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LAWRENCE M. MARON, J.S.C.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

DOCKET NO. HUD-L-6191-11

GONZALO CHIRINO, FELIX D. JAY, :
ANDREW ANKLE, GARY JOSEPHS, :
RENE CAMPBELL, ASTON HEMLEY :
and MARYAN VASYUTA, on behalf of :
themselves all others similarly situated, :

Plaintiffs,

Civil Action

v.

**ORDER QUANTIFYING DAMAGES
AND AWARDING ATTORNEY'S FEES
AND COSTS**


PROUD 2 HAUL, INC. , :
IVANA KOPROWSKI, and "Anonymous :
Managers 1-5" (names being fictitious), :

Defendants.

The Court, having granted plaintiffs declaratory and additional relief in its Order of December 20, 2013, as amended on January 15, 2014, and directing plaintiffs to quantify the damages arising out of defendants' failure to have written leases with Class members who performed interstate motor freight delivery services for defendants' benefit, and defendants having represented to the Court that it would have in place conforming written leases with the Class as of January 1, 2014, and plaintiffs having calculated the damages to that date, and the instant matter having been opened to the Court by motion of David Tykulsker & Associates, attorneys for plaintiff, and the Court having considered the moving papers, any opposition and reply papers submitted, the arguments of counsel, and good cause appearing,

IT IS this 28 Day of FEBRUARY, 2014, **ORDERED** and **ADJUDGED** that

1. Plaintiffs' Motion be and hereby is granted.
2. Defendants shall jointly and severally pay to the Class, for damages incurred through December 31, 2013, the sum of ~~\$4,481,747.37~~ and prejudgment interest per R.4:42-11 in the amount of \$92,296.37, apportioned as set forth on the annexed Exhibit A.
3. Defendants shall jointly and severally pay to plaintiffs attorney's fees in the amount of ~~\$116,388.84~~ and costs of \$4,276.27.
\$ 96,990.70



LAWRENCE M. MARON, J.S.C.

FEE ENHANCEMENT IS DENIED.

**For The Reasons Set Forth In The Attached
Findings Of Fact And Conclusions Of Law**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Chirino V. Proud 2 Haul Inc.

Docket: L-6191-11

Motion Returnable: 2/28/14

Relief Requested: Quantifying Damages and Attorney's Fees.

Procedural History

Plaintiffs filed a motion, returnable December 6, 2013, requesting partial summary judgment. The Court reserved its decision on the issue of injunctive relief because Defendants' counsel, at oral argument, indicated that his client would provide a certification stating that Proud 2 Haul (P2H) would not engage in interstate trucking without coming into conformity with the Truth in Leasing (TIL) Regulations. During the week of December 16, 2013, Defendants submitted their certification. On December 20, 2013, this Court entered an Order granting partial summary judgment to Plaintiffs and denying injunctive relief.

The underlying facts of this case are fully set forth in the Court's Findings of Fact and Conclusions of Law explaining the Court's reasoning for the December 20, 2013 Order.

In connection with the December 6, 2013 motion, the Court addressed the issue of how damages should be quantified.

Plaintiffs asserted that the formula utilized Brinker v. Namcheck, 577 F. Supp. 2d 1052 (W.D. Wisc. 2008), was the appropriate means to quantify damages.

Brinker held that when quantifying the damages owed by a federally regulated motor-carrier for violating the TIL Regulations, the motor carrier is responsible for any expense not specified in the lease to be paid by the owner-operator. Defendants did not object to employment of the Brinker formula to quantify damages. The Court found that this standard was the appropriate method of quantifying damages.

The Court's December 20, 2013 Order required this motion to be made returnable January 31, 2014. However, due to the year end and the time required to obtain certain financial documents, Plaintiffs requested leave to file their motion so that it would be returnable February

14, 2014. Defendants consented to this request. The Court granted leave to file the motion so that it was returnable February 14, 2014.

In the interim, Defendants filed a motion returnable February 14, 2014, seeking reconsideration of the Court's December 20, 2013 Order granting summary judgment. Defendants requested that the present motion be adjourned until their motion for reconsideration was decided. The Court granted this request and made this motion returnable February 28, 2014. On February 14, 2014 the Court entered an Order denying Defendant's motion for reconsideration.

This motion was decided on February 28, 2014. Neither party requested oral argument in their moving papers or opposition thereto.

The Court determined, based upon a review of the parties' submissions, that oral argument was not necessary and the motion could be resolved on the papers. Pursuant to R. 1:6-2(d), this motion was decided without oral argument.

ANALYSIS

This motion presents two issues: 1) the quantum of damages resulting from P2H's failure to comply with the TIL Regulations and 2) the quantum of attorney's fees that should be awarded pursuant to the TIL Regulations.

I. Quantum of Damages

On December 20, 2013, this Court determined that Defendants violated the TIL Regulations by failing to have conforming written leases in place with each of the Plaintiffs.

Although Plaintiffs do not have direct evidence of each item of damages for every class member, they reconstructed such data by using tax documents and data for other class members to apply an "average" rate of loss to those individuals. For example, Plaintiffs have data regarding fuel expenses for only 78% of the Class. These drivers had \$ 863,270.55 in fuel deductions and \$ 3,209,272.59 in income, an average of 26.9%. Plaintiffs then took this 26.9%, and applied it to all remaining drivers for whom they did not have reliable data regarding fuel deductions in order to determine what damages should be imputed. The Court finds that such methodology permits a fair and reasonable estimate of the damages, rather than impermissible

speculation, see Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 128-29 (App. Div. 2002), cert. den. 176 N.J. 279 (2003); Caldwell v. Haynes, 136 N.J. 422, 442 (1994), and is proper quantification of damages in a matter such as this. See also Borough of Fort Lee v. Banque National de Paris, 311 N.J. Super. 280, 291 (App. Div. 1998); Kozlowski v. Kozlowski, 80 N.J. 378, 377 (1979).

Applying this methodology, Plaintiffs calculated the damages attributable to the class members as \$4,481,747.37. Defendants have not challenged either the methodology or the quantum of damages.

Therefore, the Court finds, pursuant to Brinker, that Plaintiffs are, collectively, entitled to the \$4,481,747.37 in damages.

Plaintiffs seek prejudgment interest in the amount of \$92,296.37. As this Court determined in connection with Plaintiffs August 23, 2013 motion for summary judgment, prejudgment interest is available to Plaintiffs based on federal law, at a rate calculated pursuant to New Jersey law. North Bergen Rex Transport Inc. v. Trailer Leasing Co., 158 N.J. 561 (1999); R. 4:42-11.

Defendants have not challenged the quantum of interest. The Court finds that interest was properly calculated by Plaintiffs' counsel and awards \$92,296.37.

Plaintiffs are entitled to damages totaling \$4,574,043.74 due to Defendants violation of the TIL Regulations.

II. Quantum of Attorney's Fees

Plaintiffs seek \$116,388.84 in attorney's fees. The Court has previously determined that, pursuant to the TIL Regulations, Plaintiffs are entitled to attorney's fees. 49 U.S.C. § 14704 (e). Nevertheless these fees must be found to be reasonable.

The starting point for calculating reasonable attorney's fees is called the "lodestar" which multiplies the hours expended by a reasonable hourly rate. NJDPM v. DOC, 185 N.J. 137, 153 (2005) (citing Rendine v. Pantzer, 141 N.J. 292, 324 (1995)).

Those opposing fee applications have an obligation to object, with specificity and reasonable precision, to the hours they believe should be excluded. See ACLU v. Barnes, 168 F.3d 423, 428 (11th Cir. 1999).

The first determination in the lodestar calculation is whether the amount of time billed was reasonably expended by the applying party. Rendine v. Pantzer, 141 N.J. 292, 334-35 (1994). Counsel's billable hours should be presented in sufficient detail to allow the trial court to determine how the billable hours were expended. Id. at 337. Hours not reasonably utilized, for example, those that are "excessive, redundant, or otherwise unnecessary[.]" should be stricken from the lodestar calculus. Id. at 336.

Defendants assert that this Court should wholly disregard all hours expended by Plaintiffs' counsel prior to November 4, 2013, when Defendants assert Plaintiffs "changed" their requested relief. Defendants essentially contend that no time spent prior to November 4, 2013 can be attributable to Plaintiffs' success on the motion for summary judgment. Specifically Defendants state "the time and labor required should not exceed the time spent in writing and preparing plaintiffs' briefs and attending oral argument. Costs allowed should only be those associated with printing of the briefs, postage, etc."

The Court disagrees with that argument. The drafting of the motion and formulation of legal argument were not the products of a discrete moment in time. The process leading up to a motion for summary judgment involves discovery and research, as well as contacting clients, opposing counsel and the Court. To say that the date of November 4, 2013 should serve as a "cut off" for counsel's fees would not only be arbitrary, but it would undermine the very purpose of granting attorney's fees under the TIL Regulations.

Attorney's fees are granted so that plaintiffs who have a meritorious cause of action may have their choice of counsel to represent them without fear that they will be inundated by bills they cannot afford. Cf. Venegas v. Mitchell, 495 U.S. 82, 87-88 (1990) (describing the reason for attorney's fees in civil rights cases); See Walker v. Giuffre, 209 N.J. 124, 129-130 (2012) (discussing the purposes of statutory fee-shifting). To say that a plaintiff is only entitled to the fees that are attributable to the single legal issue or argument that ultimately entitled the plaintiff to victory would, quite simply, eliminate the incentive for attorneys to take cases on behalf of clients who cannot afford to be adequately represented. Defendants position would, therefore, function to deny adequate counsel to indigent clients with meritorious claims.

The Court cannot set an arbitrary cut-off date for Plaintiffs fees. Time spent preparing the matter to be ripe for summary judgment is spent just as reasonably as time spent arguing the motion itself. The Court will concern itself only with whether the hours billed by counsel are reasonable. Defendants have not challenged any specific hours of Plaintiffs billing as redundant, unreasonable or excessive.

Looking to Counsel's hourly billing, the Court finds that the time spent was reasonable and that counsel has properly excluded all bills which have previously been compensated and work for claims which have not yet been adjudicated. Notably, the hours include fees incurred in the preparation of this motion, including time for the reverse-engineering of financial data so as to calculate damages.

Accordingly, the Court finds that following time expenditures are reasonable: 145.19 hours for David Tykulsker, Esq.; 122.21 hours for Jeffrey Olshansky, Esq.; 38.48 hours for Ms. Norma Edrington; 30 hours for Ms. Al-Jabbar Riddle and 33.26 hours for Ms. Anita King.

The next step in the lodestar calculation is to verify that the hourly rates of the attorneys are reasonable. To calculate a reasonable hourly rate, the Court should look to prevailing market rates in the community in relation to the experience and skill of the prevailing party's attorney. See Rendine, 141 N.J. at 337.

In connection with Plaintiffs' October 11, 2013 motion to quantify attorney's fees, the Court determined the reasonable rates for counsel and his staff. The Court approved rates of \$450 per hour for David Tykulsker, Esq.; \$200 per hour for Jeffrey Olshansky, Esq.; \$200 per hour for Heather DeGeorge Esq.; \$100 per hour for Ms. Norma Edrington; and \$20 per hour for Ms. Anita King. The Court is not presented with any legal argument or evidence to demonstrate that these rates are no longer reasonable.¹ The Court finds that these rates remain reasonable.

During Autumn, 2013, Plaintiffs' counsel employed Ms. Al-Jabbar Riddle, a law student. Counsel requests a rate of \$90 per hour for Ms. Riddle's work. The Court finds this rate to be reasonable. Defendants did not oppose this rate.

¹ The Court notes that Plaintiffs' counsel elected not to challenge the rates the Court previously approved, but that counsel reserves the right to modify the rates sought on any future applications.

The Court also notes Defendant's argument that "no great skill was required to set forth the prevailing arguments," should be factored into the reduction of Plaintiffs hourly rate. Defendants did not challenge the hourly rates of counsel's billing on October 11, 2013 and have not provided any evidence in this motion as to the reasonable market rate for the work performed.

Accordingly, the lodestar in this case is reached by multiplying the court approved rates for each individual by the undisputed number of hours billed by them and then adding the individual totals. Based on the conclusions of rates and hours, *supra*, the Court reaches individual totals of: \$65,335.50 (Mr. Tykulsker); \$24,442.00 (Mr. Olshansky); \$3,848.00 (Ms. Edrington); \$ 2,700 (Ms. Jabbar) and \$665.20 (Ms. King). The total of those amounts is \$96,990.70.

Courts are authorized to reduce the lodestar amount in certain situations where the amount is excessive given the circumstances. See New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 153 (2005). The amount can be reduced if the "level of success achieved in the litigation is limited as compared to the relief sought" *Id.* (quoting Rendine, 141 N.J. at 337). However, if an attorney obtains excellent results that attorney is entitled to a full fee. *Id.* at 154.

Here, Plaintiffs' Counsel was successful in obtaining partial summary judgment on the issue of violating the TIL Regulations and therefore, the issue of wrongfully deducting certain expenses from the Plaintiffs' wages. That violation entitled the class to approximately \$4.5 million in damages as a result of Defendants' wrongful conduct; the quantum of these damages, as noted *supra* is unchallenged by Defendants. Accordingly, the Court will not reduce the lodestar.

In addition, an attorney's fee application must be reasonable when interpreted under the guidance of the Rules of Professional Conduct. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004). Rule of Professional Conduct § 1.5(a) sets forth the standard governing fee applications. To verify the reasonableness of a fee, a court must address: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and the ability of the lawyer or lawyers performing the services; and (8) whether the fee fixed or contingent.

As to factor 1, the Court finds that a class action such as this requires the expenditure of significant time and the application of considerable skill. The questions involved address a complex area of federal regulation.

As to factor 2, the Court finds that Plaintiffs' counsel was hindered from undertaking other work, due to the lack of available resources, but that such hindrance was limited to declining to represent a class action involving corrections officers.

As to factor 3, the Court finds that there is no customary fee for a class action involving TIL regulations. The statute provides for fee shifting and allows the Court to set a reasonable fee so that Plaintiffs may have their choice of reasonably-compensated counsel. The Court has already determined Counsel's billing rates to be commensurate with the local legal market, supra.

As to factor 4, the amount of damages involved is in excess of \$ 4.5 million and potential injunctive relief. Class counsel has succeeded in obtaining full monetary relief for his clients and a certification from Defendants stating that they will not engage in interstate trucking absent conforming leases.

As to factor 5, Plaintiffs' counsel certifies there were no significant time restraints.

As to factor 6, this litigation is counsel's first opportunity to represent his clients. Plaintiffs' counsel anticipates that his clients will not need his services in the future.

As to factor 7, the experience and abilities of counsel are not in doubt. This factor was addressed in connection with Plaintiffs' October 11, 2013 motion for fees. The Court finds that circumstances surrounding its analysis of factor 7 on that date have not changed.

As to factor 8, the fee in this matter is contingent.

Defendants assert that the fees are unreasonable based primarily on factor 1, due to the lack of novelty given the "copious cases where the motor carrier was required to pay back all deductions from the owner-driver's pay due to the motor carrier's failure to have a written lease conforming to the TIL Regulations." Def's Br. at 7.

The Court disagrees with that proposition. Defendants not only opposed the motion for summary judgment, but brought a motion for reconsideration arguing that the TIL Regulations

were not properly understood by either party's counsel or the Court on December 20, 2013. That Plaintiff has identified the proper means of quantifying damages, as represented through multiple cases, does not diminish the difficulty of the question presented to this Court.

The Court, as noted supra, also disagrees with Defendants' argument that Plaintiffs' only "reasonable" hours spent on pursuit of the relief awarded on December 20, 2013 (i.e. compensation for all costs that were attributed to the owner-operators in contravention of the TIL Regulations, which Defendants violated) are those spent on briefing the December 20, 2013 motion and appearing for oral argument.

Lastly, the Court does not agree with Defendants assertion that "no great skill" was required to prevail over them. Defendants mounted a defense, including motions for reconsideration, which required significant legal research and policy analysis to overcome.

The final issue is, therefore, whether Plaintiffs' counsel is entitled to a fee enhancement. Counsel seeks a 20% fee enhancement. Defendants did not provide citation to any legal authority weighing against a fee enhancement. Plaintiff cited Walker v. Giuffre as support for a contingent fee enhancement.

In Walker v. Giuffre, 209 N.J. 124 (2012) the Court stated

Although an award of attorneys' fees pursuant to a federal fee-shifting statute would be required to comply with the guidance from the United States Supreme Court, awards made pursuant to fee-shifting statutes enacted by our Legislature must instead continue to conform to the principles announced in Rendine.

Id. at 140-141.

Therefore, while Plaintiff is correct that the lodestar may be enhanced in the Court's discretion, it is federal jurisprudence that determines whether it is appropriate for an enhancement. The Court disagrees with Plaintiff's argument that North Bergen Rex Transport Inc. v. Trailer Leasing Co., 158 N.J. 561 (1999), which states that awards of attorney's fees are a matter of procedure rather than substantive law, would permit a fee enhancement on a federal statute in light of the Supreme Court's explicit statement in Walker.

Here, because the fee-shifting is based on the TIL Regulations, which are federal law, pursuant to Walker, this Court must comply with the United States Supreme Court's fee shifting jurisprudence as it pertains to fee enhancements.

The United States Supreme Court has said that fee shifting is appropriate only in "rare" or "exceptional" circumstances. Perdue v. Kenny A., 559 U.S. 542, 552 (2010). Supreme Court jurisprudence presumes that a lodestar-calculated fee is appropriate and no factor within the lodestar calculation should be used to enhance a contingent fee. Id. at 553. "[T]he burden of proving that an enhancement is necessary must be borne by the fee applicant." Ibid. The applicant must provide "specific evidence" in support of the award. Ibid. This does not mean that a lodestar enhancement is never appropriate. The Court articulated factors to consider in determining whether a fee enhancement is appropriate.

The factors are:

- 1) "[T]he hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation." Id. at 554-555.
- 2) "[I]f the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." Id. at 555.
- 3) "[E]xtraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees." Id. at 556. This means an "unanticipated delay, particularly where the delay is unjustifiably caused by the defense." Ibid.

Here, Plaintiff has not provided specific evidence demonstrating that a fee enhancement is appropriate in accordance with the above factors. The Court finds that the fees awarded pursuant to the lodestar calculation are reasonable. Counsel's hourly rate has been adequately measured, there is no evidence of an extraordinary outlay of expenses or unexpected protraction of litigation and the Court does not anticipate an exceptional delay in the payment of fees upon resolution of the matter.

Accordingly, the Court finds that no fee enhancement is appropriate at this time. Counsel's request for fees shall be granted in the amount of the lodestar, which is reasonable under the R.P.C. 1.5 factors, in the amount of \$96,990.70.

The Court also awards costs in the amount of \$4,276.27, which the Court finds to be reasonable. Costs include child support lien searches, which are required pursuant to N.J.S.A. 2A17-56.23(b).

CONCLUSION

This motion is GRANTED.

Plaintiffs are entitled to damages totaling \$ 4,574,043.74 due to Defendants violation of the TIL Regulations.

Plaintiffs are awarded attorney's fees, pursuant to the TIL Regulations, in the amount of \$ 96,990.70. Plaintiffs' request for a fee enhancement is DENIED.

Plaintiffs are awarded costs in the amount of \$4,276.27.