

1 Martin Quinn
2 JAMS
3 Two Embarcadero Center, Suite 1500
4 San Francisco, CA 94111
5 Telephone: (415) 982-5267
6 Fax: (415) 982-5287

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SPECIAL MASTER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

CASE NO. M:07-cv-01827-si

MDL No. 1827

CASE NO. 10-CV-4572 SI

**SPECIAL MASTER'S REPORT AND
RECOMMENDATION RE BEST
BUY'S MOTION FOR FEES AND
COSTS AND HANNSTAR'S
OBJECTION TO BILL OF COSTS
(Hrg. 1/9/14)**

This Order Relates to Individual Case:

BEST BUY CO., INC.

Plaintiffs,

v.

AU OPTRONICS CORP., *et al.*,

Defendants.

1 On November 20, 2013, the Court referred to the Special Master for determination in the
2 first instance [Dkt. No. 8788] Best Buy's Motion for Fees and Costs [Dkt. No. 8610, and
3 HannStar's Objections to Best Buy's Bill of Costs [Dkt. No. 8788]. The Special Master heard
4 the matter on January 9, 2014. Counsel for all affected parties were present. Having considered
5 all arguments and evidence submitted, the Special Master now recommends that the matter be
6 decided as follows.

7 Relevant Factual Background

8 On September 4, 2013 the Court entered judgment following a six-week jury trial in
9 favor of Best Buy and against HannStar. Adopting the jury verdict, the Court entered judgment
10 against HannStar in the sum of \$7,471,943 [Dkt. No. 592 in C 10-4572 SI]. The Court
11 subsequently granted in part HannStar's Motion to Vacate the Judgment [MDL Dkt. No. 8786],
12 and entered an Amended Judgment [MDL Dkt No. 8787] that (a) trebled the jury award to
13 \$22,415,829, and (b) applied an offset of \$229,000,000 for the cash consideration Best Buy
14 received in earlier settlements -- which reduced the damages award to zero.

15 The trial verdict also found in favor of defendant Toshiba and against Best Buy, which
16 therefore recovered nothing from Toshiba.

17 Best Buy entered into nine earlier settlements with other defendants. [Rosen Decl., ¶29-
18 40, Exh. 5-13]. It is undisputed that the cash consideration received by Best Buy in those
19 settlements was at least \$229 million. HannStar contends that Best Buy received an additional
20 \$144.52 million in non-cash consideration, for a total consideration of \$373.52 million. [Rosen
21 Decl., ¶39-40].

22 In this motion, Best Buy seeks recovery of attorney's fees of \$9,103,109.95. It seeks
23 recovery of costs in the sum of \$8,550,525.26, including \$7,617,874.63 of expert witness fees.
24 Best Buy's requests raise the following legal issues that are discussed in Section A below:

- 25 1. May Best Buy recover fees and certain costs under the Clayton Act?
- 26 2. Does Best Buy have a right under federal law to recover its expert witness fees?
- 27 3. Did Best Buy prevail on a direct purchaser claim under Minnesota law?

28

1 4. Does federal, or Minnesota, law govern whether Best Buy may recover expert witness
2 fees on its Minnesota anti-trust law claim?

3 Section B below considers whether Best Buy's prior settlements are to be offset against its claim
4 for fees and costs. Section C below addresses the reasonableness of Best Buy's fee request.
5 Section D below addresses the reasonableness of Best Buy's cost request, and the Objections to
6 Best Buy's Bill of Costs.

7 Analysis of Issues

8 A. Does Best Buy Have a Right to Recover Fees and Costs under Federal and/or 9 Minnesota Law?

10 1. Best Buy May Recover Fees & Certain Costs under the Sherman and Clayton 11 Acts

12 Section 4(a) of the Clayton Act provides that, "any person who shall be injured in his
13 business or property by reason of anything forbidden in the antitrust laws....shall recover...the
14 cost of suit, including a reasonable attorney's fee." 15 U.S.C §15. Best Buy seeks to recover
15 attorneys' fees and its costs under this federal statute.

16 HannStar contends that Best Buy has not demonstrated a right to recover under the
17 Sherman Act, and hence has no right to attorneys' fees under this provision.¹ HannStar points to
18 the special verdict, in which the jury answered "no" to Question No. 5, "Did Best Buy prove, by
19 a preponderance of the evidence ... that the conspiracy involved conduct which had a direct,
20 substantial and reasonably foreseeable effect on trade or commerce in the United States?"

21 HannStar argues that, given this jury finding, Best Buy has not demonstrated compliance with
22 the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. §6(a). However,
23 this contention has already been rejected by the Court's Order re Post-Trial Motions [Dkt. No.
24 8786] in which the Court specifically found that the jury's other findings satisfied the FTAIA.

25 Best Buy plainly showed at trial that it had been "injured in [its] business or property"
26 since the jury concluded that HannStar's conduct had damaged it in the sum of \$7.47 million.
27

28 ¹ The parties agree that this provision does not allow recovery of non-taxable costs and expenses, such as expert fees. Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir. 1964). However, Best Buy argues that the Court has discretion under federal law to award expert witness fees, which are non-taxable.

1 Accordingly, Best Buy has demonstrated -- subject to the discussion below about offset -- that it
2 is entitled to recover allowable costs and attorneys' fees under federal law.

3 **2. Best Buy Has No Right to Recover Non-Taxable Costs Under Federal Law**

4
5 It has long been the law that the Clayton Act does not authorize a private anti-trust
6 plaintiff to recover costs other than those properly taxable. Twentieth Century-Fox Film Corp. v.
7 Goldwyn, 328 F.2d 190, 224 (9th Cir. 1964). The Supreme Court has affirmed this rule, holding
8 that absent explicit statutory authorization federal courts are limited in awarding costs to those
9 that are taxable under 28 U.S.C. §§ 1821 and 1920. Crawford Fitting Co. v. J.T. Gibbons, Inc.,
10 482 U.S. 437, 445 (1987). In Crawford the Court rejected the argument that Federal Rule of
11 Civil Procedure 54 gives a court discretion to award expert witness fees or other non-taxable
12 costs.²

13 The Crawford rule has been applied expressly to reject the right to recover expert witness
14 fees under the Clayton Act. Seven Gables Corp. v. Sterling Recreation Org., 686 F.Supp. 1418
15 (W.D. Wash. 1988); U.S. Industries v. Norton Co., 578 F.Supp. 1561, 1568 (N.D.N.Y. 1984).

16 Accordingly, Best Buy has no basis, either as a matter of right or under the Court's
17 discretion, to recover expert witness fees and other non-taxable costs under the Clayton Act.

18 **3. Best Buy Prevailed on a Direct Purchaser Claim under Minnesota Law**

19
20 Best Buy sought relief under the Minnesota anti-trust laws, as well as under federal law.
21 Although its primary purpose in invoking Minnesota law was to permit it to assert a claim as an
22 indirect purchaser, which federal law does not allow, Best Buy's complaint expressly sought
23 relief also for its direct purchases.³ The jury rejected Best Buy's claim for damages as an
24 indirect purchaser [Special Verdict, Question No. 10]. Therefore, unless Best Buy prevailed on a
25 Minnesota direct claim it has no right to fees and costs under Minnesota law.

26
27
28 ² In doing so the Court expressly disapproved *dicta* to the contrary in Farmer v. Arabian American Oil Co., 379 U.S. 227, 235 (1964), and the other cases relied upon by Best Buy in its Reply brief, at p. 14.

³ "All Plaintiffs except MHF bring a claim under the Minnesota Antitrust Act of 1971 in connection with their direct and indirect purchases of LCD Products containing LCD Panels." [Second Am. Complaint, ¶338, Dkt. No. 7366]

1 HannStar contends that, notwithstanding Best Buy's allegation of a direct purchaser
2 claim in its complaint, the only Minnesota law claim that went to trial and was decided by the
3 jury was its claim as an indirect purchaser. HannStar points to a number of references, both by
4 Best Buy and the Court, to the Minnesota-based claim as being for "indirect purchases." In its
5 Preliminary Conference Statement, Best Buy said that it, "seeks to recover, under Minnesota
6 law, the overcharges it paid for LCD products...purchased from entities besides the...defendants."
7 [Dkt. No. 406 in C 10-4572 SI, at 5:23-6:2] Best Buy's proposed jury instructions stated that its
8 Minnesota claims "pertain to indirect purchases," [Dkt. No. 555 in C 10-4572 SI, p. 63]
9 Best Buy's Opening Statement described its indirect purchaser claim and stated, "That's a
10 Minnesota state law claim. It's called an indirect purchaser claim. In addition to that, there are
11 direct purchaser claims under the Sherman Act." [Tr. Transcript 230:16-25]. Also, the Court
12 itself while instructing the jury stated, "I will now instruct you on the elements of the Plaintiffs'
13 Minnesota state law claims, as distinct from Plaintiffs' federal claims.[W]ith respect to the
14 Plaintiffs' state law claims, the Plaintiffs allege that they purchased those products from entities
15 such as finished-product makers and distributors.... The parties have sometimes referred to the
16 Plaintiffs' state law claims as 'indirect' claims...." [Tr. Transcript 3384\$-3387:7]

17 Best Buy counters by pointing to its Second Amended Complaint. It also references the
18 Court's ruling on a Toshiba motion to dismiss in which it held that, "neither limitations period
19 identified in the Vendor Agreements applies to Best Buy's Minnesota claims based on direct
20 purchases, and these claims are timely...." Best Buy notes that the jury instructions with respect
21 to Minnesota claims were broad enough to apply to both direct and indirect claims. Best Buy
22 further notes that nothing in the jury's verdict distinguishes between claims based on federal or
23 Minnesota law, and that its findings of liability as to direct purchases applies equally to a federal
24 or state law claim. Most tellingly, Best Buy notes that the Court's Amended Judgment
25 specifically referenced Minnesota law to support its trebling of the jury award.

26 The Special Master concludes that the Amended Judgment against HannStar found it
27 liable under both federal and Minnesota law for damages for Best Buy's direct purchaser claims.
28 First, the Second Amended Complaint unequivocally asserts a Minnesota-based claim for direct

1 purchases that was never dismissed. Therefore, in the absence of a showing that Best Buy
2 unequivocally relinquished that claim, it remains alive and at issue. Second, none of the
3 references HannStar cites, that were obviously intended to painstakingly clarify for the jury the
4 differences between direct and indirect claims, excludes the possibility that Best Buy was
5 making direct claims under both federal and state law. Nowhere in the cited references does
6 Best Buy or the Court state that Best Buy was not asserting a state law direct claim. Since the
7 elements of the direct claims were identical under federal and state law, there was no need to tell
8 the jury that there was also a state law direct claim. Third, the Amended Judgment -- from which
9 Best Buy's entitlement to attorney's fees and costs flows -- plainly found liability for direct
10 claims under both federal and Minnesota law. There is no other reasonable explanation for the
11 Court to have specifically referred to Minnesota law as authority for trebling.

12 Accordingly, Best Buy established under Minnesota law that it was injured as to its direct
13 purchases by HannStar's conduct. This provides a basis to seek its fees and costs, which under
14 Minnesota law may include all reasonable costs and disbursements. Minn.Stat. §§549.02,
15 549.04; Crince v. Kulzer, 498 N.W.2d 55, 58 (Minn. Ct. App. 1993) [court has no discretion to
16 deny reasonable costs]. A Minnesota court has discretion to allow recovery of reasonable expert
17 witness fees. Minn.Stat. §357.25.⁴

18 **4. Federal, Not Minnesota, Law Governs Whether Best Buy May Recover Non-**
19 **Taxable Costs, Including Expert Witness Fees**

20 However, Best Buy's ability to use Minnesota law as a hook to recover its non-taxable
21 costs ultimately fails, because even in a diversity case in which state substantive law applies,
22 federal law regarding recovery of costs governs. Therefore, absent express statutory authority or
23 a contractual provision, neither of which is present here, a successful plaintiff on a state-based
24 claim in federal court is limited in its cost recovery to those costs that are taxable pursuant to 28
25 U.S.C. §1920. Aflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175 (9th Cir. 1990)
26 Sphere Drake Ins. PLC v. Trisko, 66 F.Supp.2d 1088, 1090-91 (D. Minn. 1999), aff'd 226 F.3d
27

28 ⁴ HannStar notes that Best Buy has not cited an anti-trust case that has awarded expert or consultant fees. [HannStar ltr. to Special Master dtd. 1/8/14 [no dkt. no.] . However, the Minnesota statutes and decisions are clear that the entitlement to reasonable costs, and the discretion to award expert fees, apply to all cases.

1 9516 (8th Cir. 2000) [in federal diversity case based on Minnesota law, 28 U.S.C. §1821 limiting
2 recovery of expert fees to the \$40/day limit for all witnesses trumps Minnesota state law that
3 allows recovery of expert fees in the court's discretion]; Aceves v. Allstate Ins. Co., 68 F.3d
4 1160, 1167-68 (9th Cir. 1995) [in diversity case, recovery of expert fees was determined by
5 federal offer of judgment rules, not by Cal. Code Civ. Proc. §998]; Van Horn v. Dhillon, 2011
6 WL 66244 at *6 (E.D. Cal., No. 08-cv-01622, 1/10/11) [citing Aceves as controlling].⁵

7 Therefore, under federal law Best Buy is limited in recovering compensation for its
8 experts to the \$40/day amount allowed to all testifying witnesses. Its claim for \$7.6 million in
9 expert witness fees must be rejected. The Court must also reject Best Buy's claim to recover all
10 costs that are not expressly permitted to be taxed.

11 **B. Impact of Settlement Offset on Best Buy's Entitlement to Fees & Costs**

12
13 HannStar contends that Best Buy's prior settlement recoveries of at least \$218.8 million
14 is cash and \$144.52 million in non-cash consideration should be offset not only against Best
15 Buy's damage recovery, but also against its claimed attorneys' fees and costs.

16 HannStar relies on a new decision, In re Vitamin C Antitrust Litigation, 06-MD-1738
17 (BMC) (JO), Dkt. No. 815, slip op. at 11 (E.D.N.Y. Dec. 30, 2013), which held in a fee
18 application by plaintiff's counsel in an antitrust case that the fees and costs claimed must be
19 offset against prior recoveries of fees and costs in earlier settlements. The Vitamin C court
20 similarly relied on Corder v. Brown, 25 F.3d 833, 839 (9th Cir. 1994), a civil rights case under
21 42 U.S.C. §1983, that held that claimed attorneys' fees and costs must be offset by recoveries of
22 fees and costs in prior settlements. Neither case is applicable to the facts before the Court. Here,
23 Best Buy's prior settlements do not include separate recoveries for attorneys' fees and costs.
24 Indeed, the settlement agreements expressly state that each side will bear its own fees and costs.
25 [Rosen decl., Exh. 5-13]. Therefore, the present fee application does not present the danger that
26 Best Buy's attorneys will recover twice, or recover more in fees than were incurred -- problems
27 that Vitamin C and Corder strove to avoid.

28 ⁵ Although federal jurisdiction of Best Buy's Minnesota claim is based on diversity, the same rule applies in federal question cases. Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry., 284 U.S. 444, 446-47 (1932) [In FELA case, federal law re reimbursement of experts controlled over Minnesota discovery rule]

1 HannStar also relies on a public policy argument. Recovery of fees under the Clayton
2 Act is intended to enhance private anti-trust enforcement by ensuring that a successful plaintiff's
3 recovery will not be diminished by attorneys' fees and costs. HannStar argues that this goal is
4 not furthered by allowing a party that has already recovered hundreds of millions of dollars from
5 settling defendants to pursue an essentially cost-free Hail-Mary case against the last defendant
6 standing in the hope of reaping a huge award that will exceed prior settlements. However, that
7 policy argument confronts an opposing policy. Disallowing fees to a successful anti-trust
8 plaintiff based on prior settlements will dissuade plaintiffs from pursuing defendants once they
9 have recovered a meaningful amount in settlements. Thus, defendants like HannStar that have
10 pleaded guilty may go scot-free in the civil suit because plaintiffs will be loath to risk obtaining
11 only a hollow victory that is eaten up by non-recoverable fees and costs. While reasonable
12 people may differ over which policy is the more important and persuasive, what is clear is that
13 there is no dominant public policy to guide decision one way or the other.

14 HannStar's greater problem is that existing authority, albeit outside the Ninth Circuit
15 which has not spoken on the issue, is dead-set against its position. Both the Fifth and Third
16 Circuits have said unequivocally that prior settlements have no effect on a plaintiff's right to
17 recover attorneys' fees and costs. An anti-trust plaintiff need only show that it has been "injured
18 in his business or property" to recover fees and costs. Gulfstream III Assocs., Inc. v. Gulfstream
19 Aerospace Corp., 995 F.2d 414, 419 (3rd Cir. 1993); Sciambra v. Graham News, 892 F.2d 411,
20 415 (5th Cir. 1990); Funeral Consumers Alliance, Inc. v. Serv. Corp. Intl., 695 F.3d 330, 336-
21 342 (5th Cir. 2012). Against these appellate on-point authorities, HannStar can muster only a
22 cite to the dissent in Funeral Consumers.

23 The Special Master concurs with the Third and Fifth Circuits that the statutory language
24 of the Clayton Act governs: a party injured in its business or property (as Best Buy was by
25 HannStar to the tune of \$7.4 million) is entitled to recover its fees and costs. No meaningful
26 public policy dictates otherwise. Indeed, the policy in favor of granting fees to a successful
27 plaintiff to encourage private enforcement actions argues in favor of not offsetting prior damage
28 recoveries against fees and costs.

1 **C. Whether the Claimed Fees are Reasonable**

2 The standard for awarding attorney's fees in a private antitrust case is straightforward. A
3 prevailing plaintiff has the right to recover " a reasonable attorney's fee." 15 U.S.C §15. The
4 amount to be awarded is within the discretion of the trial court, reasonably exercised, and will
5 not be disturbed on appeal in the absence of abuse of discretion or clear error. Twin City
6 Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1312 (9th Cir. 1982). Courts often
7 allude to a number of factors in assessing the reasonableness of a fee request. The factors most
8 pertinent to the present fee motion are: whether Best Buy had the benefit of a prior judgment or
9 decree in a government case; time and labor spent; magnitude and complexity of the litigation;
10 the amount recovered. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 221 (9th
11 Cir. 1964). A prevailing antitrust plaintiff is entitled to recover a reasonable attorneys' fee for
12 every item of service which, at the time rendered, would have been undertaken by a reasonable
13 and prudent lawyer. Twin City, 676 F.2d at 1313.

14 Best Buy's overall approach to its fee claim was two-fold. Its total lodestar for the case
15 was \$10,838,036. From this total Best Buy deducted \$1,255,815, which represented 3,600 hours
16 of time and about 11.5% of the bill to eliminate work on Toshiba and other matters unrelated to
17 HannStar. Second, Best Buy applied a catch-all reduction of 5%, or \$479,111 (1,332 hours) to
18 reflect time that involved matters and parties other than HannStar that is difficult to identify.
19 The remaining total of \$9,103,110 in fees is the amount of fees it seeks to recover from
20 HannStar. Geibelson 9/18/13 Decl., ¶17-19. HannStar attacks Best Buy's request on several
21 grounds, each of which is considered below.

22 **Eliminate Fees for Work on Toshiba**

23 Best Buy acknowledges that it cannot properly recover from HannStar fees incurred to
24 pursue its claim against Toshiba. The dispute relates only to the amount to be deducted.

25 Best Buy represented at the hearing that it eliminated 11.5% of its total recorded fees, or
26 about \$1.25 million, to account for time spent by its lawyers on matters related to Toshiba and its
27 indirect purchaser claim.

28

1 HannStar's expert, Mr. Greenfield, opined that Best Buy's fee claim should be reduced
2 by \$262,998 of fees relating to depositions of Toshiba employees and witnesses, and \$123,577 of
3 fees relating to other pre-trial activities primarily involving Toshiba.⁶ Greenfield Decl, ¶50 and
4 Exh. 15 & 16. He also notes that Best Buy is seeking fees for its entire work at trial, in the
5 amount of about \$1.38 million, although a very large part of the trial was devoted to its
6 unsuccessful effort to prove liability on the part of Toshiba. Greenfield Decl., ¶49.

7 Best Buy responds to the proposed \$262,998 reduction pertaining to Toshiba depositions
8 by dividing it into three parts: \$5,750 that relates solely to Toshiba witnesses, which it concedes
9 should be eliminated; \$152,784 of time spent on witnesses relating to Toshiba and other
10 defendants; and \$104,464.48 of time that Best Buy says had nothing to do with Toshiba
11 witnesses. Geibelson 11/13/13 Decl., ¶6 and Exh. 15. Best Buy responds to the proposed
12 \$123,577 reduction of other Toshiba-related time by dividing it into two parts: \$49,965 that Best
13 Buy concedes relates solely to Toshiba and should be deducted; and \$73,615 that relates to
14 Toshiba and other defendants that Best Buy asserts is properly claimed. Best Buy does not
15 respond specifically to the assertion that a deduction should be made for trial time attributable to
16 Toshiba.

17 It is impossible for the Special Master to precisely distinguish for the hundreds of time
18 entries in question among time related solely to Toshiba, time related to Toshiba and others, and
19 time that has nothing to do with Toshiba. Neither side provided a list of Toshiba-connected
20 names that may have enabled a more fine-toothed analysis; many of the entries are block-billed,
21 so there is no way to untangle how much time was spent on Toshiba. Moreover, Best Buy makes
22 the fair point that some work that relates to Toshiba -- such as work on an important Toshiba
23 document, the "cartel e-mail" -- in fact also was important to Best Buy's efforts against other
24 defendants, including HannStar. See, Geibelson 11/13/13 Decl., ¶7. However, from a review of
25 representative time entries, the Special Master concludes that Best Buy's analysis of the
26 questioned entries is probably on the mark or close to it, and that Mr. Greenfield's identification
27 of time to be deducted (\$262,998 and \$123,577) was over-inclusive and not fully informed by
28

⁶ Greenfield acknowledges that these amounts include block billings that include work on non-Toshiba matters.

1 the facts of the case. Therefore, the Special Master will reduce the fee request by \$55,715, the
2 amount that Best Buy acknowledges should be eliminated (\$5,750 + \$49,965).

3 However, Mr. Greenfield's point regarding the trial seems well-taken. While there is no
4 way of knowing precisely how much longer the trial lasted because of Toshiba's participation, or
5 how many more hours Best Buy's counsel billed on trying to prove their case against Toshiba, it
6 is unarguable that a significant percentage of the trial time was solely devoted to Toshiba. Mr.
7 Greenfield proposes a 50% reduction from the trial billings of \$1,377,896. (Greenfield Decl.,
8 Exh. 27). Given that the 42 total witnesses included 12 Toshiba-affiliated witnesses compared to
9 one HannStar-affiliated witness, there is definitely a basis for a reduction. But there is no
10 showing that the other 29 witnesses would not have been necessary even if the trial had been
11 against HannStar only. Therefore, the Special Master concludes that a fairer deduction would be
12 25% of the trial time, or \$344,474.

13 Thus the total recommended deduction from HannStar's claimed fees for time
14 attributable solely to Toshiba is \$400,189 (\$55,715 + \$344,474).

15 Other Non-HannStar Work

16 HannStar identifies a number of areas, totaling about \$630,000 of fees, in which it claims
17 that Best Buy's efforts had nothing to do with its claim against HannStar.⁷ Best Buy
18 acknowledged that \$13,272 of time should be removed from the efforts to mediate and settle
19 with other defendants. Geibelson 11/13/13 Decl., ¶9. In all other respects it maintained its
20 claimed fees were properly recoverable.

21 First, the Special Master concludes that HannStar's criticisms are off the mark generally
22 in neglecting the interrelated and overlapping nature of this complex MDL proceeding. One
23 simply cannot reasonably run a computer search for "mediation" or "class action" or "Track 2"
24 or "spoliation" and the like, and eliminate all entries that contain those words. Most of the work
25 that HannStar identifies as unrelated to the claim against it was in fact necessary simply to
26 preserve Best Buy's position and fulfill its responsibilities in the entire MDL. Moreover, in view

27
28 ⁷ Settlements with other defendants, \$47,667; mediations (HannStar did not mediate), \$142,590.25; non-testifying
experts, \$32,400; work against other defendants, \$91,195; work on class actions, \$71,702; work on attorney fee
claims by other parties, \$5,047; spoliation of evidence, \$1,710; work on Track 2 issues, \$118,029; monitoring of
opt-outs, \$125,680. Greenfield Decl., ¶¶52-54.

1 of the joint and several liability of the various defendants, it is not possible to say categorically
2 that all work related to another defendant was not rationally related to HannStar.

3 Second, Best Buy acknowledges that some reduction is appropriate in most of the very
4 categories identified by HannStar, including settlement efforts with other defendants, work with
5 non-testifying experts, work related to the class cases and other opt-out cases. As noted above,
6 Best Buy reduced its fee claim by \$1,255,815 and another \$479,111 to account for these and
7 other areas of work unrelated to HannStar.

8 The Special Master concludes that HannStar has not established a rational basis for
9 reducing Best Buy's fees by another \$630,000, or indeed by any additional amount other than the
10 \$13,272 reduction that Best Buy concedes, in light of the \$1.7 million cut Best Buy has already
11 taken itself. The Special Master recognizes Best Buy has the burden of justifying its fee claim,
12 and believes it has carried that burden as to rebutting any basis for the additional reductions
13 HannStar seeks.

14 Block-Billing

15 HannStar asserts that over \$4.4 million of fees, or 49% of the amount Best Buy claims,
16 were block-billed. Greenfield Decl., Exh. 5. Another \$415,000 in entries were block-billed and
17 also contain redactions. Greenfield Decl., Exh. 6. However, HannStar does not articulate how
18 the fact of block-billing or redactions should impact the fee request. It does not expressly ask
19 that all, or even a part, of the block-billed or redacted entries be disregarded. It appears simply
20 to identify the block-billing to cast a shadow of doubt over the authenticity of the entire fee
21 request.

22 Although block-billing -- that is the inclusion of multiple activities with a single time
23 entry -- may not be the gold standard of billing practices, it can indicate rampant overbilling or
24 simply an efficient short-cut. Having reviewed a sampling of the block-billing here, the Special
25 Master (who himself has spent far too many hours of his adult life preparing and reviewing
26 billing entries) concludes that it does not show a pattern of egregious overbilling. The entries
27 one worries about are not those that combine 2-3 activities and bill for 1.5 hour, but rather those

28

1 that combine dozens of activities and bill 9 hours for a whole day. While the latter type of entry
2 certainly exists here, it does not predominate.

3 Therefore, the Special Master concludes that no specific deduction should be made from
4 the fee request because of the presence of block-billing.

5 Other Issues: Weekend Trial Work, Vague/Boilerplate Billing Entries, Computing Error,
6 Etc.

7 HannStar criticizes other aspects of the billing: vague entries, work on weekends during
8 trial, and days on which attorneys and others billed 18-23 hours. As with block-billing,
9 HannStar notes these purported deficiencies, but does not say what impact they should have on
10 the fee request. It does not recommend a specific deduction for any of them.

11 Some of the criticism is just silly, such as the assertion that lawyers take weekends off
12 during a major trial, and that entries that are redacted in the fee request. The Special Master
13 finds nothing improper about the time charged by Best Buy's lawyers during weekends while
14 trying a major case in a city where they are not based. And the few redactions have nothing to
15 do with whether the time spent was justified.

16 Some entries -- review files, trial preparation, review documents -- are indeed vague. But
17 in a case of this magnitude it would be absurd to expect time-keepers to meticulously describe
18 every activity they undertake. Many of these entries are by paralegals who indeed do perform
19 such repetitive work that it would be absurd to try to describe each day with a fresh, unique
20 wording.

21 HannStar identified, and Best Buy acknowledges, an error in computing fees of
22 \$79,753.70 (of the amount claimed after the 5% catch-all reduction). Therefore, that amount
23 must be deducted. In all other respects, to the extent that HannStar's criticisms have merit, Best
24 Buy has adequately dealt with them by its voluntary reduction of over \$1.7 million.⁸

25 Complexity of Litigation

26 Little needs to be said about the complexity of this MDL proceeding, including the case
27 against HannStar. Although HannStar, like other co-conspirators, pleaded guilty to some

28 ⁸ HannStar raises other minor issues which have no serious merit. Also, the parties disputed the calculation of the 5% reduction, but ultimately their two calculations come to the same result: a reduction of \$479,111.

1 antitrust violations, Best Buy and the other plaintiffs were left with the tasks of proving
2 violations of a scope broader than the plea agreements, of proving both direct and indirect
3 damages, and of resisting defendants' repeated attempts to narrow or eliminate claims. The case
4 required, and generally received, excellent lawyering. Excellent lawyering takes time and costs
5 money. HannStar quite sensibly has not challenged the billing rates of Best Buy's counsel,
6 which in any event appear to be well within the range charged by San Francisco Bay Area
7 lawyers for cases of this type. Carlson Decl.

8 Having examined the bills of about 116 law firms in the indirect purchaser class action,
9 the Special Master concludes that the range of time spent by Best Buy's counsel was appropriate
10 and within the normal range for a case of this complexity, and this case in particular.

11 Result Obtained

12 This is the factor as to which Best Buy is most vulnerable. It sought close to \$800
13 million in damages from HannStar, but was awarded by the jury -- after one day of deliberation -
14 - only \$7.47 million. After trebling, the award was \$22.4 million. Thus, the jury awarded Best
15 Buy about .9% of its claim, and its ultimate judgment was about 2.8% of its claim. Moreover,
16 because of offsets by its prior settlements, Best Buy actually received nothing at all in damages
17 from HannStar.

18 This is also the factor that courts have repeatedly said is the most important in assessing a
19 fee request. Hensley v. Eckerhart, 461 U.S. 424, 536 (1983). "An attorney who works
20 incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method.
21 ... Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." In
22 re HP Inkjet Printer Litigation, 716 F.3d 1173, 1182 (9th Cir. 2013) [consumer class action].
23 Best Buy has cited Minnesota cases holding that fees are not excessive simply because they
24 exceed the recovery. Best Buy Reply, 5:7-15. However, no case has been cited in which
25 significant fees have been awarded in a case in which plaintiff recovered nothing.

26 Mr. Greenfield opined that Best Buy should receive no more than \$2,682,496 in fees. He
27 arrived at this number not by applying specific deductions for the various categories of fees that
28 he criticized, but rather by an across-the-board percentage approach to estimate the amount of

1 the total fee claim could properly be attributed to the pursuit of HannStar. He would allow Best
2 Buy 25% of the time expended before Toshiba got into the case (when HannStar was one of
3 about 10 defendants), 20% of the time after filing the Toshiba complaint until the motion to
4 consolidate (when discovery against HannStar was closed), 30% of the time during the seven
5 months prior to trial, and 50% of the time in trial. When asked whether it was conceding that
6 \$2.68 million in fees should be awarded, HannStar said it was not, but that Mr. Greenfield had
7 not specifically opined on the dollar impact of the other faults he found with Best Buy's bills.
8 Nor did Mr. Green opine as to, or provide any analysis of, the deduction to be made for the result
9 obtained, although he mentioned that factor in passing. Greenfield Decl., ¶62.

10 It is inescapable that Best Buy's dogged pursuit of HannStar and Toshiba through years
11 of litigation and a 6-week trial achieved nothing. Best Buy couldn't prove its claim against
12 Toshiba at all, utterly failed to prove significant damages against HannStar despite its guilty plea
13 to liability, and ended up with no recovery at all after the settlement offset. Quite simply, this is
14 the same result as if HannStar had obtained a defense verdict. In retrospect, rather than proceed
15 to trial Best Buy would have been better advised to have focused with delight on its \$363 million
16 in cash and non-cash settlements, and simply folded its tent as to Toshiba and HannStar.

17 There is a reasonable argument for awarding no fees at all, or a token amount. There is
18 no reasonable argument for awarding the entire \$8,609,895 -- the amount claimed after the
19 deductions applied for the reasons stated above. That would exceed the amount of damages
20 awarded by the jury and, in view of the zero net recovery, border on the unconscionable.
21 However, HannStar does not argue that the entire case was unjustified, or should never have
22 been brought. HannStar did admit liability. Therefore, it is reasonable to award some fees to
23 compensate Best Buy for a portion of its litigation effort. But a plaintiff that recovers nothing --
24 whether because of a defense verdict or the application of offsets -- cannot reasonably expect to
25 be paid a sizeable fee. "[F]ixing the fees in a particular case must rest largely upon the good
26 judgment of the district court." Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190,
27 221 (9th Cir. 1964). Applying his best judgment to these various factors, the Special Master
28

1 recommends that Best Buy be awarded a fee of \$1.75 million, which is about 20% of the \$8.6
2 million in fees claimed after deductions that the Special Master has found necessary.

3 Summary of Recommended Fee Award

4 \$10,838,036 (Best Buy's full lodestar)
5 - 1,255,815 (Best Buy reduction for non HannStar work)
6 - 479,111 (Best Buy 5% reduction)
7 \$ 9,103,111 (Amount claimed by Best Buy)
8 - 55,715 (Toshiba pre-trial work)
9 - 344,474 (Toshiba trial work)
10 - 13,272 (mediation/settlement with other defendants)
11 - 79,754 (calculation error)
12 \$ 8,609,896 (Net fee request after deductions)
13 x .20 (Reduction factor for zero recovery)
14
15 \$ 1,750,000 (Recommended fee award - rounded up)

16 **D. Whether the Claimed Costs are Reasonable; Recommendation as to HannStar's**
17 **Objections to Best Buy's Bill of Costs**

18 This section of the Recommended Order responds to both HannStar's objections to Best
19 Buy's fees and costs sought in this Motion, and to its objections to Best Buy's Bill of Costs dated
20 9/18/2013 [Dkt. No. 8612]. To the extent Best Buy sought the same costs both in this Motion
21 and in its Bill of Costs, obviously, it can recover such costs only once, as Best Buy
22 acknowledges.

23 As discussed in Sections A.2 and A.4 above, Best Buy has no right under either federal or
24 Minnesota law to recover any of its claimed \$8,550,525.26 in costs (including over \$7.6 million
25 in expert fees), other than those costs properly taxable under 28 U.S.C. §1920 and Northern
26 District Civil Local Rule 54-3. Therefore, this inquiry is reduced to whether the costs sought in
27 the Bill of Costs are allowable.

28 Best Buy's Bill of Costs originally sought \$222,984.62. Best Buy withdrew \$48,429 in
trial and deposition transcript costs during the meet-and-confer process, and an additional
\$5,566.96 in its Reply in Support of its Bill of Costs [Dkt. No. 8767], leaving a net cost bill of
\$168,988.66. Best Buy Reply, p. 5. HannStar objects to four additional categories of costs as
not allowable: translation costs (\$64,820.69); enhanced deposition costs (expedited service,

1 rough copies, real-time hookup fees) (\$11,205.26); insufficiently documented costs
2 (\$21,415.63); costs related to the Toshiba (\$4,490.60) and indirect purchaser claims (\$9,316.05).
3 Rosen Decl., ¶4-8.

4 Best Buy's effort to recover the cost of translating documents fails. In Taniguchi v. Kan
5 Pacific Saipan, Ltd., 132 S.Ct. 1997 (2012), the Supreme Court flatly rejected the view that the
6 cost of translating documents is recoverable as a taxable cost under the §1920(6) allowance for
7 "interpreters." Best Buy notes that in this MDL, unlike in Taniguchi, the parties were ordered to
8 have foreign language documents translated. Translation Protocol Order [Dkt. No. 2248]. The
9 Special Master entirely agrees that translation costs were a necessity, not an option, and that
10 fairness suggests they should be a taxable cost. But the Supreme Court has ended any possible
11 debate. They are simply not recoverable. The Supreme Court also rejected Best Buy's argument
12 that Fed. Rule Civ. Proc. 54 gives the district court the discretion to award costs in addition to
13 those listed in Section 1920, holding that Rule 54 only allows the district court discretion to
14 disallow costs. Taniguchi at 2006.

15 As to enhanced deposition costs, the Special Master recommends that they be allowed.
16 The use of Realtime, the practice of obtaining an immediate rough copy, the need to effect
17 expedited service in some instances -- these are all normal and necessary features of complex,
18 multi-party litigation such as this. Costs such as these are properly included within "fees of the
19 court reporter for all or any part of the stenographic transcript necessarily obtained for use in the
20 case." 28 U.S.C. §1920(1).

21 Best Buy has supplied the missing invoices to cure HannStar's objection that some
22 claimed costs were not adequately documented. Therefore, the Special Master recommends that
23 such costs be allowed.

24 As to costs incurred to obtain transcripts of depositions of certain Toshiba witnesses, and
25 or four experts who testified on indirect purchaser issues, the Special Master also recommends
26 that they be allowed. HannStar has not adequately demonstrated why it was not reasonably
27 necessary for Best Buy at least to obtain a copy of those transcripts, or that testimony of those
28 witnesses was not in some legitimate fashion pertinent to their claim against HannStar.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The Special Master recommends that HannStar’s objection to Best Buy’s claim for translation costs of \$64,820.69 be granted, and that in all other respects HannStar’s objections to Best Buy’s Bill of Costs be overruled. Therefore, the Special Master recommends that Best Buy shall recover on its Bill of Costs the sum of \$104,167.97 (\$168,988.66 - \$64,820.69).

Recommended Order

The Special Master recommends that the Court order that Best Buy’s Motion for Fees and Costs be GRANTED IN PART to the extent that Best Buy shall recover from HannStar the sum of \$1,750,000 as attorneys’ fees and \$104,167.97 as costs. The Special Master recommends that HannStar’s Objection to Best Buy’s Bill of Costs be GRANTED IN PART, and that Best Buy’s costs shall be taxed against HannStar in the sum of \$104,167.97.

Dated: February 3, 2014



Martin Quinn, Special Master