SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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NICKLAUS COMPANIES, LLC,

Plaintiff,

- v -

GBI INVESTORS, INC., JACK W. NICKLAUS,

Defendants.

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INDEX NO. 656284/2022

MOTION DATE 04/21/2025, 04/21/2025, 04/21/2025

MOTION SEQ. NO. 013 013 013

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 638, 640, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654
were read on this motion for ATTORNEY FEES AND COSTS.

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were read on this motion for ATTORNEY FEES AND COSTS.

Defendants GBI Investors, Inc. and Jack W. Nicklaus ("Defendants") move for an award of $6,267, 902 in attorneys' fees and $361,150.72 in litigation costs as the prevailing party in the underlying litigation pursuant to section 10.7 of the Purchase and Sale Agreement ("PSA"), section 9.20 of the LLC Agreement § 9.20, and section 6.3 of the Non-Competition Agreement. Plaintiff Nicklaus Companies (the "Company") opposes this motion. For the following reasons, Defendants' motion is granted in part.

A. Whether Defendants are entitled to attorney's fees and costs

Absent a contractual agreement to the contrary, the general rule under New York law is that each party is responsible for its own attorneys' fees and costs of litigation (*see Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]; *AG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 515 [2008]). A contractual agreement allowing a prevailing party to collect legal expenses relating to the action from the non-prevailing party must be explicit (*see Hooper*, 74 NY2d at 492; *Sage Sys., Inc. v Liss*, 39 NY3d 27, 31 [2022]).

Here, it is undisputed that the fee-shifting provisions contained in the LLC Agreement and Non-Competition Agreement (*see* NYSCEF 400 [LLC Agreement] § 9.20; NYSCEF 402 [Non-Competition Agreement"] §6.3) are sufficiently clear and unambiguous to warrant an award of fees to the prevailing parties (here, Defendants) with respect to claims arising under those agreements. By contrast, although the PSA provides for fee-shifting under certain circumstances, those circumstances are not present in this case. Therefore, Defendants are not entitled to recover their fees or litigation costs (other than normal taxable costs as part of a judgment) with respect to claims asserted under the PSA.

Section 10.7 of the PSA, titled "Limitation on Recourse," provides that "no claim shall be brought or maintained by the Company" "against any officer, director, employee (present or former)" "and no recourse shall be brought or granted against any of them, by virtue of or based upon any alleged misrepresentation or inaccuracy in or breach of any of the representations, warranties or covenants of any Party hereto set forth or contained in this Agreement. . . ." (NYSCEF 398 ["PSA"] § 10.7[b]).

As relevant here, this section goes on to provide that:

> "[w]ithout limiting the foregoing, ***neither the Company*** nor Investor or its Affiliates, nor any Person claiming by or through any of such Persons, ***shall have any recourse against Jack W. Nicklaus*** or any other member of his Immediate Family (as such term is defined in the LLC Agreement), ***with respect to any claims that directly or indirectly arise from***

> ***or relate to, in whole or in part, the transactions undertaken by the GBI Entities*** as contemplated by this Agreement and the Ancillary Agreements, provided however, that the foregoing limitation of recourse shall not preclude the enforcement of any obligations undertaken by any of such persons individually in any Ancillary Agreement or the Guarantees of Collection to which such individual may be a named party. ***In the event that the Company, Investor or its affiliates, or any Person claiming by or through any of such Persons, institutes any legal action or proceedings against Jack W. Nicklaus*** or any other member of his Immediate Family in violation of this covenant, such persons shall be entitled to obtain their immediate dismissal with prejudice from any such action or proceeding and ***an award of the expenses and attorneys' fees incurred by them in securing such dismissal***, without prejudice to their ability to institute proceedings to recover any other losses sustained or damages incurred by them as a result of such violation

(PSA § 10.7[b] [emphasis added]).

In this case, the Company's claims under the PSA are against GBI, not Mr. Nicklaus personally, and therefore the "no recourse" provision is not triggered. As this Court observed during a preliminary injunction hearing early in the case, "the contract says that … it is without recourse to Mr. Nicklaus personally. And that is true. I think that those kinds of provisions are typically interpreted and I think reasonably interpreted, as meaning financially as in [a] without recourse lending transaction . . . I don't think that means that Mr. Nicklaus avoids all responsibilities for that part of the transaction . . . even if you assume that GBI is the only party that could be sued for anything, Mr. Nicklaus remains a principal of that [entity], and an injunction against GBI could be enforceable against Mr. Nicklaus" (NYSCEF 246 at 347-48). In sum, the Company's claims under the PSA do not impermissibly seek to hold Mr. Nicklaus liable for breach of contract. The fact that an award against GBI might have impacted Mr. Nicklaus (as its owner) does not mean that the Company was seeking "recourse" against Mr. Nicklaus for GBI's breach of the agreement, even if that breach was the result of Mr. Nicklaus's conduct. Accordingly, the fee-shifting provision contained in section 10.7 is inapplicable.

The task then becomes how to allocate Defendants' fee application so that it is limited to fees and expenses relating to the Company's claims under the LLC Agreement and Non-

Competition Agreement. The Company requests that the proposed fees be cut by 56 percent based on this Court's Summary Judgment decision, which it reckons dedicated 9.5 pages to the cause of action for breach of the PSA and 7.5 pages to the other causes of action (NYSCEF 94 at 18-34). While creative, this is not persuasive. The number of words the Court chose to use in deciding the various claims is not a reliable proxy for the effort expended in litigating those various claims, although in the end the resulting proposed discount is not far from the Court's assessment of the proper allocation.

The PSA, the LLC Agreement, and the Non-Competition Agreement were all executed as part of the same overall transaction governing the sale, structure, and future governance of Nicklaus Companies. Each agreement addresses distinct but related components of the same business relationship, that being ownership transfer (PSA), post-transaction conduct and restrictions (Non-Competition), and corporate structure and dispute resolution (LLC). As this Court already determined, because these agreements were executed simultaneously and pertain to the same subject matter, they must be read together as "inextricably intertwined" components of a unified contractual arrangement (*Fundamental Long Term Care Holdings, LLC v Cammeby's Funding LLC*, 20 NY3d 438, 445 [2013]; NYSCEF 595 at 17).

"In the similar context where the party seeking fees has prevailed on some but not all of its claims, the court looks to whether the claims 'involve a common core of facts; or are 'based on related legal theories'" (*Adstra, LLC v Kinesso, LLC*, 2025 WL 1070034, at *5 [SDNY 2025] [finding that "[t]he work that would have been necessary to defend against the breach of the MDSA contract claim was tightly "'interwoven,' with the work necessary to defend against each of the other claims"]). Where claims are related to one another, the appropriate inquiry is to "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably

expended on the litigation" (*id.*). Moreover, when allocating attorneys' fees between compensable and non-compensable claims, courts regularly "make across-the-board percentage cuts in hours, as opposed to an Item-by-item approach, to arrive at the reasonable hours expended" (*United States ex rel. Nichols v Computer Scis. Corp.*, 499 F Supp 3d 32, 41 [SDNY 2020]).

While there is an argument to allocate an equal share to each of the agreements principally at issue (i.e., to deduct one-third of the fee request to account for the PSA claims versus the LLC and Non-Competition Agreements), that would not adequately take into account the relative importance of the agreements to the litigation. The PSA contains the main financial terms of the parties' relationship and was, in the Court's view, the principal focus of the parties' and the Court's attention. While the LLC Agreement and Non-Competition Agreement were important to the outcome, they were in effect satellites orbiting the PSA, adding provisions that could have been included in the PSA but instead were broken out separately.

Although the record does not provide a precise method of allocating the percentage of litigation effort among the various agreements, the Court finds that apportioning 50% of the litigation expense to the PSA is a reasonable estimate. Thus, the requested attorney's fees and costs (if granted in full) should be reduced by half.

B. Whether Defendants' Fees are Reasonable

"An award of attorneys' fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered" (*Kamco Supply Corp. v Annex Contr. Inc.*, 261 AD2d 363, 365 [2d Dept 1999]). "The determination of what constitutes a reasonable attorney's fee is a matter within the sound discretion of the Supreme Court" (*Lancer Indem. Co. v JKH Realty Group, LLC*, 127 AD3d 1035, 1035-36 [2d Dept 2015]). When reviewing the overall reasonableness of a fee application, the "court is not required to 'set forth item-by item findings

concerning what may be countless objections to individual billing items[.]'" (*Reveyoso v Town Sports Int'l. LLC*, 2018 NY Slip Op 32939[U], *7 [Sup Ct, NY County 2018]).

Here, in support of its application, Defendants submits the affirmation of Eugene Stearns (NYSCEF 621 ["Stearns Affirm"]) and accompanying exhibits including attorney biographies and the time entries for Stearns Weaver and Holwell Shuster & Goldberg LLP ("HSG") (NYSCEF 622-634). In the context of this complex and difficult litigation, Defendants have, in the Court's view, established the reasonable value of the services rendered (Stearns Affirm ¶¶42-68).

In opposition, the Company argues that Stearns Weaver, a Florida firm, has not established that it is entitled to the same hourly rates as comparable New York attorneys. "As a general rule, the 'reasonable hourly rate [for an attorney] should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented'" (*Matter of Gamache v Steinhaus*, 7 AD3d 525, 527 [2d Dept 2004]).

In determining the relevant "community," the Second Circuit has applied the "forum rule" under which "courts 'should generally use 'the hourly rates employed in the district in which the reviewing court sits' in calculating the presumptively reasonable fee" (*Simmons v New York City Tr. Auth.*, 575 F3d 170, 174 [2d Cir 2009]). The *Simmons* Court held that when "faced with a request for an award of higher out-of-district rates, a district court must first apply a presumption in favor of application of the forum rule. In order to overcome that presumption, a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result" (*id.* at 175). Thus, the Court looks to reasonable New York rates for similar services *(see*

also Pac. W. Bank v 919 Old Winter Haven Realty, LLC, 2024 WL 247097, 3 [Sup Ct, NY County 2024] ["There is no dispute in the record that counsel's fees are comparable to those of other lawyers of similar expertise and experience in New York. While defendants argue that the relevant rate is that charged in Florida, this argument is inadequately supported. Generally, the relevant rate is the one in the area in which the reviewing court sits"]).[1]

Here, the Court finds that Stearns Weaver's rates are comparable to New York rates for similar services in high-stakes litigation. In this case, the only attorney pushing the upper boundary of the rates described as reasonable New York rates was Mr. Stearns, who charged a rate of $1,750 to $1,850 per hour between 2022 and 2025 (NYSCEF 626 [Defendants' Attorneys' Fees Summary]). As the Arbitrator in the related Florida arbitration noted, "Stearns Weaver firm has long been considered a top tier firm in [the Miami area], and Mr. Stearns in particular has long sat at the top or very close to the top of the most respected and best-known counsel in Miami-Dade County and the State of Florida" (*see* NYSCEF 632 ["Final Arbitration Award"] at 11-12).[2] While on the high side, Mr. Stearns's rates still fall within the range of rates

[1] The Court declines to adopt the Company's argument that that the Court should look at comparable Florida fee rates rather than New York City rates. In *In re Terrorist Attacks on September 11, 2001*, (2015 WL 6666703, at *6 [SDNY 2015], *report and recommendation adopted sub nom.* 2015 WL 9255560 [SDNY 2015]), upon which the Company relies, the court held that "[t]he fee award for out-of-town counsel therefore will be calculated with the prevailing rates in their home communities in mind." (*id.*). However, in the paragraph directly above this quote, the court specifically noted that unlike a fee-shifting case, where courts have approved the use of higher out-of-district rates, the court was analyzing a fee application based on a sanctions award. That is not the case here. Nor is the Court persuaded by the Company's other authorities on this point.

[2] In the Florida-based arbitration proceeding, the arbitrator reduced Defendants' counsel's hourly rates in accordance with what reasonable attorneys of similar experience *in Florida* would charge (NYSCEF 632 [Final Arbitration Award] 14-16). Stearns rates were reduced to $1000 per hour, Buttrick's to $825 per hour, Lichy's to $550 per hour, and Simmons' to $600 per hour (*id.* at 18).

charged by top-tier firms in the New York community for similar services and comparable skill and reputation (*Adstra*, 2025 WL 1070034, at *7 [“Although the rates are not low, “[i]n this district, partner billing rates in excess of $1,000 are ‘not uncommon in the context of complex commercial litigation.’”]; *see generally Cerco Bridge Loans 6 LLC v Schenker*, 2025 WL 622608, at *21 n 13 [SDNY 2025] [approving rates of $2,035 for a partner with more than 30 years’ experience in real-estate and other commercial litigation]; *An v Despins*, 2024 WL 1157281, at *2 [SDNY 2024], *appeal dismissed*, 2024 WL 4524742 [2d Cir Aug. 13, 2024] [approving partner rates of $1,592 in 2022 and $1,760 in 2023]). The Court found the quality of legal work by both sides in this contentious litigation to be exceptional, and it would be inappropriate to discount the value of Defendants’ counsel’s time simply because of their home address.

The Company’s remaining arguments to lower the fee award are unavailing. First, the Company’s argument that Defendants should not include work on unsuccessful motions is not persuasive. First, Defendants were the “prevailing party” in the action, which is the relevant question under the applicable agreements. Nothing in indemnification provisions in the relevant agreements limit recovery to successful motions. “[A]n award of attorneys' fees does not require success at all stages of the litigation, only that ‘the claimant must simply be the prevailing party on the central claims advanced, and receive substantial relief in consequence thereof’” (*542 E. 14th St. LLC v Lee*, 66 AD3d 18, 24-25 [1st Dept 2009] [rejecting landlord's objection to paying for fees incurred in some of the motion practice, particularly tenant's unsuccessful summary judgment motion]). Moreover, the Company does not argue that any of Defendants’ unsuccessful motions were frivolous or lacking merit. Therefore, this argument fails.

Second, the Court declines to further reduce the award due to what the Company calls vague entries, unreasonable staffing of tasks like document review, and inappropriate block billing. Defendants' counsel have adequately explained their time entries (*see* NYSCEF 653 at 11-13).

Finally, as to the amount requested in costs and expenses, the Company argues that amounts spent on Defendants' expert witness should be excluded. However, New York courts "routinely reimburse prevailing parties for the costs of expert witnesses and consultants, regardless [of] whether the expert [actually] testified at trial." (*Themis Capital v Democratic Republic of Congo*, 2014 WL 4379100, at *9 [SDNY 2014]). A notable exception is when the expert's opinions were "appropriately stricken." (*United Realty Advisors, LP v Verschleiser*, 2023 WL 4141545, at *14 [SDNY 2023]), which is inapplicable here. While the Court is not persuaded by the Company's other arguments seeking to reduce certain multimedia expenses and e-discovery costs, the Court does find that consistent with the reduction of the attorney's fees, a reduction of 50 percent of the costs is appropriate to exclude costs incurred in relation to the PSA claims for which cost-shifting is unavailable.

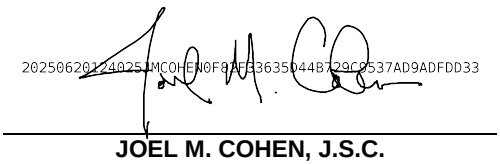
The Court has considered the Company's remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Defendants' motion is **GRANTED IN PART**, and Defendants are entitled as the prevailing party to $3,133,951.00 in attorney's fees and $180,575.36 in litigation costs; and it is further

ORDERED that the parties settle a judgment.

This constitutes the Decision and Order of the Court.



6/20/2025
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE