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

DRONE TECHNOLOGIES, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 2:14-cv-00111-AJS
v.	)	Judge Arthur J. Schwab
	)	
PARROT S.A., PARROT, INC.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

Before the Special Master is the Court's June 12, 2015 Order referring Plaintiff's Petition for Attorneys' Fees and Expenses (the "Section 285 Petition") (Doc. No. 415), Plaintiff's Petition for Rule 37 Attorneys' Fees (the "Rule 37 Petition") (Doc. No. 416) and Defendants' Responses thereto (Doc. Nos. 429, 430) to the Special Master for a Report and Recommendation. The Court directed the Special Master to recommend the amount of reasonable attorneys' fees and expenses to be awarded to Plaintiff pursuant to applicable legal standards. See Order Re: Post-Trial Damages Mots. (Doc. No. 404). The Special Master's Report and Recommendation follows.

A. PERTINENT BACKGROUND

Plaintiff's Complaint in this alleged patent infringement case was filed on January 24, 2014 and averred the alleged infringement of two (2) United States Patents. After extensive motions practice relating to initial disclosures and discovery, on November 3, 2014 the Court entered an Order (Doc. No. 107) striking Defendants' Answer and Counterclaims and entering default judgment against Defendants as to liability for infringement of the Patents.[1]

[1] The Court entered the November 3, 2014 Order as a sanction after finding that

A three-day jury trial as to damages commenced on April 27, 2015. See Mem. Order Re: Post-Trial Damages Mots. at 1 (Doc. No. 403). After deliberating, the jury awarded Plaintiff $3,783,950.00 for past damages and rendered an advisory verdict as to Plaintiff's future damages in an amount of $4,016,050.00. Id. at 13. The Court determined that the jury's advisory verdict for future damages was a "reasonable award" that "compensate[d] Plaintiff for Defendants' future uncondoned use of its patents." Id. Accordingly, on June 12, 2015, the Court issued a Final Judgment Order entering judgment against Defendants in the amount of $7,800,000.00 – $3,783,950.00 for Plaintiff's past damages and $4,106,050.00 for Plaintiff's future damages. See Final J. Order (Doc. No. 405).

In its June 12, 2015 Memorandum and Order Regarding Post-Trial Damages Motions (Doc. Nos. 403, 404), the Court ruled upon Plaintiff's Motion for Fees Under Rule 37 (Doc. No. 380), Plaintiff's Renewed Motion for an Exceptional Case Finding and an Award of Attorneys' Fees (Doc. No. 383), and Defendants' Responses thereto (Doc. Nos. 389, 390). The Court granted Plaintiff's Motion for Fees Under Rule 37 and granted in part and denied in part Plaintiff's Renewed Motion for an Exceptional Case Finding and an Award of Attorneys' Fees; the Renewed Motion was granted to the extent Plaintiff sought attorneys' fees and expenses and denied to the extent Plaintiff moved for an award of the costs of Plaintiff's expert witness. Pursuant to the Order, Plaintiff was directed to file – on or before June 25, 2015 – both the Section 285 Petition and the Rule 37 Petition. See Order Re: Post-Trial Damages Mots. (Doc. No. 404). The Court directed Defendants to file Responses to the Petitions on or before July 8, 2015. Id.

Defendants were non-compliant with discovery obligations and the Court's Orders. See Nov. 3, 2014 Mem. Op. at 25 (Doc. No. 106).

On June 25, 2015, Plaintiff timely filed the Section 285 Petition (Doc. 415) and the Rule 37 Petition (Doc. No. 416). In the Section 285 Petition, Plaintiff seeks an award of $1,595,097.00 for attorneys' fees and $107,465.63 for costs.[2] In the Rule 37 Petition, Plaintiff seeks an award of $174,702.00 for attorneys' fees.

On July 8, 2015, Defendants timely filed a Response to Plaintiff's Rule 37 Petition (Doc. No. 429) and a Response to Plaintiff's Section 285 Petition (Doc. No. 430). In their Response to the Section 285 Petition, Defendants "object[] to the fees requested by Plaintiff in several respects: (1) the hourly rate claimed is not the market rate; (2) the time charged is excessive; (3) the time charged includes unrelated matters; and (4) the time charged is not supported by the information provided by Plaintiff." See Resp. to Section 285 Pet. at 1. In their Response to the Rule 37 Petition, Defendants argue that: (1) Plaintiff failed to meet its burden of proof regarding hourly rates; and, (2) Plaintiff's time sheets contain vague, duplicative, unrelated and non-compensable charges. See Resp. to Rule 37 Pet. at 1, 6. In the Rule 37 Petition, Defendants seek discovery and an evidentiary hearing on the issue of Plaintiff's attorneys' fees. Id. at 5.[3]

The Parties having fully briefed their respective positions, the Court directed the Special Master to recommend the amount of a reasonable award of attorneys' fees and expenses to

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2 In response to a request by the Special Master, on July 8, 2015 Plaintiff provided a spreadsheet to the Special Master and Defendants' Counsel containing additional descriptive information regarding the costs sought in the Section 285 Petition.

3 For the reasons stated below, the Special Master does not recommend an award of attorneys' fees pursuant to the Rule 37 Petition. Nevertheless, while an evidentiary hearing must be conducted "if the reasonable market rate [for attorneys' fees] is in dispute . . . our appellate court held that a hearing is only necessary if there are disputed questions of fact." See Sandvik Intellectual Prop. v. Kennametal, Inc., 2013 WL 141193, at *3 (W.D. Pa. Jan. 11, 2013), citing Blum v. Witco, 829 F.2d 367, 377 (3d Cir. 1987). Here, as in the very similar circumstances in Sandvik, an evidentiary hearing is unnecessary. Id. "A request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

Plaintiff pursuant to applicable legal standards. See Order Re: Post-Trial Damages Mots. (Doc. No. 404).

B. ANALYSIS OF THE SECTION 285 PETITION

1. Applicable Law

On procedural matters not unique to areas of law "exclusively assigned" to the Federal Circuit, the law of the regional circuit governs. Nat'l Presto Indus., Inc. v. W. Bend Co., 76 F.3d 1185, 1188 n.2 (Fed. Cir. 1996). An award of attorneys' fees and costs pursuant to 35 U.S.C. § 285 is, however, "an issue unique to patent law and therefore subject to Federal Circuit law." Special Devices, Inc. v. OEA, Inc., 269 F.3d 1340, 1343 (Fed. Cir. 2001). As such, calculation of an award for the attorneys' fees and costs sought in the Section 285 Petition is governed by Federal Circuit law.[4] Third Circuit precedent may be a useful supplement for points the Federal Circuit has not addressed. Eli Lilly & Co. v. Zenith Goldline Pharm., Inc., 264 F. Supp. 2d 753, 758 (S.D. Ind. 2003).

Conversely, the Court's "decision to sanction a litigant pursuant to Fed. R. Civ. P. 37 is one that is not unique to patent law" and the Federal Circuit "therefore appl[ies] regional circuit law to that issue." ClearValue, Inc. v. Pearl River Polymers, Inc., 560 F.3d 1291, 1304 (Fed. Cir. 2009). Accordingly, calculation of an award for the attorneys' fees sought in the Rule 37

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[4] A plethora of district courts have arrived at this conclusion. See Nilssen v. Gen. Elec. Co., 2011 WL 633414, at *6 (N.D. Ill. Feb. 11, 2011) (because "this is a patent case, Federal Circuit case law controls the calculation of reasonable attorneys' fees"); Intellect Wireless, Inc. v. HTC Corp., 2015 WL 136142, at *6 (N.D. Ill. Jan. 8, 2015) (Federal Circuit law applies to the calculation of the amount of reasonable attorneys' fees under Section 285); SunTiger Inc. v. Telebrands Adver. Corp., 2004 WL 3217731, at *7 n.2 (E.D. Va. Mar. 29, 2004) (Federal Circuit law governs a court's determination of attorneys' fees awarded under Section 285); Eli Lilly & Co. v. Zenith Goldline Pharm., Inc., 264 F. Supp. 2d 753, 758 (S.D. Ind. 2003) (Federal Circuit law applies to the calculation of fees and expenses under Section 285).

Petition is governed by the law of the Third Circuit. Id.

2. Permissible Scope of Attorneys' Fees and Costs Awarded in "Exceptional" Cases

A determination of whether to award attorneys' fees and costs pursuant to 35 U.S.C. § 285 is a two-step process: a court must first determine whether the case is "exceptional"; if the court finds the case to be exceptional, it must then determine whether an award of attorneys' fees and costs is appropriate. See Kilopass Tech., Inc. v. Sidense Corp., 738 F.3d 1302, 1308-09 (Fed. Cir. 2013). Here, the Court determined that Defendants' "dilatory and unreasonable conduct merits a finding that this case is exceptional pursuant to 35 U.S.C. § 285." See Mem. Order Re: Post-Trial Damages Mots. at 21 (Doc. No. 403). Indeed, the Court held that the extent of Defendants' misconduct was "pervasive" and that Defendants: (1) "proactively and steadfastly refused to comply with Orders of Court"; (2) "advanced inconsistent and presumably false positions"; (3) systematically "stymied both Plaintiff's prosecution of its claims and the Court's administration of th[e] dispute"; and, (4) tactically and pervasively defied the Court. Id. at 20. Accordingly, the Court granted Plaintiff's request for attorneys' fees and costs. See id. at 22.

An exceptional case finding "usually does not support a full award of attorney's fees." Monolithic Power Sys., Inc. v. O2 Micro Int'l, Ltd., 726 F.3d 1359, 1369 (Fed. Cir. 2013). Instead, a "fee award must bear some relation to the extent of the misconduct, and compensate a party for the extra legal effort to counteract the misconduct." Id. (internal quotation signal omitted). Nevertheless, more than two decades ago, the Federal Circuit noted that it could "certainly imagine a case in which litigation misconduct would justify an award of attorney fees for the entire litigation." See Beckman Instruments, Inc. v. LKB Produkter AB, 892 F.2d 1547, 1553 (Fed. Cir. 1989). In Monolithic Power Systems, the Federal Circuit held that the case before it "was the kind of case" the Beckman Instruments Court "had in mind." Monolithic

Power Sys., Inc., 726 F.3d at 1369. Examining the record before it, the Monolithic Power Systems Court described the "vexatious litigation strategy" and "litigation misconduct" articulated by the trial court: defendant made "various misrepresentations" which affected the litigation from discovery through judgment and, further, defendant filed at least three "baseless motions" to needlessly prolong the litigation. See id. at 1364. As such, the Federal Circuit determined that defendant's argument – which asserted that "it was an abuse of discretion for the district court to award fees that [were] not traceable solely to [defendant's] 'exceptional' behavior in the litigation" – was wide of the mark. Id. at 1368. Rather, given defendant's "abusive 'pattern'" and "vexatious 'strategy,'" that was "'pervasive' enough to infect the entire litigation," the Court opined that defendant's "rampant misconduct so severely affected every stage of the litigation that a full award of attorney fees was proper." Id. at 1369.

Here, as in Monolithic Power Systems, the Court determined that Defendants advanced "presumably false positions" and engaged in "tactical and pervasive defiance" of the Court. See Mem. Order Re: Post-Trial Damages Mots. at 20. The Court noted that such conduct permeated multiple phases of the litigation. "Defendants' actions during the discovery phase of this litigation" were "unprecedented" and weighed "heavily towards the imposition of severe sanctions." See Nov. 3, 2014 Mem. Op. at 16 (Doc. No. 106). Thereafter, Defendants "consciously and deliberately strategized to delay this litigation" and "attempted to impede" the just, speedy and inexpensive determination of this matter through extensive and unnecessary motions practice. See Mem. Order Re: Post-Trial Damages Mots. at 20-21.[5] This conduct and Defendants' strategy of delay, which the Court described as both conscious and deliberate,

[5] Several examples of Defendants' use of motions practice to delay the litigation were provided by the Court. See id. at 21.

continued even after the Court's imposition of sanctions during the discovery phase of the litigation. See id. at 21 (noting Defendants' attempts "to impede this litigation through motions practice" and citing motions filed by Defendants in February and March 2015 – one month before the damages trial commenced).[6] Indeed, the Court determined that Defendants "inhibited Plaintiff's ability to prepare this case for trial." Id. at 22.

For these reasons, the Special Master reports and recommends that the award of attorneys' fees and costs should encompass Plaintiff's fees and costs for all stages of the litigation.

3. Methodology for Calculation of Reasonable Attorneys' Fees and Costs in "Exceptional" Cases Using the Hybrid Lodestar Approach[7]

The methodology of assessing a reasonable award of attorneys' fees and costs under 35 U.S.C. § 285 is within the discretion of the district court. Mathis v. Spears, 857 F.2d 749, 754 (Fed. Cir. 1988). When determining an appropriate award of fees and costs in an "exceptional" case, district courts "may use the hybrid lodestar approach." See Maxwell v. Angel-Etts of California, Inc., 53 Fed. Appx. 561, 568 (Fed. Cir. 2002), citing Hensley, 461 U.S. at 433-34. District courts throughout the country have thus employed the hybrid lodestar approach to patent matters. See, e.g., Gerawan Farming, Inc. v. Rehrig Pac. Co., 2013 WL 6491517 (E.D. Cal. Dec.

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[6] In ruling upon Defendants' Motion to Dismiss for Lack of Standing, the Court opined that Defendants' arguments were "re-styled versions of previously unsuccessful invalidity defenses and perhaps are another attempt to stall the upcoming damages trial." See Mar. 24, 2015 Mem. Order at 4 (Doc. No. 229).

[7] "The purpose of [Section] 285 is . . . to compensate the prevailing party for its monetary outlays in the prosecution or defense of the suit." Central Soya Co. v. Geo. A. Hormel & Co., 723 F.2d 1573, 1578 (Fed. Cir. 1983) (citation omitted). Accordingly, the Federal Circuit "explicitly interpreted 'attorney fees' under [Section] 285 to 'include those sums that the prevailing party incurs in the preparation for and performance of legal services related to the suit." See Maxwell v. Angel-Etts of California, Inc., 53 Fed. Appx. 561, 568 (Fed. Cir. 2002), citing Centra Soya Co., 723 F.2d at 1578.

10, 2013); Pfizer Inc. v. Teva Pharm. USA, Inc., 820 F. Supp. 2d 751 (E.D. Va. 2011); Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 2010 WL 6432945 (N.D. Tex. Nov. 5, 2010) (rev'd on other grounds); Veteran Med. Products, Inc. v. Bionix Dev. Corp., 2010 WL 989804 (W.D. Mich. Mar. 16, 2010). Under this approach, a court first determines a lodestar figure by multiplying the number of hours reasonably spent by counsel on the litigation by a reasonable hourly rate. See Maxwell, 53 Fed. Appx. at 568. The lodestar figure may then be increased or decreased "based on a variety of factors" such as the skill and time required in the litigation and the results obtained. Id. Under the hybrid lodestar approach, while a court "must articulate reasons for any changes made to the number of hours spent or to the lodestar," it "is not required to do a line-by-line analysis." Id.

With respect to an assessment of the reasonableness of firms' billing rates, "there must be some evidence to support the reasonableness of, *inter alia*, the billing rate charged and the number of hours expended." In re Electro-Mechanical Indus., 359 Fed. Appx. 160, 165 (Fed. Cir. 2009). In addition to affidavits and declarations, the Court of Appeals for the Federal Circuit and other courts have relied upon the American Intellectual Property Law Association's (the "AIPLA") *Economic Survey* – which provides billing rates for intellectual property attorneys based on their degree of experience – to gauge the reasonableness of attorneys' fees incurred in patent litigation. See View Eng'g, Inc. v. Robotic Vision Sys., Inc., 208 F.3d 981, 987-88 (Fed. Cir. 2000) (approving lodestar calculation by a trial court using AIPLA survey); Mathis, 857 F.2d at 755-56 (district court's conclusion that billing rates "generally corresponded to those presented in the [AIPLA] surveys and were [thus] reasonable in view of those surveys" was, "as the law makes clear," appropriate); Intamin, Ltd. v. Magnetar Technologies Corp., 2009 WL 5215393, at *1 (C.D. Cal. Dec. 28, 2009) (reasonableness of billing rates can be guided by

"surveys" of "patent-lawyer billing rates" in the relevant geographic area, such as "Los Angeles rates for a case tried in Los Angeles"); Jepson, Inc. v. Makita USA, Inc., 1994 WL 543226, at *11 (C.D. Cal. May 27, 1994) (such surveys are perhaps "the best way" to determine the reasonableness of billing rates); Marctec, LLC v. Johnson & Johnson, 2010 WL 680490, at *11 (S.D. Ill. Feb. 23, 2010), aff'd, 664 F.3d 907 (Fed. Cir. 2012) (weighing reasonableness of attorneys' fees against those reported in AIPLA survey); Bendix Commercial Vehicle, Sys., LLC v. Haldex Brake Prods. Corp., 2011 WL 871413, at *3 (N.D. Ohio Mar. 1, 2011) (amount of attorneys' fees sought by plaintiffs not "out of line" with those reflected in AIPLA survey and therefore were appropriate); Swapalease, Inc. v. Sublease Exchange.com, Inc., 2009 WL 1119591, at *5 (S.D. Ohio Apr. 27, 2009) (employing AIPLA survey to ascertain reasonable rates).

The Special Master has thus reviewed the 2011 and 2013 AIPLA *Economic Survey* to determine whether Plaintiff's counsel's billing rates are within the range of fees charged by other patent lawyers within this district. The AIPLA's 2013 *Survey*, which contains data from 2012, shows that in Pittsburgh, Pennsylvania (the "other East" region), the median billing rate for partners, without regard to the number of years of experience, is an hourly fee of $400; billing rates for partners in the highest quartile were $468 per hour. Portions of the 2011 and 2013 AIPLA *Economic Survey* are attached hereto as Exhibit A.

4. Evaluation of the Reasonableness of Hourly Rates in the Section 285 Petition

With the exception of Mr. Tabachnick (with a $450 hourly rate), Plaintiff's attorneys' hourly rates range from $350 to $425. See Decl. of John C. Thomas, III ¶ 7 (Doc. No. 415-1). In addition to the Declaration of Plaintiff's own counsel, Mr. Thomas, Plaintiff filed of record the Declaration of Frederick H. Colen, an intellectual property lawyer from the Reed Smith firm

who has "been practicing intellectual property law in this district for over 40 years." See Decl. of Frederick H. Colen ¶ 3 (Doc. 415-2). Mr. Colen declares that he is "generally aware of the range of hourly rates charged" by attorneys specializing in intellectual property law "in this district." Id. ¶ 6. Further, Mr. Colen states that he is "personally aware of many instances in which significantly higher hourly rates are charged for intellectual property litigation in this district." ¶ 8. Accordingly, Mr. Colen attests that the hourly rates charged by Plaintiff's counsel are "more than reasonable for these lawyers, both in this district and outside of this district." Id.

The Special Master is satisfied that the hourly rates charged by Plaintiff's counsel are reasonable hourly rates which fall well within the market rates for patent litigators in Pittsburgh, Pennsylvania. Defendants contend that "Plaintiff has not offered any evidence as to what constitutes a reasonable market rate" in Pittsburgh, Pennsylvania. See Defs.' Resp. to Section 285 Pet. at 1-2 (Doc. No. 430). Indeed, Defendant implies that because "Plaintiff's rates exceed those charged by Parrot's local counsel in Pittsburgh," this is somehow indicative that Plaintiff's counsel's rates exceed market rates. Id. at 2. The Special Master is not persuaded by Defendants' arguments.

