

COURIER SOLUTIONS, INC., §
§
Plaintiff, §
§
v. § Civil Action No. 3:08-CV-2254-N
§
CSA DELIVERY, INC., *et al.*, §
§
Defendants. §

ORDER

This Order addresses Plaintiff Courier Solutions, Inc.’s (“CSI”) motion for attorneys’ fees [118]. For the reasons that follow, the Court grants CSI’s motion in a modified amount. The Court orders Defendants Woodrow Clayton, Sr. and Action Courier & Logistics, LLC (collectively the “Clayton Defendants”) to pay CSI \$302,169.67 in attorneys’ fees.¹

I. ORIGINS OF THE GROUP’S FEE REQUEST

CSI brought suit against the Clayton Defendants in December 2008 for violations of the Lanham Act, 15 U.S.C. § 1051, *et seq.*, and for various state law violations, including common law unfair competition, breach of fiduciary duty, tortious interference with business relations, and violations of the Texas Anti Dilution Act.² Pl.’s Compl. ¶¶ 47-88 [1]. The

¹The Court awards attorneys’ fees to CSI payable only by the Clayton Defendants because under the Lanham Act, a court may award attorneys’ fees only to “prevailing part[ies].” 15 U.S.C. § 1117(a). The jury in this case found that Clayton Sr. and Action Courier & Logistics, LLC unfairly competed with CSI in violation of the Lanham Act. Ct’s Charge 13, 31 [111].

²Some of the Defendants originally filed suit in state court against CSI in 2008 for conversion, styled *CSA Delivery, Inc. d/b/a Courier Solutions of America, Inc., et al. v. Courier Solutions, Inc., et al.*; Case No. 2008-40185. Br. Supp. Defs.’ Mot. Transfer or Dismiss 4 [12]; *see also* Lippe Aff. ¶ 5 [118-1]. This litigation appears to have continued until after February 7, 2011, when the parties filed a joint motion for nonsuit in the state case.

Clayton Defendants unfairly competed with CSI and that CSI suffered \$350,000 in damages from Woodrow Clayton Sr.'s unfair competition and \$0 in damages from Action Courier & Logistics, LLC's unfair competition. Ct.'s Charge 13, 31.

After trial, CSI moved for entry of judgment. In the Order addressing CSI's motion, the Court found this case to be an exceptional case warranting attorneys' fees under the Lanham Act, 15 U.S.C. § 1117(a). Order, May 13, 2011 [116]. It directed the parties to confer regarding an appropriate amount of attorneys' fees and further directed that if the parties could not agree on an appropriate amount, CSI should apply for fees pursuant to Federal Rule of Civil Procedure 54(d)(2). *Id.* at 1. CSI subsequently filed the present motion.

II. THE FIFTH CIRCUIT'S ATTORNEYS' FEES STANDARD

In determining an appropriate fee award, courts first calculate a "lodestar" amount by multiplying a reasonable billing rate by the number of hours reasonably spent litigating the successful claim. *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 284 (5th Cir. 2008); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983). This calculation, however, excludes hours spent on "excessive, redundant, or otherwise unnecessary work" and on nonprevailing claims unrelated to successful claims. *Hensley*, 461 U.S. at 434-35. The court then increases or decreases the lodestar amount based on the "*Johnson* factors": (1) the time and labor required to litigate the case, (2) the novelty and difficulty of the questions involved, (3) the

Hoffman Aff. ¶ 35 [123-8]. All Defendants in this case countersued in federal court for conversion, breach of contract, and tortious interference with contract. Defs.' Am. Answer 26-30 [73-2].

other employment, (5) the customary fee for similar work in the community, (6) the fee or percentage of recovery the attorney quoted to the client, (7) whether the client or case required expedited legal work, (8) the amount involved and results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the attorney-client relationship, and (12) awards made in similar cases. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The lodestar necessarily “subsumes” some *Johnson* factors. *Hensley*, 461 U.S. at 434 n.9; *Sims v. Jefferson Downs Racing Ass’n, Inc.*, 778 F.2d 1068, 1084 (5th Cir. 1985).

III. THE COURT MODIFIES CSI’S PROPOSED LODESTAR

CSI presents an initial lodestar calculation of \$339,940.88, a number calculated by first adding time billed from December 2008 through May 2011 by five attorneys and one paralegal from the law offices of Lippe & Associates and West & Associates, LLP, Pl.’s Mot. 2, and then reducing that sum by 25% to account for time spent on nonprevailing and defensive claims.³ Pl.’s Reply 4.

³According to CSI, this amount represents litigation in the District Court. Pl.’s Reply 10 [132]. CSI also requests \$50,000 in appellate attorneys’ fees, \$15,000 for responding to a petition for certiorari, and \$35,000 for briefing and appearing before the Supreme Court for oral argument should the Supreme Court grant the writ. *Id.*

The Lanham Act does not distinguish between trial and appellate cases in relation to fee awards. *See* 15 U.S.C. §1117(a). However, appellate fees and trial fees may be different even within the same case. *See Tamko Roofing Prods., Inc. v. Ideal Roofing Co.*, 294 F.3d 227, 230-31 (1st Cir. 2002) (articulating a different test for appellate versus trial “exceptional cases” under the Lanham Act and declining to award appellate fees to prevailing party but affirming fee award for trial fees). Accordingly, circuit courts may award or decline appellate fees at the appeal stage, *see id.* at 230-31, and district courts may award appellate fees on remand after an appeal, *see Kiva Kitchen & Bath, Inc. v. Capital Distributing, Inc.*, 681 F.Supp.2d 807 (S.D. Tex. 2010) (calculating appellate attorneys’ fees on remand). Because either court may determine an award of appellate fees based on factors within the

The Clayton Defendants present two principle arguments to reduce CSI's lodestar.⁴ *See* Defs.' Resp. 3-11 [130]. First, the Clayton Defendants argue that CSI requests fees for hours not reasonably expended on claims under the Lanham Act because CSI did not properly segregate the time spent on nonstatutory claims. *Id.* at 8-11. Second, the Clayton Defendants dispute CSI's characterization of the case under the *Johnson* factors – specifically that the case was particularly difficult due to lengthy and complicated discovery. *Id.* at 11-25. The Court considers each argument in turn.

A. The Court Reduces CSI's Lodestar for Time Spent on Unrelated Claims⁵

appeal itself, *see, e.g., id.*, the Court declines to award CSI attorneys' fees for appellate litigation at this time.

⁴The Clayton Defendants have two other disputes with CSI's lodestar that the Court does not address at length. They first point out that CSI erred twice in its original motion. CSI accidentally submitted the wrong time sheets for West & Associates with its initial motion and then mis-labeled the amended exhibit. Defs.' Resp. 6, 13-14. The Court considers these mistakes harmless. The Clayton Defendants also note that they caught mathematical errors in CSI's original calculations, *id.* at 13-14; however, CSI remedied the errors in its reply, and the Court used CSI's revised numbers in this Order.

Additionally, the Clayton Defendants contend that CSI employed too many attorneys during the case (five attorneys from two law firms) and had too many attorneys present at hearings, depositions, and trial (one to three attorneys at each). *Id.* at 15-16. However, the Court does not find the number of attorneys excessive.

⁵In addition to improper segregation of claims, the Clayton Defendants argue that the proffered rate (\$200/hour) for Corey Hayden, a Lippe & Associates associate who has been practicing law for less than one year, is too high under both the initial lodestar – presumably for “hours [un]reasonably expended” because of Mr. Hayden's lack of experience and skill – and under the *Johnson* factors. Defs.' Resp. 3, 20, 24-25. The Court does not opine as to the proper billing rate for a first-year associate or a law student. However, Mr. Hayden is the only attorney (indeed, the only person) for which CSI submitted time from Lippe & Associates besides Mr. Lippe himself. *See* Lippe Aff. ¶ 9. As such, the Court does not find his time on the case unreasonable and believes that it has properly reduced CSI's initial lodestar to account for this consideration, if it be a consideration.

Under the Lanham Act, a party may recover only for work performed “in connection with claims filed under the [] Act.” *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 527 (citing approvingly opinions holding recovery under the Act limited to time spent on claims connected to the Act); *see also Hensley*, 461 U.S. at 434-35 (counseling that “[i]f a plaintiff has achieved only partial or limited success,” a court should exclude fees for work performed on unsuccessful claims in calculating a fee award). If, however, the claims under the Act and the claims connected to the Act are “so intertwined that it is impossible to differentiate between work done on claims,” a court may permit recovery for work performed on the non-Lanham Act claims. *Id.*; *see also Hensley*, 461 U.S. at 435 (“In other cases the plaintiff’s claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours Such a lawsuit cannot be viewed as a series of discrete claims.”). In intertwined cases, “[t]here is no precise rule or formula for [determining the time spent on each claim]. [A] district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.” *Hensley*, 461 U.S. at 436-37.

In its proposed lodestar, CSI reduced its fee by 25% to account for claims and defenses unconnected to the Act. Pl.’s Reply 4. However, given the numerous claims and defenses in this case, CSI’s reduction is inadequate. Therefore, the Court reduces CSI’s fee

by 33%⁶ to account for time spent on claims unconnected to the Act, for a revised lodestar of \$302,169.67.⁷

B. The Remaining Johnson Factors Do Not Warrant Further Adjustment

The Court now turns to whether its revised lodestar requires further adjustment in light of the *Johnson* factors. The parties' main disagreement under the factors focuses on CSI's allegations regarding unusually difficult discovery that unnecessarily protracted litigation.⁸ According to CSI, discovery complications affected: the time and labor required to litigate the case, the novelty and difficulty of the questions involved, the skill required to litigate the case, the fee or percentage of recovery quoted to the client, the amount involved and results obtained, the "undesirability" of the case, and the experience, reputation, and ability of the attorneys involved.⁹ *See* Pl.'s Mot. 5-8.

⁶Because this case involved intertwined facts, events, and actions, *see* Pl.'s Reply 5, the Court declines to attempt to allocate the time CSI spent on each claim.

⁷CSI's total time billed, as revised for typos in CSI's original total, is \$453,254.50. *See* Pl.'s Reply 4. $\$453,254.50 \times 0.66666667 = \$302,169.67$.

⁸Namely, CSI alleges difficult discovery because (1) Washington Mutual – a party to one of the main contracts in dispute – filed bankruptcy in the middle of the case and refused to cooperate in discovery, (2) the Clayton Defendants and their Codefendants initially concealed much of their business from CSI and "stonewalled" discovery, (3) CSI had difficulty in procuring tax returns from all Defendants, and (4) the case involved extensive document production and depositions. *See* Pl.'s Mot. 4-8.

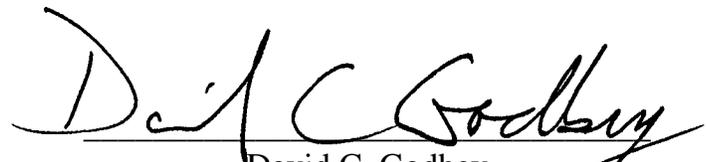
⁹CSI does not apply, and the Clayton Defendants do not dispute, the factors concerning whether the case precluded the attorneys from other employment, whether the case required expedited legal work, and the length and nature of the attorney-client relationship. Pl.'s Mot. 5-8; Defs.' Resp. 19, 22, 23-24. The parties do, however, dispute the "customary fees" factor and the "awards in similar cases factor" with regard to associate Cory Hayden. The Court addressed Mr. Hayden's rate in note five above.

It is true that CSI has had some trouble obtaining discovery in this case. *See* Order Granting Mot. Compel, Nov. 20, 2009 [37]; Order Granting in Part Mot. Compel, Mar. 4, 2010 [41]. However, given that (1) CSI submitted attorney time as the basis for its proposed award during the entire pendency of the federal litigation, Lippe Aff. ¶ 9, and (2) the Court used this submitted time to arrive at its revised lodestar, the Court finds that its revised lodestar aptly captures any unique discovery difficulties without further adjustment.

CONCLUSION

Because CSI presents an initial lodestar that includes fees too high for its Lanham Act claims and claims related to the Act, the Court reduces CSI's proffered lodestar to \$302,169.67. The Court concludes that the *Johnson* factors do not support further adjustment. Accordingly, the Court orders the Clayton Defendants to pay CSI its reasonable attorneys' fees of \$302,169.67.

Signed December 1, 2011.


David C. Godbey
United States District Judge