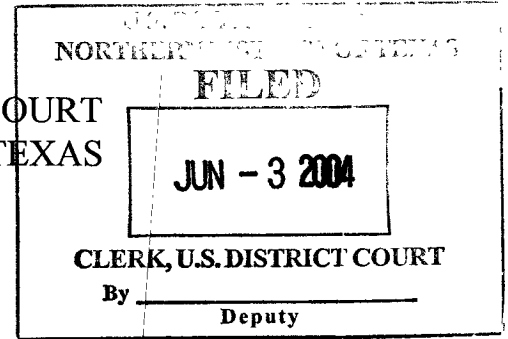


ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



DIPPIN' DOTS, INC., et al.,

Plaintiffs,

v.

THOMAS R. MOSEY, et al.,

Defendants.

CIVIL ACTION FILE
NO. 3:96-CV-1959-L

ORDER

This is an action for patent and trademark infringement. At trial, the Defendant Frosty Bites Distribution, LLC ("Frosty Bites Distribution") prevailed on its antitrust counterclaim. The case is now before the Court on the Defendant's Motion for Attorney Fees and Costs Under the Clayton Act [Doc. 849]. For the reasons set forth below, the motion is granted, and Frosty Bites Distribution is awarded \$676,675.46 in attorneys' fees and costs.

I. BACKGROUND

This action was filed by Plaintiffs Dippin' Dots, Inc. ("Dippin' Dots"), and its founder, Curt Jones. Dippin' Dots is an Illinois corporation with its principal place of business in Paducah, Kentucky. Dippin' Dots is engaged in the business of

manufacturing and distributing flash frozen novelty ice cream. The Defendants in this action are engaged in either the manufacture (“Manufacturing Parties”) or distribution (“Distribution Parties”) of a competing flash frozen novelty ice cream product known as Frosty Bites.

As part of their response to the Plaintiffs’ claims, the Distribution Parties filed antitrust counterclaims against the Plaintiffs. The Distribution Parties brought their antitrust claims based on the theory of Walker Process fraud. In October 2003, a jury trial was held in this case. The jury found for Frosty Bites Distribution on every element of the antitrust counterclaim, although the jury awarded no monetary damages. (Jury Verdict, p. 3-4.) Pursuant to the jury’s findings, Frosty Bites Distribution filed this motion for attorneys’ fees.

II. STANDARD

Section four of the Clayton Act provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15(a). A violation of the antitrust laws is, by itself, not enough to justify an award of attorneys’ fees. Rather, an antitrust plaintiff must show that the violation of the antitrust laws caused an injury to its business or property, although the actual recovery of

compensatory damages is not necessary. Sciambra v. Graham News, 892 F.2d 411, 415-16 (5th Cir. 1990). Once the antitrust plaintiff proves a violation of the antitrust laws and the fact of damage, an award for attorneys' fees and costs is mandatory. Id. at 414; 15 U.S.C. § 15(a).

III. DISCUSSION

In its verdict, the jury determined that Frosty Bites Distribution had proven all of the elements of its antitrust counterclaim, including the fact of damage. (Jury Verdict, p. 3-4.) The Plaintiffs contend that Frosty Bites Distribution is not entitled to an award of attorneys' fees because the jury did not give the Defendants a monetary award. (Id. at 4.) However, whether the jury awarded monetary relief is not dispositive with respect to an award of attorneys' fees under the Clayton Act. Rather, the issue is whether the Plaintiffs' antitrust violations caused damage to the business or property of the Defendants. Sciambra, 892 F.2d at 415 ("Our holding merely recognizes that the structure of section 4 and the fact of damage analysis make the actual recovery of compensatory damages irrelevant"). The jury answered that specific question in the affirmative, entitling Frosty Bites Distribution to an award of attorneys' fees and costs of the suit. See also Kearney & Trecker Corp. v. Cincinnati Milacron Inc., 562 F.2d 365, 374 (6th Cir. 1977) (placing the defendant in the position of having to choose from ceasing competition, obtaining a license, or defending the

suit, each of which would result in negative economic injury, is an injury to business or property).

The Plaintiffs also contend that Frosty Bites Distribution's motion should be denied or apportioned because the Court granted judgment as a matter of law against seventeen of the twenty Distribution Parties in the litigation. This occurred because the other Distribution Parties did not appear at trial and presented no evidence to support any claims for relief. Frosty Bites Distribution, however, is the only party seeking an award of attorneys' fees, and it was one of the parties which the jury determined was injured in business or property by the Plaintiffs' violations of the antitrust laws. Moreover, through indemnity agreements, Frosty Bites Distribution took on the entire defense of the Plaintiffs' action and prosecution of the antitrust counterclaim. Accordingly, Frosty Bites Distribution is the only party that incurred any attorneys' fees and costs with respect to the antitrust claims. Finally, even if the indemnity agreements were not in place, Frosty Bites Distribution would have had to incur the fees and costs it now seeks for its own prosecution of the antitrust counterclaim. The fact that not all of the Distribution Parties' claims went to the jury is not relevant to Frosty Bites Distribution's claim for the fees and costs it incurred in prosecuting the antitrust counterclaim against the Plaintiffs. Because Frosty Bites Distribution showed it suffered damage to its business or property by the Plaintiffs'

violations of the antitrust laws, it is entitled to an award of reasonable attorneys' fees and costs.

Once the Court has determined that an award of attorneys' fees is proper, it must then determine what that award should be. The determination of reasonable attorneys' fees is a two step procedure under prevailing Fifth Circuit caselaw. First, the Court must determine the reasonable number of hours expended on the litigation, and the reasonable hourly rates for the services rendered. Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 324 (5th Cir. 1995). Next, the Court must multiply the reasonable hours by the reasonable rates. Id. "The product of this multiplication is the lodestar, which the district court then either accepts or adjusts upward or downward, depending on the circumstances of the case." Id.

With respect to the reasonable number of hours spent on the litigation, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Id. at 324. The documentation should be such that this Court cannot only determine whether the total hours claimed is reasonable, but also, whether particular hours claimed were reasonably expended. Id. at 325. Frosty Bites Distribution filed a Detailed Specification and Itemization of the Requested Clayton Act Attorneys' Fee Award [Doc. 873] ("Specification") in which it sets out the number of hours expended on this litigation and the claims to

which those hours were directed. The Specification summarizes the hours expended by the attorneys and staff that worked on this case, and then lists each of the billable hour entries for this litigation, beginning on April 1, 2003.¹ Below each billable hour entry is a detailed description of the work which was performed on the case during that time period. In listing the billable hour entries for this case, the Specification identifies those hours which were spent on matters unrelated to the antitrust counterclaim, and does not include those hours in Frosty Bites Distribution's calculation of reasonable hours expended. (Specification, Tab A, 1, (entries marked with "Ø").) The Specification also identifies those hours which were split between the antitrust counterclaim and other, unrelated matters, and for those entries, only half of the hours are included in Frosty Bites Distribution's calculation of reasonable hours expended. (Specification, Tab A, 1, (entries marked with "Sp.")) Having carefully reviewed Frosty Bites Distribution's Specification, including the summaries, detailed billable hour entries, and supporting affidavits, this Court finds that the hours claimed were reasonable, especially considering the complexity and length of this litigation. The Plaintiffs have not asserted specific objections to any of the hours claimed as being unnecessary, redundant or lacking in billing judgment.

¹Frosty Bites Distribution indicated that although some work was done on the antitrust counterclaim prior to April 1, 2003, those hours are not included in the request for attorneys' fees.

As for determining the reasonable rate to be charged for the services rendered, the Court is to consider the “attorneys’ regular rates as well as the prevailing rates.” Louisiana Power & Light, 50 F.3d at 328. When the rates requested by the attorneys are their regular rates, are within the range of prevailing market rates, and are not contested, such rates are “prima facie reasonable.” Id. Frosty Bites Distribution produced evidence that their attorneys’ regular rates fell within the range of prevailing market rates, and the Plaintiffs did not contest that issue. (Specification, Tab B, Table 17b.) Given that such rates are “prima facie reasonable” and seeing no reason to adjust them, especially considering the complexity and length of this litigation, this Court determines that the rates requested by Frosty Bites Distribution in the Specification are the reasonable rates for the services rendered for prosecuting the antitrust counterclaim.

Having determined that the hours and rates requested by Frosty Bites Distribution are reasonable, the remaining step is to multiply the reasonable hours by the reasonable rates to come up with the reasonable attorneys’ fee award. When the hours are multiplied by the appropriate rate, depending on the attorney billing the hours, and those products are added together, the total comes to \$649,898.39. Frosty Bites Distribution is also entitled by statute to costs of the case, which total

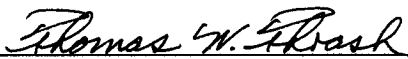
\$26,777.07. (Specification, Tab A, 1, p. 4.) Thus, the Frosty Bites Distribution lodestar amount is \$676,675.46.

After calculating the reasonable award of attorneys' fees and costs, a district court may consider adjustment of the lodestar based on the twelve factors from Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717-19 (1974). The party advocating an adjustment has the burden to prove such is warranted. Louisiana Power & Light, 50 F.3d at 329. In this case, however, neither party sought an adjustment of the lodestar – Frosty Bites Distribution did not request an upward adjustment, and the Plaintiffs did not request a downward adjustment. Since neither party sought an adjustment to the lodestar, there is no reason for this Court to undertake an evaluation of the Johnson factors.

IV. CONCLUSION

For the reasons set forth above, Frosty Bites Distribution's Motion for Attorney Fees and Costs Under the Clayton Act [Doc. 849] is GRANTED. The Clerk is directed to enter a judgment in favor of the Defendant Frosty Bites Distribution and against the Plaintiffs in the sum of \$676,675.46 with post judgment interest from October 20, 2003.

SO ORDERED, this 3 day of June, 2004.



THOMAS W. THRASH, JR.
United States District Judge