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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Apollo Education Group, Inc., an Arizona
corporation,

Plaintiff,

vs.

National Union Fire Insurance Company
of Pittsburgh, PA, a Pennsylvania
corporation,

Defendant.

No. CV-15-CV-01948-SPL

ORDER

Before the Court is Defendant National Union Fire Insurance Company of Pittsburgh, PA’s Motion for Attorneys’ Fees (the “Motion”). (Doc. 113) For the following reasons, the Motion will be granted.

I. Background

Apollo Education Group, Inc. (“Apollo”) purchased an insurance policy from National Union Fire Insurance Company of Pittsburgh, PA (“National Union”). (Doc. 1 at 2) Apollo was the defendant in a class action lawsuit, which settled for \$13.125 million in April 2014. (Doc. 1 at 5) Apollo filed a claim with National Union to fund the settlement, but National Union refused to fund any of the settlement amount. (Doc. 1 at 6) Apollo then initiated this suit against National Union for wrongful and bad faith refusal to pay the claim related to the settlement agreement and reimbursement for the \$13.125 million Apollo paid out of pocket. (Doc. 1 at 2) National Union successfully

1 moved for summary judgment on all of Apollo's claims, and it now moves for an award
2 of attorneys' fees. (Doc. 119 at 2)

3 **II. Standard of Review**

4 Federal Rule of Civil Procedure 54(d)(2) provides "[a] claim for attorney's fees
5 [...] must be made by motion unless the substantive law requires those fees to be proved
6 at trial as an element of damages." Fed. R. Civ. P. 54. National Union is moving for an
7 award of attorneys' fees pursuant to Fed. R. Civ. P. 54(d)(2)(B) and A.R.S. § 12-341.01.
8 There are six factors to consider in a request for such fees under A.R.S. § 12-341.01(A).
9 *Associated Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985). These factors are:
10 (1) whether the unsuccessful party's claim was meritorious; (2) whether the litigation
11 could have been avoided or settled and the successful party's efforts were completely
12 superfluous in achieving the result; (3) whether assessing fees against the unsuccessful
13 party would cause extreme hardship; (4) whether the successful party prevailed with
14 respect to all relief sought; (5) whether the legal question presented was novel and
15 whether such a claim had previously been adjudicated in this jurisdiction; and (6)
16 whether an award in the case would discourage other parties with tenable claims from
17 litigating legitimate contract issues for fear of incurring liability for substantial amounts
18 of attorneys' fees. *Id.* The Court must consider each factor as no one factor is
19 determinative. *Wilcox v. Waldman*, 744 P.2d 444, 450 (Ariz. Ct. App. 1987).

20 **III. Entitlement to Attorney's Fees**

21 The Court finds that the *Warner* factors weigh in favor of awarding National
22 Union attorneys' fees.

23 **A. Merit**

24 The Court finds that Apollo's claims had merit because the claims centered on an
25 ambiguous contractual agreement. It is first important to note that "[a]n unsuccessful
26 claim is not necessarily one that lacks merit." *Biltmore Assocs., L.L.C. v. Twin City Fire*
27 *Ins. Co.*, 2007 WL 496766 at *3 (D. Ariz. 2007). Apollo and National Union had a
28 Consent-to-Settle provision as part of their contracts which stated that "Insurer's consent

1 [to settlements] shall not be unreasonably withheld.” (Doc. 75-3 at 14) Arizona courts
2 have yet to interpret what “unreasonably” means in the present context. However,
3 according to the Restatement (Second) of Property, Apollo must prove that National
4 Union withheld its consent “as a result of unreasonable caprice, whim, or personal
5 prejudice.” Restatement (Second) of Property § 15.2 Comment g (1977); *Tucson Med.*
6 *Ctr. v. Zoslow*, 712 P.2d 459, 462 (Ariz. Ct. App. 1985). Apollo argues that the
7 applicable standard is that an insurer is obligated to provide consent as long as the
8 settlement is reasonable. The Court finds that because of the ambiguity of the provision
9 in terms of the word “unreasonably” and lack of Arizona precedent on the specific issue,
10 the case had merit despite the summary judgement ruling. This factor weighs against
11 awarding attorneys’ fees.

12 **B. Settlement Efforts**

13 The settlement efforts in this case present a neutral factor in determining awards of
14 attorneys’ fees. Both parties argue that the other side was unreasonable in their
15 mediation efforts. Apollo acknowledges its failure to make counteroffers, but claims, and
16 appears to offer no proof, that National Union promised to increase its settlement offers
17 at each mediation. On the other hand, National Union argues that it should not be
18 required to “bid against itself” and increase settlement offers if Apollo does not give a
19 counteroffer. The records of what actually occurred at the settlement negotiations are
20 sealed. The Court finds that this factor does not weigh in favor of either party because
21 neither side appeared willing to work together to reach an agreed settlement.

22 **C. Extreme Hardship**

23 The Court finds that due to the size and revenue of Apollo, the requested
24 attorneys’ fees would not cause extreme hardship. “This factor asks whether assessing
25 fees against an unsuccessful party would cause extreme hardship given the parties’
26 relative economic positions.” *Biltmore*, 2007 WL 496766 at *4. It is the burden of the
27 party asserting financial hardship to show *prima facie* evidence of financial hardship.
28 *Woerth v. City of Flagstaff*, 808 P.2d 297, 305 (Ariz. Ct. App. 1990). National Union

1 argues that paying the requested attorneys' fees would not cause undue hardship because
2 Apollo is "a global company that reported \$2.1 billion in net revenue for its fiscal year
3 ending August 31, 2016." (Doc. 113 at 9) Additionally, in its Form 10-K, Apollo
4 asserted that the \$13.125 million settlement was an "immaterial" amount that was paid
5 for without the liquidation of assets. (Doc. 113 at 9) Apollo had the burden of proving
6 potential financial hardship if attorneys' fees were awarded, but failed to do so. Not only
7 did Apollo fail to present an argument regarding this factor, they also did not list this
8 factor as one that favors a finding against an award of fees. Apollo did not meet its
9 burden of showing extreme financial hardship. Accordingly, the Court finds that this
10 factor weighs in favor of awarding attorneys' fees to National Union.

11 **D. Winning Party Prevailed**

12 Both parties agree that National Union successfully moved for summary
13 judgement with respect to all of the relief sought by Apollo. This factor weighs in favor
14 of a finding that National Union is entitled to an award of attorneys' fees.

15 **E. Novelty of the Issue**

16 The Court finds that because the issues presented were somewhat novel, this fifth
17 factor weighs slightly against a finding that attorneys' fees should be granted. The
18 Arizona Appellate Court has found that even when the state has not determined the
19 meaning of the word in question in a similar context, if other jurisdictions have done so,
20 no novel question regarding the meaning of the word exists. *Potter v. United States*
21 *Specialty Ins. Co.*, 98 P.3d 557, 560 (Ariz. App. 2004). Arizona may not have addressed
22 the word "unreasonable" in an insurance contract, but the issue has been addressed in
23 other jurisdictions. *See Schwartz v. Twin City Fire Ins. Co.*, 492 F. Supp. 2d 308, 319
24 (S.D.N.Y. 2007) (finding that a court may consider the totality of the circumstances
25 known to the party whose conduct they were considering in deciding whether they acted
26 reasonably or in good faith). Due to the previous interpretation of the term, this Court
27 finds that the meaning of the term "unreasonable" in a contract dispute is not a
28 completely novel question. However, because the Arizona courts needed to establish

1 what they would find to be the proper definition in this jurisdiction, the issue presented
2 was still somewhat novel and weighs slightly in favor of denying the motion for
3 attorneys' fees.

4 **F. Discourage Future Claims**

5 The Court finds that awarding attorneys' fees in this case would not discourage
6 future claims. Precedent already alerts parties to the risks of bringing unmeritorious
7 claims. A.R.S. § 12-341.01(A) discusses the possibility of a court awarding attorneys'
8 fees. That statute warns potential litigants to consider that possibility, regardless of what
9 this case decides. In addition, Apollo is a large organization that has been involved in
10 lawsuits in the past, and it is well aware of the risks of litigation. Accordingly, the Court
11 finds that this factor is neutral in deciding whether to award attorneys' fees.

12 **G. Consolidation of Court Resources**

13 Apollo argues that the Court should deny the Motion without prejudice until the
14 pending appellate case has been decided. While the District Court has discretion as to
15 whether or not to award attorneys' fees after the notice of appeal from the decision has
16 been filed, ruling on motions for attorneys' fees "will prevent hasty consideration of post-
17 judgement fee motions." *Masalosalo ex rel. Masalosalo v. Stonewall Ins. Co.*, 718 F.2d
18 955, 957 (9th Cir. 1983). The Ninth Circuit has also noted that if the District Court
19 decides a fee issue "early in the course of a pending appeal on the merits, and the fee
20 order is appealed, the appeals may be consolidated." *Id.* Here, the Court agrees with the
21 Ninth Circuit and finds that in order to promote efficiency with both time and court
22 resources, the present Motion shall be granted.

23 **IV. Reasonableness of Attorney's Fees**

24 The Court finds that the requested fee award of \$1,215,832.80 is reasonable
25 because National Union (1) addressed Apollo's concerns in response to the Motion, and
26 (2) reasonably deducted the costs that Apollo found to be incompliant with Local Rule
27 54.2.

28 First, in order to calculate the fee award, the Court must multiply the number of

1 hours reasonably expended on the litigation times a reasonable hourly rate. *Blum v.*
2 *Stenson*, 465 U.S. 886, 888 (1984). Here, National Union provided documentation as to
3 the hours worked on the case and the fee acquired.

4 Next, National Union addressed several block billed entries by reducing its fee
5 request. Block billing, entering multiple and unrelated tasks together in a single fee entry,
6 is prohibited by LRCiv 54.2(e)(1)(B). This rule requires “unrelated” tasks to be on
7 separate time entries, and the Court may reduce excessive fees in the event that that
8 National Union has block billed. Apollo listed seven time entries in which Apollo claims
9 National Union block billed. Apollo does not list a total of how many time entries they
10 believe were in direct conflict of LRCiv 54.2(e) other than that the seven entries listed
11 were just a “small sample” of the invalid entries. National Union gave evidence to show
12 that several of the given entries were valid due to each activity being related. Without
13 further evidence as to how many legitimately block billed time entries are present, the
14 Court is unable to adequately determine the severity of the issue. Thus, with the evidence
15 presented to the Court, it would be unjust to create a fee reduction because of the block
16 billing entries.

17 Further, Apollo argues several categories in which National Unions fees were
18 excessive: (1) preparing for fee petition, (2) Floren deposition, (3) written discovery
19 requests, (4) mediation, and (5) Expert Peter (“Thomas”) Zaccaro.

20 1) Apollo discusses how the fees charged for preparing the fee petition are
21 excessive, in part, because National Union requested \$36,000 for more than
22 70 hours of preparation for attorneys’ fees. Due to the complexity of the
23 issue, the Court uses its discretion and follows the guidelines of *Angel Jet*
24 *Servs., LLC v. Giant Eagle, Inc.* in finding that 77.4 hours was a reasonable
25 amount of hours expended in this litigation. 2013 WL 11311729, at *9.

26 2) As for claims regarding the Floren deposition, National Union has already
27 withdrawn fees for travel time and decreased its requested fees where it
28 charged more than the discussed \$460/hour billing rate because of a

1 spreadsheet error. National Union has, on its own, fixed the issues with this
2 charge that Apollo addresses, so the Court finds the updated amount
3 reasonable.

4 3) Apollo also requests that National Union's fees pertaining to written
5 discovery requests be found unreasonable because they were "largely boiler
6 plate responses." (Doc. 119 at 16) However, Apollo does acknowledge that
7 the issues addressed were complicated and time sensitive. Furthermore,
8 Apollo does not state how much time courts generally find to be
9 unreasonable in the past for similar jobs. Apollo therefore has not provided
10 sufficient evidence towards a finding that this charge is objectively
11 unreasonable.

12 4) Apollo next explains that the 168 hours and \$53,633.00 incurred in
13 connection with the second mediation is unreasonable because it was
14 largely redundant. However, both sides agree that this was the first
15 mediation in which National Union's counsel, Steptoe & Johnson LLP, was
16 hired to represent National Union. It is only logical that the new firm would
17 require a substantial amount of time to prepare for their first mediation with
18 Apollo. Therefore, the Court finds that the costs were reasonable.

19 5) Apollo finally argues that the Court should strike all of the fees related to
20 National Union's expert Zaccaro because (i) National Union did not rely on
21 his testimony during litigation, and (ii) Zaccaro is unqualified as an expert.
22 The Court finds that National Union did rely on Zaccaro heavily before trial
23 by repeatedly citing his reports and submitting those reports as exhibits.
24 There is also a high bar to establish that an expert witness is unqualified.
25 "Because there are many different kinds of experts and expertise, [the
26 standards for determining if an expert is qualified] is, by necessity, a
27 flexible one." *People v. Kowalski*, 492 Mich. 106, 119 (2012). Apollo does
28 not allege what the legal standard is to be an expert in this field. The Court

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does not find reason to rule that Zaccaro is unqualified as an expert witness.

For the foregoing reasons, the Court finds that the amount of attorneys' fees requested, \$1,215,832.80, is reasonable.

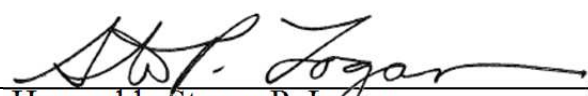
IV. Conclusion

While no one factor is determinative, most of the factors favor granting National Union's Motion. As the Court has found, three of the six *Warner* factors weigh in favor of granting the Motion: (i) the requested fees would not cause Apollo undue hardship, (ii) National Union prevailed on summary judgement with respect to all relief sought, and (iii) the issue presented was only somewhat novel. On the other hand, only one factor actually weighed against awarding attorneys' fees: the claim that Apollo brought did have merit. The other two factors are neutral in this analysis. Further, it conserves court resources to grant the Motion now, rather than dismissing the Motion until after the case is decided on appeal. For the foregoing reasons, the Court grants the Motion.

Accordingly,

IT IS ORDERED that Defendant's Motion (Doc. 113) is granted, and that the Plaintiff shall pay, and the Defendant shall be awarded, attorneys' fees in the amount of \$1,215,832.80.

Dated this 18th day of July, 2018.


Honorable Steven P. Logan
United States District Judge