First, Defendants' local counsel maintains a practice in Pittsburgh and filed a Declaration indicating that Defendants' local counsel charged a $400 hourly rate for its partners in this litigation. See Decl. of Eric G. Soller ¶ 13 (Doc. No. 390-1). With the exception of Mr. Tabachnick's $450 hourly rate, Plaintiff's attorneys charged no more than $425 per hour – a mere 6.25% difference from Defendants' attorneys' own hourly rates. A 6.25% difference is certainly not indicative of Defendants' contention that the rates charged by Plaintiff's counsel are "well above market rates for Pittsburgh." See Defs.' Resp. to Rule 37 Pet. at 3 (Doc. No. 429).

Second, Defendants provided the Special Master and counsel for Plaintiff documents

outlining Defendants' attorneys' fees for Defendants' co-counsel, Osha Liang LLP. Defendants provided these documents pursuant to a Protective Order and, accordingly, detailed descriptive information concerning the billing rates for Osha Liang LLP cannot be articulated in the Report and Recommendation. Nevertheless, these documents indicate that Osha Liang LLP charged hourly rates in this litigation substantially in excess of those charged by Plaintiff's Counsel. As the Federal Circuit has held, "courts of appeals have uniformly concluded that forum rates should be used to calculate attorneys' fee awards . . . [T]o determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation." Bywaters v. United States, 670 F.3d 1221, 1232-33 (Fed. Cir. 2012), citing Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1348 (Fed. Cir. 2008).[8] As such, the hourly rates charged in this litigation by Defendants' co-counsel Osha Liang LLP support a determination that the rates charged by Plaintiffs' counsel – rates substantially less than Defendants' co-counsel – are reasonable.

Moreover, while Defendants contend that Plaintiff has offered no evidence as to what constitutes a reasonable market rate, Mr. Colen's Declaration provides such evidence. The range of rates charged by Plaintiff's counsel represents reasonable rates in the Pittsburgh market area. See Decl. of Frederick H. Colen ¶ 8. Mr. Colen, a patent litigator "in this district for over 40 years," is "personally aware" of significantly higher hourly rates charged "in this district." Id. ¶¶ 3, 8. Defendants emphasize that the burden is on Plaintiff to produce satisfactory evidence of reasonable market rates "**in addition to the attorney's own affidavits**." See Defs.' Resp. to Rule 37 Pet. at 2 (emphasis in original), citing Smith v. Phila. Housing Auth.,107 F.3d 223, 225 (3d Cir. 1997); Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). Plaintiff has produced such

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[8] The forum rate should not be disregarded merely because a party elects to retain counsel located "outside the forum in a jurisdiction that charges higher rates than the forum rates." Id. at 1233.

evidence – Mr. Colen is a lawyer at the Reed Smith firm and is not employed by Plaintiff's counsel. See Decl. of Frederick H. Colen ¶ 2. Mr. Colen does declare that he "practiced together at Reed Smith" with certain of Plaintiff's attorneys. Id. ¶ 9. However, this does not transform Mr. Colen's Declaration into an affidavit of Plaintiff's own attorney. The Third Circuit did not opine otherwise. Smith v. Phila. Housing Auth.,107 F.3d at 225 n.2. Even were Mr. Colen's Declaration somehow considered inadequate, courts have considerable "experience in determining what are reasonable hours and reasonable fees, and should rely on that experience and knowledge if the documentation is considered inadequate." Slimfold Mfg. Co. v. Kinkead Indus., 932 F.2d 1453, 1459 (Fed. Cir. 1991). The Special Master believes that Mr. Colen's Declaration is adequate and, further, based upon the Special Master's experience and knowledge, that Plaintiff's counsel's billing rates are reasonable and reflective of the market rates for patent litigation in Pittsburgh.

Further, it is "not the number of affidavits submitted that is important [but,] rather, it is the content of the affidavits and the expertise of the affiant, with a proper foundation, to make the representations contained therein." Rode v. Dellarciprete, 892 F.2d 1177, 1185 (3d Cir. 1990). The Special Master is satisfied that the expertise of Mr. Colen and the content of his Declaration is sufficient to establish that Plaintiff's counsel's hourly fees are within the reasonable market rates for patent litigators in Pittsburgh.[9] Data from the 2011 and 2013 AIPLA *Economic Surveys* reinforces and supports this conclusion. See supra.

[9] The Special Master notes that a court in this district, examining the reasonableness of hourly rates in patent litigation, determined – using 2012 billing levels – that hourly rates for attorneys "ranging from $242.25 to $599.25" and an hourly rate of $221.00 for a paralegal "are largely reflective of the market rate of attorneys and paralegals . . . in the Pittsburgh market" for commercial and patent litigation. See Sandvik Intellectual Prop. v. Kennametal, Inc., 2013 WL 141193, at *3-6 (W.D. Pa. Jan. 11, 2013). Indeed, in Sandvik, Judge McVerry noted that attorneys' fees had been "justifiably awarded" based upon even "higher rates in specialized litigation such as this." Id. at *6.

Finally, Defendants assert that Plaintiff has not offered evidence that any past or present client of Plaintiff's counsel has paid the hourly billing rates charged by Plaintiff's counsel in this litigation. See Defs.' Resp. to Rule 37 Pet. at 3. Defendants offered no case law to support the imposition of such a requirement. Indeed, in the face of similar arguments advanced by a party, the Federal Circuit noted that the purpose of Section 285 is to reimburse a party (and not that party's attorneys) who had been "forced to undergo an 'exceptional' case." Mathis, 857 F.2d at 753. Attacking the Section 285 award "as though it is made to [Plaintiff's] attorneys" confuses and obfuscates this purpose. Id. Accordingly, the Special Master concludes that Plaintiff has no burden to present evidence that any past or present client of Plaintiff's counsel paid the hourly billing rates charged by Plaintiff's counsel in this litigation.

For these reasons, the Special Master reports and recommends that the hourly billing rates identified in the Declaration of John C. Thomas, III at Paragraph 22(A) (Doc. No. 415-1) are reasonable hourly rates which fall well within the market rates for patent litigators in Pittsburgh, Pennsylvania.

5. Evaluation of the Reasonableness of Hours Expended in Plaintiff's Section 285 Petition

Having determined that the billing rates of Plaintiff's counsel are reasonable hourly rates reflective of market rates in the Pittsburgh forum, the Special Master must next determine the hours reasonably spent by counsel on this litigation. See Maxwell, 53 Fed. Appx. at 568. When "a prevailing party has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation." Mathis, 857 F.2d at 755 (internal quotation signal omitted). The Special Master has carefully scrutinized the billing entries submitted by Plaintiff as well as the objections to certain of the billing entries raised by Defendants. The Special Master is satisfied – with limited

exceptions – that the attorneys' fees submitted by Plaintiff are properly supported, that the work performed was reasonably related to the issues in this case, and that the fees are not excessive.[10]

First, given the scope of the patent litigation and the magnitude of damages awarded, the attorneys' fees and expenses incurred by Plaintiff very closely approximate the midpoint of all attorneys' fees and costs as reflected in AIPLA surveys of patent infringement litigation actions in this district. Plaintiff seeks an award of $1,595,097.00 for attorneys' fees and $107,465.64 in costs for a total of $1,702,562.64. The 2011 AIPLA survey indicates that the median amount of total attorneys' fees and costs for similar litigation in this district is $1,750,000.00. As such, the AIPLA survey supports the conclusion that an award of full attorneys' fees and expenses is reasonable in comparison to fees for similar litigation. See Marctec, 2010 WL 680490, at *11, citing Mathis, 857 F.2d at 755-56.

Second, the Special Master has carefully considered Defendants' objections to Plaintiff's attorneys' fees and – with limited exceptions – is unconvinced by Defendants' arguments. Defendants assert that certain of Plaintiff's time entries "appear to be" overstated. See Defs.' Resp. to Section 285 Pet. at 2. The Special Master finds no basis to conclude that Plaintiff routinely "overstated" its fees. Specifically, the Special Master considered, among other arguments:

(1) Defendants' assertion that Plaintiff should not be compensated for its counsel's travel time to and from Pittsburgh to Taiwan to attend depositions. See Defs.' Resp. to Section 285 Pet. at 3. The Special Master concludes that Plaintiff's counsel's travel time to depositions is

[10] The Special Master notes that Plaintiff's counsel exercised billing judgment by removing "at least 150 hours of time" incurred for, among other things, consultation amount Plaintiff's attorneys. See Decl. of John C. Thomas, III ¶ 19. Plaintiff has not included those hours in the requested attorneys' fees in the Section 285 Petition. Id.

reasonable and compensable.

(2) Defendants' argument that Plaintiff requests attorneys' fees for four (4) duplicate time entries. See Defs.' Resp. to Section 285 Pet. at 4. The Special Master reviewed the time entries and determined that the identified time entries are not duplicative: two (2) of the entries relate to similar work performed by *different* attorneys and, as such, are not duplicative charges; two (2) other time entries relate to similar work performed by the same attorney for *different* amounts of time and, as such, are not duplicate charges.

(3) Defendants' assertion that attorneys' time related to ADR, settlement communications and appellate issues are not properly costs of this litigation and thus should be excluded from an award of attorneys' fees. See Defs.' Resp. to Section 285 Pet. at 4-5. The Special Master concludes, as discussed supra., that Plaintiff is entitled to an award of attorneys' fees for all phases of this litigation. Moreover, Defendants' counsel's own billing records include charges related to certain of these same activities; thus, Defendants' argument that such charges are not properly "costs of the litigation" is untenable given Defendants' counsel's own billing of such activities to its client in this same litigation. Further, the Federal Circuit permits the recovery of attorneys' fees incurred in appellate proceedings. See PPG Indus., Inc. v. Celanese Polymer Specialties Co., Inc., 840 F.2d 1565, 1569 (Fed. Cir. 1988) (district court not precluded from awarding fees for prior appeals where

such appeals are an integral part of the ongoing litigation).

(4) Defendants' argument that Plaintiff's counsel's communications with Apple are non-compensable. See Defs.' Resp. to Section 285 Pet. at 9-10. The Special Master concludes that Plaintiff's counsel's strategy regarding and communications with Apple are properly compensable attorneys' fees. The Special Master (in a prior *in camera* review in this litigation) has reviewed certain of the communications at issue and thus has personal knowledge of this issue. The Special Master has determined that the fees to which Defendants object were incurred for issues integrally related to the patents in this litigation. See M.G. v. E. Reg'l High Sch. Dist., 386 Fed. Appx. 186, 189 (3d Cir. 2010) (court may rely upon its personal knowledge of issues when evaluating hours billed in a fee request).

(5) Defendants' assertion that Plaintiff's billing entries are insufficiently detailed and provide insufficient information to conduct a thorough analysis of Plaintiffs' attorneys fees. See Defs.' Resp. to Section 285 Pet. at 11. The Special Master concludes that Plaintiff's billing entries are adequately specific and provide enough information to support an award of attorneys' fees and costs pursuant to Federal Circuit requirements. See ClearValue, Inc. v. Pearl River Polymers, Inc., 560 F.3d 1291, 1305 (Fed. Cir. 2009).

(6) Defendants' assertion that certain "conferences," "meetings" or "discussions" conducted by Plaintiff's counsel are non-compensable.

> See Defs.' Resp. to Section 285 Pet. at 4-5. The Special Master has reviewed the time entries to which Defendants object and concludes that the time entries and corresponding fees are reasonable and compensable. Indeed, many of the time entries at issue reflect a conference, meeting or discussion as only one portion of a time entry also relating to other work.[11] Federal Circuit precedent permits such multiple task billings. See Applegate v. United States, 52 Fed.Cl. 751, 769 (Fed. Cl. 2002), aff'd, 70 Fed. Appx. 582 (Fed. Cir. 2003).

In addition to Defendants' above objections to the attorneys' fees in Plaintiff's Section 285 Petition, Defendants object to Plaintiff's attempt to recover: (1) certain attorneys' fees regarding a separate litigation matter filed in California Superior Court; and, (2) certain attorneys' fees for "two separate *Inter Partes Review* (IPR) proceedings" before the Patent and Trademark Office. See Defs.' Resp. to Section 285 Pet. at 5-9. In support of its request for attorneys' fees for the California matter, Plaintiff states only that it "had to monitor the California case in order to ensure compliance with this Court's Order and to obtain information that related to this with respect to damages and declarations made by Defendant's employees." See Decl. of John C. Thomas, III ¶ 20. As to its request for fees for the IPR proceedings, Plaintiff supports its request by explaining that "[h]undreds of thousands of dollars of billings for the IPR proceedings are billed to a separate matter and have not been included [here] . . . Plaintiff's had to investigate the impact and timing issues of the IPR and present them to the Court for its consideration." Id.

Based upon the record as submitted to the Special Master, the Special Master cannot

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[11] See also note 10, supra.

conclude that attorneys' fees for the California litigation are – in their entirety – reasonably and necessarily attributable to this litigation. Defendants object to the following time entries and fees pertaining to the California litigation: 6.1 hours of time for Richard Ting ($2,135.00); 10.1 hours of time for Gene Tabachnick ($4,545.00); and, 13.6 hours of time for Clay Hughes ($4,760.00).[12] Defendants thus object to total fees of $11,440.00 relating to the California litigation. The Special Master has reviewed the time entries pertaining to the California litigation and concludes that the time entries and commensurate fees should be reduced by 50%. This reduction fairly compensates Plaintiff for time identified in multiple task billing entries while ensuring that fees that may not be attributed solely to this litigation are not charged to the Defendants. The reduction will be applied to the lodestar calculation infra.

As with attorneys' fees related to the California litigation, the Special Master cannot conclude – based upon the record as submitted to the Special Master – that attorneys' fees for the IPR proceedings are, in their entirety, reasonably and necessarily attributable to this litigation. Defendants object to the following time entries and fees pertaining to the IPR proceedings: 4.5 hours of time for John Thomas ($1,912.50); 15.0 hours of time for Gene Tabachnick ($6,750.00); 1.7 hours of time for James Dilmore ($595.00); 13.8 hours of time for Richard Ting ($4,830.00); 3.5 hours of time for Charles Dougherty ($1,487.50); and, 15.8 hours of time for Clay Hughes ($5,530.00).[13] Defendants thus object to total fees of $21,105.00 relating to the IPR proceedings. The Special Master has reviewed the time entries pertaining to the IPR proceedings and concludes that the time entries and commensurate fees should be reduced by

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[12] Certain of the time entries reflect that the California litigation pertains to only a portion (and not the entirety) of the time entries at issue.

[13] Certain of the time entries reflect that the IPR proceedings pertain to only a portion (and not the entirety) of the time entries at issue.

50%. This reduction fairly compensates Plaintiff for time identified in multiple task billing entries while ensuring that fees that may not be attributed solely to this litigation are not charged to the Defendants. The reduction will be applied to the lodestar calculation infra.

6. Evaluation of the Reasonableness of Expenses in Plaintiff's Section 285 Petition

The Special Master has reviewed the expenses in Plaintiff's Section 285 Petition and additional descriptive information supporting the expenses submitted to the Special Master and Defendants' counsel on July 8, 2015. Defendants objected to several minor expense entries which Defendants indicated may not relate to this litigation. See Defs.' Resp. to Section 285 Pet. at 11-12. The Special Master has reviewed the expenses and supplemental documentation in support and concludes that the expenses are reasonable, appropriate and attributable to this litigation. Further, while Defendants "reserve[d] the right to address these expenses after receipt and review of Plaintiff's supporting documentation" (which was provided to Defendants on July 8, 2015), Defendants have raised no further issues concerning the expenses. See id. at 11. When a court conducts a "line-by-line analysis of [a party's] costs and exclude[s] those it f[inds] unreasonable," the court does not abuse its discretion in granting the remaining costs to a party. Gorini v. AMP, Inc., 2004 WL 3244159, at *2 (3d Cir. Dec. 8, 2004). Accordingly, the Special Master concludes that Plaintiff is entitled to an award of $107,465.64 for its expenses and costs in this litigation.

7. Lodestar Calculation for Plaintiff's Section 285 Petition

Having concluded that the Plaintiff's counsel's hourly rates are reasonable and having determined that certain adjustments to the number of hours spent by Plaintiff's counsel on this litigation were necessary to arrive at a reasonable number of hours, the Special Master applies the following calculations to determine the lodestar, see Maxwell, 53 Fed. Appx. at 568:

a. Gene A. Tabachnick: 1637.35 hours (1649.9 hours less 12.55 hour adjustments referenced infra.) at $450/hour = fees of $736,807.50;

b. Richard T. Ting: 651.45 hours (661.4 hours less 9.95 hour adjustments referenced infra.) at $350/hour = fees of $228,007.50;

c. Clay P. Hughes: 846.75 hours (861.45 hours less 14.7 hour adjustments referenced infra.) at $350/hour = fees of $296,362.50;

d. Charles H. Dougherty, Jr.: 317.65 hours (319.4 hours less 1.75 hour adjustment referenced infra.) at $425/hour = fees of $135,001.25;

e. John C. Thomas: 216.25 hours (218.5 hours less 2.25 hour adjustment referenced infra.) at $425/hour = fees of $91,906.25;

f. Dr. James G. Dilmore: 156.65 hours (157.5 hours less 0.85 hour adjustment referenced infra.) at $350/hour = fees of $54,827.50;

g. Legal Assistants/Paralegals: 224.45 hours at $160/hour = fees of $35,912.00.

Total Fees: $ 1,578,824.50
Expenses: $ 107,465.64

TOTAL AWARD OF FEES AND COSTS: $ 1,686,290.14

Because the result yielded by the lodestar represents a reasonable amount of attorneys' fees for an action for patent infringement in this district, the Special Master concludes that an adjustment to the lodestar is unnecessary.

For these reasons, the Special Master reports and recommends that $1,686,290.14 is a reasonable award of attorneys' fees and costs pursuant to the Section 285 Petition.

C. ANALYSIS OF THE RULE 37 PETITION

In the Rule 37 Petition, Plaintiff notes the pending Section 285 Petition and states that it "is not seeking double recovery of the fees requested" in the Section 285 Petition. See Decl. of

John C. Thomas, III at 8 n.3 (Doc. No. 416-1). Instead, Plaintiff seeks only to recover its total fees "under the two alternative bases." Id. Defendants object to any double recovery of attorneys' fees and note that the attorneys' fees sought in the Rule 37 Petition are "also included in the attorneys' fees" identified in the Section 285 Petition. See Defs.' Resp. to Rule 37 Pet. at 1 n.1.

Because the Special Master concludes infra. that Plaintiff's counsel's hourly rates were reasonable and, with limited exceptions, that the hours expended by Plaintiff's counsel were reasonable, further analysis of the Rule 37 Petition is unnecessary. Plaintiff does not seek double recovery of its attorneys' fees nor would such recovery be permissible. See Pub. Interest Research Grp. of New Jersey, Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995) (reasonable attorneys' fees cannot produce a "windfall").

For these reasons, the Special Master reports and recommends that there be no award of attorneys' fees pursuant to the Rule 37 Petition.

D. CONCLUSION

The Special Master recommends that the Court award $1,686,290.14 to Plaintiff as a reasonable amount of attorneys' fees and costs pursuant to the Section 285 Petition. The Special Master recommends that there be no award of attorneys' fees pursuant to the Rule 37 Petition.

Respectfully submitted,

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