

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
I Certify that the foregoing is a
true copy of the original on file in this
court and cause.

GARY T. BELL, CLERK
s/RCovey

By: _____
Date: 9/23/2022

NEXUS STAFFING, INC.,)
)
Plaintiff)
)
v.)
)
NEXUS EMPLOYMENT SOLUTIONS)
PLUS OF INDIANA, INC.,)
)
Defendant)

Cause No. 2:20-cv-166-RLM

ORDER

Defendant Nexus Employment Solutions Plus of Indiana, Inc.’s motion for \$177,338.50 in attorney fees pursuant to 15 U.S.C. § 1117(a) is before the court. For the following reasons, the court GRANTS Nexus Employment’s motion.

The issues before the court today turn in considerable part upon the case’s procedural history, so the court recounts that history in greater than normal detail.

Nexus Staffing sent a cease-and-desist letter to Nexus Employment on July 17, 2018, claiming that Nexus Employment was infringing on its trademark rights and demanding that Nexus Employment stop using the Nexus mark. Nexus Staffing provided Nexus Employment with a copy of its trademark registration and discussed how Nexus Employment’s use of the Nexus mark was causing “an unavoidable likelihood of confusion among consumers”

Nexus Employment responded to the letter about four months later comparing the two companies’ use of the Nexus mark under the likelihood of

confusion factors set forth in Smith Fiberglass Prod., Inc. v. Ameron, Inc., 7 F.3d 1327, 1329 (7th Cir. 1993). Likelihood of confusion among consumers is one of two elements that must be established to show trademark infringement. Packman v. Chicago Trib. Co., 267 F.3d 628, 638 (7th Cir. 2001). Nexus Employment proposed that the two companies continue their respective use of the Nexus mark, but Nexus Employment would agree to not expand its services into New York state (where Nexus Staffing conducted business), and not provide staffing services in the finance, government, engineering, legal, or information technology industries (industries in which Nexus Staffing provided services). Nexus Staffing rejected Nexus Employment's offer about three weeks later, saying that Nexus Employment's comparison of the two companies didn't "accurately assess the real overlap between the parties' services and the consumers they each service," and the proposal wouldn't "eliminate likelihood of confusion nor ameliorate actual confusion" between the two marks. Nexus Staffing renewed its demand that Nexus Employment stop using the Nexus mark and threatened to file suit without further notice if Nexus Employment didn't. Nexus Employment continued using the Nexus mark.

On April 23, 2020 – 513 days later – Nexus Staffing filed this lawsuit. Nexus Staffing presumably waited so long because its trademark had been on the Principal Register for five years by that point, making the mark "incontestable" and so entitled to certain defenses and presumptions. Much of Nexus Staffing's substantive legal position at summary judgment was that

incontestability alone was enough to prove infringement. That's an incorrect legal premise and has no bearing on the likelihood of confusion analysis.

Nexus Staffing's first complaint brought three Lanham Act claims against Nexus Employment. Count 1 alleged intentional trademark infringement under 15 U.S.C. § 1114; Count 2 alleged false advertising under 15 U.S.C. § 1125(a); and Count 3 alleged cyberpiracy under 15 U.S.C. § 1125(d).

A cyberpiracy plaintiff must allege (among other things) that "it had a distinctive or famous mark at the time the domain name was registered [by the defendant]" Flentye v. Kathrein, 485 F. Supp. 2d 903, 914 (N.D. Ill. 2007) (citing V'soske, Inc. v. V'soske.com, 2001 WL 546567, at *6 (S.D.N.Y. May 23, 2001)); accord Svanaco, Inc. v. Brand, 417 F. Supp. 3d 1042, 1055 (N.D. Ill. 2019). The court granted Nexus Employment's motion to dismiss Count 3 for failure to state a claim upon which relief can be granted, because Nexus Staffing didn't allege anything about when Nexus Employment registered its domain name. The court granted Nexus Staffing leave to amend to fix the problem, and Nexus Staffing amended its complaint a month later. Nine days after that, Nexus Employment moved to dismiss count 3 again under Rule 12(b)(6), and the court granted that motion for the same reasons as last time, but this time with prejudice.

Magistrate Judge Kolar set the discovery deadline for December 31, 2020. When no depositions had been scheduled by December 11, 2020, Nexus Employment asked Nexus Staffing to agree to a joint motion to extend discovery.

Nexus Staffing responded that it didn't need any more discovery and was ready "to go to motions and trial," so Nexus Employment moved on its own to extend the discovery deadline. Judge Kolar granted that motion and extended the discovery deadline to February 1, 2021. The discovery deadline was again extended to March 17, 2021, after Nexus Employment filed a motion to compel. Throughout this entire time, Nexus Staffing only took one deposition and didn't retain any expert witnesses.

Nexus Employment later moved (1) for summary judgment on Nexus Staffing's two remaining counts (intention trademark infringement and false advertising); (2) to exclude evidence it anticipated Nexus Staffing would offer in response to its summary judgment motion; and after Nexus Staffing responded to the summary judgment motion, (3) to exclude three of Nexus Staffing's statements of genuine dispute. The court first addressed the motion to exclude evidence because some of that evidence was cited in Nexus Staffing's statements of genuine disputes. The court then addressed the motion to exclude the statements of genuine dispute, so that the evidence and factual contentions in consideration would be settled when it finally turned to Nexus Employment's summary judgment motion.

The Motion to Exclude Evidence and Statements of Disputed Fact

The motion to exclude evidence sought to exclude from summary judgment consideration four pieces of evidence that it believed Nexus Staffing would cite

to show actual consumer confusion. The court granted the motion, leaving Nexus Staffing with no admissible evidence to show actual consumer confusion.

The first piece of excluded evidence consisted of calls Nexus Staffing received that, according to Nexus Staffing, indicated confusion between the two companies. Nexus Staffing didn't offer any evidence to establish the authenticity of the alleged phone calls and admitted to not knowing the callers' identities, when the calls took place, what exactly was said, how many calls there were, or who answered the calls. The only evidence that the calls even occurred was the deposition testimony of Nexus Staffing's Federal Rule of Civil Procedure 30(b)(6) designee that unidentified employees left Post-It notes on his desk saying that they answered phone calls from people looking for a different company. The court excluded the evidence for lack of foundation.

The second piece of excluded evidence was a recorded third-party telephone call. Nexus Employment argued that it should be excluded as inadmissible hearsay. Nexus Staffing simply cited the elements of the business records exception in response. But Nexus Employment had already cited well-settled precedent in its motion that the "[business records] exception does not encompass statements contained within the business record that are made by third parties." Johnson v. Herman, 132 F. Supp. 2d 1130, 1133 (N.D. Ind. 2001) (citing Woods v. City of Chicago, 234 F.3d 979, 986 (7th Cir. 2000)), *cert. denied*, 534 U.S. 955 (2001)). The court excluded the recording.

The third piece of excluded evidence consisted of screenshots of three LinkedIn profiles bearing the names of people who, according to Nexus Staffing, represented that they work for Nexus Staffing but actually work for Nexus Employment. Nexus Employment argued that Nexus Staffing couldn't lay a foundation for their admission. Nexus Staffing responded that screenshots are admissible under Federal Rule of Evidence 803(17)'s commercial publications exception to the rule against hearsay. Nexus Staffing never produced the screenshots for the court to review, but Nexus Employment provided one screenshot along with the affidavit of the person in the screenshot attesting that he never created that LinkedIn profile. Nexus Staffing's Rule 30(b)(6) designee testified that he had no information about the three people from the LinkedIn pages; had never spoken to any of them; didn't know how, when, why, or by whom the pages were created; and didn't know for sure how Nexus Staffing came into possession of the screenshots. The court excluded the LinkedIn evidence.

The fourth piece of excluded evidence was a notice of claim for employee benefits document set to Nexus Staffing by the Indiana Department of Workforce Development about a previous Nexus Employment employee. Nexus Employment argued that a foundation for admission couldn't be laid because there wasn't any information as to how this document was created, who created it, when it was created, or why it was created. Nexus Staffing didn't depose the employee or anyone else about the document. Nexus Staffing responded that the document should be admissible under Federal Rule of Evidence 803(8)'s public

records exception to the rule against hearsay. The court granted the motion to exclude the notice of claim.

The court granted in part Nexus Employment's motion to exclude statements of genuine dispute and excluded two statements. Both excluded statements related the first piece of excluded evidence—the unknown callers. Nexus Staffing simply copied and pasted its response to the motion to exclude evidence in responding to this motion. Nexus Staffing only submitted six statements total; the four remaining statements didn't contravene any of 70 statements of genuine facts that Nexus Employment submitted.

The Summary Judgment Motion

Nexus Employment's summary judgment motion argued that the two remaining claims had to fail because Nexus Staffing couldn't establish likelihood of confusion as required to sustain a Lanham Act claim. The court agreed, finding that all seven likelihood of confusion factors recognized under Packman v. Chicago Tribune Co., 267 F.3d 628, 643 (7th Cir. 2001), favored Nexus Employment.

Before the court got into the likelihood of confusion analysis, it addressed Nexus Staffing's preliminary arguments. Nexus Staffing first said that Nexus Employment admitted existence of likelihood of confusion because it admitted that Nexus Staffing had an incontestable registered mark. The court rejected this argument because incontestability has no bearing on the likelihood of confusion analysis. Nexus Staffing then said that Nexus Employment hadn't produced any

evidence that its services were distinguishable from the recited services of Nexus Staffing's trademark registration. The court noted that this was one of the likelihood of confusion factors and considered it later in the opinion. Notably, Nexus Staffing cited Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), in telling the court that: "The question, at this stage, is not whether the Court agrees with Nexus Employment's allegations regarding a likelihood of confusion, but whether Nexus Staffing has produced sufficient facts to support a claim for relief that is plausible on its face." [Doc. No. 50, at 5]. That isn't the standard for summary judgment.

Count I: Intentional Trademark Infringement

"Seven factors comprise the likelihood of confusion analysis: (1) similarity between the marks in appearance and suggestion; (2) similarity of the products; (3) area and manner of concurrent use; (4) degree of care likely to be exercised by consumers; (5) strength of the plaintiff's mark; (6) actual confusion; and (7) intent of the defendant to "palm off" his product as that of another" Uncommon, LLC v. Spigen, Inc., 926 F.3d 409, 425 (7th Cir. 2019); Packman v. Chicago Tribune Co., 267 F.3d 628, 643 (7th Cir. 2001).

The court first noted that there is no reasonable similarity between the visual depictions of the two companies' marks other than that they both use the word "Nexus." Nexus Staffing argued that its registration is for "NEXUS" without reference to color, style, or any other elements, and that the comparison of the

two logos doesn't matter because how the marks are used in commerce doesn't matter. The court noted that that's an incorrect statement of the law.

Regarding the second factor—similarity of products—Nexus Staffing first argued that Nexus Employment's use of the Nexus mark was evidence of palming off. The court noted that palming off was a separate factor in the likelihood of confusion analysis that would be considered later in the opinion. Nexus Staffing then argued that its registration covered Nexus Employment's services. But again, the court noted that the trademark registration had no bearing on the likelihood of confusion analysis.

Nexus Staffing devoted two sentences to the third factor—area and manner of concurrent use: “The federal registration covers the entire United States, and Nexus Staffing has introduced evidence that it established nationwide use prior to Nexus Employment's use. This factor is in Nexus Staffing's favor.” The court noted that Nexus Staffing didn't provide any citation to the record to back that up,¹ and once again explained that the trademark registration had no bearing on the likelihood of confusion analysis. In addressing the next two factors—the degree of care likely exercised by consumers and the strength of Nexus Staffing's mark—Nexus Staffing again just pointed to its trademark registration.

¹ Nexus Staffing's citation to the record was sparse in general. Nexus Staffing only designated three exhibits as evidence; for reference, Nexus Employment designated 31. All three exhibits were deposition transcripts—two of them were of deponents that Nexus Employment deposed.

Regarding the sixth factor—actual confusion—Nexus Staffing copied and pasted its response to the motion to exclude evidence and didn't make any additional argument or citations to the record. For the seventh factor—intent to palm off the product of another—Nexus Staffing didn't address Nexus Employment's intent but instead accused Nexus Employment of lying to the court about the year Nexus Employment was formed. The alleged misrepresentation, though, had no bearing on whether this factor favored one of the companies over the other.

Count II: False Advertising

To establish a false advertising claim, Nexus Staffing had to establish (among other things) that Nexus Employment made a literally false statement of fact about its offered services. Alternatively, Nexus Staffing could show Nexus Employment made a true or ambiguous statement about its services that is misleading in context, as demonstrated by actual consumer confusion. Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999).

Nexus Employment argued that Nexus Staffing hadn't offered any evidence that Nexus Employment made any literally false statement of fact about its services, and it couldn't show actual consumer confusion. Nexus Staffing's entire response concerning count II was: "The citations by Nexus Employment relate to claims that were for untrue statements rather than trademark use, distinguish the citations by their facts and then state for the reasons on likelihood of confusion NESP's motion must fail." Nexus Staffing didn't cite the record at all.

Whether Nexus Staffing even made out a prima facie case of false advertising is doubtful, but regardless, the court found that Nexus Staffing hadn't established a genuine issue of material fact and granted Nexus Employment summary judgment.

* * *

Nexus Employment now moves for attorney fees and costs under 15 U.S.C. § 1117(a).

Section 1117(a) enables trademark litigants to recover attorney fees in “exceptional cases.” Litigants must establish their entitlement to fees under a preponderance of the evidence standard. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 557 (2014); cf. LHO Chicago River, L.L.C. v. Perillo, 942 F.3d 384, 388-389 (7th Cir. 2019).

Exceptional Case

An “exceptional” case is “one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. at 554; cf. LHO Chicago River, L.L.C. v. Perillo, 942 F.3d at 388-389.

No precise rule or formula exists for making these determinations; instead, courts exercise equitable discretion and consider the totality of the circumstances. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. at 554. A nonexclusive set of factors that courts consider include “frivolousness,

motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” LHO Chicago River, L.L.C. v. Perillo, 942 F.3d 384, 386 (7th Cir. 2019). “[A] case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award.” Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. at 555.

“In appropriate circumstances, a successful party should be entitled to full compensation for the injuries sustained and expenses incurred, since these were necessitated by the acts of the opposing party.” Id. at 388. But “the Supreme Court has cautioned [that] fee awards are not to be used as a ‘penalty for failure to win a patent infringement suit.’” Stone Basket Innovations, LLC v. Cook Med. LLC, 892 F.3d 1175, 1184 (Fed. Cir. 2018) (quoting Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. at 548).

Nexus Employment argues that this is an exceptional case for several reasons:

1. Nexus Staffing claimed proof of ongoing actual consumer confusion between itself and Nexus Employment for more than three years. When Nexus Staffing was faced with the “put up or shut up” moment to admissible proof of its allegations, Nexus Staffing didn’t produce any admissible evidence of any consumer confusion.

2. Nexus Employment consistently maintained that there was no potential risk of consumer confusion between itself and Nexus Employment. This court agreed by finding that all seven of the regularly applied likelihood of confusion factors favored Nexus Employment.

3. Nexus Staffing's substantive litigation position was always based on a wrong legal premise—that the incontestability of its mark and the scope of services detailed in its registration obviated the second required element of a trademark infringement claim—a likelihood of confusion among likely consumers.

4. Nexus Staffing's false advertising and ACPA claims were frivolous. Nexus Staffing never identified a single false or deceptive statement made by Nexus Employment. Nexus Staffing was never able to establish the first necessary element of its ACPA claim, despite getting two chances to do so.

5. Nexus Staffing shirked its legal obligations at the “put up or shut up” moment in this case: summary judgment.

[Doc. No 74, at 3-4].

Nexus Staffing responds to each of these reasons in turn, but it prefaces its argument by acknowledging that it relies on additional evidence and caselaw that it didn't rely on for summary judgment.

Regarding the lack of admissible evidence of actual consumer confusion, Nexus Staffing says additional deposition testimony existed that would have provided a foundation to admit the unknown telephone calls and third-party call, despite Nexus Staffing's failure to designate or cite this evidence at summary judgment. Nexus Staffing then says that other courts have admitted "anecdotal" evidence of customer confusion under various rules of evidence. Nexus Staffing says its overall substantive legal position wasn't weak given that other evidence could have been available and that other courts have admitted evidence of consumer confusion.

As for the likelihood of confusion factors, Nexus Staffing either cites new case law that neither party cited before and the court didn't consider at the summary judgment stage, or offers new arguments (that are more pertinent to the governing law) about how the factors actually favor Nexus Staffing. All this shows, says Nexus Staffing, that it wasn't unreasonable for Nexus Staffing to conclude that the factors weighed in its favor. Nexus Staffing concedes that the last factor—intent to palm off another's product—weighed in favor of Nexus Employment.

Nexus Staffing says Nexus Employment is incorrect in saying that it got basic trademark law wrong. Nexus Staffing says that while it incorrectly stated the law, it still engaged in the correct legal analysis by devoting nine of its fifteen-page brief to addressing the likelihood of confusion analysis. Nexus Staffing finally says that the court shouldn't find Nexus Employment's fourth reason (that

the cyberpiracy claim lacked merit) or fifth reason (that the remaining claims lacked merit) persuasive because the court must consider whether “the case overall was exceptional[,]” not on a claim-by-claim basis. RooR Int'l BV v. Amused Clothing, LLC, 2020 WL 6867180, at *3 (N.D. Ind. Nov. 23, 2020) (quoting Intell. Ventures I LLC v. Trend Micro Inc., 944 F.3d 1380, 1384 (Fed. Cir. 2019)).

Nexus Staffing’s substantive legal position was strongest when it sent its cease-and-desist letter; every point after that was exceptionally weak. After the court granted Nexus Employment’s first motion to dismiss the cyberpiracy claim, all Nexus Staffing needed to do to avoid dismissal was allege when Nexus Employment registered its domain name. Nexus Staffing couldn’t get that done after two chances, which suggests frivolity. Even now, Nexus Staffing concedes that dismissal was appropriate.

Many of Nexus Staffing’s problems regarding the evidence of actual consumer confusion arose because Nexus Staffing didn’t have enough information to lay a foundation for its admission or refute hearsay objections. Yet Nexus Staffing claimed actual consumer confusion in its cease-and-desist letter—513 days before this suit was filed. Nexus Staffing saw two discovery deadline extensions come and go—extensions that Nexus Employment sought—and still didn’t investigate enough to develop this evidence. What’s more, Nexus Staffing claimed it was ready to go to trial before the first discovery extension was granted. Nexus Staffing took one deposition; Nexus Staffing now wants to

say that there were possible deponents that could've strengthened their case, but the time to develop that testimony has long since passed.

Nexus Staffing's responses to Nexus Employment's evidentiary objections were outside the ordinary. Nexus Staffing had absolutely no evidence to lay a foundation for the calls indicating confusion. Nexus Staffing simply ignored well-settled precedent that the business records exception doesn't include third-party statements. It responded to foundational objections to the LinkedIn screenshots and the Indiana Department of Workforce Development document with exceptions to the rule against hearsay. That's a failure to even engage with the relevant legal rules, let alone establish a substantive legal position.

Nexus Employment submitted 70 statements of genuine facts; Nexus Staffing only submitted six statements of genuine dispute to controvert them, and two of those statements were excluded. That's just not a lot of material to establish a genuine issue of material fact. It's even more striking because Nexus Staffing spurned Nexus Employment's invitation to extend the discovery deadline—extensions that gave Nexus Staffing more time to develop its case.

Although Nexus Staffing seemed to understand the lay of the legal land in its cease-and-desist letter, something happened in the 513 days it took Nexus Staffing to file suit that mutated its position into a steadfast but incorrect belief that an incontestable registered mark was enough to prove its case. Again, that is a failure to engage with the relevant law, let alone establish a substantive legal position. It's made worse because Nexus Staffing acknowledged the correct legal

framework at first, but then pointed to its registered mark in addressing five of the likelihood of confusion factors and didn't provide any further analysis whatsoever. And Nexus Staffing told the court that the summary judgment standard was whether it had produced sufficient facts to support a claim for relief that is plausible on its face, citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). That misstep certainly stands out from other cases.

Nexus Staffing's argument now is essentially that there was merit to its legal position, it just didn't provide evidence or cite the right cases to show it. Now, Nexus Staffing says, it has the evidence and caselaw to flesh that out. Nexus Staffing essentially reargues its case with germane points that weren't originally made instead of arguing that its legal position at the time was reasonable. Nexus Staffing doesn't present any persuasive authority showing that the court is free to consider new evidence and caselaw at this stage of the case. And it's inconsistent for Nexus Staffing to now argue that the likelihood of confusion factors weighed in its favor when it originally argued that they didn't apply.

* * *

This is an exceptional case in which Nexus Employment is entitled to attorney fees under 15 U.S.C. § 1117(a).

Amount of Fees to Award

“District courts have discretion in determining to what extent prevailing parties may be awarded costs.” Eagle F. v. Phyllis Schlafly's Am. Eagles, 498 F.

Supp. 3d 1024, 1049 (S.D. Ill. 2020) (citing Weeks v. Samsung Heavy Indus. Co., 126 F.3d 926, 945 (7th Cir. 1997)). In calculating the amount to award Lanham Act attorney fees, courts “generally begin[] with the ‘lodestar’—the product of the hours reasonably expended on the case multiplied by a reasonable hourly rate.” Eagle F. v. Phyllis Schlafly's Am. Eagles, 498 F. Supp. 3d at 1044 (citing Montanez v. Simon, 755 F.3d 547, 553 (7th Cir. 2014)). “Although the lodestar yields a presumptively reasonable fee . . . the court may nevertheless adjust the fee based on factors not included in the computation,’ such as the time and labor required, the novelty or difficulty of the case, the degree of the success achieved, the experience and ability of the attorneys, the adequacy of the documentation of the hours, and whether appropriate billing judgment was used.” Eagle F. v. Phyllis Schlafly's Am. Eagles, 498 F. Supp. 3d at 1044 (quoting Montanez v. Simon, 755 F.3d at 553). “Generally, counsel's decisions on how to spend time litigating a matter are reasonable in the absence of particularized evidence of the contrary.” N. Am. Van Lines, Inc. v. N. Am. Moving & Storage, Inc., 2020 WL 1130339, at *1 (N.D. Ind. Mar. 6, 2020) (citing People Who Care v. Rockford Bd. of Educ., 90 F.3d 1307, 1314 (7th Cir. 1996)).

“The movant bears the burden of proving that the requested hourly rate is reasonable and ‘in line with those prevailing in the community.’” N. Am. Van Lines, Inc. v. N. Am. Moving & Storage, Inc., 2020 WL 1130339, at *1 (quoting Pickett v. Sheridan Health Care Ctr., 664 F.3d 632, 640 (7th Cir. 2011)). “A request for attorney's fees should not result in a second major litigation.” Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

Nexus Staffing doesn't dispute the reasonableness of the hourly rates charged by Nexus Employment's attorneys, but it does raise two objections. First, Nexus Staffing says that Nexus Employment's invoices appear to show that Nexus Employment was billed twice for the same services provided by attorneys Cole Dunnick and Sean Darke. For example, some of the billing invoices show that both attorneys spent time reviewing documents and caselaw, developing strategies, and communicating with an insurance company. Nexus Staffing says that these invoices might not be significant under normal circumstances, but the reasonableness of those invoices is brought into question because attorney Darke never entered his appearance in the litigation. Second, Nexus Staffing says that Nexus Employment hasn't completed the final calculation of its fees.

"[J]ust because two lawyers have billed for the same task does not mean the hours should be deducted." Eagle F. v. Phyllis Schlafly's Am. Eagles, 498 F. Supp. 3d 1024, 1046–47 (S.D. Ill. 2020) (citing Tchemkou v. Mukasey, 517 F.3d 506, 511-512 (7th Cir. 2008)). "The relevant inquiry remains whether the time was 'reasonably expended.'" Id. Nexus Staffing admits that the fees for attorneys Dunnick and Darke are reasonable, and it's unclear why the fees would suddenly become unreasonable just because Mr. Darke didn't file a formal appearance in court.

Nexus Employment filed three supplements updating the calculation of its fees to include fees incurred from October 2021 through January 2022. Nexus Staffing challenged these supplements on two grounds (the first two

supplements are briefed with a response and reply). First, Nexus Staffing says that Federal Rule of Civil Procedure 54(d)(2)(B) requires a motion for attorney fees “to be filed no later than 14 days after the entry of judgment” and “state the amount sought or provide a fair estimate of it.” Nexus Staffing says that while the motion complied with these requirements, the court should ignore the supplements because they were filed after the 14-day window. Nexus Staffing doesn’t cite any persuasive authority for the proposition that a supplement to a motion for attorney fees is subject to the 14-day window that the original motion is.

Second, Nexus Staffing challenges the reasonableness of the fees claimed in the supplements.

Nexus Staffing says that the 17.8 hours Nexus Employment spent on preparing proposed jury instructions and a verdict form is unreasonable, citing the local rules and this court’s pretrial order for support. The local rules and this court’s pretrial order provide that “parties must use pattern jury instructions when possible.” N.D. Ind. L.R. 51-1. The Seventh Circuit Pattern Civil Jury Instructions include pattern instructions for use in trademark infringement cases. Nexus Employment submitted 17 proposed jury instructions and a verdict form that relied on extensive caselaw when it could have more easily turned to the pattern jury instructions.

The hours billed drafting jury instructions seem to be more than what the court would to be anticipate necessary for this case. But Nexus Staffing doesn’t

suggest a number of hours by which to reduce Nexus Employment's billed hours to make the final number of billed hours reasonable. Nor does Nexus Staffing provide evidence of similar situations where proposed jury instructions were prepared in less than 17.8 hours. Instead, Nexus Staffing simply asks that the court reduce the 17.8 hours by an amount the court finds reasonable. With no better solution, the court reduces the amount claimed for drafting jury instructions by 15 percent, to \$5,007.25.

Nexus Staffing next says that the 17.4 hours Nexus Employment expended to prepare and submit a pretrial brief is unreasonable. Nexus Staffing points to the large overlap between the arguments made in Nexus Employment's previously filed summary judgment motion and motion to exclude evidence, stating that 17.4 hours is excessive time to spend on an essentially copy-and-pasted brief. Nexus Employment's pretrial brief largely repeats the arguments it made in its previous motions for summary judgment and motion to exclude evidence, so the 17.4 hours billed is more than expected under the circumstances. Again, Nexus Staffing doesn't suggest a number of hours by which to reduce Nexus Employment's billed hours to make the final number of billed hours reasonable or provide evidence of similar situations where a pretrial brief was prepared in less time. Again, the court reduces the claimed fee by 15 percent and awards fees in the amount of \$4,806.75 for the pretrial brief.

Nexus Staffing contends that the 44.1 hours Nexus Employment claims for preparing and submitting its motions in limine is unreasonable, stating that

the motions in limine simply recited of arguments raised in previous motions. Nexus Employment's reply acknowledges that two of the seven issues do have some overlap with its motions to exclude evidence because they concern the same evidence, but it argues that those two issues required additional work because Nexus Staffing's trial brief posed new arguments in opposition to Nexus Employment's motions to exclude evidence and Nexus Employment was required to respond in limine to those new arguments. Nexus Employment also argues that the other five issues raised in limine were novel and that two of them wouldn't have been raised but for Nexus Staffing's refusal to stipulate to certain facts and exhibits and its late notice of a new witness. The court agrees with Nexus Employment. Given the new arguments raised in limine by Nexus Staffing and the novelty of the five of the seven issues raised in limine by Nexus Employment, 44.1 hours of time is reasonable, and Nexus Employment is awarded the full monetary amount requested.

Nexus Staffing argues that the \$952.50 billed for 2.9 hours of redaction of invoices is unreasonable. It contends that redaction is a task that is typically assigned to a paralegal and a fee of \$350.00 per hour for a paralegal is excessive. The court agrees that redaction is a simple task easily assigned to a paralegal and completed at a lower billing rate, but an attorney must make the decisions about what is to be redacted, so the court can't simply change the hourly rate for the entire 2.9 hours of redaction from that of an attorney to that of a paralegal. With no better suggestion before it, the court reduces the fee petition for invoice reduction by 15 percent, from \$952.50 to \$809.62.

Nexus Staffing states that the 3.5 hours of time Nexus Employment billed to respond to Nexus Staffing's motion for enlargement of time to file an appeal is excessive since the motion was both short (1.5 pages) and simple. The court once again agrees that billing 3.5 hours to respond to a motion as short and simple as this one seems excessive. And again, the court reduces this portion of the fees by 15 percent, from the requested \$1,137.50 to \$966.87.

Nexus Staffing asserts that the 3 hours of time Nexus Employment billed to communicate with its client between December 17 and December 28, 2021 is unreasonable because the only open issue at the time was Nexus Staffing's motion to enlarge the time for appeal. This doesn't appear to the court to be an unreasonable amount of time to speak with a client over an 11-day period. The court overrules the objection to this component of the requested attorney fees.

Finally, Nexus Staffing challenges the 16.5 hours attorney Cole Dunnick billed litigating this case in January 2022. But Nexus Staffing doesn't give any particularized reason why 16.5 hours is unreasonable. Nexus Staffing's naked objection isn't persuasive, so the court overrules it and awards Nexus Employment the full \$5,362.50 in attorney fees requested for Mr. Dunnick's work in January 2022.

Conclusion

For the foregoing reasons, the court GRANTS Nexus Employment's motion attorney fees under 15 U.S.C. § 1117(a) and awards Nexus Employment \$175,712.50 in attorney fees.

SO ORDERED.

ENTERED: August 24, 2022

/s/ Robert L. Miller, Jr.
Judge, United States District Court