STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

4M COMMUNICATIONS, INC., a Michigan corporation,

Plaintiff,

v

File No. 00-21253-CK
HON. PHILIP E. RODGERS, JR.

WOODLAND OIL COMPANY, a Michigan corporation, and FARMERS GAS & OIL OF MICHIGAN,

Defendants.
_____/

Edgar Roy III (P36809)
Attorney for Plaintiff

Stephen Rockman (P49065)
Attorney for Defendants

OPINION

This is a breach of contract action that involves a dispute over the removal of 20 coin operated telephones owned by the Plaintiff 4M Communications, Inc. ("4M") from locations owned by Defendants Woodland Oil Company ("Woodland") and Farmers Gas & Oil Co. of Michigan ("Farmers"). 4M's complaint alleged that the Defendants were in breach of contract and sought injunctive relief as well as liquidated damages.[1]

The parties filed cross motions for summary disposition. On October 22, 2001, the Court heard the oral arguments of counsel. On November 9, 2001, the Court issued its Decision and Order. The Court held that 4M was entitled to judgment on its breach of contract claims against Woodland and Farmers only, but vacated the liquidated damages provision as a penalty. The Court also held that 4M was not entitled to injunctive relief against three other Defendants and those claims were dismissed. The sole issue remaining for trial was the amount of Plaintiff's actual damages that could be recovered on its breach of contract claims.

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[1]Plaintiff's Motion to Amend Pleadings to conform to the evidence is granted.

Following a bench trial on November 21, 2001, the Court took the matter under advisement. Post-trial briefs have been filed. The Court now issues this written Opinion.

At trial, testimony was taken and exhibits were introduced relating to the appropriate measure of 4M's lost profits and the reasonableness of the attorney fees and costs sought by 4M. Each of these elements of damage will be addressed separately.

I.

LOST PROFITS

Karen Houghtaling testified on behalf of 4M. Mrs. Houghtaling is the general manager for 4M and as such she manages the day-to-day operations and directly oversees the accounting department. She presented joint trial exhibits "3" and "4" which recite the revenue and expenses associated with operating the 20 telephones, commission expenses and related information. Her testimony, based on allocating overhead to the 20 subject telephones by looking at expenses avoided by removal of the telephones, was offered in support of a damage award against Woodland in the amount of $83,934 and against Farmers in the amount of $54,501. Mrs. Houghtaling's testimony was supported by the testimony of Denny Bogard who has prepared the tax returns for 4M for the past four years. He opined that Plaintiff's trial exhibit "B" reflects a fair and proportionate allocation of variable overhead.

Doug Hoard, CPA, testified on behalf of the Defendants. He testified that all overhead, fixed and variable, should be considered in determining lost profits. Mr. Hoard calculated that 4M's average net profit, which accounts for all revenue and all overhead expenses (fixed and variable), is 5.65 percent. He applied this percentage to the actual revenues generated by the 20 subject phones to establish the actual lost profit per phone per month. He then multiplied that number by the number of months remaining on each contract. In short, he calculated lost net profits by multiplying 4M's gross revenue associated with the 20 subject phones by the average percentage of net profit for 4M over the preceding five years (5.65 percent). Mr. Hoard concluded that 4M's net lost profits

from the Woodland phones is $8,672.84 and from the Farmers phones is $4,993.08 for a total of $13,665.92.[2]

The first question that the Court must decide is what is the proper measure of damages. The measure of damages in a breach of contract suit is intended to place the injured party in as good a position as he would have been in if the promised performance had been rendered. *Allen v Michigan Bell Telephone Co*, 61 Mich App 62, 67-68; 232 NW2d 302, 305 (1975) lv den 395 Mich 793 (1975); *Ambassador Steel Co v Ewald Steel Co*, 33 Mich App 495; 190 NW2d 275 (1971); and *Dierickx v Vulcan Industries*, 10 Mich App 67; 158 NW2d 778 (1968). Lost profits, if properly proven, are an appropriate element of damages. *Brodsky v Allen Hayosh Industries, Inc*, 1 Mich App 591; 137 NW2d 771 (1965); *Allen v Michigan Bell, supra.*

4M's position is that net lost profits should be calculated by taking gross revenue from the 20 phones and reducing it by avoidable overhead expenses only. Woodland and Farmers take the position that the gross revenues must be reduced by all fixed and variable expenses attributable to the 20 phones. 4M does not cite any Michigan authority to support its position. Woodland and Farmers rely upon *Lawton v Gorman Furniture Corp*, 90 Mich App 258; 282 NW2d 797 (1979).

The Michigan Supreme Court grappled with the definition of "net profit" in *Swaney v Derragon*, 281 Mich 142, 143-144; 274 NW 741 (1937), saying:

> The definitions of the words 'net profit' by the lexicographers, text-books, or adjudicated cases afford little assistance. Bouv. Law Dict. title *Profits*; 50 CJ at 641-649; and Words and Phrases, First, Second, Third, Fourth Series, under the title *Profit*, may be consulted.
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> Profits are usually defined as the net gain made from an investment or from the prosecution of some business after payment of all expenses incurred, and the term is not to be confused with earnings or receipts which deal only with income and not with operating costs, fixed charges, overhead, depreciation, or expenses. Ordinarily, gains and profits are ascertained by determining the difference between the cost of an article to the vendor and the price received for it from the vendee. * * *
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> Wharton [13th Ed.], Bouvier [Rawle's 3d Rev.], Ballentine and Black [2d Ed.] indicate profit is the gain made by the sale of produce or manufactures after

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[2]These amounts when reduced to present value are $7,227 in net lost profits from the Woodland phones and $4,285 in net lost profits from the Farmers phones for a total of $11,512.

deducting the value of the labor, materials, rent, and all expenses, together with the interest on the capital employed.

The Supreme Court of the United States says:

> 'Profit' is the gain made upon any business or investment, when both the receipts and payments are taken into the account. *Providence Rubber Co v Goodyear*, 9 Wal. (76 US) 788, 804; 19 L Ed 566.

In *Lawton, supra*, a furniture business, which leased an adjacent building to another furniture business, brought an action to recover for breach of a provision restricting the lessee's sales of bedroom furniture unless the orders therefor were first referred to the lessor, which sold only bedroom furniture and accessories. The trial court rendered judgment for plaintiffs, and defendants appealed of right. Regarding the award of damages, the Court of Appeals held that the proper measure of recovery was not profits gained by the lessee but profits lost by the lessor. An award based on consideration of only gross sales and gross profits was held not sustainable because no deduction is made for the cost of the furniture paid the manufacturer or for normal overhead costs which the plaintiff would necessarily have had to pay had it sold the furniture. "Damages for lost profits are based on the loss of net rather than gross profits." *Benfield v H K Porter Co, Inc*, 1 Mich App 543; 137 NW2d 273 (1965); *The Vogue v Shopping Centers, Inc*, 402 Mich 546; 266 NW2d 148 (1978). "Any other rule would obviously grant the offended litigant a greater sum than he would have earned had the breach not occurred." *Id.* See also, *Davidson v General Motors Corp*, 119 Mich App 730; 326 NW2d 625 (1982); *Getman v Mathews*, 125 Mich App 245; 335 NW2d 671 (1983); and *Body Rustproofing, Inc v Michigan Bell Telephone*, 149 Mich App 385; 385 NW2d 797 (1986).

In the instant case, 4M is not arguing that it is entitled to gross profits, but that it is entitled to gross profits minus only avoidable overhead expenses. In *Federal Bond & Mortgage Co v Burstein*, 222 Mich 88; 192 NW 549 (1923), our Supreme Court specifically held that a proportionate amount of overhead expense must be allocated across all contracts even if the failure to perform any specific contract would not change the overhead costs.

Thus, there is no precedent for an award of damages as calculated by the Plaintiff in this case. All of the authority cited by the parties and reviewed by the Court supports a damage award based

on net rather than gross profit with net profit defined as gross revenue reduced by all expenses (fixed and variable) allocated, if necessary, proportionately across all contracts.

The Defendants argue that 4M should not be allowed any recovery at all because it did not meet its burden of proof by not presenting any proof of fixed overhead expenses apportioned on a percentage basis to the phones at issue in the case.

In *Lorenz Supply Co v American Standard, Inc*, 100 Mich App 600, 611-613; 300 NW2d 335 (1981), the Court said:

> Lost profits resulting from a breach of contract are proper items of loss to be considered by a jury in determining damages. However, lost profits must be subject to a reasonable degree of certainty and cannot be based solely on conjecture and speculation. This does not imply that lost profits must be determined to a mathematical certainty. Even where lost profits are difficult to calculate, and are speculative to some degree, they are still allowed as a loss item. See *Wolverine Upholstery Co v Ammerman*, 1 Mich App 235, 244; 135 NW2d 572 (1965); *Fister v Henschel*, 7 Mich App 590, 595-596; 152 NW2d 555 (1967); *Valley Die Cast Corp v A C W Inc*, 25 Mich App 321, 334-336; 181 NW2d 303 (1970); *Allen v Michigan Bell Telephone Co*, 61 Mich App 62, 68-69; 232 NW2d 302 (1975); *National Pharmaceutical Services, Inc v Harrison Community Hospital*, 67 Mich App 286, 293-294; 241 NW2d 76 (1976); *Lawton v Gorman Furniture Corp*, 90 Mich App 258, 269-271; 282 NW2d 797 (1979); *Allis v McLean*, 48 Mich 428, 432-433; 12 NW 640 (1882); *Isbell v Anderson Carriage Co*, 170 Mich 304, 317-319; 136 NW 457 (1912); *Stimac v Wissman*, 342 Mich 20, 28; 69 NW2d 151 (1955); *The Vogue v Shopping Centers, Inc (After Remand)*, 402 Mich 546; 266 NW2d 148 (1978).
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> Furthermore, Michigan case law indicates that doubts as to the certainty of damages must be resolved against the wrongdoer. In *Howard v City of Melvindale*, 27 Mich App 227, 235; 183 NW2d 341 (1970), this Court said:
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> > On the principle that where a litigant can show he has been damaged, but his damages cannot be measured with certainty, that it is better that he recover more than he is entitled to than less, the rule in Michigan is that the risk of the uncertainty is cast upon the wrongdoer, not the injured party. *Routsaw v McClain*, 365 Mich 167, 171; 112 NW2d 123 (1961).
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> See also *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 369; 137 NW2d 151 (1965); *Wolverine, supra*, 1 Mich App 244; 135 NW2d 572 ('It is the uncertainty as to the fact of legal damages that is fatal to recovery, but not uncertainty as to the amount').

> Mr. Lorenz testified as to his company's loss of profits due to the breach, based on profits in past years. This is a legitimate method to establish future losses. *National Pharmaceutical Services, Inc, supra*; *Fera v Village Plaza, Inc*, 396 Mich 639, 644; 242 NW2d 372 (1976).

In the instant case, Mr. Hoard calculated 4M's lost net profits by multiplying 4M's gross revenue associated with the 20 subject phones by the average percentage of net profit for 4M (5.65 percent) over the preceding five years. This calculation is reasonable and is consistent with Michigan law.

II.

ATTORNEY FEES

Attorney fees and costs are separate items of compensable damages under the express terms of the contracts. *First Security Savings Bank v Aitken*, 226 Mich App 291, 319; 573 NW2d 307 (1998); *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). Attorney fees awarded under contractual provisions are considered damages, not costs. *Wilson Leasing Co v Seaway Pharmacal Corp*, 53 Mich App 359, 367; 220 NW2d 83 (1974). Recovery of attorney fees is limited to reasonable attorney fees. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996), citing *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 299; 386 NW2d 177 (1986).

In *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), the Court of Appeals set forth factors to be considered in determining the reasonableness of the attorney fees, saying:

> Where the amount of attorney fees is in dispute each case must be reviewed in light of its own particular facts. There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. See generally 3 Michigan Law & Practice, Attorneys and Counselors, § 44, p. 275 and Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics.

See also, *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1983) ("the controlling criterion is that the attorney fees be 'reasonable.'")

Mrs. Houghtaling presented and testified about Plaintiff's trial exhibit "A" which represented the actual legal fees, litigation costs and professional fees incurred by 4M through November 20, 2001 (the day before trial). Of course, there were additional attorney fees incurred at trial and post-trial which must also be considered.

Woodland and Farmers contend that the attorney fees requested by 4M are unreasonable in light of *Crawley* factor 3 which calls for consideration of "the amount in question and results achieved." Woodland and Farmers point out that 4M originally filed suit against five Defendants for injunctive relief and to enforce a liquidated damages clause. The Court denied their request for injunctive relief and dismissed the case as to the three Defendants against whom 4M sought injunctive relief. In addition, the Court vacated the liquidated damages clause as a penalty. Woodland and Farmers also point out that some of the attorney fees and costs were necessitated by 4M's trial strategy. Finally, Woodland and Farmers point out that 4M sought liquidated damages in the amount of $175,000 but recovered actual damages of only $11,512.

The Court cannot disagree with any of these points. However, Woodland and Farmers would have the Court ignore the fact that they are the wrongdoers here. They intentionally and willfully breached their contracts with 4M.[3] Both of the contracts contained a liquidated damages clause that was only vacated by this Court as a penalty because it was based on payment of 100 percent of 4M's estimated gross revenue when actual damages could be readily ascertained and where attorney fees were separately recoverable. 4M's attempt to obtain injunctive relief, as well as to enforce the liquidated damages provisions of its contracts, was not frivolous. 4M fought a noble battle and ultimately prevailed although the actual damages were not what 4M had hoped for. 4M's attorneys should nonetheless be compensated for their efforts. The actual attorney fees incurred by 4M are reasonable and recoverable.

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[3]When they subsequently entered into similar contracts with 4M's competitor, NCI, they were promised indemnification should they be sued by 4M. They were indifferent, then, to the consequences of this suit until the promised indemnification was not forthcoming.

III.

COSTS

There are two separate categories of costs at issue here. First, there are taxable costs of any civil action pursuant to Chapter 24 of the revised Judicature Act. Second, there are all the other expenses of litigation.

MCR 2.625, in pertinent part, provides as follows:

> (A) **Right to Costs**
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> (1) *In general.* Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

Taxation of costs under MCR 2.625(A) is within the discretion of the trial court. *American Aggregates Corp v Highland Twp*, 151 Mich App 37, 53; 390 NW2d 192 (1986). A trial court is not required to justify awarding costs to a prevailing party; rather, the court must justify the failure to award costs. *Id.*

In the instant case, 4M sought injunctive relief against three Defendants. The Court ruled that 4M was not entitled to injunctive relief and dismissed that claim against those three Defendants. Thus, 4M is not the "prevailing party" on its action for injunctive relief and is not entitled to any of the costs associated with pursuing that claim. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 520-521; 556 NW2d 528 (1996)

On its breach of contract claim, however, 4M is the prevailing party and is entitled to an award of costs associate with that claim, unless otherwise prohibited.

4M seeks to recover $5,775 for the cost of retaining Dennis Bogard of Plante & Moran as an expert in this case. Expert witness fees are taxable under MCL § 600.2164; MSA 27A.2164. *Joerger v Gordon Food Service*, 224 Mich App 167; 568 NW2d 365 (1997). That section provides in pertinent part:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom [sic] such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case.

The Court, then, is empowered in its discretion to authorize expert witness fees which might include preparation fees. *Fireman's Fund American Ins Cos v General Electric Co*, 74 Mich App 318, 329; 253 NW2d 748 (1977). This Court awards 4M the requested expert witness fees.

4M seeks $860.95 for deposition/transcript. MCL § 600.2549; MSA § 27A.2549 provides:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

4M may recover the cost of any deposition that was "filed in any clerk's office" and "at the trial" was "read in evidence." None of the deposition/transcript costs were for depositions or transcripts read in evidence at the trial. The cost of the depositions and transcripts is not recoverable.

As for all of the other expenses of this litigation, MCL § 600.6013(6); § MSA 27A.6013(6) entitles a prevailing party in a civil action to prejudgment interest from the date of filing the complaint to the entry of the judgment. The purpose of prejudgment interest is to "compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages." *HJ Tucker & Associates, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550; 595 NW2d 176 (1999); *Phinney v Perlmutter*, 222 Mich App 513, 541; 564 NW2d 532 (1997); *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 357; 554 NW2d 43 (1996); *Paulitch v Detroit Edison Co*, 208 Mich App 656, 663, n 2; 528 NW2d 200 (1995). "[T]he prejudgment interest statute is remedial in nature and is to be construed liberally in favor of the plaintiff." *Phinney, supra.*

4M will be awarded prejudgment interest pursuant to MCL § 600.6013(6); MSA § 27A.6013(6). Therefore, any additional award for expenses of litigation would be duplicative and punitive.

CONCLUSION

4M is entitled to an award of $8,672.84 against Woodland for lost profits resulting from breach of contract. 4M is entitled to an award of $4,993.08 against Farmers for lost profits resulting from breach of contract. These amounts must be reduced to present value. See, Note 2.

4M is not entitled to costs incurred in connection with its claim for injunctive relief. 4M is entitled to attorney fees. 4M is also awarded taxable costs in connection with its claims for breach of contract. Finally, 4M is entitled to an award of prejudgment interest. Total damages shall be assessed to each Defendant in the same proportion that each Defendant's liability for lost profits bears to the total lost profits.

Counsel for 4M should prepare and submit a judgment consistent with this opinion for entry within 14 days of the date signed below.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/20/02