

**THE UNITED STATES DISTRICT COURT FOR
DISTRICT OF NEW JERSEY**

MARSHELLE HIGHTOWER

Plaintiff,

v.

**INGERMAN MANAGEMENT
COMPANY and BRAD INGERMAN**

Defendants.

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CIVIL ACTION NO. 17-08025

**PLAINTIFF MARSHELLE HIGHTOWER’S
PETITION FOR ATTORNEYS’ FEES AND COSTS**

Respectfully submitted,

CONSOLE MATTIACCI LAW, LLC

By: /s/ *Caren N. Gurmankin*

Laura C. Mattiacci, Esquire
Caren N. Gurmankin, Esquire
Fernando I. Rivera, Esquire
1525 Locust Street
Philadelphia, PA 19102

Dated: July 13, 2022

I. INTRODUCTION.

From Day 1, Plaintiff's pursuit of her claims of discrimination and retaliation were met with threats of counter-offensive attack by Defendant Ingerman Management Company ("IMC") through counsel on its behalf and under the watch of its CEO and named Defendant, Brad Ingerman.

Before a Charge of Discrimination was filed, Defendant Brad Ingerman sent an e-mail to Plaintiff stating, among other things, "I take the threat of a lawsuit on your part very personally. I will NOT settle your case. I am prepared to spend whatever I have to because I know the truth and the truth is not what you told your counsel as you wanted to paint a picture of 'big bad Ingerman.'" *See, e.g.*, Declaration of Caren Gurmankin (exhibit 5 hereto) at ¶ 17.

In its position statement to the EEOC, the company accused Plaintiff of extortion. *See id.* at ¶ 21.

Then, before her federal court complaint was filed and in a letter on which IMC and Brad Ingerman were copied, Defendants' counsel warned that, "this one is going to be painful."

During the course of litigation, Defendants continued their strategy of trying to bully and intimidate Plaintiff into dropping her claims. *See id.* at ¶ 22. Plaintiff was repeatedly and baselessly accused of criminal misconduct, subjected to threats of lawsuit, and accused falsely and relentlessly of lying. *See id.* at ¶ 25. Her counsel, Console Mattiacci Law ("CML") and Caren Gurmankin individually were likewise accused of criminal misconduct and threatened with suit. *See id.* at ¶¶ 16, 18, 23. As this Court has already found, Defendants' counsel engaged in a "pattern of vexatiousness observed by each Judge to have touched this case" and acted in bad faith.

Nonetheless, Marshelle Hightower persisted—and won.

Through CML's excellent advocacy, Plaintiff obtained the full measure of the relief she sought against IMC. On June 9, 2022, after a seven-day trial, a jury returned a unanimous verdict in favor of Plaintiff in the amount of \$825,000.00 for compensatory and punitive damages, finding that Defendant IMC intentionally retaliated against Plaintiff for her opposition to or complaints of sex and/or race discrimination under 42 U.S.C. §1981 ("Section 1981") and the New Jersey Law Against Discrimination, N.J. Stat. §10:5-1, *et seq.* ("NJLAD"). Dkt. Nos. 355, 362. On June 10, 2022, the parties stipulated to a back pay damages amount of \$100,000.00 to compensate Plaintiff for her economic loss resulting from her retaliatory termination. Dkt. No. 340. In total, Plaintiff recovered **\$925,000.00**, exclusive of her reasonable attorneys' fees and costs. Dkt. No. 362.

Statutory fee shifting provisions are essential to the vindication of important civil rights; they are crucial to incentivize talented attorneys to represent clients who otherwise could not afford them and to take on cases that pose significant risk of non-payment. Under Section 1981 and NJLAD, as the prevailing party, Plaintiff is entitled to an award of her reasonable attorneys' fees and expenses. Because CML represented Plaintiff on a straight contingency fee basis by which the firm would receive no compensation for its services unless it prevailed, the Court pursuant to the NJLAD is to consider a contingency enhancement to the lodestar amount awarded. Plaintiff respectfully requests an award of her reasonable attorney's fees, calculated as follows: a lodestar amount of \$1,135,328.50, with an 85% percent contingency enhancement of \$965,029.22 equaling a total fee award of \$2,100,357.70 for services rendered through June 9, 2022.¹ In addition, she seeks \$71,137.87 in reimbursement for reasonable expenses incurred through that date.

¹ Plaintiff's fee petition does not include costs or time for services rendered on any post-verdict work on this matter (including for the preparation of the petition), and Plaintiff reserves right to seek same at a later time.

II. MARSELLE HIGHTOWER IS ENTITLED TO HER REASONABLE ATTORNEYS' FEES AND COSTS AS A PREVAILING PLAINTIFF UNDER SECTION 1981 AND THE NJLAD.

A. Plaintiff As Prevailing Party Is Entitled To The Full Lodestar Fee Amount (\$1,135,328.50) As A Baseline Award To Which A Contingency Enhancement Should Be Added.

There can be no dispute that Plaintiff is a prevailing party. Plaintiff obtained in this case the full measure of relief she sought: economic loss damages; compensatory damages; and punitive damages. She should recover a fully compensatory fee, starting with her full and unreduced lodestar amount as a baseline. CML's lodestar calculation is summarized as follows:

Attorney (As Referenced In Time Entries)	Year began practicing	Hours worked	Hourly rate	Lodestar
Stephen G. Console, Co-Managing Member ("SGC")	1982	75	\$960 (\$700) ²	\$52,500
Laura C. Mattiacci, Co-Managing Member ("LCM")	2002	362.5	\$960 (\$700) ³	\$253,750
Caren N. Gurmankin, Partner ("CNG")	2007	940.9	\$590	\$555,131
Fernando I. Rivera, Associate Attorney ("FR")	2014	677.75	\$350	\$237,212.50
Anna D. Norman, Associate Attorney ("ADN")	2017	43.6	\$220	\$9,592
Holly Smith, Associate Attorney ("HS")	2019	106.6	\$230	\$24,518
Jonathan D. Gilman, Associate Attorney ("JDG")	2018	10.5	\$250	\$2,625
Total		2,216.85		\$1,135,328.50

² Despite customarily billing at an hourly rate of \$960, Mr. Console is seeking only a rate of \$700 in this matter.

³ Despite customarily billing at an hourly rate of \$850, Ms. Mattiacci is only seeking a \$700 based on the Court's recent ruling on her reasonable hourly rate in consideration of Plaintiff's motion to quash the subpoena of Kim Johnson and for sanctions related to same. *See* Dkt. No. 367.

As set forth more fully below, the hours expended by CML were reasonable, as are the rates requested.

1. Plaintiff Seeks Compensation For A Reasonable Number Of Attorneys' Hours Expended.

As the Court is fully aware and witnessed first-hand during the course of pre-trial and trial proceedings, this was not your typical single-plaintiff employment discrimination/retaliation case. Instead, this case was morphed into a protracted litigation due, in large part, to the antagonistic and overly aggressive defense strategy undertaken by Defendants, which resulted in the need to assign multiple attorneys to the matter and spend the time necessary to combat same.

This case was vexatious and protracted due to Defendants' "scorched earth" litigation tactics. In light of Defendants' abusive litigation tactics, Plaintiff was forced to fight back in opposing attempts by Defendants to dismiss her claims and to seek sanctions against Plaintiff and CML (in the form of dismissal, an adverse inference, monetary penalties, and to preclude certain material evidence). Overall, Plaintiff's efforts were required in light of Defendants' conduct and played a critical role in increasing Plaintiff's odds of success at trial. Thus, because of Defendants' own doing, the hours CML expended were reasonable and necessary to combat Defendants' attempts to imitate and bully Plaintiff at every turn, and to win. *See Rivera*, 477 U.S. 561, 581 (noting that a defendant in a fee shifting case cannot litigate tenaciously and then complain about the time necessarily spent by plaintiff in response).

a. CML staffed this case to meet head on and combat Defendants' threats and pattern of vexatiousness.

CML is a boutique employee rights firm that allocates work among its legal staff in a way so as to ensure excellent representation in an efficient manner. Console Declaration at ¶ 13. The firm's founder and Co-Managing Member, Stephen G. Console, staffs each case. *Id.* at ¶ 14. Each case is staffed according to its need. *Id.* The level of experience of the attorneys assigned depends

on several factors including the complexity and difficulty of the case. *Id.* If it is necessary to try a case in court, the firm devotes great resources to what is considered in today's legal world to be an unusual event requiring unique talent and specialized skills. *Id.* If warranted, the case will be tried by firm Co-Managing Member Laura Mattiacci, the firm's designated lead trial counsel for its most significant cases. *Id.*

CML's case staffing according to particular skills works. *Id.* at ¶ 18. Mr. Console has attested that he has found, in his approximately forty-years of experience, that this method of staffing is necessary to advocate for clients at the highest level and achieve the reputation and success that CML has. Console Declaration at ¶ 18.

From day 1, Defendants made clear to Plaintiff and her counsel that this case would never settle, and that Defendants would do everything in their power to punish Plaintiff for fighting back by pursuing her claims. Additionally, this case against Defendants presented several challenges, including the anticipated and excessive motion practice based on Defendants' early conduct, the number of foreseeable depositions, and certainty that this case would resolve only at trial. CML approached head-on the challenges of this complex and tough case and did what was necessary to prevail.

Mr. Console allocated the work in this case to ensure the excellent representation of Plaintiff in an efficient way. *Id.* at ¶ 16. Generally, the case was staffed as follows: Mr. Console initially assigned Ms. Gurmankin, a Partner, to handle the case on a day-to-day basis. After witnessing Defendants' tactics and overly aggressive defense strategy, Mr. Console assigned Mr. Rivera, an Associate Attorney, to share in the responsibilities of the case through resolution. Based on Mr. Rivera's involvement as lead counsel in the *McDonald* matter and as co-counsel in the matter, Mr. Rivera's involvement was not only necessary to the effective adjudication of the case

but required as the two cases were consolidated for discovery at the request of Defendants. As is our firm's practice, Ms. Mattiacci would generally be kept abreast of the case, and then step in to try it, as she had done successfully as the firm's lead trial counsel in many other of our cases. *Id.* at ¶ 22–25; Mattiacci Declaration at ¶ 12.

b. CML professionals did the work necessary to fight back and win.

Stephen G. Console is CML's founder who, with 35+ years, is recognized as a preeminent employment lawyer. Since the outset of this matter through the verdict, he performed 75 hours of work for which Plaintiff seeks reimbursement. He kept abreast of and oversaw Plaintiff's case from inception through verdict, and now post-trial motions. Among other things: he communicated with the client about litigation strategy; communicated and strategized with Ms. Mattiacci, Ms. Gurmankin, and Mr. Rivera throughout the litigation; formulated a settlement demand and strategy; reviewed and advised on important correspondence and filings; strategized and advised on Plaintiff's discovery and trial strategy; communicated and strategized with Ms. Mattiacci during the trial; and strategized and advised on post-trial filings. The itemized time entries for Mr. Console's work are set forth in Exhibits 1 and 2 and are reasonable. Mr. Console is referred to in Exhibits 1 and 2 as "**SGC.**" Console Declaration at ¶¶ 34, 55.

Caren N. Gurmankin was the Partner assigned to primarily oversee and handle the day-to-day litigation of this case from its inception. Ms. Gurmankin is a tenacious litigator who vigorously prosecuted Plaintiff's claims and combatted Defendants' scorched earth defense tactics. In general, and among other things, Ms. Gurmankin conducted comprehensive discovery and developed the extensive and varied facts necessary to demonstrate pretext and established Console Declaration at ¶ 20. From March 23, 2017, through June 9, 2022, Ms. Gurmankin performed 940.9 hours of work on this case for which Plaintiff seeks reimbursement. *See* Declaration of Gurmankin

(Ex. 5), at ¶ 9. The itemized time entries for Ms. Gurmankin's work are set forth in Exhibits 1 and 2 and are reasonable. Console Declaration at ¶¶ 20, 34.

Fernando I. Rivera was the Associate Attorney assigned to assist Ms. Gurmankin on this case. Mr. Rivera has practiced employment law for more than 7 years, including at CML since 2017. Mr. Rivera jointly worked with Ms. Gurmankin on all discovery related matters, pre-trial submissions, and trial preparation, including filing and opposing motions, conducting legal research, taking and defending depositions, and strategizing and summarizing deposition testimony for use at trial. Additionally, Mr. Rivera served as lead counsel in the consolidated *McDonald* matter under the supervision of Ms. Gurmankin. Console Declaration at ¶ 17. Through Mr. Rivera's work on the *Hightower* and *McDonald* matters, he developed intimate and deep knowledge of the facts of the case, relevant witnesses and documents, and the corporate culture and structure, and that his participation in discovery and at trial was therefore necessary and productive. Console Declaration at ¶ 21. From October 10, 2017, through June 9, 2022, Mr. Rivera performed 677.75 hours of work on this case for which Plaintiff seeks reimbursement. *See* Declaration of Fernando I. Rivera (Ex. 6) at ¶ 15. The itemized time entries for Mr. Rivera's work are set forth in Exhibits 1 and 2 and are reasonable. Console Declaration at ¶¶ 21, 34.

Laura C. Mattiacci focused intensively on the trial of Plaintiff's case. Ms. Mattiacci is an experienced and excellent trial lawyer whose superior skills and successes have commanded the attention and respect of the defense bar. Ms. Mattiacci mastered the varied and many facts of this case, worked extensively on trial preparation, and presented the evidence to the jury in a way that was easy to grasp and which allowed them to, *inter alia*, see that the retaliatory motives of Defendants' highest-level decision-makers and award Plaintiff compensatory damages for emotional distress without the aid of an expert witness. Console Declaration at ¶ 22. From October

2, 2017, through June 9, 2022, Ms. Mattiacci performed 362.5 hours of work on this case for which Plaintiff seeks reimbursement. *See* Declaration of Laura C. Mattiacci (Ex. 4), at ¶ 15. The itemized time entries for Ms. Mattiacci's work are set forth in Exhibits 1 and 2 and are reasonable. Console Declaration at ¶¶ 22, 34.

Anna Norman, a former Associate Attorney with the firm, provided valuable assistance primarily in the form of legal research from June of 2019 through December of 2019. Ms. Norman graduated law school and began practicing in 2017. Console Declaration at ¶ 25. Ms. Norman performed 43.6 hours of work on this case for which Plaintiff seeks reimbursement. The itemized time entries for Ms. Norman's work are set forth in Exhibits 1 and 2 and are reasonable. *Id.* at ¶ 34.

Holly Smith, an Associate Attorney at the firm, also made valuable contributions to the prosecution of this case from October of 2019 through June of 2022. Her work primarily involved legal research and assisting with Plaintiff's *Daubert* motion to preclude Defendants' expert witness (which was granted in part). Ms. Smith graduated law school and began practicing in 2019. *See* Console Declaration at ¶ 23. Ms. Smith performed 106.6 hours of work on this case for which Plaintiff seeks reimbursement. The itemized time entries for Ms. Smith's work are set forth in Exhibits 1 and 2 and are reasonable. *Id.* at ¶¶ 28, 35.

Jonathan Gilman, an Associate Attorney new to the firm, also made valuable contributions to the prosecution of this case in March of 2022. His work on this matter primarily involved legal research regarding Defendants' offers of judgment. Mr. Gilman graduated law school and began practicing in 2018. Console Declaration at ¶ 24. Mr. Gilman performed 10.5 hours of work on this case for which Plaintiff seeks reimbursement. The itemized time entries for Mr. Gilman's work are set forth in Exhibits 1 and 2 and are reasonable. *Id.* at ¶¶ 28, 34.

Valuable contributions were also made by legal assistants, paralegals, and summer law clerks whose time has not been recorded and/or for which Plaintiff does not seek reimbursement. *See* Console Declaration at ¶ 27. Among other things, the clerks conducted legal research, and the paralegals/assistants, who assisted during trial from inside the courtroom), helped maintain the file and assisted in the organization of exhibits, and the visual presentations at trial. *Id.*

In determining the number of hours reasonably expended on the litigation, Plaintiff is entitled to be compensated for work “useful and of a type ordinarily necessary” to secure the final result obtained from the litigation. *Pennsylvania Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 556 (1986). “In determining what hours are reasonably expended on the suit, the most critical factor is the degree of success obtained.” *Tomasso v. Boeing Co.*, 2007 U.S. Dist. LEXIS 70001, *11 (E.D. Pa. Sept. 21, 2007). Here, Plaintiff obtained the full measure of relief sought after years of abusive and protracted litigation.

In addition to the difficulties presented by Defendants’ pattern of vexatiousness, prevailing at trial in this case presented particular challenges. Mattiacci Declaration at ¶ 13. Plaintiff had Demonstrating pretext in a retaliation case where Defendant IMC asserted various defenses and stated reasons for Plaintiff’s termination, including some supported by alleged contemporaneous maintained, documented performance deficiencies is especially daunting as it requires the presentation of varied and extensive facts to the jury in a way that is easy to grasp and explain away. *Id.* Further adding to the challenges of this case were the unusually large amount of documentation and intended trial exhibits, which included over 93 pre-marked defense exhibits and numerous intended witnesses at trial, the number of depositions conducted, and an excessive amount of motion practice by Defendants, including leading up to and during trial. *Id.*

Defendants in this case made no good faith or legitimate offers to settle. Console Declaration at ¶ 50. For example, despite later stipulating to Plaintiff's back pay losses in the amount of \$100,000.00 (representing only a fraction of Plaintiff's jury award), Defendants made two offers of judgment under Rule 68 that failed to account for same (\$5,000 and \$75,000) in February of 2018 and March of 2022, respectively. *See* Console Declaration at ¶ 9. Moreover, each time, Defendant's Rule 68 offers of judgment were made **inclusive** of Plaintiff's reasonable attorneys' fees and costs, which failed to account for the significant amount of fees and costs expended to date. As the Supreme Court has noted, if a defendant in a fee shifting case could have avoided the bulk of attorneys' fees for which they find themselves liable by making a reasonable settlement offer, they cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in response. *See Rivera*, 477 U.S. at 581.

Plaintiff's counsel did what was necessary to win this case and succeeded in same, and the hours expended to do so were reasonable. *See, generally*, Console Declaration; Mattiacci Declaration at ¶ 14; Gurmankin Declaration at ¶ 25.

2. CML's requested hourly rates are reasonable.

From March 23, 2017, through June 9, 2022, CML performed 2,216.85 hours of services for which reimbursement is sought,⁴ resulting in a lodestar amount of \$1,135,328.50. The rates used in the calculation of the lodestar are the firm's customary and usual hourly rates for 2022 for attorneys Ms. Gurmankin, Mr. Rivera, Ms. Smith, and Mr. Gilman. For Ms. Norman (who is a

⁴ CML has exercised billing judgment so that the entries of attorney time now submitted reflect only the time for which Plaintiff now seeks compensation, including, among other things: carefully apportioning time spent on joint and consolidated discovery with the *McDonald* case and removing all entries for time associated with work on the Kim Johnson subpoena (for which CML already sought reimbursement and which is the subject of the Court's award of attorneys' fees as a sanction for attorney Gary Lightman's conduct). Console Declaration at ¶ 26.

former associate without a “current” rate), Plaintiff used the hourly rate approved in October of 2021 by the Honorable Mark A. Kearney in *Giedgowd v. Cafaro Grp.*, No. 20-6184, 2021 U.S. Dist. LEXIS 205882 (E.D. Pa., Oct. 26,2021). Console Declaration at ¶ 31.

The current and usual hourly rate for Mr. Console is \$960 and \$850 for Ms. Mattiacci. Console Declaration at ¶ 32. Although Plaintiff believes that these current hourly rates are reasonable, Plaintiff have not used them for purposes of the lodestar calculation here in light of the Court’s June 21, 2022 Letter Order (ECF 367) (setting a reasonable hourly rate for Ms. Mattiacci at \$700, and citing in support of this determination the recent decision on CML’s fee petition in *Ray v. AT&T Mobility Servs., LLC*, No. 18-03303, 2022 U.S. Dist. LEXIS 73948 (E.D. Pa. April 22, 2022)). Instead, Plaintiff have used for purposes of this lodestar calculation only an hourly rate of \$700 for Ms. Mattiacci and, based on the Court’s reliance on the *Ray* decision, an hourly rate of \$700 for Mr. Console, as well.

CML was established by Mr. Console in 1990 and for more than 30 years, has specialized in representing non-union employees in all aspects of workplace matters. Console Declaration at ¶ 11. The firm is included among the Martindale-Hubbell Bar Register of Preeminent Lawyers, which is exclusive to AV Preeminent Attorneys—those who have achieved the highest possible peer review rating in both legal ability and ethical standards. *Id.* The firm has achieved a high level of success and a great demand for its services. *Id.* at ¶ 18. The hourly rates it has requested in this fee petition are reasonable and supported in several ways.

First, the requested rates for Mr. Console and Ms. Mattiacci are less than what the firm actually charges its clients who pay on an hourly basis. The requested rates for the other attorneys are the firm’s usual and customary actually paid by hourly clients. Console Declaration at ¶ 37. That the rates requested are within the range of prevailing market rates is demonstrated by the fact

that people within the Philadelphia metropolitan/South Jersey area are willing to pay them. For example, in 2017 (the year in which Ms. Hightower retained our firm), CML billed its hourly clients more than \$500,000 based on its usual and customary hourly rates, which for 2017 (and by agreement) were subject to reasonable increases effective January 1 of each year. *Id.* at ¶ 37.

Second, the requested hourly rates are consistent with recent court decisions in similar types of matters; most notably, the recent *Ray v. AT&T* case, upon which the Court has already relied in setting Ms. Mattiacci's rate.⁵

Third, the requested hourly rates are in line with the prevailing range of rates in this market for services of attorneys of reasonably comparable skill, experience and reputation. Plaintiff has supported the reasonableness of her requested rates with declarations from several prominent employment lawyers in this market.

⁵ CML has been awarded attorney's fees in several recent cases. In addition to *Ray v. AT&T*:

In October of 2021, the Honorable Wendy Beetlestone ordered the defendant to pay plaintiff CML's reasonable attorney's fees as a sanction in a discovery dispute. *Mammen v. Thomas Jefferson University, et al.*, E.D. Pa. Civil Action No. 20-127 (October 13, 2021, ECF No. 74). Judge Beetlestone concluded that the "hourly rates charged by Plaintiff's attorneys [which were CML's usual and customary rates] are reasonable 'calculated according to prevailing market rates in the relevant community,'" including Ms. Smith's then-hourly rate of \$210. *Id.* (quoting *Blum v. Stenson*, 463 U.S. 886, 895 (1984)). *Id.*

In October of 2020, the Honorable Nitza I. Quiñones Alejandro granted CML's joint motion for an Order approving settlement in an FLSA action in the matter of *Gasper v. Collective*, No. 19-2676, 2020 U.S. Dist. LEXIS 182617, at *18-19 (E.D. Pa. Oct. 2, 2020), based on the usual and customary hourly rates of Mr. Rivera, including then-hourly rate of \$320. The motion was consented to by opposing counsel and approved by the Court, concluding that Mr. Rivera's requested hourly rate was "well within the range of what is reasonable and appropriate in this market." *See id.* at Dkt. No. 21. In the *Gasper* matter, the Court also found that Mr. Rivera did not request compensation for any time that was "excessive, redundant, or otherwise unnecessary." *Id.*

In 2019, Judge Kearney awarded CML's attorney's fees to a client who prevailed in an employment discrimination. In *Middlebrooks v. Teva Pharms., USA, Inc.*, No. 17-cv-412, 2019 U.S. Dist. LEXIS 30530 (E.D. Pa. Feb. 26, 2019), Judge Kearney praised our firm's "heightened level of lawyering," but awarded a fee based on a lodestar calculation using rates less than CML's usual and customary ones, including awarding a rate of \$410 for Ms. Gurmankin.

Fourth, the requested hourly rates are in line with rates charged by other firms per published data. CML's rates are further supported by credible and published data. CML's usual and customary rates are consistent with rates charged by other law firms practicing employment and labor law in the Philadelphia area according to the 2021 Real Rate Report by Wolters Kluwer (submitted herewith as Exhibit 13), which has been cited by courts in the consideration of attorneys' fees awards. *See, e.g., Sabinsa Corp. v. Herbakraft, Inc.*, No. 14-4738 (RBK/SAK), 2022 U.S. Dist. LEXIS 72331, 23-24 (D.N.J. Apr. 20, 2022) (citing to Wolters Kluwer's Real Rate Report for determining reasonable rates); *Skeen v. BMW of N. Am., Ltd. Liab. Co.*, No. 2:13-cv-1531 (WHW/CLW), 2016 U.S. Dist. LEXIS 97188, 61-62 (D.N.J. July 26, 2016) (citing to Wolters Kluwer's Real Rate Report for determining reasonable rates). For example, according to the 2021 Real Rate Report (Wolters Kluwers' most recent survey):

- In 2021, the median hourly rate for law firm partners practicing employment and labor law in Philadelphia, PA, was \$678; the first quartile was \$500 and the third quartile was \$810; and
- In 2021, the median hourly rate for law firm associates practicing employment and labor law in Philadelphia, PA, was \$450; the first quartile was \$398 and the third quartile was \$500.

Exhibit 12. Accordingly, all of the rates for which CML seeks reimbursement fall well within a conservative range of reported hourly rates for partners (\$500–\$810) and associates (\$398–\$500) in the same practice area and geographic location. *See id.*

Fifth, to the extent that the Court were to look to CLS for guidance, the requested rates of Mr. Console, Mr. Rivera, Ms. Norman, Ms. Smith, and Mr. Gilman all fall at or below the prescribed CLS schedule—despite the guidelines not having been updated in 5 years nor failing to account for any inflation or considering the relevant experience, skills, and reputation of same (all of which would support an upward increase if considered). Additionally, when considering the

realities of increasing rates of inflation over time in the legal market as courts often have, the requested hourly rate of Ms. Gurmankin also falls within the CLS guidelines.⁶

Further, based on experience, reputation, and skill, the requested rates of the individual CML attorneys who performed the bulk of work in this case are reasonable.

Ms. Mattiacci seeks a rate of \$700 per hour for services performed. Her outstanding credentials are set forth in her attached Declaration. As noted, the Court has already approved a rate of \$700 for Ms. Mattiacci. Further, the Court in *Ray* approved her rate of \$700 and praised her for her exceptional talent. Her requested rate is also supported declarations from several highly regarded employment law practitioners in the Philadelphia metropolitan/South Jersey area who are familiar with Ms. Mattiacci's work. Moreover, Ms. Mattiacci's requested rate is well in line with the hourly rates for partners practicing employment and labor law in the Philadelphia area as reported in the 2021 Real Rate Report by Wolters Kluwer.

Mr. Console seeks a rate of \$700 for services performed. His outstanding credentials are set forth in his Declaration. His requested rate of \$700 was also approved by the Court in *Ray*. In support of Mr. Console's requested rate of \$700, Plaintiff has submitted declarations from several highly regarded employment law practitioners in the Philadelphia metropolitan/South Jersey area who are familiar with his work. Moreover, Mr. Console's requested rate is well in line with the

⁶ For example, applying a reasonable 7% annual rate of inflation to the CLS baseline rates for someone with 15 years of experience (a high-end rate of \$450) over four years (from the date on which CLS's schedule was last updated to present), an appropriate rate for Ms. Gurmankin would be increased from \$450 to \$590 in 2022. *See, e.g., Earley v. JMK Assocs.*, No. 18-760, 2020 U.S. Dist. LEXIS 66176, at *3–6 (E.D. Pa. Apr. 15, 2020) (acknowledging evidence of regional billing rates having increased between 5 percent and 7 percent in recent years and extrapolating rates to account for inflation over time); *K.N. & J.N. ex rel. J.N. v. Gloucester City Bd. of Educ.*, No. 17-7976-NLH-SAK, 2022 U.S. Dist. LEXIS 36492, at *8 (D.N.J. Mar. 1, 2022) (using CLS rates as baseline but increasing fee to account for reasonable inflation and because said schedule has not been updated since 2018).

hourly rates for partners practicing employment and labor law in the Philadelphia area as reported in the 2021 Real Rate Report by Wolters Kluwer.

Ms. Gurmankin seeks a rate of \$590 per hour for services performed. Her outstanding credentials are set forth in her Declaration. An hourly rate of \$410 was approved by the Court in *Middlebrooks, supra*, based on the CLS schedule. As noted above, when adjusted for inflation, her current hourly rate falls within the CLS schedule. Moreover, Ms. Gurmankin's requested rate is consistent with the hourly rates for partners practicing employment and labor law in the Philadelphia area as reported in the 2021 Real Rate Report by Wolters Kluwer. Further, Plaintiff has submitted declarations from highly regarded employment law practitioners in the Philadelphia metropolitan/South Jersey area who attest to Ms. Gurmankin's skills and expertise, and that the rate requested for Ms. Gurmankin's services (\$590) is reasonable because it lies well within the range of fees charged for work in fee shifting cases by attorneys with similar backgrounds, experience, and abilities in the employment field in the Philadelphia metropolitan/South Jersey area. *See* Torchia Declaration at ¶ 11; Peck Declaration at ¶ 11; Davitch Declaration at ¶ 11.

Mr. Rivera seeks a rate of \$350 per hour for services performed. Mr. Rivera's outstanding credentials are set forth in his Declaration. An hourly rate of \$320 was approved in 2020 by the Court in *Gaspar, supra*, which should be adjusted to reflect current market rates. Further, his rate is supported by several employment attorneys in the market. Moreover, it is consistent with the published market data, and within the CLS schedule.

2. The Court Should Award Plaintiff An Extraordinary Contingency Fee Enhancement.

The NJLAD protects important civil rights and its enforcement is crucial to New Jersey citizens and the state itself. The NJLAD begins with a finding and declaration of the importance of this legislation:

The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race [or] . . .sex . . . are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race...[or] sex..., in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety cause by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

N.J. Stat. §10:5-3.

The Legislature’s intention to provide full relief to “all persons protected by this act” would surely be thwarted if the law’s protections as a practical matter are available only to those who can afford to pay competent counsel on a guaranteed hourly fee basis to represent them. That would be very few victims, indeed, of employment discrimination and wrongful termination. Thus, the NJLAD’s statutory fee shifting provision is crucial to achieving the law’s goals. It provides:

In any action or proceeding brought under [10:5-1, *et seq.*] the prevailing party may be awarded a reasonable attorney’s fee as part of the cost, provided however, that no attorney’s fee shall be awarded to the respondent unless there is a determination that the complainant brought the charge in bad faith[.]

N.J.S.A. §10:5-27.1.

The New Jersey Supreme Court has recognized that an award of attorneys' fees is not "reasonable" if it is simply a lodestar "calculated as if the attorney's compensation were guaranteed irrespective of result." *Rendine*, 141 N.J. at 338. According to the New Jersey Supreme Court, "as a matter of economic reality and simple fairness," no fee award may be deemed "reasonable" unless the lodestar "is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed." *Rendine*, 141 N.J. at 338.

The court in *Rendine* explained that lawyers in the marketplace will not provide legal representation on a contingent basis unless they receive a premium for taking the risk of incurring considerable time and resources to litigating a case to verdict and receiving no monetary compensation for their services in exchange. In the private market, "[t]o bid for services effectively, parties with only fee awards to offer must be able to pay market rates. They cannot do that when they are denied contingency enhancements because they cannot cover the non-payment risk. A lawyer given a choice between an unenhanced hourly rate in a fee award case and an equal rate in a case where payment is certain will have a strong incentive to decline the fee award case." *Rendine*, 141 N.J. at 339. Lawyers must be sufficiently incentivized to take the gamble of representing clients of little means but with important rights at stake. If they are not, there will not be a market of competent counsel to act as "private attorneys general" to vindicate important civil rights, crucial to New Jersey's citizens and the state itself.

a. The Court is required to consider a contingency enhancement in its award of a "reasonable" attorney's fees under NJLAD.

Under *Rendine*, once the lodestar fee has been calculated, the court "**should** consider whether to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." *Rendine v. Pantzer*,

141 N.J. 292, 337 (emphasis added). In fact, the Third Circuit has reversed lower court decisions that did not apply a fee enhancement under these circumstances because to do so would be in contravention of *Rendine*. See, e.g., *Coleman v. Kaye*, 87 F.3d 1491, 1511 (3d Cir. 1996); *Am. Hardware Mut. Ins. Co. v. Harley Davidson of Trenton, Inc.*, 124 Fed. Appx. 107, 113 (3d Cir. 2005). CML's compensation in this case is entirely contingent on a successful outcome. Console Declaration at ¶ 15. After determining the appropriate lodestar, then, the next step is for the Court to consider what is an appropriate contingency enhancement.

b. Contingency enhancements in fee-shifting cases *ordinarily* should range between five and fifty percent.

The New Jersey Supreme Court in *Rendine* pointed to three primary factors when evaluating a contingency enhancement: (1) whether a case was taken on a contingent basis; (2) whether the attorney was able to mitigate risk of nonpayment in any way; and (3) whether other economic risks were aggravated by the contingency of payment. *Rendine*, 141 N.J. at 339. The Supreme Court in *Rendine* set certain standards to guide a court's consideration. It concluded that:

contingency enhancements in fee-shifting cases ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency fee cases ranging between twenty and thirty-five percent. Such enhancements should never exceed one-hundred percent of the lodestar, and an enhancement of that size will be appropriate only in the rare and exceptional case in which the risk of nonpayment has not been mitigated at all, *i.e.*, where the "legal" risk constitutes "an economic disincentive independent of that created by the basic contingency in payment...[and] the result achieved...is significant and of broad public interest...." Enhancements of that magnitude will be reserved for cases of that description in which no prospect existed for the attorney to be compensated by payment of a percentage of a large damages award, and in which the relief sought was primarily equitable in nature. Obviously, we remain willing to revisit the issue if presented with compelling evidence that our perception of the proper range of contingency enhancements is inconsistent with the relevant market and therefore is obstructing the availability of competent counsel to conduct fee-shifting litigation.

Rendine, 141 N.J. 343–44.

The court’s evaluation in that case further considered that “the risk of nonpayment was also somewhat mitigated by the strength of plaintiff’s case. *Id.* at 345. The court assessed the risk of non-payment as moderate but noted that that moderate risk “increased during the course of the litigation by virtue of defendant’s vigorous resistance to each element of plaintiff’s claims.” *Id.* The court concluded that a contingency enhancement of one-third of the lodestar was appropriate.

The *Rendine* case was itself an employment discrimination case. The plaintiffs were terminated, and the jury awarded them compensatory and punitive damages. Unlike this case, however, the fee arrangement in *Rendine* was not even entirely contingent. On the contrary, the plaintiffs had entered into a retainer agreement that provided for a fee of the greater of 1) a specific hourly billing plus twenty-five percent of plaintiff’s recovery; or 2) the amount of attorneys’ fees awarded by court pursuant to the fee-shifting provision of the NJLAD. *Id.* at 298. Other than the inherent difficulty associated with proving discrimination and “a vigorous resistance to each element of the claim,” there does not appear to be anything especially risky about the case. On the contrary, there was a guarantee of some payment, and an indication that the case was especially strong. It presents risk factors that are moderate, and some guaranteed payment. Still the court awarded a contingency enhancement of 33% of the lodestar amount. *Id.* at 345; *see also, e.g., Montone v. City of Jersey City*, 2020 U.S. Dist. LEXIS 224883, *24 (D.N.J. Dec. 1, 2020) (awarding a 40% enhancement in an employment discrimination case involving “extraordinarily complicated pretrial procedural maneuverings,” but notably no bad faith or improper conduct).

As discussed below, this case was not an ordinary employment discrimination case, presenting an ordinary level of risk. This case did not involve a “vigorous resistance;” it was not zealous advocacy within the bounds of professional conduct. This case from the very start was

about an employer's strategy of threats and obstructionism intended to get Plaintiff to drop her case—in which case, CML would have received no compensation from either the contingency fee agreement or the fee-shifting statutes.

c. This is an extraordinary case that warrants an 85% contingency enhancement of the lodestar amount.

Applying the standards set forth in *Rendine* warrants an exceptional, but not the maximum, enhancement: this is not a case seeking primarily equitable relief (which might warrant a 100% enhancement) and, like *Rendine*, the risk is mitigated somewhat by the strength of the case. However, this case certainly is not “typical” (which might warrant a 20% to 30% enhancement); nor is it “ordinary” (which might warrant up to a 50% enhancement). This case has all of the inherent risk associated with an “ordinary” employment discrimination case undertaken on a straight contingency fee basis, but far more risk and far more at stake. Plaintiff seeks an 85% contingency enhancement of the lodestar amount.

As a preliminary matter, the risk of non-payment to a lawyer representing a terminated employee on a straight contingency fee basis is by the very nature of the case so substantial that many employment lawyers in the Philadelphia metropolitan/South Jersey area are unable or unwilling to take on such representation or devote the necessary time and resources to be able to successfully litigate these cases to verdict. *See* Console Declaration at ¶ 40; *see also* Torchia Declaration at ¶ 14; Roth Declaration at ¶ 6; Davitch Declaration at ¶ 13; Peck Declaration at ¶ 15; Schorr Declaration at ¶ 14; Barasch Declaration at ¶ 12. In this case, there are some more or less “ordinary” factors that increase the risk of non-payment and would be considered a disincentive to commit the time and resources necessary to represent through verdict a plaintiff on a straight contingency fee basis:

- The parties stipulated to a back pay amount of \$100,000 covering a period of approximately 56 months, and no front pay was awarded to the Plaintiff. The relatively small amount of economic loss damages increases the risk of nonpayment and would be considered a disincentive to attorneys to take the case on a contingency fee basis. *See* Console Declaration at ¶ 43; *see also* Roth Declaration at ¶ 9; Peck Declaration at ¶ 18.
- IMC had no applicable insurance coverage. Lack of insurance increases the risk of nonpayment and would be considered a disincentive to attorneys in this market to take the case on a contingency fee basis. Console Declaration at ¶ 45; *see also* Roth Declaration at ¶ 11; Peck Declaration at ¶ 20; Schorr Declaration at ¶ 16.
- IMC is a privately held company. Lack of information regarding the financial health of an employer-defendant increases the risk of nonpayment and would be considered a disincentive to attorneys in this market to take the case on a contingency fee basis. Console Declaration at ¶ 46; *see also* Roth Declaration at ¶ 12; Peck Declaration at ¶ 21; Schorr Declaration at ¶ 16.

These additional factors warrant a contingency enhancement in the upper range of the 30–50%. But this case involves the extraordinary factor of a defendant engaging in a strategy of bullying and intimidating Plaintiff to get her to drop her civil rights claims (in which case, an attorney representing the plaintiff on a straight contingency fee basis would get nothing).

Defendants’ counsel filed an inordinate number of groundless and unnecessary motions during the course of this litigation, and engaged in otherwise obstructionist conduct, to such an extent that he was repeatedly admonished by the Court. Moreover, the Court exercised its inherent power to sanction Defendants’ counsel for his conduct during trial and expressed that his failure to comply with the Court’s Orders issued as to evidentiary matters amounted to bad faith; and, further, in sanctioning Defendant’s counsel under Rule 11 in connection with another, unrelated matter, the Court stated that it had observed that the defendant’s counsel’s offending behavior “was part of a pattern of vexatiousness observed by each Judge to have touched this case.” This type of conduct increases the risk of non-payment and would be a significant disincentive to take on the case on a contingency fee basis. *See* Console Declaration at ¶ 47; *see also* Torchia

Declaration at ¶ 15; Roth Declaration at ¶ 6; Peck Declaration at ¶ 15; Schorr Declaration at ¶ 14; Barasch Declaration at ¶ 12.

Plaintiff was repeatedly and baselessly accused of engaging in criminal misconduct. Without limitation: in the company's position statement to the EEOC, Ms. Hightower was baselessly accused of making her allegations of discrimination in an effort to extort money from Defendant Ingerman Management Company; she was repeatedly and in several publicly accessible documents and elsewhere baselessly accused of committing several felonies, including perjury. Moreover, before she filed her EEOC Charge throughout the duration of the litigation, Defendants' counsel repeatedly and without legitimate basis threatened to sue Ms. Hightower. And further, not only was she threatened with a lawsuit, Defendants' counsel threatened to refer her to the U.S. Attorney's office for prosecution. This type of conduct increases the risk of non-payment and would be a significant disincentive to take the case on a contingency fee basis. Console Declaration at ¶ 48; *see also* Roth Declaration at ¶ 14; Peck Declaration at ¶ 23; Schorr Declaration at ¶ 14.

CML and our individual attorneys were also baselessly accused of criminal misconduct (*i.e.*, "aiding and abetting"), subject to personal attack, and threatened with suit for various and baseless alleged offenses, including slander, defamation, malicious prosecution, and frivolous litigation. As experienced litigators, we are prepared to deal with and fend off baseless accusations. But still, this type of conduct is extraordinary and goes well beyond vigorous advocacy within the bounds of professional conduct. The prospect of having to deal with this type of conduct would certainly be considered a disincentive to take on the case. Console Declaration at ¶ 49; *see also* Roth Declaration at ¶ 15; Peck Declaration at ¶ 24; Schorr Declaration at ¶ 14; Barasch Declaration at ¶ 12.

Defendants in this case made two offers of judgment: an offer in on February 2, 2018, of \$5,000, inclusive of attorney's fees and costs; and an offer on March 7, 2022, of \$75,000, inclusive of attorney's fees and costs. Console Declaration ¶50. By the time Defendants made the second offer of judgment on the eve of trial, CML had incurred hundreds of thousands of dollars in attorney's fees and expenses. Had Ms. Hightower succumbed to the pressure of vexatious litigation and Defendants' repeated threats and accepted the offer of judgment, CML would have been compensated with 40% of \$75,000, *i.e.*, \$30,000. This type of conduct increases the risk of non-payment and would be a significant disincentive to take the case on a contingency fee basis. Console Declaration at ¶ 50.

These factors, especially the vexatious conduct and threats, warrant an extraordinary enhancement of the lodestar amount under the NJLAD. Console Declaration at ¶ 51; *see also* Roth Declaration at ¶ 16; Peck Declaration at ¶ 25. Defendants' strategy and its counsel's tactics implementing it should not be tolerated. Absent a premium to compensate for risk and deter such a strategy, few competent attorneys in the Philadelphia metropolitan/South Jersey area would be willing to take on such a case on a straight contingency fee basis. Console Declaration at ¶ 51.

This extraordinary case warrants an extraordinary premium to incentivize attorneys in this market to use their talents to act as private attorney generals and vindicate employees' civil rights and the important goals of the NJLAD. Console Declaration at ¶ 51.

B. Plaintiff is entitled to reasonable costs incurred.

The enforcement provision of Section 1981 and the NJLAD also provides for the award of reasonable costs to a prevailing party. *See* 42 U.S.C.S. § 1988(b) (referencing, *inter alia*, Section 1981); *see also* N.J. Stat. 10:5-27.1. "Reasonable costs, unlike attorney's fees, should be awarded as a matter of course." *Doering v. Union Cty. Bd. of Chosen Freeholders*, 1987 U.S. Dist. LEXIS

9031, at *11 (D.N.J. Sep. 28, 1987) (citing *P. Mastrippolito & Sons, Inc. v. Joseph*, 692 F.2d 1384, 1389 (3d Cir. 1982)); *see also Andujar v. Gen. Nutrition Corp.*, No. 14-7696 (JS), 2018 U.S. Dist. LEXIS 141244, at *20 (D.N.J. Aug. 20, 2018) (“Under the NJLAD[,] plaintiff is entitled to reimbursement of his reasonable costs for his successful prosecution of the case.”). Plaintiff, as the prevailing party, is thus entitled to reimbursement of her reasonable and appropriate costs.

The costs and expenses incurred and paid by CML in connection with this case were reflected on the books and records of the firm. Console Declaration at ¶ 52. These books and records were prepared from records that were regularly maintained by the firm in the ordinary course of business and accurately reflect the costs and expenses incurred. *Id.* A printout of the detailed, individualized billing entries is attached as Exhibit 14 to Plaintiff’s Petition. *Id.*; *see also* Console Declaration at ¶¶ 52–53. CML has incurred \$71,137.87 in costs through June 9, 2022, in pursuing this action on behalf of Plaintiff. *Id.* Those costs are summarized in the chart that follows:

Category	Cost Incurred
Delivery	\$1,168.57
Filings/Service Fees	\$663.00
Document Hosting (ESI)/IT Support	\$10,938.70
Hearings/Deposition Travel	\$110.93
Deposition Transcripts and Video	\$12,717.08
Hearings/Trial Transcripts	\$13,367.60
Expert Witness Fees	\$27,808.94
Witness Fees	\$325.64
Local Counsel Fees	\$476.00
Miscellaneous Trial Expenses (travel, meals, parking, tolls, etc.)	\$3,561.41
TOTAL	\$71,137.87

These costs were reasonably incurred in the prosecution of this litigation. Console Declaration at ¶ 54. Accordingly, they should be awarded to Plaintiff as the prevailing party.

III. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court enter the proposed Order submitted herewith, and award to Plaintiff her reasonable attorney's fees calculated as follows: \$1,135,328.50 lodestar, and an 85% percent contingency enhancement of \$965,029.22, equaling a total fee award of \$2,100,357.70 for services rendered through June 9, 2022; and \$71,137.87 for reasonable expenses incurred, through June 9, 2022.

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Dated: July 13, 2022