IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FEDERAL TRADE COMMISSION, and STATE OF OHIO, ex rel. ATTORNEY GENERAL DAVE YOST,	§	
Plaintiffs,	§	
v.	§	**EP-19-CV-196-KC**
EDUCARE CENTRE SERVICES, INC., et al.,	§	
Defendants.	§	

ORDER

On this day, the Court considered Robb Evans & Associates LLC's ("Receiver") Unopposed Application for Order Approving and Authorizing Payment of Receiver's and Receiver's Counsel's Fees and Expenses for the Period from Inception of Receivership Estate Through December 31, 2019 ("Application"), ECF No. 181, and the Receiver's Supplemental Brief in Support of the Application ("Supplemental Brief"), ECF No. 215. For the following reasons, the Application is **GRANTED** in part.

I. BACKGROUND

On July 19, 2019, this Court issued a Temporary Restraining Order ("TRO"), ECF No. 8, appointing Receiver as a temporary receiver with full powers of an equity receiver over Defendants as Receivership Entities. On December 17, 2019, the Court entered two Preliminary Injunctions, ECF Nos. 124, 125, ordering Receiver to continue its role as equitable receiver over the Receivership Entities. Pursuant to its obligations under the TRO and Preliminary

Injunctions, Receiver has filed one report summarizing its activities. Report of Receiver's Activities, July 19, 2019, Through Dec. 13, 2019 ("Receiver Report"), ECF No. 120-1.

On February 14, 2020, Receiver filed the instant Application for payment of reasonable fees. On February 19, 2020, the Court ordered Receiver to file supplemental briefing addressing the issues of billing judgment and reasonable market rates. *See* Feb. 19, 2020, Order 2–3, ECF No. 189. Accordingly, on March 17, 2020, Receiver filed the Supplement Brief. Receiver's Application has not been objected to by the parties.

II. DISCUSSION

A. Standard

"A receiver appointed by a court who reasonably and diligently discharges his duties is entitled to be fairly compensated for services rendered and expenses incurred." *SEC v. Striker Petroleum, LLC*, No. 3:09-CV-2304-D, 2012 WL 685333, at *2 (N.D. Tex. Mar. 2, 2012) (quoting *SEC v. Byers*, 590 F. Supp. 2d 637, 644 (S.D.N.Y. 2008)). This is true even where "a receiver may not have increased, or prevented a decrease in, the value of the collateral." *Id.* (quoting *SEC v. Elliot*, 953 F.2d 1560, 1577 (11th Cir. 1992)). The district court's discretion over the award of a receiver's fees is well-established. *SEC v. Allen*, No. 3:11-CV-882-O, 2013 WL 12125996, at *2 (N.D. Tex. Feb. 26, 2013) (citing *Stuart v. Boulware*, 133 U.S. 78, 82 (1890); *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 373 (5th Cir. 1982); *Commodity Credit Corp. v. Bell*, 107 F.2d 1001, 1001 (5th Cir. 1939)). Even where a fee application is unopposed, "the court nevertheless must carefully examine the fee application to determine whether the time spent, services performed, hourly rates charged, and expenses incurred by the Receiver are justified." *SEC v. Megafund Corp.*, No. 3-05-CV-1328-L, 2008 WL 3153074, at *2 (N.D. Tex. June 2, 2008).

1. The applicable standard for Receiver's fees

"[C]ourts have relied upon myriad factors in determining the reasonableness of a receivership fee." *Striker Petroleum*, 2012 WL 685333, at *3. Generally, "a reasonable fee is based on all circumstances surrounding the receivership." *Id.* (quoting *SEC v. W.L. Moody & Co., Bankers (Unincorporated)*, 374 F. Supp. 465, 480 (S.D. Tex. 1974), *aff'd*, 519 F.2d 1087 (5th Cir. 1975)). Many district courts in the Fifth Circuit have applied the familiar standard for attorneys' fees awards to a receiver's application for fees, looking to the lodestar method and the twelve factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See, e.g.*, *SEC v. Sethi Petroleum, LLC*, 2016 WL 4216311, at *1–2 (E.D. Tex. Aug. 10, 2016); *FTC v. IAB Mkt'g Assocs., L.P.*, No. 3:14-CV-458-L-BK, 2015 WL 3826331, at *3 (N.D. Tex. June 19, 2015); *Allen*, 2013 WL 12125996, at *2; *FTC v. Nat'l Bus. Consultants, Inc.*, No. 89-1740, 2009 WL 2984198, at *1 (E.D. La. Sept. 17, 2009); *SEC v. Millenium Bank*, No. 7:09-CV-050-O, 2009 WL 10689052, at *2–3 (N.D. Tex. Dec. 31, 2009); *Megafund*, 2008 WL 3153074, at *2.

A more limited number of cases rely exclusively on five factors from *W.L. Moody* to analyze a receiver's fee application. *See, e.g.*, *Striker Petroleum*, 2012 WL 685333, at *3 (citing *W.L. Moody*, 374 F. Supp. At 480); *SEC v. Harris*, No. 3:09-CV-1809-B, 2016 WL 1555773, at *7–9 (N.D. Tex. Apr. 18, 2016) (citing *Striker Petroleum*, 2012 WL 685333, at *3)). Those factors are: "(1) the complexity of the problem faced by the receivership; (2) the ability, reputation and professional qualities of the receiver and assisting professionals necessary for the job; (3) the time and value of the labor necessarily expended; (4) the results achieved; and (5) the ability of the receivership estate to afford the requested fees and expenses." *Striker Petroleum*, 2012 WL 685333, at *3 (citing *W.L. Moody*, 374 F. Supp. at 480). The *Striker Petroleum* court

noted that the receiver had supported its fee application by briefing the *Johnson* factors, but declined to apply that standard. *Id.* at *3 n.10. The court found that "[t]he Fifth Circuit has not required" application of *Johnson* "when making fee awards in receiverships," and found the *W.L. Moody* factors more appropriate, given that "the *Johnson* factors address fee applications by lawyers, and receivers need not be lawyers." *Id.* (conceding, though, that the *Johnson* factors still may "provide guiding principles for evaluating the fee applications of non-lawyer receivers").

However, the *W.L. Moody* opinion predates the Fifth Circuit's 1974 adoption of the *Johnson* factors and the Supreme Court's adoption of the lodestar method in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the time since, many district courts in the Fifth Circuit—cited above—have applied this widely adopted standard to receivership fee applications. And, the Fifth Circuit has applied the standard to non-lawyers. *See, e.g.*, *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 654–56 (5th Cir. 2012) (applying a lodestar calculation and the *Johnson* factors fee awards under the Bankruptcy Act for any "professional" employed by the bankruptcy estate). District courts in other jurisdictions have applied the lodestar method and *Johnson* factors without further comment. *See, e.g.*, *FTC v. Worldwide Info Servs., Inc.*, No. 6:14-cv-8-Orl-41DAB, 2015 WL 3953761, at *3–4 (M.D. Fla. June 29, 2015); *Sam Wang Produce, Inc. v. MS Grand, Inc.*, No. PJM 10-2286, 2014 WL 2964077, at *1–3 (D. Md. June 27, 2014). Some of those courts have cited the factors from *W.L. Moody* and *Striker Petroleum* as background considerations, but still apply the lodestar method and *Johnson* factors to evaluate the reasonableness of the requested award. *See, e.g.*, *FTC v. Vylah Tec, LLC*, No. 2:17-cv-228-FtM-PAM-MRM, 2019 WL 8348950, at *1–4 (M.D. Fla. Aug. 2, 2019); *Gordon v. Dadante*, No. 1:05CV2726, 2018 WL 3496382, at *17–18 (N.D. Ohio Feb. 1, 2018). And, even in *Striker*

Petroleum, the court still analyzed—in a footnote—whether the hourly rates cited by the applicants were reasonable based on prevailing market rates, appearing to apply at least a partial lodestar analysis. *See* 2012 WL 685333, at *3 n.12. Therefore, relying exclusively on the factors listed in *W.L. Moody* is likely insufficient.

For these reasons, the Court finds that the proper standard for analyzing a receiver's fee application is the same as in attorneys' fees analyses, considering the lodestar method, billing judgment, and the *Johnson* factors. The *W.L. Moody* court's oft-cited commentary on factors specific to the receivership context provides important guidance.

2. The Lodestar method and *Johnson factors*

There are two steps to determining a reasonable fee award. *Rutherford v. Harris County*, 197 F.3d 173, 192 (5th Cir. 1999). First, the court utilizes the lodestar method to calculate a reasonable amount of fees. *Id.* The "lodestar" amount is found "by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Id.* The appropriate hourly rate is based on the prevailing market rate for attorneys of comparable skill, experience, and reputation in the legal community at issue. *Black v. SettlePou, P.C.*, 732 F.3d 492, 502 (5th Cir. 2013); *Heidtman v. County of El Paso*, 171 F.3d 1038, 1043 (5th Cir. 1999). "There is a strong presumption of the reasonableness of the lodestar amount." *Black*, 732 F.3d at 502. Nevertheless, second, the court applies the twelve *Johnson* factors to analyze whether the lodestar amount is reasonable, or else should be adjusted upward or downward. *Rutherford*, 197 F.3d at 192. The *Johnson* factors are:

> (1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment in taking the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and results obtained; (9) counsel's experience, reputation, and ability; (10) case undesirability; (11) nature and length of relationship with the client; and (12) awards in similar cases.

Id. (citing *Johnson*, 488 F.2d at 717–19); *see also Jason D.W. v. Hous. Indep. Sch. Dist.*, 158 F.3d 205, 209 (5th Cir. 1998) ("Many of [the *Johnson*] factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate and should not be double-counted.").

The fee applicant bears the burden of showing "the reasonableness of the hours billed and that the attorneys exercised billing judgment." *Black*, 732 F.3d at 502; *see also Walker v. U.S. Dep't of Hous. & Urban Dev.*, 99 F.3d 761, 769 (5th Cir. 1996) (describing reasonable "billing judgment" as "writing off unproductive, excessive, or redundant hours"). Applicants typically meet this burden "by submitting contemporaneous billing records or other documentation sufficient to allow the court to meaningful[ly] review whether the hours were reasonably expended." *See Rocha v. Balfour Beatty Military Hous. Mgmt., LLC*, EP-16-CV-358-DB, 2017 WL 10774806, at *2 (W.D. Tex. Apr. 10, 2017). The applicant also bears the burden of establishing the reasonableness of the market rate relied upon in the lodestar calculation. *Id.* Parties usually do so "by providing affidavits of other attorneys practicing in the community," but the affidavits of the applicant-counsel alone can be sufficient, especially when the application is unopposed. *Id.* (citing *Smith & Fuller v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 490–91 (5th Cir. 2012); *Tollett v. City of Kemah*, 285 F.3d 357, 368 (5th Cir. 2002); *Baulch v. Johns*, 70 F.3d 813, 818 n.8 (5th Cir. 1995)).

B. Analysis

The Application seeks a total award of $85,924.76, including (1) $40,315.48 for the fees and costs of Receiver and its staff ($38,669.85 in fees and $1,645.63 in costs); (2) $15,912.20 for the fees and costs of its El Paso-based local counsel Kemp Smith Law ("Kemp Smith") ($15,906.90 in fees and $5.30 in costs); and (3) $29,697.08 for the fees and costs of its Canadian

counsel Kugler Kandestin SENCRL / LLP ("Kugler") ($27,525.21 in fees and $2,171.87 in costs). The Application is supported by Receiver's first report of its activities and by declarations from representatives for Receiver, Kemp Smith, and Kugler. In their supplemental briefing, Receiver, Kemp Smith, and Kugler also address their exercise of billing judgment and the reasonableness of the market rates relied upon.

1. Reasonableness of hours expended

The Application sufficiently establishes the reasonableness of the hours billed and that Receiver and its counsel exercised billing judgment. *See Black*, 732 F.3d at 502.

Receiver's report of its activities provides a general overview of the work undertaken by Receiver, Kemp Smith, and Kugler during the relevant period. *See* Receiver's Report. First, shortly after its appointment, Receiver filed a so-called Mareva Injunction application in Canadian court to enforce this Court's injunctive orders against relevant Canadian individuals and entities. *Id.* at 2. Receiver states that, as a result, Defendants Mohammad Souheil and 9896988 Canada, Inc. turned over around CAD$3,200 from a Canadian bank account. *Id.* The rest of Receiver's report focuses on work conducted after Plaintiffs named two additional defendants, referred to as the "Globex Defendants." *Id.* 2–6. Receiver obtained financial records from the Globex Defendants and began analyzing that information. *Id.* at 3 (noting that the information was provided "on the eve of preparing this report"). In total, during the relevant period, Receiver obtained $361,999.21 for the receivership estate. *Id.* at 6. Receiver's work consisted of its "efforts to identify, obtain, safeguard and preserve assets of the receivership estate and otherwise to perform its duties and responsibilities" under the Court's Order. *See* Application Ex. 1 ("Brick Kane Declaration"), ECF No. 181-1.

Kemp Smith contributed during this period by reviewing and analyzing this Court's orders and orders in ancillary hearings, conferencing with Receiver, meeting and conferring with counsel for the Globex Defendants, contributing to Receiver's report, and preparing for the preliminary injunction hearing. *See* Application Ex. 2 ("Shelley Rivas Declaration"), ECF No. 181-2. Kugler's work consisted of providing counsel on Canadian law, preparing for the Mareva Injunction application and corresponding proceedings, and responding to Canadian bankruptcy proceedings initiated by one of the Globex Defendants. *See* Application Ex. 3 ("Jeremy Cuttler Declaration"), ECF No. 181-3.

Receiver, Kemp Smith, and Kugler each attach time records from computerized billing programs documenting their expenditures on this case, attesting that the billing records accurately reflect the services rendered, time spent, and costs incurred. Brick Kane Decl. 18–53; Shelley Rivas Decl. 5–11; Jeremy Cuttler Decl. 5–11. The records include substantive descriptions of how each billed unit of time was spent. Rounding up, Receiver billed 139 hours, Kugler billed 110 hours, and Kemp Smith billed forty-nine hours. In each instance, the bulk of the hours were expended in December, following the addition of the Globex Defendants and leading up to the preliminary injunction hearing. In their supplemental briefing, the parties establish that billing judgment was exercised in arriving at these totals. *See* Suppl. Br. 4–5; *see also* Suppl. Br. Ex. 1 ("Kandestin Declaration") ¶¶ 6–8, ECF No. 215-1 (attesting to Kugler's billing efficiency procedures and discretionary judgment as to hours billed on this case); Suppl. Br. Ex. 2 ("Shelly Rivas Supplemental Declaration") ¶¶ 5–6, ECF No. 215-2 (same, as to Kemp Smith); Suppl. Br. Ex. 3 ("Brick Kane Supplemental Declaration") ¶¶ 3–5, ECF No. 215-3 (same, as to Receiver). The Court finds the submissions sufficient to meet the applicants' burden

of showing they billed a reasonable number of hours while exercising billing judgment. *See Black*, 732 F.3d at 502; *Walker*, 99 F.3d at 769.

2. Reasonableness of hourly rate

Receiver billed at an hourly rate of $342 for the services of Brick Kane and Anita Jen, $150 for the services of Henry Jen, $121.50 for the services of Carl DeCius, $225 for the services of Coleen Callahan, and $30 for support staff. *See* Brick Kane Decl. 18–53. Kugler's hours were predominantly billed by William Colish, at an hourly rate of $275, and Jeremy Cuttler, at an hourly rate of $350. *See* Jeremy Cuttler Decl. 10–11. Significant hours were also billed by Jean-François Carpentier at CAD$380 per hour, Gerald F. Kandestin at CAD$700 per hour, and Darlene Power at CAD$125 per hour. *Id.* A small amount of time was billed by David Stolow at CAD$490 per hour, Eva Richard at CAD$275 per hour, Stuart Kugler at CAD$485 per hour, and Gianna Scarola at CAD$200 per hour. *Id.* At Kemp Smith, Ken Slavin and James Brewer billed at a $351 hourly rate, and Shelley Rivas billed at $292 per hour. Shelley Rivas Decl. 5–11.

