IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

GN NETCOM, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 12-1318 (LPS)
	)	
PLANTRONICS, INC.,	)	
	)	
Defendant.	)	

DEFENDANT PLANTRONICS'
OPENING BRIEF IN SUPPORT OF MOTION FOR ATTORNEY'S FEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

NATURE AND STAGE OF PROCEEDINGS

This case was litigated for five years with the jury ultimately rendering a complete defense verdict for Plantronics after just over an hour of deliberations—demonstrating the utter lack of merit to GN's claims. D.I. 533. Pursuant to Fed. R. Civ. P. 54(d)(2), 28 U.S.C. § 1927, and/or the Court's inherent power, Plantronics moves for a reasonable portion of the attorney's fees it incurred defending against GN's baseless claims. Although Plantronics strongly believes all of GN's claims lacked merit from the beginning of the case—as ultimately proven by the jury's verdict—Plantronics' fee request is narrowly tailored to GN's pursuit of its common law tortious interference claim after the Court's summary judgment and *Daubert* hearing on August 29, 2017. As set forth below, GN's conduct with respect to this claim was particularly unreasonable and vexatious and demonstrably exemplifies bad faith.

At the August 29 hearing, GN's counsel asserted, without any evidentiary basis, that he could "*come up with a theory*" at trial on which the tortious interference claim could stand alone separate and apart from GN's antitrust claims. 8/29/17 Hearing Tr. 53:14-25 (emphasis added). Clearly, GN never did come up with such a theory. GN proffered no evidence to the jury on its tort claim and waited to abandon the claim until just before the case was submitted to the jury. As a result, Plantronics unnecessarily incurred substantial fees preparing its tortious interference defense for trial.

Plantronics therefore seeks attorney's fees in the amount of at least $877,692 for those fees needlessly incurred in connection with GN's tortious interference claim for the time period after August 29, 2017, when GN began asserting that its tort claim somehow stood separate and apart from its antitrust claims. *Id.*

SUMMARY OF ARGUMENT

1. Pursuant to Fed. R. Civ. P. 54(d)(2), 28 U.S.C. § 1927, and/or the Court's inherent power, Plantronics moves for recovery of its reasonable attorney's fees incurred with respect to GN's tortious interference claim after August 29, 2017, the date on which GN stated, without a good faith basis, that its tortious interference claim stood separate and apart from its antitrust claims. GN's bad faith is demonstrated, *inter alia*, by the following: (a) the absence of any opinion by GN's expert, Professor Einer Elhauge, regarding GN's tortious interference claim throughout the five years of this litigation, (b) GN's failure to proffer any evidence at trial directed to its tortious interference claim, and (c) GN's refusal to dismiss its tortious interference claim and then its voluntary dismissal of the claim just before the case was submitted to the jury.

2. As a result of GN's bad faith pursuit of a tortious interference claim that lacked merit, Plantronics unnecessarily expended substantial time and resources in the weeks leading up to trial preparing to defend against a vaguely asserted theory of alleged tortious interference liability and damages separate and apart from GN's antitrust claims. As evidenced by its ultimate dismissal on the eve of the case's submission to the jury, GN's tort claim never had any merit.

3. Plantronics should be able to seek its fees throughout the course of the litigation for this claim, but it has limited its request to the final time period after GN's counsel made it clear it would proceed with that claim, then only to abandon it just before the case was submitted to the jury. Accordingly, Plantronics seeks one-quarter of its attorney's fees incurred from August 30, 2017 to October 31, 2017 in the amount of at least $877,692[1], which represents a

[1] The present motion only reflects Plantronics' fees incurred through October 31, 2017. Plantronics respectfully requests recovery of the fees it will incur in connection with preparing any post-trial motions in this case because those fees also result from GN's bad faith litigation conduct. Plantronics will supplement the present motion with updated fees once post-trial

reasonable estimate of the fees it incurred in defending against GN's tortious interference claim during this time period. Further, the requested amount of fees is reasonable in view of the legal rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

STATEMENT OF FACTS

On October 12, 2012, GN filed its Complaint asserting three federal antitrust claims and one claim for tortious interference with business relations under Delaware common law. D.I. 1. Throughout the five years of this litigation, however, GN's expert witness, Professor Elhauge, did not offer any opinions on GN's tortious interference claim. In his four expert reports and two depositions, Professor Elhauge only addressed GN's antitrust claims. In addition, at trial Professor Elhauge provided no testimony regarding GN's tortious interference claim. Nor did GN proffer any evidence at trial directed to that claim. GN advised Plantronics for the first time on Sunday, October 15, 2017, that it would not pursue its tortious interference claim. Declaration of J. Blumenfeld ("Blumenfeld Decl.") at ¶ 7.

