

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: December 15, 2013

Date Decided: March 25, 2014

Date Revised: March 28, 2014

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RE: *Preferred Investments, Inc. v. T&H Bail Bonds, et al.*
Civil Action No. 5886-VCP

Dear Counsel:

This matter is before me on objections by Plaintiff, Preferred Investment Services, Inc. ("PISI"), to the affidavit setting out the claimed reasonable attorneys' fees and expenses filed by counsel for Defendants on December 2, 2013 (the "Affidavit"). For the reasons that follow, I grant Defendants \$287,339.99 in attorneys' fees and expenses, with up to an additional \$19,914.77 for Defendants' expenditures relating to expert testimony, subject to my instructions set forth below.

I. FACTUAL BACKGROUND

In its July 24, 2013 Memorandum Opinion, the Court, among other rulings, ordered PISI to pay to Defendants 80% of the attorneys' fees and expenses that Defendants reasonably had incurred in this litigation.¹ Then, on July 31, PISI filed a motion for reargument or clarification of the Memorandum Opinion under Court of Chancery Rules 59(e) and 59(f). In a Letter Opinion entered on November 21, the Court denied that motion and directed counsel for Defendants to file, within ten days, an affidavit "setting forth, in detail, the basis for their claimed reasonable attorneys' fees and expenses."² In addition, the Court permitted PISI to file thereafter a letter setting forth, in detail, any objections to Defendants' claimed attorneys' fees and expenses.

Defendants' counsel filed their Affidavit on December 2. PISI then filed objections to various aspects of the Affidavit on December 16. Both Defendants' counsel and PISI filed responsive letters on December 17 and 18, respectively. This Letter Opinion addresses the Affidavit and PISI's objections to it.

¹ *Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, 2013 WL 3934992, at *27–28 (Del. Ch. July 24, 2013) (granting an award of attorneys' fees and expenses reasonably incurred by Defendants, but only for 80% of such fees and expenses in view of PISI's success on the merits of "certain secondary aspects of its claims" and on some of the "procedural disputes that arose in the pretrial phase of this case").

² *Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, 2013 WL 6123176, at *7 (Del. Ch. Nov. 21, 2013).

A. The Affidavit

In all, Defendants’ counsel seek \$484,011.82 in attorneys’ fees and expenses (the “Proposed Fee Award”). They broke down that amount as follows:

Fees incurred by Elliott Greenleaf & Siedzikowski, P.C. (“EG&S”)	\$148,980.00
Fees incurred by Gordon Fournaris & Mammarella, PA (“GF&M”)	190,739.00
Expenses incurred by EG&S	6,961.33
Expenses incurred by GF&M	11,185.54
Expenses incurred by Defendants personally	5,309.12 ³
Expenses incurred by Defendants related to expert	24,893.46
Fees that have accrued on loan taken out by Defendants from a “litigation lending service,” which loan is now in default	<u>221,946.32</u>
Gross Proposed Fee Award	610,014.77
<i>Less 20%, accounting for the Court’s award of 80% of fees and expenses</i>	<i>-122,002.95</i>
Adjusted Gross Proposed Fee Award	488,011.82
<i>Less this Court’s previous award of \$4,000 in “attorneys’ fees and costs” to Defendants (the “August 7, 2012 Award”)⁴</i>	<i><u>-4,000.00</u></i>
Net Proposed Fee Award⁵	\$484,011.82

³ “These expenses are largely comprised of court reporter and deposition transcript fees and fees related to the service of subpoenas and production of bank records.” Aff. ¶ 7.

⁴ See *Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, C.A. No. 5886-VCP (Del. Ch. Aug. 7, 2012) (ORDER).

⁵ As indicated above, Defendants’ counsel subtracted \$4,000 from the Adjusted Gross Proposed Fee Award. This Court awarded Defendants 80% of the attorneys’ fees and expenses they reasonably incurred in this litigation. My previous award of \$4,000 was not subject to the 80% qualification. Therefore, it should be subtracted from the Gross Proposed Fee Award. As otherwise set forth in the Affidavit, this would result in an Adjusted Gross Proposed Fee Award of \$606,014.77, and, after reducing that amount by 20%, would yield a Net Proposed

In addition, as discussed *infra*, Section III, Defendants' counsel provided a breakdown of hours, tasks, and billable rates for all the individuals whose time comprised the Proposed Fee Award.

II. PISI'S OBJECTIONS

Primarily, PISI objects to three aspects of the Affidavit.⁶ PISI first contends that the Affidavit is not supported sufficiently for it or the Court to assess the reasonableness

Fee Award of \$484,811.82—an increase of \$800 above the amount reflected in the Affidavit.

