IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

WHITE FLINT REALTY GROUP LIMITED PARTNERSHIP, LLLP, Plaintiff, v. BAINBBRIDGE ST. ELMO BETHESDA APARTMENTS, LLC, *et al.*, Defendants.	:	Case No. 362334-V

MEMORANDUM AND ORDER

In this case, the court was asked to award attorneys' fees under a contractual fee shifting clause. On January 17, 2014, the plaintiff, White Flint Express Realty Group Limited Partnership, LLLP ("White Flint"), submitted its application for the attorneys' fees and costs it had incurred up to December 31, 2013.[1] The defendant against whom fees are sought, Bainbridge St. Elmo Bethesda Apartments, LLC ("Bainbridge"), filed an opposition on February 3, 2014.[2] White Flint filed a supplemental application on March 20, 2014, in which it requested additional fees and expenses through February 2014. The total requested is $3,847,164.59 in legal fees and $411,391.88 in expenses.

The litigation over White Flint's fee request has been as heated as the litigation over the underlying case. Each side has bombarded the other (and the court) with memoranda and affidavits, going disputatiously back and forth over nearly every point. According to Bainbridge, the "typical metrics used to evaluate fee applications all support at least a 60% reduction in White Flint's fee application." White Flint hotly disputes this contention.

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[1] White Flint was represented by Venable LLP.

[2] Bainbridge was represented by Pillsbury Winthrop Shaw Pittman LLP.

On March 26, 2014, the court held a hearing for several hours on White Flint's request. The court reviewed all of the memoranda, affidavits and exhibits filed by White Flint and Bainbridge. The court also re-reviewed some of the materials previously submitted in light of the points made by each side at oral argument. For the reasons discussed below, White Flint's petition will be granted in part.

I.

Factual Background

This case began in 2012 when White Flint sued Bainbridge for the breach of an Easement Agreement dated September 7, 2011, that had allowed Bainbridge to go forward with its construction of a new luxury apartment ("The Monty") in Bethesda, Maryland and "intrude" on White Flint's property. White Flint terminated the Easement Agreement on February 27, 2012, on the ground that Bainbridge's construction of The Monty had caused severe structural damage to its adjacent buildings. Litigation ensued on April 24, 2012.

This lawsuit has consumed an enormous amount of time. There have been twenty-two contested motions and nine days of pre-trial hearings. Motions were heard by the court on July 23, 2012; January 9, 2013; June 5, 2013; September 27, 2013; October 24, 2013; November 21, 2013; November 25, 2013; December 2, 2013; and December 5, 2013.

Over 431,568 documents were produced. The defendants (which include Turner Construction Company,[3] the general contractor, and Schnabel Foundation Company,[4] the sheeting and shoring contractor) filed five motions to dismiss and five motions for summary judgment. The defendants also filed four motions to strike. Most of these motions were denied.

[3] Turner was represented by Bradley Arant Boult Cummings LLP and Willcox & Savage PC.

[4] Schnabel was represented by Thompson O'Donnell, LLP.

Depositions consumed thirty-one days. White Flint designated eight experts for trial and the defendants designated seven trial experts. The parties filed ten motions in limine. The Joint Pre-Trial Statement is over one hundred pages.

This case had been set to start a two-week jury trial on December 9, 2013. At the parties' request, the court had reviewed all of the motions in limine and proposed voir dire questions and was prepared to make rulings. However, on December 5, 2013, at what was supposed to be a hearing on all open pretrial matters, the court was informed that the parties had reached a settlement agreement under which Bainbridge would pay White Flint an additional $3.2 million, with White Flint retaining the right to seek legal fees and costs under the fee shifting clause contained in the Easement Agreement. Also included was a declaration that certain financial covenants in the Easement Agreement, which favored White Flint, survived termination. Other than an email, the agreement had not yet been reduced to writing.

Being concerned about finality, given the ferocious nature of the litigation, the court required counsel to not only recite the terms of the settlement on the record, but also required them to confirm, on the record, that they had the actual authority to enter in the settlement agreement. The lawyers did so; the court accepted the settlement and cancelled the trial. Disputes over the terms of the settlement erupted soon thereafter.

On January 17, 2014, White Flint filed along with its fee petition a motion to enforce the settlement agreement. Bainbridge replied in kind. On February 4, 2014, Bainbridge filed a written opposition to White Flint's motion to enforce the settlement agreement and an opposition to White Flint's petition for attorneys' fees and expenses. Discovery disputes also ensued regarding the fee application, which required court intervention, and a variety of cross-motions and replies about nearly everything regarding the fee petition, the supporting affidavits and the

exhibits. Both sides also filed numerous affidavits and counter-affidavits about the nature of the settlement, earlier settlement discussions, an unsuccessful mediation and a host of disputed topics.

White Flint's motion to enforce the settlement agreement was granted at the conclusion of the hearing on March 26, 2014. Its fee request was taken under advisement. The court's decision regarding White Flint's fee application is set forth below.

II.

General Legal Principles

In *Monmouth Meadows Homeowners Ass'n, Inc. v. Hamilton*, 416 Md. 325 (2010), the Court of Appeals expressly rejected the lodestar method – common in statutory fee shifting – for reviewing attorneys' fee requests under a contractual fee shifting provision.[5] The Court instead adopted the eight factor test set forth in Rule 1.5(a) of the Maryland Lawyers' Rules of Professional Conduct.

The factors of Rule 1.5(a) include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood that acceptance of the employment will preclude other employment of the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;

[5] On October 17, 2013, the Maryland Court of Appeals adopted new rules related to attorneys' fees. For cases commenced on or after January 1, 2014, these new rules shall apply: new Title 2, Chapter 700; new Rule 3-741; new Appendix: Guidelines Regarding Compensable and Non-Compensable Attorneys' Fees and Related Expenses; and the amendments to Rules 1-341, 2-305, 2-433, 2-603, and 3-305. These rules do not apply to this action, which commenced well before December 31, 2013, the effective date of the new rules.

(5) time limitations imposed by the client or circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyers performing the services; and

(8) whether the fee is fixed or contingent.

A trial court may also consider the amount of the fee requested in relation to the dollar amount recovered and other relief achieved by the prevailing party in the litigation, the terms of any fee agreement between the paying party and its counsel, and any other factor that reasonably relates to the attorneys' fees requested in the specific case before it.[6] *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 465 (2012); *Monmouth Meadows*, 416 Md. at 337-38; *see Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 757-58 (2007).

A trial court may also consider its familiarity with the case at hand and its own experience in similar types of cases litigated in the jurisdiction in which it serves. *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. 36, 53 (1987); *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 121 Md. App. 100, 121-22 (1998); *see also Foster v. Foster*, 33 Md. App. 73, 77 (1976) (the trial judge "may rely upon his own knowledge and experience in appraising the value of an attorney's services" (footnote omitted)).

To be sure, the party seeking to shift fees has the burden to produce legally sufficient evidence to justify their award under the same standards for proof applicable to contract damages. *Bankers & Shippers. Ins. Co. of New York v. Electro Enters., Inc.*, 287 Md. 641, 661

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[6] As the Fourth Circuit has gently observed, "the determination of a 'market rate' in the legal profession is inherently problematic, as wide variations in skill and reputation render the usual laws of supply and demand largely inapplicable." *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990). This is particularly true in the Washington Metropolitan area.

(1980). The level of billing detail that must be provided by the party seeking attorneys' fees generally is within the discretion of the trial court, but that detail must be sufficient to evaluate the work for which compensation has been requested. However, there is no specific amount of billing detail that is required in every case.

Of course, attorneys "should make their billings as detailed as reasonably possible, so that the client, and any other person who might be called upon to pay the bill, will know with some precision what services have been performed." *Diamond Point*, 400 Md. at 760. What is key is to ensure that there is sufficient information, given the type of case and the nature of the claims, from which the court can make an informed judgment. *See id.* at 761 ("It is not reasonable to expect the lawyer to have in tow an industrial engineer with a stop watch to measure how much time was devoted to one claim or another.").

Ordinarily, when considering a request in a contractual fee shifting case, the court must employ a two-step analysis. First, the party seeking an award must prove their entitlement to attorneys' fees by a preponderance of the evidence and under the same standards as proof of contractual damages. *Diamond Point*, 400 Md. at 761; *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 453-54 (1994). The mere compilation of hours recorded by lawyers, multiplied by hourly rates, is an insufficient measure. Among other things, there must be proof of the type of services rendered, as well as the necessity of those services in the context of the specific litigation. *See Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 457-59 (2008); *Long v. Burson*, 182 Md. App. 1, 29 (2008); *Maxima*, 100 Md. App. at 453-54. But "[d]etermining reasonableness does not require that this Court examine individually each time entry and disbursement." *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010) (footnote omitted).

Second, as noted above, the court must evaluate the evidence supporting or opposing the fee award under the standards of Rule 1.5(a), along with other pertinent factors. "The party requesting fees has the burden of providing the court with the necessary information to determine the reasonableness of its request." *Myers v. Kayhoe*, 391 Md. 188, 207 (2006). But there is no fixed litany the trial court needs to recite in order to properly evaluate the request in light of the record of the proceedings. Rather, what is important is to analyze the information before the court and to relate it to the facts of the case. *See Carroll Indep. Fuel Co. v. Washington Real Estate Inv. Trust*, 202 Md. App. 206, 237-40 (2011); *Cong. Hotel Corp. v. Mervis Diamond Corp.*, 200 Md. App. 489, 499-502 (2011).

There is some sentiment in the reported decisions to the effect that, unlike statutory fee shifting cases, contractual fee shifting "does not carry with it the notion that the importance of the right vindicated will justify an expenditure of attorney time that is *hugely disproportionate* to the dollar amount at issue in the case." *Monmouth Meadows*, 416 Md. at 337 (emphasis added). To that effect, the Court of Appeals has directed that "trial judges should consider the amount of the fee award in relation to the principal amount in litigation, and this may result in a downward adjustment." *Id.*

To be sure, a trial judge must consider proportionality under Rule 1.5(a), but in a contractual fee shifting case, the degree of success does not predominate over the other factors under the Rule. Although degree of success is important, it is simply one factor in a court's analysis.

Delaware case law is particularly useful in properly balancing these factors given the volume of complex litigation it encounters. In *Mahani v. Edix Media Group, Inc.*, the Supreme Court of Delaware expressly rejected a strict proportionality or predominance argument under

Rules which are identical to Maryland's Rules. 935 A.2d 242, 248 (Del. 2007).[7] The Delaware Court of Chancery likewise has rejected an analysis that focuses too heavily on the result in a contractual fee shifting case. *Aveta*, 2010 WL 3221823, at *6.

It is also important to consider that, unlike fees shifted under a statute which are imposed on the parties by a legislature, attorneys' fees under a contract are an item of damages for which the parties specifically bargained, an item of damage to be recovered in the event of a breach of that agreement. This is especially true in cases in which the agreement in question is a negotiated one, as opposed to a take-it-or leave one such as a consumer credit card agreement. In this case, the parties are sophisticated commercial real estate entities who certainly know what their contracts mean, who were represented by lawyers well-versed in commercial real estate matters, and who were by no means "forced" to agree to any particular term in an agreement, much less fee shifting. In cases such as this one, where there was no assurance that fees would be shifted, the prospect that a party – especially a sophisticated corporate party – will bear its own expenses is an additional incentive for that litigant to ensure that counsel does not engage in any unnecessary or excessive efforts. *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 997 (Del. Ch. 2012) (discussing and applying Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct).

Contract-based fee shifting, especially in commercial or business cases, truly is a matter of mutual assent between the parties to a contract. In other words, when deciding upon the total consideration for a business transaction, sophisticated parties ordinarily take into account the likelihood of litigation in the event of breach. The recovery of attorneys' fees in the event of a

[7] In *Mahani*, 935 A.2d at 245, the Delaware Court of Chancery awarded the plaintiff $16,500.06 in damages for breach of contract and $103,454.50 for attorneys' fees. The Delaware Supreme Court affirmed this decision. *Id.* at 247-48.

breach, therefore, is a contemplated item of contractual damage. The recovery of attorneys' fees and costs is part of the expectation interest as much as any other part of the consideration and should be respected unless plainly unreasonable. Of course, the fees and costs requested must be reasonable under Rule 1.5(a), but reasonableness should be measured with reference to the scope and nature of the specific litigation and contractual provision at hand.

Also pertinent is the agreement between the clients and the lawyers, as contemplated by factor 8 of Rule 1.5(a). Although the terms of a fee agreement between a lawyer and his client "cannot absolve the [c]ourt of its duty to determine a reasonable fee; on the other hand, an arm's length agreement, particularly with a sophisticated client, as in this instance, can provide an initial 'rough cut' of a commercially reasonable fee." *Wisconsin Inv. Bd. v. Bartlett*, 2002 WL 568417, at *6 (Del Ch., April 9, 2002) (Chandler, C.), *aff'd*, 808 A.2d 1205 (Del. 2002); *see Danenberg*, 58 A.3d at 997 (quoting *Bartlett*, 2002 WL 568417, at *6).

With these principles in mind, the court's findings are set out below.[8]

III.

Factual Findings[9]

In support of the fee request, the court finds that White Flint has submitted detailed billing statements from counsel showing, among other things, the nature of the work performed, the date on which it was performed, the timekeeper, the hourly rate for attorney time, and a listing of items of expense. The court has reviewed each and every binder, legal memoranda,

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[8] The court has considered all of the factors of Rule 1.5(a) in making its findings.

[9] In making its findings, the court has carefully considered all of the exhibits and affidavits submitted by the parties under Title 5 of the Maryland Rules. As the trier of fact, the court "may believe or disbelieve, accredit or disregard, any evidence introduced." *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 725 (1977); *see Bereano v. State Ethics Comm'n*, 403 Md. 716, 747 (2008). Every statement in this section is a factual finding, even if the word "finding" is not used in the sentence.

and affidavit that was submitted by the parties. The court finds the information submitted by White Flint, qualitatively and quantitatively, to be detailed and informative.

This case settled on the "eve of trial." Everything that needed to be done to prepare for a jury trial had been done. Substantial discovery was undertaken, including third party subpoenas, and extensive reports and depositions of experts in a variety of construction and engineering related fields. The court finds that this discovery was necessary for White Flint's development and presentation of its claims. The court also finds that the work for which compensation is sought plainly was related to this case. The damage to White Flint's building was so significant that the commercial tenants were required to abandon their leased premises.

Its claim in the attorneys' fee aspect of this case notwithstanding, Bainbridge never conceded liability. As a consequence, the court finds that its argument that the litigation (and any trial) should have been truncated, or limited to damages, is wrong. There is no cogent factual basis to support Bainbridge's contention that White Flint unreasonably failed to settle this case or submit to a damages only trial.

The court further finds the nature of the Easement Agreement to be particularly relevant. Bainbridge approached White Flint because it wanted something from them: specifically, the opportunity to profit financially. White Flint agreed, and the parties subsequently entered into the Easement Agreement. There was little, if any, economic benefit to White Flint resulting from the transaction.

The litigation of White Flint's underlying claims for damage to its realty and lost revenue was, at all times, hotly contested. From Bainbridge's answer in November 2012, and its responses to interrogatories and requests for admissions, through the Joint Pre-trial Statement in December 2013, Bainbridge denied liability. Tellingly, on January 3, 2013, Bainbridge filed its

Scheduling Hearing Statement with the court, asserting that: "*Bainbridge did not cause and is not responsible for the damages claimed by Plaintiff.*" (Emphasis added).

A.

Hourly Rates

Bainbridge contends that the hourly rates charged by White Flint's attorneys are unreasonably high. In support of this contention, Bainbridge points to the fee guidelines used by the United States District Court for the District of Maryland and the affidavit of its expert, Geoffrey Gavett, Esquire. Not surprisingly, White Flint believes that the rates charged are reasonable for cases of this type in this court and point to the affidavit of their expert, William J. Murphy, Esquire.

The court finds Mr. Murphy's affidavit to be highly persuasive, factually correct and consistent with the court's experience in complex litigation of this nature. Mr. Murphy is a partner with Zuckerman Spaeder LLP. He clerked for the Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States, and the Honorable Collins J. Seitz, Chief Judge of the United States Court of Appeals for the Third Circuit. Beginning with his entry into private practice in 1980 with Williams & Connolly, Mr. Murphy has been closely involved with innumerable high stakes litigation, including attorneys' fee disputes. He has also been an expert witness and testified in attorneys' fee litigation. The court credits his assertions, including that he is familiar with the rates typically charged in the Washington, D.C. area by firms that handle similar complex litigation. The court also credits his conclusion that "the Venable rates are fairly comparable to the hourly rates charged by other large law firms in such matters."

The affidavit of Bainbridge's expert, Mr. Gavett, is not persuasive for a number of reasons. First, his experience in complex litigation on behalf of a sophisticated business client is much more limited than Mr. Murphy's. Second, a substantial portion of Mr. Gavett's work, based on the cases listed on his resume, is insurance driven; that is, either on behalf of or paid for by insurance carriers. Indeed, as shown by his deposition, Mr. Gavett's primary experience with legal fees is negotiating downward adjustments to law firms' billing on behalf of insurance companies. The court concurs with Mr. Murphy that insurance carrier rates (and billing requirements) are of little relevance to this case and say nothing informative about the private market in the Washington, D.C. metropolitan area.

Third, the court finds that Mr. Gavett's opinion relies too heavily on the federal District of Maryland fee schedule. That schedule was last modified in 2008 and is based largely on rates then charged in Baltimore, not the Washington, D.C. metropolitan area. Initially, the fee schedule was developed for statutory fee shifting cases, not contract-based business litigation. Although federal judges and magistrate judges use the fee schedule in more routine civil cases, the court finds that they do not invariably follow the schedule in complex business litigation.

The top rate in the 2008 federal fee schedule is $400 per hour. The court credits Mr. Murphy's conclusion, which is consistent with this court's experience in business cases under Md. Rule 16-205, that experienced lawyers handling complex litigation matters in this court "routinely charge their business clients substantially more than $400 per hour." Mr. Gavett's thinly supported contention that the hourly rates are "excessive in light of the prevailing rates charged by local firms" is not well founded.

By way of further example, Venable charged $725 per hour for its lead trial lawyer. Bainbridge's lead trial lawyer charged $675 per hour, a mere $50 delta for lead counsel. The

principal Venable associate was billed at $495 per hour. The principal Bainbridge associate was billed at $485 per hour, a delta of $10. These differences are plainly economically immaterial, but the comparison is illustrative of the reasonableness of Venable's rates when compared to the concededly "market rates" charged by Bainbridge's own counsel in the same case. In short, the court finds that the hourly rates charged by Venable (and the other White Flint law firms) are reasonable.

B.

Assignment of Work

Bainbridge contends that White Flint's legal team had too many lawyers, that the case was way overstaffed and over-litigated, and that the legal work was not managed efficiently. According to Mr. Gavett, the outer limit of White Flint's reasonable attorneys' fees is $1,284,400 and for costs is $432,961.[10] His preferred view is that the most reasonable total is $610,000 in attorneys' fees and $432,931 in costs. The facts and the litigation history of this case, as well as the court's observations while managing this case, belie that assertion.

White Flint's legal team used a total of thirty-two timekeepers. By point of contrast, the three defendants collectively used forty-six timekeepers. Important to the court, however, is substance and, in that regard, 90% of White Flint's legal work was performed by only six individuals. For a case of this magnitude and scope, that is not excessive. Moreover, the court finds that White Flint's lawyers appropriately assigned more junior attorneys (with lower billing rates) to assist lead attorneys during the conduct of the litigation. As well, to reduce the cost of document production, White Flint used contract lawyers (at much reduced rates) to assist in the review and assembly of the innumerable documents generated during discovery.

[10] Bainbridge has not challenged White Flint's disbursements. The challenge is only as to the legal fees.

The court also rejects the contention that it is unreasonable for more than one lawyer to attend a deposition. This was a document heavy case. In such a case, the lawyer taking or defending a deposition simply cannot simultaneously handle the documents and pay close attention to the deponent's testimony. As Mr. Murphy correctly states: "This was a case in which document handling and the ability to ask follow-up questions during a particular deposition would have been enhanced by the presence of two attorneys representing the Plaintiff." Frankly, this is an understatement. More pointedly, the court finds that a good lawyer in this type of a case simply would not handle the documents and take or defend a deposition at the same time. The case is simply too complex and paper-intensive.

In summary, the court credits Mr. Murphy's opinion and finds that "the matter was appropriately staffed to provide the Plaintiff with skilled and competent legal services at reasonable rates."

C.

Time Spent

As of December 31, 2013, White Flint's team spent 9,393.9 hours on the case, whereas the defendants had spent 7,838.8 hours, even though two of the defendants, Turner and Schnabel, did not join the litigation until the fall of 2012, some five months after the case started.

The court finds the hours spent by White Flint to be reasonable. White Flint, not Bainbridge, had the burden of proof, and the defendants mounted a complex, expert-heavy engineering defense. As was its right, Bainbridge challenged White Flint at every turn, despite the fact that by February 27, 2012, it turns out that Bainbridge knew that its construction of The Monty was undermining the soil beneath White Flint's adjacent buildings and causing structural damage. By March 26, 2012, Bainbridge knew that the shoring and sheeting done by a

subcontractor simply "did not work." Yet, throughout the case, Bainbridge took the position that the damage to White Flint's buildings was "aesthetic," and that its general contractor, Turner, and Turner's insurance company were responsible for any of White Flint's losses. Turner, in turn, pointed the finger at its subcontractor, Schnabel. At one point in the case, Schnabel suggested to this court that any damage to White Flint's buildings was caused by the August 2011 earthquake experienced by this region.

The court agrees with Mr. Murphy's conclusion that "Plaintiff's success in defending its claims against numerous motions to dismiss and for summary judgment, demonstrates that Plaintiff had no choice but to engage in extensive, hard fought litigation, in order to sustain its legal position that Bainbridge was required by the Easement Agreement to indemnify White Flint for its damages, including its reasonable attorneys' fees and costs. . . . If Bainbridge had acquiesced early on, and abandoned its untenable view that the indemnification provisions of the Easement Agreement did not survive a termination of that Agreement caused by its own breach, no doubt the litigation would have been far less costly."

D.

Client Discount

The court finds that White Flint received a 15% discount (approximately $579,220) from Venable's standard fee charges. In other words, that is money already saved.

In addition, the court finds that Venable's staffing agreement with its client provided that 80% of the work would only be done by five professionals, and 90% of Venable's total legal fees were incurred by these five timekeepers plus a single lead trial lawyer. The court finds this assignment arrangement to be eminently reasonable and protective against unnecessary duplication of effort in a large law firm such as Venable.

The court also finds that the fee concessions were negotiated from Venable by a sophisticated consumer of legal services, which also benefits Bainbridge. This finding is not unimportant because, in the business world, sophisticated consumers of legal services simply do not pay for unreasonable legal fees; they have many choices and are not reluctant to take their business elsewhere. Mr. Murphy also found this to be germane. He observed that "it also was significant to me that the Plaintiff in this matter is a real estate development company that is part of a group of affiliated real estate companies that are themselves sophisticated consumers of legal services."

As of December 31, 2013, White Flint's legal team charged its client $3,606,380.09, while the defendants' legal team charged $2,690,635.25. The court finds that two of the defense firms for Turner and Schnabel charged like "insurance defense" firms, which base their fees on volume-based insurance company negotiated rates, which are not reflective of the private marketplace. Largely for that reason, the defendants' legal bills are lower.

The court finds that White Flint paid all of its legal bills without complaint and with no guarantee whatsoever that fees would be recovered in this case.

E.

"Block Billing"

According to Bainbridge, White Flint's fee application is fatally defective because "[t]he records provided by White Flint are replete with block billing." In Bainbridge's view, it is difficult if not impossible for the court (or anyone) to evaluate the reasonableness of the time charges of White Flint's attorneys. This view is echoed in the affidavit of Bainbridge's expert, Mr. Gavett, who says that "task billing" is required. In his view, "White Flint's Application

offers insufficient proof of the type and necessity of services provided to White Flint in this matter."

Although the court has not audited every time entry and disbursement,[11] it has carefully reviewed the bills and the supporting affidavits. The court does not find the bills difficult to read or understand. The court does not find "block billing." The court has encountered no difficulty in reviewing White Flint's legal bills for substance or reliability.

F.

Scope of the Litigation: White Flint's so-called "Refusal to Settle"

According to Bainbridge, the vast majority of White Flint's legal fees were incurred after September 2012, and "a dramatic downward adjustment" is required because White Flint unreasonably refused Bainbridge's settlement offer of September 2012. Mr. Gavett endorses this view. The court does not credit this contention.

At no time in this case did Bainbridge admit liability, in whole or in part. Even at oral argument on the fee petition, its lawyers would not concede that Bainbridge was liable for White Flint's losses or that it breached the Easement Agreement. Bainbridge hedged, saying only that it "took responsibility." Whatever that means, it is not a concession of legal liability. In every pleading, discovery response, motion and even the Pre-Trial Statement, Bainbridge flatly denied it was legally liable for any loss claimed by White Flint. Its contention that White Flint unreasonably failed to settle is unfounded.

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[11] White Flint provided the court with unredacted copies of every legal invoice and every expense receipt. White Flint also submitted affidavits of its principal, Leonard A. Greenberg, who personally reviewed all of the attorneys' invoices, found them to be reasonable and paid them on a timely basis "without assuming that Bainbridge would be liable for or would in fact pay White Flint's attorneys' fees, disbursements, and litigation costs." Mr. Greenberg also personally reviewed the major pleadings, motions and correspondence relevant to the case.

Apart from some $73,000 in new money, what Bainbridge offered White Flint in September 2012, was nothing more than an unenforceable agreement to agree. Committing "to an adjustment of the loss by Liberty Mutual when the Monty foundations reach[ed] street level" is illusory. In other words, the offer of a future "adjustment" was little more than an offer to pay whatever Liberty Mutual, Turner's insurance carrier, decided to pay with no promise to make up any shortfall. There was no assumption of liability by Bainbridge. It is not hard to see why White Flint decided to "pass" on this proposal.

G.

Degree of Success Achieved

The court finds that White Flint obtained cash payments in this case of $3,391,005, which is 96% of its documented damages. In addition, the court finds that White Flint obtained commercially valuable declaratory judgment rulings. These include White Flint's right to indemnification under Section 19 of the Easement Agreement by Bainbridge (which Bainbridge originally opposed) against *future claims* filed against White Flint,[12] the right to reciprocal easements over Bainbridge's property under Section 18(a), and a broad array of important covenants under Sections 18(b)-(g) which protect White Flint from nuisances that will likely occur at the construction site. All of these covenants are enforceable by liquidated damages against Bainbridge. As well, Bainbridge conceded its $7 million set-off claim against White Flint for delay damages due to the termination of the Easement Agreement.

[12] White Flint has already been sued by one of its former tenants, which claims $1 million in damages.

H.

Documentation of Fees and Costs

Hayes M. Walker's affidavit discloses that he is a certified public accountant and the president of Rollins Accounting & Advisory Services. Walker and his firm were hired by White Flint to calculate and quantify White's Flint's damages, including attorneys' fees and disbursements. According to Walker, White Flint's direct damages to the buildings harmed by Bainbridge's activities are $3,526,383. Walker calculated, as of December 31, 2013, White Flints' attorneys' fees and disbursements to be $4,039,641. The court finds that the methodology used by Walker is sound and his work to be accurate. He reviewed every type of accounting data needed to audit the work of counsel and analyze the disbursements.[13] Walker reviewed and submitted to the court a detailed breakdown of all charges related to this litigation. The court finds his work to be very informative and helpful in connection with its consideration of White Flint's petition.

IV.

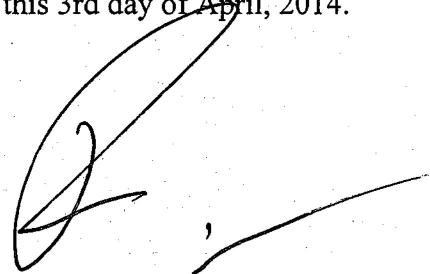
Adjustments and Conclusion

As of the date of the hearing on the fee petition, March 26, 2014, White Flint has requested an award of attorneys' fees in the amount of $3,847,164.59. White Flint also seeks reimbursement for costs and expenses of $411,391.88. Only the attorneys' fee portion is contested by Bainbridge.

[13] Venable's disbursements, along with a detailed month-by-month spreadsheet, are set forth in Exhibit 10 to the fee petition. Every item is meticulously described.

The court has concluded that certain adjustments to the fee request are appropriate in the exercise of judicial discretion. Mr. Silver[14] charged White Flint $9,275 for attending depositions conducted or defended by Venable. Although certainly not inappropriate, his attendance was not necessary. Before Venable entered the case, White Flint had its landlord and tenant lawyer look into its claims. The time for legal research and complaint drafting, $14,080, will be disallowed because Venable also performed similar work. These adjustments were discussed by Mr. Murphy in his affidavit, although he did not believe them to be necessary. Also, the court will disallow $303,553 for the time charged by Venable lawyers other than the six key team members. Again, the court does not find that it was improper to bill the client for this effort, but in the exercise of discretion in connection with the fee petition, the court has decided to make this adjustment.

For the reasons set forth above, White Flint is awarded $3,520,256.59 in reasonable legal fees and $411,391.88 in costs and expenses. It is SO ORDERED this 3rd day of April, 2014.



Ronald B. Rubin, Judge

[14] Joel Z. Silver, Esquire, serves as outside general counsel to White Flint's principal and his affiliated business entities.