



party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.” Fed. R. Civ. P. 37 advisory committee’s note; see also Metrocorps, Inc. v. Eastern Massachusetts Junior Drum and Bugle Corps Ass’n, 912 F.2d 1, 2 (1st Cir. 1990). Generally, 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.” Cobell v. Norton, 231 F. Supp. 2d 295, 300 (D.D.C. 2002) (citing cases).

The Court has carefully reviewed the transcript of the hearing before the magistrate judge. As defendant points out, the magistrate judge stated that “[w]hile it may be the case that the Court would nonetheless have discretion in this context to require an award of all of the Plaintiff’s fees -- all of the Plaintiff’s costs, including fees associated with the litigation of this matter, the Court finds that in this circumstance such an award would not be appropriate.” Tr. at 39:12-17. The magistrate judge also stated that “in the circumstances of this case such an award is fair and just and proportionate.” Id. at 40:13-15. The decision, however, does not take into account the mandatory language of Rule 37(b)(2)(C), and does not conclude that an award of expenses using the traditional lodestar method would be “unjust,” for example as a result of “other circumstances.” Nor, in the alternative, does it find that defendant has met his burden to show that his discovery violation was “substantially justified.” Fed. R. Civ. P. 37(b)(2)(C).

The Court concludes that the March 18, 2008 decision to award plaintiff sanctions in the amount \$10,000 was clearly erroneous and contrary to law in that it does not follow the mandatory language of Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure. The Court

therefore will set aside the decision under Local Civil Rule 72.2. Plaintiff's counsel is directed to file within ten business days a petition seeking fees and expenses, accompanied by time sheets or business records that support the amount sought. Defendant's counsel may file an opposition no later than ten business days after the filing of the petition.

This matter is remanded to the magistrate judge. She should make a determination, consistent with Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure, of the amount of fees and costs reasonably expended by plaintiff as a result of defendant's conduct. To the extent that any award granted is less than the amount reached through the lodestar calculation, the magistrate judge should indicate whether and why "the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

SO ORDERED.

\_\_\_\_\_/s/\_\_\_\_\_  
PAUL L. FRIEDMAN  
United States District Judge

DATE: June 25, 2008