

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 HIMC CORPORATION, a Washington corp.,

5 Plaintiff,

6 v.

7 PREM RAMCHANDANI, *et al.*, and
8 FIDELITY TRANSFER CO., a Nevada
9 corporation,

10 Defendants.

Case No. C07-5342FDB

ORDER DENYING PLAINTIFF'S
MOTION FOR AWARD OF
ATTORNEY'S FEES AND COSTS

11 HIMC moves for an award of **attorney's fees and costs** pursuant to RCW 4.84.250 in the
12 total amount of \$119,831.62; for **costs** pursuant to Rule 56(d)(1), Fed. R. Civ. P. in the amount of
13 \$13,354.91; and for **fees and costs** pursuant to Rule 68, Fed. R. Civ. P. in the total amount of
14 \$33,536.00. Plaintiff contends that each of the three independent authorities for a fee award has
15 slightly different criteria for the granting of a fee request.

16 Factoring in a credit to Defendants of \$2,652.72, HIMC seeks a total of \$119,831.53 fees
17 and costs pursuant to RCW 4.84.250 and \$42,690.53 fees and costs pursuant to Federal Rules of
18 Civil Procedure 54(d)(1) and 68.

19 The parties arguments and the Court's decision on each of the claims now follows:

20 **Fees and Costs Claim under RCW 4.84.250**

21 The statute under this fees and costs claim provides as follows:

22 **RCW 4.84.250. Attorneys' fees as costs in damage actions of ten thousand
23 dollars or less – Allowed to prevailing party**

24 Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.10.060, in
25 any action for damages where the amount pleaded by the prevailing party as
26 hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less,
there shall be taxed and allowed to the prevailing party as a part of the costs of the
action a reasonable amount to be fixed by the court as attorneys' fees. After July 1,
1985, the maximum amount of the pleading under this section shall be ten thousand
dollars.

1 **RCW 4.84.270. Attorneys’ fees as costs in damage actions of ten thousand**
2 **dollars or less – When defendant deemed prevailing party**

3 The defendant, or party resisting relief, shall be deemed the prevailing party within the
4 meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for
5 damages where the amount pleaded, exclusive of costs, is equal to or less than the
6 maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery,
7 exclusive of costs, is the same or less than the amount offered in settlement by the
8 defendant, or the party resisting relief, as set forth in RCW 4.84.280.

9 HIMC argues that attorney’s fees are awarded under RCW 4.84.250 to the prevailing party
10 as part of the “costs” of litigation, and that neither the amount of money ultimately recovered nor the
11 assertion of a counter-claim of more than \$10,000 affects the ultimate award of fees and costs.

12 The Individual Defendants oppose the motion, contending that “Plaintiff’s motion is a sham
13 and is filed in bad faith.” Individual Defendants argue that HIMC’s Complaint contained no causes
14 of action for damages and that RCW 4.84.250 does not apply, therefore: the first cause of action,
15 based on failure to fully pay consideration for the stock certificates at issue, was for declaratory and
16 injunctive relief against the individual defendants to prevent them from seeking removal of the
17 restrictions from the stock certificates; and the remaining two causes of action sought rescission of
18 the “Memorandum of Understanding and an order directing the Individual Defendants to “surrender”
19 the stock certificates. Thus, Individual Defendants argue that while the amount pleaded by HIMC
20 was less than \$10,000, this is because no amount of damages was pleaded.

21 HIMC replies that a costs award under RCW 4.84.250 may be to a prevailing plaintiff or
22 prevailing defendant. Under RCW 4.84.260, a plaintiff is the prevailing party for purposes of an
23 award under RCW 4.84.250 when the recovery is more than the amount offered in settlement. RCW
24 4.84.270 authorizes an award of fees and costs when the Plaintiff recovers nothing following an offer
25 of settlement. HIMC argues that there is nothing in the language of RCW 4.84.250 that bars its
26 application to a claim for equitable relief or its applicability to a counter-plaintiff.

 The Court concludes that HIMC is not entitled to attorney’s fees and costs under RCW
4.84.250 for two reasons. First, the purpose of RCW 4.84.250 is to encourage out-of-court

1 settlements and to penalize parties who unjustifiably bring or resist small claims. *See Public Utilities*
2 *District No. 1 of Grays Harbor v. Crea*, 88 Wash. App. 390, 395 (1997)(“The legislative purpose,
3 ‘to enable a party to pursue a meritorious small claim without seeing his award diminished ... by legal
4 fees.’”) The Court is not convinced that this case is a “small claim” given that it involves issues
5 surrounding the issuance of securities (restricted stock) and an effort to forge a joint venture that the
6 parties believed would be highly remunerative to them. Moreover, in the jurisdictional statement of
7 its Complaint, HIMC Corporation states that the value of the controversy is more than \$75,000.00.
8 Second, RCW 4.84.250 applies to “any action for damages,” but Plaintiff HIMC did not file an
9 action for damages. Rather, HIMC’s Complaint sets forth three causes of action: 1. Declaratory
10 Judgment with Injunctive Relief and T.R.O., 2. Rescission Based on Breach of Contract, and 3.
11 Rescission based on common-law misrepresentation. *See Becerra v. City of Warden*, 117 Wash. App.
12 510 (2003). In *Becerra*, the Court stated:

13 As the City aptly notes, Mr. Becerra did not file an action for damages. *See*
14 *Lay v. Hass*, 112 Wash. App. 818, 51 P.3d 130 (2002)(noting request for damages in
15 connection with quiet title action made RCW 4.84.250 applicable). Rather, he
16 contested the impoundment of his vehicle and requested refund of the fees incurred in
17 connection with that action. RCW 46.55.120(3)(e). He did not seek statutory loss of
18 use damages. *Id.* Accordingly, the statute ordinarily would not apply.

19 In contrast, although the Individual Defendants’ counterclaim did seek damages (Answer and
20 Counterclaim, Dkt. # 24, ¶¶ 73 - 74, and 85 - 86.), this fact does not change the result because the
21 cause of action is not a small claim as contemplated by RCW 4.84.250. The Individual Defendants’
22 counterclaim, which alleges no value, essentially presents the opposite view of HIMC’s claim, which
23 alleged that the jurisdictional amount was met, the value of the controversy being more than
24 \$75,000.00. In *Schmerer v. Darcy*, 80 Wash. App. 499 (1996), Schmerer sought attorney fees
25 pursuant to RCW 4.84.250 and .270. The Court stated that Schmerer would be entitled to attorney
26 fees “... despite the lack of pleading an exact amount, if she had constructive knowledge that the
amount of the claim was \$10,000 or less. *Beckmann v. Spokane Transit Auth.*, 107 Wash.2d 785,

1 789-90 , 733 P.2d 960 (1987).” *Schmerer*, 80 Wash. App. at 510. In the case of HIMC and the
2 Individual Defendants, the parties all were aware that this case does not involve a small claim of
3 \$10,000 or less. RCW 4.84.250 does not apply, and HIMC’s motion for attorney’s fees pursuant to
4 this provision is denied.

5 **Fees and Costs Claim under Fed. R. Civ. P. 68**

6 Fed. R. Civ. P. 68 provides as follows:

7 (a) **Making an Offer; Judgment on an Accepted Offer.** More than
8 10 days before the trial begins, a party defending against a claim may
9 serve on an opposing party an offer to allow judgment on specified
10 terms, with the costs then accrued. If within 10 days after being
11 served, the opposing party serves written notice accepting the offer,
12 either party may then file the offer and notice of acceptance, plus proof
of service. The clerk must then enter judgment.

(d) **Paying Costs After an Unaccepted Offer.** If the judgment that
the offeree finally obtains is not more favorable than the unaccepted
offer, the offeree must pay the costs incurred after the offer was made.

13 HIMC contends that on October 8, 2008 it – as counter-defendant – made a Rule 68 Fed. R.
14 Civ. P. offer of judgment to the Individual Defendants in the amount of \$2,500.00 to resolve the two
15 pending counterclaims and the litigation. (Adler Decl. Ex. 1.) The Individual Defendants did not
16 respond to the offer. *Id.* HIMC says that from October 8, 2008 (the time of the offer) through June
17 3, 2009, it incurred attorney’s fees totaling \$33,636.00 and costs totaling \$571.00 for a total of
18 \$34,207.00. HIMC argues that under Rule 68 and Washington state law, the term “costs” is defined
19 to include attorney’s fees. *See Marek v. Chesney*, 473 U.S. 1 (1985); *Champion Produce v. Ruby*
20 *Robinson Co.*, 343 F.3d 1016 (9th Cir. 2003), and *see* RCW 4.84.250.

21 The Individual Defendants respond that the offer of judgment was by HIMC as a
22 counterclaim defendant and the motion under Rule 68 is without merit because the Counterclaim
23 Defendant HIMC prevailed not the Counterclaim Plaintiffs, citing *Delta Air Lines, Inc. v. August*,
24 450 U.S. 346 (1981)(“Rule 68 prescribes certain consequences for formal settlement offers made by
25 ‘a party defending against a claim.’ The Rule has no application to offers made by the plaintiff.” *Id.*

1 at 350. The Individual Defendants also argue that HIMC’s Rule 68 motion should be denied because
2 the offer is an ambiguous, lump-sum offer made to several plaintiffs without apportionment of the
3 total amount, citing *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1075 (7th Cir. 1999). The
4 Individual Defendants cite the offer, which they argue improperly states as follows:

5 That HIMC Corp. Will allow judgment to be taken against it for \$1,500.00 inclusive
6 of all costs and fees, and will pay to the four Defendants collectively the amount of
7 \$2,500.00, or pay \$2,500.00 in such allocations as they may direct. That upon
satisfaction of the foregoing, all claims and counterclaims will then be dismissed with
prejudice, without further award of costs, fees or expenses.

8 (Mortner Decl. p. 5; see also, Adler Decl. Ex. 1, ¶¶ 5 & 6.)

9 HIMC replies that Rule 68 does not require that a defendant allocate among the various
10 plaintiffs how the offered award would be divided. The authority cited by the Individual Defendants
11 is not binding in this Circuit, which has rejected the need to allocate an offer. *See Lang v. Gates*. 36
12 F/3d 73 (9th Cir. 1994). HIMC also replies that its offer was made as a defendant in the context of
13 the counterclaims against it, and that there is nothing in Rule 68 that proscribes a counter-defendant,
14 which will also always be a “Plaintiff,” from making a Rule 68 offer.

15 Finally, HIMC replies to the Individual Defendants’ argument that Rule 68 does not apply to
16 cases where the counterclaim defendant obtains a judgment, citing *Delta Airlines v. August*, 450
17 U.S. 346 (1981). HIMC distinguishes the case from the facts of this case, where the airline made an
18 offer to Plaintiff to settle case, plaintiff lost, and the Court rejected the airline’s attempt to have the
19 costs incurred after the offer of judgment to be paid by the Plaintiff. The Court rejected the Airline’s
20 Rule 68 claim because it found the minimal offer made under the circumstances to have been
21 unreasonable and not made in good faith. *Id.* at 348-49.

22 The Court concludes that HIMC is not entitled to costs, including attorney’s fees under Fed.
23 R. Civ. P. 68. In *Ezelle v. Bauer Corporation*, 154 F.R.D. 149 (1994), the Defendant sought an
24 award of costs after an offer of judgment for \$35,000.00 was rejected and Plaintiffs lost the case and
25 obtained a zero judgment. The *Ezelle* court reasoned as follows:

1 The defendant misconstrues the matter in which Rule 68 properly operates.
2 Here, the defendant, not the plaintiffs, prevailed. The judgment entered by the court
3 directs that the plaintiffs “recover nothing from and of the defendant.” Rule 68
4 requires a “prevailing “ plaintiff to pay the costs of litigation in the single
5 circumstance covered by the rule: where the plaintiff does not accept the defendant’s
6 offer of judgment which is more favorable than the judgment the plaintiff ultimately
7 obtains.

8 154 F.R.D. at 152. The Court held that “Rule 68, then, pertains only to judgments obtained by the
9 plaintiff and is inapplicable to cases, such as the case *sub judice*, where the defendant obtains
10 judgment, or where the plaintiff takes nothing. *Delta Airlines v. August*, 450 U.S. at 351, 101 S.Ct.
11 at 1150.” HIMC’s offer was made as to its own case and as to the Individual Defendants’
12 counterclaim. In its own case, it was “not a party defending against a claim,” and so did not come
13 within the statute, and in the case of the counterclaim, the offerees (Individual Defendants) did not
14 obtain any judgment. HIMC’s argument for an award of costs under Rule 68 is denied.

15 **Cost Claim under Fed. R. Civ. P. 54(d)(1)**

16 Fed. R. Civ. Pro. 54(d)(1) provides in pertinent part as follows:

17 (1) **Costs Other Than Attorney’s Fees.** Unless a federal statute, these rules, or a
18 court order provides otherwise, costs – other than attorney’s fees – should be allowed
19 to the prevailing party.

20 HIMC seeks costs totaling \$14, 764.73, which include costs of taking depositions and travel,
21 hotel and room rental costs for taking depositions in out-of-state locations.

22 The Individual Defendants oppose costs being taxed to them and request that the Court, in its
23 discretion, set off such costs by an award of attorney’s fees to them in connection with defending
24 against “the sham and bad faith application for attorney’s fees.” The Individual Defendants also
25 request that the Court note that the “the judgment this Court ultimately granted in this action in favor
26 of HIMC was based upon findings of fact and conclusions of law that bore no resemblance to the
27 facts and law alleged by HIMC in the Complaint and throughout this case. Thus, the Individual
28 Defendants argue that the parties should bear their own costs.

1 The Court concludes that costs will not be taxed to the Individual Defendants, and that each
2 party should bear its own costs. The Court denied the Individual Defendants' motion for summary
3 judgment and granted in part and denied in part Plaintiff's motion for summary judgment, and under
4 all the circumstances, it is appropriate for each party to bear its own costs. HIMC's motion for
5 award of costs pursuant to Fed. R. Civ. P. 54(d)(1) is denied.

6 **Cost Claim under Fed. R. Civ. P. Rule 11**

7 HIMC seeks sanctions of attorney's fees in the amount of \$12,772.00 pursuant to Fed. R.
8 Civ. P. Rule 11, which fees were incurred in response to the Individual Defendants' conduct in filing
9 a Notice of Appeal on November 26, 2008 following this Court's Order on Cross -motions for
10 summary judgment entered November 25, 2008 and also in response to the Ninth Circuit's show
11 cause order of January 30, 2009 [Dkt. # 126].

12 The Individual Defendants do not respond to this portion of HIMC's motion.

13 The Court is not inclined to award attorney's fees to HIMC for the Individual Defendants'
14 appeal improvidently taken before the entire case was resolved and which was *sua sponte* dismissed
15 by the Ninth Circuit for lack of jurisdiction. The main substance of the case was resolved, and only
16 Fidelity Transfer Co. remained as the agent to handle the return of the restricted shares to HIMC.
17 HIMC's motion for attorney's fees pursuant to Fed. R. Civ. P. Rule 11 is denied.

18 NOW, THEREFORE, for all the reasons cited above on the various bases for an award of
19 attorney's fees and costs,

20 IT IS ORDERED: Plaintiff's Motion for Award of Attorney's Fees and Costs [Dkt. # 137] is
21 DENIED.

22 DATED this 26th day of June, 2009.

23 
24 _____
25 FRANKLIN D. BURGESS
26 UNITED STATES DISTRICT JUDGE