MAINE MOTOR VEHICLE FRANCHISE BOARD

M.M.V.Bd. No. 17-01, COUNT VII

Darling's, )

Petitioner, )

)

v. ) ORDER ON ATTORNEY’S FEES

)

Ford Motor Company, )

Respondent. )

Pending before the Board is Darling’s Application for Attorney’s Fees and Costs, filed with the Board on October 19, 2020, along with exhibits and attorney Patient’s Supporting Affidavit; Ford filed its Brief on October 26, Darling’s Replied to Ford’s Brief on October 28, and Ford Replied to Darling’s Response on November 23. Darling’s application is GRANTED as set forth below.

Title 10. § §1173 governs the present question.

**1**. **Civil remedies.**  Any franchisee or motor vehicle dealer who suffers financial loss of money or property, real or personal, or who has been otherwise adversely affected as a result of the use or employment by a franchisor of an unfair method of competition or an unfair or deceptive act or any practice declared unlawful by this chapter may bring an action for damages and equitable relief, including injunctive relief. When the franchisee or dealer prevails, the court shall award attorney's fees to the franchisee or dealer, regardless of the amount in controversy, and assess costs against the opposing party. For the purpose of the award of attorney's fees and costs, whenever the franchisee or dealer is seeking injunctive or other relief, the franchisee or dealer may be considered to have prevailed when a judgment or other final order providing equitable relief is entered in its favor. …

In considering Applications for Attorney’s Fees, Maine courts have long applied twelve factors set out by the 5th Circuit Court of Appeals in [*Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717–19 (5th Cir.1974)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974108744&pubNum=0000350&originatingDoc=I68c66c2c34cb11d9abe5ec754599669c&refType=RP&fi=co_pp_sp_350_717&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_717)

(1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Poussard v. Commercial Credit Plan, Incorporated of Lewiston*, 479 A.2d 881, 884(Me. 1984) and *Gould v. A-1 Auto, Inc,* 2008 ME 65, ¶ 13, both contain this language.

Attorney Patient has submitted a thirty-two page record of the time she spent on this matter as well as the time spent by Attorney Metcalf and paralegal Robin Thompson. Patient accompanied the 400-odd time entries with decisions of Maine superior courts and this Board. She then applied the twelve factors long-used by Maine Courts to the time recorded in the Fee Application.

In response, Ford did not review the bill in detail, nor did it consider the *Poussard* factors, but simply argued that the Board’s decision is flawed, so no fee is payable. If, however, Ford must pay any attorney’s fee for Darling’s in-house representation, that fee cannot be based upon a “fictitious” hourly rate rather than counsel’s actual salary. Ford objected to only two specific entries: five obvious clerical errors which had attorney Patient conferring with herself, and the bill for all of her travel time to Detroit. Ford did not question any of the other time entries.

Courts have applied two theories in considering the fees and costs of in-housel like attorney Patient. The cost-plus rate of computing the fees of in-house counsel is based on the actual salary, cost and overhead of counsel; the market theory looks to the time spent and the attorney’s hourly rate, limited to the customary fee in the community. Ford has argued that the cost-plus analysis must apply to the fees sought here; Darling’s argues that the market rate should apply.

Ford repeatedly characterized the market fee, the theory which Darling’s used as fictitious, false, and imaginary. This language finds no support in *Rodriguez v. City of New York,* 721 F. Supp. 2d 148 (2010), nor in  *Soft Solutions, Inc. v. Brigham Young University,* 200 UT 46, 1 P. 3d 1095, cited by Ford, nor in any other cited case. Rather, the courts in both *Rodriguez* and *Soft Solutions* recognized the market analysis theory, but rejected it and applied the cost- plus theory.

In reply, Darling’s, distinguished the two Maine cases Ford cited, In *Net 2 Press, Inc. v. National Graphic Supply Corp.* 324 F. Supp. 2d 15, (D. Me. 2004) the statute allowed for reimbursement of only “actual expenses.” In *Carvel Co. v. Spencer Press, Inc.,* Me. Super. LEXIS 400 (Aug 27, 1997), the hourly rate and the hours were not contested, and the prevailing attorney did not ask that the court apply the market rate.

As argued by Darling’s state and federal courts differ on which analysis should apply. At least three states, Texas, Colorado, and California, the U.S. Supreme Court, the 3d and 9th Courts of Appeal, and federal District Courts in Rhode Island and Pennsylvania have applied the market rate. Indeed, the 9th Circuit Court of Appeals referred to the “modern trend” of using the market rate to determine in-house attorney’s fees*.* [*Milgard Tempering, Inc. v. Selas Corp. of Am., 761 F.2d 553, 558 (9th Cir.1985)*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126012&pubNum=0000350&originatingDoc=I0c2402c4284311dea82ab9f4ee295c21&refType=RP&fi=co_pp_sp_350_558&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_558); *see also* [*Blum v. Stenson,* 465 U.S. 886, 892–94, 104 S.Ct. 1541, 1545–47, 79 L.Ed.2d 891 (1984)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984114238&pubNum=0000708&originatingDoc=I0c2402c4284311dea82ab9f4ee295c21&refType=RP&fi=co_pp_sp_708_1545&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_1545) Which held that the nonprofit legal aid organization which represented prevailing Civil Rights Act litigant was entitled to recover attorney’s fees calculated under prevailing market rate rather than cost-related basis, even if the fee so calculated exceeded the salaries and expenses of staff counsel);.

In *PCLM Group Inc., v. Drexler* 22 Cal.4th 1084, 997 P2d 511, 520, 95 Cal.Rptr.2d 198, 208 (2000), the Supreme Court of California considered a statute which provided the prevailing party with attorney’s fees and stated that the generally prevailing rates in a particular market will

necessarily take into consideration such factors as salaries, overhead, costs of support personnel, and incidental expenses [as does the cost-plus analysis], [h]owever the market-rate approach has the virtue of being predictable for the parties and easy to administer. By contrast, the cost-plus approach, in addition to being cumbersome, intrusive, and costly to apply, may distort the incentives for settlement and reward inefficiency.

Indeed, while the Utah court in *Soft Solutions, supra,* reversed the lower court and rejected the market analysis, its instructions on remand demonstrate why the California Supreme Court found that the cost-plus approach to be ”’cumbersome, intrusive, and costly to apply.  *PCLM Group, supra,* at ¶ 52.

To assist the district court on remand, we set forth general guidelines to be considered in making such an award. Fees for in-house counsel are limited to consideration actually paid or for which the party is obligated, calculated using a cost-plus rate and taking into account (1) the proportionate share of the party's attorney salaries, including benefits, which are allocable to the case based upon the time expended, plus (2) allocated shares of the overhead expenses, which may include the costs of office space, support staff, office equipment and supplies, law library and continuing legal education, and similar expenses.  The party seeking recovery of fees has the burden of proving these amounts. (internal citation omitted) *Soft Solutions, supra, at* ¶ 52.

In *PCLM, supra, 1d,* the California Supreme Court quoted a 3d Circuit case as follows: *Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co. of N.Y.* (3d Cir.1960) 281 F.2d 538, 542

There is no reason in law or in equity why the insurer should benefit from [the insured’s] choice to proceed with some of the work through its own legal department. We discern no basis for discriminating between counsel working for a corporation in-house and private counsel engaged with respect to a specific matter or on retainer. Both are bound by the same fiduciary and ethical duties to their clients. Both are qualified to provide, and do provide, equivalent legal services. And both incur attorney fees and costs in enforcing the contract on behalf of their client. (citations omitted)

In 2009 the Court of Appeals of Texas applied the market analysis to set the fees of in-house counsel; it noted that other state and federal courts have also done so. *AMX Enterprises L.L.P, v. Master Realty Corp.* 283 S.W. 3d, 506, 518-19 (Tex. 2009), *See* [*Carter v. Rhode Island,* 25 F.Supp.2d 24 (D.R.I.1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998226929&pubNum=0004637&originatingDoc=I04a110b8f55511d983e7e9deff98dc6f&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), and [*Blum* v. St*enson, supra,*  at 104 S.Ct. 1547, 7](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984114238&pubNum=0000708&originatingDoc=I04a110b8f55511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_708_1547&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_708_1547), holding that ‘reasonable fees’ in a federal civil rights action are to be calculated according to the prevailing market rates in the relevant community, “regardless of whether plaintiff is represented by private or nonprofit counsel.”[*Balkind v. Telluride Mountain Title Co.,* 8 P.3d 581, 588 (Colo.App.2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000394300&pubNum=0004645&originatingDoc=I0c2402c4284311dea82ab9f4ee295c21&refType=RP&fi=co_pp_sp_4645_588&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4645_588)“Salaried and public interest attorneys should be awarded attorney fees based on the prevailing market rate rather than a ‘cost-plus’ approach focusing on the attorney’s salary.”; [*Cottman Transmission Sys., Inc. v. Martino,* Nos. CIV.A. 92–7245, CIV.A. 92–2131, CIV.A. 92–2253, 1993 WL 541680, at \*15 (E.D. Pa. Dec. 22, 1993)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994020514&pubNum=0000999&originatingDoc=I0c2402c4284311dea82ab9f4ee295c21&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (“The Third Circuit has indicated that there is nothing improper about a market rate calculation for attorney fee awards for salaried in house counsel.”), *vacated on other grounds,* [36 F.3d 291 (3rd Cir.1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994189482&pubNum=0000506&originatingDoc=I0c2402c4284311dea82ab9f4ee295c21&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).,

The Court of Appeals of Texas rejected Ford’s argument here that the market value method creates a windfall for the prevailing party. It noted “that calculating fees at less than the market value creates a windfall for the losing defendant.” *AMX Enterprises, supra, at 519, and see Serrano v. Unruh,* 32 Cal. 3d 621, 186 Cal. Rptr.754, 652 P.2d*.* 985, 999(1982) This would be the effect of applying the cost-plus to Darling’s attorney fees; rather than Darling’s receiving the market rate for its fees, Ford would benefit because Darling’s hired its long-time counsel directly. This is the reverse of the language and the intent of Section 1173.

It bears pointing out that this language mandates that the manufacturer pay the dealer’s attorney’s fees, and it is part of Maine law enacted to address the imbalance of power between automobile manufacturers and Maine dealers. This is an often cited for including fees in remedial sttutes.

Ford argued that it should pay no attorney’s fees at all, but if a fee is due, it must be based upon the cost-plus theory. It objected to only to five clerical errors and the fact that attorney Patient billed for all of her travel time to Detroit. Darling’s fees and costs are reasonable and bear scrutiny under the *Poussard* factors. This matter was litigated over a period of twenty months; it presented the novel and difficult issue of whether the parties entered into a contract outside their franchise agreement, as such it called for focused and skilled representation; counsel’s hourly fee is reasonable and in accord with fees in the local community for able and experienced counsel with special expertise in the Dealers Act gained in years of representing Darling’s; Counsel achieved an excellent result and the amount involved does not matter under §1173. Darling’s application for fees and costs is APPROVED.

WHEREFORE

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John McCurry, Chairman

Maine Motor Vehicle Franchise Board