⁶ In addition to the objections discussed below, PISI appears to argue several other minor points. For example, PISI asserts that, under *Aveta v. Bengoa*, 2010 WL 3221823, at *1 (Del. Ch. Aug. 13, 2010), it should not be responsible for compensating Defendants for the extra cost of their decision to hire new counsel. PISI also contends that the Court should analyze discrete tasks performed by Defendants' counsel "to determine whether counsel should have defrayed costs through the use of a paralegal." Dec. 16, 2013 letter from PISI ("PISI Opp'n") 2. Finally, PISI seems to object generally to the "reasonableness" of the amount of the Proposed Fee Award attributed to the expert.

Only one of PISI's arguments has merit. Defendants did not "change counsel"; their lead attorney changed firms, which required a change in the name of the firm providing representation. Also, because paralegals accounted for approximately 43% of the billable hours, I find unpersuasive PISI's objection that, perhaps, Defendants should have relied more heavily on paralegals. PISI's objection to the reasonableness of the expert's fee has merit, however. Defendants' counsel avers, without documentary support, that Defendants paid \$24,893.46 for the work performed by their expert. The amount itself seems reasonable in light of the general nature of the work performed (*i.e.*, forensic financial analysis). Defendants' failure to produce the expert's invoices, however, unfairly hampered PISI's ability to challenge in detail any aspect of this particular portion of the Proposed Fee Award. Thus, if Defendants intend to pursue this request, they must provide additional documentation.

of the Proposed Fee Award. Specifically, on December 6, PISI had requested from Defendants' counsel: (1) timesheets; (2) the fee agreements with the two firms that represented Defendants; (3) "the financing agreement with whoever financed the [attorneys' fees]"; (4) the payment status of the attorneys' fees; and (5) "any attorney fee arrangements related to the success of the attorney fee application."⁷ PISI asserts that it cannot object *in detail* to the Affidavit, as the Letter Opinion requires, because Defendants' counsel did not attach this information to the Affidavit and also refused to produce it. In addition, PISI has cited to this Court's decision in *Weichert Co. v. Young*⁸ for the proposition that "a determination that attorneys' fees are reasonable requires an analysis of specific time entries as well as discrete tasks."⁹ Thus, because counsel for Defendants have not submitted this information with the Affidavit, PISI also submits that the Court should disregard the Affidavit for lack of specificity and documentation.

Second, PISI argues:

[Because] this Court has specifically excluded from the fee award the costs incurred in litigating Defendants' motions to compel and for a rule to show cause related to PISI's delayed

⁷ PISI Opp'n 1.

⁸ 2008 WL 1914309, at *1 (Del. Ch. May 1, 2008).

⁹ PISI Opp'n 1. PISI also relied upon several other decisions of this Court for similar propositions. *See id.* at 1–2 (citing *Aveta*, 2010 WL 3221823, at *1); *Elite Cleaning Co. v. Capel*, 2006 WL 3393480, at *1 (Del. Ch. Nov. 20, 2006); *All Pro Maids, Inc. v. Layton*, 2004 WL 3029869, at *1 (Del. Ch. Dec. 27, 2004); *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225 (Del. Ch. 1997).

production of electronic records, it is insufficient to merely deduct \$4,000 from the total; Defendants must exclude all of the time entries, tasks and other actions and expenses related to that issue.¹⁰

Third, PISI objects to the inclusion of an amount related to a loan that Defendants took out from a litigation lending service to enable them to defend this litigation. The loan, which has been in default, has resulted in an accrual of at least \$221,946.32 in loan-related expenses.¹¹ Defendants seek repayment of these expenses on the basis that they would not have defaulted on the loan but for PISI having dragged out this litigation.

Ultimately, PISI contends that Defendants are entitled to \$15,308.29, which is one-third (a “standard” contingency fee rate, according to PISI) of the \$45,924.88 in damages that the Court awarded to Defendants in its Memorandum Opinion.¹²

In response to PISI’s objections, Defendants generally defend the adequacy of the Affidavit to support their requested fees and expenses.

¹⁰ PISI Opp’n 2.

¹¹ Aff. ¶ 8.

¹² *See Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, 2013 WL 3934992, at *28 (Del. Ch. July 24, 2013). There is no basis for PISI’s proposed fee award based on a “standard” contingency fee rate. First, the record does not disclose the specific fee arrangement between Defendants and their counsel. In addition, counsel for Defendants have proposed a fee award based on their hourly billing rates. Therefore, there is inadequate support in the record for a fee award based solely on a contingency rate, no matter how standard it is.

III. ANALYSIS

With one exception, I find PISI's primary objections unpersuasive.

As an initial matter, I find that the Affidavit generally is sufficiently supported to permit PISI and the Court to assess the reasonableness of most aspects of the requested attorneys' fees and expenses. Regarding the amount of attorneys' fees, for example, Defendants' counsel identified the specific individuals who worked on this case, their position, their respective hourly billing rate, and the number of hours each individual billed on the case. Counsel also has provided an hourly breakdown of specific tasks performed throughout the litigation and the amounts of expenses incurred by both counsel and Defendants personally.

In opposing Defendants' request for fees and expenses, PISI seeks greater detail based on cases it cited for the proposition that "a determination that attorneys' fees are reasonable requires an analysis of specific time entries as well as discrete tasks." Although that proposition is generally true, none of the cited cases support taking that concept to the lengths PISI suggests. Indeed, in *Weichert Co.*, this Court declined to review in detail time entries for more than 100 hours of what the party challenging that fee award claimed to be "excessive unexplained time and labor," noting that "[a] discussion of each specific invoice item that Young contests would neither be useful nor

practicable.”¹³ In *Weichert Co.*, the Court reviewed the challenged invoices, but primarily because the party challenging the fee award was a *pro se* litigant.¹⁴

Next, I consider PISI’s objection regarding the alleged inclusion of fees and expenses associated with the August 7, 2012 Award. Counsel for Defendants expressly deducted from the Adjusted Gross Proposed Fee Award the sum of \$4,000, which amount was assessed against PISI in relation to Defendants’ motion to compel. To the extent Defendants actually incurred more than \$4,000 in fees and expenses prosecuting that motion, nothing in the August 7, 2012 Award precludes Defendants from recovering 80% of those additional expenses in connection with this Court’s post-trial award of fees and expenses. I therefore find that Defendants’ counsel adequately have accounted for the Court’s previous instructions regarding the August 7, 2012 Award.

Finally, to the extent that PISI objects to the reasonableness of the amount of attorneys’ fees requested by Defendants, I overrule that objection. In assessing a fee’s reasonableness, the Court must consider the factors set forth in Rule 1.5 of the Delaware Lawyers’ Rules of Professional Conduct.¹⁵ Rule 1.5 provides in part:

The factors to be considered in determining the reasonableness of a fee include the following:

¹³ 2008 WL 1914309, at *2.

¹⁴ *Id.* at *2.

¹⁵ *Mahani v. Edix Media Gp.*, 935 A.2d 242, 245–46 (Del. 2007).

- (1) the time and labor required, the novelty and difficulty of the questions 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.¹⁶

In addition, “a court [] should consider whether the number of hours devoted to litigation was ‘excessive, redundant, duplicative or otherwise unnecessary.’”¹⁷

Having carefully considered these factors, I find the amount of attorneys’ fees set out in the Affidavit—\$339,719—to be reasonable. This suit was commenced on October 8, 2010, and it included extensive motion practice, a trial that took place on September

¹⁶ Del. Lawyers’ R. Prof’l Conduct 1.5(a).

¹⁷ *Weichert Co. v. Young*, 2008 WL 1914309, at *2 (Del. Ch. May 1, 2008) (quoting *Mahani*, 935 A.2d at 247).

24, 25, and 27, 2012, and post-trial briefing and argument. In addition, as the Court noted at length in the Memorandum Opinion, PISI engaged repeatedly in bad faith litigation tactics, including modifying some of PISI's financial records in an apparent attempt to strengthen its case, without providing any notice of those changes to Defendants or the Court.¹⁸ Furthermore, the hourly rates charged by Defendants' counsel are consistent with the rates generally charged in this jurisdiction, and, in view of the length of this litigation and the unusual tactics employed by PISI, the number of hours devoted to this litigation was not "excessive, redundant, duplicative or otherwise unnecessary."¹⁹

The one PISI primary objection that has merit relates to Defendants' claim for reimbursement of the fee they incurred in connection with a loan they took out to finance the litigation. I agree that PISI should not be required to reimburse Defendants \$221,946.32 for the "fees" associated with Defendants' default on the litigation lending service loan they obtained. Counsel for Defendants have cited no cases, nor is the Court aware of any, that support reimbursing a party for "fees" they incurred as a result of having taken out a loan to pay that party's legal fees and expenses and ultimately defaulting on that loan. Thus, I exclude that amount from the fee award.

¹⁸ See *Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, 2013 WL 3934992, at *26–27 (Del. Ch. July 24, 2013).

¹⁹ See *Weichert Co.*, 2008 WL 1914309, at *2 (quoting *Mahani*, 935 A.2d at 247).

IV. CONCLUSION

For the reasons stated, Defendants are entitled to an award of attorneys' fees and expenses of \$287,339.99, which is 80% of the amounts claimed in the Affidavit regarding the attorneys' fees and expenses incurred by EG&S, GF&M, and Defendants personally, less the \$4,000 associated with the August 7, 2012 Award.

This amount may be increased by an additional amount of up to \$19,914.77, representing 80% of a maximum of \$24,893.46, the amount specified in the Affidavit as being attributable to Defendants' expert witness. If Defendants still wish to pursue this portion of their requested award, within five business days of this Letter Opinion, counsel for Defendants shall supplement the Affidavit with invoices or equivalent documents reflecting the amount of fees and expenses charged by Defendants' expert witness. Within five business days of the filing of Defendants' counsel's supplementation, PISI may file a letter setting forth, in detail, any objections to the claimed fees and expenses related to Defendants' expert witness.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp