

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS

FILED

OCT 18 2016

CLERK, U.S. DISTRICT COURT

Deputy

INDUSTRIAL MODELS, INC.,

Plaintiff,

VS.

SNF, INC., ET AL.,

Defendants.

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NO. 4:15-CV-689-A

ORDER

Came on for consideration the motion of plaintiff, Industrial Models, Inc., for attorney's fees on statutory fee-shifting grounds. The court, having considered the motion, the response and objections of defendants, SNF, Inc., BrandFX Holdings, LLC, and BrandFX, LLC d/b/a BrandFX, the reply, and applicable authorities, finds that the motion should be granted.

By memorandum opinion and final judgment signed August 29, 2016, the court granted plaintiff's motion for summary judgment and declared that (1) plaintiff had not infringed any trade dress right, patent or copyright of any of the defendants; (2) that no sale or reasonably foreseeable use of certain molds by plaintiff would infringe any trade dress right, patent or copyright of any defendant; and (3) no use, manufacture, or sale by plaintiff of any product reasonably expected to result from a manufacturing process using the subject molds would infringe any trade dress

right, patent or copyright of any defendant. Doc.<sup>1</sup> 79 & 80.

Plaintiff now seeks an award of attorney's fees under the fee-shifting aspects of the Lanham Act, 15 U.S.C. § 1117(a)), Patent Act, 35 U.S.C. § 285, and the Copyright Act, 17 U.S.C. § 505. A similar standard applies under each. See Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979, 1985 (2016); Octane Fitness, L.L.C. v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1756 n. 6 (2014); Baker v. DeShong, 821 F.3d 620, 625 (5<sup>th</sup> Cir. 2016).

Under the Patent and Lanham Acts, the court considers whether the case is exceptional, meaning that it stands out from others with respect to the substantive strength of a party's litigating position or the unreasonable manner in which the case was litigated. ICON, 134 S. Ct. at 1756. The determination is made on a case by case exercise of the court's discretion, considering the totality of the circumstances. Highmark, Inc. v. Allcare Health Mgt. Sys., Inc., 134 S. Ct. 1744, 1748 (2014). Fee shifting under the Copyright Act is similar, but the court need not find that the case is exceptional. Courts have broad leeway in ordering fee shifting under the Copyright Act. Kirtsaeng, 136 S. Ct. at 1985. No matter which of the three Acts is under consideration, the court focuses on frivolousness, motivation, objective unreasonableness (in both legal and factual components

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<sup>1</sup>The "Doc." reference is to the number of the item on the docket in this action.

of the case), and the need in particular circumstances to advance considerations of compensation and deterrence. Kirtsaeng, 136 S. Ct. at 1985; ICON, 134 S. Ct. at 1756 n.6; Baker, 821 F.3d at 625. Fee shifting is appropriate in a declaratory judgment action such as this one. Highmark, 134 S. Ct. at 1747; Lefemine v. Wideman, 133 S. Ct. 9, 11 (2012).

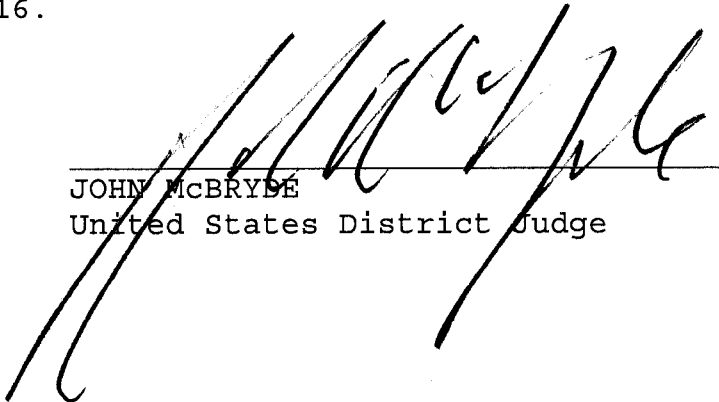
The court is satisfied that this is a case in which fee-shifting would be appropriate. As noted in the court's memorandum opinion and order of August 29, plaintiff never infringed any trade dress right, patent, or copyright of defendants. Doc. 79 at 9. Yet defendants continually threatened plaintiff and refused all efforts to get them to agree that they would not sue plaintiff for any alleged infringement. Id. at 7; Doc. 77 at 2. This, despite the fact that defendants could not identify any relevant trade dress, patent, or copyright that would be infringed. Doc. 79 at 9.

The court is also satisfied that the amount of fees sought, \$239,408.25, is appropriate and has been calculated in compliance with Johnson factors as applied to the lodestar calculation. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5<sup>th</sup> Cir. 1974). And, plaintiff exercised proper billing judgment. Defendants' objections are without merit. Plaintiff timely disclosed the documents supporting its fee request and defendants

have had ample time in which to study them and make objections. Plaintiff has appropriately segregated and limited the fees it seeks to recover to those necessarily incurred in pursuing declaratory relief. Defendants have acted collectively and have not shown that segregation of fees as to each of them separately is appropriate or required. Doc. 77 at 2; Doc. 79 at 7.

The court ORDERS that plaintiff's motion for attorney's fees be, and is hereby, granted, and that plaintiff have and recover from defendants, jointly and severally, the sum of \$239,408.25 as reasonable and necessary attorney's fees incurred in the prosecution of its declaratory judgment claims in this action.

SIGNED October 18, 2016.



JOHN MCBRYDE  
United States District Judge