

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

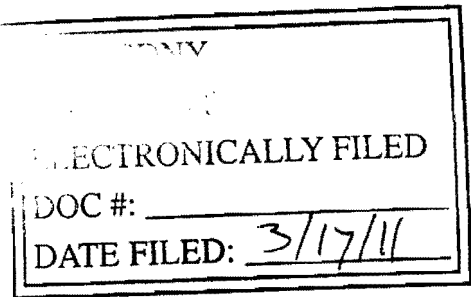
MERCK EPROVA AG,

Plaintiff,

-v-

GNOSIS S.P.A. and GNOSIS BIORESEARCH S.A.,

Defendants.



No. 07 Civ. 5898 (RJS)
MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge:

Plaintiff Merck Eprova AG brings this action against Defendants Gnosis S.P.A. and Gnosis Bioresearch S.A., alleging that Defendants' actions in advertising and promoting its dietary ingredients constitute false advertising under Section 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); contributory false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); federal unfair competition under Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A); unfair competition under New York common law; deceptive trade practices pursuant to N.Y. Gen. Bus. Law § 349(h); and false advertising under N.Y. Gen. Bus. Law § 350(e)(3). Before the Court are the parties' cross-motions for summary judgment and Plaintiff's motion for attorneys' fees. For the following reasons, Plaintiff's motion for summary judgment is denied in full, Defendants' motion is granted in part and denied in part, and Plaintiff is awarded \$89,921 in attorneys' fees.

I. BACKGROUND¹

Plaintiff is a Swiss pharmaceutical company that produces dietary ingredients for the nutritional industry. (Pl. 56.1 ¶ 1, 3.) Among other things, it makes a product called Metafolin, a source of folate used in dietary supplements. (*Id.* ¶ 5-6.) Defendant Gnosis S.P.A. is an Italian corporation, while Defendant Gnosis BioResearch S.A. is a Swiss association based in San Antonino, Switzerland. (*Id.* ¶ 2.) Defendants also produce dietary ingredients, including a source of folate it calls Extrafolate. (Def. 56.1 ¶¶ 26, 29; Pl. 56.1 ¶ 88.)

This case is about whether the term “L-5-MTHF” can be properly used to refer to Defendants’ product. Plaintiff argues Defendants’ use of this term to describe Defendants’ product, a diastereoisomeric mixture (Pl. 56.1 ¶ 87), is improper as the term can only be used to describe ingredients, like those of Plaintiff, that are “substantially pure” (Pl. Mem. at 2). Defendants argue that they use the term in a different way, with the “L” in L-5-MTHF referring to the “configuration of the glutamic acid” in their product. (*See* Def. 56.1 ¶ 29.)

Plaintiff filed this action on June 21, 2007. The case was originally assigned to the docket of the Hon. Kenneth M. Karas but was reassigned to the undersigned on September 4, 2007. Plaintiff filed an Amended Complaint on October 22, 2007. The Court denied Defendants’ motion to dismiss for lack of jurisdiction on December 12, 2008.

After a series of discovery disputes, the Court imposed sanctions on Defendants on April 4, 2010, ordering Defendants to pay a fine of \$25,000 and the costs it expended in connection with attempting to acquire responsive documents in this case. *See Merck Eprova AG v. Gnosis S.P.A.*,

¹ The following facts are taken from the parties’ Local Rule 56.1 statements. Where only one party’s Rule 56.1 statement is cited, the opposing party does not dispute that fact. The Court presumes the parties’ familiarity with the facts and procedural history of this action. Accordingly, the Court will briefly recite only those facts necessary to the resolution of the parties’ present motions.

No. 07 Civ. 5898 (RJS), 2010 WL 1631519 (S.D.N.Y. Apr. 20, 2010). On May 4, 2010, Plaintiff filed its motion for attorneys' fees. That motion was fully briefed on May 14, 2010. Thereafter, Plaintiff filed its motion for summary judgment on August 5, 2010, and Defendants filed their motion for summary judgment on May 6, 2010. Defendants' motion was fully briefed on September 11, 2010. After the Court allowed sur-reply briefing on Plaintiff's motion, that motion was fully briefed on November 18, 2010. The Court held oral argument on both parties' summary judgment motions and Plaintiff's motion for attorneys' fees on March 10, 2011.

II. SUMMARY JUDGMENT

A. Standard of Review

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, a court may not grant a motion for summary judgment unless "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of showing that it is entitled to summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The court "is not to weigh evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir. 2004); *accord Anderson*, 477 U.S. at 248. As such, "if there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment." *Binder & Binder PC v. Barnhart*, 481 F.3d 141, 148 (2d Cir. 2007) (internal quotation marks omitted) (alteration in original).

Inferences and burdens of proof on cross-motions for summary judgment are the same as those for a unilateral summary judgment motion. *See Straube v. Fla. Union Free Sch. Dist.*, 801 F.

Supp. 1164, 1174 (S.D.N.Y. 1992). “That is, each cross-movant must present sufficient evidence to satisfy its burden of proof on all material facts.” *U.S. Underwriters Ins. Co. v. Roka LLC*, No. 99 Civ. 10136 (AGS), 2000 WL 1473607, at *3 (S.D.N.Y. Sept. 29, 2000); *see also Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988).

B. Analysis

To succeed on a claim under the Lanham Act, a plaintiff must demonstrate that the defendant has made a “false or misleading description of fact, or false or misleading representation of fact” that misrepresents that “nature, characteristics, or qualities” of the defendant’s goods. 15 U.S.C. § 1125(a). The Second Circuit has stated that a claim for false advertising under the Lanham Act may rest on one of two theories: (1) that the “challenged advertisement is literally false, *i.e.*, false on its face,” or (2) “that the advertisement, while not literally false, is nevertheless likely to mislead or confuse customers.” *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 (2d Cir. 2010). In this case, the parties agree that Plaintiff must demonstrate that Defendants’ labeling is either literally or impliedly false to succeed on any of its claims, including those under New York state law. (*See* Pl. Mem. at 2; Def. Mem. at 4, 18, 21-22.) Plaintiff argues that it is entitled to summary judgment because Defendants are unable to raise a triable issue of fact regarding the literal (or implied) falsity of their labeling and advertising. (Pl. Mem. at 2.) In their papers, Defendants contend, *inter alia*, that they are entitled to summary judgment because (1) L-5-MTHF “is susceptible to more than one reasonable interpretation, and can reasonably be interpreted to mean [Defendants’] product” (Def. Mem. at 5), (2) Plaintiff cannot demonstrate implied falsity (*id.* at 10), (3) Plaintiff will be unable to establish the required elements of its various claims, and (4) Plaintiff’s claims are precluded by the Food, Drug, and Cosmetic Act (*id.* at 23).

1. Literal Falsity

To be literally false, the message must be unambiguous; if the representation “is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false” and the advertisement is actionable only upon a showing of actual consumer confusion. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007).

Both parties contend that they are entitled to summary judgment on the issue of literal falsity. Plaintiff argues that it is entitled to summary judgment because it has demonstrated through an “overwhelming body of evidence” “that the term L-5-MTHF is properly used on in connection with the pure or substantially pure isomer ingredient, and cannot be used to describe the diastereoisomeric mixture D,L-5-MTHF.” (Pl. Mem. at 2.) It points to evidence in support of this position, including several scientific articles, submissions to regulatory bodies, expert reports, and deposition testimony. In contrast, Defendant argues that it is entitled to summary judgment because “the evidence clearly shows that the L-5-MTHF designation is susceptible to more than one reasonable interpretation.” (Def. Mem. at 5.)

While Plaintiff contends that the meaning of L-5-MTHF is undisputed, Defendants have offered, *inter alia*, the expert report of Dr. Jay S. Siegel, in which he states that the term L-5-MTHF can be used to describe the ingredient included in Defendants’ product. (*See* Declaration of Jay Siegel dated Aug. 5, 2010, Doc. No. 107 (“Siegel Decl.”), Ex. 1 (“Siegel Report”), ¶¶ 4-9; *see also* Siegel Decl. ¶¶ 31-34, 48.) Specifically, Dr. Siegel – a professor of chemistry at the University of Zurich and holder of a Ph.D. from Princeton University – stated that, under the rules of the International Union of Pure and Applied Chemists, labeling a substance L-5-MTHF does not require the substance to be a “diastereomeric essentially pure compound” and the “L” in the label is only “the designator of the configuration in the amino acid side chain.” (Siegel Report ¶ 7.) Plaintiff

argues that Dr. Siegel's testimony should be ignored because his opinion is "based on a misapplication of formal nomenclature guidelines and a lack of understanding of, and experience with, folates." (Pl. Mem. at 13.) Plaintiff essentially asks the Court to weigh the evidence and/or make a credibility assessment, which is inappropriate on summary judgment. *See Amnesty Am.*, 361 F.3d at 122. Plaintiff will be free to challenge the testimony of Defendants' witnesses at trial and perhaps make *Daubert* motions, and a factfinder could certainly find that Plaintiff's witnesses are more credible than those presented by Defendants. But it would be inappropriate for the Court to do so here. Accordingly, Plaintiff's motion for summary judgment on the issue of literal falsity is denied.

Defendants argue that they are entitled to summary judgment on this issue, as it will be impossible for Plaintiff to prove at trial that L-5-MTHF cannot reasonably refer to Defendants' product. The Court disagrees. Among other things, Plaintiff has offered the testimony of its expert, Dr. Daniel W. Armstrong, that "it is well-established in the scientific community that the name 'L-5-methyltetrahydrofolic acid' and its synonyms refer only to th[e] single diastereomer. These names simply cannot be properly used to refer to the diastereomeric mixture D,L-5-MTHF." (Declaration of Adrienne D. Moran dated Aug. 5, 2010 ("Moran Decl."), Ex. 2, ¶ 3.) The factfinder in this case will be allowed to make credibility judgments and weigh the evidence. It could certainly conclude, for example, that Plaintiff's experts are entirely credible while Defendants' are not, and therefore determine that Plaintiff is correct and that there is only one reasonable interpretation of the term.² Accordingly, the Court also declines to grant summary judgment for Defendants on the issue of literal falsity.

² Among other things, a factfinder could rely on Defendants' own experts' use of the term L-5-MTHF as Plaintiff does in preparing a draft GRAS report. (*See* Pl. Sur-Reply at 4.)

2. Implied Falsity

Plaintiff argues that even if the Court finds that there is a genuine issue of material fact with regard to literal falsity, the Court may still grant it summary judgment under an implied falsity theory. (See Pl. Mem. at 16.) Plaintiff contends that the evidence shows “that a substantial number of Gnosis’s customers were confused about the nature of Gnosis’s Mixture Product.” (*Id.* at 16-17.) However, the Second Circuit has noted that “the success of a plaintiff’s implied falsity claim usually turns on the *persuasiveness* of a customer survey.” *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992) (emphasis added). Persuasiveness is a factual question for the factfinder to resolve, not this Court on a summary judgment motion. Accordingly, the Court denies Plaintiff’s motion for summary judgment on this issue.

Defendants also seek summary judgment on the implied falsity issue, arguing that Plaintiff’s failure to conduct a customer survey is a critical deficiency that warrants a grant of summary judgment in Defendants’ favor. (See Def. Mem. at 10.) Precedents in this circuit and district require “extrinsic evidence of consumer deception or confusion to support a finding of an implicit false message,” *Time Warner*, 497 F.3d at 153 (quotation marks and alterations omitted), as opposed to a judge’s “own intuitive reaction,” see *Johnson & Johnson*, 960 F.2d at 297. Surveys are certainly the regular method, see *POM Wonderful LLC v. Organic Juice USA, Inc.*, No. 09 Civ. 4916 (CM), 2011 WL 70562, at *6 (S.D.N.Y. Jan. 3, 2011) (“In *most* likelihood of confusion cases, the required extrinsic evidence will come in the form of expert consumer surveys.” (emphasis added)), but a plaintiff is only required to introduce evidence showing how the statements are perceived by those who are exposed to them, and the Court sees no reason why this could not be done in the form of depositions in a case like this where the number of potential direct consumers is arguably fairly

small. The deposition testimony of businesses known to have consumed Defendants' product has probative value as evidence that some of those consumers were confused. Finally, while Defendants argue only an insignificant portion of the intended audience – namely, manufacturers of folate supplements – was surveyed, the size of the intended audience is in dispute. If Plaintiff is correct and the size of the audience is relatively small, the deposition testimony might be enough here.³ Accordingly, the Court denies Defendants' motion for summary judgment on this issue.

Defendants also contend that summary judgment should be granted in its favor because Plaintiff cannot establish that Defendants misrepresented an inherent characteristic or quality of their product. (Def. Mem. at 15-16.) Again, the Court disagrees. Certainly, the very nature of what a manufacturer is selling is an inherent quality of that product. *See, e.g., Rexall Sundown, Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9, 30 (E.D.N.Y. 2009) (collecting cases). Defendants argue that “industry custom and practice is to test raw ingredients independently prior to finalizing a purchase” and therefore any alleged incorrect labeling could not affect purchasing decisions. (*See* Def. Mem. at 16.) However, Plaintiff has identified at least one alleged purchaser of Defendants' products that did not test to determine whether it was buying D,L-5-MTHF or L-5-MTHF. (Moran Decl., Ex. 11, at 131:4-14.) The Court will deny Defendants' motion for summary judgment on this ground.

Defendants argue that Plaintiff should not be allowed to recover compensatory damages in this case. To the extent willfulness is required under the Lanham Act, Plaintiff has presented sufficient evidence for a factfinder to so find here. Certainly, it is undisputed the Defendants made

³ While Defendants argue a small audience size necessarily means the advertising was not widely disseminated (Def. Opp. at 16.), courts in this district have upheld Lanham Act claims in cases involving similarly small markets. *See Nat'l Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1235 (S.D.N.Y. 1991) (allowing claim, even though defendant advertised to only 10 of plaintiff's 30 clients and 10 former clients, because industry involved was “indisputably small and closely interconnected”).

the decision to refer to their product as L-5-MTHF, and Plaintiff has presented at least some evidence that Defendants benefitted from referring to their product in this way. The Court therefore rejects Defendants' motion for summary judgment on this ground.

3. Contributory False Advertising

As a primary violation of the Lanham Act is essential to assert a contributory false advertising claim, the Court rejects both parties' motions for summary judgment on Plaintiff's contributory false advertising claim for the reasons stated above.

4. Unfair Competition

As distinguished from the false advertising provision of the Lanham Act, which "is intended to prevent confusion, mistake, or deception regarding the *characteristics or qualities* of goods or services," *In re Conn. Mobilecom, Inc.*, Nos. 02 Civ 12725 (REG), 02 Civ. 2519 (WHP), 2003 WL 23021959, at *9 (S.D.N.Y. Dec. 23, 2003) (emphasis added), "[t]he 'unfair competition' or 'consumer confusion' section of the Lanham Act is intended to prevent confusion, mistake, or deception regarding the *source* of goods or services," *id.* at *8 (emphasis added). Plaintiff agrees with this distinction (*see* Pl. Opp. at 14), yet argues it has sufficiently established this claim by "showing that Gnosis has improperly capitalized on the L-5-MTHF market created by Merck" (*id.* at 15.) This argument is specious. In this action, Plaintiff contends that Defendants misled consumers about the *characteristics* of their goods, not the *source*, and has presented no evidence that consumers believed they were purchasing Plaintiff's actual product, as opposed to a product identical to it, when they bought Defendants' products. Accordingly, the Court grants summary judgment for Defendants on this claim. "The essence of unfair competition under New York common law is the bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchasers as to the *origin* of the goods." *Jeffrey Milstein, Inc. v.*

Greger, Lawlor, Roth, Inc., 58 F.3d 27, 34 (2d Cir. 1995) (emphasis added and quotation marks omitted). Plaintiff admits that to prevail on a claim for unfair competition under New York common law, *inter alia*, a plaintiff “must provide evidence supporting liability under the Lanham Act.” (See Pl. Opp. at 15.) As stated above, Plaintiff has presented no evidence of confusion about the origin of Defendants’ goods. Accordingly, the Court will also grant Defendants summary judgment on Plaintiff’s New York common law unfair competition claim. The Court will therefore deny Plaintiff’s motion for summary judgment on both claims.

5. Deceptive Trade Practices Under New York Law

“A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.” *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000). Plaintiff argues that it is entitled to summary judgment on its claim under Section 349 because such claims “are analyzed under the same substantive standards as the Lanham Act claims.” (Pl. Mem. at 22.) As the Court ruled above, Plaintiff has failed to demonstrate it is entitled to judgment as a matter of law on the issue of falsity. Accordingly, the Court will deny Plaintiff’s motion for summary judgment on this claim.

Defendants argue that summary judgment should be granted in their favor because Plaintiff cannot establish the three required elements. (See Def. Mem. at 21.) The Court disagrees. The conduct here was certainly consumer-oriented. While Defendants directly sold their product to manufacturers and distributors of nutritional supplements, those nutritional supplements are later sold to individual consumers. The Court has already found that Plaintiff has presented sufficient evidence to survive summary judgment with regard to materiality and falsity. The issue of actual injury is a somewhat closer call. Plaintiff, citing *Burberry Ltd. v. Eoro Moda Inc.*, No. 08 Civ. 5781

(CM), 2009 WL 1675080 (S.D.N.Y. June 10, 2009), argues that Defendants' placing their goods into the stream of commerce is sufficient to demonstrate injury. (Pl. Opp. at 17.) As Defendants point out, *Burberry* is a case about trademark infringement, but the Court sees no reason why the same idea would not hold true in a case about false advertising, at least where the plaintiff has presented some evidence that the two parties are direct competitors. Therefore, the Court will deny Defendants' motion for summary judgment on this ground.

6. False Advertising Under New York Law

With respect to Plaintiff's claim under Section 350, the Court denies summary judgment for Plaintiff for the reasons given above. Defendants argue the Court should grant summary judgment for them on this cause of action because Plaintiff has not presented evidence of proof of actual reliance. (Def. Mem. at 22.) Again, the Court disagrees. As noted above, Plaintiff has presented the testimony of several manufacturers who relied on Defendants' information. Therefore, the Court also denies Defendants' motion for summary judgment on this ground.

7. Preclusion

Defendants also argue that they are entitled to summary judgment because Plaintiff's claims are precluded by the Food, Drug, and Cosmetic Act (the "FDCA"). While an individual may bring a Lanham Act claim, there is no private right of action under the FDCA. "Because of this distinction between the two laws and their remedial mechanisms, a line of cases has arisen finding that Lanham Act claims are barred where private litigants ask the district court to 'determine preemptively how [the FDA] will interpret and enforce its own regulations.'" *Pom Wonderful LLC v. Ocean Spray Cranberries, Inc.*, 642 F. Supp. 2d 1112, 1118 (C.D. Cal. 2009) (quoting *Summit Tech. v. High-Line Med. Instruments Co.*, 922 F. Supp. 299, 305-06 (C.D. Cal. 1997); see also *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 230-32 (3d Cir. 1990). However, "an advertising claim is

not shielded from the Lanham Act merely by appearing only on a product's label." *Sandoz*, 902 F.2d at 231. "[T]he key issue in the line of cases dealing with [F]DCA or FDA regulation preclusion of Lanham Act claims is whether the false advertising involves a fact that can be 'easily verified,' without requiring the truth of the fact to be determined by the FDA." *Pom Wonderful*, 642 F. Supp. 2d at 1118.

Judge Berman considered this same issue of FDCA preclusion in ruling on a motion for partial summary judgment in a sister action to this case. Judge Berman found that the claims of the plaintiffs in that case were not precluded by the FDCA because the plaintiff did not claim that the defendant "ha[d] violated an FDA regulation or FDCA provision" and did not "rely extensively on the FDCA or FDA regulations in support of [their] Lanham Act claims [or] require the Court to interpret or apply any provision of the FDCA or any FDA regulation." *Merck Eprova AG v. Prothera Inc.*, No. 08 Civ. 35 (RMB), slip. op. at 7 (S.D.N.Y. Oct. 20, 2010) (quotation marks omitted). Instead, Judge Berman found, the plaintiffs were asking the Court to determine that the defendants' advertising of its products as containing L-5-MTHF was false based on "accepted standards in the scientific and dietary supplement community." *Id.* (quotation marks omitted); *see also Sciele Pharma, Inc. v. Brookstone Pharmaceuticals, LLC*, No. 09 Civ. 3283 (JEC), slip.op. at 7-13 (N.D. Ga. June 23, 2010) (same).

As in *Prothera*, Plaintiff is not asking the Court to interpret FDA regulations. Instead, Plaintiff is arguing that the definition of L-5-MTHF is well-established in the scientific and nutritional supplement community – a claim that may legitimately be pursued under the Lanham Act. While one may question the wisdom of having a jury of lay persons determine whether this assertion is accurate, the Court agrees with Judge Berman that the claim is not precluded by the FDCA. Accordingly, Defendants' motion for summary judgment on this ground is denied.

III. ATTORNEYS' FEES

In an Order dated April 20, 2010, the Court found that Defendants had been, at best, “grossly negligent in fulfilling their fundamental obligation of preserving relevant information when litigation is reasonably anticipated.” *Merck Eprova*, 2010 WL 1631519, at *5. Among other things, Defendant’s CEO testified before this Court that he knew of certain discoverable materials but decided not to produce them because he did not believe them to be sufficiently relevant and concluded that the discovery requests were “disproportionate with respect to” the company’s sales in the United States. (Transcript of Jan. 22, 2010 Hearing (“Jan. 22 Tr.”), at 36:6-11, 49:18-50:3, 55:19-56:12.) As a sanction, the Court ordered Defendants to pay a fine of \$25,000 as well as the costs, including attorneys’ fees, that Plaintiff “expended in connection with attempting to acquire responsive documents,” including the costs associated with bringing its sanctions motion. *See Merck Eprova*, 2010 WL 161315919, at *6. In a declaration accompanying its motion, Plaintiff seeks fees and costs in the amount of \$175,739.73 (Declaration of Robert E. Hanlon, dated May 4, 2010 (“Fee Decl.”), at 2); Defendants counter that fees and costs should not exceed \$66,155.00 (Def. Opp. Fees at 23).

The parties agree that the standard this Court should follow in setting attorneys’ fees was laid out by the Second Circuit in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 522 F.3d 182 (2d Cir. 2008). Under this method, a court must first set a “reasonable hourly rate” for each attorney and staff member, keeping in mind all case-specific variables. Second, the court must determine the number of hours reasonably expended. Third, it must multiply the reasonable hourly rate by the number of hours reasonably expended to determine the “presumptively reasonable fee.” *See Margolies v. County of Putnum N.Y.*, No. 09 Civ. 2061 (RKE) (GAY), 2011 WL 721698, at *1 (S.D.N.Y. Feb. 23, 2011).

A. The Reasonable Hourly Rate

A reasonable hourly rate is the rate a paying client would be willing to pay. *Arbor Hill*, 522 F.3d at 190. To determine this, the Second Circuit has directed courts to look to the twelve factors identified by the Fifth Circuit in *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974). These include: (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount of money involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Arbor Hill*, 522 F.3d at 190.⁴ A court should also "bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively" and "that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case." *Id.* In evaluating these factors, a court may rely on "its own knowledge of comparable rates charged by lawyers in the district," *Morris v. Eversley*, 343 F. Supp. 2d 234, 345 (S.D.N.Y. 2004), and evidence provided by the parties.

Defendants contend that Plaintiff's counsel's rates are unreasonable. Specifically, they argue that Plaintiff's attorneys expended more time than was necessary; that this discovery dispute did not involve novel or difficult issues; that a high level of skill was not required to engage in this

⁴ These factors were primarily developed in the context of fee shifting in civil rights cases. The Court recognizes that several of these factors, such as the undesirability of the case, are not applicable to the analysis of this motion.

dispute; that there was no preclusive effect; that there were no time limitations involved; that the amount in controversy in this case is less than the amount sought in fees; that Plaintiff has not provided sufficient information about the experience, reputation, and ability of its attorneys; and that this case was not undesirable. (Def. Opp. Fees at 17-19.) Defendants also contend that the rate requested is higher than that routinely approved by other courts in this district (*id.* at 20), and that Plaintiff likely would wish to pay lower rates and had the ability to negotiate such rates (*id.* at 21-22).

Having considered all of the *Arbor Hill* factors with regard to each attorney, the Court agrees that somewhat lower rates than those requested by Plaintiff are appropriate. Among other things, the Court agrees with Defendants that Plaintiff's attorneys expended more time than was necessary, that Plaintiff likely had the ability to negotiate lower fees, and that the fees requested here are somewhat higher than those routinely awarded in this district.

The Court will address each class of attorney separately. Two partners worked on this case, Robert Hanlon and Thomas Parker. Plaintiff requests \$700 per hour for the hours both partners worked in 2009 and \$735 per hour for the hours both worked in 2010. (*See Fee Decl.* at 3.) Defendants suggest a rate of \$500 per hour for each partner. (Def. Opp. Fees at 23.) Plaintiff has not provided information about what Alston & Bird routinely charges its clients. It has provided an article from the National Law Journal suggesting that the average Alston & Bird partner's hourly billing rate in 2009 was \$602 per hour and the median was \$590 per hour, but that is of somewhat limited utility, as it, among other things, gives information for the firm nationwide. As Defendants point out, Plaintiff has provided little information on the experience and reputation of their attorneys. However, the Court has been impressed by their work on this case, and they did succeed on the merits of their discovery dispute and sanctions motion. Seasoned trial attorneys have been

routinely awarded fees at rates of between \$250 and \$600 in this District. *See, e.g., Rozell v. Ross-Holst*, 576 F. Supp. 2d 527, 546 (S.D.N.Y. 2008); *see also Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316 (RMB) (MHD), 2007 WL 1284013, at *4 (S.D.N.Y. Apr. 24, 2007) (awarding two partners at firm comparable to Alston & Bird \$700 & \$600 per hour, respectively). Based on the foregoing, the Court concludes that a rate of \$600 per hour is appropriate for both partners for work performed in both 2009 and 2010.

Three associates worked on this case, Natalie Clayton, Victoria Spataro, and Adrienne Moran. For Clayton, Plaintiff seeks \$455 per hour for work performed in 2009 and \$505 per hour for work performed in 2010. (Fee Decl. at 3.) For Spataro, Plaintiff seeks \$430 per hour for work performed in 2009 and \$475 per hour for work performed in 2010. (*Id.*) For Moran, Plaintiff seeks \$335 per hour for work performed in 2009 and \$405 per hour for work performed in 2010. (*Id.*) Defendants argue for a rate of \$250 per hour for each associate. (Def. Opp. Fees at 23.) The same National Law Journal Article states that the average Alston & Bird associate bills at \$388 per hour and the median associate bills at \$385, though this obviously varies quite a bit based upon class year and is also nationwide, not New York-specific, data. As with the partners in this case, Plaintiff has not provided information about the associates' level of experience. Defendants contend, without citing sources, that Spataro is approximately a fourth-year associate and Clayton is approximately a fifth-year associate. (*See* Def. Opp. Fees at 8 n.4.) It has recently been observed that attorneys' fees awarded for associates have ranged between \$200 and \$350 in the Southern District. *See Robinson v. City of N.Y.*, No. 05 Civ. 9545 (GEL), 2009 WL 3109846, at *4 (S.D.N.Y. Sept. 29, 2009). Considering all of the relevant factors, the Court concludes that a rate of \$350 per hour is appropriate for the work performed by Clayton and Spataro, and a rate of \$300 per hour is appropriate for the work performed by Moran.

Five paralegals and support staff members worked on this case. For paralegal Yolanda Sanchez, Plaintiff seeks \$205 per hour for work performed in 2009 and \$215 per hour for work performed in 2010. (Fee Decl. at 3.) For paralegal Amanda Factor, Plaintiff seeks \$170 per hour for work performed in 2009 and \$180 per hour for work performed in 2010. (*Id.*) For technical analyst Elsie Trawick, Plaintiff seeks \$205 per hour for work performed in 2009. (*Id.*) For court clerk Jeannine Grudzien, Plaintiff seeks \$165 per hour for work performed in 2009 and \$175 per hour for work performed in 2010. (*Id.*) For court clerk Kim Fitzgerald, Plaintiff seeks \$175 per hour for work performed in 2009 and \$185 per hour for work performed in 2010. (*Id.* at 4.) Defendants argue for a rate of \$150 per hour for each paralegal or staff member. (Def. Opp. Fees at 23.) The paralegal rates requested by Plaintiff seem in line with what courts in this district have previously allowed, *see, e.g., Lucky Brand Dungarees, Inc. v. Ally Apparel Resources, LLC*, No. 05 Civ. 6757 (LTS) (MHD), 2009 WL 466136, at *6 (S.D.N.Y. Feb. 25, 2009) (awarding hourly rate of \$235-\$205 for paralegals), and a factor driving the Court's reduction of the billing rate for the attorneys – excessive hours spent on the various tasks – is not an issue here, as Defendants admit. The Court finds that a rate of \$205 per hour is appropriate for the work performed by Sanchez, and a rate of \$170 per hour is appropriate for the work performed by Factor. On the other hand, the Court agrees with Defendants that the given rate for the support staff members is high. The Court finds that Defendants' suggested rate of \$150 per hour is appropriate for the support staff members. Indeed, it is higher than the \$50 per hour rate generally used in this district. *See Lucky Brand*, 2009 WL 466136, at *6.

B. Hours Reasonably Expended

The next step in the attorneys' fees process is determining the number of hours reasonably expended by Plaintiff's counsel.

In determining how much attorney time should be compensated, the court looks initially to the amount of time spent on each category of tasks, as reflected in contemporaneous time records, and then decides how much of that time was reasonably expended. To do so 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. If the court finds that some of the time was not reasonably necessary to the outcome, it should reduce the time for which compensation is awarded.

Id. at *1 (internal citations and quotation marks omitted). The Court’s task is to make adjustments for hours that were either improperly or imprecisely billed, excessive, redundant, or otherwise unnecessary. *See Robinson*, 2009 WL 3109846, at *5. The focus of this inquiry should not be made with the benefit of hindsight, but rather answer the question of “whether ‘at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures.’” *Id.* (quoting *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992)). Defendants contest the hours expended by Plaintiff’s attorneys, but do not argue over the hours expended by Plaintiff’s paralegals and staff members.

Defendants first argue that work performed by Plaintiff’s counsel after March 3, 2010 is not covered by the sanctions Order. (Def. Opp. Fees at 7.) Though one entry – Parker’s review of the Fee Declaration (Fed Decl., Ex. 10, at 6) – is obviously covered by the Order, the Court agrees that the other April 2010 entries are not clearly related to the sanctions Order. Indeed, many of the time entries relate to documents not created until after the January 22, 2010 hearing. Therefore, the Court reduces Hanlon’s hours by 2.7, Clayton’s hours by 12.3, and Spataro’s hours by 2.1. (*See id.*, Ex. 10.)

The Court will also make reductions due to work performed by overqualified persons, overstaffing, the expenditure of unnecessary amounts of time, and unclear billing. The Court finds that more of the work here could and should have been done by lower-level associates, paralegals,

or support staff. For example, Plaintiff seeks fees for hours spent by partners reviewing correspondence with opposing counsel, when much of that work could have been done by associates. (See Fee Decl., Ex. 3, at 3618, 3620.) Courts often reduce fees when such practices occur. See *Shannon v. Fireman's Fund Ins. Co.*, 156 F. Supp. 2d 279, 301-02 (S.D.N.Y. 2001). While Defendants' actions made the discovery process more difficult than it needed to be, and surely required senior attorneys to be more involved than in the average case, the involvement of five different attorneys does seem somewhat excessive and those lawyers spent more time than seems necessary on certain tasks, such as devoting numerous hours to the preparation of letters to the Court (see Fee Decl., Ex. 1, at 3844, 3845, 3847; *id.*, Ex. 2, at 3633, 3634, 3635; *id.*, Ex. 3, at 3600, 3601, 3607, 3608, 3609; *id.*, Ex. 5, at 3311; *id.*, Ex. 6, at 3261, 1, 3, 4, 5, 9) and declarations (*id.*, Ex. 8, at 3719, 3725, 3726, 3727, 3728.) Some time entries are also somewhat vague, justifying a slight reduction as a result. (See, e.g., *id.*, Ex. 2, at 3635 ("Follow-up . . . re: discovery issues"); *id.*, Ex. 3, at 3601("Discovery dispute").)

More generally, the Court finds that a significant portion of the time devoted to discovery disputes was not necessarily attributable to Plaintiff's attempts "to acquire the documents that should have been produced in the first instance [by Gnosis]." *Merck Eprova*, 2010 WL 1631519, at *1. For example, Plaintiff dedicated a substantial amount of correspondence and energy to raising and proving its allegation that documents missing from a CD supplied by Defendants' paralegal were *willfully* omitted from the production as part of a deliberate attempt by Defendants to withhold documents that were "damaging to its case." (Pl. Ltr. dated Dec. 14, 2009, at 3.) As it turned out, the Court rejected Plaintiff's allegations of willfulness on the part of Defendant's counsel and paralegal, at least as far as the CD documents were concerned. See *Merck Eprova*, 2010 WL 1631519, at *2; (Jan. 22 Tr. 71:4-14). Obviously, Plaintiff should not receive attorneys' fees for

time spent advancing an argument that was rejected by the Court. Unfortunately, the billing records supplied by Plaintiff do not allow the Court to readily determine how much time was spent on the various arguments raised in connection with the discovery dispute. (*See, e.g.*, Fee Decl., Ex. 2, at 1 (“Began drafting sanctions letter regarding Gnosis’s deficient production”); *id.* at 5 (“Reviewed and edited letter to . . . Judge Sullivan regarding Gnosis’ withholding of documents”); *id.* at 6 (“Preparing . . . for teleconference with the Court”).)

Similarly, Plaintiff includes numerous billing entries relating to, *inter alia*, (1) disputes concerning Defendants’ production of a sample of the isomer at the heart of this matter (*see id.*, Ex. 1, at 3844, 3845, 3851, 3853; *id.*, Ex. 3, at 3618, 3619, 3620); meet and confer sessions with Defendants’ counsel in July and September (*id.*, Ex. 1, at 3846; *id.*, Ex. 2, at 3628, 3629); discussions with counsel regarding depositions (*id.*, Ex. 2, at 3620; *id.*, Ex. 4, at 3844; *id.*, Ex. 8, at 3724); (4) protective orders (*see, e.g., id.*, Ex. 4, at 3843); and (5) client communications and emails (*see, e.g., id.*, Ex. 6, at 3261; *id.*, Ex. 7, at 3469). None of these are expenses properly passed on to Defendants as a result of the Court’s April 20, 2010 Order.

Finally, it must be noted that time spent reviewing the documents produced by Gnosis – although necessary and related to the discovery disputes at issue in this case – was not necessarily or wholly time “expended in attempting to compel Gnosis to live up to its discovery obligations.” *Merck Eprova*, 2010 WL 1631519, at *6. Even if discovery had gone smoothly, Plaintiff would still have had to spend considerable time reviewing and analyzing the documents produced by Defendants. Indeed, such review is a necessary part of discovery and litigation, and the fact that such review initially took place in the context of a hotly contested discovery dispute should not obscure the fact that such review would ultimately have been necessary in any event. Clearly, it would be improper and an unjustified windfall to Plaintiff to pass on the cost of *all* such review to