An hourly rate is treated as *prima facie* reasonable when it is uncontested, equivalent to or less than the applicant's customary billing rate, and within the range of prevailing market rates. *See La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 328 (5th Cir. 1995). Generally, the relevant legal market is determined based on the community in which the district court sits. *Tollett*, 285 F.3d at 368. However, where there is sufficient evidence showing the necessity of hiring out-of-district co-counsel, the co-counsel's "home" rates should be used instead. *See McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 382 (5th Cir. 2011).

Here, the applicants submit their own declarations as evidence of the reasonableness of the hourly rates. Typically, some further evidence is required—such as affidavits from other

attorneys in the market or empirical evidence of market rates—but because the Application is unopposed, the applicants' own affidavits may be sufficient. *See Nevarez Law Firm, PC v. Dona Ana Title Co.*, EP-15-CV-297-DB, 2017 WL 5653871, at *4 (W.D. Tex. Mar. 24, 2017) (stating, further, that a court may also consider the attorney's experience and qualifications when determining a rate's reasonableness in the community).

Receiver avers that its rates are within the prevailing range of rates for similar services and are reasonable in light of its experience and expertise. Brick Kane Suppl. Decl. ¶ 7. While Receiver does not provide examples or evidence of the rates of comparable service providers, Receiver does state that the rates charged in this case are reduced by ten percent from Receiver's "private sector rates." *Id.* Receiver also makes a sufficient showing of the necessity of hiring Kugler as out-of-district counsel. *Id.* ¶ 9 (explaining the necessity of "counsel experienced in Canadian insolvency law and cross-border receivership actions" with "a physical presence in Quebec, Canada"). Accordingly, Kugler's rates are judged against prevailing community rates in their "home" district. *See McClain*, 649 F.3d at 382. A representative for Kugler avers that the rates it billed in this case "comport with, and are in fact less than, the prevailing market rates in the Quebec legal community for attorneys with commensurate experience and performing similar services." Kandestin Decl. ¶ 9. Further, "Kugler's rates for this matter, in particular, have been discounter further" from its usual rates. *Id.* Given the specialized role played by Receiver and Kugler in this case, that the rates are uncontested, and that the rates are less than their customary billing rates, this evidence is sufficient to establish Receiver and Kugler's requested hourly rates as *prima facie* reasonable. *See Kellstrom*, 50 F.3d at 328; *Nevarez Law Firm, PC*, 2017 WL 5653871, at *4.

There is insufficient evidence, however, to accept the rate of $351 per hour charged by two of the attorneys from Kemp Smith as *prima facie* reasonable. The Court is not aware of any case finding the prevailing range of hourly rates in the El Paso market to reach $351. *See, e.g.*, *Rocha*, 2017 WL 10774806, at *4 (finding requested rate of $350 per hour unreasonable based on range of rates in El Paso market, and using a rate of $300 per hour to calculate the lodestar instead); *Nevarez Law Firm, PC*, 2017 WL 5653871, at *4 (finding requested rate of $300 reasonable based on El Paso market); *see also GCC Rio Grande, Inc. v. Paso Del Norte Ready-Mix, Inc.*, EP-14-CV-00100-FM, 2015 WL 13656901, at *7 (W.D. Tex. Jan. 21, 2015) (reducing a requested $250 hourly rate to $200 based on El Paso market rates); *Sparling v. Doyle*, No. EP-13-CV-323-DCG, 2014 WL 12489989, at *3 (W.D. Tex. Oct. 22, 2014) (accepting $195 per hour as a reasonable rate in the El Paso market). And, in contrast to Receiver and Kugler, the representative for Kemp Smith does not attest that its attorneys charged a rate less than their "customary" rate in this case. *See* Shelly Rivas Suppl. Decl. Thus, there is insufficient evidence for the Court to adopt Kemp Smith's rate as *prima facie* reasonable. *See Kellstrom*, 50 F.3d at 328; *Nevarez Law Firm, PC*, 2017 WL 5653871, at *4.

However, the Court does find cases concerning the El Paso market awarding fees at a rate of $325 per hour. *See, e.g.*, *Hunt Bldg. Co. v. John Hancock Life Ins. Co.*, No. EP-11-CV-00295-DCG, 2013 WL 12094217, at *19 (W.D. Tex. Oct. 3, 2013); *Compass Bank v. Veytia*, No. EP-11-CV-228-PRM, 2012 WL 627756, at *5 (W.D. Tex. Feb. 24, 2012). Accordingly, the Court adopts $325 per hour as a reasonable rate here for Mr. Brewer and Mr. Slavin. *See, e.g.*, *Rocha*, 2017 WL 10774806, at *4. Ms. Rivas' requested rate of $292 per hour is therefore reasonable as well.

Having found the number of hours expended reasonable and arriving at reasonable rates, the Court multiplies the number of hours expended by the respective hourly rates to arrive at the lodestar. *See, e.g.*, *Nevarez Law Firm, PC*, 2017 WL 5653871, at *5. This comes out to Receiver's requested $40,315.48, Kugler's requested $29,697.08, and to an adjusted $15,207.60 for Kemp Smith. Therefore, the total lodestar amount is $85,220.16.

3. The *Johnson* factors

The lodestar amount is presumptively reasonable. *Black*, 732 F.3d at 502. This is especially the case in the context of a receivership in a federal enforcement action, where the receiver's fee application is unopposed by the federal enforcement agency. *See Striker Petroleum*, 2012 WL 685333, at *3. Starting from this background presumption, the Court applies the *Johnson* factors here.

The lodestar amount is relatively high, considering the amount of funds in the receivership estate and the amount of work required to manage the receivership entities' businesses. However, the receiver and its attorneys had to expend a considerable amount of time and labor to become acquainted with the interrelated parties and complex issues surrounding the receivership, and were required to use specialized skills, in the face of Defendants' ongoing non-compliance with Receiver. *Cf. Netsphere, Inc. v. Baron*, 703 F.3d 296, 313 (5th Cir. 2012) ("We also take into account that . . . [the defendant's] own actions resulted in more work and more fees for the receiver and his attorneys."). The addition of the Globex Defendants shortly before the preliminary injunction hearings and Receiver's submission of its first report also likely imposed time constraints, and Receiver did successfully obtain some funds for the receivership estate. And, the Court has no reason to doubt the applicants' statement of their specialized experience, reputation, and ability. *See, e.g.*, Brick Kane Suppl. Decl. ¶¶ 7, 9. Finally, in similar cases, fee

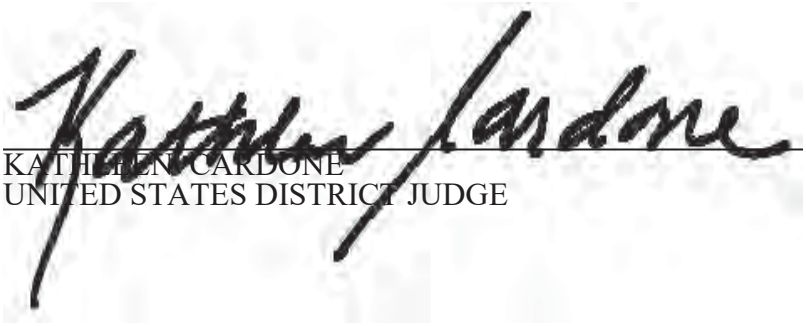
awards are comparable or reach greater amounts. *See, e.g.*, *Millenium Bank*, 2009 WL 10689052, at *2, *5 (awarding receiver, in SEC enforcement action, $52,752 in fees for work from March to July, and awarding receiver's counsel $434,657.52 in fees after reduction); *Vylah Tec*, 2019 WL 8348950, at *1–2 (awarding receiver, in FTC enforcement action, $272,922.2 in fees for one reporting period after reduction). Based on these *Johnson* factors, and considering that Receiver has not requested an upward adjustment and that the Application is unopposed, the Court finds no adjustment warranted here.

III. CONCLUSION

For the foregoing reasons, Receiver's Application, ECF No. 181, is **GRANTED** in part; Receiver is awarded $85,220.16, with $40,315.48 allotted for its own fees and costs, $29,697.08 for fees and costs to its Canadian counsel Kugler, and $15,207.60 for fees and costs to its local counsel Kemp Smith.

SO ORDERED.

SIGNED this 17th day of April, 2020.



KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE