IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRIAN TEED, MARCUS CLAY, ANDY AI, MICHAEL ANDERSON, JAMES BENSON, KEVIN BURK, HENRY CHAU, NORMAN EASTWOOD, JR., THERESA FRITSCHER RUCHO (as real party in interest for the Estate of Andrew Fritscher), TIM HERSHEY, WALT GIBSON, OMA GRAVES, MICHAEL KEHRMEYER, CHRISTOPHER KRAFT, WESLEY MARCUM, DARRICK NELSON, JESSE OLIVAS, WILLIAM PERRY, JR., JAMES PROVENZALE, JIMMY RIVERA, RICHARD SILVERS, OUMAR SOW, JEFF ST. ONGE, CURTIS TROUP, SCOTT WOLF,

ORDER

Plaintiffs,

08-cv-303-bbc
09-cv-313-bbc

v.

THOMAS & BETTS POWER SOLUTIONS, LLC,

Defendant.

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In this case under the Fair Labor Standards Act, 29 U.S.C. § 216, plaintiffs Brian Teed, Marcus Clay, Andy Ai, Michael Anderson, James Benson, Kevin Burk, Henry Chau, Norman Eastwood, Jr., Theresa Fritscher Rucho (as real party in interest for the Estate of Andrew Fritscher), Tim Hershey, Walt Gibson, Oma Graves, Michael Kehrmeyer,

Christopher Kraft, Wesley Marcum, Darrick Nelson, Jesse Olivas, William Perry, Jr., James Provenzale, Jimmy Rivera, Richard Silvers, Oumar Sow, Jeff St. Onge, Curtis Troup and Scott Wolf have moved for an award of attorney fees of $352,737.55, together with costs of 13,900.42, pursuant to plaintiffs' acceptance of defendant's offers of judgment under Fed. R. Civ. P. 68. They have supported their request with an affidavit from their counsel as well as an itemized list of fees and costs.

Defendants object to the requested amount on several grounds, arguing that many of the entries on plaintiffs' request are excessive, unnecessary or related to time spent on unsuccessful claims and arguments. For the reasons discussed below, plaintiffs' motion for attorney fees and costs will be granted in part and denied in part. I am awarding plaintiffs fees in the amount of $324,587.80 and costs in the amount of $13,900.42, for a total of $338,488.22.

DISCUSSION

Defendant's offers of judgment to each plaintiff provide:

> Pursuant to Fed. R. Civ. P. 68, [defendant] hereby offers to allow judgment to be taken against it by [plaintiff] in the total sum of [], plus an award of reasonable attorney fees and costs now accrued within the meaning of Fed. R. Civ. P. 68, to be determined by the Court on a properly supported petition.

Dkt. ##162-1–162-6.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). This is known as the "lodestar"

calculation. Johnson v. GDF, Inc., 668 F.3d 927, 929 (7th Cir. 2012). Plaintiffs have the burden to show that the lodestar amount is reasonable. Hensley, 461 U.S. at 433.

Defendant does not contest that plaintiffs' attorneys charged a reasonable hourly rate. Its objection is that much of the work plaintiffs' counsel performed was not reasonable.

A. Work Related to Summary Judgment Motion

Plaintiffs request $20,337 for 60.3 hours of time incurred pursuing the motion for partial summary judgment they filed in August 2011. In their motion, plaintiffs asked the court to make findings on nine specific issues, such as whether plaintiffs had established a prima facie case under the FLSA and whether defendant could succeed on several specific defenses. Defendant contends that plaintiffs should not recover fees for the hours spent preparing the motion because it was denied in large part and did not advance the litigation. Plaintiffs disagree, contending that they should be allowed to recover for time spent researching and preparing their summary judgment materials because the motion was related to the FLSA claims on which plaintiffs prevailed ultimately. Plaintiffs cite Jaffee v. Redmond, 142 F.3d 409, 414 (7th Cir. 1998), in which the court of appeals held that "courts may award fees for time reasonably spent on an unsuccessful argument in support of a successful claim." See also Pressley v. Haeger, 977 F.2d 295, 298 (7th Cir. 1992) (courts may "award fees for losing arguments in support of prevailing claims, but not for losing claims."). The question that must be asked in such cases is "not whether a particular argument was successful, but rather whether it was reasonable." Jaffee, 142 F.3d at 414. See

also Shott v. Rush-Presbyterian-St. Luke's Medical Center, 338 F.3d 736, 742 (7th Cir. 2003) (holding that prevailing party was not entitled to attorney fees incurred as part of unreasonable strategy).

Plaintiffs' motion for partial summary judgment was largely unnecessary and unreasonable. As I explained in the order addressing the motion, "plaintiffs have not shown that summary judgment would be appropriate on many of the issues either because plaintiffs have presented very few facts in support of them, there are material facts in dispute, the issues are not relevant to the case or a decision on the issues would be premature." Dkt. #127 at 1. In particular, plaintiffs sought a determination that they had established a prima facie case under the FLSA and that they were entitled to a burden-shifting standard at trial, but adduced no evidence to support their arguments. Additionally, plaintiffs moved for summary judgment on defenses that defendant had not raised or that involved obvious disputed issues of material fact, such as the motor carrier exemption. Because most of the arguments plaintiffs asserted in conjunction with their motion for summary judgment were unreasonable, it is appropriate to reduce the amount of fees plaintiffs may recover related to their summary judgment motion by 75%, or $15,252.75.

B. Work Related to Opposing Decertification

Early in this case, the original defendants, JT Packard and S.R. Bray Corp., stipulated to certification of a collective action under § 216(b) of the FLSA and the court concluded that certification was appropriate. After Thomas & Betts was substituted as the defendant,

the parties engaged in the first significant discovery since the case had been filed. Shortly after that discovery, defendant filed a motion to decertify the case, which plaintiffs opposed. I granted the motion, concluding that plaintiffs' were not "similarly situated" within the meaning of § 216(b). However, plaintiffs were permitted to amend their complaint and name the opt-in plaintiffs as individual plaintiffs.

Plaintiffs have requested $10,639.50 in attorney fees for the 43.5 hours spent on their opposition to decertification. Defendant contends that plaintiffs should not recover fees for that time because plaintiffs' opposition was unsuccessful. However, although the collective action was decertified ultimately, it was reasonable for plaintiffs to argue against decertification in order to protect the rights and claims of the opt-in plaintiffs. Plaintiffs believed that if they did not oppose decertification, the opt-in plaintiffs would be required to pursue individual lawsuits. This would have likely caused some of the opt-in plaintiffs with small claims to forgo enforcement of their rights. Thus, defendant's objection to this work is overruled.

C. Other Objections for "Unnecessary Work"

1. Research into stock purchase of Thomas & Betts Corp.

Plaintiffs seek $450.00 in fees for three hours of research work related to the sale of Thomas & Betts in February 2012. Defendants contend that this research was unnecessary because plaintiffs never asked Thomas & Betts about the stock purchase and how it might affect plaintiffs' claims. However, it is not unreasonable for a lawyer to conduct independent

research about whether their clients' claims will be affected by a sale or merger. Thus, this time need not be excised.

2. Research related to "interlocutory appeal"

Plaintiffs seek fees for research and conferences related to an "interlocutory appeal." No interlocutory appeal was filed in this case, and plaintiffs concede in their reply brief that this time should be excluded. Thus, I will deduct $400.50 for this time.

3. Research related to "estoppel"

Defendant contends that the court should deduct $915.00 from plaintiffs' fee award for the six hours of research regarding "estoppel" because estoppel "has no relevance to Plaintiffs' overtime claims." Dft.'s Br., dkt. #175, at 17. However, defendant pleaded estoppel as an affirmative defense, so plaintiffs' counsel's research on this defense was proper. Am. Answer ¶ 12, dkt. #111. Plaintiffs are entitled to the fees sought for this work.

4. Time spent in efforts to "increase class participation"

Plaintiffs seek $708.00 in fees for time spent brainstorming ways to increase the number of plaintiffs opting into the collective action. I agree with defendants that this amount should be excised from plaintiffs' fee award. The court permitted plaintiffs' counsel to distribute notice to potential opt-ins within a certain deadline. The purpose of the notice was to inform potential class members of their rights, not to encourage joinder or recruit

clients for plaintiffs' counsel. Thus, plaintiffs can recover for their initial efforts at informing potential class members of their rights, but they cannot recover for their efforts to increase the opt-in rate. I will subtract $708.00 from plaintiffs' fee award.

5. Clerical or administrative activities

Defendants have moved to exclude $2,126.00 as being incurred for work that is clerical or administrative in nature. Plaintiffs' counsel maintains that only two of the tasks that defendant identifies as clerical fall into that category (calling process servers). Thus, I will subtract $57.50 for those entries. The remainder of the tasks were performed by a paralegal or lawyer and involved exercise of discretion and judgment. I see no reason why these tasks should not be included in the fee award.

6. Billing error

Plaintiffs concede that defendant identified a billing error from February 2, 2010 for $796.50. I will subtract that amount.

D. Costs and Fees Incurred After Defendant's Offer of Judgment

Plaintiffs seek to recover $10,992 in attorney fees incurred after April 4, 2012, the date defendant served its offer of judgment. (Although defendant says that plaintiffs seek $11,021.50 in fees incurred after that date, my calculation is $10,992.) Defendant contends that the plain language of the offers precludes plaintiffs from recovering fees for time

incurred after the date the offer was extended. Generally, courts use the principles of contracts to interpret offers of judgment under Rule 68. Webb v. James, 147 F.3d 617, 620 (7th Cir. 1998); Guerrero v. Cummings, 70 F.3d 1111, 1113 (9th Cir. 1995). If the offer unambiguously precludes or limits recovery of attorney fees, the court should honor those limitations. Norby v. Anchor Hocking Packaging Co., 199 F.3d 390, 392 (7th Cir. 1999) (finding that plaintiff could not recover post-judgment attorney fees because plaintiff had accepted Rule 68 offer for "judgment in the amount of $56,003.00 plus $1000 in costs as one total sum as to all counts of the amended complaint" and that offer was unambiguously inclusive of all the relief sought in all the counts, including statutory attorney fees); Bilazzo v. Portfolio Recovery Associates, LLC, – F. Supp. 2d. –, 2012 WL 2464223, *4-5 (D.N.J. June 25, 2012) (finding that Rule 68 offer precluded recovery of fees incurred after date of offer); Zavodnick v. Gordon & Weisberg, P.C., 2012 WL 2036493, *2-3 (E.D. Pa. June 6, 2012) (same); Arch v. Glendale Nissan, 2005 WL 1421140, *3 (N.D. Ill. June 7, 2005) (same); Sherry v. Protection, Inc., 14 F. Supp. 2d 1055, 1058 (N.D. Ill. 1998) (same).

Plaintiffs contend that defendants' offers in this case are ambiguous. The offers state that plaintiffs are entitled to "reasonable attorney fees and costs now accrued within the meaning of Fed. R. Civ. P. 68." Dkt. #157-1. Plaintiffs argue that this could reasonably be interpreted as limiting only costs "now accrued," but not attorney fees. They argue that if defendant had intended to limit attorney fees, it should have stated that the offer was limited to "reasonable attorney fees *now accrued* and costs now accrued."

Plaintiffs' argument is not persuasive. The natural reading of the offers limits both

costs and fees to those incurred through the date of the offer, or April 4, 2012. Most lawyers would have considered it unnecessary to use the phrase "now accrued" twice.

As plaintiffs point out, this provision is highly favorable to defendant. It allows defendant to object to plaintiffs' attorney fee request and appeal the court's substitution order without the possibility of paying for the attorney fees plaintiffs will incur in responding to defendant's objections and appeal. However, plaintiffs cite no authority that would permit a court to disregard the plain language of the offers of judgment in such a situation. If plaintiffs wanted to insure recovery of attorney fees incurred after the date of the offers, including those related to preparation of this motion and defendant's appeal, plaintiffs were free to reject the offers outright or negotiate for different terms. Plaintiffs did not do so. Instead, they accepting the offers, agreeing to limit the recoverable fees to those incurred only through April 4, 2012. Accordingly, I will reduce plaintiffs' fee award by $10,992.

E. Other Costs

Plaintiffs have requested an award of costs in the amount of $13,900.42, which includes $751.50 of costs allowed under 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d) (for filing fees, service of summons and copying costs), as well as costs incurred beyond the scope of the statute and federal rules, including travel, copies, scanning, postage and Lexis research costs. Defendant concedes that plaintiffs may recover expenses that are distinct from statutory costs or attorney fees. Downes v. Volkswagen of America, Inc., 41 F.3d 1132, 1144 (7th Cir. 1994) (quoting Heiar v. Crawford County, Wisconsin, 746 F.2d 1190, 1203

(7th Cir. 1984) ("expenses of litigation that are distinct from either statutory costs or the costs of the lawyer's time reflected in his history of billing rates—expenses for things as postage, long-distance calls, xeroxing, travel, paralegals, and expert witnesses—are part of the reasonable attorney's fee")). However, defendant objects to $484.80 in "scan document" charges and $3,773.11 for travel costs associated with attending depositions of opt-in plaintiffs.

Defendant does not explain what is unreasonable about the scanning charge. Plaintiffs explain that Cross Law Firm charges a $0.20/page fee for scanning documents for electronic use. Documents are scanned to allow lawyers and others working on the case to have an electronic version, rather that making paper copies for all those involved in the case. This cost may be recovered as part of plaintiffs' reasonable attorney fees.

Defendant contends that plaintiffs' travel costs should not be reimbursed because defendant scheduled depositions in each opt-in plaintiff's city of residence as an accommodation and convenience to the opt-in plaintiffs. Defendant argues that it would be unfair to require defendant to reimburse plaintiffs for travel that was necessary only because defendant was trying to be helpful. This argument is not persuasive and defendant cites no authority to support it. The court of appeals has held that reasonable travel costs are compensable as attorney fees, Heiar, 746 F.2d at 1203, and defendant has not shown that the costs were extravagant or unnecessary. Therefore, defendant's objection to this time is denied.

F. Reduction of Lodestar

Finally, defendant raises an objection to the overall reasonableness of a $352,737.55 fee award in a "straightforward wages and hour case that took years to resolve because Plaintiffs had unreasonable expectations regarding their potential recovery." Dft.'s Br., dkt. #175, at 23. Additionally, they argue that because some plaintiffs ultimately resolved their claims for as little as $1,000, plaintiffs' fee request is unreasonable.

Proportionality is a fair criterion to use in assessing the propriety of a fee award. Hensley, 461 U.S. at 440 ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole."). However, although each plaintiff's award was small, plaintiffs' were successful in obtaining a total judgment in the amount of $162,500, not a nominal amount. Additionally, this case involved complications not caused by plaintiffs, including the state court receivership proceedings and the purchase of JT Packard by defendant, and plaintiffs successfully argued a novel issue regarding successor liability. Further, I have reviewed the time logs submitted by plaintiffs' lawyers and, apart from the reductions discussed above, find them to be reasonable and compensable. Therefore, I will not reduce the overall award.

In summary, defendant's objections to plaintiffs' claim are denied with the following exceptions. I will deduct $28,149.75 from plaintiffs' fee request of $352,737.55 as follows:

1. $15,252.75 for time related to plaintiffs' motion for partial summary judgment;

2. $400.50 for time related to an interlocutory appeal;

3. $708.00 for time spent to increase opt-in rate;

4. $10,992 for fees incurred after April 4, 2012; and

5. $796.50 for an undisputed billing error.

The resulting fee award is $324,587.80.

ORDER

IT IS ORDERED that plaintiffs Brian Teed, Marcus Clay, Andy Ai, Michael Anderson, James Benson, Kevin Burk, Henry Chau, Norman Eastwood, Jr., Theresa Fritscher Rucho (As Real Party In Interest for the Estate of Andrew Fritscher), Tim Hershey, Walt Gibson, Oma Graves, Michael Kehrmeyer, Christopher Kraft, Wesley Marcum, Darrick Nelson, Jesse Olivas, William Perry, Jr., James Provenzale, Jimmy Rivera, Richard Silvers, Oumar Sow, Jeff St. Onge, Curtis Troup and Scott Wolf are AWARDED attorney fees in the amount of $324,587.80 and costs in the amount of $13,900.42.

Entered this 20th day of August, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge