECF No. 191-5.

bankruptcy proceedings and opposed the discharge of the Receiver's claim.

II. LEGAL STANDARDS

The application for fees and expenses in this matter is governed by the lodestar method of calculation. *See Sec. & Exch. Comm'n v. EFS, LLC*, No. 3:06-CV-1097-M, 2007 U.S. Dist. LEXIS 19281, at *13 (N.D. Tex. Jan. 24, 2007) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319 (5th Cir. 1995); *Sec. & Exch. Comm'n v. Megafund Corp.*, No. 3:05-CV-1328-L, 2006 U.S. Dist. LEXIS 529, 2006 WL 42367 (N.D. Tex. Jan. 9, 2006); *Sec. & Exch. Comm'n v. Tyler*, No. 3:02-CV-282-P, 2003 WL 21517879 (N.D. Tex. June 30, 2003). Under the lodestar method, "a party seeking an award of attorney's fees has the burden of proving the reasonableness of the hours expended and the rate charged, and the district court must be able to determine the reasonable number of hours expended and the reasonable hourly rate for each participating attorney." *Megafund*, 2006 U.S. Dist. LEXIS at *4. Thus, the court must determine the reasonable number of hours expended, then determine the reasonable hourly rates of the applicants. *Kellstrom*, 50 F.3d at 324.

In evaluating the reasonableness of the number of hours expended, the court determines "whether the total hours claimed are reasonable [and] also whether particular hours claimed were reasonably expended." *Id.* at 325. The burden of proving reasonableness of the billed hours is on the applicant. *Mota v. Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 528 (5th Cir. 2001). Therefore, the applicant must prove he exercised billing judgment in calculating the hours expended. *Sec. & Exch. Comm'n v. AmeriFirst Funding, Inc.*, No. 3:07-CV-1188-D, 2008 U.S. Dist. LEXIS 42166, at *7 (N.D. Tex. May 27, 2008) (Fitzwater, C.J.) (citing *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799 (5th Cir. 2006)). "Billing judgment requires documentation of the hours charged

and of the hours written off as unproductive, excessive, or redundant.” *Id.* (quoting *Saizan*, 448 F.3d at 799). Where no evidence of billing judgment has been submitted, it is appropriate to reduce the fee award by a percentage intended to substitute for the exercise of billing judgment. *Saizan*, 448 F.3d at 799; *see also Walker v. City of Mesquite, Tex.*, 313 F.3d 246, 251 (5th Cir. 2002).

Upon ascertaining the compensable time, the court determines the appropriate hourly rate based upon the prevailing community standards for attorneys of similar experience in similar cases. *Kellstrom*, 50 F.3d at 328. The party seeking payment of fees has the burden of establishing the market rate. *Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th Cir. 1996). This requires evidence establishing the reasonableness of the proposed rate, typically through affidavits of other attorneys practicing in the community. *Id.*; *Tollett v. City of Kemah*, 285 F.3d 357, 368-69 (5th Cir. 2002). Absent such evidence, the court may rely upon its expertise and judgment to independently assess the valuation of the asserted rate. *Davis v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 526 F.2d 865, 868 (5th Cir. 1976).

After the court determines the multiplied product of the reasonable compensable hours and reasonable hourly rate, the court may adjust the result—the lodestar—upward or downward as it sees fit based on consideration of the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*² *See Kellstrom*, 50 F.3d at 329. Additionally, although no responses were filed in opposition to the present motion, the Court may nonetheless “adjust the fee request *sua sponte*” in order to

² The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

ensure that only reasonable attorney's fees are awarded. *AmeriFirst Funding*, 2008 U.S. Dist. LEXIS at *4 (citing *Wright v. Blythe-Nelson*, No. 3:99-CV-2522-D, 2004 U.S. Dist. LEXIS 25181 (N.D. Tex. Dec. 13, 2004); see also *Curtis v. Bill Hanna Ford, Inc.*, 822 F.2d 549, 551 (5th Cir. 1987) (permitting the court to adjust fee where the requested amount was unopposed, because the court is obligated to award only "reasonable attorney's fees"). With these operative standards, the Court now considers the Receiver's request for payment of fees and costs.

III. ANALYSIS

A. Receiver and Thompson & Knight Fees

The Court first determines the lodestar for the requested attorneys' fees submitted by the Receiver for himself and the attorneys at Thompson & Knight.

1. Reasonable Hours Expended

A review of the Receiver and Thompson & Knight's billing records demonstrate that the majority of the billing entries are adequately documented with a "short but thorough description of the services rendered." *Walker*, 313 F.3d at 252. The Receiver submitted a summary of hours expended totaling 80 hours. See App. Supp. Mot. (Receiver's Invoice Summ.) Ex. B, at 5, ECF No. 191-2. The total hours expended for attorneys and legal assistants with Thompson & Knight reached 1,984.80 hours. See *id.* (Thompson & Knight Invoice Summ.) Ex. C, at 7, ECF No. 191-3.

After a thorough review, the Court finds that the Receiver's and Thompson & Knight's billing records reflect significant discounts with regard to work undertaken in order to catalogue, analyze, and respond to investor claims, and to maintain a database related to same. The Court further finds that Thompson & Knight has demonstrated billing judgment by writing off unproductive, possibly excessive and/or redundant work, as well as by waiving significant fees

related to the review and analysis required in the ongoing investor claims process. *See* Mot. 2-3, ECF No. 191. The Receiver represents that the hours expended and identified as unproductive or redundant have been reduced from the total in calculating the final fees for which Receiver now seeks approval. *See* Mot. 19, ECF No 191 (citing *AmeriFirst Funding, Inc.*, 2008 U.S. Dist. LEXIS, at *7; *Saizan*, 448 F.3d at 799). Therefore, the Court finds that, for purposes of the lodestar, the total hours billed over the course of a year by the Receiver and Thompson & Knight are reasonable and reflect billing judgment.

2. Reasonable Hourly Rates

Next, the Court determines the reasonableness of the attorney billing rates. The Thompson & Knight attorneys assisted in seizing and liquidating assets of the Estate and analyzing documents and evidence seized from the Defendants, figures and details provided by the forensic accountants, and “claw-back” and third-party litigation matters. *See* Mot. 2, ECF No. 191. These tasks required considerable effort. Eleven separate attorneys participated to varying degrees and at various stages of the effort. *See* App. Supp. Mot. (Thompson & Knight Invoice Summ.) Ex. C, at 7, ECF No. 191-3. Additionally, nine legal assistants and information specialists were utilized in furtherance of the Receivership. *See id.* The attorneys who represented the Receiver billed at an hourly rate between \$252.00 and \$460.00.³ *See id.* As previously stated, applicants for payment of fees typically submit evidence—through affidavits of other attorneys practicing in the community—establishing the reasonableness of the proposed rate. *Tollett*, 285 F.3d at 368-69. Here, the Receiver has not submitted such evidence. Nonetheless, the Court determines that, based on the background of the attorneys and the Court’s understanding of the legal market for this judicial district, these billing

³ The Receiver states that these billing rates reflect a 20% discount. *See* Mot. 20, ECF No. 191.

rates are reasonable. *See Davis*, 526 F.2d at 868.

3. Lodestar

After a thorough evaluation of the billing records, the obligations of the attorneys to prove the exercise of billing judgment, and the appropriateness of a lodestar reduction as a means of correcting for this failure, the Court finds that a reduction in the lodestar amount is not warranted.

See Kellstrom, 50 F.3d at 329; *AmeriFirst Funding*, 2008 U.S. Dist. LEXIS at *4.

B. Professional Services Fees

1. LSS&M

The Court has reviewed the Receiver's request for the payment of work performed by the Receiver's forensic accountants, LSS&M. LSS&M performed work at the Receiver's request including, among other things, analyzing Defendants' corporate and financial records in order to provide forensic accounting and investigative support services. *See Mot. 20*, ECF No. 191. LSS&M reviewed company books and records and determined the total number of investors, total number of CDs, the entities in which investors invested, and the total amount of investor dollars received. *See id.* In addition, they analyzed the amount of "rollover" investments, the total sum of cash paid back out to investors, and numerous banking records and financial statements. *See id.* at 20-21. LSS&M's bill reflects .6 hours of accountants' work and 17.9 hours of clerical work performed, with billing rates ranging from \$35-\$395/hour. *See id.* at 21. LSS&M provided a summary sheet of tasks performed and requests payment in the amount of \$1,688.00.⁴ The Court finds that these expenditures were essential to the obligations of the Receiver and should be paid.

⁴ The Receiver represents that this amount reflects a 20% discount. *See Mot. 21*, ECF No. 191.

2. BGD

The Court has additionally reviewed the Receiver's request for the payment of work performed by BGD, a Kentucky law firm. BGD assisted the Receiver in staying the Kentucky bankruptcy court's jurisdiction over the Receiver's claims against Jones and in lifting the automatic bankruptcy stay against Jones. *See* Mot. 21, ECF No. 191. These actions allowed Receiver to move forward with his claims against Jones in this Court. *See id.* BGD's bill reflects charges of \$6,142.14 (\$5,987.68 in fees and \$162.25 in expenses). *See* App. Supp. Mot. (BGD Invoice) Ex. E, at 2-3, ECF No. 191-5. The invoice, however, does not include any itemized or summarized billing entries nor does it contain descriptions of the services rendered. *See id.* Further, the invoice lacks any calculation of the amount of hours expended or the billing rates. *See id.* Where billing entries are "not illuminating as to the subject matter" or are "vague as to precisely what was done," the court is prevented from making a determination of whether the time was reasonably expended. *See Leroy v. City of Hous.*, 906 F.2d 1068, 1079 (5th Cir. 1990). Moreover, "a party seeking an award of attorney's fees has the burden of proving the reasonableness of the hours expended and the rate charged, and the district court must be able to determine the reasonable number of hours expended and the reasonable hourly rate for each participating attorney." *Megafund Corp.*, 2006 WL 42367 at *1. Here, the Receiver has failed to meet his burden of proving reasonableness of the hours expended and the rate charged. Therefore, the Court is unable to make a determination of the reasonableness of the charges billed by BGD.

Accordingly, the Court **DENIES** the Receiver's request for payment of fees and expenses billed by BGD.

C. Reasonable Costs

The Court has also reviewed the bill of expenses submitted by the Thompson & Knight attorneys and the Receiver. The Court finds that these expenses reflect the efforts of the various attorneys to marshal assets and to further the collection of funds for the Receivership. Given the essential nature of these costs, the Court finds payment in the requested amount to be appropriate.

IV. CONCLUSION

Based on the foregoing, the Receiver's Third Motion for Approval of Interim Fee Application (ECF No. 191) is **GRANTED in part** and **DENIED in part**. As such, the Receiver is entitled to payment totaling \$34,290.25, and Thompson & Knight is entitled to payment totaling \$384,005.27. The Court further approves the payment of the professional service expenses of LSS&M totaling \$1,688.00. The Court denies any payment to BGD at this time.

SO ORDERED on this 17th day of April, 2012.



Reed O'Connor
UNITED STATES DISTRICT JUDGE