

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

<p>RUSSELL W. CALKINS, III, Plaintiff, vs. DONALD R. BRANDT, CTI HOLDINGS, INC., CLAIM TECHNOLOGIES INCORPORATED, and CTI ADMINISTRATORS, INC., Defendants.</p>	<p>CASE NO. EQCE081752 ORDER RE: MOTION FOR ATTORNEY FEES, EXPENSES OF COUNSEL AND EXPERTS and DEFENDANTS' MOTION TO ENLARGE OR AMEND</p>
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The court has before it plaintiff, Russell Calkins' ("Calkins") motion for attorney fees and expenses of counsel and experts. The court also has before it the defendants' motion to enlarge or amend.¹ A hearing was held on April 26, 2019. At the hearing, the parties were represented by their respective counsel. Having reviewed the written submissions and having heard arguments of counsel the court finds and orders as follows.

Calkins seeks an award of attorney fees, expenses and expert witness costs as allowed under Iowa Code section 490.1433(5). The court entered an order on January 26, 2019 in which the court found in favor of Calkins on his claim for oppression and awarded him \$1,193,175.00 in damages. The court denied Calkins' claims for lost wages and benefits and for corporate waste and misapplication of corporate assets. In a subsequent order, the court awarded Calkins \$1,099.60 for deposition costs and in an order filed on March 15, 2019 the court found Calkins was entitled to an award of attorney fees pursuant to section 490.1434(5) and ordered Calkins to file an affidavit for attorney fees and supporting documentation. Calkins filed his affidavit of

¹ At the hearing, the parties informed the court the issue raised by defendants was resolved and there was no need for the court to address this issue.

attorney fees and supporting documentation on April 1, 2019. The defendants' filed their resistance on April 15, 2019. Calkins filed a brief in support of his application on April 29, 2019. Defendants filed additional exhibits in support of their resistance on May 3, 2019.

Calkins seeks an award of attorney fees of \$259,916.50, litigation expenses of \$4,409.59 and expert fees of \$40,908.19 for a total of \$305,234.28.

APPLICABLE LAW

A party that successfully prevails on an oppression claim under section 490.1430 is entitled to an award of attorney fees under section 490.1434(5). The district court is required to determine a reasonable fee. Iowa courts recognize that the district court is an expert on the issue of reasonable attorney fees.² "A reasonable attorney fee is initially calculated by multiplying the number of hours reasonably expended on the winning claims times a reasonable hourly rate."³ The reasonableness of the hours expended and the hourly rate depends upon the facts of each case⁴ and there is no bright line formula for making these determinations.⁵

The factors to consider when awarding reasonably necessary attorney's fees 'include the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service. The district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case.'⁶

² *Kragnes v. City of Des Moines*, No. 13-2065, slip op. at 3 (Iowa Jan. 14, 2015) (citing *King v. Armstrong*, 518 N.W.2d 336, 337 (Iowa 1994))

³ *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832-33 (Iowa 2009)

⁴ *Id.*

⁵ *Id.*

⁶ *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d at 842

The district court is not required to provide the precise bases of its award.⁷ In making its determination, the law gives the district court significant discretion.⁸ The party seeking an award of fees has the burden of proving the fee was reasonably necessary and the charges were a reasonable amount.⁹ An attorney is not guaranteed payment at a fixed hourly rate for every hour expended.¹⁰ With these principles in mind, the court addresses the attorney fee award sought by Calkins.

Calkins seeks reimbursement of attorney fees of \$211,766 he paid to the Belin Law Firm. He also seeks \$48,150.50 for attorney fees he paid to Jeff Winick, a Chicago attorney that represented him prior to commencement of the litigation in this matter. Trial counsel for Calkins was Matthew McDermott who charged \$325.00 to \$350.00 per hour. The firm also utilized Christopher Jessen, an associate, during the case at a rate of \$200.00 per hour. Other senior attorneys and paralegals were also utilized on the matter; however, McDermott and Jessen did most of the work. McDermott is a shareholder in the firm practicing in Des Moines since 2003.

The attorney fees for Jeffrey Winick were fees incurred from April 2015 through October 2016, which was the period when the parties were negotiating a buyout of Calkins' interest in the company. Winick practiced law in Chicago for over twenty years at the time of his representation of Calkins. Winick's hourly rate was \$670.00.

The court will first address the fees sought for the legal services provided by McDermott. Calkins filed suit on July 7, 2017 seeking damages under two counts, oppression pursuant to

⁷ *Bremicker v. MCI Telecommunications Corp.*, 420 N.W.2d 427, 429 (Iowa 1988)

⁸ *Mississippi Valley Broad., Inc. v. Mitchell*, 503 N.W.2d 617, 619 (Iowa Ct. App. 1993) (“This court will reverse for an abuse of discretion ‘only when such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.’”) (quoting *Rowen v. LeMars Mut. Ins. Co.*, 357 N.W.2d 579, 583 (Iowa 1984)).

⁹ *Ales v. Andersen, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d at 842

¹⁰ *See Green v. Iowa Dist. Court*, 415 N.W.2d 606, 608 (Iowa 1987)

Iowa Code section 490.1430 and multiple breaches of fiduciary duties. The latter claims also included claims for corporate waste and/or misapplication of corporate assets. In its decision, the court found Calkins proved his claim of oppression and awarded \$1,193,175 as his value in the corporation. The court denied his claims for corporate waste and/or misapplication of corporate assets.

Defendants resisted the amount of fees sought by Belin. Defendants argued prior to trial Calkins sought damages of \$5.5 million, which he reduced to \$2.173 million at the time of trial.¹¹ Defendants argued Calkins only recovered approximately 20% of his pretrial damages.¹² Defendants also attacked the hourly rates of McDermott and Stephen Zumbach, a senior shareholder who charged \$480.00 per hour. Defendants' provided the affidavit of Benjamin Roach, their trial counsel, with the Nyemaster Law Firm who charged \$285 to \$295 per hour. A senior shareholder from Nyemaster who also worked on the case, Rick Neumann, charged \$430.00 per hour. Roach began practicing in Des Moines in 2003 the same year, as did McDermott. Roach indicated he worked 302.7 hours and another shareholder, Katie Graham, billed 60.5 hours.¹³

¹¹ Defendants' Resistance at 2 n.2 (Polk Cty Dist. Ct. April 15, 2019)

¹² Using the defendants' argument Calkins recovered 55% of the damages claimed at trial.

¹³ Utilizing Roach's hourly rate of \$295 and his hours expended on the case were \$89,296.50. Roach did not inform the court of the Ms. Graham's hourly rate. She began practicing in Des Moines in 2006. If the court assumes her hourly rate to be \$265.00 based upon the court's knowledge of prevailing rates for a shareholder with twelve years of experience. *See Standard Water Control Systems, Inc. v. Jones*, EQCE075412, Order Re: Motion for Attorney Fees and Costs at 5 (Polk Cty Dist. Ct. Feb. 11, 2015) (Shareholder with ten years of experience charged \$250.00 per hour) and *Standard Water Control Systems, Inc. v. Jones*, EQCE075412, Order re: Trial Attorney Fees, Appellate Attorney Fees and Sheriff's Sale at 14-15 (Polk Cty Dist. Ct. Mar. 24, 2017) (shareholders with ten years of experience charging between \$250.00 and \$295.00 per hour). At \$265.00 per hour and 60.5 hours her fees were \$16,032.50. The court is unaware whether other attorneys or paralegals may have worked on the file and the court does assume that to be the fact since the court is aware Rick Neumann was involved in the matter as probably other associates or paralegals.

The parties during oral argument suggested the court determine fees based upon the percentage of success Calkins had with regard to the claims he raised. Calkins argued he was entitled to over 90% of the fees requested since while he did not prevail on all of his claims the services provided, the witnesses utilized and the time expended covered not only Calkins oppression claim but also his corporate waste or misapplication of corporate assets claims. Calkins argued virtually the same evidence was needed to establish either claim. Defendants argue Calkins only received about 20% of his claimed damages and his claim for attorney fees should be reduced commensurate with that number.

The court at the suggestion of the parties reviewed its decision analyzing the witnesses necessary to prove the claim for oppression and the witnesses necessary to prove the claim for corporate waste or misapplication of corporate assets. The obvious witnesses to prove the claim for oppression were Calkins, Donald Brandt, Patricia Gagne, Dan Montgomery, Wayne Walkotten and to a limited extent Ted Lodden. Also to a limited extent the testimony of Randy Brandt, Michelle Suckow, and Rob Rater were required.¹⁴ Calkins, throughout trial and based upon questions posed at trial to various corporate witnesses, which included Gagne, Montgomery, Rater, Suckow and Randy Brandt, and during discovery expended a considerable amount of time establishing and attempting to prove his claim for corporate waste and/or misapplication of corporate assets. When the court examines the record, the court concludes a significant amount of time was spent developing a claim or claims on which Calkins did not prevail. The result obtained is a factor the court may consider when determining an appropriate award of attorney fees.

¹⁴ The significance of their testimony limited primarily to actions taken at a meeting when the decision was made to terminate Calkins' employment.

Prior to Calkins' termination his last offer to Donald Brandt for his value in the company was \$1,342,386.00.¹⁵ Calkins requested the court award him \$1,325,240 for the fair value of his interest in the company after trial. The amount last offered by Calkins and requested after trial was approximately \$150,000 to \$155,000 less than awarded.

With regard to his claim for corporate waste or misapplication of corporate assets, Calkins requested the court award him \$377,879.00. As noted above the court did not award these damages to Calkins.

A review of the itemized billing statements presented by Belin demonstrated the firm expended between November 2016 and July 2017 approximately \$52,000 prior to the filing of the lawsuit. Between July 2017 and September 2018, Calkins incurred approximately \$98,000 for discovery and trial preparation. The trial was in October 2018 and trial costs were \$48,375.27. From November 2018 to the present, Calkins incurred \$17,750.55 in fees on post-trial issues.

The court finds the difference in hourly rates between McDermott and Roach are not significant enough for the court to reconcile those differences. The same is true as to the differences in hourly rates between Steven Zumbach and Rick Neumann. Of the four day trial one day was probably spent attempting to prove the corporate waste claims and damages related to that claim. The court finds after reviewing the itemized billings from the Belin Law Firm, the time spent, the hourly rates charged, examining the work performed as it related to the claims brought by Calkins, and the results achieved the reasonable and necessary costs for bringing Calkins' claims to judgment is 25% less than the legal fees requested. The court finds defendants

¹⁵ Exhibit 24

shall pay as reasonable and necessary legal fees the amount of \$158,825.00 for the legal fees paid to the Belin Law Firm.

With regard to Winick's fees a review of his billing statements demonstrate his work involved the discussions with the defendants' counsel, Rick Neumann regarding the retention of Marsh Berry for the initial valuation and negotiations between the parties regarding the value of Calkins' interest in the company. This involved fees incurred between April 2015 and July 2016. These fees were not generated in preparation for matters associated with Calkins' claim for oppression. While some of the events may have provided evidence towards establishing Calkins' claim for oppression the primary interest during this time was reaching an agreement on Calkins' value in the company. Calkins expended \$24,696.00 for these services. The services from August 2016 through October 2016 largely were further attempts by Winick to reach a resolution of the dispute with Neumann, defendants' counsel. There appears to be research conducted by Winick and another member of his firm regarding oppression claims. These services were performed on August 3, 5 and September 16, 2016. Winick and another attorney with the initials, CKW, performed these services. CKW's hourly rate was \$450.00. The time involved with these, services were approximately \$4,400.00. The court finds the research performed on the oppression claims would be reasonable and necessary for the prosecution of Calkins' oppression claim. As a result the court finds Calkins is entitled to receive \$4,400.00 from the defendants on the fees he paid to Winick. The remaining fees were not incurred to prosecute the oppression claim but on attempts to resolve the dispute.

The expert fees incurred for Marsh Berry of \$17,859.22 were clearly incurred in the prosecution of the oppression claim. The court finds these expenses were necessary and

reasonable for the prosecution of this claim. The defendants shall pay to Calkins the amount of \$17,759.22 for these expenses.

Ted Lodden's expert fees were \$18,048.50. While the court cited to a couple of Lodden's opinions in its decision the primary focus of Lodden's testimony was the damage Calkins requested for the corporate waste or misapplication of corporate asset claim. The court relied on Lodden's comments regarding calculation of discount rates, the reduction of corporate perks when valuing companies and Marsh Berry's experience at determining weighted average of equity capital involving insurance companies. Lodden charged \$290.00 per hour for his services.¹⁶ The court finds that the necessary and reasonable time spent to develop the opinions the court relied upon and present them at trial at 10 hours. The defendants shall pay Calkins \$2,900.00 for the expenses Calkins incurred for Ted Lodden's services.

Calkins seeks an award for litigation expenses he paid to the Belin Law Firm for \$4,409.59. He seeks these expenses pursuant to section 490.1434(5), which provides the prevailing party may receive reasonable expenses of counsel.

"Court costs are taxable only to the extent provided by statute."¹⁷ "Because costs were not recoverable at common law, statutes providing for their recovery are strictly construed."¹⁸ Our supreme court has construed "'all costs' language in fee-shifting statutes to limit reimbursement for litigation expenses to those allowed as taxable costs."¹⁹ The court does not

¹⁶ McDermott Aff. 83

¹⁷ *Schark v. Gorski*, 421 N.W.2d 527, 528 (Iowa 1988)

¹⁸ *Id.*

¹⁹ *City of Riverdale v. Diercks*, 806 N.W.2d 643, 660 (Iowa 2011) (citing *Iowa Dep't of Transp. v. Soward*, 650 N.W.2d 569, 572 (Iowa 2002) (defining "all costs" in Iowa Code section 6B.33 to mean taxable court costs; rejecting reimbursement for expert-witness fee above \$150 per day); *City of Ottumwa v. Taylor*, 251 Iowa 618, 622, 102 N.W.2d 376, 380 (Iowa 1960) (rejecting argument that "all costs" in section 472.33 includes "all expenses reasonably necessary in preparation and trial of the appeal").⁷

believe the use of the term “expenses” in section 490.1434(5) instead of “costs” would change our supreme court’s analysis of this issue.

The costs of depositions not offered during trial are not recoverable.²⁰ Calkins incurred deposition costs for Wayne Walkotten for \$145.30. This deposition was not introduced into evidence at trial so his amount is not recoverable. Calkins incurred deposition costs for the depositions of Calkins, Lodden, Donald Brandt, Randy Brandt and Robert Rater for \$2,423.75. These depositions were not offered into evidence at the time of trial so they are not recoverable.

Calkins seeks recovery of costs for lunches at \$34.64; postage for \$40.42 conference calls for \$162.77; Bankers Trust Logik Storage System for \$18.56; Acurint searches for \$30.67 and photocopies for \$1,039.60. None of these items are allowed as taxable costs under chapter 625. Thus, Calkins cannot recover these costs.

Postage that is incurred for the “sending of process, depositions, and other papers being part of the record, by mail,” may be taxed as costs. Calkins seeks recovery of \$40.42 for postage, however, it is not clear whether these costs were incurred for the “sending of process, depositions, and other papers being part of the record, by mail.” Calkins may submit further evidence establishing these costs meet the statutory definition and the court will reconsider the request.

Finally, Calkins seeks recovery of \$30.00 for a subpoena issued by the Fulton County Clerk of Superior Court to the Boys and Girls Clubs of America. This is cost allowed under section 625.7 as the fee of an officer. The court finds the clerk of court would be an officer for purpose of issuing a subpoena. Calkins is entitled to the recovery of this cost.

²⁰ *Woody v. Machin*, 380 N.W.2d 727, 730 (Iowa 1986)

Calkins seeks recovery of the filing fee for this case for \$185.00. This amount was not taxed in the clerk's bill of costs to the defendants. This is a recoverable court cost under section 625.14. Calkins is entitled to receive the \$185.00 filing fee from the defendants.

IT IS THEREFORE ORDERED Calkins has judgement against the corporate defendants and Donald Brandt, jointly and severally, for \$158,825.00 for payment of legal fees to the Belin Law Firm.

IT IS FURTHER ORDERED Calkins has judgement against the corporate defendants and Donald Brandt, jointly and severally, for \$4,400.00 for payment of legal fees to the Winick Law Firm.

IT IS FURTHER ORDERED Calkins has judgement against the corporate defendants and Donald Brandt, jointly and severally, for \$17,859.22 for expert witness fees paid to Marsh Berry.

IT IS FURTHER ORDERED Calkins has judgement against the corporate defendants and Donald Brandt, jointly and severally, for \$2,900.00 for expert witness fees paid to Ted Lodden.

IT IS FURTHER ORDERED Calkins has judgement against the corporate defendants and Donald Brandt, jointly and severally, for \$215.00 as expenses recoverable under section 490.1434(5).

IT IS FURTHER ORDERED the defendants shall make payment of these awards in the last installment ordered by the court in its order dated March 15, 2019. These awards are due on January 1, 2022. Post-judgment interest will accrue on these awards beginning on the date the order is filed at 3.96%.²¹

²¹ See federalreserve.gov/release/h15/ (The one-year treasury constant maturity on June 26, 2019 was 1.96. Pursuant to section 668.13(3), 2% is added to this value.)



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
EQCE081752 RUSSELL W CALKINS III VS DONALD R BRANDT ET AL

So Ordered

A handwritten signature in black ink, appearing to read "L. P. McLellan". The signature is written in a cursive, flowing style.

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa