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Franchise Regulation and Damages, the only treatise that covers valuations and damages in franchise disputes, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the Wolters Kluwer Law & Business web page here.

Attorneys' Fees

Prevailing Party

For this issue we are departing from our usual format to bring you an in-depth look at the matter of attorneys' fees, a subject dear to the hearts of many of our readers.

In franchising, dealership and distributorship disputes, the entitlement to such an award is often directed by the contract (franchise agreement) to be awarded to the "prevailing party." For this single-topic issue we have included an excerpt from my treatise, *Franchise Regulation and Damages,* published by Wolters Kluwer/CCH and updated three times a year. I hope it proves helpful.

§19.03, Prevailing Party and Fee Amount

Definition

Frequently the fee-shifting language used in franchise agreements and statutes says that the loser shall pay the "prevailing party's" [69] attorneys' fees and costs. Who is the " prevailing party"? Generally "a party prevails if he or she succeeds in obtaining substantially the relief sought." [70] However, where an agreement provided for attorneys' fees to be paid to the prevailing party in "enforcing" the franchise agreement, the court ruled against franchisor Benihana recovering fees for defending against a franchisee counterclaim because those fees were not to "enforce" the agreement.[71] Even though a party's alternative theories are rejected or withdrawn, they can still be the prevailing party in a litigation.[72] For example, in *Coral Group, Inc. v. Shell Oil Corp.*,[73] Shell Oil Co. and a subsidiary were entitled to an award of $3.1 million in attorneys' fees and costs in an action brought by former gas station franchisees following the dismissal of the action. In 2005, the franchisees filed an action alleging that Shell had induced them to enter the contracts through misrepresentation and fraud. In 2012, however, the court dismissed the plaintiffs' claims as a sanction for their bad faith failure to preserve evidence. The court found that when a plaintiff's claims have been dismissed with prejudice as a discovery sanction, the defendant was the prevailing party for purposes of awarding attorneys' fees and expenses. Moreover, since the plaintiffs' tort claims, such as those for fraud, negligence, and tortious breach of contract, required Shell and its subsidiary to defend their rights and performance under the agreements, the cost of defending against the tort claims could also be recovered. The defendants' request for $3,103,110 in attorneys' fees and costs was reasonable in light of the more than eight year duration of the litigation.

However, a party that only succeeds on an interim basis may not be considered to have prevailed.[74] A recent example of this can be found in *Kaeser Compressors, Inc. v. Compressor & Pump Repair Services, Inc*,[75] where a distributor of industrial compressors that prevailed on a manufacturer's motion for a declaratory judgment brought to ensure that it would not violate the Wisconsin Fair Dealership Law (WFDL) by terminating the distributor without " good cause" was not entitled to an award of attorney fees. The WFDL provided attorney fees to a dealer who sued a grantor successfully but by its plain terms, only if the grantor violated the WFDL. Since the manufacturer did not violate the WFDL, the attorney fee provision did not apply. Likewise, when both parties receive some relief as a result of the litigation, a court may deem neither to be the "prevailing party." [76]

Additionally, one must be the "prevailing party" in the right forum. In the case of *Fantastic Sams Salon Corp. v. Moassesfar*,[77] even after prevailing against a franchisee on its breach of contract action for nonpayment of fees, the franchisor was not entitled to the award of its attorney fees and costs because the attorney fee provision in the parties' franchise agreements only applied to arbitration proceedings. It read, "Any cost or other expenses, including attorney's fees and cost incurred by the successful party, arising out of or occurring because of the arbitration proceeding, will be assessed against the unsuccessful party." The action was not an arbitration proceeding, and thus this provision did not apply. Moreover, the franchise agreements specifically excluded from arbitration "matters relating to the collection of monies owed to Salons Corp by Licensee," thus making it crystal clear that the parties did not contemplate the recovery of attorney fees in collection actions at all.
A federal district court has ruled that, under the Lanham Act, a convenience store franchisor was entitled to recover attorney fees expended in its dispute with a terminated franchisee for the time spent preparing for and arguing the franchisor's motion for an order to show cause and the corresponding contempt proceedings as the prevailing party. However, the court denied the franchisor's request for the remainder of its fees, ruling that the time and resources expended after the contempt proceedings were largely spent trying to settle the remaining

disputes between the parties. The court, in its discretion, did not believe an award of fees was warranted for those efforts[78].

In another case, fitness center franchisor Curves was entitled to an award of attorneys' fees and costs from a terminated franchisee pursuant to the attorney fee provision in the parties' franchise agreement and pursuant to the Lanham Act for prevailing against the franchisee in securing a default judgment on its claims for breach of the parties agreement, including a noncompete provision, and for trademark infringement and false designation of origin. Having inquired as to whether offering personal training services would constitute a breach of the franchise agreement, and having been informed that indeed it would, the terminated franchisee proceeded to provide such services without regard for her contractual obligations. She ignored demands to comply with the terms of the agreement, including a cease-and-desist letter and therefore, the franchisor was entitled to attorney fees and costs with regard to its Lanham Act claims.[79]

In another intangible property case the court held that under Section 505 of the Copyright Act a district court "may ... award a reasonable attorney's fee to the prevailing party." The case involved the wrongly asserted ownership of the civil rights anthem "We Shall Overcome." The court held that the plaintiffs, who brought suit to overturn the claimed ownership, were the prevailing party because they obtained a summary judgment decision in their favor on the merits of their primary claim. Attorney fees of $352,000, plus certain expenses and costs, were awarded and deemed warranted in view of the plaintiffs' success on summary judgment—proving defendants' copyrights were invalid for lack of originality— and "the inestimable benefit" they conferred on the public by bringing the lawsuit and obtaining a settlement that preserved "We Shall Overcome" in the public domain. The court, however, reduced the plaintiffs' requested hourly fees by 65%, given the unusual circumstances of the case.[80]
In another decision that may become important precedent for franchise litigation, the First Circuit Court of Appeals upheld the dismissal of a copyright infringement plaintiff's claims against music publisher Sony Corporation of America and other related defendants pursuant to a mandatory arbitration provision in the agreement that the plaintiff had signed. The court held that such motion practice did not warrant an award of attorney fees to Sony as a prevailing party under the Copyright Act because an award of attorney fees under the Copyright Act required a material alteration of the parties' relationship, and the mere sending of the plaintiff's claims to arbitration did not suffice.[81]

A hotel franchisor's motion for attorney fees and interest was granted in a dispute with a terminated franchisee—in which the franchisor succeeded in showing that its termination was valid—except that the time billed by the franchisor's senior paralegal would only be reimbursed at $125 per hour, rather than $195 per hour. The franchisee argued that the proposed hourly rate of $195 for the senior paralegal was excessive.[82] A similar result was obtained in *AFC Franchising, LLC v. Fairfax Family Practice, Inc.*[83] However, to be entitled to an award of attorneys' fees for a successful dispute with the Federal Trade Commission, a party must do more than just prevail. It must also show that the claim brought was entirely without color and was asserted wantonly, for purposes of harassment or delay, or for other improper reasons.[84]

However, a claim for attorneys' fees spent contesting the removal of a Colorado action to federal court was denied because, although the franchisor's attempt to remove the lawsuit to federal court was ultimately unsuccessful, it could not be said that the attempt was unreasonable. The franchisees claimed that removal was unreasonable as evidenced by *sua sponte* remands of nine other, similar cases. However, the court held that even if a similar

case was *sua sponte* remanded, this indicated only that removal was not valid, not that it was also unreasonable.[85] Likewise, a metal supply franchisor was not entitled, as the prevailing party, to attorney fees incurred in its successful attempt to enforce a franchise agreement's arbitration provision against a franchisee. The provision in the agreement referred to claims by the franchisor when it was owed money by the franchisee, or the franchisee otherwise breached the agreement. Here, neither side had claimed that the other side had breached the agreement or owed them money. Instead, the franchisor's single cause of action was for clarification of the parties' rights and obligations under the agreement pertaining to the purchase price of franchise assets. Thus, the court held the provision in the agreement relating to attorney fees was inapplicable.[86]

Similarly, to award attorney fees to a prevailing party in an action brought under the Copyright Act, courts consider nonexclusive factors such as frivolousness, motivation, objective unreasonableness, compensation and deterrence, degree of success obtained by the prevailing party, purposes of the Copyright Act, and whether the chilling effect of attorney's fees would be too great or would impose an inequitable burden on an impecunious plaintiff. Simply prevailing is not enough.[87]

In *Lift Truck Lease v. Nissan Forklift Corp.*,[88] it was held that a lift truck manufacturer was not entitled, under the Missouri Power Equipment Act, to attorney fees as the prevailing party in a franchise termination suit filed by a former franchisee fork lift dealer since the dealer's claims were not frivolous, unreasonable, or groundless.

In Creative Playthings Franchising Corp. v. Reiser, a franchisor of outdoor swing set businesses was entitled to recover attorney fees and expenses as the prevailing party and was awarded $296,641.13 in fees and $33,673.94 in expenses for a total fee award of $330,315.07, while the total damages awarded in the litigation was less than $62,000.[89]

In *EMI Blackwood Music, Inc. v. KTS Karaoke, Inc*., 2d Cir., No. 15-2308-cv, July 20, 2016, a seller of karaoke equipment whose insurance carrier paid over $1 million to music publishers to settle infringement claims over the alleged unlicensed distribution of song recordings, in exchange for dismissal of the claims with prejudice, was not the "prevailing party" for purposes of the Copyright Act's fee-shifting provision. The district court did not abuse its discretion by denying the seller's motion for fees.

This should be compared with a decision by the Sixth Circuit[90] affirming a federal district court in Nashville, finding that a Russian pop singer was entitled to attorney fees and costs for his successful defense of copyright infringement claims by two Nashville songwriters after it was determined that, as a result of several agreements between the singer, the record label and the plaintiffs, the singer had a valid sublicense to record and perform the song. Thus, the district court concluded that the infringement claims were frivolous and unreasonable and did not abuse its discretion by awarding attorney fees.

And in another federal district court decision, a former employee who prevailed on the company's trade secret misappropriation claims against him under the Kansas Uniform Trade Secrets Act was not entitled to an award of attorney fees because he failed to make the required showing as to either the objective or subjective component of a bad faith claim.[91] In an interesting twist in a Tax Court case,[92] the court found that under Code Sec. 7430 only a party to the underlying action may pursue an award. The court rejected an attorney's argument that he was entitled to recover costs for representing his client before the IRS, holding that the attorney was not the prevailing party; he was the representative of the prevailing party. The attorney initially argued that he had been assigned the right to pursue the

award by his client and therefore had the right to seek attorneys' fees on his own behalf. The IRS determined that the Anti-Assignment Act bars the assignment of a legal suit against the U.S. government.

In another prevailing party case decided under Maryland law, Midas was entitled to an award of its attorney fees and costs in the amount of $31,030.30, after prevailing in its breach of contract and trademark infringement action against a former franchisee that continued to operate its business as a Midas shop following the expiration of the parties' franchise agreement. The hourly rates and amounts requested by the attorneys for the franchisor were reasonable and the attorney fee provision in the parties' franchise agreement that entitled the franchisor to recover its attorney fees and expenses in the event of the franchisee's default was enforceable under Maryland law[93]

Because a restaurant franchisor voluntarily dismissed claims against its franchisee, the franchisee was not a "prevailing party" and was thus not entitled to attorney fees. The franchisee was not a prevailing party because the claims were voluntarily dismissed and the franchisee failed to demonstrate that the voluntary dismissal was filed to avoid an unfavorable merits ruling. In addition, the franchisee had not prevailed on all claims. Even if the franchisee were a prevailing party, it would not be entitled to attorney fees because the franchise agreement authorized fees only for a plaintiff and not a defendant.[94]

Also, in *Sumanth v Essential Brands, Inc*., a federal district court refused to award attorney's fees under a franchise agreement which did not specifically provide for such fees, a strict requirement under Maryland law.[95]

Voluntarily dismissed federal trade secrets misappropriation claims not subject to award of defendant's attorney fees

According to the Eleventh Circuit, a district court properly determined that the Defend Trade Secrets Act (DTSA) does not allow a defendant to recover attorney fees for defending against a plaintiff's claims that were voluntarily dismissed without prejudice. The court held that the defendant in such a case does not qualify as a "prevailing party" under the statute's fee shifting provision. Because the interpretation of "prevailing party" status in a federal statute is a question of federal law, the defendants' reliance on judicial interpretation of state statutes modeled on the Uniform Trade Secrets Act was misplaced. Under federal statutes, such as the Copyright Act and the Patent Act, a dismissal without prejudice does not grant prevailing party status because it does not result in a "material alteration of the legal relationship of the parties."[96]

Under a Louisiana statute, a distributor of baby products was entitled to an award of attorney fees as the prevailing party in a contempt proceeding brought by a manufacturer alleging contempt for violating a permanent injunction. Under a reasonable interpretation of the statute, courts may award attorney fees to the party who prevails in a contempt proceeding, whether that party is successful in proving or in defending the contempt allegation. However, the amounts awarded to the distributor by a trial court for both attorney fees and expert witness fees were reduced because the trial court erred in awarding over $9,000 in undocumented costs and in awarding as expert witness fees charges for work performed by people other than the expert.[97]

Fee award for litigation misconduct reversed after judgment on merits was vacated

In *UCP International Company Ltd v. Balsam Brands, Inc.*,[98] because the Federal Circuit had vacated a lower court's ruling that a manufacturer of artificial Christmas trees was entitled to judgment of non-infringement of asserted patent claims, the manufacturer was held to be no longer a "prevailing party." The U.S. Court of Appeals for the Federal Circuit reversed a district court's award of attorney fees after it vacated, in a separate opinion, the district court's decision on the merits that a Chinese manufacturer was entitled to a declaration of non-infringement. The district court had awarded limited attorney fees under Section 285 of the Patent Act with respect to the patent holder's litigation misconduct, but had denied the request for a full award of fees because, in its view, the case was not otherwise "exceptional." After the Federal Circuit's decision vacating the district court's ruling on the merits, the manufacturer was no longer a "prevailing party" for purposes of Section 285's fee-shifting provision. For the same reason, the manufacturer was not entitled to fees incurred in defending a customer in another lawsuit involving the same patentee.

Attorney fees denied to domain name holder who was awarded declaratory relief

A federal district court in San Jose, California, ruled that an adverse determination by a jury, standing alone, is not a basis for finding exceptional circumstances justifying attorney fees under the Lanham Act.[99] The decision denied attorney fees to a domain name holder who was awarded declaratory relief in a dispute involving his use of the imi.com domain name. But in the court's opinion, the domain name holder failed to demonstrate by the preponderance of the evidence that his case was so "exceptional" as to justify an award of fees. Moreover, his own manner of litigation weighed against the award of fees. The court found that the manner in which the plaintiff litigated the case militated against attorney fees because throughout the case, the court clearly and unequivocally warned the plaintiff that he did not have a claim for reverse domain name hijacking or any other affirmative claim against the defendant. Notwithstanding this fact, the plaintiff repeatedly "ignored this warning," and the court held that such behavior was an equitable factor that militated against the award of attorney fees.

Attorney fees denied to defendant following favorable PTAB unpatentability ruling

An award of attorney fees to a prevailing party in a patent case is within court discretion but only if the case is "exceptional." Thus, on remand, a federal district court in Texas declined to award attorney fees to the prevailing party, defendant Alcatel-Lucent Enterprises ("ALE"). Although the district court vacated an earlier judgment in favor of plaintiff Chrimar Systems following the PTAB's ruling that the patent claims were unpatentable, the court held that Chrimar's conduct in pursuing its claim did not make the case "exceptional" under 35 U.S.C. § 285. Accordingly, ALE's motion for award attorney fees against Chrimar was denied.[100]

Photographer denied attorney fees in suit involving Willie Nelson concert photo

In *Philpot v. LM Communications II of South Carolina, Inc.*,[101] a plaintiff photographer's practice of making money by filing or threatening to file copyright infringement lawsuits was ruled to preclude an attorneys' fee award. After the Sixth Circuit remanded the copyright infringement case upon concluding that the trial court erred in determining that the photographer was not the prevailing party entitled to attorney fees, the Lexington, Kentucky, trial court, acknowledging that the photographer was the prevailing party, but nevertheless rejected his request for attorney fees under the Copyright Act because his motivations for pursuing the suit were suspect. He was deemed to be in the business of litigation rather than licensing the photograph to third parties. Other courts had labelled the photographer as a "copyright troll."

Over $100K in attorney fees and $10K in sanctions awarded for bad faith litigation

In *Rock v. Enfants Riches Deprimes, LLC*,[102] a copyright infringement suit brought by a professional photographer against defendants that created and sold high-end sweaters and coats bearing copies of a photograph of musician Lou Reed, the federal district court in Manhattan awarded over $100,000 in attorney fees and $10,000 in sanctions. After the court dismissed the copyright infringement claim for failing to register the work before filing suit, the court denied a motion to reconsider an award of $100,000 in attorney fees to the defendants as prevailing parties and $10,000 in sanctions for bad faith. The court concluded that a summary judgment order for failure to meet copyright registration requirements materially altered the legal relationship between the parties entitling the defendants to recovery of attorney fees as a prevailing party.

6th Cir.: Damages award in home design infringement case was reversed as 'plainly absurd'

In *Singletary Construction, LLC v. Reda Home Builders, Inc.*,[103] a copyright infringement case involving a stolen house design, a jury awarded the copyright holder $296,208.75 in damages against a builder and $14,440.50 against a real estate agent. The Sixth Circuit Court of Appeals reversed and remanded the damages award against the builder but not the real estate agent, because giving the copyright holder the full cost of the house without deducting any building expenses "shocks the conscience." One judge, who wrote a separate opinion, concurring in part and dissenting in part, would have affirmed the full amount on both defendants, on the theory that the award was made in compliance with the Copyright Act's burden-shifting damages analysis, under which the builder should be forced to accept his failure to convince the jury of the legitimacy of his expenses.

Spanish Broadcasting System awarded $845K in attorney fees for successful defense

In *Latin American Music Co., Inc. v. Spanish Broadcasting System, Inc.*,[104] Spanish Broadcasting System (SBS) was awarded over $845,000 in attorney fees and costs after music publisher Latin America Music Company and a music performance licensor failed to show that SBS had infringed copyrights in six songs,. The infringement claims—as well as the plaintiffs' appeal of their dismissal—were objectively unreasonable and frivolous because the plaintiffs did not own the rights to the allegedly infringed songs. The plaintiffs also engaged in litigation misconduct during discovery by failing to produce certain evidence until just before trial. The court, however, reduced the fee award from the amount sought by SBS, finding that counsels' hourly rates were too high, and declined to award time spent by SBS a third party on indemnity issues.

Producer denied attorney fees and sanctions against director and his attorney

In *16 Casa Duse, LLC v. Merkin*,[105] on remand from the Second Circuit, the federal district court in New York City denied film producer 16 Casa Duse, LLC's renewed motion for attorney fees and costs under Section 505 of the Copyright Act and sanctions under 28 U.S.C. § 1927 in its long-running dispute with a film director Alex Merkin over rights in a short film they worked on together. An award of attorney fees and costs under the Copyright Act was unwarranted because Merkin's copyright counterclaims were not objectively unreasonable or advanced in bad faith, nor did they sufficiently violate principles of compensation and deterrence. Sanctions against Merkin's attorney also were not appropriate due to reasons related to his untimely death.

Attorney fees denied for defense of suit over HOTEL CHICAGO mark

A federal district court in Chicago denied a renewed request for attorney fees in defending a trademark infringement suit involving the HOTEL CHICAGO mark brought by the owner of a hotel in the River North District of Chicago. The defendants failed to prove that the case was exceptionally weak or frivolous based on an objective unreasonableness standard, especially when the magistrate judge recommended that the court issue a preliminary injunction. The court also concluded that the plaintiff hotel owner did not engage in an unreasonable manner of litigation when it had a good-faith belief that it acquired secondary meaning for the mark.[106]

Biotechnology company to receive over $300,000 in attorney fees from former employee

Atlas Biologicals, Inc. (Atlas)—a company that sells bovine-serum products—recovered $308,554.50 in attorney fees from a former employee who was found liable for trademark infringement, misappropriation of trade secrets, and breach of fiduciary duty. Atlas persuaded the court that the attorney hours and hourly rates were both reasonable, and that the case warranted an upward lodestar adjustment. Atlas's motion for $38,577.35 in expert witness fees was denied as courts do not have discretion to impose costs that are not expressly allowed by statute. Atlas previously was awarded more than $2 million in damages.[107]

Attorney fees awarded in Sargon of Akkad YouTube copyright case

An individual who successfully defended against copyright infringement claims in connection with his posting of a YouTube video, on fair use grounds, was entitled to an award of his attorney fees, the federal district court in New York City decided. The attorney fee award was appropriate because there was evidence of improper motivation by the plaintiff, and the case was objectively unreasonable. Fees were warranted, the court held, even though a GoFundMe campaign had already garnered more than the amount of the fees sought.[108]

Franchisor wins attorneys' fees and costs in termination decision

In *AFC Franchising, LLC, et al., v. Fairfax Family Practice, Inc.*,[109] the U.S. District Court for the Eastern District of Virginia issued a decision awarding a franchisor attorneys' fees and costs following a drawn-out suit based on, among other things, alleged breach of a franchise agreement. Plaintiff AFC Franchising, LLC (AFCF) operated a franchise system consisting of urgent care centers. In June 2014, AFCF entered into a franchise agreement with defendant Fairfax Family Practice, Inc. (FFP), subject to a weekly royalty fee that AFCF could electronically debit from FFP. The agreement provided that any default from FFP on royalty or other payments would constitute a basis for termination of the agreement unless FFP cured the default. Finally, the agreement specified that defendants would be liable for attorneys' fees if FFP breached the agreement. Though the amount of fees was more than five times the amount of past-due royalties awarded to AFCF, this did not stop the court from awarding fees where they were due.

Direct capacitor buyers' attorneys awarded $70 million

The federal district court in San Francisco has granted final approval of a settlement between certain direct purchasers of electrolytic and film capacitors and manufacturers, resolving allegations that mostly Japanese and other East Asian capacitor manufacturers engaged in an international conspiracy to fix prices.[110] Under the terms of the settlement, the manufacturers agreed to pay $232,050,000 to resolve the claims. The court approved the settlement, and awarded class counsel $70 million in attorney fees and $9 million in costs.

Terminated Shell franchisee awarded attorney fees after partially prevailing in suit over rent spike

In *Four S Shell LLC v. PMG LLC*,[111] (on which we previously reported) a franchisee's successful Petroleum Marketing Practices Act suit warranted an attorneys' fees award despite the failure of other claims. The former operator of a franchised Shell station was entitled to $100,276.93 in legal fees and costs associated with its pursuit of PMPA and other claims against the franchisor because it prevailed on its claim under the PMPA. The requested amounts were for the most part reasonable, the court explained, and the defendants' various arguments for reconsideration or reduction of the award lacked merit.

Car dealership entitled to fees, costs for defending against frivolous dilution claim

The Eleventh Circuit has decided that a Florida district court did not abuse its discretion in awarding attorney fees under the Lanham Act's fee shifting provision to a Florida car dealership that prevailed in a trademark dilution claim brought by another Florida business because the plaintiff carried on with a frivolous claim for trademark dilution, despite knowing its asserted mark was not famous and that the claim lacked merit, which caused the car dealership to incur significant expenses in defending against the dilution claim (*Off Lease Only, Inc. v. Lakeland Motors, LLC*, 11th Cir., No. 20-12877, February 10, 2021).

Fees, sanctions awarded over refusal to dismiss after being presented with valid license

A photographer, who refused to dismiss his copyright infringement case after the user produced a valid license from the photographer's distributor, was ordered by the federal district court in Manhattan to pay attorney fees and costs under Section 505 of the Copyright Act and sanctions under 28 U.S.C. § 1927 to the prevailing defendants, a candle manufacturer and three retailers. After being made aware that the facts were other than as they had believed, the photographer and his counsel changed gears and pursued a meritless theory for violation of the underlying license for years instead of bringing the case to a close. The photographer's former counsel, Richard Liebowitz, was jointly and severally liable for the attorney fees, costs, and sanctions because the award was necessary to deter Liebowitz from filing unfounded copyright infringement lawsuits (*Bechler v. MVP Group International, Inc*., S.D.N.Y,

Footnotes

[69] For discussion of the "prevailing party" issue *see Kissinger, Inc v. Singh*, 304 F. Supp.2d 944 (W.D. Mich. 2003) CCH Business Franchise Guide ¶12,747; *see also Eskenazi v. Essential Healthcare Resources, Inc.*, 2004 Iowa App. LEXIS 337, 2004 WL 360515 (holding the prevailing party was entitled to attorneys' fees for preparation and trial) and *Eskenazi v. Essential Healthcare Resources, Inc.*, 680 N.W.2d 379 (Iowa App. 2004) (awarding Essential its attorneys' fees for the appeal as well).

[70] *Gardner v. Clark,* 503 A.2d 8, 10 (Pa. Super. 1986). *Cf. Sir Speedy Inc. v. L&P Graphics Inc.*, 957 F.2d 1033 (2nd Cir. 1992) [under California law, " the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract" *i.e.* a larger damage award. Cal.Civ.Code §1717(b)(1)]. *See also Novus Franchising, Inc. v. Oksendahl* (D. Minn. March 27, 2008) CCH Business Franchise Guide ¶11,879 (The definition of "prevailing party" in the attorney fee provisions of two automobile glass repair businesses was valid and enforceable under Idaho law, and the franchisor of the agreements was the prevailing party under that definition with respect to its action seeking preliminary injunctive

relief against the two franchisees. The attorney fee provision in the in the franchise agreements provided that a "party against whom injunctive relief is granted will indemnify the prevailing party for all costs that it incurs in any lawsuit or proceeding." The franchisees argued that "prevailing party" was a term of art under Idaho statute and that the court must look to the statutory definition to determine which party prevailed in the franchisor's action for injunctive relief. However, the contractual provision unambiguously defined "prevailing party." The contract reflected a clear intent to allocate costs in the event that one or the other party sought, and successfully obtained, some measure of preliminary injunctive relief. Even if Idaho's statutory definition conflicted with the contractual definition, that fact did not preclude sophisticated parties from negotiating at arm's length the allocation of fees and costs in the event of litigation). See also *Schwartz v. Rent-A-Wreck of America* (D. Md. July 12, 2016) Business Franchise Guide ¶15,809.

[71] *Meltzer/Austin Restaurant Corp. v Benihana National Corp.* (W.D. Tex. 2014), Business Franchise Guide ¶15,434. In *Simon Property Group, L.P. v. Casino Travel, Inc.*, S.D. Fla., No. 0:19-cv-60807-RKA, October 20, 2020, the court held that a party that was voluntarily dismissed from an ordinary trademark infringement case was not the "prevailing" party and was not entitled to attorney fees under the Lanham Act. The shopping mall operator prevailed on every significant issue. Furthermore, even if the dismissed defendant, a bus service, could somehow have been said to have prevailed, this run-of-the-mill trademark infringement case failed to satisfy the Lanham Act's requirement that the case be "exceptional" before fees could be awarded.

[72] *See e.g. Anna Oganesov and ORG Products Corp. v. GNC Franchising, Inc.* (Pennsylvania Court of Common Pleas 2000); CCH Business Franchise Guide ¶11,808 where the court held " [the plaintiff's] underlying claim has always been that GNC violated her protected area and breached the contract. That she pled differing theories in attempting to protect her territory, albeit without prevailing on all of them, does not diminish the fact that in the end, she won. The wording of the contract states the prevailing party is entitled to attorney's fees and costs, and as such, Oganesov was entitled to both since she prevailed."*See also Magna Cum Latte, Inc. v. Smith* (Bankr. S.D. Tex. May 9, 2008) CCH Business Franchise Guide ¶13,895.

[73] Business Franchise Guide ¶15,106 (W.D. Mo. August 12, 2013).

[74] See *Yousuf v. Motive Enterprises LLC* (5th Cir. September 5, 2007) CCH Business Franchise Guide ¶13,699, in which a gasoline dealer secured a stipulated standstill agreement and later a preliminary injunction ordering that the franchise agreements between the dealer and a franchisor continue in force until judgment was rendered on the dealer's claim for a permanent injunction. However, Hurricane Katrina destroyed everything in the interim and the case was dropped. When the dealer's attorney moved for an award under the PMPA as the prevailing party, the request was denied because the court found there were no "merits-based" decisions on which the dealer had prevailed. *See also CK DFW Partners Ltd. v. City Kitchens, Inc.* (N.D. Tex. March 6, 2008) CCH Business Franchise Guide ¶11,848 (A franchisor's successful efforts to obtain dismissal, without prejudice to refiling, of an action filed against it by a franchisee pursuant to choice of California forum selection clauses in the parties' agreements did not make the franchisor the "prevailing party" under the meaning of the California statute governing the recovery of attorney fees in connection with contract-related disputes). See also *KFC Corporation v. JRN, Inc.* (W.D. Ky. January 19, 2012) CCH Business Franchise Guide ¶14,767, holding that prevailing on a non-dispositive motion was not the same thing as prevailing entirely in an action at law or equity.

[75] (E.D. Wis. September 2, 2011) CCH Business Franchise Guide ¶14,674.

[76] *Power Tools and Supply, Inc. v. Cooper Power Tools, Inc.* (E.D. Mich. June 26, 2007) CCH Business Franchise Guide ¶13,657. But see *Best Western Int'l, Inc. v. Patel* (D. Ariz. February 25, 2008) CCH Business Franchise Guide ¶13,836, where the issue was who was the "successful party" under the Arizona attorney fees statute in a case where both parties were awarded damages.

[77] (C.D. Cal. June 7, 2017) Business Franchise Guide ¶15,986.

[78] *7-Eleven, Inc. v. Spear*, (N.D. Ill. May 11, 2012), CCH Business Franchise Guide ¶14,821
.
[79] *Curves Int'l, Inc. v. Nash* (N.D.N.Y. July 25, 2013) Business Franchise Guide ¶15,102.

[80] *We Shall Overcome Foundation v. The Richmond Organization, Inc*., 1st Cir., No. 1:16-cv-02725-DLC, July 31, 2018.

[81] *Cortes-Ramos v. Sony Corp. of America*, 1st Cir., No. 16-2441, May 4, 2018.

[82] The franchisee also argued that the $9,352.50 that the franchisor sought for preparation of the motion for fees was excessive, both in terms of the time spent (33.2 hours) and in the use of a partner's time to research and draft. The court disagreed, holding that the time spent was not excessive, given that the motion was for more than $200,000 in fees and interest, covering extensive work in a fact-intensive case, and involved preparation of a 13-page memorandum of law and a 7-page declaration. *HLT Existing Franchise Holding LLC v. Worcester Hospitality Group LLC* (S.D.N.Y. May 7, 2014) Business Franchise Guide ¶15,285
.
[83] Business Franchise Guide ¶16,651 (E.D. Va. May 8, 2020).

[84] *FTC v. Freecom Communications, Inc.* (10th Cir. 2005) CCH Business Franchise Guide ¶13,030 (district court abused its discretion by awarding $176,623.71 in attorney fees to the majority shareholder of several corporations that sold home-based business opportunities as the prevailing party in a suit by the FTC alleging that he had the authority to control the acts and practices of the corporations which made a number of misrepresentations likely to mislead consumers in violation of the FTC Act. The FTC's claim that the defendant corporations violated Section 5 by making material misrepresentations in the form of exaggerated income projections likely to deceive ordinary consumers was not without record support and thus not without color).

[85] *MB Light House, Inc. v. QFA Royalties LLC* (D. Colo. July 9, 2013) Business Franchise Guide ¶15,116.

[86] *Moody v. Metal Supermarket Franchising America Inc.* (N.D. Cal. May 15, 2014) Business Franchise Guide ¶15,293.

[87] *Bisson-Dath v. Sony Computer Entertainment America Inc.*, N.D. Cal., No. CV-08-1235 SC July 24, 2012.

[88] Business Franchise Guide ¶15,185 (E.D. Mo. 2013).

[89] *Creative Playthings Franchising Corp. v. Reiser* (D. Mass.August 3, 2015) Business Franchise Guide ¶15,565.

[90] *Murphy v. Lazarev* (6th Cir. June 22, 2016).

[91] *Tank Connection, LLC v. Haight* (D. Kan. May 2, 2016).

[92] *David B. Greenberg v. Commissioner*, U.S. Tax Court, Dkt. No. 9840-15, 147 TC —, No. 13, November 9, 2016.

[93] *Midas Int'l Corp. v. Poulah Investors, LLC,* (D. Md. June 16, 2017). Business Franchise Guide ¶15,992.

[94] *Stockade Companies, LLC v. Kelly Restaurant Group, LLC* (W.D. Tex. June 15, 2018). Business Franchise Guide ¶16,214.

[95] (D. Md. January 25, 2018) Business Franchise Guide ¶16,129.

[96] *Dunster Live, LLC v. LoneStar Logos Management Co. LLC*, (5th Cir.November 13, 2018).

[97] *Luv N' Care, Ltd. v. Jackel International Ltd*., Business Franchise Guide ¶16,406 (La. App. April 10, 2019).

[98] Fed. Cir., No. 3:16-cv-07255-WHO, September 19, 2019.

[99] *Black v. Irving Materials, Inc*., N.D. Cal., No. 5:17-cv-06734-LHK, January 6, 2020.

[100] *Chrimar Systems, Inc. v. Alcatel-Lucent Enterprise USA Inc.*, N.D. Tex., No. 6:15-cv-00163-JDL, April 21, 2020.

[101] E.D. Ky., No. 5:17-cv-00173-CHB-EBA, May 15, 2020.

[102] S.D.N.Y., No. 1:17-cv-02618-ALC-DCF, May 29, 2020.

[103] 6th Cir., No. 19-5491, June 1, 2020.

[104] S.D.N.Y., No. 1:13-cv-01526-RJS, June 1, 2020.

[105] S.D.N.Y., No. 1:12-cv-03492-RJS, June 1, 2020.

[106] *LHO Chicago River, LLC v. Rosemoor Suites, LLC*, N.D. Ill., No. 1:16-cv-06863, July 15, 2020.

[107] *Atlas Biologicals, Inc. v. Kutrubes*, D. Colo., No. 1:15-cv-00355-CMA-KMT, July 10, 2020
.
[108] *Hughes v. Benjamin*, S.D.N.Y., No. 1:17-cv-06493-RJS, August 5, 2020.

[109] Business Franchise Guide ¶16,651 (E.D. Va. May 8, 2020).

[110] *In re Capacitors Antitrust Litigation*, N.D. Cal., No. 3:14-cv-03264-JD, November 6, 2020.