

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: March 16, 2016)

BRUCE W. BURLINGAME :
AIRVONE SURITAMONKOL :

V. :

C.A. No. PC 11-2097

BOUCHER & COMPANY, :
DUANE BOUCHER, JOHN BOUCHER, :
BOUCHER REAL ESTATE, INC., and :
LAURELWOOD PARTNERS LLC :

DECISION

CARNES, J. Before the Court is Plaintiffs’ Bruce W. Burlingame (Mr. Burlingame) and Airvone Suritamankol’s (Ms. Suritamankol) (collectively, Plaintiffs) motion for costs and attorneys’ fees against Defendants John Boucher (John), Duane Boucher (Duane), and Boucher Real Estate, Inc. (Boucher Real Estate) (collectively, Defendants). In September 2015, Plaintiffs were awarded \$41,626.28 on their breach of fiduciary duty and successor liability claims. The amount replicates judgments that were awarded to Plaintiffs in 2010 and evaded by Defendants. Plaintiffs were also awarded interest from the dates the original judgments became static. The Court chose to award attorneys’ fees in lieu of punitive damages. Plaintiffs now seek a total of \$155,687.65 in costs and attorneys’ fees that they have incurred in enforcing the original judgments after being given the “run around.” For the reasons stated herein, this Court hereby awards a total of \$127,411.28 in costs and attorneys’ fees, \$72,750.12 to Mr. Burlingame and \$54,661.16 to Ms. Suritamankol.

I

Facts and Travel

Mr. Burlingame and Ms. Suritamonkol were real estate agents for Boucher & Company (Boucher & Co.). After ceasing employment with Boucher & Co., Mr. Burlingame and Ms. Suritamonkol sought compensation for unpaid commissions in the Superior Court.¹ On January 14, 2010, Ms. Suritamonkol obtained a judgment in the amount of \$10,376.75 for unpaid commissions, plus pre-judgment interest of \$8187.67 and costs of \$200.00. Her total award equaled \$18,764.42. On March 5, 2010, Mr. Burlingame obtained a judgment in the amount of \$15,025.00 for unpaid commissions, plus pre-judgment interest of \$7836.86. His total award equaled \$22,861.86.²

Boucher & Co. ceased doing business on May 20, 2010 without satisfying the debts owed to Mr. Burlingame and Ms. Suritamonkol. Both judgments were returned unsatisfied, Mr. Burlingame's on July 6, 2010 and Ms. Suritamonkol's on August 26, 2010. Duane, the company's principal broker, had the authority to determine which outstanding invoices should have been paid by Boucher & Co.'s remaining funds. In May of 2010, Duane was paid \$3480.00 and John was paid \$5775.00.

Boucher Real Estate was incorporated on April 16, 2010, just shy of a month before Boucher & Co. ceased operations. Marc Cote, Linda Delach, and Ann Gariepy were independent real estate agents at Boucher & Co. They all transferred their real estate licenses to Boucher Real Estate in May 2010. Duane also transferred his license to Boucher Real Estate and

¹ Ms. Suritamonkol filed her case on January 21, 2004, Suritamonkol v. Boucher & Co., PC-2004-0325. Mr. Burlingame filed his case on February 2, 2006, Burlingame v. Boucher & Co., PC-2006-0664.

² Boucher & Co. filed a Notice of Appeal in both cases but withdrew such on May 24, 2010.

signed an independent contractor contract with the new company as President. He also continued his role as principal broker.

On April 14, 2011, the present action was brought before the Court. Plaintiffs alleged that Duane and John breached their fiduciary duties by making preferential payments to themselves and others at the time Boucher & Co. was insolvent. Plaintiffs also alleged a statutory count of fraudulent transfer and a common law count of successor liability against Boucher Real Estate. The case proceeded to a bench trial in late August 2015. On September 4, 2015, a decision was rendered by this Court, finding for Plaintiffs on all counts. The Court awarded Plaintiffs judgment in the amount of their original judgments, plus interest from the date those original judgments became static. At that time, the Court also addressed the award of both punitive damages and attorneys' fees. While the Court refrained from awarding punitive damages, the Court made clear that it intended to award attorneys' fees and had the authority to do so from its "inherent power to award an attorney's fee when a party acts in bad faith, vexatiously, wantonly, and for oppressive reasons." Decision Tr., 29:14-16, Sept. 4, 2015. In addition, the Court acknowledged an "injustice" in the case and noted that the "timing and conduct [was] suspect." Id. at 30:11-12.

