

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

FILED

AUG - 4 2011

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY CLERK

ATSER RESEARCH TECHNOLOGIES, §
INC., §

Plaintiff, §

v. §

RABA-KISTNER INFRASTRUCTURE, §
INC., et al., §

Defendants. §

NO. SA-07-CA-93-H

ORDER REGARDING DEFENDANTS' CLAIM FOR ATTORNEYS' FEES

This is a suit alleging patent infringement. On August 27, 2009, this Court granted Defendants' motion for summary judgment under 35 U.S.C § 102(b)'s on sale bar and dismissed Plaintiff's claims with prejudice. Defendants requested that this Court find the case exceptional due to Plaintiff's litigation misconduct, which the Court did. Defendants then filed a motion for attorneys' fees in the amount of \$1,152,654.00. Defendants then amended their request, stating that attorneys' fees actually amounted to \$800,577.00.¹ Having reviewed the motion, response, and applicable law, this Court finds that it should be granted.

Under 35 U.S.C. § 285, "the court in exceptional cases may award reasonable attorney fees to the prevailing party." The court must apply Federal Circuit case law to the § 285 analysis, as it is unique to patent law. **Digeo, Inc. v. Audible, Inc.**, 505 F.3d 1362,

¹Defendants attempted to amend their request a third time, but this Court declined to grant them leave to amend.

1366 (Fed. Cir. 2007). A district court must first determine whether there is clear and convincing evidence that a case is exceptional. **Id. at 1367.** If so, then a court must determine in its discretion whether an award of attorneys fees is justified. **Id.** Litigation misconduct and unprofessional behavior may suffice, by themselves, to make a case exceptional under § 285. **Rambus Inc. v. Infineon Technologies Ag**, 318 F.3d 1081, 1106 (Fed. Cir. 2003). In cases deemed exceptional only on the basis of litigation misconduct, however, the amount of the award must bear some relation to the extent of the misconduct. **Id.**

This Court found the case exceptional on the grounds that Plaintiff failed to produce important documents related to the Utah Department of Transportation's Interstate 15 project. Although Plaintiff produced a few documents related to the project, the documents that eventually proved fatal to Plaintiff's patent were never produced. Plaintiff failed to produce these documents despite the fact that the Court ordered Plaintiff to produce all I-15 documents in its possession dating from the years 1997-2000. Additionally, the Court found that Plaintiff committed litigation misconduct by falsely alleging that no license agreement existed regarding the '498 patent.

Defendants request attorneys' fees for the time period from which Plaintiff failed to produce the I-15 documents through the award of judgment in this case, which is May 16, 2007 through

August 27, 2009. Defendants contend that had the I-15 documents been produced when ordered, they would have immediately filed for summary judgment under the on sale bar. However, because the documents were never produced, Defendants were forced to engage in prolonged discovery, trial preparation, and motion practice.

Plaintiff does not dispute the hourly rate charged by Defendants' attorneys, nor does it dispute the total hours billed. Instead, Plaintiff contends that Defendants should only be awarded fees related to their trip to Utah to conduct discovery, totaling \$17,149.00. According to Plaintiff's logic, the only fees incurred as a result of its failure to produce documents fatal to its claim were those related to Defendants' travel to Utah to look for the documents themselves. Plaintiff also concedes that Defendants should be awarded \$8,575.00 in fees related to investigating the license for the '498 patent. Therefore, Plaintiff is prepared to offer a total award of \$24,724.50 to Defendants.

Plaintiff continues to misunderstand the severity of its misconduct. Plaintiff sued Defendants for patent infringement. Throughout the duration of the suit, Plaintiff had in its possession documents which ultimately invalidated the patent it was alleging to be infringed. Plaintiff has yet to produce these documents; Defendants were only able to discover them through a combination of extreme diligence and good fortune. The duration of this lawsuit would have been significantly shorter had Plaintiff

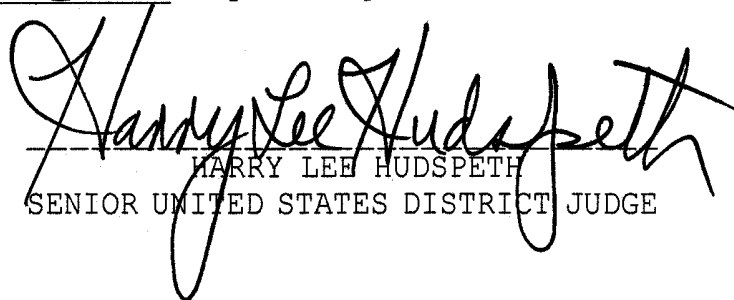
turned over the pertinent documents when it was ordered to do so. The evidence indicates that Plaintiff either willfully withheld the documents, or else it never bothered to locate the documents. Either way, Plaintiff's misconduct directly caused Defendants to incur hundreds of thousands dollars in ultimately unnecessary fees.

Having reviewed Defendants' itemized claim for attorneys' fees, this Court finds that the requested fees are reasonable.

It is therefore ORDERED that Defendants' amended claim for attorney's fees (Doc. 276) be, and it is hereby, GRANTED.

It is further ORDERED that Defendants RABA-KISTNER INFRASTRUCTURE, INC.; RABA-KISTNER CONSULTANTS, INC.; BRYTEST LABORATORIES, INC.; RABA-KISTNER-ANDERSON CONSULTANTS, INC.; and LONE STAR INFRASTRUCTURE, JOINT VENTURE, do have and recover of and from the Plaintiff Atser Research Technologies, Inc., attorneys' fees and costs in the amount of eight hundred thousand five hundred seventy seven (\$800,577.00) dollars, for all of which let execution issue.

SIGNED AND ENTERED this 3^d day of August, 2011.


HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE