

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>JACK A. DORAZIO,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
v.	:	
	:	
<b>CAPITOL SPECIALTY</b>	:	
<b>PLASTICS, INC.,</b>	:	
<b>Defendant.</b>	:	<b>No. 01-6548</b>

**MEMORANDUM AND ORDER**

Schiller, J.

March , 2003

Presently before the Court is Plaintiff’s Petition for Allowance of Counsel Fees and Costs. For the reasons stated below, I grant in part and deny in part Plaintiff’s petition, such that I will award Plaintiff \$156,386.00 in fees and \$ 8,443.66 in costs.

**I. BACKGROUND**

This action arose out of a dispute between Plaintiff Jack Dorazio and his former employer, Defendant Capital Specialty Plastics (“CSP”) over Mr. Dorazio’s termination and CSP’s alleged theft of his intellectual property. Plaintiff filed his Complaint on December 18, 2001, suing in three counts: Count I for breach of contract, Count II for fraud by way of a scheme to steal his contacts and ideas, and Count III for misappropriation of his intellectual property rights in his inventions.

On November 15, 2002, following the submission of cross-motions for summary judgment, the Court granted summary judgment for Plaintiff as to liability on the Count I claim and reserved the issue of damages for trial. The court also granted summary judgment for Defendant on the Count III claim on jurisdictional and ripeness grounds. On November 25, 2002, the Court entered an Order

reflecting that the parties had reached an agreement to settle the Count I claim for \$160,000.00, exclusive of attorneys' fees and costs.<sup>1</sup>

In its November 15, 2002 Order, the Court re-styled Count II as a misappropriation of trade secrets claim and the matter proceeded to a jury trial on that claim on November 25, 2002. At trial, Plaintiff testified and presented evidence as to existence of his trade secrets and CSP's misappropriation thereof. At the close of Plaintiff's testimony, Defendant moved pursuant to Federal Rule of Civil Procedure 50 for judgment as a matter of law. The Court subsequently granted Defendant's motion.

On December 30, 2002, Plaintiff filed the petition for fees and costs that is the subject of this memorandum and order. Plaintiff's counsel, John J. Barrett, Jr., submitted a supporting affidavit and detailed billing records for the work performed in this case. Therein, Mr. Barrett avers that he made repeated efforts to eliminate any recorded time or costs that related primarily to Counts II or III. (Barrett Aff. at 2.). Plaintiff represents that ultimately, Count I accounted for 60% of the fees in the case. Accordingly, Plaintiff seeks \$171,295.00 in counsel fees and \$8,443.66 in costs.

## **II. DISCUSSION**

Although the general "American Rule" requires each party to bear its own attorneys' fees, parties may contract to permit recovery of fees and a federal court will enforce such an agreement. *See McGuire v. Miller*, 1 F.3d 1306, 1312-1313 (2d Cir. 1993). Although such awards are normally within this Court's discretion, "where a contract authorizes an award of attorneys' fees, such an award

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<sup>1</sup> After trial, further dispute arose over the payment of \$160,000 settlement amount to the Plaintiff. It was not until January 13, 2003 that payment was made to Plaintiff's escrow account. (Pl.'s Resp. at 2.)

becomes the rule rather than the exception.” *Id.* Paragraph 10 of the Employment Agreement, states that the agreement “shall be construed, interpreted and enforced in accordance with and shall be governed by the laws of the State of New York . . .” (Employment Agreement ¶ 10.) The paragraph further states, “the parties hereto agree that the *prevailing party* in any litigation or arbitration shall be entitled to, *inter alia*, reasonable attorneys’ fees and costs.” (*Id.*) (emphasis added). The Court has already found these terms to be unambiguous, *see Dorazio v. Capitol Specialty Plastics*, Civ. A. No. 01-6548, 2002 U.S. Dist. LEXIS 22205, at \*5-6, 2002 WL 31546171, at \*2 (E.D. Pa. Nov. 15, 2002), and I will therefore analyze Plaintiff’s petition in light of those terms and in accordance with New York law.

#### **A. Prevailing Party**

Under New York law, a determination of which party is the prevailing party requires an initial consideration of the true scope of the dispute litigated, followed by analysis of what was achieved within that scope. *Jocar Realty Co. v. Galas*, 673 N.Y.S.2d 836, 838 ( N.Y. Civ. Ct. 1998). To be considered a prevailing party, a party must achieve success with respect to “the central relief sought.” *25 East 83 Corp. v. 83rd Street Associates*, 624 N.Y.S.2d 125 (N.Y. App. Div.1995). The United States Supreme Court recently adopted the Black’s Law Dictionary definition of “prevailing party,” which it defines as “[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . .” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 603 (2001) *quoting* BLACK’S LAW DICTIONARY 1145 (7th ed. 1999).<sup>2</sup>

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<sup>2</sup> In *Buckhannon*, the Supreme Court rejected the “catalyst theory” permitting private settlement to give rise to prevailing party status, reasoning that where a defendant voluntarily changes its conduct, the change “lacks the necessary judicial imprimatur” for a finding that the

In opposing Plaintiff's fee petition, CSP contends that Dorazio was not the prevailing party in the litigation because it prevailed on two of three causes of action asserted by Dorazio. Similarly, Dorazio secured only \$160,000 in damages out of \$3,300,000 that Defendant asserts Dorazio sought in the complaint. Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes, however, if they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Thus, because Dorazio succeeded on his central breach of contract claim, he need not have survived summary judgment or judgment as a matter of law on his intellectual property claims to be considered the prevailing party. *See Sugarman v. Vill. of Chester*, 213 F. Supp. 2d 304, 308 (S.D.N.Y. 2002) (holding that plaintiff who challenged constitutionality of defendant municipality's sign ordinance on two separate grounds was prevailing party, where court below granted summary judgment for defendant on one set of claims, but also granted summary judgment for plaintiff on other claims); *Goldman, et al. v. Burch*, 78 F.Supp. 1441, 1445-46 (S.D.N.Y. 1992) (holding that defendant was prevailing party where it succeeded to "a substantially greater extent" than did plaintiffs on their complaint).

Similarly, Dorazio need not secure all the monetary relief sought to claim prevailing party status. In a case involving contract language like that employed here, the Southern District of New York recently found that the defendant was a prevailing party where the jury rejected any recompense

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plaintiff has prevailed. 532 U.S. at 605. At least one district court has read *Buckhannon* to hold that a party may prevail where the court memorializes its victory in an order. *See Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Illinois, et al.*, Civ. A. No. 00-7363, 2001 U.S. Dist. LEXIS 11671, at \*9 (Aug. 7, 2001). Here, this Court's order of November 15, 2002 memorialized the settlement in Plaintiff's favor.

for the plaintiff's claims and awarded the defendant \$83,500 of the \$1,033,732 sought on its breach of contract counterclaim. *See MTX Communs. Corp. v. LDDS/WorldCom, Inc.*, Civ. A. No. 95-9569, 2001 U.S. Dist. LEXIS 7912, at \*3, 2001 WL 674142, at \*1 (S.D.N.Y. June 15, 2001.); *see also F.H. Krear Co. v. Nineteen Named Trs., et al.*, 810 F.2d 1250, 1266-67 (2d Cir. 1987) (agreeing with court below that plaintiff who sought \$1,381,500 in damages for breach of contract and was awarded \$269,400 was prevailing party).

Here, the Court granted summary judgment for Plaintiff on his Count I breach of contract claim. Shortly thereafter, the Court announced that the parties had privately agreed to set damages at \$160,000 on that Count. Although the Court issued a judgment as a matter of law for defendant on the trade secrets claim, and granted summary judgment for defendant on ripeness grounds on the patent claim, Plaintiff has certainly succeeded on a significant issue in the litigation, and won a notable amount of the central relief sought. Moreover, Plaintiff did not, in fact, demand \$3,300,000. The Complaint stated that the amount of harm was "to be determined," but was estimated to be "in excess of \$3,300,000." (Pl.'s Cmpl. at 4.) Apparently knowing that he could not accurately calculate damages absent further discovery, Plaintiff instead demanded "an amount to be determined after a hearing by this Court." (*Id.*) I cannot now say that Plaintiff failed to achieve a significant portion of the relief sought and therefore find that Dorazio may be considered a prevailing party.

#### **B. Reasonable Award**

Under New York law, "when a contract provides that in the event of litigation the losing party will pay the attorneys' fees of the prevailing party, the court will order the losing party to pay whatever amounts have been expended by the prevailing party, so long as those amounts are not unreasonable." *Krear*, 810 F.2d at 1263. Reasonableness is measured by such factors as the

difficulty of the questions presented; the skill required to manage the litigation; the time and labor necessary; the experience, skill and reputation of counsel for the prevailing party; the customary fees of the relevant bar for similar services; and the amount in dispute. *Reid v. IBM*, Civ. A. No. 95-1755, 1998 U.S. Dist. LEXIS 1273, at \* 3, 1998 WL 50201, at \*1 (S.D.N.Y. 1998). The fee itself is calculated by multiplying the hours reasonably spent by the reasonable hourly rate. *See Id.* When fees are requested, “the burden is on counsel to keep and present records from which the court may determine the nature of the work done, the need for it, and the amount of time reasonably required.” *Krear*, 810 F.2d at 1265.

Plaintiff seeks \$171,295.00 in fees plus \$8,443.66 in costs. An application of the *Reid* factors does raise the issue of the difficulty of the question presented by the breach of contract claim, which, as Defendant argued, was a relatively simple matter. Yet the overall case presented very complicated issues of law and, as the Court’s approach to Count II reveals, the case was susceptible of multiple legal theories. Moreover, it must be noted that Defendants did not pursue settlement of Count I until after the Court granted summary judgment on liability in Plaintiff’s favor.<sup>3</sup> This fact belies Defendant’s claim that Count I might have been easily resolved without the Court’s intervention. Further, the remaining *Reid* factors all work in Plaintiff’s favor.

A more significant obstacle for Plaintiff is the “general rule” in New York that it is “rarely proper” to award fees in an amount that exceeds the amount involved in the litigation. *Krear*, 810 F.2d at 1263-64. Here, the \$171,295.00 in fees claimed exceeds the \$160,000.00 recovered through

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<sup>3</sup> Defendant has submitted the affidavit of Robert Sawyer, its Chief Financial Officer, who indicates that he made a settlement offer to Plaintiff prior to the Court’s November 15, 2002 Order. (Sawyer Aff. ¶ 5.) As Mr. Dorazio’s affidavit makes clear, however, this was an offer to settle all claims in the case, and Mr. Sawyer did not respond to Mr. Dorazio’s clarifying questions or further pursue settlement. (Dorazio Aff. ¶ 1-2.)

settlement by \$11,295.00. Exceptions to the general rule may be made in cases involving “transcending principles” where the benefits of the litigation reach for beyond the amount sought in the immediate suit. *Id* at 1264; *Simmons v. Gov’t Employees Ins. Co.* 59. A.D. 2d. 468, 473 (2d Dep’t 1977.) It is difficult to identify any such transcending principles in this case. Yet the amount “involved” in the litigation appears to relate not to the amount recovered, but to that sought by plaintiff. *Krear*, 810 F. 2d at 1264. Here, as noted, at the time of filing the suit Plaintiff estimated that the value of his Count I claim exceeded \$3 million. Moreover, there is evidence that an officer of Defendant offered to settle the entire dispute with Plaintiff for \$350,000. It is thus not unreasonable, as a general matter, for Plaintiff to claim fees of \$171,295, an amount that does not greatly exceed his damages.

**1. Reasonableness of Hours Expended**

Plaintiff’s counsel submitted detailed billing records for work that, he avers, relates primarily to the Count I claim. Defendant raises several objections to the hours expended by Plaintiff’s counsel. First, Defendant notes that the petition includes \$5,600.00 in bills for trial preparation for work occurring subsequent to November 22, 2002, when parties agreed to settle the Count I claim. Plaintiff responds that November 22, 2002, is the last date for which any fees of “significance” are claimed and that one entry on November 27, 2002 relates to communication with Mr. Dorazio as to the status of the lawsuit. The record indicates that there are four entries that post-date November 22, 2002 as follows:

Date	Attorney	Description	Hours	Value
11/23/02	CREEL ELIZABETH	CONFERENCE WITH J. BARRETT RE: TRIAL PREPARATION[,] PREPARATION OF EXHIBITS FOR TRIAL. CREATE LIST OF EXHIBITS.	4.3	\$ 559.00

11/24/02	BARRETT JOHN J.	TELEPHONE TO BILL DE STEFANO. TELEPHONE TO JACK DORAZIO. REVIEW OF CONFIDENTIALITY STIPULATION. TRIAL PREP.	6.5	\$ 2,275.00
11/23/02	BARRETT JOHN J.	TRIAL PREPARATION. CONFERENCE WITH JACK DORAZIO. LEGAL RESEARCH	8.5	\$ 2,975.00
11/27/02	BARRETT JOHN J.	CONFERENCE WITH BILL DE STEFANO. EMAILS TO AND FROM JACK DORAZIO.	1.3	\$ 455.00

(Pl.’s Time Entries, Dec, 27, 2002.). While these entries do contain references to conversations had with Mr. Dorazio, they also – with the exception of the November 27, 2002 entry – contain references to trial preparation and legal research. Because I cannot distinguish between the elements within each entry and because these entries post-date the settlement of the Count I claim, I find that these remaining entries do not relate primarily to Count I and are therefore not allowable. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (holding that no fee may be awarded on unsuccessful claim).<sup>4</sup> This will cause a reduction of Mr. Barrett’s claimed hours by 16.3 and Ms. Creel’s<sup>5</sup> claimed hours by 4.3.

Defendant also notes that the petition included fees and expenses relating to contact with witnesses whose depositions had no significant bearing on the Count I claim. Specifically, Defendant objects to fees and costs relating to the depositions of Scott Coapman, Michael Payne and Cynthia Headen. Plaintiff responds that these depositions were necessary to establish what commissions

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<sup>4</sup> Plaintiff also notes that it does not seek fees for time expended in pursuit of the attorneys’ fees and costs. This is entirely appropriate, given that New York law would not permit Plaintiff to claim such fees. *See Zauderer v. Barcellona*, 130 N.Y.S. 2d 881, 883 (Civ. Ct. 1985) (“attorney’s fees incurred in proceedings to collect attorney’s fees are not recoverable.”)

<sup>5</sup> Plaintiff provides no information regarding Ms. Creel. Simple math reveals the Ms. Creel claims a rate of \$130 per hour. Defendant offered no objection to this rate and I have no independent basis on which to judge it as unreasonable, given that Ms. Creel appears in only two entries.

might have been available to Plaintiff under his employment contract with CSP had he not been prematurely terminated. In other words, these depositions go to Plaintiff's Count I damages. In addition, the depositions of Mr. Payne and Ms. Headen go to the validity of Defendant's proffered reason for terminating Mr. Dorazio. I find these explanations plausible and will permit Plaintiff to claim costs and fees relating to these depositions.

Defendant also points to more than \$10,000.00 in fees that Plaintiff attributes to "conferences with William DeStafano." Plaintiff responds that these entries do not add up to that amount and that Mr. DeStefano, a partner at Mr. Barrett's firm and an old friend of Mr. Dorazio, had the job of keeping Mr. Dorazio informed. Because Mr. DeStefano's time discussing the case is not apart of the fee petition, Plaintiff argues that Mr. Barrett's conversations with Mr. DeStefano provide a cost savings in that Mr. Barrett would have had to spend more time explaining the case to Mr. Dorazio than he had to spend explaining the case to an experienced attorney. My review of record indicates that entries including conversations with Mr. DeStefano tally 25.4 hours (excluding the November 27, 2002 entry discussed above). While the Court recognizes the importance of consulting with senior counsel during major cases, 25.4 hours is excessive, particularly where these conversations allegedly relate primarily to the relatively straightforward Count I claim. Accordingly, I will reduce the hours attributable to conversations with Mr. DeStefano by fifty percent. This will cause a reduction in Mr. Barrett's claimed hours by 12.7.

## **2. Reasonable Hourly Rate**

Mr. Barrett has submitted an affidavit in support of the fee petition, in which he avers that he was admitted to practice law in Pennsylvania in 1973, and has been a partner at the reputable firm Saul, Ewing since 1980. He has billed at \$350.00 per hour for all work on this case. Plaintiff's

attorneys Shanna L. Peterson, Colleen F. Nihil and Gregg W. Marsano each claim \$150.00 per hour for their work on this case. Defendant does not dispute the reasonableness of these claimed rates, and I find no independent reason to do so.

**C. CSP's Petition for Fees and Costs**

In its memorandum in opposition to Plaintiff's petition, CSP indicates that it seeks to petition the Court for an award of fees and costs, but is unable to do so because CSP's prior counsel has refused to sign the supporting affidavits. My finding today that Plaintiff is the prevailing party and thus entitled to fees and costs under the terms of the employment agreement renders futile any pursuit of fees by CSP.

**III. CONCLUSION**

Because he succeeded on a central claim in this litigation, Mr. Dorazio is the prevailing party and, as such, is entitled to reasonable attorneys' fees and costs pursuant to the terms of his Employment Agreement with CSP. For the foregoing reasons, however, I will reduce the hours properly claimed by Plaintiff's counsel, Mr. Barrett by 29.0 and by Ms. Creel by 14.3, yielding a total reduction of \$14,909.00 in fees. Thus, I will award Plaintiff \$156,386.00 in fees and \$8,443.66 in costs. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>JACK A. DORAZIO,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>CAPITOL SPECIALTY</b>	:	
<b>PLASTICS, INC.,</b>	:	
<b>Defendant.</b>	:	<b>No. 01-6548</b>

**ORDER**

**AND NOW**, this      day of **March, 2003**, upon consideration of Plaintiff's Petition for Allowance of Counsel Fees and Costs, and the response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

Plaintiff's Petition for Allowance of Counsel Fees and Costs (document no. 50) is **GRANTED IN PART** and **DENIED IN PART** as follows: Plaintiff is awarded \$156,386.00 in fees and \$8,443.66 in costs.

**BY THE COURT:**

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**Berle M. Schiller, J.**