FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

RELIGIOUS TECHNOLOGY CENTER, a California corporation,	§	Civil Action No. 6:00CV503
Plaintiff,	§	Judge Hannah
vs.	§	
DELL LIEBREICH, Individually and as Personal Representative of the Estate of Lisa McPherson,	§	
Defendant.	§	

PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND MEMORANDUM OF LAW IN SUPPORT

Plaintiff Religious Technology Center ("RTC") hereby moves the Court for an Order requiring that defendant Estate of Lisa McPherson ("defendant") pay RTC its attorneys' fees and costs incurred in this litigation, pursuant to the express terms of the contract upon which this suit was brought. By virtue of the Court's Order of March 19, 2001 finding that defendant had breached the agreement and granting RTC summary judgment of liability, RTC has established its entitlement to contractual attorneys' fees.

Pursuant to 28 U.S.C. § 1927, RTC also seeks an award of those same attorneys' fees and costs against defendant's attorneys, Thomas Dandar and Kennan Dandar, whose conduct of this case exponentially enlarged the amount of work that was needed, and consequently, RTC's fees and expenses

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The grounds for this motion are further set forth in the Memorandum of Law below.

MEMORANDUM OF LAW

I. INTRODUCTION

It is beyond dispute that where a party successfully litigates the breach of a contract containing a prevailing party clause, it is entitled, as a matter of law, to be awarded its fees and costs.

RTC sued defendant here for breach of contract. Paragraph 15 of that agreement provides that if a party successfully litigates a claim of breach, it is entitled to recover its attorneys' fees and costs so incurred:

> "In the event of a breach of this agreement, the prevailing party shall be entitled to attorneys' fees and costs."

RTC thus requests that the Court award RTC $544,699.84 in attorneys' fees and costs it has incurred to prosecute this case. The magnitude of the attorneys' fees sought herein directly reflects the enormous time that RTC's attorneys have been obliged to spend, often needlessly, to defend and to respond to defendant's relentless motion practice, including the repeated, *seriatim* assertion of arguments that had already been rejected by this Court, not once, not twice, but over and over again. For example, at the final pretrial conference held on January 14, 2002, defendant asserted the supposed lack of *in personam* jurisdiction, the Rooker-Feldman doctrine, and numerous equally meritless defenses and arguments, all of which defendant had previously asserted, and all

of which this Court had earlier and repeatedly rejected. It now asserts all of its oft-rejected arguments once again in its post-trial Rule 59 motion. In fact, defendant litigated this case as if the principle of law of the case did not exist.[1]

RTC thus submits that where, as here, defendant has geometrically increased litigation costs by its onslaught of baseless, repetitive motions, defendant cannot now be heard to object to an award of the substantial legal expenses it has caused RTC to incur, and that RTC's fees and costs should be granted in their entirety, both under the relevant contract and pursuant to 28 U.S. C. § 1927. Furthermore, to the extent defendant or its counsel choose to challenge either the reasonableness of the hourly rates charged by RTC's attorneys herein or the number of hours they expended, RTC respectfully insists that defendant ought to disclose that same information respecting its attorneys because it is certainly relevant here. [2]

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[1] *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-816, 108 S.Ct. 2166, 2176 (1988) ("'As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'"); *see Barrett v. Thomas*, 809 F.2d 1151, 1155 (5th Cir. 1987) ("Under the 'law of the case' doctrine, once the court decides an issue, that decision will remain binding on the court in all subsequent proceedings in the same case in trial court or on a later appeal in the appellate court."); *see also, Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) (law of the case is "a '*rule of practice*, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter.'"; "a court will follow a ruling previously made unless the prior ruling was erroneous, is no longer sound, or would work an injustice.") (emphasis in original).

[2] As the court stated in *David Ruiz, et al., v. W. J. Estelle, et al.*, 553 F.Supp. 567, 584, S.D. Tex. (1982):

(continued...)

II. STATEMENT OF FACTS

A. The Fees and Costs Sought by RTC

RTC is filing herewith the Declarations of John F. (Jack) Walker, III (Ex. 1), Samuel D. Rosen (Ex. 2), and Charles A. Gall (Ex. 3), each documenting the legal fees and expenses that RTC has incurred to their firms for the litigation of this case.[3] RTC is also filing a declaration from Warren McShane which documents the fees of Paul Mogin, Mike Addison and Brent Howard. (Ex. 4.) To summarize, those fees and costs by firm are:

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[2](...continued)

> "The time spent by defendants' attorneys in defending an action necessarily relates to the time spent by plaintiffs, though the relation is obviously imprecise, and may be governed by a variety of factors. Federal Courts have repeatedly noted the value of information concerning the defendants' counsel's time expenditure, in assessing the reasonableness of time claimed by plaintiffs. . . .
>
> "Though an assumption of precise congruity between the amounts of time spent by the two parties would obviously not be warranted, the value of the comparison cannot reasonably be assailed."

(Citations omitted.)

[3] The fees sought include fees for litigating the issue of contractual attorneys' fees on this motion, as "attorney's fees may be awarded for time spent litigating the fee claim." *See Johnson v. Mississippi*, 606 F.2d 635, 638 (5th Cir. 1979); *Cruz v. Hauck*, 762 F.2d 1230, 1233 (5th Cir. 1985) ("It is settled that a prevailing plaintiff is entitled to attorney's fees for the effort entailed in litigating a fee claim and securing compensation.")

FIRM	FEES [4]	COSTS [5]	TOTAL
Attorney Fees & Costs:			
Jenkens & Gilchrist	$216,862.50	$21,847.96	$238,710.46
Sammons & Parker, PC	$ 48,682.50	$ 2,096.54	$ 50,774.04
Paul, Hastings, Janofsky & Walker, LLP	$190,782.75 [6]	$20,281.59	$223,714.34
Witness Costs:			
Samuel D. Rosen		$12,650.00	$12,650.00
Paul Mogin		$16,160.00	$ 16,160.00
Mike Addison		$ 7,766.00	$ 7,766.00
Brent Howard		$ 7,560.00	$ 7,560.00

[4] Under Florida law, where a single transaction or set of facts gives rise to different theories of recovery, then a prevailing plaintiff is entitled to recover all of his fees. See *LaFerney v. Scott Smith Oldsmobile, Inc.*, 410 S.W.2d 534 (Fla. 5th DCA 1982). However, in the event that this Court believes that a recovery of the fees for work devoted to RTC's unsuccessful tort claim is inappropriate, the appropriate reduction would be $13,133.25. McShane Declaration, ¶ 6.

[5] The costs requested by RTC include the fees charged by RTC's witnesses, less the *per diem* amounts requested in RTC's Bill of Costs. As the Supreme Court has ruled, "contractual authorization for the taxation of the expenses of a litigant's witness as costs" is an exception to the rule that witness costs are limited by 28 U.S.C. §§ 1821 and 1920. *Crawford Fitting Co., v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445, 107 S.Ct. 2494, 2499 (1987). As RTC's damages consisted of the attorneys' fees it had paid, it was required to provide the testimony of the attorneys concerning those fees, and the fees that they charged for doing so was one of RTC's costs. In addition, the fees charged by RTC's experts also constituted part of its costs.

[6] As set forth in the Declaration of Samuel D. Rosen, RTC does not here seek any attorneys' fee award for the time Mr. Rosen spent as a trial witness, but does include Mr. Rosen's fees for time spent as a witness – $12,650 – in the witness costs portion of this motion.

RTC also submits herewith the Declaration of Brent Howard, Esq., respecting the reasonableness of these charges. (Ex. 5.)

III. ARGUMENT

A. RTC Is Contractually Entitled to an Award of Its Attorneys' Fees and Costs

In the Fifth Circuit, federal courts "enforce a valid fee-shifting provision as an exception to the American rule." *Resolution Trust Corp. v. Marshall*, 939 F.2d 274 (5th Cir. 1991) (enforcing fees provision of guaranty agreement). In a diversity action, the award of attorneys' fees is governed by state law. *Northwinds Abatement Co. v. Employers Ins. of Wausau,* 258 F.3d 345, 353 (5th Cir. 2001).

As the Court has previously ruled (October 20, 2000 Order), and as the parties have agreed by the contract, the agreement was made under Florida law, and it is Florida law that governs its interpretation and enforcement. Under Florida law, it is error as a matter of law for a Court to not award attorneys' fees where a contract in suit contains a prevailing party provision. *Remarc Homes, Inc. v. Kumar,* 616 So.2d 498, 499 (Fla. 5th DCA 1993). As the court stated in *Remarc*:

> Generally, with few exceptions, an attorney's fee provision in a contract cannot be ignored and courts have no discretion to decline to enforce contract provisions for awards of attorney's fees. Since the trial court found Remarc to be the prevailing party in this action, the court erred in denying attorney's fees.

Id.; *Blue Lakes Apts., Inc. v. George Gowing, Inc.*, 464 So.2d 705, 709 (Fla. 4th DCA 1985) ("[w]here a contract provides for an award of attorney's fees to the prevailing party in any litigation arising out of the contract a court is without discretion to decline to

enforce the provision."); *Richmond v. Lumb*, 339 So.2d 1147, 1147-1148 (Fla. 3rd DCA 1976) (same).

There can be no dispute that RTC is the prevailing party in this litigation. As such, under the applicable law, RTC is entitled to an award of its attorneys' fees and costs pursuant to paragraph 15 of the agreement, as a matter of law.

B. RTC's Attorneys' Fees and Costs Are Reasonable and Should Be Awarded

In determining a reasonable fee award, federal courts in the Fifth Circuit often look to the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974). *Northwinds Abatement Co.*, 258 F.3d at 354; *see*, *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.4, 103 S.Ct. 1933, 1937-1938 n. 4 (1983). Florida courts apply similar factors. *See, Florida Patients Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) (factors set forth in Bar rules for reasonable fees should be used in determining prevailing party fees); Fla. Rules of Prof. Conduct 4-1.5(b) (listing eight factors to be considered). Several of those factors have particular application to this litigation, as follows:

Factor 1. The time and labor required.

In this case, this factor is the most important. Despite that this might have been a simple breach of contract case, and despite the Court's recognition early on that defendant's positions were not well taken, defendant has engaged in extensive efforts to relitigate – over and over again – the same arguments rejected by the Court, and has asserted numerous motions that were at best ill-advised and at worst frivolous.

In the year and one half this case has been pending, defendant has filed, *seriatim*, nine dispositive motions under different labels, all seeking dismissal, each one more frivolous than the last and each were denied by this Court:

1. Motion to Dismiss and Memorandum of Law, filed on August 29, 2000, Docket #5, motion denied October 20, 2000, Docket #18;

2. Motion for Rule11 Sanctions, filed on September 26, 2000, Docket #13, motion denied October 20, 2000, Docket #17;

3. Motion for Rehearing or Reconsideration, filed on October 27, 2000, Docket #20, motion denied December 8, 2000, Docket #28;

4. Supplemental Motion for Rehearing or Reconsideration, filed on October 30, 2000, Docket #21, motion denied December 8, 2000, Docket #28;

5. Defendant's Motion for Summary Judgment and Memorandum of Law, filed on December 26, 2000, Docket #32, motion denied February 1, 2001, Docket #46;

6. Defendant's Motion for Rehearing and Reconsideration, and Alternatively, Renewed Motion for Summary Judgment, filed on March 30, 2001, Docket #80, motion denied April 24, 2001, Docket #95;

7. Motion to Dismiss and Motion for Attorney Fees, filed on April 26, 2001, Docket #96, motion denied July 3, 2001, Docket #120;

8. Motion to Dismiss for Lack of Subject Jurisdiction and Memorandum of Law, filed on June 4, 2001, Docket #115, motion denied July 3, 2001, Docket #120; and

9. Supplemental Motion to Dismiss for Lack of Subject Matter Jurisdiction and

Memorandum of Law, filed on January 14, 2002, Docket #138; denied orally at trial.

Beyond these dispositive motions, defendant has filed several frivolous non-dispositive motions, each of which was decided against defendant:

1. Defendant's Motion to take Deposition of Specific Corporate Officers, filed on February 5, 2001, Docket #48, motion denied April 2, 2001, Docket #81;

2. Defendant's Motion to Strike Plaintiff's Experts, filed on February 20, 2001, Docket #54, motion denied March 20, 2001, Docket #54; and

3. Defendant's Motions to Transfer Venue for Forum Non Conviens [sic], filed on February 20, 2001, Docket #55, motion denied March 13, 2001, Docket #69.

Defendant also filed two non-meritorious motions *in limine* on January 14 and 15, 2002 seeking various limitations on the trial, but without providing the Court any reasons.

In addition, defendant has filed papers that were not supported by any applicable rule, including:

1. Notice of Non-compliance filed on April 11, 2001, which claimed that RTC had not disclosed its bills within 15 days from an order from this Court requiring it to produce unredacted bills. This "notice" was filed even though RTC had filed a motion asking for a confidentiality order before producing the bills. And RTC's motion was only necessitated by the fact that defendant's attorney, Thomas Dandar, refused to agree to the entry of a standard confidentiality order to protect the confidentiality of attorney-client and privileged information in RTC's bills. The Court subsequently issued the confidentiality order that RTC had proposed and Mr. Dandar had refused to accept.

2. Notice of Non-Compliance/Direct Violation of Court Order and Defendant's Motion for Involuntary Dismissal filed on May 3, 2001, which complained that RTC should have its case dismissed and its President's Affidavit stricken. The basis for this motion was that RTC filed an affidavit of its President, who knew the facts concerning the fees sought in the Florida action for representation of its Chairman, instead of its Chairman who did not.

3. Notice of Non Compliance filed on June 1, 2001, which complained that the bills he received were still redacted, even though the only redactions were for entries not at issue in this case.[7] This resulted in the Court issuing an otherwise unnecessary Order and RTC having to file a Motion to Clarify on June 20, 2001, to correct the false impression created by defendant, that RTC had failed to comply with the Court's Order by producing redacted bills.

4. On September 28, 2001, Defendant filed a Motion for Continuance of Final Pre-Trial, Jury Selection and Trial, claiming irreconcilable scheduling conflicts on the part of counsel. As a perusal of the claimed conflicts showed, the dates set forth were not specific trial dates and most of them were not dates for Thomas Dandar, the only attorney who had filed an appearance in this case and had litigated it to that point. The Court denied the requested continuance, but RTC had to respond to this attempt to delay the trial a third time.

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[7] This "notice" and the April 11, 2001 motion were both filed without any attempt to meet and confer on the issues raised with RTC's counsel (see Docket Nos. 111 and 86), in violation of Local Rule CV-7.

In its many filings, defendant has raised the same issues already lost over and over again. For example, improper venue was asserted by defendant no less than nine (9) times:

- Motion to Dismiss and Memorandum of Law filed on August 29, 2000. (Docket #5.)
- Defendant's Notice of Reliance on Additional Authority in Support of their Motion to Dismiss filed on September 6, 2000. (Docket #8.)
- Motion for Rule 11 Sanctions filed on September 26, 2000. (Docket #13.)
- Motion for Rehearing or Reconsideration filed on October 27, 2000. (Docket #20.)
- Supplemental Motion for Rehearing or Reconsideration filed on October 30, 2000. (Docket #21.)
- Defendant's Response to Plaintiff's Motion for Partial Summary Judgment filed on November 16, 2000. (Docket #23.)
- Defendant's Motion for Summary Judgment and Memorandum of Law filed on December 26, 2000. (Docket #32.)
- Defendant's Motion to Transfer for Forum Non Convenience filed on February 20, 2001. (Docket #55.)
- Defendant's Motion for Rehearing and Reconsideration and Alternatively Renewed Motion for Summary Judgment filed on March 30, 2001. (Docket #80.)

Similarly, defendant asserted that this Court lacked subject matter jurisdiction no

less than ten (10) times:

- Motion to Dismiss and Memorandum of Law filed on August 29, 2000. (Docket #5.)
- Motion for Rule 11 Sanctions filed on September 26, 2000. (Docket #13.)
- Motion for Rehearing or Reconsideration filed on October 27, 2000. (Docket #20.)
- Supplemental Motion for Rehearing or Reconsideration filed on October 30, 2000. (Docket #21.)
- Defendant's Response to Plaintiff's Motion for Partial Summary Judgment filed on November 16, 2000. (Docket #23.)
- Defendant's Motion for Summary Judgment and Memorandum of Law filed on December 26, 2000. (Docket #32.)
- Defendant's Motion for Rehearing and Reconsideration and Alternatively Renewed Motion for Summary Judgment filed on March 30, 2001. (Docket #80.)
- Defendant's Motion for Lack of Subject Matter Jurisdiction and Memorandum of Law filed on June 4, 2001. (Docket #115.)
- Defendant's Reply to Plaintiff's Motion for Sanctions filed on July 2, 2001. (Docket #119.)
- Supplemental Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum of Law filed on January 14, 2002. (Docket #138.)

And defendant asserted its "defenses" of *res judicata* and collateral estoppel eight (8) separate times in:

- Motion to Dismiss and Memorandum of Law filed on August 29, 2000. (Docket #5.)
- Motion for Rule 11 Sanctions filed on September 26, 2000. (Docket #13.)
- Supplemental Motion for Rehearing or Reconsideration filed on October 30, 2000. (Docket #21.)
- Defendant's Motion for Summary Judgment and Memorandum of Law filed on December 26, 2000. (Docket #32.)
- Defendant's Response to Plaintiff's Motion for Reconsideration and Memorandum of Law filed on February 13, 2001. (Docket #51.)
- Defendant's Motion for Rehearing and Reconsideration and Alternatively Renewed Motion for Summary Judgment filed on March 30, 2001. (Docket #80.)
- Defendant's Motion for Lack of Subject Matter Jurisdiction and Memorandum of Law filed on June 4, 2001. (Docket #115.)
- Supplemental Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum of Law filed on January 14, 2002. (Docket #138.)

Now, post-trial, defendant has dragged out all of its repetitious and rejected arguments still another time in its Rule 59 Motion. Thus, even though the Court has previously denied motions based on each of them, defendant is now asserting lack of jurisdiction, lack of authorization for the fees under Florida law, RTC's lack of standing, estoppel, and failure to distinguish between fees sought in Florida and here, for as much as the eleventh time.

Defendant attempted to relitigate issues the Court already decided, even up to the time of trial. At the January 14 Pretrial Conference, Kennan Dandar had the temerity to tell the Court that he was repeating arguments he had made previously because maybe the Court had not bothered to read his prior submissions:

> MR. KEN DANDAR: *One more thing, and that is when we filed our motion for summary judgment, we attached the April 19th, 2000 hearing, and we – I don't know if we highlighted portions for you to draw your attention to*, but in that hearing Mr. Miscavige argued first the motion for summary judgment and then they brought up insufficiency of service and process. And the Court said I thought – I didn't know that was an issue. That's what we should hear first. And then they argued insufficiency of service of process, and Judge Moody on page 179, line five, of that hearing specifically held for the second time that David Miscavige individually is not protected by the confidential agreement. And then a few months later he ruled on the sufficiency of service of process.
>
> *The reason I bring that up is I don't know if we highlighted that. I want to make sure the Court is aware of that.* I believe that because of that hearing of April 19th, all of this matter before the Court is precluded, especially under Worker [sic] Feldman.

(Ex. 6, Tr., pp. 35-36 (emphasis added).)

Thus, defendant has chosen to geometrically increase the burden on RTC and this Court by filing seriatim motions asserting the exact same arguments previously rejected by this Court. As the Court itself is well aware, RTC has been forced to respond to all of these filings by defendant, no matter how repetitious or how unfounded, in addition to prosecuting its own meritorious motions and discovery. (Ex. 5, Howard Decl., ¶ 3.)

Even the litigation of RTC's own motions was rendered more complex than it needed to be by the fact that defendant raised convoluted arguments, simply because they were convoluted. In fact, RTC won every motion it brought, with the exception of a

motion to compel that was denied as moot, a motion for leave to amend the complaint, and its initial request for summary judgment that was, however, then granted in reargument. In contrast, with minor procedural exceptions, such as trial continuances and an extension for disclosing its expert, defendant has lost each motion it has brought.

The fees and costs incurred by RTC have been well spent in litigating this case in the most expedient and economical fashion possible in the face of the continuous barrage of meritless filings by defendant. They are entirely reasonable for the efforts that were necessitated as the result of defendant's filings and unreasonable positions. (Ex. 5, Howard Decl., ¶¶ 3, 5.)

Factor 2. The novelty and difficulty of the questions.

As addressed above, defendant regularly raised convoluted and complex issues as to jurisdiction, the Rooker-Feldman doctrine, and the like, each of which required RTC to file a responsive brief.

Factor 3. The skill requisite to perform the legal service properly.

The task of separating the wheat from the chaff in responding to defendant's arguments, as well as the research and preparation needed on the complex and convoluted issues raised, required counsel of a high level of skill. This Court is familiar with the high caliber of work product evident in RTC's filings and its presentation of its case.

Factors 5 and 9. The experience, reputation, and ability of the attorneys and the customary fees.

The declarations of counsel submitted herewith show that they are of stellar

experience, reputation, and ability. Mr. Rosen is with Paul, Hastings, Janofsky, and Walker, LLP. As the Court heard in the expert testimony presented at trial, as well as the testimony of other lawyer witnesses, Paul Hastings is an international law firm of high repute and standing in the legal community. (Ex. 7, pp. 196-200.) Mr. Rosen's own extensive qualifications were addressed in his trial testimony (*id*, pp. 196-198) and are further set forth in his Declaration herewith. The fees he charged here, ranging from $550.00 to $575.00 during the pendency of this case (Ex. 2, Rosen Decl., ¶ 9), are his usual and customary fees.

Mr. Gall is also a highly experienced and competent senior trial attorney with the prominent Dallas-based national law firm of Jenkens & Gilchrist, P.C. His Affidavit sets forth the considerable credentials that warrant the rates charged by him and his associates that assisted on different aspects of this case. Mr. Gall has charged RTC from $375.00 to $450.00, and the fees for the two associates who have principally worked on this case at different times, has been $165.00 for one and from $215.00 to $280.00 for the other. (Ex. 3, Gall Decl., ¶ 5.) The fees charged by Mr. Gall and his firm are the customary fees that they charge whether they work for clients in Dallas, or elsewhere.

Mr. Walker is a well-known and highly competent trial attorney in the Tyler, Texas community. His rates charged to RTC have been $200 to $225 per hour. His credentials are set forth in his Affidavit. Mr. Walker charged RTC his customary rate that he charges to each of his clients for the type of work being performed in this case. (Ex. 1, Walker Decl., ¶ 4.)

In a related case pending in Florida, *Church of Scientology Flag Service Organization v. Estate of Lisa McPherson*, No. 00-02750-CI-007 (Pinellas County Circuit Court), defendant's attorney herein, Thomas John Dandar, submitted an Attorney Fees Affidavit to the court. Mr. Dandar swore, under oath both that: (1) his hourly rate was $400.00 per hour and (2) $400.00/hour was a reasonable rate for *his* services. (Ex. 8, Affidavit of Thomas Dandar, at ¶ 4.) Kennan Dandar has also testified that he and his brother both charge $400.00 per hour and sometimes even more than that. (Ex. 9, Deposition of Kennan Dandar, pp. 26, 56-57, 124, 127, 128.) The Court has had before it through the pendency of this case, Kennan and Thomas Dandar, the attorneys that represented RTC, and the attorneys' respective briefs and other work product. Simply put, if $400/hour is reasonable for the fees of the Dandars, then, *a fortiori*, the rates of the attorneys herein are reasonable for their levels of ability and experience. RTC's expert confirms that this is so. (Ex. 5, Howard Decl., ¶ 6.)

Factor 8. The amount involved and the results obtained.

RTC prevailed on its breach of contract claim against defendant and was awarded nearly $260,000 out of $331,000 in attorneys' fees claimed as damages by the jury.

In *State Farm Fire & Cas. Co. v. Palma*, 524 So.2d 1035, 1036-1037 (Fla. 4th DCA 1988), the court affirmed an award of $253,500 in attorney fees to collect *$600* in medical bills. This was based on a $150 reasonable rate (at 1988 rates) with a 2.6 contingency risk multiplier. Some of the court's language there is helpful here:

> It appears that State Farm decided to "go to the mat" over the bill for thermographic studies because, apparently, it is a diagnostic tool which is

> becoming more widely used contrary to State Farm's view of what is "necessary medical treatment" as provided in the statute. Having chosen to stand and fight over this charge, State Farm, of course, made a business judgment for which it should have known a day of reckoning would come should it lose in the end.

Similar holdings are found in Fifth Circuit cases. *See, e.g., Northwinds Abatement Co.*, 258 F.3d at 354-355 (affirming fee of $712,000 that "was more than three times the trebled damages award and more than nine times the actual damages");[8] *McGowan v. King,* Inc., 661 F.2d 48, 51 (5th Cir. 1981). As the court stated in *McGowan*,

> [plaintiff's] counsel did not inflate this small case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents, and thus, if unsuccessful, be required to bear that cost.

Id. Here, lacking any factual or legal basis for a good faith "stalwart defense," defense counsel resorted to a strategy to vexatiously multiply the litigation costs and made misrepresentations to the Court. Thus, much of the time expended by RTC's attorneys was in response to the objectively unreasonable actions by defendant's counsel.

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[8] Notably, the disproportionate fee award in *Northwinds Abatement Co.* was upheld based on several factors that applied in that case, including the extensive proceedings, even though the court stated as follows about the prevailing party:

> Northwinds' attorneys were not very successful in their prosecution of this suit: following this decision, Northwinds will have prevailed on only two of its original laundry list of claims; the actual damages awarded to Northwinds are a tiny fraction of the multi-million dollar recovery it sought; and Northwinds took nothing on its key theory that Wausau's actions reduced Northwinds' profits by convincing its customers and potential customers that it ran an unsafe operation. Indeed, the only front on which Northwinds' attorneys enjoyed outright success was in convincing the jury to award full attorneys' fees. *Id.*

Factor 11. The nature and length of the professional relationship with the client.

This factor is significant with respect to Mr. Rosen, who, along with his firm, has represented RTC in many matters and has substantial familiarity with RTC. (Ex. 2, Rosen Decl., ¶ 15.) Mr. Rosen advises RTC on a variety of litigation matters.

The remaining *Johnson* factors.

The remaining *Johnson* factors have little to no application here. Whether the attorney is precluded from other employment (Factor 4), whether the fee is fixed or contingent (Factor 6), and time limitations imposed by the client or circumstances (Factor 7) typically have bearing on issues such as whether the lodestar amount should be multiplied upwards, and Factor 6 has been ruled improper to consider in any event. *See, e.g., Rutherford v. Harris County, Texas*, 197 F.3d 173, 193 (5th Cir. 1999). This case was not a contingency fee case, and RTC is not asking for anything more than the fees it actually paid. Nor are "undesirability" of the case (Factor 10) or awards in similar cases (Factor 12) a factor in the case at bar.

Finally, if defendant intends to challenge the number of hours expended by RTC's counsel, defendant should be required to disclose its own counsel's time records for comparison purposes. And if defendant wishes to challenge the reasonableness of the fees charged by RTC's attorneys, it should be required to produce its own counsel's bills showing the fees charged to defendant. (See Footnote 2.)

Here, the Declarations of counsel and the attached bills show that:

- Each firm played a unique role in the litigation;
- The attorneys involved are highly competent and have excellent credentials;
- The amounts charged are reasonable for attorneys of their respective skills, backgrounds, experience, reputation, and firms; and
- The hours expended were reasonable, and more significantly, were *required* by defendant's oppressive and redundant motion practice.

RTC therefore submits that it should be awarded the full amount of the fees and costs that it expended on this litigation.

C. RTC Should Also Be Awarded Its Fees Against Defendant's Attorneys Pursuant to 28 U.S.C. § 1927

RTC should also be awarded its attorneys' fees as a sanction against defendant's attorneys, Thomas and Kennan Dandar, for vexatious multiplication of these proceedings. Section 1927 provides:

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

An award of fees under section 1927 requires a showing that the conduct in question was both vexatious and unreasonable. *Edwards v. General Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998). Such a showing is made where there is evidence of "bad faith, improper motive, or reckless disregard of the duty owed to the court." *Id.* This requirement is satisfied by counsel who have "displayed, at the very least, a reckless disregard of his duties as an officer of this Court by" making frivolous arguments.

Baulch v. Johns, 70 F.3d 813, 817 (5th Cir. 1995); *Christianburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421, 98 S.Ct. 694, 700 (1978) (stating, in awarding fees in Title VII case, "the term 'vexatious' in no way implies that the [party's] subjective bad faith is a necessary prerequisite to a fee award against him.").

Courts have awarded section 1927 sanctions where an attorney files motions that have no basis in fact or law. *E.g., Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc.*, 38 F.3d 1414, 1417 (5th Cir. 1994) (sanctions awarded for a Rule 60(b)(6) motion that "unreasonably and vexatiously multiplied the proceedings."); *see, Edwards v. General Motors Corp.*, 153 F.3d at 246-247 (awarding 1927 fees where attorney had maintained a lawsuit in order to force a settlement or to force the defendant to defend it long after she knew it was not legally viable and had abandoned any thought of winning).

In *Travelers*, 38 F.3d at 1417 n. 6, the court found, in words that equally applicable here, that "defense counsel has badgered the Court with these various motions without basis in fact or law, in an attempt to intimidate the Court and retard the progress of the litigation." Furthermore, an attorney may not engage in "ostrich-like conduct," ignoring the applicable law, and then argue against being sanctioned. *See, Tomczyk v. Blue Cross & Blue Shield United of Wisconsin*, 951 F.2d 771, 776-779 (7th Cir. 1991). As the court stated in *Tomczyk*, in imposing sanctions under F.R.A.P. 38 on an appeal,

> An honest presentation of the case, adherence to the basic technical rules, and a colorable basis in law and fact–as well as a certain amount of common sense–will shield litigants and their attorneys from sanctions. Unfortunately, the attorneys for the appellant in this case transgressed these wide boundaries.

wide boundaries.

Id., at 779.

The actions of the defendant's attorneys were both unreasonable and vexatious. As shown above, they repeated the same arguments that had already been rejected as many as ten times in different briefs, and they filed numerous papers that can only be deemed frivolous. They misrepresented important facts to the Court, such as stating that they had first learned of the Paul Hastings time sheets during trial when this was clearly false, and they had never even asked RTC to produce them after they learned of them in January 2001. And they required litigation of simple issues such as the entry of a confidentiality order, rather than agree to standard language. All of these matters demonstrate that the Dandars had a reckless disregard for their obligations as officers of the Court, warranting that the fees attributable to their conduct be awarded against them.

IV. CONCLUSION

RTC respectfully requests that its motion for an award of attorneys' fees against the defendant and its counsel be granted in its entirety.

Dated: March 20, 2002

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that I called Defendant's counsel to discuss the merits of this Motion and he opposed the relief requested herein.

Jeffrey L. Crouch

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the above and foregoing **PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND MEMORANDUM OF LAW IN SUPPORT** has been served upon counsel for Defendant on this 20th day of March, 2002, by certified mail, return receipt requested.

John (Jack) F. Walker, III