Consequently, at the close of evidence, Plantronics moved under Fed. R. Civ. P. 50(a) for judgment as a matter of law of no tortious interference. D.I. 530. On October 18, 2017, the Court ordered GN to file a stipulation voluntarily dismissing that claim. 10/18/17 RT at 1595:9-20. On October 20, 2017, GN voluntarily dismissed its tortious interference claim with prejudice, which the Court entered on October 25, 2017. D.I. 538 & 10/25/17 Minute Entry. As set forth below, GN never had any good faith basis to pursue its tortious interference claim.

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briefing has concluded, if the Court grants this motion.

LEGAL STANDARD

Fed. R. Civ. P. 54(d)(2) provides that a prevailing party may move for attorney's fees and related nontaxable expenses pursuant to a statute, such as 28 U.S.C. § 1927, or other grounds, such as the court's inherent power. The Supreme Court has vested lower courts with the "inherent power" to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (internal quotations and citation omitted). In the Third Circuit, bad faith is inferred when "claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment." *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 188 (3d Cir. 2002) (affirming fee award under the court's inherent powers and § 1927).

GN's conduct at issue here is distinguishable from antitrust cases like *Bund v. ATP*, No. 07-178, 2009 U.S. Dist. LEXIS 97851 *9; 2009 WL 336704 (D. Del. Oct. 19, 2009), in which a fee-shifting request simply based on being a prevailing party was denied for antitrust policy reasons. Antitrust cases, like *Bund*, do not preclude a prevailing party from recovering fees for bad faith litigation conduct under the Court's inherent power or § 1927. In fact, *Bund* made clear that the prevailing defendant in that case, which sought more than $17 million in fees, apparently over the entire life of the case, did not and never had asserted that the plaintiff acted in bad faith in pursuing its claims. *Id.* at **2, 13-14. Accordingly, cases like *Bund* do not preclude fee requests in antitrust-related cases. Indeed, courts in the Third Circuit award fees where the fee request is narrowly tailored to the bad faith litigation conduct, as is the case here.

For example, in *Parallel Iron LLC v. NetApp, Inc.*, 84 F. Supp. 3d 352, 357 (D. Del. Mar. 25, 2015), Judge Andrews exercised the court's inherent power to award the prevailing defendant more than $500,000 in attorney's fees because the plaintiff had pursued claims

"without a good faith basis and continuing to litigate [its claims] in a misleading and prejudicial way." *Id.* As set forth below, GN's similarly pursued its tortious interference claim without a good faith basis and continued to litigate that claim in a highly misleading way to Plantronics' substantial prejudice. Thus, a fee award is warranted here under the Court's inherent power or § 1927.

ARGUMENT

I. GN'S PURSUIT OF ITS TORTIOUS INTERFERENCE CLAIM AFTER AUGUST 29, 2017 RISES TO THE LEVEL OF BAD FAITH LITIGATION CONDUCT

GN's conduct leading up to the ultimate abandonment of its tortious interference claim just before the case was submitted to the jury, exemplifies the type of "bad faith, vexatious[], wanton[], or . . . oppressive" conduct the Court's inherent power and § 1927 were meant to protect against. *Chambers*, 501 U.S. at 45-46. First, the fact that GN's expert, Professor Elhauge, never offered any opinions on GN's tortious interference claim throughout this five-year case demonstrates the claim, among others, was baseless from the beginning.

Second, even six weeks before trial at the August 29, 2017 hearing, GN admittedly had no theory to maintain its tortious interference claim when its counsel could identify no such theory for the Court. Instead, when the Court asked GN's counsel whether GN would "still have a case" if the Court granted Plantronics' motion for summary judgment or *Daubert* motion on GN's antitrust claims, GN's counsel asserted, without evidentiary basis, that he *"could come up with a theory"* at trial on which the tortious interference claim could stand alone separate and apart from GN's antitrust claims. 8/29/17 Hearing Tr. 53:14-25 (emphasis added). The Third Circuit has found that such "empty posturing" amounts to bad faith. *See Matthews v. Freedman*, 128 F.R.D. 194, 206-07 (E.D. Pa. 1989), *aff'd*, 919 F.2d 135 (3d Cir. 1990) (finding that plaintiff's counsel acted in bad faith by litigating meritless, time-barred claims).

Third, until the August 29 hearing, Plantronics had proceeded with the understanding that GN's antitrust and tortious interference claims rose and fell together. Once GN's counsel asserted that he *"could come up with a theory"* for a separate tort claim, Plantronics repeatedly objected to GN's new, undisclosed theory of tortious interference liability leading up to trial. For example, in the pretrial order, Plantronics lodged objections to GN's tortious interference claim and any reference thereto at trial because GN and its expert failed to disclose any such theory of liability and damages. D.I. 490, Ex. 3, Plantronics' Contested Issues of Fact at n.4, p.9 (objecting to any reference to GN's tortious interference claim at trial for failure to disclose any such theory of liability and damages thereto); D.I. 490, Ex. 5, Plantronics' Contested Issues of Law at n.5, p.20 (same).

Fourth, despite Plantronics' repeated objections, GN refused to withdraw its tort claim. As a result, in addition to preparing its defense on the antitrust claims, Plantronics was forced to incur considerable expense preparing for trial on this alleged separate common law "theory" that GN was preparing to "come up with." For example, Plantronics researched and prepared lengthy jury instructions on the required elements of tortious interference. Plantronics also researched and prepared lengthy issues of contested facts and law regarding GN's tortious interference claim. D.I. 490, Ex. 3 & 5. Plantronics also expended substantial resources reviewing materials and analyzing potential legal bases regarding the common law claim. Plantronics should not have been led to believe that it needed to combat a new, undisclosed tortious interference claim when, in fact, that claim was never viable.

Fifth, despite refusing to withdraw its tortious interference claim in the critical six weeks leading up to trial, GN failed to present evidence on that claim at trial. For example, GN did not identify a single distributor, reseller, or end user—much less a preexisting business relationship

between GN and any such entity—that allegedly was subject to any intentional interference by Plantronics. *See Cryovac, Inc. v. Pechiney Plastic Packaging, Inc.*, C.A. No. 1278 (D. Del. Jun. 2006) (Jury Instruction No. 4.1 regarding required elements of tortious interference of business relations claim). The fact that GN presented no such evidence at trial clearly demonstrates that GN "knew or should have known" it had no good faith basis to maintain the claim. *In re Prudential*, 278 F.3d at 188.

Sixth, GN's bad faith is further demonstrated by its gamesmanship in waiting to withdraw its tortious interference claim during the final days of trial. After GN effectively ended its case in chief on October 13, 2017 without presenting any evidence of tortious interference, Plantronics requested that GN withdraw its tort claim on October 14, 2017. Blumenfeld Dec. ¶¶ 4-5 (twice requesting GN to confirm whether it was withdrawing its tortious interference claim with GN responding that it could not confirm both times). Plantronics' request was time sensitive so the parties could avoid expending valuable time and resources given the impending October 15 Court deadline for submitting final jury instructions and the impending October 16 jury charge conference. *Id.* at ¶ 2.

Only after Plantronics' counsel expended considerable time and resources preparing tortious interference instructions and preparing for the charge conference did GN's counsel finally inform Plantronics' counsel that it was withdrawing that claim—*less than two hours before the jury instructions were due with the Court on October 15*. *Id.* at ¶ 7. Such gamesmanship clearly rises to the level of "bad faith, vexatious[], wanton[], or . . . oppressive" conduct that the Court's inherent power and § 1927 were meant to protect against.

GN's conduct from August 29, 2017 through its abandonment of its tort claim on October 15 unnecessarily added to the proceedings in an unreasonable and vexatious manner and thereby

needlessly increased Plantronics' fees. Pursuant to its inherent power and/or § 1927, this Court should award Plantronics at least $877,692 in attorney's fees, which is a reasonable estimate of the fees it incurred in defending against GN's baseless tort claim after August 29.

II. THE REQUESTED ATTORNEY'S FEES ARE REASONABLE

Importantly, Plantronics is not seeking fees for the entire life of the case. Instead, Plantronics' fee request is narrowly tailored, as described above, to GN's bad faith pursuit of its common law tortious interference claim after the Court's summary judgment and *Daubert* hearing on August 29, 2017.

Until the Court ruled that GN could pursue separate Sherman Act 1 and Clayton Act 3 claims at the jury charge conference on October 16, 2017, Plantronics had proceeded with the understanding that there were four claims in this case, which GN pled in the Complaint as follows: (I) monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; (II) attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; (III) concerted action in restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14; and (IV) tortious interference with business relations under Delaware common law.

Therefore, Plantronics requests one-fourth, or 25%, of its fees from August 29, 2017 to October 31, 2017 in the amount of at least $877,692. This is a fair and reasonable estimate of the work associated with the tortious interference claim out of what Plantronics understood were a total of four claims at issue in the case.[2] If the Court grants this motion, Plantronics will submit

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declarations and documentation to further substantiate that amount.

III. CONCLUSION

To be clear, Plantronics strongly believes all of GN's claims lacked merit from the beginning of the case—as ultimately proven by the jury's verdict. For the reasons discussed herein, GN's conduct was particularly egregious with respect to its tortious interference claim. Plantronics therefore has narrowly tailored its fee request to GN's conduct after August 29, 2017 with respect to this claim. Accordingly, Plantronics respectfully requests that the Court order GN to reimburse Plantronics its attorney's fees in the amount of at least $877,692 under the Court's inherent powers and/or § 1927.

At a minimum, any fee award should not be less than one-fifth of the fees incurred during this time period, should the Court account for the four antitrust claims that were sent to the jury and the fifth tortious interference claim that GN withdrew just before the case was submitted to the jury.

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