

GRANTED IN PART.

I. BACKGROUND

The procedural history of this case is extensive and, thus, only that portion relevant to this Court's disposition of Plaintiffs' Fee Petition will be provided below.

Following this Court's entry of summary judgment on June 25, 2002 in favor of Plaintiffs, Plaintiffs timely filed the instant Fee Petition on July 9, 2002. Defendants filed their Notice of Appeal to the Third Circuit on July 16, 2002. On July 23, 2002, the Third Circuit ordered Defendants' appeal stayed pending this Court's disposition of Plaintiffs' timely filed post-judgment motion.

Both parties were provided opportunity to brief the issue of attorneys' fees. On August 1, 2002, Defendants filed their Memorandum in Opposition to Plaintiffs' Fee Petition and, on August 12, 2002, Defendants filed a Pre-Hearing Memorandum. A hearing was held on August 14, 2002, after which time this Court ordered Plaintiffs' counsel to submit an additional memorandum within seven days concerning the allocation of fees and expenses as to certain issues, and Defendants' counsel to file a response thereto seven days thereafter. On August 22, 2002, Plaintiffs filed their Supplemental Memorandum and, on August 29, 2002, Defendants filed their Supplemental Memorandum.

Noting that they had already filed their Notice of Appeal with the Third Circuit, Defendants object to this Court's jurisdiction to rule on Plaintiffs' Petition as either a Rule 54(d) motion for attorneys' fees or a Rule 59(e) motion to amend the judgment. (Defs.' Mem. in Opp'n. to Pls.' Rule 54(d) Fee Pet., or in the Alternative, Mot. to Amend the J., at pp. 1-2.) Notwithstanding their objection to jurisdiction, Defendants also briefed this Court on the legal standard for awards of reasonable attorneys' fees under Massachusetts law.² (Defs.' Pre-Hearing Mem. Re: Att'ys.' Fees, at pp. 1-5.) In addition, Defendants argue that they are entitled to a jury trial on the reasonableness of requested attorneys' fees. (Defs.' Reply to Pls.' Supplemental Mem. Regarding Att'ys' Fees, at pp. 1-2.) Defendants, however, do not dispute the enforceability of the Franchise Agreement or the fee-shifting provision contained therein.

II. DISCUSSION

A. JURISDICTION

As a preliminary matter, Defendants object to this Court's jurisdiction to rule on Plaintiffs' Petition on the ground that

² Pursuant to the choice of law provision contained in the Franchise Agreement, Massachusetts law governs its interpretation. (Dunkin' Donuts Incorporated Franchise Agreement, ¶16.A.)

Defendants already filed their Notice of Appeal with the Third Circuit. The filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction upon a court of appeals and divesting a district court of its control over those aspects of the case involved in the appeal; however, it is well-settled that a district court retains jurisdiction to act in a limited number of circumstances, such as determining an application for attorneys' fees. Sheet Metal Workers' Int'l Assoc. Local 19 v. Herre Bros., Inc., 198 F.3d 391, 394 (3d Cir. 1999) (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)); Venen v. Sweet, 758 F.2d 117, 120 n.2 (3d Cir. 1985) ("A district court, during the pendency of an appeal is not divested of jurisdiction to determine an application for attorney's fees."). That well-settled principle, coupled with the Third Circuit's July 23, 2002 order staying Defendants' appeal, makes clear the Third Circuit's preference for attorneys' fees to be awarded along with the entry of final judgment to avoid piecemeal appeals. See Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988). Accordingly, this Court will retain jurisdiction to rule on Plaintiffs' petition for attorneys' fees.³

³ Defendants also argue that a jury must decide the issue of attorneys' fees. Although Defendants may have had a right to a jury decision on whether Plaintiffs were entitled to recover attorneys' fees pursuant to the terms of the Franchise Agreement, they do not have the right to a jury decision on the reasonable

B. APPLICABLE LAW

The enforceability of the fee-shifting provision contained in the Franchise Agreement is not in dispute, and provides for the award of reasonable attorneys' fees:

If FRANCHISEE fails to cure a default, . . . or if this Agreement is terminated, FRANCHISEE shall pay to DUNKIN' DONUTS all damages, costs and expenses, including without limitation interest at 18% per annum, or the highest permissible rate, and reasonable attorneys' fees, incurred by DUNKIN' DONUTS as a result of any such default or termination; and said interest and all damages, costs and expenses, including reasonable attorneys' fees, may be included in and form a part of the judgment awarded to DUNKIN' DONUTS in any proceedings brought by DUNKIN' DONUTS against FRANCHISEE

(Dunkin' Donuts Incorporated Franchise Agreement, ¶9.C.2.) The choice of law provision contained in the Franchise Agreement provides that the laws of the Commonwealth of Massachusetts shall govern its interpretation. (Id. at ¶16.A.)

In a diversity case, absent a conflicting applicable federal

amount of attorneys' fees. See McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1315 (2d Cir. 1993); see also Longport Ocean Plaza Condominium, Inc. v. Robert Cato & Associates, Inc., Civ. A. No. 00-CV-2231, 2002 U.S. Dist. LEXIS 12929, at *7-8 (E.D. Pa. March 5, 2002) ("it is permissible for a court to determine the amount of attorney's fees and costs to be awarded to a party pursuant to an . . . agreement in a separate proceeding, after a jury has determined that party may recover such an award While the Third Circuit has never opined on this procedure [t]his procedure is commonly used in other circuits as well . . . and is also the usual practice of this Court" (emphasis in original)).

rule of procedure, state law governs not only the actual awarding of attorneys' fees but also the method of determining those fees. Northern Heel Corp. v. Compo Industries, Inc., 851 F.2d 456, 475 (1st Cir. 1988); Buse v. Vanguard Group of Investment Cos., No. 91-3560, 1998 U.S. Dist. LEXIS 1242, at *8 (E.D. Pa. Jan. 30, 1998) (citations omitted).⁴ Parties may contract to permit recovery of attorneys' fees, and a federal court will enforce contractual rights to attorneys' fees if the contract is valid under applicable state law. See SNA, Inc. v Array, 173 F. Supp. 2d 347, (E.D. Pa. 2001), aff'd, No. 01-4313, 2002 U.S. App. LEXIS 17317 (3d Cir. August 19, 2002) (finding contract provision for recovery of attorneys' fees in event of breach enforceable under Pennsylvania law); Kucel v. Walter E. Heller Co., 813 F.2d 67, 73 (5th Cir. 1987) (finding same under Texas law); see also McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1313 (2d Cir. 1993) (citations omitted). Under Massachusetts law, counsel fees can be assessed pursuant to specific affirmative authority, such as a

⁴ The Federal Rules of Civil Procedure provide general guidance on the procedures to be followed for fee petitions, but do not set forth the specific procedure by which a prevailing party should move for attorneys' fees and expenses. Thus, the procedure is often handled on an ad-hoc basis. See, e.g., TPS Technologies, Inc. v. Rodin Enterprises, Inc., 816 F. Supp. 345, 351 (E.D. Pa. 1993) (ordering prevailing plaintiff to submit motion and proposed order for attorneys' fees); Carpenter Technology Corp. v. Armco, Inc., 800 F. Supp. 215, 228 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993) (establishing schedule for briefing of attorneys' fees issue when party entitled to fees).

contract. Northern Heel Corp., 851 F.2d at 475 (citations omitted).

In the instant matter, the Franchise Agreement contains specific authority for the award of reasonable attorneys' fees and neither party disputes the choice of law provision contained therein. Accordingly, this Court's award of Plaintiffs' reasonable attorneys' fees shall be guided by Massachusetts law.

C. FACTORS TO CONSIDER

Under Massachusetts law, in determining an attorney's fair and reasonable charge for his or her services,

many considerations are pertinent, including the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by controversy, and the results secured.

Mulhern v. Roach, 494 N.E.2d 1327, 1331 (Mass. 1986) (citations omitted).⁵ Not one of these factors is necessarily decisive, and the weight to be given to each of them will vary according to the

⁵ This method is different from the federal lodestar method, which is most commonly used when determining attorneys' fees in federal court. See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000); Lindy Brothers Builders, Inc of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167-169 (3d Cir. 1973), followed by, Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); Northern Heel Corp., 851 F.2d at 475.

nature of the services rendered in the particular instance under examination. Id. (citations omitted). A district court has broad discretion in awarding reasonable attorneys' fees.

Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1034 (3d Cir. 1996).

In support of their Fee Petition, Plaintiffs submit the following documents: (1) Affidavit of lead counsel, Robert L. Zisk, Esquire, of Schmeltzer, Aptaker & Shepard, P.C.; (2) "Partner, Associate & Legal Assistant Billing Rate Survey for Law Firms," which summarized billing rates in Washington, D.C., and was published by the National Survey Center in June 1, 2001; and (3) an itemized Matter Ledger Report.⁶ As to the substance of Plaintiffs' itemized Matter Ledger Report, Defendants object only that the time spent and expenses charged by Plaintiffs' attorneys were excessive.

We now turn to the factors considered when determining a reasonable attorneys' fees award under Massachusetts law.

1. Ability and Reputation of Attorneys and Demand for Their Services by Others.

Plaintiffs' attorneys, the approximately 45-member

⁶ Following this Court's instruction at the August 14, 2002 hearing, Plaintiffs submitted an itemized Matter Ledger Report that differentiated between fees and expenses relating to Plaintiffs' claims for nonpayment and to their defense against Defendants' counterclaims. (See Pls.' Supp. Mem. In Support of Pls.' Rule 54(d) Fee Pet., or in the Alt. Mot. to Amend the J.)

Washington D.C. law firm of Schmeltzer, Aptaker & Shepard, P.C., specialize in franchise litigation and have represented numerous national franchisers, including International House of Pancakes, Arby's, Meineke Discount Mufflers, Entre Computer Centers, Cottman Transmission Systems, Midas Mufflers, Burger King Corporation, Togo's Eateries, Inc. and Baskin-Robbins, Inc. Attorneys in the firm's franchise litigation practice have worked to establish a national reputation in the field of franchise law by presenting on relevant topics for such organizations as the International Franchise Association and the ABA Forum on Franchising, and by publishing newsletters on the topic of franchise litigation. The firm has represented Plaintiffs in litigation matters across the country since 1989 as its primary national litigation counsel, and has accumulated substantial knowledge of Plaintiffs' organization, policies, practices, filing methods and history.

2. Importance of Matter.

The focus of the underlying case was the enforcement of the parties' Franchise Agreement, which this Court previously determined that Defendants had breached. As franchisers, the enforcement of franchise agreements is of obvious importance to sustaining Plaintiffs' business purpose.

3. Time Spent.

Plaintiffs' attorneys and legal assistants assert that they have expended a total of 2,705.03 hours over a period of three years, from April 1999 to June 2002, in enforcing termination of the Franchise Agreement. Plaintiffs' attorneys took four depositions of Defendants and their accountants, including one in particular where questions were repeated on the second day following the deponent's refusal to answer them the first day, and were obligated to file numerous discovery motions for Defendants' failure to provide even the most basic documents and responses.

As Plaintiffs' attorneys have accumulated a familiar understanding of Plaintiffs' business operations in the course of more than ten years of representation, Plaintiffs' attorneys were able to expend a significantly less amount of time becoming familiar with Plaintiffs' business structure and franchise organization. This familiarity resulted in a corresponding reduction in fees and expenses.

4. Prices Charged for Similar Services in Similar Area.

The rates charged by Plaintiffs' attorneys and legal assistants are below market when compared with the rates charged for comparable services in the Washington D.C. area, according to the information contained in the billing rate survey published in

June 2001. For example, Plaintiffs' lead counsel, Robert Zisk, Esquire, billed Plaintiffs at a rate of \$225-\$285 per hour, reflecting the civil litigation experience he acquired over nineteen (19) years of practice, the last fifteen (15) years of which focused on franchise litigation. Mr. Zisk's billing rate is lower than eighty-one percent (81%) of all partners, regardless of experience, in the Washington D.C. area. By way of further example, Steven A. Browne, Esquire, the primary associate on the matter billed at a rate of \$160-\$210 per hour, a rate that is lower than the average billing rates of other associates at his level. The majority of the hours billed by attorneys on the case were worked by Mr. Zisk and Mr. Browne.

5. Amount Involved or Value of Property Affected by Controversy.

The value of the controversy was substantial, specifically, Plaintiffs' rightful possession of a franchise worth in excess of \$600,000.00.

6. Results Secured.

Plaintiffs' attorneys achieved Plaintiffs' primary goal of obtaining possession of its valuable business venture and terminating the Franchise Agreement.

D. AWARD OF REASONABLE ATTORNEYS' FEES AND EXPENSES

The Franchise Agreement provides that Defendants are responsible for reasonable attorneys' fees and expenses expended to enforce the Franchise Agreement. After careful consideration of the above factors, this Court is satisfied that the rates charged and time expended by Plaintiffs' attorneys were reasonable in light of Plaintiffs' counsel's ability and reputation, the importance of the matter, the prices charged in the Washington D.C. area, the amount involved, and the results secured. Having broad discretion to determine the reasonable amount of attorneys' fees, this Court grants Plaintiffs' Petition in part, specifically as to those discounted attorneys' fees⁷ and expenses expended for the nonpayment issue upon which they prevailed on summary judgment, and for defending against Defendants' counterclaims. Those amounts are \$97,499.70 in discounted attorneys' fees and \$13,872.96 in expenses for the nonpayment issue; and \$102,474.92 in discounted attorneys' fees and \$14,595.51 in expenses for their defense of Defendants' counterclaims.

III. CONCLUSION

Accordingly, Plaintiffs' Rule 54(d) Fee Petition, or in the

⁷ Plaintiffs received a dollar discount from Schmeltzer, Aptaker & Shepard on bills submitted in this case, which reflects an amount that is substantially less than the actual dollar value of the hours worked on the case.

Alternative, Motion to Amend the Judgment is **GRANTED IN PART.**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DUNKIN' DONUTS INC., et al.	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
GUANG CHYI LIU, et al.	:	No. 99-3344
Defendants.	:	00-3666

O R D E R

AND NOW, this day of October, 2002, in consideration of the Rule 54(d) Fee Petition, or in the Alternative, Motion to Amend the Judgment to Include an Order of Reasonable Attorneys' Fees and Expenses filed by Plaintiffs Dunkin' Donuts Incorporated and Third Dunkin' Donuts Realty, Inc. (Doc. No. 183); Memorandum in Opposition thereto filed by Defendants Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company (Doc. No. 188); Defendants' Pre-Hearing Memorandum re: Attorneys' Fees (Doc. No. 190); Plaintiffs' Supplemental Memorandum (Doc. No. 192); and Defendants' Reply thereto (Doc. No. 193), it is **ORDERED**:

1. Plaintiffs' Rule 54(d) Fee Petition, or in the Alternative, Motion to Amend the Judgment to Include an Order of Reasonable Attorneys' Fees and Expenses is **GRANTED IN PART**.
2. Judgment is **ENTERED** in favor of Plaintiffs, and against Defendants, in the amount of \$97,499.70 in attorneys' fees and \$13,872.96 in expenses for the nonpayment issue, and \$102,474.92 in attorneys' fees and

\$14,595.51 in expenses for their defense of Defendants' counterclaims.

BY THE COURT:

JAMES MCGIRR KELLY, J.