

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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NOVUS FRANCHISING, INC.,

Plaintiff,

v.

SUPERIOR ENTRANCE SYSTEMS, INC.,  
SUPERIOR GLASS, INC., and KNUTE  
PEDERSEN,

Defendants.

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OPINION AND ORDER

12-cv-204-wmc

Now before the court is plaintiff Novus Franchising, Inc.'s motion for attorneys' fees following entry of judgment in its favor. Article 24.3 in the parties' Franchise Agreement permits Novus to recover costs and expenses incurred in "successfully enforcing any term, condition or provision of this Agreement, in successfully enjoining any violation of this Agreement . . . or in successfully defending any lawsuit you bring against us." (Franchise Agreement, dkt. #1-1.) Defendants dispute that Novus achieved "success" in this suit and argue that the fee request is unreasonable. While these protestations have some merit, and warrant a reduction from the requested total, the court finds that the plaintiff prevailed in substantial part and will award \$124,745.40 in fees and costs.

OPINION

**I. Costs**

Plaintiff is entitled to its reasonable costs under Article 24.3 of the Franchise Agreement and Federal Rule of Civil Procedure 54(d)(1), which states in pertinent part

that “costs—other than attorney’s fees—should be allowed to the prevailing party.” Plaintiff’s bill of costs and expenses comes to \$5,997.14, and is not disputed by defendants. In light of the lack of objection and the facial reasonableness of the request, the court will award the entire sum.

## II. Fees

Plaintiff requests attorneys’ fees calculated via the lodestar method -- the “number of hours reasonably expended on the litigation” multiplied by “a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Plaintiff claims 586.50 hours of attorney work billed by its counsel at the law firm Larkin Hoffman Daly & Lindgren in Minneapolis, for a total charge of \$158,331.02.

### A. Rate

While five attorneys and two technical support staff contributed to the case for plaintiff, the bulk of the work was done by James Susag at \$360/\$370 per hour and Susan Tegt at \$220/\$230 per hour, with roughly 30 hours of assistance from Charles Modell at \$480 per hour. Mr. Susag avers that each attorney has charged his or her standard and actual billing rates for 2012 and 2013, which means that the rates are “presumptively appropriate.” *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1310 (7th Cir. 1996). Once an attorney provides evidence establishing his or her market rate, the burden shifts to the defendant to demonstrate why a lower rate should be awarded. *Spegon v. Catholic Bishop of Chi.*, 175 F.3d 544, 555 (7th Cir. 1999).

Defendants simply point out that the requested rates are considerably higher than the Wisconsin average (\$188) and their own hourly charge (between \$180 and \$150/hour). This bare comparison is not especially persuasive because it fails to account for professional accomplishments and years of experience, the market in which the litigators are based, or the size of the firm involved. In the Madison market for business litigation attorneys, it is defendants' counsel's rates that stand out as somewhat low, rather than plaintiff's rates being unusually high. Only the \$480/hour billed by Mr. Modell pushes the upper limits of what is typically charged in Madison, but this rate appears to properly reflect his more than thirty years of experience and his prominence as a franchise litigator. In any case, the court generally does not attempt to impose local rates on foreign attorneys accustomed to earning more absent unusual circumstances -- "if an out-of-town attorney has a higher hourly rate than local practitioners, district courts should defer to the out-of-town attorney's rate when calculating the lodestar amount." *Mathur v. Bd of Tr. of S. Ill. Univ.*, 317 F.3d 738, 743-44 (7th Cir. 2003).

## **B. Hours**

Defendants object to the 586.50 hours of time claimed by plaintiff's counsel on grounds that: (1) the attorneys spent an unreasonably large amount of time working on the complaint and the motion for attorneys' fees; (2) the attorneys needlessly increased the amount of work in this case by over-litigating motions; and (3) plaintiff is not eligible for reimbursement of hours spent on motions that were denied and claims that were unsuccessful.

**i. Reasonableness of Hours Spent on the Complaint and the Motion for Attorneys' Fees**

First, defendants argue that there was no need to spend 33.20 hours (\$9,234) on the complaint, which they say contains a substantial amount of boilerplate language and is “nearly identical in form, content, substance, language, and allegations to at least five complaints Novus filed between 2006 and 2011.” Plaintiff responds that most of the time spent on the complaint was devoted not to drafting the complaint but to researching the factual assertions made in support of the pleadings. Plaintiff also points out that the 33.20-hour total includes time spent drafting a response to defendants’ counterclaims.

The court concludes that while 25 hours (allocating 8.20 hours to the counterclaims) may seem like a lot of time to spend on a complaint -- even one with twelve claims -- the bill was justified in this case. The Federal Rules of Civil Procedure impose a duty upon parties and their attorneys to ensure that “to the best of the person’s knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances* . . . factual contentions [asserted] have evidentiary support.” Fed. R. Civ. P. 11(b)(3) (emphasis added). As the court discussed at summary judgment, the facts at play in this case were relatively complicated, compounded further by confusion over which entity is the actual franchisee. While plaintiff’s counsel *might* have been more efficient, the requested hours do not appear to be unreasonable from the court’s vantage point.

