

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

JANICE R. WINTERS, an individual;
ALBERT M. TIECHE, JR., an individual;
**LEE STONE ARMSTRONG
HOLDINGS**, a Florida partnership;
THOMAS FINKBINER, an individual;
BARBARA KESLINKE, an individual,

GENERAL JURISDICTION
DIVISION

Case No.: 05-20353 CA21

Plaintiffs,

vs.

SOUTH BEACH FRANCHISING, LLC.,
a Florida limited liability company;
CAROL BROTHERS, an individual;
FRANCORP, INC., an Illinois corporation; and
DONALD BOROIAN, an individual,

Defendants.

COPY

**PLAINTIFFS' MOTION FOR ATTORNEYS' FEES
AGAINST DEFENDANTS FRANCORP, INC. AND DONALD BOROIAN**

Plaintiffs, JANICE WINTERS, ALBERT M. TEICHE, JR., LEE STONE ARMSTRONG HOLDINGS, THOMAS FINKBINER, and BARBARA KESLINKE ("Plaintiffs"), pursuant to the November 3, 2009 Order of Final Judgment from this Court (and subsequently filed on November 24, 2009), and in connection with the jury verdict reached in this matter, respectfully request an Order from this Court: 1) awarding reasonable attorneys' fees and costs in favor of Plaintiffs and against Francorp, Inc. and Donald Boroian (collectively hereinafter "Defendants"); and 2) setting the amount of attorneys' fees and costs. In support of this motion, Plaintiffs would show the Court as follows:

I. BACKGROUND

Following nearly four years of litigation, and a five day jury trial, the jury in this matter returned a verdict in favor of all Plaintiffs. The jury's verdict confirmed that Plaintiffs prevailed on every count on which the jury was asked to deliberate; in fact, the jury awarded the Plaintiffs every penny that the Plaintiffs requested. Following the jury's verdict, on November 3, 2009, this Court entered a Final Judgment in favor of all Plaintiffs on Plaintiffs' claims of Fraud in the Inducement and Concealment, Negligent Misrepresentation and Omission, Violation of the Florida Franchise Act, Violation of the Florida Deceptive and Unfair Trade Practices Act, Violation of the Florida Sale of Business Opportunities Act, and Conspiracy. [The Final Judgment is annexed hereto at Exhibit "A."]

Prosecution of this document intensive matter required extensive travel and extensive investigation. Throughout discovery of this matter, the parties were required to travel throughout the State of Florida, and to the State of Illinois. Witnesses that testified in the case, and the interviewed potential witnesses in the action, were located throughout the country in, among other places, Kentucky, Virginia, New York, and Ohio. Defendant Boroian himself testified at trial that he spent approximately \$500,000.00 in attorneys' fees defending this case.

II. ARGUMENT

Plaintiffs are entitled to recover the reasonable attorneys' fees incurred in connection with their claims under the Florida Deceptive and Unfair Trade Practices Act, the Florida Franchise Act, and the Florida Sale of Business Opportunities Act.

Section 501.2105, Florida Statutes, permits the prevailing party in FDUTPA litigation to collect its costs and reasonable attorneys' fees from the non-prevailing party. The statute contemplates a recovery of attorneys' fees for the entire litigation, and not just the time spent on the FDUTPA claim if the alternative theories of recovery are based upon the same set of facts. Smith v. Bilgin, 534 So.2d 852, 854 (Fla. 1st DCA 1988); *see also* Heindel v. Southside Chrysler-Plymouth, Inc., 476 So.2d 266, 271 (Fla. 1st DCA 1985); LaFerney v. Scott Smith Oldsmobile, Inc., 410 So.2d 534 (Fla. 5th DCA 1982) ("proof of a deceptive trade practice under Chapter 501 may well, and frequently does, involve proof of breach of contract and fraud or misrepresentation. It is analogous to the prosecution in a criminal case proving commission of a greater felony, and in doing so proving up lesser included offenses").

Similarly, Plaintiffs are entitled to collect their attorneys' fees under the Florida Franchise Act, Fla. Stat. § 817.416(3); *see also* Boca Mara Properties, Inc. v. Intn'l Dairy Queen, Inc., 732 F.2d 1550 (11th Cir. 1984), and the Sale of Business Opportunities Act. *See*, Fla. Stat. § 559.813 (3).

A. The Amount of A Reasonable Fee Award

A reasonable fee award is determined under the "federal lodestar approach" adopted by the Supreme Court of Florida in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). The "lodestar" approach requires a two step analysis. The first is calculating the "lodestar," which is the product of the time expended in performing the services, multiplied by a reasonable hourly rate. The second step is determining whether the lodestar should be enhanced or reduced through consideration of the following factors:

- (1) The time and labor required, the novelty and difficulty of the question 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.

Id. at 1150.

1. The Lodestar

The first step in fixing the lodestar is the calculation of the hours expended. The records attached to the affidavit of Robert M. Einhorn, Esq. (submitted herewith at Exhibit B) satisfy the *Rowe* requirement that counsel keep "accurate and current records

of work done and time spent on a case, particularly when someone other than the client may pay the fee.” *Id.*

The next step in determining the lodestar is to establish a reasonable hourly rate for the services provided. *Id.* The party seeking fees has the burden of establishing the “market rate; *i.e.*, the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services.” *Id.* at 115. As demonstrated in the records annexed to the Affidavit of Robert M. Einhorn, Esq., the Plaintiffs’ law firm expended \$258,475.16 in recorded attorney time on this matter. Plaintiffs will submit the declaration of an expert who will affirm that the rates charged by counsel were actually below the current prevailing “market rate,” as that concept is defined in *Rowe*.

2. Application of the Rowe Factors

Plaintiffs’ counsel prosecuted the instant action under a contingency fee arrangement. Plaintiffs, therefore, submit that the Court should award an enhancement of the lodestar under the *Rowe* factors. Plaintiffs will demonstrate that enhancements in cases of this matter typically range between 2.5 and 3.0.

a. *Time and Labor, Novelty, Difficulty and Skill Requisite to Perform the Subject Services*

In the pursuit of their judgment in this action, Plaintiffs’ proof of their claims at trial required significant skill, time and labor. Plaintiffs were required to unearth the fraudulent scheme of the co-conspiring Defendants, who even fabricated the existence of an attorney (“Marty Cohen”), and co-conspired to defraud the Plaintiffs. In proving their case, Plaintiffs were required to demonstrate that Defendant Francorp either knew or should have known of the fraudulent scheme, and that they either implicitly or explicitly

consented to Ms. Brothers' perpetration of the fraudulent scheme. Plaintiffs' efforts to expose this scheme, and Francorp's active participation therein (as evidenced by the jury's finding of a conspiracy between the defendant parties), required the careful review and investigation of more than ten thousand (10,000) documents, and depositions and interviews with more than ten witnesses.

Plaintiffs also underwent significant efforts to investigate the whereabouts of Ms. Brothers' fabricated attorney, in order to confirm that he in fact did not exist. Needless to say, despite Plaintiffs' diligent efforts to locate the attorney, he was never located. Yet, Plaintiffs had to anticipate the risk that he would perhaps surface someday, as a result of the lies and deceit of the Defendants.

Plaintiffs' attorneys also expended significant time and effort to investigate Francorp's method of conducting business, and engaged in significant legal research on a variety of critical legal issues. Such issues included but were not limited to issues concerning the duties that professionals owe to third parties, the engagement in the unauthorized practice of law, and the application of the laws of the courts of both the State of Florida and the State of Illinois.

Notably, in the years preceding and leading up to the trial of this matter, Defendants refused to offer even a single penny in settlement of this matter. In fact, Defendants unnecessarily increased the stakes of the litigation, and unnecessarily escalated the litigation and the stakes of the litigation, through among other things, their filing and pursuit of a frivolous motion for sanctions, under Fla. Stat. § 57.105, against the Plaintiffs. Defendants also sought to thwart Plaintiffs' efforts to gather the requisite

discovery through untenable assertions of the attorney-client privilege, and used various other tactics to stall and thwart this litigation, which ultimately lasted four years.

As a result of Defendants' constant legal maneuvering, Plaintiffs' trial and justice was delayed for years, without good cause. Plaintiffs' attorneys have been required to dedicate significant time and labor to prove Plaintiffs' case, based upon a unique set of facts, and difficult legal principles.

b. The Likelihood, If Apparent To The Client, That The Acceptance of The Particular Employment Will Preclude Other Employment By The Lawyer.

Plaintiffs will show that prosecution of Plaintiffs' claims, and the trial of this matter, on a partial contingent fee basis precluded counsel from working on other fee paying matters. This factor therefore supports the requested award's reasonableness.

c. The Fee Customarily Charged In The Locality For Similar Legal Services

Plaintiffs will show that the requested fee is commensurate with fees charged in matters of comparable complexity and novelty.

d. The Amount Involved And The Results Obtained

The amount in controversy is in excess of \$360,000. Plaintiffs, through diligent prosecution of their case, were awarded every dollar that they requested, but the recovery required diligent and vigilant advocacy, both in the pleading, in discovery, and in the demonstration of proof. Moreover, Plaintiffs gained a significant benefit from their attorneys' in-depth knowledge and background in handling franchise-related cases. Finally, Defendant Boroian testified at trial that he spent in excess of \$500,000.00 in defending this action – an amount that exceeded the ultimate amount of the recovery.

In light of the foregoing, Plaintiffs will show that the requested fees are commensurate with the recovery and the uniqueness of the legal issues in the case.

e. The Time Limitations Imposed By The Client Or By The Circumstances

This factor has not application to this motion.

f. The Nature and Length of the Professional Relationship With The Client

Plaintiffs' law firm has represented these Plaintiffs since before the commencement of this action, which began in 2005.

g. The Experience, Reputation, and Ability of The Lawyer or Lawyers Performing The Services.

Plaintiffs will show that the requested fee is commensurate with this factor. As mentioned herein above, Plaintiffs' counsel have extensive experience in practicing in the relatively unique field of representing injured franchisees, such as the Plaintiffs in this action. The Plaintiffs' law firm carries a superior national reputation for excellence in their representation of such franchisees.

h. Whether The Fee is Fixed or Contingent

This matter began as a partial-contingent matter, but the fee arrangement was converted to a complete contingency arrangement early in the pendency of the litigation. After Plaintiffs made an initial, nominal payment, the undersigned counsel had no assurance of any payment at all. Counsel also assumed the risk of collecting any final judgment that might be procured.

In view of these considerations, this factor supports an enhancement of the fee by a multiplier of 2.5 to 3.0.

WHEREFORE, Plaintiffs respectfully request the entry of an Order and final judgment for: 1) reasonable attorneys' fees and costs, incurred in litigation before this Court in connection with obtaining a verdict and final judgment against Defendants Francorp and Boroian; and 2) for such other and further relief as this Court deems just and proper.

Respectfully submitted,

ZARCO EINHORN SALKOWSKI & BRITO, P.A.

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By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail upon: Carl F. Shoeppl, Esq., Schoeppl & Burke, P.A., 4651 North Federal Hwy, Boca Raton, Florida 33431-5133, on this 1st day of December, 2009.

By: 

K. BRIAN ROLLER