The document below is hereby signed.

Signed: October 16, 2020

S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
NEIGHBORS' CONSEJO,	)	Case No. 15-00373
	)	(Chapter 11)
Debtor.	)	Not for publication in
	)	West's Bankruptcy Reporter.

MEMORANDUM DECISION AND ORDER
RE ATTORNEYS' FEES FOR FAUSTO FABRE

In its *Memorandum Decision Order Re Fausto Fabre's Motion to Amend Claim to Include Attorney's Fees and Setting Scheduling Conference* (Dkt. No. 533) ("*Memorandum Decision*"), the court determined that under the terms of the proposed settlement between the debtor and Fausto Fabre, a former employee of the debtor, Fabre ought to be deemed a prevailing plaintiff and entitled to attorney's fees and costs as provided under the Fair Labor Standards Act ("FLSA") and the District of Columbia Wage Payment and Collection Law ("DCWPCL"). *See* 29 U.S.C. § 216(b); D.C. Code § 32-1308(b)(1). At a hearing held on March 12, 2020, Fabre and the debtor agreed that the court could decide the issue

of attorney's fees on the papers. This memorandum decision and order addresses that outstanding issue of attorney's fees.

I

D.C. Code § 32-1308(b) provides:

> [T]he court shall award to each attorney for the employee an additional judgment for costs, including attorney's fees computed pursuant to the matrix approved in *Salazar v. District of Columbia*, 123 F. Supp. 2d 8 (D.D.C. 2000), and updated to account for the current market hourly rates for attorney's services.

There is conflicting case law about whether § 32-1308(b) requires updating the rate to account for the current experience of the attorney or only to the current rate for the attorney's level of experience at the time the work was performed. One approach is to update the rate to reflect the current rate for attorney's level of experience at time of billing. *See Young v. Sarles*, 197 F. Supp. 3d 38, 50-53 (D.D.C. 2016). Another approach, in line with Fabre's *Motion to Amend Proof of Claim to Include Attorney's Fees* (Dkt. No. 495), uses the current rate for the attorney's current level of experience, even for work performed when the attorney had less experience. *See Miller v. Holzmann*, 575 F. Supp. 2d 2, 18-21 (D.D.C. 2008); *Radtke v. Caschetta*, 254 F.

Supp. 3d 163, 182 (D.D.C. 2017) (applying *Miller* in FLSA case).[1]

As noted in the *Memorandum Decision*, factual considerations weighed heavily on the district courts' decisions in *Miller* and *Young*. In *Miller,* "more than a decade separated the onset of litigation on the merits and resolution of the subsequent fee-shifting dispute, with the time entries for which the prevailing plaintiff sought reimbursement spanning a thirteen-year period." *Young*, 197 F. Supp. 3d at 50 (citing *Miller*, 575 F. Supp. 2d at 18). In contrast, in *Young*:

> [T]he gravamen of the plaintiff's First Amendment challenge in this case was largely resolved within a month of the plaintiff having filed his Complaint and corresponding request for a preliminary injunction. Following a brief stay to allow WMATA to review the challenged regulation, the Court awarded summary judgment, and a permanent injunction, to the plaintiff roughly seven months after he filed his claim against WMATA. Thereafter, the case was again delayed, this time to provide the parties an opportunity to brief the impact of [*Eley v. District of Columbia*, 793 F.3d 97 (D.C. Cir. 2015)] on the present fee dispute and, importantly, to provide the plaintiff an opportunity to supplement his prior submissions in order to justify his request for reimbursement at LSI/*Salazar* rates.

Id. at 51.

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[1] In *Cobell v. Jewell*, 234 F. Supp. 3d 126, 168 (D.D.C. 2017), the district court suggests that in *Miller*, "the applicant sought to recover fees from the government, which enjoys sovereign immunity from paying interest on accrued fees. To make up for that deficiency, the court[] determined that a fee award based on the then-current Laffey rates was appropriate." However, the *Miller* decision does not state this rationale explicitly, and Judge Lamberth's subsequent application of the *Miller* methodology in *Radtke* further suggests that *Miller* was not intended to be limited to governmental defendants.

On the record before the court, application of the *Young* methodology is more appropriate. Fabre's counsel has submitted records for the period from August 12, 2014 to June 18, 2019, reflecting some activity in this litigation for nearly every month of that period; other than May to July 2016, January to April 2017, and October to December 2017, counsel did not go more than a month without devoting some time to this matter. Thus, the length of the litigation weighs somewhat in favor of the use of the *Miller* methodology. However, in *Miller*, counsel's time involvement in the litigation was much more extensive and stretched over a longer period of time. Whereas Fabre seeks attorney's fees for 144.5 hours of work performed over a period of slightly under five years, in *Miller*, the plaintiff's counsel submitted "24,584.6 billable hours, spread over thirteen years." *Miller*, 575 F. Supp. 2d at 19. Moreover, unlike *Miller*, in which roughly half of the hours were billed in 2007 (the year whose rates served as the basis of the fee calculation), *id.*, only 13.1 of the 144.5 hours (approximately 9%) submitted by Fabre's counsel were for the period beginning on June 1, 2019 (the date Fabre's counsel wishes to use for calculating years out of law

school).[2] Moreover, whereas in *Miller* only 7.4% of hours were services rendered before 2006, *id.*, approximately 56% of the hours billed in this case were billed before May 31, 2018. Accordingly, it is sufficient to apply the LSI/*Laffey* rates for June 1, 2019, to May 31, 2020, to counsel's historical experience levels to compensate for delays in payment of attorney's fees.

Having reviewed Fabre's counsel's records, I find that they are sufficiently complete and reasonable to warrant an award of attorney's fees for the full 144.5 hours sought. I note, however, that included among the records are entries relating to counsel's participation in the debtor's bankruptcy case in ways that are not in direct pursuit of Fabre's wage claims, such as review of the debtor's bankruptcy filings. Where such activities are necessary to protect an FLSA plaintiff's interest, they may be included in a fee award. *See e.g. Lora v. J. V. Car Wash, Ltd.*, Case No. 11 Civ. 9010 (LLS)(AJP), 2015 WL 7302755, at *6-7 (S.D.N.Y. Nov. 18, 2015) (granting plaintiff's attorney's fees for participation in defendant's bankruptcy case, including attendance at the meeting of creditors, after lifting of the automatic stay as to plaintiff's claim because such activities

[2] Moreover, the bulk of the 13.1 hours billed after June 1, 2019, was for work relating to the attorney's fees application. It would be inappropriate to allow a double adjustment of the billing rate (to reflect the current rate for current experience rather than just the current rate for historical experience) based on a small number of hours that were devoted primarily to the fee issue rather than the underlying claim.

were necessary to resolution of litigation); *Barrett v. Fields*, No. 95-2028-KHV, 1996 WL 571385, at *2 (D. Kan. Aug. 8, 1996) (attorney's fees incurred during defendants' intervening bankruptcy action were warranted because "attorneys fees incurred in the bankruptcy case through the time the stay was lifted were reasonably necessary to plaintiff's efforts to have a judgment entered"). Because Fabre pursued his wage claims in this court after the filing of the petition and the imposition of the automatic stay, I find that the hours devoted to his counsel's participation in the bankruptcy case outside of direct pursuit of the FLSA/DCWPCL litigation is compensable, and the time spent was reasonable.

II

Fabre's counsel also seeks reimbursement of $831.36 in costs. In the debtor's opposition (Dkt. No. 498) to Fabre's *Motion to Amend Proof of Claim to Include Attorney's Fees*, the only objection to payment of costs was that Fabre was not a prevailing party entitled to costs, an argument that I rejected in the *Memorandum Decision*. Having reviewed these costs, I find that they are described adequately and are reasonable. Accordingly, $831.36 of costs will be allowed.

III

In summary, Fabre is entitled to attorney's fees for the work for which fees are sought and is entitled to recover costs

in full. However, the amount of attorney's fees must be recalculated in conformity with the reasoning set forth above. It is thus

ORDERED that attorney's fees and costs component of Fabre's claim is allowed as follows. It is further

ORDERED that Fairfax has an allowed claim of attorney's fees reflecting 144.5 hours of work relating to Fabre's wage claims under federal and D.C. law and costs in the amount of $831.36. It is further

ORDERED that with 14 days after the entry of this memorandum decision and order, Fabre's counsel shall submit an updated calculation of fees incurred, using each attorney's level of experience at the time the work was performed but adjusting the rate upward to reflect the LSI/*Laffey* rates for June 1, 2019 to May 31, 2020.

[Signed and dated above.]

Copies to: Recipients of e-notification of orders.