STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

UNLIMITED AUTO IMPORTS, LLC,

Plaintiff,

v

VOLKSWAGEN GROUP OF AMERICA, INC., a New Jersey corporation,

Defendant.
_____/

Case No. 22-000802-CB-C30

OPINION AND ORDER RE: REASONABLE ATTORNEY FEES

At a session of said Court held in Lansing, Ingham County, Michigan, on March 5, 2024

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

The matter before the Court is to assess reasonable attorneys fees following a settlement of this lawsuit. The Complaint filed on November 28, 2022 alleges that Plaintiff purchased a defective vehicle from Defendant. There are 7 counts:

Ct. I:	breach of written warranty under the Uniform Commercial Code
Ct. II:	breach of implied warranty of merchantability under the Uniform Commercial Code
Ct. III:	breach of contract
Ct. IV:	breach of written warranty under the Magnuson-Moss Warranty Act
Ct. V:	revocation of acceptance
Ct. VI:	breach of implied warranty under the Magnuson-Moss Warranty Act
Ct. VII:	recission of contract

A scheduling order set August 21, 2023 as the deadline for completion of discovery. Discovery proceeded in a normal fashion and a facilitative mediation was held, but the case did not settle. As the discovery period was drawing to a close, Defendant submitted an offer of judgment pursuant to MCR 2.405. The offer was to pay Plaintiff the total sum

of $6,500 in satisfaction of all claims, including the expected loss of profit on resale of the vehicle. The offer further provided:

> Defendant, VWGoA, will pay Plaintiff's costs and expenses incurred in this action, including Plaintiff's attorney's fees in an amount to be agreed upon between the parties; or, if an agreement cannot be reached, Defendant, VWGoA, will pay Plaintiff a sum equal to the aggregate amount of costs and expenses, including Plaintiff's attorney's fees based on actual time expended, determined by either an arbitrator or the Court to have been reasonably incurred by the Plaintiff in connection with the commencement and prosecution of this action.

Plaintiff responded with an acceptance of the offer of judgment, that reworded the attorney fee provision:

> In addition, the judgment shall reflect that Defendant, Volkswagen Group of America Inc., shall also pay a sum equal to the aggregate amount of costs and expenses, including Plaintiff's attorney's fees based on actual time expended, determine[d] by the Court to have been reasonably incurred by the Plaintiff in connection with the commencement and prosecution of this action.

The rewording triggered a dispute about the enforceability of the accepted offer of judgment. Plaintiff maintained that the acceptance was a counteroffer and opposed an entry of judgment under MCR 2.405. Ultimately, this Court held that under principles of contract law, there had been an offer and acceptance of all material terms.

The dispute did not end there. The attorneys could not agree on an order to be entered following the hearing on the offer of judgment and a hearing had to be held on objections to the 7-day order. Following that hearing, the case proceeded on the issue of reasonable attorney fees. Plaintiff submitted affidavits and detailed billing records that have given the Court a sufficient evidentiary record to make its determination. Oral argument was held and the Court took the matter under advisement.

Hourly rate

The first step in the process set forth in *Smith* v *Khouri*, 481 Mich 519, 751 NW2d 472 (2008) and *Pirgu* v *United Servs Auto Assn*, 499 Mich 269, 884 NW2d 257 (2016) is to assess a reasonable hourly rate.

Three attorneys worked on this case for Plaintiff. They each filed affidavits attesting to their experience and qualifications and the time spent on the case. Steven Toth said he has been licensed in Michigan since 1998 and he has practiced in the area of consumer protection law for 22 ½ years. He is admitted to practice in Wisconsin and Michigan. Christopher Winkler has been licensed in Michigan since 1998 and he has practiced in the area of consumer protection law for 24 years. He has tried dozens of cases and has appellate experience. He is admitted to practice in Michigan, California, Ohio, and Wisconsin in addition to *pro hac vice* admissions in other jurisdictions. Travis Shackelford has been licensed in Michigan since 2005 and he has practiced in the area of consumer law for 16 years. He is admitted to practice in Michigan, Connecticut, Texas, Wisconsin and various federal courts, including the US Court of Appeals for the 6th Circuit.

Based on the affidavits, Plaintiff maintains that all 3 attorneys should be placed in the 75th percentile on the Economics of Law Practice study and all 3 should have their time assessed at $450 per hour. At the outset, the Court notes that the only applicable rate on the Billing Rates for Practitioners tables that shows $450 for the 75th percentile is the Field of Practice table for attorneys who practice consumer law. To accept Plaintiff's argument would mean that the Court places all 3 attorneys in the 75th percentile and considers only the field of practice, while disregarding geographic area of practice. That

is not a satisfactory approach given the directive in *Smith* to consider the fee customarily charged *in the locality* for similar legal services. *Smith* at 528 (emphasis added).

The Court recognizes that all 3 attorneys are skilled and experienced in a specialized area of law. However, they have provided no reason to justify placing them on the 75th percentile. The factors that are argued here are the same factors that can be accounted for by reference to the various tables under Billing Rates for Practitioners. In other words, 26 years of practice can be recognized with reference to the table of Billing Rates by Years in Practice. Consumer protection law can be recognized with reference to the table of Billing Rates by Field of Practice. And geographic area of practice is accounted for in the Bill Rates by County table. The only factor provided that is not accounted for in the table of billing rates is the number of jurisdictions in which an attorney is admitted to practice. The Court finds that factor to be of little weight in determining a reasonable hourly rate in this case in this locality. Given what was submitted in this case, the Court finds that a normal or customary rate is reflected in the mean rate rather than the 75th percentile.

Plaintiff argues that taking the rate for years in practice does not take into account geographic location or area of practice. The Court agrees. The best method of assessing all the pertinent factors is to take an average of all the pertinent factors. For Plaintiff's 3 attorneys, that would look as follows:

Years in practice (16-25)	$337
Field of practice (consumer law)	$330
Rates by county (Wayne)	$357

The average of the hourly rate for these 3 factors is $341. The Court concludes that $341 is a rate that reflects a reasonable hourly rate in this case.

Number of hours

Defendant made 3 specific objections to Plaintiff's number of hours. They are (1) time spent seeking the fees should be capped or disallowed, (2) time and expenses of mediation should not be allowed because Plaintiff did not mediate in good faith, and (3) certain time incurred in discovery should be disallowed.

Defendant says that 40 hours of Plaintiff's attorneys' time were spent seeking the fees and should not be allowed or should be limited to 3% of the time spent on the underlying case. Defendant claims that the 3% rule is part of Federal law.

The so-called 3% presumptive cap originated with *Coulter* v *State of Tennessee*, 805 F2d 146 (1986), where the 6th Circuit Court of Appeals endorsed it "to insure that the compensation from the attorney fee case will not be out of proportion to the main case and encourage protracted litigation." *Coulter* at 151.

In *Northeast Ohio Coalition for the Homeless* v *Husted*, 831 F3d 686 (2016), the 6th Circuit Court of Appeals re-examined the presumptive cap and rejected its further use, noting that it was the only circuit that ever adopted the rule. The Court also found that the rule was at odds with a number of policy considerations.

This Court likewise rejects any use of a 3% cap or other mathematical formulation to limit fees seeking fees. In *Smith*, the Michigan Supreme Court vested trial courts with the discretion to assess the reasonableness of the number of hours spent on a case. Besides the fact that the 6th Circuit abrogated such a cap, this Court would not impose it because it would be at odds with the directive in *Smith*.

Defendant contends that the total number of hours that Plaintiff is requesting for seeking fees is 40. Plaintiff says that it is actually seeking 15.6 hours for work that started

on December 6, 2023. After careful review of Plaintiff's detailed billing entries, the Court agrees that there are no entries attributable to "fees seeking fees" until December 6, 2023. The entries immediately prior to that date pertain to defendant's objections to Plaintiff's proposed order following the hearing on the offer of judgment. That order is the one that reflected the Court's ruling that under contract law the parties had achieved a settlement agreement. The entries for fees seeking fees start on December 6 and total 15.6 hours. The Court has reviewed the entries and finds that the hours spent are reasonable

Defendant argues that the post-settlement time was not agreed upon. The parties agreed to attorney fees "reasonably incurred by the Plaintiff in connection with the commencement and prosecution of this action." Under any other scenario—whether case evaluation attorney fees were in issue or contractual attorney fees were in issue—fees incurred in the prosecution of the action would include all fees through and including the attorney fee hearing. There is no reason to interpret the agreement here as meaning anything different.

Defendant maintains that 5.4 hours and $1,781 in costs should be striken for time spent in mediation because Plaintiff did not mediate in good faith. At oral argument, Defendant suggested that this might be the topic of an evidentiary hearing. Plaintiff denies that it failed to mediate in good faith and maintains that the parties were simply unable to settle.

In the briefing and in oral argument, counsel for both sides had no issues with discussing what took place during mediation, even upon the Court questioning the confidentiality of the process. MCR 2.412(C) provides that mediation communications are confidential and not admissible in a proceeding. Mediation communications include

"statements whether oral or in a record, verbal or nonverbal, that occur during the mediation process." MCR 2.412(B)(2). There are exceptions to confidentiality. None of the exceptions apply here.

Despite counsels' nonconcern with this issue, the Court *is* concerned that if a party's "good faith" in mediation becomes an issue in attorney fees disputes, it will severely undercut the mediation process. This goes to the heart of what MCR 2.412 is seeking to protect. The Court will not entertain arguments about what was said and done in the mediation of this matter in order to assess whether those fees should be awarded. Mediation was court ordered in this matter in the scheduling conference order entered on February 16, 2023. The hours spent in mediation and the fee paid to the mediator are to be included in the award as they are fees and expenses reasonable and necessary to this litigation.

Plaintiff submitted as Ex. 14 to its motion for attorney fees a document entitled "Plaintiff's Response to Defendant's Interrogatories to the Plaintiff, Unlimited Auto Imports LLC." Plaintiff's Ex. 14 is unsigned and has a blank proof of service attached with the date shown as "May ____, 2023." Plaintiff requests 5.4 hours to answer Defendant's discovery.

Defendant objects because Ex. 14 was never signed or served on Defendant. Instead, Defendant submits a copy of Plaintiff's Objections to Defendant's Interrogatories to the Plaintiff, Unlimited Auto Imports LLC that was signed and served on Defendant on March 29, 2023. Plaintiff maintains that the answers to interrogatories were prepared as a necessary part of this case but never signed or served because the settlement intervened.

The Court can conceive of several reasons why a party may object to interrogatories but at the same time or at a subsequent time also prepare answers to those interrogatories. It cannot be said that the answers were unnecessary to this case just because they were never signed or served. The Court has reviewed the 5.4 hours in Plaintiff's counsel's billing entries and finds that the time spent in answering discovery was reasonable.

In summary, the Court finds no merit in Defendant's specific objections to the number of hours spent. The Court has reviewed all the time entries and finds that the 71.8 hours spent is time that is reasonable and was necessary for this case.

Having determined that a reasonable hourly rate is $341 for all 3 attorneys and that 71.8 hours is a reasonable number of hours, the Court arrives at a baseline amount of $24,483.80. The next step is to apply the factors found in *Pirgu* to determine whether that baseline amount should be adjusted.

Pirgu factors

1. The experience, reputation, and ability of the lawyer performing the services:

Plaintiff argues that if the Court sets an hourly rate below $450, then it should be adjusted upward under this factor because of counsels' substantial experience, reputation, and ability in the area of consumer law. The Plaintiff's lawyers are skilled and experienced. That factor has already been taken into account. Likewise, their specialized area of practice has been taken into account. There is nothing extraordinary that would call for a departure under this factor.

2. The difficulty of the case, i.e., the novelty and difficulty of the questions involved:

Plaintiff maintains that anything less than $450 per hour would fail to recognize the complexity of consumer law and the need to have practitioners experienced in the intricacies of voluminous statutory provisions. Plaintiff also points to aggressive product manufacturers having more resources than aggrieved consumers and that a small settlement for a manufacturer may represent a substantial sum to the average consumer.

The Court acknowledges Plaintiff's position may accurately reflect the typical consumer law case. However, the Court is assessing reasonable attorney fees on this specific case. The Plaintiff here is a business suing a business. Unlimited Auto Imports, LLC is a used car dealership. Its owner, Ernest Shamilov, bought the vehicle in the name of the business and testified at his deposition:

> Q. So when you bought this vehicle for – in the name of Unlimited Auto in June of 2020, did you buy it specifically for your son Timothy to drive?
>
> A. I bought specifically, no. I bought specifically for the purpose of the business, okay? But when problem was occurred, Tim was driving that vehicle because I cannot sell with that problem was developed, so I cannot sell like this vehicle, so that's reason Tim started driving that vehicle before we can fix everything.
>
> Q. Okay, so when you bought it, what was your purpose? I know you bought it for the business. Tell me what your purpose was.
>
> A. Resale.
>
> Q. Resale. How – how quickly did you hope to resell the vehicle?
>
> A. Usually to – like this type of vehicle, it's like two, three months around, uh-huh.
>
> [Deposition of Ernest Shamilov, taken 4/4/2023, Ex. E to Defendant's brief in opposition to Plaintiff's motion for attorney fees.]

Furthermore, Plaintiff speaks to the complexity of consumer law cases but not to the complexity of this particular case. The Complaint filed in this case is almost a carbon

copy of the same 7-count Complaint filed in another case by Plaintiff's counsel in this jurisdiction. (Ex. G to Defendant's brief). In this case, there was no motion practice until the offer of judgment dispute arose. There was no motion for summary disposition on any of the counts, including the MMWA counts, which counts would be questionable given the definition of consumer under that act and the above testimony that the vehicle was purchased by a business for resale. There may indeed have been factual disputes about the alleged defects in the vehicle, but as far as complexities in the law go, there appear to have been none litigated.

The nature of consumer law cases is already factored into the hourly rate by taking into account the hourly rates of other lawyers handling those types of cases. The Court concludes that no further adjustment is called for under this factor.

3. The amount in question and the results obtained:

Plaintiff maintains that despite the low settlement amount, there should be no downward departure for this factor. In support of its argument, Plaintiff cites to cases holding it is error to reduce fees based on a low amount in controversy. The Court has examined those cases and finds them to be based on litigation involving fee-shifting provisions in remedial statutes. One such case, *Jordan* v *Transnational Motors, Inc.*, 212 Mich App 94, 537 NW2d 471 (1995), reversed the trial court for failing to consider the remedial nature of the Magnuson Moss Warranty Act (MMWA) and the Michigan Consumer Protection Act when assessing a reasonable attorney fee.

At oral argument on the motion for attorney fees, Plaintiff acknowledged that the MMWA does not control since this was a settlement. Plaintiff nevertheless points out that

the settlement language mirrors the attorney fee language of the MMWA and that should be taken into account in deciding not to reduce the fees under this factor of Pirgu. [1]

Plaintiff's position must be rejected for several reasons. First, despite Plaintiff's statement that the claims in this matter were based upon the MMWA, only 2 counts of a 7-count Complaint were actually based on the MMWA. Had this case gone to trial with a recovery on all counts and attorney fees were sought, the Court could rightfully consider that only a portion of the claims were based on a remedial statute.

Second, the settlement language is consistent with the MMWA but it is also consistent with the general language found in contracts or other contexts in which attorney fees are awarded. Had counsel here wanted to ensure that the remedial nature of the MMWA was taken into account, the settlement language could have provided for that by specifying that attorney fees under the MMWA were to be considered. Without such specificity, the settlement language reads not much differently than any general provision for an award of attorney fees.

The Court finds that consideration of the results obtained necessitates a downward departure from the base rate.

4. Expenses incurred:

Plaintiff acknowledges that no adjustment is required for this factor, but also requests $2,253.50 in the actual costs incurred. These costs were the mediation fee addressed above. Defendant objected to these costs on grounds that Plaintiff did not

[1] The MMWA provides that a prevailing plaintiff may "recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution" of the case. 15 USC 2310(d)(1).

mediate in good faith and the Court rejected that argument. The costs requested were necessarily incurred and shall be awarded.

5. The nature and length of the professional relationship with the client:

Plaintiff concedes no adjustment is called for under this factor.

6. The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer:

Plaintiff suggests neither an upward nor downward departure for this factor, but uses the opportunity to point out the contentiousness of opposing counsel. Further, Plaintiff says that every hour spent on this case precluded Plaintiff's counsel from handling other matters. That is true of every case. Plaintiff points to nothing extraordinary or specific about this case that precluded other employment. The Court finds that this factor is neutral.

7. The time limitations imposed by the client or by the circumstances:

For this factor, Plaintiff's counsel points out that the Plaintiff was burdened with a defective vehicle during the pendency of the litigation. The Court finds that to be a valid point, but not necessarily apropos to this factor. This factor is properly applied in cases where an emergency motion or a TRO is needed, for example. While Plaintiff should not have to have been burdened with a defective vehicle at all, there was nothing about the timeline or circumstances of this case that imposed limitations. The Court finds this factor to be neutral.

8. Whether the fee is fixed or contingent:

Under this factor, Plaintiff says that the fee was contingent and that calls for an upward departure from the baseline figure. Plaintiff's reasoning is that counsel's hourly rate is subject to a premium because of the risk of zero recovery. The Court rejects that argument. An award of attorney fees "is not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls." *Smith* at 528. If Plaintiff's counsel made a contingent fee agreement, then he runs the risk of zero recovery. But he should not receive an upward departure to make up taking that risk and then achieving a small recovery.

Defendant argues that this factor supports a downward departure. The Court agrees. The relief sought here was revocation of acceptance of the vehicle, which would have meant that the vehicle was returned and the purchase price refunded, and any consequential damages be awarded. While it is impossible to say how much was at stake, it is possible to say that when Plaintiff's counsels took this case on a contingent fee agreement, they could reasonably expect to receive substantially less than a fixed hourly rate agreement. To award what would amount to a fixed hourly rate would produce a windfall. The baseline figure must be adjusted downward to reflect counsel's reasonable expectation of receiving one-third of any amount recovered.

9. Other factors:

Neither side has proposed any additional factors and the Court is aware of none.

The baseline amount of fees the Court has found is $24,483.80. There are two *Pirgu* factors—the results achieved and the contingent fee agreement—that merit a

significant downward departure. The Court will apply a 50% reduction in the baseline amount to reflect that departure and award attorney fees in the amount of $12,241.90. Plaintiff is awarded $2,253.50 in costs. Together with the $6,500 settlement amount, this will result in a judgment for Plaintiff in the amount of $20,995.40.

IT IS HEREBY ORDERED that Plaintiff is awarded judgment in the amount of $20,995.40.

IT IS FURTHER ORDERED that Plaintiff shall, within 21 days of the date of this order, submit for entry a judgment that comports with this opinion and order and that closes this case.

/S/

_____

Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Opinion and Order Re: Reasonable Attorney Fees upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on March 5, 2024.

/S/

_____

Michael Lewycky
Law Clerk/Court Officer