

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 17-cv-02097-RBJ

REALTIME ADAPTIVE STREAMING LLC,

Plaintiff,

v.

SLING TV L.L.C.,
SLING MEDIA, L.L.C.,
ECHOSTAR TECHNOLOGIES L.L.C.,
DISH NETWORK L.L.C

Defendants.

ORDER AWARDING ATTORNEY'S FEES

The Court previously granted summary judgment in favor of the defendants and found that this is an “exceptional case” for purposes of an attorney’s fee award. The amount of the attorney’s fee claimed by defendants was disputed. Having considered the parties’ briefs and the evidence and arguments presented during the hearing, the Court awards attorney’s fees to defendants Sling TV L.L.C., Sling Media, L.L.C., Echostar Technologies, L.L.C., and Dish Network, L.L.C. (collectively the “Dish defendants”) and against plaintiff Realtime Adaptive Streaming, L.L.C. in the amount of \$3,911,002.79.

BACKGROUND

This patent infringement case was filed on August 31, 2017. ECF No. 2. On February 26, 2019, the Court granted the then-parties’ joint motion for a stay until resolution of certain related matters pending before the Patent Trial and Appeal Board. ECF No. 162. The case was

administratively closed at that time. ECF No. 163. The stay was lifted, and the case was reopened, on January 15, 2021. ECF No. 179.

On May 26, 2021, the Dish defendants filed a motion for summary judgment based on their contention that the subject patent was invalid. ECF No. 216. Two days later the Dish defendants filed four additional motions for summary judgment based on other theories. *See* ECF Nos. 218, 221, 223 and 227. The Court rejected what appeared to be an effort to circumvent its page limitations by filing five separate motions for summary judgment; denied all the motions for that reason; and recommended that the Dish defendants pick whatever it considered to be its best issue and move on that basis. ECF No. 232.

On June 2, 2021, the Dish Defendants filed a motion for summary judgment of invalidity based on lack of subject matter jurisdiction. ECF No. 234. Briefing on this motion was completed upon the filing of the Dish defendants' reply brief on July 2, 2021. ECF No. 280. The Court granted the motion and dismissed the case with prejudice in an order issued on July 21, 2021. ECF No. 305. On August 13, 2021, the Dish defendants moved to dismiss their counterclaims in view of the Court's granting of their motion for summary judgment. ECF No. 307. That motion was granted, and an amended final judgment was entered on January 20, 2022. ECF Nos. 325 and 326. The merits of those findings and conclusions are currently on appeal to the Federal Circuit.

In the meantime, however, the Dish defendants moved for an award of attorney's fees under 35 U.S.C. § 285 in the amount of \$5,075,519. ECF No. 308. Following briefing, the Court on January 20, 2022 found that this is an exceptional case and that the Dish defendants as the prevailing parties are entitled to an award of attorney's fees. ECF No. 326. The Court did not determine a reasonable amount at that time. Rather, I asked that a responsible partner or

principal lawyer carefully review the defense teams' time entries and cull all time that he or she finds to be duplicative, inefficient, or otherwise unreasonable in view of the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974). I indicated that a responsible member of the plaintiff's legal team should then review the remaining time entries to identify time that plaintiff still considered to be unreasonable or not satisfactorily explained. Then counsel should confer and attempt to reach agreement. If agreement were not reached, then the parties should set an evidentiary hearing. I invited plaintiff to divulge information about the time spent by members of the plaintiff's team and their corresponding rates if it was willing to do so.

Adam Shartzter, a principal of the law firm Fish & Richardson that served as lead counsel for the Dish defendants, did the screening and culling requested by the Court. However, plaintiff's counsel did not object to any of the remaining time entries. There was discussion of a possible resolution, but nothing came of it. The Court then conducted an evidentiary hearing on May 19, 2022; and because the hearing was not completed, the Court held a second session of the hearing on August 4, 2022. The Court then took the matter under advisement pending its review of the evidence and preparation of this order.

STANDARD OF REVIEW

In determining the reasonableness of attorney's fees, the Court starts with the "lodestar" which is the product of hours "reasonably expended" times a "reasonable hourly rate." See *Robinson v. City of Edmund*, 160 F.3d 1275, 1281 (10th Cir. 1998). The lodestar is presumed to be a reasonable fee. *Id.* However, the lodestar can be adjusted after considering factors affecting reasonableness such as the 12 factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974): (1) the time and labor required; (2) the novelty and difficulty of

the questions; (3) the skill required; (4) preclusion of other employment; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney's; (10) the undesirability of the case; (11) the nature and relationship of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717-19. The Colorado Rules of Professional Conduct provide a similar list of relevant factors.¹

ANALYSIS AND CONCLUSIONS

A. The Dish Defendants' Initial Application.

As indicated above, in their motion for an award of attorney's fees the Dish defendants sought an award of \$5,075,519, claiming that those were the attorney's fees they reasonably incurred in the six and one-half months after the stay was lifted. ECF No. 308 at 14. This sum included fees billed by Fish & Richardson, L.L.C. (\$4,971,532.50) and by Denver counsel Wheeler, Trigg, O'Donnell LLP (\$103,986.50). ECF Nos. 308-1 at 1; 308-3 at 1.

In support, the Dish defendants filed the declaration of Mr. Shartzter, describing the members of the Fish & Richardson PC team and the work they performed. The Fish & Richardson contingent included thirteen lawyers; three paralegals; four discovery analysts; four library and search analysts; an IP operations specialist; and a graphic artist. ECF No. 308-1. Their rates ranged upward to \$900 per hour. Overall, these individuals had an average billing rate of approximately \$668 per hour. That included a 15.5% discount that Dish receives. *Id.* at

¹ The Colorado Rules of Professional Conduct are found as an Appendix to Chapters 18 to 20, COLORADO COURT RULES – STATE (2018). These factors identified in Rule 1.5 are (1) time and labor required, (2) likelihood of preclusion of other employment, (3) fee customarily charged in the locality, (4) amount involved and results obtained, (5) time limitations imposed by the client or circumstances, (6) nature and length of the professional relationship, (7) experience, reputation, and ability of the lawyer(s), and (8) whether the fee is fixed or contingent.

11-12. Defendants also filed the affidavit of Hugh Gottschalk, a partner in Wheeler Trigg O'Donnell LLP, who indicated that his firm's fees totaled \$103,986.50. This represented the work of one partner, one associate and one paralegal, at rates between \$685 and \$220 per hour, with an overall average billing rate of approximately \$637 per hour. ECF No. 308-3.

In its response Realtime asserted that \$5 million is unreasonable on its face. ECF No. 319 at 14. However, it declined to dig into the "84 pages of raw billing entries" to highlight those it believed to be unreasonable, and it suggested that the Court should not have to do that either. *Id.*

B. The Dish Defendants' Revised Application: the Lodestar.

After receiving the Court's direction that counsel cull out all duplicative and otherwise inefficient time, Mr. Shartzler reviewed the Fish & Richardson billing records and reduced the total amount from \$4,971,532.50 to \$4,293,406.93, a reduction of \$678,125.57. *Compare* ECF No. 308-2 with ECF No. 333-1.² The reduction was accomplished by eliminating 1,073 hours, including the hours of fourteen timekeepers. *See* Ex. 7 at 3-4. The Dish defendants also withdrew their previous request for an award of prejudgment interest.

The Dish defendants' total request after the culling but with the addition of Fish & Richardson's "fees-on-fees," is \$4,564,236.63, comprised as follows:

Fish & Richardson pre-attorney's fee application fees:		\$4,293,406.93
Wheeler Trigg O'Donnell fees		103,986.50
"Fees-on-Fees"		166,843.20
Hours billed drafting fees motion	97,065.50	
Hours billed calculating fees	69,777.70	
<u>TOTAL</u>		<u>\$4,564,236.63</u>

² Defendants have also indicated that they culled \$164,942 before submitting their original fee request. *See* ECF No. 335 at 64.

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