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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Zounds Hearing Franchising, LLC, an Arizona limited liability company; and Zounds Hearing Inc., a Delaware corporation,

Plaintiffs,

v.

Edward T. Bower and Barbara Bower, husband and wife; and Lend Me Your Ears, Inc., an Ohio corporation;

Defendants.

**ORDER**

No. CV-16-01462-PHX-NVW  
(Consolidated)

Zounds Hearing Franchising, LLC, an Arizona limited liability company; and Zounds Hearing Inc., a Delaware corporation,

Plaintiffs,

v.

Frank R. Graziano and Mary E. Graziano, husband and wife; and FNM Enterprises, Inc., an Ohio corporation,

Defendants.

No. CV-16-01465-PHX-NVW

Zounds Hearing Franchising, LLC, an Arizona limited liability company; and Zounds Hearing Inc., a Delaware corporation,

Plaintiffs,

v.

Glenn Harbold, an individual; and Perfect Clarity LLC, an Ohio limited liability company,

Defendants.

No. CV-16-01467-PHX-NVW

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2 Zounds Hearing Franchising, LLC, an Arizona  
3 limited liability company; and Zounds Hearing  
4 Inc., a Delaware corporation,

5  
6 Plaintiffs,

7 v.

8 Lawrence R. Woerner and Nancy Woerner,  
9 husband and wife; Susan Steigerwald and David  
10 Steigerwald, husband and wife; Lawrence W.  
11 Woerner and Rosemarie Woerner, husband and  
12 wife; and WOCO Franchise LLC, an Ohio  
13 limited liability company,

14 Defendants.

No. CV-16-01470-PHX-NVW

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16 Before the Court is Defendants' Motion for Attorneys' Fees (Doc. 60), the  
17 Response, and the Reply. The Court has previously determined that Defendants' fees  
18 will be awarded under Ariz. Rev. Stat. § 12-341.01(A) and Ohio Rev. Code §  
19 1334.09(B)(2). Fees are awardable under the Arizona statute because the four failed  
20 Arizona actions were filed in Arizona, claiming to be under Arizona contract law. Fees  
21 are also awardable in the four Arizona actions under the Ohio statute because they were  
22 filed in violation of the Ohio statute, which prohibits lawsuits out of Ohio and non-Ohio  
23 choice-of-law clauses and permits a fee award for violation of the Ohio statute.

24 All the fees incurred in the four Arizona cases and in the Ohio case, except the  
25 fees incurred in the Ohio case before the Arizona cases were filed, are awardable in these  
26 Arizona cases because all the work was the same for all the cases, with one exception  
27 noted later. The only task remaining on this motion is the quantification of the fee award.

28 Unfortunately, both sides' briefs are burdened with erroneous and inapplicable  
assertions concerning attorney fee awards. The correct legal analysis concerning the fee  
award is as follows.

1. The basis for the award is the reasonable hours expended at the agreed  
hourly rates, assuming those rates are reasonable. Ariz. Rev. Stat. § 12-341.01(B) ("the  
award may not exceed the amount paid or agreed to be paid"); *Schweiger v. China Doll*

1 *Restaurant, Inc.*, 138 Ariz. 183, 187-88, 673 P.2d 927, 931-33 (Ariz. Ct. App. 2006) (the  
2 agreed hourly rate is presumptively the reasonable rate in commercial litigation).  
3 Nevertheless, Defendants seek an award above the agreed rates and even above the  
4 reasonable lodestar rate for the services, a multiplier on the lodestar value. That is  
5 because Defendants' counsel agreed to a mixed attorney fee based on a reduced hourly  
6 rate and a contingent fee as well. Under the Arizona statute the Court can award at most  
7 the agreed hourly rate for time reasonably expended. Moreover, the four Arizona cases  
8 did not produce a monetary recovery, so no contingent fee has been earned.

9 A monetary recovery may yet occur in the Ohio case, first transferred to Arizona  
10 and the transferred back to Ohio. That remains to be seen. If further proceedings do  
11 result in a monetary recovery to the Franchisees, the Ohio court will have to quantify and  
12 award later fees incurred in the Ohio proceedings, including any shifting of fees to  
13 Zounds based on the contingent fee portion of the recovery.

14 There is no authority on whether the Ohio statute allows a multiplier on lodestar  
15 value. If there is a monetary recovery and the Ohio court concludes a multiplier may be  
16 awarded under the Ohio statute, then the Ohio court may make such an award at that  
17 time, together with the additional hourly-rate fees incurred.

18 2. Defendants' counsel's discounted hourly rates are eminently reasonable.  
19 The services at the reduced rates are reasonable, and the times and fees as a whole are  
20 reasonable. Even at counsel's full regular hourly rate, the total fees would be reasonable.  
21 Contrary to Zounds' repeated assertions, this was not a simple case. Zounds fought hard  
22 to oust Ohio franchise law from protecting Ohio franchisees in Ohio franchises. Zounds'  
23 attack on the Ohio franchise law was bold and had to be met with full force.

24 3. Sometimes unidentified legal research can be ascertainable in the context of  
25 other described services. This case called for substantial legal research and it is inferable  
26 that the legal research was being done on the matters otherwise at hand. The amount  
27 expended on legal research was entirely reasonable, considering the nature of the issues  
28 and the magnitude of the cases.

1           4. Counsel who describe dissimilar services without adequate breakdown to  
2 determine what was done and whether it was reasonable run the risk that the court may  
3 reduce such services. *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2001).  
4 But often quantity of the services can fairly be known from the similar services with  
5 which they are associated. For example, writing a response brief and legal research on  
6 the same need not be broken down to ascertain that the whole is reasonable. The  
7 admonition against block billing is not a game of gotcha, regardless of whether  
8 reasonableness can be determined. Here the Court has reviewed all Zounds' objections  
9 and concludes some of the so-called block billing is not block billing at all and, whether  
10 it is or not, the entries do not prevent determination of reasonableness.

11           5. In the Ohio litigation, the Franchisees sued additional defendants, the  
12 brokers who sold them the franchises. Those parties were among those transferred to  
13 Arizona. To the extent time was expended solely on negotiating settlements with those  
14 brokers, fees should not be awarded against Zounds. But work relevant to Zounds does  
15 not become unawardable because it also served the claims against the brokers.  
16 Therefore, 10.75 hours of Mr. Dub's time devoted solely to the brokers will be reduced  
17 from the award.

18           6. Fees incurred on unsuccessful legal theories and strategies should be  
19 awarded when the successful party has achieved the result sought in the litigation.  
20 *Schweiger*, 138 Ariz. at 189, 673 P.2d at 939. The Franchisees wholly prevailed on the  
21 points on which Zounds brought the Arizona lawsuits. The fees incurred in resisting the  
22 transfer of the Ohio case to Arizona have now been fully vindicated.

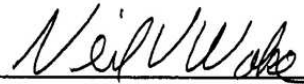
23           7. Zounds contends that some fees were excessive, redundant, or  
24 unreasonable. Some of those objections are based on miscounting of time. (Doc. 67 at 7-  
25 9.) Having examined the questioned time entries, the Court squarely rejects those  
26 contentions. The times expended were eminently reasonable. The Franchisees are not  
27 required to do perfunctory work when their businesses are put to life or death litigation.  
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1           The Court awards Defendants (the Franchisees) \$42,000.00 in attorney's fees for  
2 Mr. Dub's services for 210 hours at the agreed rate of \$200/hour. The Court awards  
3 \$6,240.00 in attorney's fees for Mr. Greenfield's services of 41.6 hours at the agreed rate  
4 of \$150/hour. Attorneys' expenses of \$269.75 are also awarded under the Ohio statute.  
5 The total fee award is \$48,509.75.

6           IT IS THEREFORE ORDERED that Defendants' Motion for Attorneys' Fees  
7 (Doc. 60) is granted in the amount of \$48,509.75.

8           IT IS FURTHER ORDERED that the Clerk enter judgment **in favor of**  
9 **Defendants** Edward T. Bower and Barbara Bower, husband and wife; Lend Me Your  
10 Ears, Inc., an Ohio corporation; Lawrence R. Woerner and Nancy Woerner, husband and  
11 wife; Susan Steigerwald and David Steigerwald, husband and wife; Lawrence W.  
12 Woerner and Rosemarie Woerner, husband and wife; WOCO Franchise LLC, an Ohio  
13 limited liability company; Frank R. Graziano and Mary E. Graziano, husband and wife;  
14 FNM Enterprises, Inc., an Ohio corporation; Glenn Harbold, an individual; and Perfect  
15 Clarity LLC, an Ohio limited liability company, **against Plaintiffs** Zounds Hearing  
16 Franchising, LLC, an Arizona limited liability company; and Zounds Hearing Inc., a  
17 Delaware corporation, jointly and severally, **for \$48,509.75**, plus interest thereon at the  
18 federal rate of 2.27% per annum until paid.

19           Dated: May 15, 2018.

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23 Neil V. Wake  
24 Senior United States District Judge  
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