IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

ROOF MAXX TECHNOLOGIES LLC,	:	
	:	
Plaintiff,	:	
	:	Case No. 20 CV H 12 0551
vs.	:	
	:	JAMES P. SCHUCK, JUDGE
GREENER SHINGLES ASPHALT SHINGLE REJUVENATION, et al.,	:	
	:	
Defendants.	:	

MAGISTRATE'S DECISION
AWARDING DAMAGES AFTER DEFAULT JUDGMENT

On April 28, 2022, this Court entered default judgment in favor of Plaintiff Roof Maxx Technologies, LLC ("Roof Maxx") against Defendants Greener Shingles Solutions, 102063856 Saskatchewan Ltd., and Bruce Robinson, as to Roof Maxx's claims of tortious interference, deceptive trade practices, and spoliation.

In a default judgment proceeding, damages must be proven the same as in a case assigned for regular trial. *Bd. of Trumbull Twp. Trustees v. Rickard*, 11th Dist. Ashtabula Nos. 2016-A-0044, 2016-A-0045, 2017-Ohio-8143, 98 N.E.3d 800, ¶ 70. Although proof of damages is not necessary to support a liquidated damages claim based upon an account, a plaintiff seeking unliquidated damages must present proof. *Heckman v. Porter*, 5th Dist. Stark Nos. 2002CA00380, 2002CA00381, 2003-Ohio-3135, ¶ 13, citations omitted.

As an initial matter, the Court must resolve two motions filed by Plaintiff on June 8, 2022. Plaintiff first asked the Court to limit the participation of Defendant Bruce Robinson in the damages hearing for the reason that Robinson may only represent himself and may not represent his two corporate entities. Plaintiff also sought a ruling that Plaintiff's request for admissions be deemed admitted due to Defendants' failure to answer.

The Court grants the motion to limit Robinson's participation at the damages hearing to his appearance in his personal capacity only. The Court appropriately enforced that limitation at the hearing, at which Robinson appeared via teleconference.

The second motion was a motion in limine to preclude Defendants from challenging requests for admissions that they did not answer. A request for admissions is deemed admitted by operation of law pursuant to Civ.R. 36 if it is not answered within 28 days. *Hayes v. Horn*, 5th Dist. Coshocton No. 00CA022, 2001 WL 704460 (May 14, 2002); *Portfolio Recovery Assn., LLC v. Dahlin*, 5th Dist. Knox No. 10-CA-000020, 2011-Ohio-4436, ¶¶ 22-25. Defendants did not answer the requests for admissions, so they are deemed admitted. There is no need for the Court to grant a motion or issue an order to effectuate that result. Defendant Robinson did not seek to challenge the admitted matters at the hearing. For this reason, the Court denies this motion in limine as moot.

The Court held a damages hearing on June 13, 2022. At the hearing, Plaintiff presented testimony by Rebekah A. Smith, a business valuation expert, regarding the damages incurred by Plaintiff as a result of Defendants' actions. Describing the analytical methods she used to reach her conclusions, Smith testified that Plaintiff incurred lost-profit damages in the amount of $7,838,268. The Court finds Smith's testimony to be credible and her calculations reliable.

Pursuant to the evidence and testimony submitted by Roof Maxx, the Court enters an award of actual damages against Defendants Greener Shingles Solutions, 102063856 Saskatchewan Ltd., and Bruce Robinson, jointly and severally, in the amount of $7,838,268 in lost profits as proven at the damages hearing.

Plaintiff also seeks $164,119.14 in attorney fees, expert fees, and costs, providing an affidavit and billing as support.

Plaintiff argues it is entitled to an award of fees because of Defendants' bad faith in responding to this litigation. No evidence to support a claim of bad faith has been offered. However, Count II of Plaintiff's March 18, 2021 amended complaint alleges violations of the Deceptive Trade Practices Act, codified at R.C. Chapter 4165. R.C. 4165.03(B) allows actual damages and authorizes a reasonable attorney fee award to a person who is injured by a person who commits a deceptive trade practice listed in R.C. 4165.02(A). That section provides, in part, that "a person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the

person does any of the following: *** (10) [d]isparages the goods, services, or business of another by false representation of fact." Plaintiff's amended complaint charges that Defendants intentionally provided dealers with "knowingly false information," and, in so doing "disparaged Roof Maxx's product, services and/or business." [Am. Compl. ¶ 31.] This allegation must be accepted as proven in the context of a motion for default judgment. *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 121, 502 N.E.2d 599 (1986)(a defaulting party effectively admits the allegations in the complaint by failing to contest them).

A prevailing party is entitled to an award of attorney fees where a statutory provision allows attorney fees as costs. *State ex rel. Chapnick v. E. Cleveland City Sch. Dist. Bd. of Edn.*, 93 Ohio St.3d 449, 451, 2001-Ohio-1585, 755 N.E.2d 883; *State ex rel. Kabatek v. Stackhouse,* 6 Ohio St.3d 55, 451 N.E.2d 248 (1983). Because R.C. 4165.03(B) allows for attorney fees in a case involving the violation of the Deceptive Trade Practices Act, the Court finds that Plaintiff is entitled to an attorney fee award in this matter.

Calculating the amount of attorney fees involves a two-step determination in which the Court first arrives at the "lodestar" by multiplying the number of hours reasonably expended by a reasonable hourly rate, and then decides whether to adjust that amount based on the reasonableness factors listed in Prof.Cond.R. 1.5(a). *Bittner v. Tri-Cty. Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991), syllabus. That rule

provides the following factors to be considered in determining the reasonableness of a fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

The Supreme Court of Ohio recently determined that "[t]he prevailing market rate can often be calculated based on a firm's normal billing rate because, in most cases, billing rates reflect market rates, and they provide an efficient and fair short cut for determining the market rate." *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 160 Ohio St.3d 32, 2020-Ohio-1056, 153 N.E.3d 30, 2020 WL 1445428, ¶ 11, quoting *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F2d 414, 422 (3d. Cir.1993). The Court emphasized a "strong presumption" that the reasonable hourly rate

multiplied by the number of hours worked – also known as the "lodestar" – is the proper amount for an attorney fee award. *Id.* at ¶ 19.

According to counsel's affidavit and supporting documents, Plaintiff's attorneys billed at rates ranging from $250 to $775 per hour for a total of 420.20 hours. Plaintiff also incurred costs in the amount of $731.14.

Based on the rationale in *Phoenix Lighting Group,* the Court accepts Plaintiff's application and the hourly rates charged by counsel as evidence of the prevailing market rate for legal representation of this nature in connection with similar cases. The Court also accepts Plaintiff's evidence relating to costs consisting of filing fees.

Generally, expert witness fees are considered litigation expenses, for which Defendants are not responsible absent statutory authority. *Victor v. Big Sky Energy, Inc.,* 11th Dist. Ashtabula No. 2017-A-0045, 2018-Ohio-4666, 124 N.E.3d 283, ¶ 95, citations omitted; *Premier Therapy, LLC v. Childs,* 7th Dist. Columbiana Nos. 14 CO 0048, 15 CO 0028, 2016-Ohio-7934, 75 N.E.3d 692, ¶ 172.

R.C. 4165.03 authorizes an award of actual damages, reasonable attorney fees, or "civil or criminal remedies otherwise available against the same conduct under the common law or other sections of the Revised Code." R.C. 4165.03(C). The statute does not specifically mention expert witness fees. However, expert witness fees may be awarded as a litigation expense in connection with an attorney fee award, and may be justified in the context of a punitive damage award. *Galmish v. Cicchini,* 90 Ohio St.3d

22, 35, 2000-Ohio-7, 734 N.E.2d 782; *Villella v. Waikem Motors, Inc.*, 45 Ohio St.3d 36, 41, 543 N.E.2d 464.

In the present case, R.C. 4165.03(B) allows an award of attorney fees to be assessed against a defendant "if the court finds that the defendant has *willfully* engaged in a trade practice listed in division (A) of section 4165.02 of the Revised Code *knowing* it to be deceptive." [Emphasis added.] Thus, although the statute does not expressly authorize an award of punitive damages, it does reference the type of intentional conduct justifying a punitive damage award under common law. *See, e.g., Preston v. Murty*, 32 Ohio St.3d 334, 335, 512 N.E.2d 1174 (punitive damages are justified where the actions of the defendant involve wrongdoing that is conscious, deliberate, or intentional).

Therefore, the Court awards Plaintiff $11,116.50 in expert witness fees paid to Smith for a total of $164,119.14 in fees and costs.

The Court awards damages in favor of Plaintiff in the total amount of $8,002,387.14, comprised of Plaintiff's actual damages in the amount of $7,838,268 plus attorney fees and costs in the amount of $164,119.14.

The Court also permanently enjoins Defendants from contacting, communicating with, recruiting, contracting with, or working with in any way, any current or former Roof Maxx dealer that is currently in a contractual relationship with Roof Maxx or

subject to noncompete covenants with Roof Maxx, including but not limited to Lee Loft, Cynthia Rourk, Preston Holsinger, Lisa Tabbert, and Greg Morris.

IT IS SO ORDERED.

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b). A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).

The Clerk of this Court is hereby ordered to serve a copy of this Judgment Entry upon all parties or their counsel through the Clerk's e-filing system, by regular mail, or by facsimile.

Shari Winget O'Neill

SHARI WINGET O'NEILL, MAGISTRATE