

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

514 BROADWAY INVESTMENT TRUST, :
UDT Dated 8/22/05, by and through :
its TRUSTEE, ROBERT A. BLECHMAN, :
Plaintiff, :
 :
v. : CA 08-369 S
 :
CRAIG F. RAPOZA; BAINBRIDGE :
REALTY CORP. a/k/a BAINBRIDGE :
REALTY, INC.; PETER P. D'AMICO; :
D'AMICO & TESTA, ATTORNEYS AT :
LAW, P.C.; MICHAEL F. BEHM; :
HELEN R. COUPE d/b/a RE/MAX :
METRO; MICHAEL J. MIALE, SR.; :
STATEWIDE REAL ESTATE APPRAISAL, :
LLC a/k/a STATEWIDE REAL ESTATE :
APPRAISAL CORPORATION; and :
JOHN DOES 1, 2, 3, 4, 5, 6, 7, :
8, 9, and 10, :
Defendants. :

MEMORANDUM AND ORDER

GRANTING PLAINTIFF'S REQUEST FOR SANCTIONS

Before the Court is the request of Plaintiff 514 Broadway Investment Trust, UDT Dated 8/22/05, by and through its Trustee, Robert A. Blechman ("Plaintiff"), for monetary sanctions against Defendant Craig F. Rapoza ("Mr. Rapoza") for refusing to testify at his October 6, 2009, deposition. The request is contained in Plaintiff's Emergency Motion to Compel Attendance and Participation of Witness at Deposition, and for Sanctions Pursuant to F.R.C.P. 37(d) (Document ("Doc.") #72) ("Emergency Motion to Compel Attendance" or "Emergency Motion") at 3. Mr.

Rapoza previously filed an objection to the Emergency Motion, see Defendant Craig Rapoza's Objection to Plaintiff's Emergency Motion to Compel Attendance and Participation of Witness at Deposition and for Sanctions (Doc. #74) ("Objection to Motion") at 1, and has since filed an objection to the amount of the sanctions sought, see Defendant Craig Rapoza's Objection and Response to Plaintiff's Motion for Sanctions and Affidavit as to Fees (Doc. #80) ("Objection to Fees").

Hearings on the Emergency Motion were conducted on October 8 and November 9, 2009. See Docket. The Court has determined that no further hearing is necessary.

I. Facts and Travel

Plaintiff filed its Complaint (Doc. #1) on October 6, 2008. See Docket. Mr. Rapoza, proceeding pro se, filed an answer on December 23, 2008, see Answer of Complaint (Doc. #17), but this filing was stricken, see Amended Order Granting in Part Plaintiff's Motion to Strike (Doc. #25) ("Order of 1/12/09") at 2, and he was ordered to file an amended answer which complied with the requirements of Federal Rule of Civil Procedure 8(b), see id. On January 28, 2009, Mr. Rapoza filed the required amended answer. See Amended Answer of Complaint (Doc. #31) ("Amended Answer").

On June 24, 2009, this Magistrate Judge conducted a hearing on a motion filed by Plaintiff to compel Mr. Rapoza to answer

interrogatories and a request for production of documents. See Docket; see also Plaintiff's Motion to Compel Outstanding Discovery from Defendant Craig F. Rapoza (Doc. #43) ("Motion to Compel"). Plaintiff's counsel and Mr. Rapoza attended the hearing. See Docket. After listening to argument, the Court granted the Motion to Compel, but it denied Plaintiff's request for an award of attorney's fees and costs. See Order (Doc. #56).

On August 19, 2009, Plaintiff's counsel, Michael P. Robinson ("Attorney Robinson") noticed Mr. Rapoza's deposition for Tuesday, October 6, 2009. See Emergency Motion, Exhibit ("Ex.") A (Notice of Deposition). The week before his scheduled deposition Mr. Rapoza attended and participated in two depositions of Plaintiff's Trustee, Robert A. Blechman ("Mr. Blechman"). See Hearing Record ("H.R.") of 10/8/09 and 11/9/09. The second deposition of Mr. Blechman was conducted on Thursday, October 1, 2009. See H.R. of 10/8/09. According to Mr. Rapoza, after the second deposition he realized that he was not competent to represent himself in this action and that he needed legal counsel.¹ See id.; see also Objection to Fees at 1. The

¹ At the hearings, Mr. Rapoza gave varying responses to the Court's questions regarding when he first came to the realization that he needed legal counsel in this matter. See Hearing Record ("H.R.") of 10/8/09 and 11/9/09; see also Defendant Craig Rapoza's Objection and Response to Plaintiff's Motion for Sanctions and Affidavit as to Fees (Doc. #80) ("Objection to Fees") at 1 ("After appearing in 2 other Depositions in this case, it became clear to Defendant Craig Rapoza that he is not competent to defend himself in this matter."). Mr. Rapoza indicated at each hearing that he had always wanted to be represented by counsel but was constrained by financial circumstances

catalyst for this realization, according to Mr. Rapoza, was the broad scope of the questions put to Mr. Blechman at the second deposition and Mr. Rapoza's recognition that similar questions could be asked of him at his own deposition. See H.R. of 11/9/09.

Thereafter, Mr. Rapoza tried to contact Attorney Robinson to request a continuance of his scheduled October 6th deposition in order to obtain legal counsel. See H.R. of 10/8/09 and 11/9/09. He made several telephone calls to Attorney Robinson's office for this purpose, but was not able to speak with him personally until late in the day on Monday, October 5, 2009.² See id. At that time, Attorney Robinson advised Mr. Rapoza that the deposition had been scheduled since August and that he would not agree to

to represent himself. See H.R. of 10/8/09 and 11/9/09. However, he primarily responded that the realization had occurred during or after the second deposition of Mr. Blechman. See id. At one point, Mr. Rapoza stated that it had occurred between the first and second depositions of Mr. Blechman (both of which occurred the week before Mr. Rapoza's deposition). See H.R. of 11/9/09. Ultimately, Mr. Rapoza appeared to settle on the realization occurring after Mr. Blechman's second deposition. See id.

² Mr. Rapoza stated at the October 8, 2009, hearing that his first telephone call to Attorney Robinson to request a continuance of his deposition had been made on Friday, October 2, 2009. See H.R. of 10/8/09. Although Mr. Rapoza indicated at the November 9, 2009, hearing that he made the first call on Thursday, October 1st, the Court credits his October 8th statement as identifying the correct date because that statement was made nearer in time to the event in question. While Attorney Robinson stated that he believed that Mr. Rapoza had not called his office until Monday, October 5th, Attorney Robinson allowed that it was possible Mr. Rapoza had called the previous Friday. See H.R. of 10/8/09 and 11/9/09. Given this concession, the Court assumes that Mr. Rapoza began calling Attorney Robinson's office to request a continuance on Friday, October 2, 2009.

continue it. See id.

Mr. Rapoza appeared for the deposition on October 6, 2009, and was sworn. See Emergency Motion, Ex. B (Transcript of 10/6/09 Deposition ("Dep. Tr.)) at 4. He then read a statement which related that he had asked Attorney Robinson for a continuance so that he could acquire legal representation, see id. at 5, that Attorney Robinson had refused and had threatened him with sanctions if he did not go forward with the deposition, id., and that he would be filing a motion for a continuance within twenty-four hours requesting a continuance of "no more than five or ten days," id., to obtain counsel, id. Mr. Rapoza concluded by stating that he would refuse to answer any questions at the deposition. Id. Attorney Robinson, after confirming that Mr. Rapoza would not answer any questions, suspended the deposition and stated that he would seek sanctions. Id. Plaintiff filed the Emergency Motion the same day. See Docket. Mr. Rapoza's objection to the motion was filed two days later. See id.

The Court conducted a hearing on the Emergency Motion on October 8, 2009. See Docket. At the conclusion of the hearing, the Court granted the Emergency Motion to the extent that Mr. Rapoza was ordered to attend and participate in his deposition which the Court set for October 14, 2009. See Order Re Motions Concerning Deposition of Craig Rapoza (Doc. #75) ("Order of

10/9/09") at 2. The Court also stated in the Order of 10/9/09 that it would conduct a further hearing on November 9, 2009, on the portion of the Emergency Motion which sought sanctions against Mr. Rapoza. See id.

On November 9, 2009, the Court heard argument from Attorney Robinson and Mr. Rapoza on the issue of sanctions. See H.R. of 11/9/09. Attorney Robinson submitted an affidavit in support of Plaintiff's request for attorney's fees. See id.; see also Affidavit as to Attorney's Fees in Support of Plaintiff's Motion for Sanctions Pursuant to F.R.C.P. 37(d) (Doc. #79) ("Affidavit"). The Affidavit sought an award of attorney's fees, costs, and expenses in the amount of \$3,280.55. See Affidavit at 2. The Court gave Mr. Rapoza ten days to file a written objection to the fees, costs, and expenses stated in the Affidavit. See H.R. of 11/9/09. On November 18, 2009, Mr. Rapoza filed his Objection to Fees. Thereafter, the Court took the matter under advisement.

II. Law

Where a party or person refuses to answer questions at a scheduled deposition, Federal Rule of Civil Procedure 37(a)³

³ Federal Rule of Civil Procedure 37(a) provides in relevant part:

- (a) Motion for an Order Compelling Disclosure or Discovery.
(1) *In General*. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good

provides a procedure whereby the party seeking the discovery may adjourn the deposition and seek an order to compel the party or person to respond to the questions and to pay the expenses ancillary thereto. R.W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11, 15 (1st Cir. 1991); see also Somascan Plaza, Inc. v. Siemens Med. Sys., Inc., 187 F.R.D. 34, 45 (D.P.R. 1999) ("When a party refuses to answer specific questions at a deposition, the party seeking the response can move to compel the deponent's answers pursuant to Federal Rule 37(a)(2)."). "If the court

faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

....

(5) Payment of Expenses; Protective Orders.

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing)*. If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed 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).

determines when analyzing a motion for a Rule 37(a) order that a party was not 'substantially justified' in refusing to answer deposition questions, it can initially award sanctions including 'the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.'" Somascan Plaza, Inc. v. Siemens Medical Systems, Inc., 187 F.R.D. at 45 n.4 (quoting R.W. Int'l Corp, 937 F.2d at 15 (quoting Fed. R. Civ. P. 37(a)(4))). Under Rule 37(a)(5) the award of fees and expenses is mandatory, unless one of the three enumerated exceptions apply. See Meridith v. Great Wolf Lodge of Kansas City, LLC, Civil Action No. 07-2529-DJW, 2008 WL 4305110, at *1 (D. Kan. Sept. 18, 2008).

III. Discussion

A. Applicability of Exceptions

It is clear that the first exception to the mandatory award of fees and expenses, i.e., where a movant files the motion before attempting in good faith to obtain the discovery without court action, is inapplicable. After Mr. Rapoza announced at the deposition that he would refuse to answer any questions, Attorney Robinson asked Mr. Rapoza if he intended to refuse to answer "[e]ach and every one of my questions[.]" Dep. Tr. at 5. Mr. Rapoza responded "Yes, sir." Id. Given this response, it would have been pointless for Attorney Robinson to attempt to persuade Mr. Rapoza to proceed with the deposition. Counsel was left with no choice but to file the Emergency Motion or accede to Mr

Rapoza's intransigence. Accordingly, the first exception does not apply.

The Court has little difficulty in finding that Mr. Rapoza's refusal to answer questions was not substantially justified. The deposition had been noticed for more than six weeks, and Mr. Rapoza's request for a continuance was communicated to Attorney Robinson's office, at the earliest, less than two full business days before the date of the deposition. Plaintiff had valid reasons for refusing to agree to a continuance. Plaintiff wanted to depose Mr. Rapoza before Defendant Peter P. D'Amico ("Attorney D'Amico") was deposed, and Attorney D'Amico's deposition was scheduled for October 8, 2009. See H.R. of 10/8/09. A mediation with Dr. Berry Mitchell, the Alternative Dispute Resolution Administrator, was scheduled to take place on October 15, 2009, and Plaintiff wanted to have the benefit of these depositions prior to mediation. See id. Postponing the mediation was not a convenient alternative because Plaintiff's principals had already made arrangements to travel from California and Hawaii to attend it. See id.

Moreover, Mr. Rapoza's inconsistent answers regarding when he first realized that he needed counsel in this action undermines any contention that his refusal to answer questions was substantially justified. Twice he indicated that he had always wanted to be represented by counsel, but due to a lack of

financial resources was forced to represent himself. H.R. of 10/8/09 and 11/9/09. However, when the Court inquired whether his financial situation had changed from the outset of the case, Mr. Rapoza answered no. See H.R. at 11/9/09. This, of course, raises the question of why Mr. Rapoza thought that he would be able to obtain counsel in the span of five to ten days, the length of the continuance he sought, when he had been unable to obtain counsel in the preceding nine months and there had been no intervening change in his financial situation.

The Court also takes into consideration that Mr. Rapoza has represented himself in other lawsuits and that he appears to be an intelligent individual. Attorney Robinson has described him as a "savvy litigator," H.R. of 10/8/09 and 11/9/09, and the Court at least agrees that he is not a neophyte with respect to legal matters. The Court finds it difficult to accept the proposition that it was only after Mr. Rapoza observed the scope of the questioning at Mr. Blechman's second deposition that Mr. Rapoza realized that he was not competent to represent himself and that he needed legal assistance. Thus, the Court finds that Mr. Rapoza's refusal to answer questions was not substantially justified. Therefore, the second exception does not apply.

With respect to the third exception, Mr. Rapoza has not pointed to any circumstance, apart from his pro se status, that would make the award of expenses and costs unjust. However, a

party's pro se status does not provide immunity for violation of procedural rules. See Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503, 506 (1st Cir. 1994); see also Ruiz Rivera v. Riley, 209 F.3d 24, 28 n.2 (1st Cir. 2000) ("We have consistently held that a litigant's pro se status [does not] absolve him from compliance with [either] the Federal Rules of Civil Procedure [or] a district court's procedural rules.") (alterations in original) (citations and internal quotation marks omitted). Accordingly, the third exception does not apply. The award of reasonable expenses is therefore mandatory, and the Court turns to consideration of the reasonableness of the expenses sought by Plaintiff.

B. Reasonableness of Expenses

1. Law

The proper method of awarding attorneys' fees for a violation of Rule 37 is the lodestar method, in which the court multiplies a reasonable hourly rate by a reasonable number of hours expended. Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd., 248 F.R.D. 64, 68 (D.D.C. 2008); Velazquez v. Land Coast Insulation, Inc., Civil Action No. 06-0174, 2007 WL 1068470, at *1 (W.D. La. Apr. 5, 2007) (stating that Fed. R. Civ. P. 37(a)(4) requires payment of "reasonable attorneys' fee" and explaining that "[r]easonable attorneys' fees are determined by multiplying the reasonable hours expended by a reasonable hourly rate")

(citing Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S.Ct. 1933 (1983)) (interpreting Rule prior to December 1, 2007, amendments); see also Tollett v. City of Kemah, 285 F.3d 357, 368 (5th Cir. 2002) (“[U]nder Rule 37, a party and its counsel can only be held responsible for the reasonable expenses [including attorney’s fees] caused by their failure to comply with discovery.”) (second alteration in original) (internal quotation marks omitted); Lithuanian Commerce Corp. v. Sara Lee Hosiery, 177 F.R.D. 205, 214 (D.N.J. 1997) (finding “that as a matter of law the award of expenses and attorneys’ fees must be reasonable regardless of [defendant’s] actual expenses”); Pizza Mgmt., Inc. v. Pizza Hut, Inc., No. 86-1664-C, 1989 WL 9334, at *2 (D. Kan. Jan. 10, 1989) (“While a purpose of Rule 37 sanctions is reimbursement, the rule does not mandate the reimbursement for *actual* costs. Rule 37(a)(4) simply allows the recovery of *reasonable* expenses, including attorney’s fees.”); cf. In re Fidelity/Micron Sec. Litig., 167 F.3d 735, 738 (1st Cir. 1999) (“[L]awyers are not necessarily entitled to the quantum of reimbursement to which they aspire. To the contrary, they must establish the reasonableness of their requests.”).

Reasonableness is largely a matter of informed judgment. See Torres-Rivera v. O’Neill-Cancel, 524 F.3d 331, 336 (1st Cir. 2008). To determine the number of hours reasonably spent as well as in setting a reasonable hourly rate, a court must review the

work to see whether counsel substantially exceeded the bounds of reasonable effort. In re Boston & Maine Corp., 776 F.2d 2, 7 (1st Cir. 1985); see also United States v. One Star Class Sloop Sailboat Built in 1930 with Hull Number 721, named "Flash," 546 F.3d 26, 42 (1st Cir. 2008) ("confirming that court may reduce fees on account of unnecessary and duplicate work by decreasing hourly rate"). A failure to explain what work was performed during the hours billed may result in a reduction of the fees sought. See Codex Corp. v. Milgo Elec. Corp., 717 F.2d 622, 632 (1st Cir. 1983) (finding "critical element missing was a categorization of the time spent according to what type of activity was engaged in and by whom"); see also Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 860 (1st Cir. 1998) (recognizing that "[i]n setting fees, the district court has broad discretion to determine how much was done, who did it, and how effectively the result was accomplished") (quoting Wagenmann v. Adams, 829 F.2d 196, 224 (1st Cir. 1987)) (internal quotation marks omitted); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984) (noting attorneys' obligation to maintain detailed records and warning that "after the date of this opinion, the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance").

The relevant market for determining the reasonableness of an

hourly rate is the community in which the district court sits. Tollett, 285 F.3d at 368; see also Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1190 (1st Cir. 1996) ("In determining a reasonable hourly rate, the Supreme Court has recommended that courts use 'the prevailing market rates^[4] in the relevant community' as the starting point.") (quoting Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S.Ct. 1541 (1984)). An attorney seeking court awarded fees may submit evidence of his customary billing rate and of the prevailing rates in the community, but the court is not obligated to adopt that rate. See Andrade, 82 F.3d at 1190; see also Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 296 (1st Cir. 2001) ("[T]he court may take guidance from, but is not bound by, an attorney's standard billing rate."). A court may rely upon its own knowledge of attorney's fees in its surrounding area in arriving at a reasonable hourly rate. See Andrade, 182 F.3d at 1190; Nydam v. Lennerton, 948 F.2d 808, 812-13 (1st Cir. 1991); United States v. Metro. Dist. Comm'n, 847 F.2d 12, 19 (1st Cir. 1988).

2. Application

Plaintiff seeks a total of \$3,280.55 in fees, costs, and expenses. Affidavit at 2. Of this amount, \$123.55 is for a copy

⁴ Prevailing market rates are defined as "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S.Ct. 1541 (1984); see also United States v. Metro. Dist. Comm'n, 847 F.2d 12, 19 (1st Cir. 1988).

of the transcript of Mr. Rapoza's October 6, 2009, deposition. The remaining \$3,157.00 is for attorneys' fees. Fees are sought for three attorneys and two paralegals, the latter of whom are identified by an asterisk following their names:

NAME	HOURLY RATE	HOURS	AMOUNT
Randall L. Souza	\$325.00	.2	\$65.00
Dean J. Wagner ⁵	\$315.00	1.0	\$315.00
Michael J. Robinson	\$275.00	5.2	\$1,430.00
Danielle M. Smith*	\$140.00	.8	\$112.00
Roberta S. Arsac*	\$120.00	.4	\$48.00
TOTAL:			\$1,970.00

In addition to the above, Plaintiff seeks fees for preparing the Affidavit (\$292.00) and fees for attending the hearing on November 9, 2009 (\$825.00). The fees for preparing the affidavit are attributable to .4 hours for Attorney Robinson (\$110.00) and 1.3 for Paralegal Danielle M. Smith (\$182.00) (\$110.00 + \$182.00 = \$292.00).⁶ With respect to the November 9th hearing, the Affidavit reflects that Attorney Robinson anticipated 3.0 hours of attorney time (\$825.00) and .5 hours of paralegal time (\$70.00).

⁵ Although Dean J. Wagner is not specifically identified as being an attorney, the Court assumes that he is based on his hourly rate of \$315.00. See Affidavit.

⁶ Although the Affidavit does not explicitly state that Attorney Robinson and Paralegal Smith prepared the Affidavit, the Court deduces their identity based on the hours expended and the amounts sought in connection with its preparation.

The Affidavit is problematic in that it fails in large measure to detail or explain what services were performed by each person for whom fees are sought. See Codex Corp. v. Milgo Elec. Corp., 717 F.2d at 632. The absence of this information makes it impossible for the Court to make an informed judgment as to the reasonableness of almost all of the fees requested. While the Affidavit appears to indicate that Attorney Robinson spent .4 hours and Paralegal Smith spent 1.3 hours preparing it and provides an estimate for their time in connection with the November 9, 2009, hearing, these are the only tasks which are identified for any of the persons for whom fees are sought. Although the Court observed Attorney Robinson at the two hearings and also can reasonably estimate the time he spent at the aborted October 6, 2009, deposition of Mr. Rapoza, apart from these few tasks the Court has no way of knowing how the time claimed by each individual was utilized and whether that time was reasonable and necessary.

Therefore, the Court will reduce the amount sought for attorneys' fees by one-third because Plaintiff has not provided sufficient information regarding what services were rendered by each person, when the services were provided, and how much time was devoted to particular tasks. Cf. Tennessee Gas Pipeline Co. v. 104 Acres of Land, More or Less, in Providence County, Rhode Island, 32 F.3d 632, 634 (1st Cir. 1994) (affirming thirty percent

reduction of award for attorneys' fees where attorneys' time sheets did not sufficiently identify the activities listed); cf. id. ("the failure to include some description of the subject matter of the task made it impossible to determine if the time factor allocated was appropriate or excessive"). The Court allows in full the expense of \$123.55 for the cost of the transcript. Thus, the total amount which the Court allows as Plaintiff's reasonable expenses in connection with the Emergency Motion is, as shown below, \$2,228.22.

\$3,157.00	attorneys' fees requested
- <u>\$1,052.33</u>	one-third reduction
\$2,104.67	attorneys' fees allowed
+ <u>\$ 123.55</u>	expenses (transcript cost)
\$2,228.22	TOTAL REASONABLE EXPENSES ALLOWED

IV. Conclusion

For the reasons stated above, pursuant to Fed. R. Civ. P. 37(a)(5), Plaintiff is entitled to its reasonable expenses incurred in connection with the Emergency Motion. The Court finds that Plaintiff's reasonable expenses are \$2,228.22. Accordingly, Mr. Rapoza is ordered to pay \$2,228.22 to Plaintiff within twenty-one days of the date of this Memorandum and Order.

So ordered.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
December 23, 2009