Defendants. And yet Plaintiff's billing records are replete with entries relating to such document review. (See, e.g., Fee Decl., Ex. 1, at 3844 ("Reviewed Gnosis document production."); *id.* at 3845 ("Reviewed 26(a)(3) disclosures"); *id.*, Ex. 2, at 3620 ("Review Gnosis production"); *id.* at 3620-21 ("Reviewing Gnosis's recent document production and determining which categories of documents have not been produced."); *id.*, Ex. 3, at 3601 ("Reviewing Gnosis's recent production"); *id.* at 3607 ("Continuing review of Gnosis's documents and preparing deposition outlines"); *id.*, Ex. 4, at 3839 ("Reviewed Gnosis's newest document production"); *id.* at 3844 ("Reviewed Gnosis's most recent production to determine whether Gnosis's de-designation of documents was sufficient"); *id.*, Ex. 6, at 3 ("Reviewed Gnosis's production to determine how many documents were produced by Gnosis that reference" third-party customers); *id.* at 5 ("[R]eviewing [third-party] productions"); *id.* at 7 ("Reviewing Gnosis production of documents alleged to be privileged"); *id.*, Ex. 7, at 3466 ("Reviewed newest production from [third party]"); *id.*, at 3468 ("review documents)).

These, and other more general entries from Plaintiff's counsel's timesheets, confirm what should be apparent to any experienced litigator – namely, that time spent reviewing documents in connection with discovery disputes, even heated ones like those at issue in this case, may save time later in the litigation, as counsel's mastery of the documents at the discovery stage will enable them to more efficiently prepare for depositions and summary judgment. Although difficult to quantify, such efficiencies are no doubt real, and the inclusion of all fees associated with document review would likely distort and overstate the true cost of litigating the discovery disputes in this matter.

Perhaps in recognition of this fact, courts have been granted ample leeway to adjust fees to comport with reality and fairness. "In reducing a claim for time spent, the court may 'use a percentage deduction as a practical means of trimming fat from a fee application.'" *Malletier*, 2007 WL 1284013, at *1 (quoting *McDonald ex rel Prendergast v. Pension Plan of the NYSA-ILA*

Pension Trust Fund, 450 F.3d 91, 96 (2d Cir. 2006)). Based on the evidence presented, as well as the Court's familiarity with the prevailing rates in this district and the work performed in this case, the Court finds that a reduction of 35% of the fee sought for work performed by attorneys is appropriate. *See, e.g., McDonald*, 450 F.3d at 97.

Accordingly, the Court calculates Plaintiff's attorneys' fees as follows:⁵

Name	Hours	Rate/hr	Total
Robert E. Hanlon (Partner)	48.8	\$600	\$29,280
Thomas Parker (Partner)	3.1	\$600	\$1,860
Natalie Clayton (Associate)	74.8	\$350	\$26,180
Victoria Spataro (Associate)	67.6	\$350	\$23,660
Adrienne Moran (Associate)	5.5	\$300	\$1,650
Yolanda Sanchez (Paralegal)	30.4	\$205	\$6,232
Amanda Factor (Paralegal)	1.2	\$170	\$204
Elsie Tarawick (Technical Analyst)	0.2	\$150	\$30
Jeannine Grudzien (Clerk)	4.4	\$150	\$660
Kim Fitzgerald (Clerk)	1.0	\$150	\$165
TOTAL			\$89,921

As noted in the Court's April 20, 2010 Order, there can be no doubt that Defendants were grossly negligent, or worse, in their conduct of discovery in this case. For that reason, the Court concludes that an award of \$89,921, coupled with the previously imposed fine of \$25,000, is sufficient to "preserve the integrity of our system of civil litigation" and defray the costs expended by Plaintiff in compelling Defendants to live up to their discovery obligations. *Merck Eprova*, 2010

⁵The Court has rounded the Hours column to the nearest tenth of an hour. For attorneys, the Hours column reflects the 35% discount.

WL 1631519, at *4. Although less than what Plaintiff asked for, \$89,921 is, by any measure, a considerable amount of money that is reasonably tailored to both deter future misconduct and “restore [Plaintiff] to the same position it would have been in absent” Defendants’ misconduct. *Id.* (quoting *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Amer. Sec., LLC*, 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010)). Accordingly, the Court finds that the fine and attorneys’ fee award combine to constitute “the least harsh sanction that can provide an adequate remedy” for the misconduct that took place in this matter. *Id.*

V. CONCLUSION

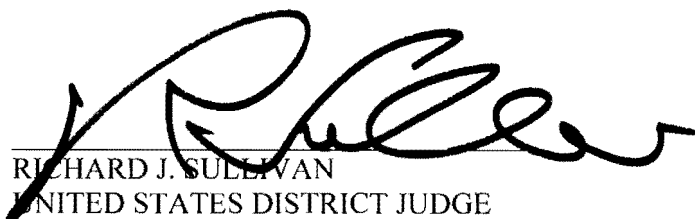
For the foregoing reasons, Plaintiff’s motion for summary judgment is DENIED in its entirety; Defendant’s motion is GRANTED to the extent it seeks the dismissal of Plaintiff’s third and fourth causes of action, and otherwise DENIED; and the Court AWARDS Plaintiff \$89,921 in attorneys’ fees.

IT IS HEREBY ORDERED THAT, by March 30, 2011, the parties shall submit a joint letter to the Court stating the weeks they are available for trial.

The Clerk of Court is respectfully directed to terminate the motions located at docket numbers 78, 88, and 96.

SO ORDERED.

Dated: March 17, 2011
New York, New York



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE