Civil No. 84-1585-E(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, dba SORBOTURF ENTERPRISES,
Plaintiffs,

v.

SORBOTHANE, INC., aka SORBO, INC.; HAMILTON-KENT MFG. COMPANY, INC.; BTR, INC.; SPECTRUM SPORTS, INC.; KENNETH M. LEIGHTON; and KENNETH B. LEIGHTON, JR.;
Defendants.

MEMORANDUM DECISION

(Dated December 19, 1988)

BACKGROUND

This is a case against multiple defendants brought by plaintiffs Shirley McQuillan and her husband, Larry, alleging that their exclusive distributorship for the product Sorbothane was wrongfully terminated. Sorbothane is a patented polymer material valued for its shock absorbent tendencies. Most notable among its uses is its cushioning effect in athletic shoes.

Plaintiffs' complaint alleged violations of state and federal antitrust and racketeering laws, as well as asserting common law contract and tort claims. After an eight-week trial ending on July 11, 1988, the jury found all defendants liable on each and every claim of relief,

with the exception of defendants Spectrum Sports and Kenneth B. Leighton, who were found liable on all but three claims of relief. A jury award of $1,743,000 was rendered on all claims. A punitive damage jury award of $500,000 was later waived by the plaintiffs.

Defendants now move for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Plaintiffs move the court to award attorney's fees, prejudgment interest, and to retax costs.

I.

JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) OR FOR NEW TRIAL

Defendants move for a JNOV or, in the alternative, a new trial. Essentially, defendants question the sufficiency of proof on all of the plaintiff's claims, as well as question the amount and form of the damage verdict and certain evidentiary rulings made by this court.

A motion for a JNOV focuses on the sufficiency of the evidence. The standard for granting a JNOV is the same legal test as for a directed verdict. *Fountila v. Carter*, 571 F.2d 487, 489-90 (9th Cir. 1978). In making a determination on a JNOV, the court considers "all evidence in the light most favorable to the non-moving party and draw[s] all reasonable inferences in favor of that party." *Twin City Fire Ins. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1423 (9th Cir. 1986). A JNOV "is not proper if there is substantial evidence to support a verdict for the non-moving party." *Id.* Further, such motions should be cautiously and sparingly granted as there must be a minimum of interference with the jury. *Walker v. KFC Corp.*, 515 F. Supp. 612, 616 (S.D. Ca.

1981), *aff'd in part and rev'd in part,* 728 F.2d 1215 (9th Cir. 1984), *citing* 9 Wright & Miller, *Federal Practice and Procedure,* §2524 (1971).

"A party may secure a JNOV only 'in accordance with its motion for a directed verdict.' " *Lifshitz v. Walter Drake & Sons, Inc.,* 806 F.2d 1426, 1429 (9th Cir. 1986), *quoting* Fed. R. Civ. P. 50(b). A directed verdict motion can therefore serve as a prerequisite to a JNOV "only if it includes the specific grounds asserted in the JNOV motion." *Id.* at 1429. *See also* 9 Wright & Miller, *Federal Practice and Procedure,* §2537 (1971).

In contrast, a motion for new trial does not test the legal sufficiency of the evidence adduced at trial by the prevailing party. *Walker,* 515 F. Supp. at 619. Instead, it may be granted by the court "if in its opinion, the jury's verdict was clearly contrary to the weight of the evidence." *William Inglis, Etc. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1027 (9th Cir. 1982), *cert. denied,* 459 U.S. 825 (1982).

The instant case involved a lengthy and complex trial. Both sides submitted extensive testimony and documentary evidence in support of their positions. This court has fully considered the papers submitted on the issues, as well as the argument of counsel; however, it declines to substitute its judgment for that of the jury. The parties received a fair and impartial trial, and the record in this case reasonably supports the jury's verdict. Accordingly, the court denies defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial.

II.

ATTORNEYS' FEES

Section 4 of the Clayton Act, 15 U.S.C. §15, allows a successful treble damage plaintiff to recover reasonable attorneys' fees as costs of suit. The purpose of the attorneys' fees provision is to insulate treble damage recovery from large expenditures for legal fees. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009 (1982). *Accord Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 663 (7th Cir. 1985). "An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory." *Twin City Sportservice*, 676 F.2d at 1312.

Similarly, the Racketeer Influenced and Corrupt Organizations Act (RICO) permits the successful plaintiff in a civil RICO action to recover reasonable attorneys' fees as a part of the costs of suit. 18 U.S.C. §1964(c). The same applies under section 16750(a) of the California Business and Professions Code, the California Cartwright Act.

" 'The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.' " *Pennsylvania v. Delaware Valley Citizens' Council (Delaware I)*, 106 S. Ct. 3088, 3097 (1986), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This establishes a lodestar figure. Additionally, a district court may adjust the fee upward or downward based upon the factors identified in *Kerr v. Screen Actors Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975),

cert. denied, 425 U.S. 951 (1976) (adopting twelve factors set forth in *Johnson v. Georgia Statistics Express, Inc.,* 488 F.2d 714 (5th Cir. 1974).[1]

However in *Delaware I,* the Supreme Court held that many of the *Kerr* factors " 'are subsumed within the initial calculation of the lodestar amount.' " 106 S. Ct. at 3098, *citing Blum v. Stenson,* 465 U.S. 886, 898-900 (1984). The Court did not preclude upward adjustments of the lodestar, although it noted that such modifications are proper only in " 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id., citing Blum,* 465 U.S. at 898-901. Therefore, there is a strong presumption that the lodestar amount represents a reasonable fee. *Id.* at 3098.

Plaintiffs prevailed on each of their claims for relief predicated on RICO and the federal and state antitrust laws against each of the defendants. Accordingly, they now seek attorneys' fees of $1,759,969. This includes a lodestar amount of $1,185,927 reflecting 9,008.4 hours as of September 19, 1988 at an average billing rate of $130.94.[2] Additionally, plaintiffs seek an enhancement

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[1] Those factors include: 1) the time and labor required, 2) the novelty and difficulty of the questions involved, 3) the skill requisite to perform the legal service properly, 4) the preclusion of other employment by the attorney due to acceptance of the case, 5) the customary fee, 6) whether the fee is fixed or contingent, 7) time limitations imposed by the client or the circumstances, 8) the amount involved and the results obtained, 9) the experience, reputation, and ability of the attorneys, 10) the "undesirability" of the case, 11) the nature and length of the professional relationship with the client, and 12) awards in similar cases.

[2] This court adopts the plaintiffs' average billing rate of $130.94 as a reasonable hourly rate. *See* Verified Application for an Award of Attorneys' Fees, Declaration of James F. Stiven, page 8, ¶11.

for delay in payment of $137,358, and an enhancement of thirty-three percent, $436,684 for the risk of nonpayment.

In examining the lodestar, this court may consider only the time spent in prosecuting those claims supporting the imposition of attorneys' fees. *See, e.g., Twin City Sportservice,* 676 F.2d at 1316. Thus, time devoted to work that is duplicative or connected to claims or activities unrelated to the successful recovery of those claims supporting attorneys' fees may be excluded. *Id. Accord, In re Equity Funding Corp. of America Securities,* 438 F. Supp. 1303, 1328 (C.D. Cal. 1977).

Further, it is plaintiff's burden to establish the amount of compensable attorney time. *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc,* 776 F.2d 646, 650 (7th Cir. 1985). Vague or insufficient documentation of hours is not compensable. *Exhibitors' Service, Inc. v. American Multi-Cinema,* 583 F. Supp. 1186, 1193 (C.D. Cal. 1984); *In re Equity Funding,* 438 F. Supp. at 1327.

Defendants have raised numerous objections to plaintiffs' lodestar amount. They include objections to the pendent state claims, duplicate time, and inconsistent or insufficient documentation. The BTR defendants in a Supplemental Memoranda filed October 18, 1988 have detailed amounts that they consider to be appropriate deductions as to these categories. This court has fully considered those objections which it considers to be reasonable and grounded in case law and, consequently, applies a deduction of $273,894.50 to

plaintiffs' requested lodestar amount.[3] This provides for a lodestar amount of $912,032.50 reflecting 6,965.3 hours at the average hourly billing rate of $130.94.

Lastly, as noted above, plaintiffs seek enhancements totaling $574,042 for the delay in payment and for the risk of nonpayment. *See Pennsylvania v. Delaware Valley Citizens' Council (Delaware II)*, 107 S. Ct. 3078 (1987) (dealing with issue of enhancement for risk of nonpayment). This court determines that an enhancement of the lodestar is inappropriate. It has considered the narrow standards as set out in *Delaware II* to justify enhancement based upon the risk of nonpayment, but finds that the plaintiffs have not met their burden in meeting those standards.

Further, this conclusion acknowledges the *Delaware I* decision noting the "strong presumption" that the lodestar amount represents a reasonable fee, and that enhancements are to be given only in "rare" or "exceptional" circumstances. 106 S. Ct. at 3098. Limiting attorneys' fees in this manner is neither unfair nor unjust to the plaintiffs or plaintiffs' attorneys, instead it is consistent with the rationale behind fee-shifting statutes, including those in the instant case. *Delaware I,* 106 S. Ct. at 3098-99. Accordingly, this court finds that plaintiffs are entitled to a reasonable fee award of $912,032.50.

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[3] This total includes deductions of $164,362.50 for pendent state claims, $11,812 for duplicative time, and $97,720.00 reflecting inconsistent or insufficient entries. Supplemental Memorandum of Defendants Sorbothane, Inc., Hamilton-Kent Manufacturing Company, Inc., BTR, Inc., and Kenneth M. Leighton Re: Plaintiffs' Application for Attorneys' Fees, p. 8, n.5.

III.

PREJUDGMENT INTEREST

A district court may award prejudgment interest on compensatory damages in order to make an injured party whole. *American Timber & Trading v. First Nat. Bank of OR.*, 690 F.2d 781, 784 (9th Cir. 1982), *citing United States v. Cal. State Bd. of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981). An award of prejudgment interest in a case is left to the sound discretion of the trial court. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982). It is this court's view that plaintiffs have received full and complete recovery for their alleged injury and, therefore, declines to award prejudgment interest.

IV.

RETAX COSTS

This court may review the clerk's assessment of costs *de novo* and "to decide the cost question himself" by exercising its own discretion. *Farmer v. Arabian-American Oil Co.*, 379 U.S. 227 (1964); *Chavez v. Tempe U. Hight Sch. Dist. No. 213*, 565 F.2d 1087 (9th Cir. 1977). Plaintiffs seek to recover the costs of their computer-assisted legal research and costs of copying incident to discovery. The clerk of the court allowed those items properly chargeable as costs. Plaintiffs' motion to retax costs is denied.

V.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth herein, the court hereby denies defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. Additionally, the court grants plaintiffs' motion for attorneys' fees in the amount of $912,032.50. Plaintiffs' motions for prejudgment interest and to retax costs are denied.

DATED: December 19, 1988.

/s/ WILLIAM B. ENRIGHT
WILLIAM B. ENRIGHT, *Judge*
United States District Court

Copies to:

Plaintiffs

Defendants