

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSEPH JACKSON,

Plaintiff,

MEMORANDUM & ORDER
18-CV-3007 (JS) (AYS)

-against-

NASSAU COUNTY; DETECTIVE ROBERT
DEMPSEY; DETECTIVE GARY
ABBONDANDELO; DETECTIVE JOHN M. HOLLAND;
DETECTIVE MICHAEL HERTS; DETECTIVE
MARTIN ALGER; DETECTIVE WALTER SWENSON;
DETECTIVE ANTHONY KOSIER;
DETECTIVE SERGEANT DAN SEVERIN; and
JOHN and JANE DOE 1 through 20,

Defendants.

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APPEARANCES

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SEYBERT, District Judge:

Pursuant to Rule 72(a) of the Federal Rules of Civil
Procedure, Defendants Nassau County, Detectives Robert Dempsey,
Gary Abbondandelo, John M. Holland, Michael Herts, Martin Alger,
Walter Swenson, Anthony Kosier, and Detective Sergeant Dan Severin

(collectively, the "Defendants") object to the May 9, 2022 Rule 37-based order of Magistrate Judge Anne Y. Shields ("Judge Shields" or the "Magistrate Judge") (hereafter, the "Award Order"¹) wherein the Magistrate Judge ruled Plaintiff was entitled to an award of expenses pursuant to Rule 37 of the Federal Rules of Civil Procedure. (See Obj.,² ECF No. 359.) Plaintiff Joseph Jackson ("Jackson" or "Plaintiff") opposes Defendants' Objection. (See Obj. Opp'n, ECF No. 360.) For the reasons that follow, the Objection is OVERRULED, with the Magistrate Judge's Award Order remaining in full effect.

BACKGROUND

I. Relevant Factual Background, Generally

The Court assumes the parties' familiarity with the factual background that gives rise to this civil rights action (hereafter, the "Action"). See generally Jackson v. Nassau County,

¹ The Award Order is found in the Case Docket at ECF No. 358; it is also found at: Jackson v. Nassau County, 602 F. Supp. 3d 352 (E.D.N.Y. 2022). Herein, the Court will cite to the docket version of the Award Order.

² Defendants' Rule 72(a) objection was filed as an "Appeal". (See docket text associated with ECF No. 359.) "Best practice is to file an appeal of a magistrate judge's discovery order as a motion pursuant to Rule 72" and not at an "appeal". White v. County of Suffolk, et al., No. 20-CV-1501, slip op. (ECF No. 150), at 2 n.1 (E.D.N.Y. Jan. 22, 2024) (explaining further that because plaintiff "docketed his submission as an 'Appeal' and not a 'Motion', said filing did not generate an electronic 'gavel' in the Court's ECF system", which gavel alerts the Court to a party's request for relief and "when no gavel is assigned to a filing, the Court may be unaware a party is requesting relief").

552 F. Supp. 3d 350, 359-63 (E.D.N.Y. 2021) (in ruling on Defendants' motion to dismiss, providing relevant factual background precipitating this Action); see also id. at 363 (providing relevant procedural history of this Action); Jackson v. Nassau County, No. 18-CV-3007, 2024 WL 4252047, at *2-19 (E.D.N.Y. Sept. 20, 2024) (in ruling on Defendants' summary judgment motion and based upon the parties' respective Rule 56.1 Statements, providing relevant factual background precipitating this Action); see id. at *19 (expanding upon the Action's relevant procedural history since the Court's 2021 ruling on Defendant's dismissal motion). However, for context and convenience, the Court reiterates Judge Shields' summary of the Action:

[Jackson] served more than twenty years in prison for the 1994 murder of Steven Jason. His conviction was vacated in 2018 after the Nassau County District Attorney's Conviction Integrity Unit (the "CIU") investigated Jackson's claim of innocence and later moved to vacate his sentence.

In May of 2018, shortly after his release from prison, Jackson commenced this [Action] alleging violation of his civil rights in connection with his vacated murder conviction. The presently operative pleading is Plaintiff's third amended complaint (the "TAC"), appearing as Docket Entry ("DE") [339] herein. . . . Briefly, the TAC alleges claims of malicious prosecution, fabrication and withholding of evidence, forcing an unconstitutional confession, failure to train and supervise, conspiracy, suppression of evidence, and state law claims of malicious prosecution and false imprisonment. Named as Defendants in the various counts of the TAC are the County of Nassau and eight Nassau

County police officers who were involved in Plaintiff's accusation and conviction of murder.

Jackson v. Nassau County, 340 F.R.D. 539, 541-42 (E.D.N.Y. 2022).³

II. Relevant Procedural Background

A. Plaintiff's Motion to Compel

During protracted discovery, exacerbated by the COVID-19 Pandemic, Plaintiff sought to compel the production of documents set forth in Defendants' revised privilege log (hereafter, the "Documents"). (See Mot. Compel, ECF No. 341.) Defendants had invoked work product privilege over said Documents. After conducting an in camera review of the Documents and holding a conference to discuss, inter alia, Plaintiff's Motion to Compel, Judge Shields ruled neither category of the Documents, i.e., those containing "express legal analysis" and those described to "reflect legal analysis", were protected work product. (See Rule 37 Order at 11-17.) Hence, Defendants were "directed to produce all documents listed in their revised privilege log." (Id. at 17.) Defendants did not object to the Rule 37 Order. (See Case Docket, in toto.)

³ Hereafter, Judge Shields' March 14, 2022 Order is referred to as the "Rule 37 Order". Said Order is also found in the Case Docket at ECF No. 351; going forward, the Court will cite to the docket version of the Rule 37 Order.

B. Plaintiff's Motion for Expenses

Thereafter, in April 2022, Plaintiff moved pursuant to Rule 37(a)(5)(A) for a corresponding award of expenses, including attorney fees, incurred in compelling the production of the Documents. (See Expenses Motion, ECF No. 353.) Plaintiff argued Defendants improperly asserted work-product protection over the Documents, which delayed Plaintiff's receipt of same for nearly three years, which delay caused Plaintiff significant prejudice in conducting his discovery. (See id. at 2.) He sought an award of \$11,700 in accordance with the Circuit's applicable lodestar method; pursuant to said method, Plaintiff advanced a billable rate of \$500 per hour for a total of 23.7 hours, claiming those hours related to compelling the turnover of the Documents. (See id. at 3.)

Defendants opposed Plaintiff's Motion for Expenses. (See Expenses Opp'n, ECF No. 354.) They advanced the "substantially justified" exception of Rule 37(a)(5), asserting the work-product privilege was arguably applicable. (See id. at 1-2 (citing FED. R. CIV. P. 37(a)(5)(A)(ii)).) In claiming an entitlement to the work-product privilege, Defendants asserted they relied upon this Court's ruling in Tankleff v. County of Suffolk, No. 09-CV-1207, 2011 WL 5884218 (E.D.N.Y. Nov. 22, 2011). (See id. at 2.) At bottom, viewed objectively, because "[p]arties 'could differ' as to the applicability of the privilege",

Defendants argued Plaintiff's Motion for Expenses should be denied. (See id.)

Over Defendants' opposition, Judge Shields granted Plaintiff's Motion for Expenses (hereafter, the "Award Order"). (See ECF No. 358.) In doing so, the Magistrate Judge properly stated, as the party opposing the motion, Defendants had the burden of persuasion to show they were entitled to a Rule 37(a)(5) exception, which is subject to an objective test of reasonableness, i.e., "there is justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure requirement, or if there exists a genuine dispute concerning compliance." (Id. at 3 (omitting citation).) Assessing the relevant factual background, Judge Shields found Defendants' invocation of the work-product privilege was not substantially justified, especially because there was a dearth of any legal analysis reflected in the previously withheld Documents. (See id. at 4-6.) Further, as to the award itself, the claimed hourly rate was not disputed, and, based upon "the Court's own knowledge of the background of the motion to compel," the Magistrate Judge found no excessive billing. (Id. at 7.) "Moreover, the Court f[ound] no evidence to support Defendants' suggestion to bluntly halve the amount sought by finding 10 hours sufficient to litigate the battle over the withheld [D]ocuments." (Id.)

C. Defendants' Objection to the Award Order

By way of its Rule 72(a) Objection, Defendants lodges a timely appeal of the Award Order. (See Obj.) Generally, they maintain Judge Shields erred by finding Defendants "failed to demonstrate substantial justification for asserting the work product privilege." (Id. at 2.) Defendants assert the Magistrate Judge "did little more than apply the same analysis that was applied in granting the underlying motion to compel" which is error "because a different standard applies". (Id.) More specifically, Defendants claim Judge Shields erred in three ways: (1) by finding Plaintiff confronted a "moving target" with respect to Defendants' assertion of work product (hereafter, the "Moving Target Objection") (see id. at 7-9); (2) by determining Defendants' assertion of work-product privilege was not substantially justified (hereafter, the "Substantially Justified Objection") (see id. at 9-11); and (3) alternatively, by awarding Plaintiff the full award he sought, since the award encompassed an over-inclusion of time Plaintiff spend in compelling production of the Documents (hereafter, the Full Award Objection") (see id. at 12-13).

In opposing Defendants' Objections, Plaintiff counters Judge Shields "was well within her discretion to award reasonable Rule 37(a)(5)(A) fees to [him] as the prevailing party in a discovery dispute where the Court had already held – in a sound

ruling unchallenged by [D]efendants – that [D]efendants’ position was meritless.” (Obj. Opp’n at 1.) Continuing, Plaintiff argues Defendants’ challenge to the Award Order:

is, at best, a belated and failing effort to relitigate the underlying adverse discovery decision[, i.e., the Rule 31 Order], to which [the Award Order] is coda, and that such regurgitated arguments are procedurally barred and, in any event, insufficient as a matter of law to disturb the thoughtful rulings, which resulted from in camera review of material defendants withheld as privileged for years.

(Id. at 2 (citations omitted).) Plaintiff asks the Court to overrule Defendants’ Objection. (See id. at 3.)

DISCUSSION

I. Applicable Law

A. Rule 72(a)

Pursuant to Federal Rule of Civil Procedure 72(a), a party has the option of objecting to a magistrate judge’s order concerning any non-dispositive pretrial matter. See FED. R. CIV. P. 72(a). The district judge “must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.” Id.; see also 28 U.S.C. § 636(b)(1)(A) (“A judge of the court may reconsider any [non-dispositive] pretrial matter . . . where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.”); Patel v. Clane Gessel Studio, No. 22-CV-10964, 2024 WL 2732308, at *2

(S.D.N.Y. May 24, 2024) (“An objection directed at non-dispositive matters decided by the assigned magistrate judge will not be ‘modified’ or ‘set aside’ unless the magistrate judge’s ruling is ‘clearly erroneous or contrary to law.’” (quoting FED. R. CIV. P. 72(a))). “An order is ‘clearly erroneous’ only if a reviewing court, considering the entirety of the evidence, is left with the definite and firm conviction that a mistake has been committed; an order is ‘contrary to law’ when it fails to apply or misapplies relevant statutes, case law, or rules of procedure.” Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 954 F. Supp. 2d 127, 139 (E.D.N.Y. 2013), aff’d, 868 F.3d 104 (2d Cir. 2017) (quotations and citations omitted); see also Alvarez v. Experian Info. Solutions, Inc., No. 19-CV-3343, 2024 WL 3643269, at *6 (E.D.N.Y. Aug. 2, 2024) (same) (quoting E.E.O.C. E.E.O.C. v. First Wireless Grp., Inc., 225 F.R.D. 404, 405 (E.D.N.Y. 2004); further citation omitted); Karavani v. Nooklyn, Inc., No. 19-CV-1588, 2020 WL 92210, at *1 (E.D.N.Y. Dec. 13, 2020) (“The Supreme Court has emphasized that an order can only be found to be ‘clearly erroneous’ when the reviewing court upon canvassing the entire record, ‘is left with the definite and firm conviction that a mistake has been committed.’” (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948))). Moreover, “[u]nder the clearly erroneous standard of review of Rule 72(a), the magistrate judge’s findings should not be rejected merely because

the court would have decided the matter differently.” Ross Univ. Sch. of Med., Ltd. v. Brooklyn-Queens Health Care, Inc., No. 09-CV-1410, 2013 WL 1334271, *5 (E.D.N.Y. Mar. 28, 2013) (citation and internal quotation marks omitted); see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720, 2021 WL 4775553, at *3 (E.D.N.Y. Jan. 14, 2021) (same).

The Rule 72(a) “standard is highly deferential, imposes a heavy burden on the objecting party, and only permits reversal where the magistrate judge abused his discretion.” Ahmed v. T.J. Maxx Corp., 103 F. Supp. 3d 343, 350 (E.D.N.Y. 2015) (quotations and citations omitted); see also Grief v. Nassau County, No. 15-CV-7240, 2022 WL 307154, at *2 (E.D.N.Y. Feb. 2, 2022) (same) (quoting Ahmed); In re Hulley Enters. Ltd., 400 F. Supp. 3d 62, 70 (S.D.N.Y. 2019) (“Magistrate judges are afforded broad discretion in resolving nondispositive disputes and reversal is appropriate only if their discretion is abused A party seeking to overturn a magistrate judge’s decision thus carries a heavy burden.” (citation modified)); Williams v. Rosenblatt Sec., Inc., 236 F. Supp. 3d 802, 803 (S.D.N.Y. 2017) (stating objections to nondispositive discovery disputes must be overruled unless a magistrate judge’s ruling is clearly erroneous or contrary to law and, given this highly deferential standard, “magistrate judges are afforded broad discretion in resolving nondispositive disputes and reversal is appropriate only if their discretion is abused”

(citation omitted)); JPMorgan Chase Bank, N.A. v. Reifler, No. 11-CV-4016, 2016 WL 10570981, at *2 (S.D.N.Y. July 14, 2016) (“It is well-settled that a magistrate judge’s resolution of a non-dispositive matter should be afforded substantial deference and may be overturned only if found to have been an abuse of discretion.”).

B. Rule 37(a)(5)

Rule 37 addresses what may occur when a party fails to make disclosures, cooperate in discovery, or otherwise fails to comply with a discovery order. See generally FED. R. CIV. P. 37; see also Sports Garten LLC v. Sunday Night Prods., Inc., No. 20-CV-5617, 2023 WL 10967725, at *2 (E.D.N.Y. Aug. 25, 2023) (“Rule 37 outlines a party’s avenues for relief in the event than an opposing party fails to make disclosures or otherwise cooperate in discovery.”). Indeed, relevant to the instant matter, “[t]he great operative principle of Rule 37 is that the loser pays the expenses incurred in making or opposing a motion to compel.” Romeo & Juliette Laser Hair Removal, Inc. v. Assara I, LLC, No. 08-CV-0442, 2013 WL 3322249, at *3 (S.D.N.Y. July 2, 2013) (citation modified). Specifically, pursuant to Rule 37(a)(5)(A), if a motion to compel is granted:

the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in

making the motion, including attorney's fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(a)(5)(A) (emphasis added).

Further, as aptly stated by Judge Mary Kay Vyskocil of the Southern District of New York:

To recover expenses under Rule 37(a)(5)(A), "the only requirements are that a party has made a motion for 'an order compelling disclosure or discovery' and that 'the motion is granted.'" John Wiley & Sons, Inc. v. Book Dog Books, LLC, No. 13 Civ. 816 (WHP) (GWG), 2014 WL 12902178, at *1 (S.D.N.Y. June 5, 2014) (first quoting Fed. R. Civ. P. 37(a)(1); then quoting Fed. R. Civ. P. 37(a)(5)(A)). The prevailing party therefore "is presumptively entitled to an award of motion expenses, including reasonable attorney's fees." Kregler v. City of New York, No. 08 Civ. 6893 (VM) (MHD), 2013 WL 1415228, at *2 (S.D.N.Y. Apr. 8, 2013). Accordingly, "the burden of persuasion [is] on the losing party to avoid assessment of expenses and fees rather than . . . on the winning party to obtain such an award." Pegoraro v. Marrero, No. 10 Civ. 00051 (AJN) (KNF), 2012 WL 5964395, at *4 (S.D.N.Y. Nov. 28, 2012) (alteration in original) (quoting 8B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2288 (3d ed. 2010)); see Romeo & Juliette Laser Hair Removal, Inc., 2013 WL 3322249, at *4 (alteration in original) ("Rule 37 'places the burden on the disobedient party

to avoid expenses [including attorneys' fees] by showing that his failure is justified.'" (quoting JSC Foreign Econ. Ass'n Technostroyexport[v. Int'l De. & Trade Servs., No. 03-CV-5562,], 2005 WL 1958361, at *11 [(S.D.N.Y. Aug. 16, 2005)]).

Wager v. G4S Secure Integration, LLC, No. 19-CV-3547, 2021 WL 293076, at *3 (S.D.N.Y. Jan. 28, 2021). Further, "[t]he imposition of Rule 37(a)(5) sanctions for failure to comply with discovery demands must be weighed in light of the full record." S.E.C. v. Yorkville Advisors, LLC, No. 12-CV-7728, 2015 WL 855796, at *3 (S.D.N.Y. Feb. 27, 2015) (citing Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures, 602 F.2d 1063, 1068 (2d Cir. 1979)). And, when "acting pursuant to Rule 37, a district court has wide discretion in sanctioning a party for discovery abuses." Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 267 (2d Cir. 1999) (quoted by Yorkville Advisors).

"[I]t is widely accepted that an award of expenses under Rule 37(a)(5)(A) is mandatory unless one of the three exceptions[, i.e., Rule 37(a)(5)(A)(i)-(iii),] applies." Wager, 2021 WL 293076, at *4 (citing Creative Res. Grp. of N.J. v. Creative Res. Grp., Inc., 212 F.R.D. 94, 103 (S.D.N.Y. 2002) ("The rule provides, in fact, that the losing party on a motion to compel must pay reasonable expenses, barring extenuating circumstances." (collecting sources) (emphasis in original)); see also Hassoun v. Searls, 524 F. Supp. 3d 101, 109 (W.D.N.Y. 2021) ("It is widely

accepted that an award of expenses under Rule 37(a)(5)(A) is mandatory unless one of the three exceptions applies.”) (citation modified). Here, in objecting to the Award Order, Defendant relies upon the “substantially justified” exception of Rule 37(a)(5). (See Obj. at 6 (“Defendants argued that their assertion of the attorney work product was substantially justified under Rule 37(a)(5)(A)(ii).”))

“The United States Supreme Court has interpreted the phrase ‘substantially justified’ to mean ‘justified in substance or in the main’—that is, justified to a degree that could satisfy a reasonable person,’ which is ‘more than merely undeserving of sanctions for frivolousness.’” MPD Accessories, B.V. v. Urban Outfitters, Inc., 12 Civ. 6501(LTS)(KNF), 2013 WL 3816598 at *3 (S.D.N.Y. July 22, 2013) (Fox, M.J.), objections overruled, 2013 WL 5647430 (S.D.N.Y. Oct. 9, 2013) (Swain, D.J.), quoting Pierce v. Underwood, 487 U.S. 552, 565-66 (1988). “Substantial justification for refusing discovery is determined according to ‘an objective standard of reasonableness and does not require that the party have acted in good faith.’” Klein v. Torrey Point Grp., LLC, 979 F. Supp. 2d 417, 442 (S.D.N.Y. 2013) (Failla, D.J.), quoting Bowne of N.Y.C., Inc. v. AmBase Corp., 161 F.R.D. 258, 262 (S.D.N.Y.1995) (Carter, D.J.). In other words, “the source of the norms for determining whether the standard has been satisfied is the courts’ [sic] view about the range of behavior that a hypothetical reasonable lawyer would engage in if confronted with the circumstances presented in the particular case [A] prevailing party can secure an expense sanction award without proving that the losing

party acted in bad faith, and proof by the losing party that it acted in subjective good faith is not sufficient to defeat a request for sanctions.”

In re Omeprazole Patent Litig., MDL 1291, M-21-81 (BSJ), 2005 WL 818821[,] at *6 (S.D.N.Y. Feb. 18, 2005) (Special Master’s Ruling), aff’d, 227 F.R.D. 227 (S.D.N.Y. Feb. 25, 2005) (Jones, D.J.), quoting 7-37 Moore’s Federal Practice-Civil § 37.23[2] (2004).

Yorkville Advisors, 2015 WL 855796, at *7. Finally, “a number of courts have observed that the question of substantial justification should be decided with some leniency given the fact that attorneys must advocate for their clients.” Cardwell v. Davis Polk & Wardwell LLP, No. 19-CV-10256, 2021 WL 2650371, at *3 (S.D.N.Y. June 28, 2021) (citation modified).

II. Application

The Court finds the Magistrate Judge did not clearly err in awarding Plaintiff his expenses in bringing his Motion to Compel. Judge Shields’ Award Order was well within her discretion, especially considering her familiarity with the proceedings. See, e.g., Bhagwanani v. Brown, 665 F. App’x 41, 42 (2d Cir. 2016) (“The breadth of the court’s discretion to select a sanction appropriate to the circumstances of a particular case reflects the ‘considerable deference [afforded] to the district court’s

familiarity with the proceedings.’”⁴ (quoting Friends of Animals, Inc. v. U.S. Surgical Corp., 131 F.3d 332, 334 (2d Cir. 1997)).

A. The Moving Target Objection

Defendants’ Moving Target Objection is without merit; it is a specious dispute regarding the semantics of the phrase “moving target”. While, arguably, the Magistrate Judge’s use of that phrase could be perceived as somewhat expansive, given the record, it certainly was not erroneous. Moreover, by their own words, Defendants implicitly concede the accuracy of Judge Shields’ intended meaning: regarding the Documents as to which Defendants claimed work product privilege, things changed. (See Award Order at 4 (stating, “prior to submission of the final claim of privilege[,] Plaintiff confronted a moving target regarding claims of privilege”).) Indeed, in responding to Plaintiff’s renewed Rule 37 motion, Defendants stated they “withdrew the assertion of privilege as to certain documents, provided [P]laintiff with a

⁴ The Court recognizes the Bhaqwanani case addressed Rule 37(b) sanctions, i.e., sanctions imposed when a party fails to comply with a court order. Nonetheless, the deference and discretion bestowed upon a trial court to fashion a sanction when a party fails to comply with a court order, which deference and discretion is based in part upon the trial court’s familiarity with, i.e., its intimate knowledge of, an action, is no less applicable in the context of Rule 37(a), where the trial court—here, the Magistrate Judge—is, likewise, well-aware of the procedural posture and nuances of the action, and is authorized to award a party its incurred expenses as the result of having to compel its adversary to turn over discovery. See generally Pippins v. KPMG LLP, 279 F.R.D. 245, 253 (S.D.N.Y. 2012) (stating a “Magistrate Judge’s resolution of discovery disputes deserves substantial deference”).

revised privilege log, and as to the remainder maintained the same arguments that they had been asserting since June 2019.” (Obj. at 8; see also id. at 12 (“The only thing that changed over the course of the dispute was that [D]efendants withdrew the assertion as to a handful of emails and other documents.” (emphasis added)); cf. Rule 37 Order at 11 (“Defendants have already once revised their privilege log to reflect reversal of their earlier position as to certain documents -- they now concede such documents contain no legal analysis.”).) Defendants’ subsequent continued invocation of the work product privilege as to the remaining Documents does not negate Judge Shields’ finding that there was a change regarding the documents for which Defendants sought work production privilege. Hence, upon the record, there is no basis for this Court to form a firm conviction Judge Shield’s “moving target” finding was a mistake; instead, that finding is correct. Accordingly, Defendants’ Moving Target Objection is OVERRULED.

B. The Substantially Justified Objection

Defendants assert the Magistrate Judge clearly erred in failing to apply the proper legal analysis, i.e., “whether a reasonable person could conclude that ‘parties could differ’ [about asserting the work product privilege]”, when determining the substantial justification exception they sought. (Obj. at 11.) They would fault Judge Shields for her reliance and “simple reference to” her earlier ruling in the Rule 37 Order regarding

the issue of substantial justification. (Id.) The Court is unpersuaded; said reliance was the foundation upon which the Magistrate Judge laid her subsequent determination that Defendants' claimed Rule 37(a)(5)(A)(ii) exception did not apply.

As articulated in her Rule 37 Order, to which Defendants did not object, Judge Shields' in camera review of the Documents established Defendants had no objective substantial justification to invoke work product privilege over said Documents. (See Rule 37 Order at 11-17.) The Magistrate Judge's reliance upon her Rule 37 Order, which contained the rationale for finding no substantial justification, i.e., there was no basis for asserting the work product privilege, in reaching her ruling in her subsequent Award Order is of no moment; doing so was well within her discretion and was not clearly erroneous. Indeed, courts often rely upon prior determinations in making subsequent rulings. Moreover, as is evident from the underlying Rule 37 Order, Judge Shields findings were based upon both the nature of the documents and the factual situation of the Action. Thus, Judge Shields' assessment of the claimed privilege comported with the law. See, e.g., In re Omeprazole Patent Litigation, 2005 WL 818821, at *8 ("In United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998), the Second Circuit observed that 'documents should be deemed prepared 'in anticipation of litigation,' and thus within the scope of the [work product] Rule, if 'in light of the nature of the document and the

factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'"). In turn, the Magistrate Judge properly used those determinations as her foundation for finding Defendants' reliance upon the work product privilege was not substantially justified. (See Award Order at 5-6 ("To be clear in its rejection of Defendants' substantial justification argument, the Court reiterates that its review of the withheld documents revealed the baseless nature of Defendants' claims of privilege. Thus, the documents alleged by Defendants to 'express' or 'reflect' legal analyses were revealed to contain no legal analyses whatever.")) Moreover, it is readily apparent, notwithstanding the lack of some sort of legal 'incantation' of the objective reasonableness standard, that in making her Rule 37(a)(5)(A)(ii) determination, Judge Shields did, in fact, consider Defendants' assertion of the work product privilege from the viewpoint of a hypothetical reasonable lawyer confronted with the circumstances presented in this Action. (See id. at 5 (stating "the Court recognizes that a difference of legal opinion might, in appropriate cases provide safe harbor from an award of Rule 37 expenses, [but] this is not such a case" and rejecting Defendant's reliance on Tankleff as inapposite).) This Court agrees; given the nature of the Documents and the factual situation this Action, asserting the work product privilege would not be justified to a degree that could satisfy a

hypothetical reasonable attorney that parties could differ whether they could rely upon that privilege in response to Plaintiff's disclosure request. Hence, upon clear error review, this Court finds none. Accordingly, the Substantially Justified Objection is OVERRULED.

C. The Alternative, Full Award Objection

In alternatively objecting to Judge Shields' full award of Plaintiff's requested attorney fees, Defendants fail to meet their heavy burden since they have not shown the Magistrate Judge abused her discretion in making said Award. In opposition to Plaintiff's Motion for Expenses, Defendants argued Plaintiff's requested hours was "grossly excessive". (Expenses Opp'n, ECF No. 354, at 2, 3.) The examples of time they highlight were purely opinion-based. Clearly, Judge Shields disagreed. As the assigned Magistrate Judge who is familiar with this Action, it was well within Judge Shields' discretion to determine the reasonableness of the hours requested, and Defendants cannot demonstrate that discretion has been abused. See, e.g., Millea v. Metro-N. R.R. Co., 658 F.3d 154, 166 (2d Cir. 2011) ("The district court retains discretion to determine what constitutes a reasonable fee." (citation modified)); Gesualdi v. Dove Mason Supply Co., Inc., No. 19-CV-1181, 2020 WL 1538746, at *5 (E.D.N.Y. Mar. 11, 2020) ("District courts have broad discretion to determine both the reasonable number of compensable hours and the reasonable hourly

rate.” (quoting Brady v. Wal-Mart Stores, Inc., 455 F. Supp. 2d 157, 203 (E.D.N.Y. 2006)), report and recommendation adopted, 2020 WL 1536408 (E.D.N.Y. Mar. 30, 2020); see also generally Monge v. Glen Cove Mansion Hospitality, LLC, No. 18-CV-7229, 2020 WL 1666460, at *7 (E.D.N.Y. Apr. 2, 2020) (“In assessing whether billed hours were reasonably expended, ‘the court looks to ‘its own familiarity with the case and its experience generally as well as to the evidentiary submissions and arguments of the parties.’” (quoting Scharff v. County of Nassau, No. 10-CV-4208, 2016 WL 3166848, at *6 (E.D.N.Y. May 20, 2016); further citation omitted)).

Indeed, none of the arguments advanced by Defendants in their Full Award Objection change this Court’s conclusion that Judge Shields’ full award was well within her discretion. First, to the extent Defendants base their Full Award Objection on semantics, i.e., whether Plaintiff was “exonerated”, that position is wholly unavailing. Second, for the reasons stated supra, the Court finds Defendants’ shifting-claim-of-privilege argument, i.e., their “moving target” argument (see Obj. at 12), without merit. Finally, the submission of papers at the Court’s directive is not a reason to find billed hours to be grossly excessive. (See id. at 12-13.) At bottom, Judge Shields’ full award was not clear error; accordingly, Defendants’ Full Award Objection is OVERRULED.

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To the extent not explicitly stated herein, the Court has considered Defendants' remaining arguments and finds them to be without merit. In sum, upon clear error review of the Award Order, the Court finds none.

CONCLUSION

Accordingly, for the stated reasons, **IT IS HEREBY ORDERED** that Defendants' Objection (ECF No. 359) is **OVERRULED** in its entirety, and the Award Order (ECF No. 358) is **AFFIRMED**.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: October 14, 2025
Central Islip, New York