

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: November 9, 2009

Date Decided: February 5, 2010

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Re: *Concord Steel, Inc. v. Wilmington Steel Processing
Co., Inc., et al.*, Civil Action No. 3369-VCP

Dear Counsel:

This matter is before me on the request of Plaintiff, Concord Steel, Inc. ("Concord"), for an award of more than \$400,000 in attorneys' fees and expenses pursuant to the Court's Opinion of September 30, 2009 (the "Opinion"), which held that Concord was entitled to recoup its reasonable attorneys' fees and expenses. The Opinion, issued after a three-day trial on the merits, resolved a dispute between Concord and Defendant Wilmington Steel Processing Co., Inc. ("WSP") over whether WSP and certain of its employees breached a noncompetition covenant in an Asset Purchase

Agreement (the “APA”) between Concord and WSP.¹ In the Opinion, I found WSP and Kenneth Neary, WSP’s founder and president (collectively, “Defendants”), liable for breaching the noncompetition covenant. I also held that because Defendants breached the APA, a provision in the agreement² entitled Concord to recover from WSP and Neary, jointly and severally, its reasonable attorneys’ fees and other costs and expenses related to this litigation.³

On October 15, 2009, Concord submitted its Memorandum in Support of Request for Attorneys’ Fees and Expenses, together with supporting affidavits. In those papers, Concord requests attorneys’ fees of \$399,057.50 and expenses of \$16,822.05, for a total of \$415,879.55.⁴ Defendants oppose Concord’s request on two grounds, contending the award is limited by law to 20 percent of the requested amount or, at a minimum, the request is unreasonable and should be reduced by 30 percent. For the reasons stated in

¹ PX 1 § 7.7(b). Section 7.7 of the APA, entitled “Restrictive Covenants,” includes the noncompetition covenant.

² Specifically, the APA includes a fee shifting provision which provides that “[WSP] and [Neary] agree that any breach . . . by any of them of any provision of this Section 7.7 shall entitle [Concord] . . . to any other remedies (including Losses) which may be available to [Concord].” *Id.* The APA defines “Losses” to include all “costs and expenses of whatever kind or nature (including reasonable attorneys’ fees)” *Id.* § 1 at 8.

³ *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *16 (Del. Ch. Sept. 30, 2009).

⁴ Pl.’s Opening Mem. 2.

this Letter Opinion, I conclude that Concord is entitled to an award of \$338,966 in attorneys' fees and \$16,822.05 in costs and expenses, for a total award of \$355,788.05.

I. BACKGROUND

Concord was represented by two law firms in this action. Lead counsel was Jeffrey H. Daichman of the firm of Kane Kessler, P.C. ("Kane Kessler"); he was assisted by partners Steven E. Cohen and Robert L. Lawrence and an associate, Sarah B. Yousuf. The firm of Smith Katzenstein & Furlow LLP ("SKF") served as Delaware counsel. Two attorneys from the SKF firm worked on this matter: Laurence V. Cronin and Etta R. Wolfe. Concord had a straightforward arrangement with its counsel: it would pay the attorneys from Kane Kessler and SKF for the time they worked at their customary hourly billing rates. There were no special, contingent, or unusual arrangements between Concord and its counsel. The attorneys' fees and expenses Concord actually incurred were \$305,007.50 in fees and \$5,357.38 in expenses at Kane Kessler for a total of \$310,364.88, and \$94,050 in fees and \$11,464.67 in expenses at SKF for a total of \$105,514.67.⁵ Thus, the grand total of fees and expenses Concord seeks to recover is \$415,879.55.

⁵ The weighted average hourly rates at Kane Kessler and SKF were \$470.84 and \$276.86, respectively.

II. ANALYSIS

I now turn to the objections raised by WSP to Concord's requests for its fees and expenses. Defendants first argue that 10 *Del. C.* § 3912 requires that I cap Concord's attorneys' fees at 20 percent of the damages I awarded at trial.⁶ Section 3912 states:

In all causes of action, suits, matters or proceedings brought *for the enforcement of any note, bond, mechanics lien, mortgage, invoice or other instrument of writing*, if the plaintiff or lien holder in the action, suit or proceeding recovers judgment in any sum, the plaintiff or lien holder may also recover reasonable counsel fees, which shall be entered as a part of the judgment in the action, suit or proceeding. Such counsel fees shall not in any such action, suit or proceeding, exceed 20 percent of the amount adjudged for principal and interest. Such counsel fees shall not be entered as a part of such judgment unless the note, bond, mortgage, invoice or other instrument of writing sued upon, by the terms thereof, expressly provides for the payment and allowance thereof, except in the cases of mechanics liens in which no express agreement shall be necessary in order to entitle the lien holder to reasonable counsel fees.⁷

Defendants contend that Concord sued upon an instrument of writing, the APA, and, thus, § 3912 limits the amount of attorneys' fees Concord can receive. I read the statute differently, however, and do not consider the APA to be the type of instrument of writing referenced by it. Section 3912 governs suits "brought for the enforcement of any

⁶ In the Opinion, I awarded Concord damages in the amount of \$553,512. *Concord Steel*, 2009 WL 3161643, at *16.

⁷ 10 *Del. C.* § 3912 (emphasis added).

note, bond, mechanics lien, mortgage, invoice or other instrument of writing”⁸ The first five of the six items in this list explicitly pertain to writings that evidence a debt. This implies that the final and catch-all item, “other instrument of writing,” refers to a class of items that are also writings that evidence a debt, but do not fit squarely within the scope of one of the preceding items. That is, to qualify as an “other instrument of writing” within the meaning of § 3912, a writing would have to evidence a debt. This conclusion comports with the comments of the Superior Court in *Beneficial Delaware, Inc. v. Waples*, which described the purpose of Section 3912 as being “to impose upon a debtor some part, at least, of the expense of collecting the debt evidenced by his obligation”⁹

The APA is not a writing that evidences a debt. Rather, it is a contract governing the sale of a company’s assets. Moreover, Concord did not file this suit to collect on a debt, but rather to enforce the noncompetition provision contained in the APA. Further, I note that Concord’s Complaint sought unspecified damages caused by Defendants’ breach of that provision, not a precise amount. Because the plain language of § 3912 indicates that it only applies to actions that seek to collect on a debt and this case is not such an action, I find 10 *Del. C.* § 3912 inapplicable to Concord’s request for attorneys’ fees.

⁸ *Id.*

⁹ 2006 WL 1880960, at *3 (Del. Super. July 3, 2006) (quoting *Petitions of Warrington*, 179 A. 505, 507 (Del. Super. 1935)).

In their opposition, Defendants assert that the most recent factually similar case is the Superior Court's decision in *J.A. Moore*,¹⁰ which they claim "suggests that § 3912 would apply to this case."¹¹ *J.A. Moore* involved a dispute over payment on a contract for the renovation of a home. The Superior Court found § 3912 applicable, but did so because it found the renovation contract to be an invoice from the contractor and, thus, expressly within the ambit of § 3912.¹² Because the APA is not an invoice,¹³ *J.A. Moore* provides no support for Defendants' assertion that 10 *Del. C.* § 3912 governs this matter.¹⁴

Defendants' second ground for opposing Concord's fee request is that the requested fees are unreasonable. Under settled Delaware law, a court is to consider the factors set forth in Delaware Lawyers' Rule of Professional Conduct 1.5 in assessing the

¹⁰ *J.A. Moore & Sons Constr. Co. v. Inden*, 1999 WL 1223762 (Del. Super. Sept. 28, 1999).

¹¹ Defs.' Opp'n 1-2.

¹² *J.A. Moore*, 1999 WL 1223762, at *1-2. Notably, Defendants failed to cite any other case law for the proposition that § 3912 applies to a suit for breach of a contract like the APA for the sale of a business.

¹³ The court in *J.A. Moore* defined an invoice as something "a party typically renders . . . when it provides goods and/or services." *Id.* at *2.

¹⁴ *See Princess Hotels Int'l, Inc. v. Del. State Bar Ass'n*, 1998 WL 283465, at *6 (Del. Super. Mar. 10, 1998) (holding that § 3912 did not apply to a contract to reserve hotel rooms because "the contract did not involve a loan.").

reasonableness of attorneys' fees.¹⁵ The factors in Rule 1.5 relevant to this dispute include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; . . .

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained; . . .

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.¹⁶

Delaware courts generally consider attorneys' actual time records when determining the reasonableness of a request for attorneys' fees.¹⁷ A fee request may be reduced when, for example, the court finds that senior partners account for an unreasonably high percentage of the total hours billed.¹⁸

Defendants challenge the reasonableness of Concord's fees on several grounds. First, Defendants contend that this case was not complicated and did not require the amount of time Concord's counsel spent working on it. In particular, Defendants claim

¹⁵ *Mahani v. Edix Media Gp., Inc.*, 935 A.2d 242, 245-46 (Del. 2007).

¹⁶ Del. Lawyers' Rules of Prof'l Conduct R. 1.5(a).

¹⁷ *See Elite Cleaning Co. v. Capel*, 2006 WL 3393480, at *2-4 (Del. Ch. Nov. 20, 2006).

¹⁸ *Carpenter v. Dinneen*, 2008 WL 2268922, at *2 (Del. Ch. June 3, 2008).

that “[a] simple breach of a written agreement, and motion for injunction, and non jury trial thereafter should not cost the litigants more than half a million dollars.”¹⁹ This matter was not as straightforward as Defendants indicate, however. The case revolved around a lengthy and ambiguously worded APA and involved at least a few complex factual issues regarding the nature of the steel processing industry. Defendants also contributed to the difficulty of Concord’s task by changing their theory of the case on more than one occasion. The litigation ultimately lasted more than two years and involved both a day-long preliminary injunction hearing and a three-day trial. While this matter was not overly complex, it was by no means simple.²⁰ Thus, having considered the novelty and difficulty of the questions involved, I reject Defendants’ argument that this factor warrants a reduction of the fees requested in this case.²¹

¹⁹ Defs.’ Opp’n 4. As previously noted, the total fees and expenses Concord seeks are \$415,879.55.

²⁰ The three-day trial produced a 703-page transcript and was followed by extensive post-trial briefing and argument.

²¹ Both of the cases Defendants cited in support of their position are readily distinguishable. In *Beard Research*, I awarded attorneys’ fees 30 percent lower than those requested because Plaintiffs’ counsel overstaffed the narrow matter at issue and failed to secure most of the relief sought in regard to that matter. *Beard Research, Inc. v. Kates*, 2009 WL 3206416, at *3 (Del. Ch. Oct. 1, 2009). Here, as discussed *infra*, the level of staffing by Concord’s counsel is open to some question, but not to the extent involved in *Beard Research*, and Concord successfully secured most, if not all, of the relief it sought. In *In re SS & C*, the court held that Defendants’ counsel should receive only 25 percent of its requested fees because counsel unreasonably spent 700 hours writing a fifty-page brief in which they devoted a substantial amount of space to unnecessary material and a restatement of the background of the dispute. *In re SS & C Techs., Inc. S’holders*

Defendants also complain that Concord's counsel unreasonably "block-billed" in multiple hour increments. Defendants, however, fail to explain what exactly they find objectionable about the block-billing. Based on my review of the time records submitted by Kane Kessler, I cannot say the time claimed in those records is unreasonable. Furthermore, the only case Defendants cite to, *Immedient*, applies California law.²² Accordingly, I find this aspect of Defendants' argument unpersuasive.

Defendants further object to certain of the work for which Concord claims reimbursement as duplicative. Specifically, Defendants attack as unreasonable occasions where two Delaware lawyers billed for time they spent conferring with each other and trial time billed by an attorney who did not handle any witnesses at trial. In *Richmont Capital Partners*, the court held that it may be appropriate to discount the time of two or three lawyers in courtroom or conference when one would do.²³ Nevertheless, I do not find the challenged time claimed by the Delaware lawyers to be unreasonable in the context of this case. It is dubious, however, whether the presence of Steven E. Cohen, a partner at Kane Kessler who did not handle any witnesses, was necessary at trial. Yet,

Litig., 2008 WL 3271242, at *4 (Del. Ch. Aug. 8, 2008). There is no indication, or even any argument, that anything done by Concord's counsel was as wasteful as the work found unnecessary by the court in *In re SS & C*.

²² *Immedient Corp. v. HealthTrio, Inc.*, 2007 WL 656901, at *2-4 (Del. Super. Mar. 5, 2007). The Court is not aware of any Delaware case that finds block-billing objectionable *per se*.

²³ *Richmont Capital Partners I, L.P. v. J.R. Invs. Corp.*, 2004 WL 1152295, at *3 (Del. Ch. May 20, 2004).

Cohen only billed 11.2 hours of trial time, totaling \$5,320 in fees. Because this amount is relatively de minimis and I address separately below the broader issue of Kane Kessler's overuse of partners in this matter, I will not decrease the fees awarded based on Defendants' objection about duplicative work.

Defendants further claim that Concord's fee request is excessive because Concord's counsel called only one primary witness at both trial and the preliminary injunction hearing. While it is true that Concord called only one primary witness,²⁴ its counsel also examined at length the WSP personnel Defendants called, both of whom were critical witnesses. Preparation for the cross-examination of Neary and William Woislaw, both co-defendants in this matter, undoubtedly required significant time and effort on the part of Concord's counsel.

Defendants also claim that Concord employed more attorneys than it needed to in litigating this dispute. While Defendants used only two attorneys, Concord used six. But, the time billed by two of the Concord attorneys was negligible.²⁵ I do not find the number of Concord attorneys excessive, as it is reasonable to use a team of four attorneys, two each from lead counsel and Delaware counsel, over the course of a multi-year litigation that included a three-day trial, especially when the Delaware attorney who

²⁴ That witness was Paul Allen Vesey, Concord's President. At trial, Concord also called a damages expert, Andrew C. Verzilli.

²⁵ Kane Kessler partner Lawrence and associate Yousuf billed 16.2 and 14 hours, respectively.

billed most of the time charged by her firm was an associate. I do find unreasonable, however, the amount of time spent on this matter by partners at Kane Kessler. Of the 647.8 hours billed by Kane Kessler, partners billed 98 percent, or all but 14, of those hours. The lead partner, Daichman, billed 477.5 hours, almost half of the total number of hours billed to Concord. Moreover, the billing rates of the Kane Kessler partners suggest they all were relatively senior partners. On average, those partners billed more than \$470 per hour. In contrast, the billing rate for the lone Kane Kessler associate was \$325 per hour and that of the SKF associate was approximately \$247. This overuse of senior partners artificially inflated Concord's attorneys' fees.

Based on the availability of associates to work on this matter, namely, Yousuf and Wolfe, and the fact that the amount billed by Defendants' counsel was roughly half of the amount billed by Concord's counsel, I find Concord's request for reimbursement of 100 percent of the fees billed by Kane Kessler to be unreasonable. Accordingly, I award Concord only 80 percent of the fees billed by the three Kane Kessler partners who worked on this matter, Daichman, Cohen, and Lawrence. Because I do not find anything unreasonable about the time spent by Yousuf or the SKF attorneys, I approve Concord's request for those fees in its entirety. Thus, I award Concord attorneys' fees of \$244,916 based on the work of Kane Kessler and \$94,050 for the work of SKF, as well as the full amount of claimed expenses, \$16,822.05.

III. CONCLUSION

For the reasons stated in this Letter Opinion, I find that Concord has met its burden of showing the reasonableness of the fees and expenses it claims subject to the modest reduction discussed above. Thus, I award Concord attorneys' fees of \$338,966 and expenses of \$16,822.05, for a total award of \$355,788.05.

I have recorded this award of fees and expenses on the proposed order and final judgment previously submitted by the parties and am entering the Order and Final Judgment concurrently with this Letter Opinion.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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