Plaintiffs now seek a total of \$155,687.65 in costs and attorneys' fees. More specifically, Attorney Vicki J. Bejma (Attorney Bejma), counsel for Mr. Burlingame, requests \$4749.50³ in costs and \$78,156.25 in fees, totaling \$82,905.75.⁴ Attorney Mark L. Smith (Attorney Smith),

³ Attorney Bejma actually requested \$4850.76 in costs but indicated a credit of \$101.26 as advance payment for Legacy Valuation Services LLC. In applying that deduction, the costs owed as requested yields \$4749.50.

⁴ Attorney Bejma's last submitted bill concludes with a total request of \$83,868.25. That bill has two separate sections, one for the substantive case and one for seeking attorneys' fees. The balance forwarded is recorded as \$79,544.19. While this number is the total indicated on the first submitted bill, page 14 of the second submitted bill indicates that the forward balance

counsel for Ms. Suritamankol, requests \$3318.49 in costs, \$59,416.91 in fees, and \$10,046.50 in prior balance, totaling \$72,781.90.

Defendants argue that the Court did not have the authority to award attorneys' fees in this case and press their objection to any award. Defendants additionally posit that even if fees are appropriate, Plaintiffs have failed to meet their burden in proving that their demand is reasonable. Defendants contend that Plaintiffs' experts, through their respective affidavits, essentially rubber-stamped the submitted attorney billings. Defendants submit their own expert affidavits to contest the reasonableness of Plaintiffs' demand.

II

Standard of Review

Rhode Island “adheres to the ‘American rule’ that litigants generally are responsible for their own attorneys’ fees and costs. However, attorneys’ fees may be appropriately awarded, at the discretion of the trial justice, given proper contractual or statutory authorization.” Pearson v. Pearson, 11 A.3d 103, 108-09 (R.I. 2011) (alteration in original) (quoting Downey v. Carcieri, 996 A.2d 1144, 1153 (R.I. 2010)) (internal quotation marks omitted). This general rule is not without exception; the Rhode Island Supreme Court has recognized that the courts have the “inherent power to fashion an appropriate remedy that would serve the ends of justice . . .” Shine v. Moreau, 119 A.3d 1, 8 (R.I. 2015) (quoting Moore v. Ballard, 914 A.2d 487, 489 (R.I. 2007)). This principle gives the trial justice inherent authority to award attorneys’ fees as a sanction (1) for “contumacious conduct,” see Moore, 914 A.2d at 489 (citing Moran v. R.I. Bhd. of Corr. Officers, 506 A.2d 542, 544 (R.I. 1986)); (2) pursuant to the “common fund exception,”

should have been marked as \$78,581.69. The difference between these two numbers represents the difference between the amount Attorney Bejma actually requested and the amount the Court is recording as requested.

see Blue Cross & Blue Shield of R.I. v. Najarian, 911 A.2d 706, 711 n.5 (R.I. 2006); and (3) when a party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons,” see id. (citing Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991)). “[T]he amount awarded in counsel fees is within the sound discretion of the trial judge in light of the circumstances of each case.” Schroff, Inc. v. Taylor-Peterson, 732 A.2d 719, 721 (R.I. 1999). When considering the reasonableness of a request for attorneys’ fees, the Court considers a variety of factors. See Rule 1.5 of the Rules of Professional Conduct (Rule 1.5). These factors are further discussed in Section III.B.

III

A

Ability to Award Fees

The Court finds it necessary to address its ability to award costs and attorneys’ fees in this case. At the outset of Defendants’ Memorandum, Defendants argue that the Court awarded fees under the Uniform Fraudulent Transfer Act, a statute that does permit the award of attorneys’ fees. A review of the decision notes the precise language used: “The Court does note that notwithstanding the difficulty of applying a remedy under Section 7, General Laws 6-16-7, the Court can award an attorney’s fee in equity. * * * The Court makes a finding here, notwithstanding the ability of the Court to award an attorney’s fee on 6-16 Section 7” Decision Tr. 29:10-13, 29:20-22. The words used in the decision, taken by themselves, as well as in conjunction with certain specific findings made immediately thereafter, do not appear to limit the award of attorneys’ fees to G.L. 1956 § 6-16-7 exclusively.

On January 22, 2016, Plaintiffs brought a motion for “additional findings and/or certain clarifications” specifically seeking clarification as to which counts the Court has awarded

attorneys' fees. See Mot. for Addt'l Findings ¶ 9. The motion and the decision of the Court clearly indicate that the Plaintiffs prevailed on Count 1—breach of fiduciary duty of corporate officers; Count 3—fraudulent transfer of assets; and Count 4—alter ego or successor liability. Given further reflection, as well as the additional findings of the Court, discussed infra, regarding bad faith, vexatious, and wanton conduct and oppression, the Court now clarifies that attorneys' fees are awarded on all Counts (1, 3, and 4), especially considering that the Court has declined to award punitive damages “in light of its award of attorney’s fees in this matter.” Decision Tr. 32:5-6.

Citing the staunchly adhered to American Rule, Defendants argue that the Court lacked contractual or statutory authority to award fees. However, as mentioned above, it is clear that the Court has the inherent authority to award attorneys' fees if doing so would serve the ends of justice. See Blue Cross, 911 A.2d at 711 n.5. While this inherent power is only available in limited circumstances, one circumstance is “when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” Id. (quoting Chambers, 501 U.S. at 45).

On September 4, 2015, this Court issued a bench decision which enumerated specific findings related to each count of the Plaintiffs' Amended Complaint. Towards the end of the decision, the Court explicitly found that “both John and Duane have acted in bad faith[,] vexatiously, wantonly, and for the oppressive reasons as it relates to their activity related to the legitimate debts of each one of the individual plaintiffs in this case.” Decision Tr. 29:23-30:2.

In explanation of this conclusion, the Court summarized:

“The Court has considered the timeline. The Court has considered what Exhibit 22 depicts. The Court has considered a complete lack of evidence of any communication with either one of the two plaintiffs regarding the legitimate debt. And the Court has considered the fact, and, again, the Court has had this case in addition to what we heard here in open court, the Court has been reading over the

weekend, as well, and [the] Court feels there is definitely an injustice, and the timing and conduct is suspect in this case.” Decision Tr. 30:3-12.

This Court has previously found that John and Duane made preferential payments to themselves and fraudulently restructured Boucher & Co. in an attempt to avoid their legitimate debt to the Plaintiffs, as well as to “pull a fast one”⁵ on the Court.

It is clear to this Court that Plaintiffs took advantage of the legal options available to them in filing actions at law in regard to their claims of commissions owed. Each case proceeded to judgment. After Duane indicated that the debtor corporation was insolvent, Defendants withdrew their appeals and any supplementary proceedings were discontinued. It is equally clear to this Court that Defendants did not avail themselves of any bankruptcy or receivership proceedings prior to commencing to do substantially similar business under a new corporate name.

The Rhode Island Constitution provides, in pertinent part:

“Section 5. Entitlement to remedies for injuries and wrongs – Right to justice. – Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one’s person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.” R.I. Const. art. 1, § 5 (emphasis added).

The National Center for State Courts has indicated on its website: “Because the judicial branch relies heavily on public support to perform its role in our system of government, public trust and confidence is a precious commodity for the courts.” Public Trust and Confidence, National Center for State Courts, <http://www.ncsc.org/Topics/Court-Community/Public-Trust-and->

⁵ To “pull a fast one” is to “play an unfair trick” or “practice deceit.” See “pull a fast one,” Dictionary.com, <http://www.dictionary.com/browse/pull-a-fast-one> (last visited Mar. 16, 2016). The phrase has its origin in the United Kingdom and is thought to have evolved from the popular game of cricket. See Dick Wilkinson, Concise Thesaurus of Traditional English Metaphors 155 (2013). In that context, the phrase is used when a fast ball is thrown after several slow pitches in an attempt to trick the batsman. See id.

Confidence.aspx (last visited Mar. 16, 2016). Along the same line of thought, Mark H. Alcott, writing for the New York State Bar Journal, has written:

“When public confidence in any facet of the court system is weak, the pillars of our legal system crumble, and the authority of our entire system of justice is undermined. Public confidence in every judge in this state is crucial to the continued vitality of the bench and bar. Indeed, due to the nature of the cases that come before Justice Courts, public confidence in those tribunals is particularly necessary.” Mark H. Alcott, Our Dual Roles, N.Y. St. B.J., Feb. 2007, at 5, 6.

Considering the importance of public confidence in the court system, the Court is left to wonder rhetorically, what would occur to such confidence if the Court did not award attorneys’ fees in the precise context of this case? Again, given the counts of Plaintiffs’ Amended Complaint, which all request attorneys’ fees, and the Court’s findings on September 4, 2015, as well as the instant Decision, the question before the Court is why should the Plaintiffs be required to pay as they chase legitimate judgments that were evaded by Defendants? If plaintiffs were required to pay under these circumstances, such would actually create an incentive for defendants to avoid their obligations. The same would also discourage plaintiffs from seeking redress through the judicial system. As a result, the Court finds that the maintenance of public confidence in the courts, as well as the rule of law, mandates an award of reasonable attorneys’ fees within the precise context of this case.

B

Fee Calculation

After deciding that a party is entitled to an award of attorneys’ fees, “[t]he next step in determining the amount of the award is to calculate the ‘lodestar,’ which is that number of hours reasonably expended by the successful party’s counsel in the litigation, multiplied by a reasonable hourly rate.” Litton Indus., Inc. v. IMO Indus., Inc. 982 A.2d 420, 428 (N.J. 2009); see also In re Matter of Schiff, 684 A.2d 1126, 1133 (R.I. 1996). “A trial justice determines the

reasonableness of the fee by considering the factors enumerated in Rule 1.5 [of the Rules of Professional Conduct].” Keystone Elevator Co. v. Johnson & Wales Univ., 850 A.2d 912, 921 (R.I. 2004) (citing Colonial Plumbing & Heating Supply Co. v. Contemporary Constr. Co., 464 A.2d 741, 743 (R.I. 1983)). These factors include:

“(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 ability of the lawyer or lawyers performing the services; and

“(8) whether the fee is fixed or contingent.” Rule 1.5.

These factors should be considered on a case-by-case basis as no one factor is controlling. See Palumbo v. U.S. Rubber Co., 102 R.I. 220, 224, 229 A.2d 620, 623 (1967). In reviewing the above, the Court agrees with Judge Silverstein in Ferris Ave. Realty, LLC v. Huhtamaki, Inc., No. PB 07-1995, 2013 WL 1789488 (R.I. Super. Ct. Apr. 22, 2013); “[T]he clearer terminology is to refer to the product of the reasonable number of hours worked multiplied by the reasonable hourly rate as the ‘lodestar amount,’ and any changes to that amount—via the eight factors or otherwise—are ‘adjustments to the lodestar amount.’” Id. at *4.

Both parties have submitted affidavits in support of their position on the reasonableness of the requested fees to the Court. In addition to these affidavits, the Court has also reviewed each submitted bill in great detail. The bills submitted by both attorneys contain hours allocated

to the original cases and the present case before the Court.⁶ In regard to the original cases, Attorney Bejma and Attorney Smith contracted with their respective clients for a standard one-third contingency fee. When the present case was pursued, the relationship and fee expectancy were never redefined. As a result, the Court finds it appropriate to deduct any hours allocated to the original suits and instead award fees for those particular services based on the contingency expectancy, as opposed to an hourly rate. The \$10,046.50 recorded as a “prior balance” on Attorney Smith’s latest bill is therefore null as the contingency agreement will be enforced as it relates to compensation in the original cases. In light of the above, the Court will proceed to analyze the appropriate award of fees using the following formula:

$$(1/3 \text{ of original judgments}) + (\text{lodestar of present case } \underline{\text{only}})$$

The Court will then compare these blended amounts to the total fee requested by each attorney and adjust according to the factors enumerated in Rule 1.5 as it finds necessary. The Court will also compare the total fee awarded to the total judgment awarded in order to check for proportionality. As a threshold matter, the Court will proceed to analyze the costs requested first.

i.

Costs

Attorney Bejma requests \$4749.50 in costs; Attorney Smith requests \$3318.49. Defendants claim that Plaintiffs seek unchargeable costs for expert fees. Section 9-17-22 of the R.I. General Laws provides: “Fees of experts, except as provided in the Rules of Evidence, shall not be allowed as part of the costs in any case in excess of the fees allowed for ordinary

⁶ Attorney Smith recently submitted a revised bill to the Court that redacted some of those hours. Nevertheless, in reviewing the revised bill, the Court finds that a small portion of recorded hours were still allocated to the original case.

witnesses.” Attorney Bejma has requested \$2550.00 in costs for expert fees.⁷ Attorney Smith has requested \$2638.13 in costs for expert fees.⁸ The Court disallows these specific costs. The Court finds all of the other requested costs reasonable in light of the circumstances. Therefore, Attorney Bejma is awarded \$2199.50 in costs, and Attorney Smith is awarded \$680.36 for the same—pursuant to their respective submissions.

ii.

Requested Fees

The Court finds that Attorney Bejma has requested a fee of \$305.00 per hour for 256.25 hours. As a result, Attorney Bejma requests a total fee of \$78,156.25. Attorney Smith has requested a fee of \$337.50 per hour for 176.05 hours. As a result, Attorney Smith requests a total fee of \$59,416.91.

iii.

Original Cases

As briefly discussed above, both attorneys agreed to a one-third contingency fee in the original cases with their respective clients. Given the simple and straightforward issues in these original suits, the expectations of the parties involved, and the fee customarily charged for such representation, the Court hereby awards each attorney one-third of the respective judgments that they originally obtained for their clients. As a result, Attorney Bejma is awarded \$7620.62 for her representation in Mr. Burlingame’s 2006 case.⁹ Attorney Smith is awarded \$6254.80 for his

⁷ The descriptions indicate that these costs were paid to Expert Ralph A. Gigliotti and Legacy Valuation Services, LLC.

⁸ The descriptions indicate that these costs were paid to an accountant acting as an expert and Legacy Valuation Services, LLC.

⁹ Mr. Burlingame was awarded \$22,861.86 in his 2006 case. One-third of \$22,861.86 equals \$7620.62.

representation in Ms. Suritamonkol's 2004 case.¹⁰ Each of these segments comprises a part of the total fee awarded for each attorney.

iv.

Hours in the Present Case

The Court finds that 31.5 of the charged hours on Attorney Bejma's bill were allocated to Mr. Burlingame's original case.¹¹ Therefore, Attorney Bejma's requested hours for the present case are 224.75. The Court finds that 5.6 of the charged hours on Attorney Smith's bill were allocated to Ms. Suritamonkol's original case.¹² Therefore, Attorney Smith's requested hours for the present case are 170.45. Defendants argue that the requested hours are not reasonable as they are often excessive in comparison to the work performed, rendering them inaccurate. The Defendants also comment on the fact that Attorney Bejma bills by the quarter-hour.

The United States Supreme Court has stated that "[a] request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). As a result, the District Court for the District of Rhode Island has held that courts are "not required to engage in a line-by-line review of time records or to 'drown in a rising tide of fee-generated minutiae.'" Sherwood Brands of R.I., Inc. v. Smith Enters., Inc., No. Civ. A. 00-287T, 2002 WL 32157515, at *2 (D.R.I. Sept. 5, 2002) (quoting United States v. Metro. Dist. Comm'n, 847 F.2d 12, 15 (1st Cir. 1988)). This Court agrees with the United States Supreme Court and District Court for the District of Rhode Island.

¹⁰ Ms. Suritamonkol was awarded \$18,764.42 in her 2004 case. One-third of \$18,764.42 equals \$6254.80.

¹¹ Specifically, the first thirty-seven entries and the entries on the following dates: 10/4/10; 10/7/10; 10/8/10; 10/28/10; 4/8/11; 4/11/11; and half of 4/14/11.

¹² Specifically, the first twenty-one entries.

While this Court has examined the bills in detail, it declines to engage in a line-by-line analysis of the submitted bills. A case involving an alleged fictitious corporate transfer encompasses a variety of challenges. Some challenges are resolved quickly, and others take more time. While one task may have taken longer than usual, another task could have been performed more quickly than usual, resulting in an even playing field. The Court declines to engage in a discussion that is ultimately going to result in inconsistent adjustments. The Court is also aware of case law that supports the slight adjustment of hours based on quarter-hour billing. See, e.g., Diffenderfer v. Gomez-Colon, 587 F.3d 445, 455-56 (1st Cir. 2009). However, Rule 1.5 does not delineate a billing style, and, to the Court's knowledge, a tenth-hour billing preference is not mandated by present Rhode Island case law.

Defendants also argue that Plaintiffs cannot collect attorneys' fees for fee-defense litigation. Defendants cite Baker Botts L.L.P. v. ASARCO, LLC, 576 U.S. ___, 135 S.Ct. 2158, 2168 (2015) for the proposition that "[i]n our legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authority." Plaintiffs argue that fees for fee-defense litigation are customarily awarded. However, in the cases cited by Plaintiffs, fees were statutorily awarded. See Comm'r I.N.S. v. Jean, 496 U.S. 154 (1990) (Equal Access to Justice Act); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978) (Civil Rights Attorneys' Fees Award Act); Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979) (same), aff'd on other grounds, 448 U.S. 122 (1980). In those cases, the court interpreted the applicable statutory provisions to include fee-defense fees. The Court in Baker Botts did the same. While the Court did make a blanket statement on the ability of attorneys to collect fees while seeking fees in general, this Court declines to find that language so limiting.

Due to our adherence to the American Rule, fees are more commonly awarded via a statute or contract. In both cases, the Court is required to interpret a provision and determine whether fee-defense fees are permissible. In the case before this Court, fees were awarded pursuant to a narrow exception that permits the Court to take action to avoid injustice. Therefore, the Court is not confined to the strict interpretation of a statute or contractual provision. Baker Botts was highly concentrated on adhering to statutory language, and this Court finds that the above-quoted language was merely an attempt to state that attorneys cannot recover fees in fee-defense litigation without the court having the authority to award such. The statement was made in an attempt to prove that a bankruptcy attorney would be in no worse of a position than other attorneys who regularly cannot collect fees in a fee-defense litigation absent some exception. The Court declines to take the statement out of context and agrees with the rationale asserted in cases where fee-defense fees have been permitted. “[D]eny[ing] attorneys’ fees for time spent in obtaining them would ‘dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees.’” Gagne, 594 F.2d at 344 (emphasis added) (quoting Stanford Daily v. Zurcher, 64 F.R.D. 680, 683-84 (N.D. Cal. 1974)). As a result, this Court holds that the hours spent litigating the issue of attorneys’ fees are reasonable hours that are compensable under the circumstances.

As indicated, this Court has reviewed the bills and affidavits in their entirety, although not required to do so. See Hensley, 461 U.S. at 433; Sherwood Brands, 2002 WL 32157515, at *2. Given the complexity of the issues in this case, the Court finds the hours requested for the present case by each attorney reasonable.

v.

Hourly Rates

Attorney Bejma has requested an hourly fee of \$305.00. According to her affidavit, she usually charges between \$150.00 and \$225.00 an hour. Attorney Smith has requested an hourly fee of \$337.50. According to his affidavit, he usually charges between \$285.00 and \$337.50 an hour. Defendants argue that the attorneys should be limited to the “default rates” established in their contingency agreements. In the alternative, Defendants contend that the usual rates charged by each attorney are reasonable, and the circumstances do not present a situation that supports fixing an hourly rate above those usual ceilings.

The case in question involved complex questions of preferential payments, fraud, fictitious corporate identity, and successor liability. A case of this magnitude requires intense discovery and nuanced comparisons. Additionally, the usual litigation hurdles are raised by the fact that most of the assets in this case were intangible. Cases of this difficulty require greater resources and are particularly time consuming. Therefore, the first two factors in Rule 1.5 cut in favor of awarding an hourly fee towards the higher end of the usual range. That being said, the Court does take this moment to note that Attorney Smith did testify at oral argument that he mostly mirrored Attorney Bejma’s steps in the present litigation. As a result, the Court is aware that Attorney Bejma was predominantly tasked with addressing the complex issues in the case, even if Attorney Smith ultimately acted as the first chair during trial.

Only one affidavit provided to the Court attests to the rates charged by other Rhode Island attorneys for similar litigation.¹³ See Aff. of Carl S. Levin ¶ 18. Attorney Carl S. Levin

¹³ Affidavits were also submitted by Attorneys William J. Delaney, Glen R. Whitehead, and Stephen A. Izzi. Attorney Delaney states in his affidavit that the demand by Plaintiffs is reasonable. See Aff. of William J. Delaney ¶ 6. However, he does not provide the Court with

states in his affidavit that other attorneys in the area charge between \$300.00 to \$350.00 for comparable representation. While both requested hourly rates are within this range, the Court does recognize that Attorney Bejma has requested a rate \$80.00 higher than her usual ceiling, and Attorney Smith has requested his ceiling.

In regard to the final four factors under Rule 1.5, the Court finds that both attorneys were prompted to work diligently and efficiently as the Plaintiffs had been awaiting judgment enforcement since 2010. The nature of the relationships between the Plaintiffs and their attorneys were long standing. Both attorneys were present during the initial cases and attempted to enforce the original judgments through to this present case. The Plaintiffs clearly felt comfortable with their respective representation and chose to proceed with such. The Court also notes the experience, reputation, and ability of both Attorney Bejma and Attorney Smith. Attorney Bejma has been a licensed attorney for fourteen years and has seasonable experience in seeking attorneys' fees in civil rights and government cases. Likewise, Attorney Smith has been a licensed attorney for forty-two years, trying over two hundred jury trials. Both attorneys also have high reputations in the surrounding legal community.

Finally, while the attorneys did contract with the Plaintiffs for a one-third contingency fee in the original cases, it is not at all clear that such a fee was intended to be applied to the present matter. As discussed, the present matter is much more complex and time consuming. Both agreements did contain an hourly fee that was to be applied if the representation was terminated;

the hourly rate customarily charged for similar cases in Rhode Island. Both Attorneys Whitehead and Izzi contest the reasonableness of the demand. See generally Aff. of Glen R. Whitehead; Aff. of Stephen A. Izzi. Attorney Whitehead focuses on the prior contingency agreement and only cursorily claims that the hourly rates "are not consistent with the customary rates charged within this jurisdiction for commercial litigation services." Aff. of Glen R. Whitehead ¶¶ 9-10. Attorney Izzi's affidavit is similar, focusing on the contingency agreement and finding that the demand is not fair and reasonable. See generally Aff. of Stephen A. Izzi.

however, those fees were assessed based on the complexity of the original cases. The Court can only assume that if those agreements were renegotiated, a default hourly fee would have been set higher. As a result, the Court does not place much significance on the prior original contingency agreements as applied to the instant case in light of this analysis.

Given the above, the Court finds that \$280.00 an hour is a reasonable hourly rate for both Attorney Bejma and Attorney Smith's representations in the present case. The Court commends both attorneys' lawyering in the present case. While the attorneys did request different rates, and Attorney Smith's was higher than Attorney Bejma's, the Court is unable to find a rational basis for awarding one attorney a higher rate than the other under the factors discussed herein. The Court is required to calculate a reasonable fee based on the factors listed in Rule 1.5. After analyzing such, the Court declines to find that the reasonable rate differs between these two attorneys.

Due to the complexity of the matter and the fact that Attorney Bejma dealt with a majority of such, the Court has chosen to award Attorney Bejma \$55.00 above her usual hourly ceiling. While this hourly rate is less than the \$305.00 requested, it amounts to approximately ninety percent of that requested. Attorney Smith requested an hourly rate of \$337.50. Although this rate is eighty-three percent of that requested, the Court is cognizant of the fact the Attorney Smith's predominant role was to try the case after the legal issues were fleshed out by Attorney Bejma. The Court has also chosen to fix a rate lower than requested by both attorneys in order to account for the commingling of non-core and core tasks that are integrated in the attorneys' respective submissions.¹⁴ In sum, taking the 224.75 hours charged in the present case, Attorney

¹⁴ Non-core tasks are commonly billed at a lower rate than core tasks. See generally Matalon v. Hynnes, 806 F.3d 627, 631-40 (1st Cir. 2015); Brewster v. Dukakis, 3 F.3d 488, 492-94 (1st Cir. 1993). Non-core tasks are customarily billed at two-thirds of the reasonable hourly rate for core

Bejma's lodestar is set at \$62,930.00 for her representation. Taking the 170.45 hours charged in the present case, Attorney Smith's lodestar is set at \$47,726.00 for his representation.

vi.

Blended Rate & Additional Adjustment

In light of the blended rate addressed above, Attorney Bejma has been awarded a total of \$70,550.62 for her representation in both cases—\$7620.62 (original case, contingency) + \$62,930.00 (present case, hourly). She requested \$78,156.25 in fees. The fees awarded have resulted in a ten percent reduction of her full requested amount. Attorney Smith has been awarded a total of \$53,980.80 for his representation in both cases—\$6254.80 (original case, contingency) + \$47,726.00 (present case, hourly). He requested \$59,416.91. The fees awarded have resulted in a ten percent reduction of his full requested amount.¹⁵ The Court finds both fees and reductions reasonable in light of the above factorial analysis.

Further adjustment of the fees based on the Rule 1.5 factors is unnecessary as the Court took such factors into consideration when setting the reasonable amount of hours spent by each attorney, as well as the reasonable hourly rate that should be applied. However, the Court also takes this opportunity to compare the grand total of fees, for both attorneys, to the sum awarded to Plaintiffs as damages. On December 11, 2015, Defendants' Motion to Deposit Funds was granted by this Court. The Defendants were directed to deposit \$71,000.00 in the Court registry in order to satisfy the Plaintiffs' judgment. The grand total of fees awarded is \$124,531.42.¹⁶

tasks. See, e.g., Wilson v. McClure, 135 F. Supp. 2d 66, 72-73 (D. Mass. 2001). Core tasks include "legal research, writing of legal documents, court appearances, negotiations with opposing counsel, monitoring, and implementation of court orders." Brewster, 3 F.3d at 492 n.4. Non-core tasks include "letter writing and telephone conversations." Id.

¹⁵ If the Court includes the \$10,046.50 categorized as "prior balance" as part of the total requested fees, the reduction is 22.3 %.

¹⁶ Attorney Bejma is allocated \$70,550.62, and \$53,980.80 is allocated to Attorney Smith.

This amount is \$53,531.42 higher than the amount deposited in the Court registry. The United States Supreme Court has stated that “reasonable attorney’s fees . . . are not conditioned upon and need not be proportionate to an award of money damages.” City of Riverside v. Rivera, 477 U.S. 561, 576 (1986). The Court in City of Riverside upheld an attorneys’ fee award that was approximately 7.36 times larger than the damages award. Id. While a fee exceeding the damages award is not usually reasonable, see Cole v. Wodziak, 169 F.3d 486, 488 (7th Cir. 1999), in light of the above circumstances a fee in this amount is both reasonable and permissible. First, the instant fee is only 1.8 times the damages award. Second, satisfying judgment in the original cases should have been relatively easy for the Plaintiffs. Instead, they were forced to incur additional expenses while they embarked on a wild goose chase. As explained in Section III.A of this Decision, the Court places emphasis on its ability to encourage judicial redress and deter future litigants from avoiding their legal obligations.

IV

Conclusion

The Court hereby awards Plaintiffs a total of \$127,411.28 in costs and attorneys’ fees. Attorney Bejma shall receive \$2199.50 in costs, \$7620.62 in fees from the original case, and \$62,930.00 in fees from the current case, totaling \$72,750.12. Attorney Smith shall receive \$680.36 in costs, \$6254.80 in fees from the original case, and \$47,726.00 in fees from the current case, totaling \$54,661.16. The Court explicitly finds this award fair and reasonable after taking the demand and the Rule 1.5 reasonableness factors into consideration. Counsel shall submit an appropriate order and judgment consistent with this Decision for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Burlingame v. Boucher & Company, et al.**

CASE NO: **PC 11-2097**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **March 16, 2016**

JUSTICE/MAGISTRATE: **Carnes, J.**

ATTORNEYS:

For Plaintiff: **Vicki J. Bejma, Esq.**
Mark L. Smith, Esq.

For Defendant: **Gerard M. Decelles, Esq.**