At a Commercial Division, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12TH day of June , 2006.

P R E S E N T:
HON. CAROLYN E. DEMAREST,
Justice.

- X

FABCON EAST, L.L.C.,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 24639/02

STEINER BUILDING COMPANY NYC, L.L.C.

Defendants.

- X

The following papers numbered to read on this motion:

	Papers Numbered
Notice of Motion-Order to Show Cause and Affidavits (Affirmations) Annexed	**1**
Answering Affidavits (Affirmations)	**2**
Reply Affidavits (Affirmations)	**3**
Other Papers Memoranda of Law	

Following trial, pursuant to Decision of this Court dated December 12, 2005, Plaintiff recovered a judgment for $239, 170 plus pre-judgment interest from December 20, 2001, and the costs of litigation pursuant to the terms of the

contract between the parties. In compliance with the Court's direction, Plaintiff has submitted the affidavit of counsel attesting to $377,745.50 as the reasonable value of attorneys' fees for legal services provided to plaintiff in the litigation of this case, plus $55,855.72 for "costs" to Fabcon and its attorneys, for a total of $433, 601.22.

This Court found, in its Decision of December 12, that "Plaintiff, as the prevailing party, is entitled to recover its costs and expenses of this litigation, including attorney's fees", pursuant to paragraph 53 of the Agreement between the parties which provides:

> This Agreement shall be governed by and construed in accordance with the law of New York and the Superior Court of the State of New York shall have exclusive jurisdiction over all actions, lawsuits and other legal proceedings between the parties hereto arising out of or in connection with this Agreement. The parties hereto expressly waive the right to trial by jury in any such action, lawsuit or other legal proceeding. Without limiting the foregoing, the parties hereto agree that the prevailing party shall recover its costs and expenses , including without limitation, attorneys' fees, incurred by it in connection with said action, lawsuit or legal proceeding from the other party hereto. Notwithstanding the foregoing, Sub-Contractor expressly agrees that the existence of any such action, lawsuit or other legal proceeding or of any other dispute, controversy or claim between General Contractor and Sub-Contractor shall not occasion or permit any delay in the prosecution of the Work and Sub-Contractor agrees to proceed with such Work without delay and without regard to such action, lawsuit, legal proceeding, dispute, controversy or claim. Sub-Contractor's refusal or failure to proceed with the performance of the Work shall constitute a material breach of this Agreement, and, in addition to all other remedies

> available to General Contractor. [sic] General Contractor shall be entitled to recover from Sub-Contractor all costs, expenses, losses and damages incurred or suffered as a result of Sub-Contractor's refusal to perform said Work.

As a threshold matter, Defendant takes issue with the value of Plaintiff's recovery as the "prevailing party" noting that its demand for costs exceeds its judgment. However, Plaintiff also prevailed over Defendant's counterclaim for breach of contract in its entirety and is entitled in addition to its own judgment, to the full ad damnum of $2, 748,950 upon the counterclaim in assessing the value of Plaintiff's attorneys' services. Accordingly, while several elements of Plaintiff's demand for costs are not recoverable, the sum demanded remains substantially below the one-third of the prevailing party's recovery deemed permissible under New York law. See F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250 (2d Cir. 1987). It will nevertheless be necessary to identify and exclude those charges related to issues upon which Plaintiff did not prevail, such as its meritless claim for lost profits which was expressly precluded by the terms of the Agreement. Matter of Rahmey v. Blum, 95 AD2d 294, 304 (2d Dep't 1983). However, although it will be appropriate to make some adjustment in the amount of time approved for work on some issues upon which Plaintiff did not "succeed", such as the filing of a mechanic's lien and the prosecution of the action against Eponymous, " '[w]here a lawsuit consists of related claims, a [prevailing party] who has won substantial relief should not have his attorney's fees reduced simply because the . . . court did not adopt each contention raised.'" Id. at 304, quoting Hensley v. Eckerhart, 461 US 424, 440 (1983).

Another threshold issue raised by Defendant is the proper interpretation to

be accorded the language of paragraph 53 in light of Plaintiff's inclusion, in its demand for costs, of the attorneys' fees related to an action brought by Jersey Precast against Fabcon, to which Defendant was not party. The operative sentence of paragraph 53 reads: "Without limiting the foregoing, the parties hereto agree that the prevailing party shall recover its costs and expenses, including without limitation, attorneys' fees, incurred by it in connection with said action, lawsuit, or legal proceeding from the other party hereto." Defendant argues that "said action" relates back to the first sentence of the paragraph which provides for "exclusive [New York Superior Court] jurisdiction over all actions . . . between the parties hereto arising out of or in connection with this Agreement" and thus precludes Plaintiff's recovery of legal fees and disbursements related to the Jersey Precast suit.

The Jersey Precast action was litigated in New Jersey federal court between Jersey Precast and Plaintiff and was ultimately settled for $155,000, over $120,000 less than the ad damnum and far less than the "exposure" contemplated by Defendant were it to terminate the Agreement without faulting Plaintiff. (See Decision of December 12). Jersey Precast's claim was for compensation for performance of a subcontract to fabricate components essential to the construction of Defendant's building and its recovery was included as an item of compensatory damages awarded to Plaintiff. It is clear, therefore, that Defendant directly benefitted from the efforts of Plaintiff's counsel in that action since its damages were substantially thereby reduced. Moreover, the operative sentence states "without limiting the foregoing", the prevailing party shall recover its costs and expenses, again "without limitation", to include attorneys' fees incurred "in connection with said action. . ." Clearly, "said action" does relate to this action,

brought in the New York State Supreme Court, between the parties to the Agreement. However, it cannot be denied that the New Jersey action brought by Jersey Precast against Plaintiff was integrally related to the terms of the Agreement between the parties herein and that Plaintiff's attorneys' fees incurred in the New Jersey action were incurred " in connection with" this action. Therefore, it is appropriate to allow recovery of the $19, 250.50 in legal fees, plus any related costs, incurred in the Jersey action.

Defendant further takes issue with Plaintiff's claim for $13,936.79 in travel expenses incurred by employees of Fabcon as witnesses. Plaintiff's right to recover its costs is derived, not from statute, but is contractual. However, in interpreting the intent of paragraph 53 of the Agreement permitting recovery to the prevailing party of "costs and expenses, including without limitation, attorneys' fees, incurred by it in connection with said action", it is appropriate to consider "the law of New York" which governs the Agreement. In New York, although, as Plaintiff points out, witness and expert fees are customarily awarded as a "cost" of litigation(Continental Building Co.,Inc.v. Town of North Salem, 150 Misc 2d 145 (Sup. Ct, Westchester, Co., 1991)), absent special circumstances, a party must bear the travel expenses incurred in producing its own witnesses as a cost of doing business. Allied Excavating Corp. v. Graves Equipment Co., Inc. , 99 AD2d 499 (2d Dep't 1984); Elliot v. E.T. Industries, Inc. , 88 Misc 2d 942 (Sup. Ct., Saratoga Co., 1976). Based upon the prefatory language of the contractual provision that New York law would govern, it is presumed that the parties did not contemplate recovery of items that are not traditionally recoverable in New York. Recovery of the $13,936.79 for witness travel expenses is disallowed.

In General Motors Corporation v. Villa Marin Chevrolet, Inc., 240 F. Supp.

2d 182, 185 (EDNY, 2002), similar to the Agreement at bar, the operative paragraph provided: "If either party commences an action to enforce the terms of, or resolve a dispute concerning, this Agreement, the prevailing party in such action shall be entitled to recover all costs and expenses incurred by such party in connection therewith, including reasonable attorneys' fees." Quoting F.H. Krear, supra at 1263, the court noted, "Under New York law, . . . in cases involving contractual fee-shifting provisions the court typically 'will order the losing party to pay whatever amounts have been expended by the prevailing party, so long as those amounts are not unreasonable'." Notwithstanding that rule, however, the court observed: "Regardless of whether fees are awarded pursuant to statute or pursuant to contract, the determination of what is a reasonable award is within the sound discretion of the trial court" which is in the best position to make an appropriate assessment based upon its familiarity with the case.

Defendant does not dispute the reasonableness of the hourly rate charged by the attorneys for Plaintiff but has questioned both the hourly rates and the total hours billed for paralegals. The Court concurs that, notwithstanding the absence of specific proof thereof, the hourly rates for counsel are well within the parameters approved for attorneys in litigation involving complex issues like that herein. See e.g., Van Der Zee v. Greenidge, 2006 WL 44020 (SDNY, 2006); Access 4 All, Inc. v. Park Lane Hotel, Inc., 2005 WL 3338555 (SDNY, 2005); Design Tex Group, Inc. v. United States Manufacturing Corp., 2005 WL 2063819 (SDNY,2005); Schruefer v. Winthorpe Grant, Inc., 2003 WL 21511157 (SDNY, 2003). Although the submissions of Plaintiff's counsel do not disclose the credentials and expertise of each of the attorneys that worked on the case, Defendant has not challenged this omission as to counsel, perhaps convinced

of the fairness of their rates based upon its own experience with the matter. However, Defendant does question the justification for the hourly rates, ranging from $60 to $140 per hour, for the twelve paralegals and the "managing clerk" who worked on the case. Other than the representation that Fritz Sammy, charged at $140 per hour, has "over twenty years experience" and "has served as the lead paralegal in over 50 trials", there is no information that would justify an hourly rate nearly that of an associate attorney. The other paralegal hourly rates also are unsupported by the particulars of their experience and exceed the recognized "going-rate". See General Motors Corp. v. Villa Marin Chevrolet, Inc., supra, 240 F Supp 2d 182; Matter of Gamache v. Steinhaus, 7 AD3d 525 (2d Dep't, 2004).

This Court notes, moreover, that there appears to be significant duplication of effort, both by counsel and paralegals, as to some issues. "[H]ours billed for duplicative services may not be included in a counsel fee award." Matter of Quill v. Cathedral Corp., 241 AD2d 593, 596 (3d Dep't 1997); see also Matter of Rahmey, supra at 300-301. Adding to the Court's concern is the billing of significant travel time between counsel's various office locations in Newark and New York City and Brooklyn. Plaintiff was entitled to retain counsel as it saw fit and, notably, defense counsel is also based in New Jersey. Recovery of necessary travel time is warranted but, here, the inter-office travel time appears to have been excessive. The cost of Plaintiff's decision to use out of state counsel should not be born by Defendant. See General Motors v. Villa Marin, supra at 189.

As previously noted, there are also significant charges allocated to issues and arguments that should not have been litigated, such as lost profits which were precluded by contract ($7230.47 including disbursements) or which could have been determined to be without merit in a matter of an hour or two, such as the

availability of a mechanics lien ($2801) (Mattter of Paedegat Boat & Racquet Club, Inc. v. Zarrelli, 57 NY2d 966 (1982); Matter of PMNC v. Brothers Insulation Co., Inc., 266 AD2d 293 (2d Dep't, 1999) (lien unavailable against real property owned by City), or the probability of success against Eponymous Associates ($9297.14 including disbursements).

Accordingly, from Plaintiff's initial lodestar-based demand for legal fees and litigation-related costs totaling $433,601.22, this Court has deducted $13,936.79 for the travel expenses of Plaintiff's own witnesses, $5666.54 for travel expenses and lodging apparently necessitated by the use of Newark-based counsel (see General Motors Corp, supra at 189), and $7230.47 for charges attributable to the meritless claim for lost profits, leaving $406,767.42, $50,083.71 of which is for costs other than legal fees, to which Plaintiff is entitled. (Charges for computerized research is compensable as it reduces the attorney hours required for research. See General Motors Corp., id. at 189-190). Twenty percent is discounted from the remaining attorneys' fees as an adjustment for inappropriate billing of travel time, duplication of services and for excessive charges relating to issues upon which Plaintiff did not prevail.

Plaintiff is hereby awarded $285,346.97 as the fair and reasonable value of

legal services rendered in connection with this case plus $50,083.71 in disbursements. This sum shall be paid to Plaintiff upon proof that it has actually paid such sum to its attorneys Gibbons, Del Deo, Dolan, Griffinger & Vecchione.

The foregoing constitutes the decision and order of the Court.

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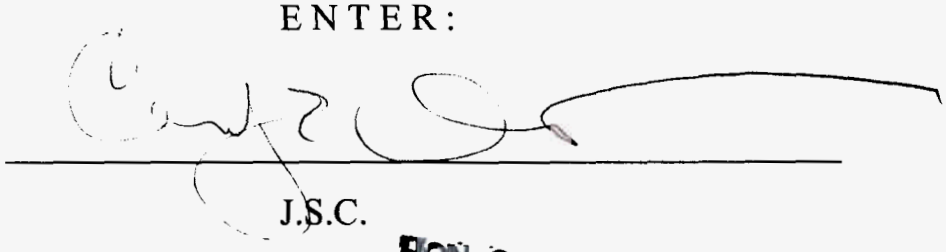

J.S.C.

HON. CAROLYN E. DEMAREST