Second, defendants argue that the 22.80 hours (\$5,705.86) spent on the motion for attorneys’ fees is an unreasonably high sum, without explaining why. Not only is the argument lacking substance but the hours spent on plaintiff’s fee petition represent less than 4% of the total bill. See *Spegon v. Catholic Bishop of Chi.*, 175 F.3d 544, 553-54 (7th

Cir. 1999) (“One factor we consider[] in determining . . . reasonableness . . . [is] the comparison between the hours spent on the merits and the hours spent on the fee petitions.”).

## **ii. Multiplication of the Proceedings**

Next, defendants argue that Novus “needlessly sought additional briefing on nearly every issue presented to the court” by requesting permission to file responsive briefs in support of its motion for a preliminary injunction (dkt. #36), on defendants’ motion for a jury trial (dkt. #60), and on briefing regarding the scope of the non-compete clause (dkt. #113). Defendants acknowledge that plaintiff was ultimately granted permission to make these additional arguments -- strong evidence that the requests were not frivolous, at least in the court’s eyes -- but contends that the additional briefings nevertheless added little to the discussion and were “probably unnecessary to a decision by the court.”

While plaintiff consistently sought the last word in many of the motions leading up to judgment, this aggressive strategy was not necessarily unjustified (in each instance, plaintiff was responding to arguments it did not previously have an opportunity to address), and in fact defendants adopted a similar approach (*see, e.g.*, dkt. ##39, 117). Defendants call this a “scorched earth” tactic; whether that is a fair characterization or not, the case has been bitterly contested by all parties, consuming a lot of attorney hours on all sides.

The court is sensitive to the fact that the fee-shifting provision in the Franchise Agreement confers a strategic advantage on plaintiff and may even provide an incentive

to “over-litigate” a case. However, the briefs that plaintiff filed, reviewed both individually and as a whole, do not seem abusive and or plainly unnecessary to a fair resolution of the issues. The court, therefore, also declines to reduce the fee award on the basis of inequitable conduct by plaintiff.

Defendants also argue that the court should subtract the time plaintiff spent bringing claims for loss of the repair bridge (Count III), the right to audit (Count V) and the right to attorneys’ fees (XII). Again, the court disagrees. Defendants disputed the right to attorneys’ fees and the right to audit to the extent that they denied that there was ever a valid contract on which these rights were based. Plaintiff had to establish the existence of the contract at summary judgment to succeed on these claims. As for the loss of the repair bridge, while defendants admitted at the outset that they had lost this item and were willing to replace it, there was a dispute over the reasonable value of the bridge that warranted litigation.

### **iii. Unsuccessful Claims and Dismissed Complaint in Minnesota**

Next, defendants argue that the court should subtract all hours spent on claims that plaintiff ultimately lost or gave up, and all hours spent working on an initial version of this complaint filed in Minnesota that was dismissed and re-filed in Wisconsin. Defendants point to two places for support. First, the Franchise Agreement provides that plaintiff is only entitled to expenses incurred in “successfully enforcing any term, condition or provision of this Agreement, in successfully enjoining any violation of this Agreement . . . or in successfully defending any lawsuit you bring against us.” (Franchise Agreement § 24.3, dkt. #1-1.) Second, common law principles that have developed

around fee-shifting statutes for “prevailing plaintiffs” provide a largely identical rule, in which a “district court may . . . increase or reduce the modified lodestar amount by considering a variety of factors, the most important of which is the ‘degree of success obtained.’” *Spegon v. Catholic Bishop of Chi.*, 175 F.3d 544, 550-51 (7th Cir. 1999) (internal citations omitted). Under the common law, “[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.” *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). For a claim to be considered distinct, however, it must be “based on different facts and legal theories.” *Spanish Action Comm. of Chi. v. City of Chi.*, 811 F.2d 1129, 1133 (7th Cir. 1987).

Defendants propose to subtract all time spent working on the following unsuccessful claims: (1) plaintiff’s breach of contract and non-competition claims as they relate to auto glass replacement (Counts I and IV); (2) plaintiff’s breach of contract and non-competition claims as they relate to the in-term covenant not to compete (Counts I and IV); (3) plaintiff’s claim for failure to pay royalties (Count II); (4) plaintiff’s common law and Lanham Act trademark infringement claims; and (5) plaintiff’s claims for unfair competition, conversion, unjust enrichment and tortious interference with contract (Counts VIII-XI). Plaintiff was indeed unsuccessful on these claims, which rely on distinct legal theories, but the court cannot readily isolate and subtract specific time spent on those claims because they are factually intertwined with plaintiff’s successful claims. Instead, the court will take plaintiff’s partial failure into account when it considers whether to reduce fees overall.

The court also declines defendants' request to toss out all time spent working on the case in its earlier incarnation in Minnesota. While it would not be difficult to quantify the hours "wasted" on the false start in Minnesota -- plaintiff's own bill establishes that 19 hours were spent transferring venue to this court -- defendants do not point to any case holding that a successful plaintiff can be denied attorneys' fees for work spent on procedural motions it lost on the way to ultimate victory. Nor is this method of fee-splitting suggested in the "success" language found in § 24.3 of the Franchise Agreement. Indeed, a rule that allows a court to exclude hours for unsuccessful motions would invite time-consuming disputes over whether a party "won" or "lost" every motion; it would also fail to account for the vagaries of litigation, denying the prevailing party compensation for fees incurred because its counsel did not predict with perfect accuracy those motions worth pursuing or opposing.

The present case provides an apt illustration. The parties are locked in a dispute over how to characterize the decision to dismiss the Minnesota action and to refile it here: plaintiff says that the Minnesota court always had jurisdiction over defendants, and that it voluntarily dismissed the action; defendants say that they "forced" plaintiff to dismiss. Perhaps both are true or neither. There is no way of knowing at this point, and it is far too late in the game for the court to be umpiring disputes of this nature, even if they could be conclusively determined. As the Supreme Court in *Hensley* observed: "a request for attorney's fees should not result in a second major litigation." 461 U.S. at 437.

### C. Modification of Award

Defendants' best argument in favor of reducing the fees requested by plaintiff is that on the whole, plaintiff achieved only some of the relief sought. In *Hensley*, the Supreme Court recognized two categories of cases for reducing an attorneys' fee award where the plaintiff achieved only partial success. "The first category involves cases where the plaintiff presents distinctly different claims for relief that are based on different facts and legal theories." *Spanish Action Comm. of Chi.*, 811 F.2d at 1133. That category was addressed above, the court having found the unsuccessful claims too closely related to the successful claims to attempt to separate out hours spent on each. "The second category of partial recovery cases . . . includes those cases in which the plaintiff's claims for relief involve a common core of facts or are based on related legal theories." *Id.* In this latter category, "the focus in arriving at the appropriate fee award should be on 'the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" *Id.* (quoting *Hensley*, 461 U.S. at 435).

Not surprisingly, defendants and plaintiff interpret "success" in this case very differently. Plaintiff points out that it prevailed "at virtually every stage of the litigation," won five-figure damages, and obtained an injunction designed to effectively shut down its former franchisee in Superior, Wisconsin, for two years. Defendants reply that plaintiff lost on Counts 6-11 of the complaint, and won only partial relief on Counts 1, 2 and 4. Defendants also point out that while plaintiff originally set out to enjoin defendants from competing across a huge swath of the United States, the court ultimately entered an injunction of drastically reduced geographical scope.

This latter argument has little force since plaintiff probably doesn't care from a practical standpoint whether or not Knute Pedersen is barred from competing in Miami or Boise. It would be artificial at best to say that blue-pencilling of a non-compete provision represents a "loss" for the contract drafter, especially here, where the more limited scope of injunctive relief is probably sufficient to protect plaintiff's interests in re-franchising the Superior area for auto glass repair. The court also finds credible and consistent with the litigation history plaintiff's assertion that it spent most of its litigation efforts on the claims that it did win, and that relatively few of the billed hours represent efforts devoted primarily to advancing the claims it lost.

Nevertheless, the fee award should reflect plaintiff's partial defeat. One of defendants' most important victories was dismissal of plaintiff's claim that the Franchise Agreement contained a non-compete clause relating to auto glass replacement. This removed a major source of potential liability and prospective loss for defendants -- potential liability that no doubt contributed to their own decision to defend the case so vigorously -- and ultimately reduced the value and impact of this litigation considerably. Defendants also succeeded in dismissing all of plaintiff's claims (Counts VIII-XI) premised on Superior Glass's allegedly tortious conduct. Finally, defendants successfully fended off plaintiff's motion for a sweeping preliminary injunction.

For all of these reasons, the court believes that a 25% reduction in the total fee award is appropriate. This figure was not (and could not have been) arrived at scientifically, given the multitude of competing considerations at play, but it seems to best reflect the court's sense that plaintiff achieved most, but certainly not all, that it set

out to do in this litigation. See *Hensley*, 461 U.S. at 436-37 (“There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.”). The court will subtract 25% of the \$158,331.02 attorneys’ fee request, for a final award of \$124,745.40, representing \$5,997.14 in costs and \$118,748.26 in attorneys’ fees.

ORDER

IT IS ORDERED that plaintiff Novus Franchising, Inc.’s motion for attorneys’ fees and costs is GRANTED in the amount of \$124,745.40.

Entered this 27th day of February, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge