



**Asahi Glass Co Ltd. et al v. Guardian Industries Corp.**

2013 | Cited 0 times | D. Delaware | March 11, 2013

IN UNITED STATES DISTRICT COURT

FOR DISTRICT OF

ASAHI GLASS CO.,

GLASS NORTH AMERICA, INC.,

09-515-SLR GUARDIAN INDUSTRIES CORP.,

I HI" 2013,

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(0.1. IT IS

Inc. "plaintiffs") Industries ("defendant") U.S.

"patents-at-issue"). (0.1. On 2011,

(0.1. On 20, 2011, "may

procedurally frivolous." (0.1. 240)

THE

THE DELAWARE

L TO. AND AGC ) FLAT )

Plaintiffs, )

v. ) Civ. No.

Defendant. )



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MEMORANDUM ORDER At Wilmington this day of March, having previously determined that defendant must pay plaintiffs' attorney fees in connection with their having to respond to defendant's post-trial briefing on inequitable conduct 243), and having considered the materials submitted in connection with plaintiffs' motion for attorney fees 254);

ORDERED, for the reasons that follow, that defendant must reimburse plaintiffs' fees in the amount of \$23,658.

1. Background. Plaintiffs Asahi Glass Co., Ltd. and AGC Flat Glass North America, (collectively, filed the instant case against Guardian Corp. alleging infringement of Patent Nos. 3,664,938 and 6,193,856 (collectively, the 1) December 14, defendant filed a post-trial brief alleging inequitable conduct in the prosecution of the patents-at-issue.

239) December the court warned that defendant incur the costs of [plaintiffs'] response, if the court determines either that such grounds were

barred or Plaintiffs filed their responsive brief on 2012. I. On 20, 2012, relevant

inequitable procedurally

plaintiffs' reasonable filing inequitable I. 250 D.I.

Following unable

plaintiffs' responsible. (See D.I. Plaintiffs reasonable filing

I. Plaintiffs believe least 60 (40

20 paralegal

(D.I. Michael Arial Foley also

paralegal,

filing local counsel. Plaintiffs hourly \$690, hourly

\$290, hourly \$220. (D.I. lodestar plaintiffs total \$26,500 (\$25,400

00 paralegal failure resolve

"due primarily lack billed



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Plaintiffs only paralegal local counsel I. January 5, (D. 243) August the court found, in part, that defendant's theories of conduct were either devoid of merit or barred and ordered defendant to pay costs in preparing and their responsive brief on conduct ("responsive brief"). (D. at 45; 252)

2. the court's order, the parties have been to reach an agreement regarding the amount of fees for which defendant is

267) now move for attorney fees for the preparation and of the responsive brief, pursuant to this court's memorandum opinion and order. (D. 254) that at hours of attorney time hours of associate attorney time and hours of partner attorney time) and 5 hours of time were appropriate for the preparation of their responsive brief. 255 at 2-3) The responsive brief was written by partner attorney D. Kaminski and associate attorney Fox Johnson, both of & Lardner LLP. Fox Johnson researched the brief. A Mary Ann Cochran, managed the documents and exhibits referenced in the briefs and coordinated of the brief with

assert that, at the time, Kaminski's rate was Fox Johnson's rate was and Cochran's rate was 256, ex. A) Thus, under the

method, request a of for attorney fees and \$11 for fees ). 1

Defendant contends that the parties' to the issue is to the surprising of documentation of the fees to

1

seek attorney and fees; they do not seek fees for or costs. (D. 265 at 3)

2 [plaintiffs]." (0.1.

calculates "lodestar" Spang 203 2000). lodestar results multiplying reasonably reasonable hourly exclude lodestar calculation

lack U.S. prevailing reasonable hourly U.S. prevailing

establishing reasonableness hourly U.S. U.S. Calculation lodestar lodestar twelve "Johnson lodestar. U.S. "can

lodestar lodestar reasonable light results

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"the



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twelve labor novelty difficulty skill legal properly;

preclusion employment

limitations client involved results

ability 0) undesirability length professional relationship

client; similar

262 at 1) 3. Standard. The court attorney fees pursuant to the approach. *Brytus v. & Co.*, F.3d 238, 242 (3d Cir. The amount from the amount of time expended by

rates. /d. The court may from the unnecessary hours or hours that proper documentation. *Hensley v. Eckerhart*, 461 424, 433 (1983). The community market rates assist the court in determining a

rate. *Blum v. Stenson*, 465 886, 895 (1984). The party bears the burden of the of both the time expended and the rates. *Hensley*, 461 at 434; *Blum*, 465 at 895 n.11.

4. of the does not end the inquiry, as the court may adjust the upward or downward. A district court may use factors 2

(the factors") to adjust the *Hensley*, 461 at 434. A court adjust the downward if the is not in of the obtained." *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. (citing *Hensley*, 461 at 434-37). A court may not sua sponte reduce a request for attorney fees. *Bell v. United Princeton Props., Inc.*, 884 F .2d 713, 719 (3d Cir. 1989) However, district court

2 The factors are: (1) the time and required; (2) the and of the question; (3) the requisite to perform the service (4) the of other by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time imposed by the or the circumstances; (8) the amount and the obtained; (9) the experience, reputation, and of the attorney; (1 the

of the case; (11) the nature and of the with the and (12) awards in cases. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

3 deal reasonable long

actually party."

plaintiffs. It plaintiffs'



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hourly (D.I. "it possible [plaintiffs' counsel] [60 paralegal

[plaintiffs] billed time." also fault plaintiffs' hourly

presumably reflect Delaware.

adequately reflects claimed plaintiffs. Plaintiffs

reflect 20 40 paralegal claim. 3

I. 2012 2012, reflect total

explains billed plaintiffs

already-high trial, belief inequitable meritless,

plaintiffs clients. (D.I. mf3, plaintiffs actually billed

lodestar counsel

Civ. LEXIS 20542, Del. retains a great of discretion in deciding what a fee award is, so as any reduction is based on objections raised by the adverse /d. at 721. The party who asks for the fees to be adjusted has the burden of proving an adjustment is necessary. Stenson, 465 U.S. at 898.

5. Discussion. Defendant objects to the amount of fees requested by asserts that submission is not supported by sufficient documentation showing the number of hours spent on the responsive brief or the appropriate rates. 262 at 1) According to defendant, is quite that

did not spend hours of attorney time and 5 hours of time] on the work or that were not for this amount of (/d. at 2) Defendant finds with invoices showing the asserted rates because the invoices rates for Washington, D.C., not (/d.)

a. The court begins by determining whether the documentation

the hours by concede that their contemporaneous records, in the form of invoices, do not the partner attorney hours (for Kaminski), hours associate attorney hours (for Fox Johnson), and 5

hours (for Cochran) they (D. 265 at 5) Rather, two itemized invoices, dated January 11, and February 14, a of 6.5 hours of

3 Kaminski that he chose to discount the time and fees to in connection with the responsive brief



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because of the cost of the

that defendant's theories of conduct were and the importance of as 266 at 11) Whether or not were

for time is inapposite to determining an award of fees; the court has awarded fees using the approach in instances where was retained on a contingent fee basis. See, e.g., *Lyon v. Whisman*, No. 91-289, 1994 U.S. Dist.

at \*18 (D. Dec. 8, 1994 ).

4 30.2 I. Nevertheless, plaintiffs claiming filing "safe fair," actual I. D.I. 0)

detailed reliable

Supp. Del. "While

allowance

substantially reasonably accurate." In law claiming only reflecting

"very detail, relating Such allowed conclude all claimed properly

declaration claiming 20 "spent related brief]." (D.I. specifically, least

originally claimed In reply plaintiffs declarations reflect (D.I.

material reply violates Local Rule

leave file surreply (D.I. surreply filed work by Kaminski, hours of work by Fox Johnson, and 8 hours of work by Cochran. 4

(D. 266, ex. A) maintain that the time they are for preparing and their responsive brief is justified and, in an effort to be and even reduced from the time spent on the matter. (D. 265 at 3-4; 266 4-1

b. Where contemporaneous time records were not maintained, a fee award can be based on a and reconstruction of the time spent. *Amico v. New Castle County*, 654 F. 982, 998-99 (D. 1987). mere estimates of time are not sufficient, an of attorney fees may be based on reconstruction, provided that the records are reconstructed and are

/d. at 998. *Amico*, a partner submitted an affidavit 271.6 hours but had contemporaneous records a portion of that time. For the time without contemporaneous records, the partner submitted specific



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each event in which he participated." /d. at 999. specificity

the court to that of the partner's hours were documented. /d. Here, Kaminski asserts in a that he is hours, even though he more than 35 hours ... working on matters to [the responsive 266 4) He asserts, more that he spent at

4 Plaintiffs did not submit any documentation supporting the number of hours. their brief to the instant motion, attached, for the first time, and invoices to some of those hours. 266) As reservation of for the brief 7.1.3(c)(2), the court grants defendant's motion for to a to the instant motion. 268) The proposed brief attached to defendant's motion is deemed and served. (/d., ex. 1)

5 ,-r,-r 7-10)

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(0.1. U.S. LEXIS In

(0.1. ,-r 0) 4 hours reviewing defendant's opening brief, alerting plaintiffs to the filing, and mentioning the anticipated response and briefing schedule; at least 8 hours further reviewing defendant's opening brief, speaking with Fox Johnson about the response, and discussing issues to be researched; at least 15 hours reviewing case law, reviewing initial drafts of the responsive brief, and preparing arguments for the brief; and at least 15 hours finalizing the responsive brief and verifying the collection of the appropriate supporting exhibits. 5

(/d. at He also provided the days during which each of these activities took place. (/d.) Although there may be some imprecision in Kaminski's reconstruction of his time, the court is satisfied that he spent at least hours on the responsive brief. 6

Therefore, the court finds that there is documentation adequately reflecting hours of partner attorney time.

c. With respect to Fox Johnson, there is proper documentation for only of the hours claimed for her work. Plaintiffs have not offered any sufficient reconstruction of her time beyond the hours reflected by the invoices, instead urging the court to take judicial notice of facts of which it is aware. 265 at 5) (citing Lyon, 1994 Oist. 20542). However, their request is unavailing. Lyon, this court gave credit for



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undocumented time based on its knowledge that an attorney spent

5 As the court only awarded plaintiffs their costs for preparing and filing the responsive brief on inequitable conduct, the court does not consider Kaminski's declaration that he also spent 3 hours reviewing defendant's reply brief on inequitable conduct. 266 at 1

6 The amount of time typically spent on an inequitable conduct responsive brief of the length filed in the instant case also corroborates Kiminski's reconstruction reflecting that he spent more than 6.5 hours preparing and filing the brief. He is the only partner attorney who worked on and reviewed the responsive brief.

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550 (D.I. Plaintiffs'

(D.I.

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(D.I.

(D.I. time in relevant proceedings before the court. /d. at \*16 n.9. Here, the court has no such factual knowledge of the time that Fox Johnson actually spent researching and writing plaintiffs' responsive brief.

d. The court next turns to the reasonableness of the amount of time spent in connection with the responsive brief. Defendant's opening brief on inequitable conduct was 27 pages long and accompanied by more than pages of documentation. 239) responsive brief was 24 pages long and included 84 pages of supporting documentation. 243) The responsive brief was also plaintiffs' only opportunity in briefing to respond to defendant's theories of inequitable conduct, which threatened to render the patents-at-issue unenforceable, so plaintiffs' legal team likely spent substantial time preparing it. Accordingly, the court finds that partner hours, 30.2 associate attorney hours, and 5 paralegal hours are reasonable in this case for preparing and filing the responsive brief. 7

e. Finally, the court finds that plaintiffs' asserted hourly rates are reasonable for the relevant market, in this case outside counsel handling a patent infringement case in Delaware. The asserted hourly rates of \$690 for Kaminski, \$290 for Fox Johnson, and \$220 for Cochran are supported by a redacted invoice dated December 8, 2011, as well as the itemized invoices dated January 11, 2012 and February 14, 2012. 8

256, ex. A; D.I. 266, ex. A) The attorney rates are also





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7 The court declines to upwardly adjust the documented 30.2 associate attorney hours or to award more paralegal time than the 5 hours that plaintiffs request.

8 The invoice dated February 14, 2012 shows Kaminski's hourly rate to be \$695.54, slightly higher than the rate of \$690 requested in the instant motion. 266, ex. A)

7 Intellectual Property 2011 ("the AIPLA plaintiffs

(0.1. AIPLA 2010, hourly 150 intellectual

lawyers, Foley LLP, \$600 hourly

\$390. While well below AIPLA

slightly Nevertheless, reasonable,

litigator

inequitable successful, would led plaintiffs' (0.1. , -r

Insofar

plaintiffs shall 20 law hourly \$690, 30.2 hourly \$290, paralegal hourly \$220, total

20 \$690 30.2 \$290 \$220 Conclusion. plaintiffs'

plaintiffs consistent with the American Law Association's Report of the Economic Survey Report"), which attached as an exhibit to their briefing on the instant motion. 256, ex. B) The Report indicated that, in the median rate for partners in a firm of more than property such as & Lardner was and that the median rate for associate attorneys in such a firm was (/d.) Fox Johnson's rate is

the associate attorney median identified by the Report, Kaminski's rate is above the partner median. Kaminski's rate is given that he is a patent with 25 years of experience and that the stakes were high in the matter- defendant's conduct argument, if have to the unenforceability of patents. 266 at 2)

f. as defendant has not demonstrated any sufficient justification for reducing this award, the Johnson factors do not mandate a downward adjustment. Therefore, be awarded hours of partner time at an rate of

hours of associate attorney time at an rate of and 5 hours of time at an rate of for a of \$23,658:



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$X + X + 5 X = \$23,658$ . 6. For the foregoing reasons, the court grants motion for attorney fees and awards \$23,658.

United States District Judge