





1 § 285, which is unique to patent law.” Pharmacia & Upjohn Co. v. Mylan  
2 Pharmaceuticals, Inc., 182 F.3d 1356 (Fed. Cir. 1999). In assessing the reasonableness  
3 of the amount of an attorneys’ fees award pursuant to section 285, the district court  
4 must support its conclusion “by adequate findings of the basis for the award,” including  
5 consideration of “the number of hours worked by specific attorneys.” Water Techs.  
6 Corp. v. Calco, Ltd., 850 F.2d 660, 674 (Fed. Cir. 1988). Additionally, there “must be  
7 some evidence to support the reasonableness of, inter alia, the billing rate charged and  
8 the number of hours expended,” and this evidence properly includes “surveys” of  
9 “patent-lawyer billing rates” in the relevant geographic area, such as “Los Angeles rates  
10 for a case tried in Los Angeles.” Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056,  
11 1068 (Fed. Cir. 1983); Mathis v. Spears, 857 F.2d 749, 755 (Fed. Cir. 1988); Eli Lilly &  
12 Co. v. Zenith Goldline Pharmaceuticals, Inc., 264 F. Supp. 2d 753, 763 (S.D. Ind. 2003)  
13 (citing Mathis, 857 F. 2d at 755-56.). Only if “the evidence reveals that the rate  
14 actually charged is abnormally high or abnormally low will the Court base an attorney  
15 fee award on an hourly rate at variance with the bill for legal services that was actually  
16 rendered to the client.” Mathis v. Spears, 857 F.2d at 756 (citing Chromalloy Am.  
17 Corp. v. Alloy Surfaces Co., 353 F. Supp. 429, 431 (D. Del. 1973).).

18 While the district court need not necessarily “specifically mention” the factors  
19 cited in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975),<sup>1</sup> those  
20 “guidelines” are proper for use in “reaching...findings and conclusions” regarding  
21 section 285 awards. Mathis, 857 F.2d at 755. Additionally, cases subsequent to Kerr  
22 indicate that a court need not discuss each of the twelve Kerr guidelines, so long as it

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25 <sup>1</sup> Factors relevant under Kerr include: (1) the time and labor required; (2) the novelty and difficulty of the  
26 questions involved; (3) the requisite skill to perform the legal service properly; (4) the preclusion of other  
27 employment by the attorney as a result of accepting the case; (5) the customary fee; (6) whether the fee  
28 is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount  
involved and the result obtained; (9) the experience, reputation, and ability of the attorney(s); (10) the  
“undesirability” of the case; (11) the nature and length of the professional relationship with the client; and  
(12) awards in similar cases. Quesada v. Thomason, 850 F.2d 537, 539 & n.1 (9th Cir. 1988).

1 discusses those most relevant to the particular case. See Kessler v. Associates Fin.  
2 Servs. Co., 639 F.2d 498 (9th Cir. 1981).

3 **2. COSTS AND NON-ATTORNEYS' FEES EXPENSES**

4 The Federal Circuit has established that the “purpose of Section 285 is, in a  
5 proper case and in the discretion of the trial judge, to compensate the prevailing party  
6 for its monetary outlays in the prosecution or defense of the suit.” Accordingly,  
7 attorneys’ fees under section 285 “include those sums that the prevailing party incurs in  
8 the preparation for and performance of legal services related to...suit.” Central Soya  
9 Co., Inc. v. George A. Hormel & Co., 723 F.2d 1573, 1577 (Fed. Cir. 1983).

10 **3. PREJUDGMENT INTEREST ON SECTION 285 AWARDS**

11 A district court has “authority, in cases of ‘bad faith or other exceptional  
12 circumstances,’ to award prejudgment interest on the unliquidated sum of an award  
13 made under Section 285.” Spears, 857 F.2d at 761.

14 **4. FAILURE TO OPPOSE THE MOTION FOR ATTORNEYS' FEES AND COSTS**

15 The Court’s previous scheduling order indicated that after Magnetar filed its  
16 supplemental memorandum regarding the precise quantum of attorneys’ fees and costs  
17 under section 285, Intamin’s “response to [Magnetar’s] supplemental memorandum”  
18 would be due seven days later. (Docket No. 168 at 2.) Intamin has failed to comply  
19 with this deadline and never submitted any opposition to the motion for attorneys’ fees.  
20 On that basis alone, the Court may grant the motion for attorneys’ fees and costs. See  
21 C.D. Cal. R. 7-12 (the “failure to file any required paper, or the failure to file it within  
22 the deadline [set by order], may be deemed consent to granting or denial of the  
23 motion.”). Notwithstanding Intamin’s non-response in this matter, the Court will  
24 proceed to consider and address the quantum of fees and costs in greater detail.

1 **D. APPLICATION**

2 **1. ATTORNEYS' FEES**

3 ***a. Hourly Rates***

4 Magnetar's counsel cite survey data to argue that their billing rates "are in line  
5 with...the rates charged by the nation's leading patent litigation firms" and "the rates  
6 charged by comparably sized firms in the Los Angeles...area." (Supp. Memo. at 8.)  
7 Counsel supports the first contention by noting that its partners' hourly billing rates in  
8 the 2004 time frame (\$380 to \$510, see references to Cianfrani, Sganga, and other  
9 partners in Confidential Ross Decl., Ex. A.) were comparable to the 2003 rates of  
10 partners at highly-ranked<sup>2</sup> intellectual property firms Fish & Richardson (\$340 to \$575,  
11 Jankowski Decl., Ex. L at 4.), Sidley Austin (\$395 to \$600, Id. Ex. L at 3.), and  
12 Townsend & Townsend (\$360 to \$525, Id. Ex. L at 5.). Similarly, counsel's associates  
13 billed at 2004 hourly rates of \$195 to \$300, comparable to the associate billing rates of  
14 the same three peer firms (Fish & Richardson associates billed at \$195 to \$355, Sidley  
15 Austin associates at \$205 to \$395, and Townsend & Townsend associates at \$150 to  
16 \$360, see Jankowski Decl., Ex. L at 3-5.) Additionally, counsel note that according to  
17 more recent 2009 surveys by the American Intellectual Property Lawyers Association  
18 ("AIPLA"), counsel's senior partner billed at an hourly rate (\$660) above the median  
19 and below the 75th percentile for comparably-sized intellectual property firms, and  
20 other attorneys in the matter billed at hourly rates below the 25th percentile for  
21 comparably-sized intellectual property firms. (Compare rates described for Sganga in  
22 Confidential Ross Decl., Ex. A with Jankowski Decl., Ex. O, at 5; compare rates  
23 described for other attorneys in Confidential Ross Decl., Ex. A with Jankowski Decl.,  
24 Ex. O, at 5.)

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27 <sup>2</sup> Fish & Richardson, Sidley Austin, and Townsend & Townsend were all ranked among the top 20  
28 intellectual property firms in a 2003 American Lawyer survey of such firms. See Jankowski Decl., Ex.  
J. Fish & Richardson and Sidley Austin both placed in the top five firms in the same survey. See id.

1 To support its second contention, counsel offers evidence that it has “more than  
2 180 attorneys in its three [Los Angeles] offices.” (Supp. Memo. at 10.) In 2003, a  
3 survey of hourly billing by “tiers” indicated that senior partner Sganga’s 2004 billing  
4 rate was within the same “tier,” as 22.9% of partners in comparably-sized Los Angeles  
5 firms, and lower than 34% of partners in that group. (Compare Confidential Ross Decl.,  
6 Ex. A referencing Sganga with Helder Associates Survey, Jankowski Decl., Ex. N, at  
7 155.) Other partners billed at 2004 rates within or below the “tier” of 83% of the same  
8 surveyed group (Compare Confidential Ross Decl. Ex A referencing Jankowski,  
9 Cianfrani, and other partners with Additionally, associate billing rates in 2004 were  
10 below the average billing rates for their classes in firms of 100 or more attorneys.  
11 (Jankowski Decl., Ex. N, at 157.)

12 Additionally, to support the reasonableness of hourly rates billed by its  
13 paralegals and support staff, counsel indicates that its average support-staff billing rate  
14 over the course of the litigation between 2004 and 2009 was \$123.60. (Supp. Memo. at  
15 By comparison, counsel argues, the average billing rate for support staff in the same  
16 geographic region was \$125 in the 2008 period alone, according to a National  
17 Association of Legal Assistants survey. (Jankowski Decl., Ex. M, at 4, 11.)

18 All of this information and evidence regarding the early stages of litigation and  
19 the more recent time period is augmented by the fact that most of the billing in this  
20 case—as indicated by Exhibit A to the Confidential Ross Declaration—took place in  
21 2004-2005, in the first instance, and in 2009, in the second instance. In sum, Magnetar  
22 has submitted detailed evidence indicating that the rates for its counsel’s partners,  
23 associates, and support staff are not “abnormally high”; Intamin, as discussed above,  
24 offers no evidence in response. The Court concludes that the hourly rates on the bills  
25 “actually rendered” to Magnetar should serve as the basis for its section 285 fee award.  
26 Consistent with controlling case law, the Court concludes that the hourly rates charged  
27 by counsel for Magnetar were within the range charged by counsel in similar firms  
28 performing similar work. Mathis, 856 F.2d at 756. Thus, the Court will base its

1 section 285 fee award in this case on the rates charged by defense counsel during the  
2 relevant time period.

3 ***b. Hours Billed***

4 In determining a proper fee award under section 285, a court must also consider  
5 evidence regarding “the number of hours expended,” and consider “the number of hours  
6 worked by specific attorneys.” Lam, Inc., 718 F.2d at 1068; Mathis, 857 F.2d at 755;  
7 Water Techs. Corp., 850 F.2d at 674. Magnetar addresses the number of hours  
8 expended in this case by comparing the overall fees billed to the charges in the average  
9 similar patent infringement suit. (Supp. Memo. at 13.) A recent AIPLA survey  
10 indicates that the average patent infringement suit with between \$1 million and \$25  
11 million at stake costs \$1.794 million to litigate through the end of discovery (Jankowski  
12 Decl., Ex. O, at 6.); however, Magnetar’s counsel’s aggregate total hours worked  
13 produce a bill of approximately \$800,000 in a case that has been litigated through  
14 discovery, two summary judgment motions, and the Federal Circuit. (See id.; see also  
15 table in Supp. Mem. at 4.) Indeed, according to the same survey just discussed,  
16 Magnetar’s billed charges approximate the 25th percentile of billed charges in the same  
17 subset of cases discussed above. (Jankowski Decl., Ex. O, at 6 (referencing “first  
18 quartile” of charges).) Thus, Magnetar argues, the amount of hours billed in this case is  
19 reasonable.

20 Magnetar buttresses this argument with the claim that the average hourly  
21 billable rate for its attorneys in this case has been \$330.66—a rate reflecting that  
22 “Knobbe Martens lower billing attorneys...associates supervised by junior partners...did  
23 the lion’s share of the work.” (Supp. Memo. at 14.) A comparison of the hours billed  
24 by attorneys Jankowski and Ross (Confidential Ross Decl., Ex. A.) with the hours billed  
25 by senior partner Sganga and partner Cianfrani (Id.) indicates that Ross and Jankowski’s  
26 hours billed far outpace the latter two attorneys’ hours.

27 The Court therefore concludes that there is “evidence to support the  
28 reasonableness of...the billing rate charged and the number of hours expended” in this

1 case, and a section 285 award according to Magnetar’s actual billed charges is proper.  
2 Water Techs. Corp., 850 F.2d at 674.

3 *c. Kerr*

4 Consideration of the Kerr guidelines further confirms the finding that the  
5 requested attorneys’ fees are reasonable in this matter. See Kerr v. Screen Extras Guild,  
6 Inc., 526 F.2d 67, 70 (9th Cir. 1975); Quesada v. Thomason, 850 F.2d 537, 539 & n.1  
7 (9th Cir. 1988). As discussed above, the customary fees for this matter charged by  
8 similar firms are in line with counsel’s billed charges. Even the typical patent case  
9 involves a complex and technical area of the law, but, as Magnetar notes, this case  
10 cannot be viewed as typical given the “convoluted” history of this particular dispute and  
11 the millions of dollars potentially at stake.. (Supp. Memo. at 13 n.8 & 15; See  
12 Confidential Pribonic Declaration, ¶ 5, at 2.) And, as of the present date, Magnetar’s  
13 counsel has achieved a very favorable result for its client.

14 The Knobbe, Martens firm is experienced and of high reputation, as evidenced  
15 by the Managing Intellectual Property surveys referenced in the Jankowski Declaration  
16 at Exhibits G-I. Additionally, the time and labor required to litigate this case through  
17 discovery, an initial summary judgment motion, an appeal to the Federal Circuit, and a  
18 second summary judgment motion were considerable in no small part due to the  
19 aggressive litigation tactics employed by Intamin. (Supp. Mem. at 14.) Thus, the  
20 Court’s consideration of the Kerr guidelines confirms the conclusion that the award of  
21 all billed attorneys’ fees pursuant to section 285 is proper in this case.

22 **2. NON-FEE EXPENSES**

23 Attorneys’ fees under section 285 may properly ““include those sums that the  
24 prevailing party incurs in the preparation for and performance of legal services related  
25 to...suit.” Central Soya, 723 F.3d at 1577. In the present case, Magnetar has submitted a  
26 Bill of Costs for \$11,769.20 to Intamin; Magnetar also seeks \$28,776 in additioanl costs  
27 for “legal research, additional photocopying charges, mailing costs, fax charges, [and]  
28 courier charges.” The Bill of Costs adequately sets forth costs for service, deposition,



1 copies, and translations in this case (Jankowski Decl., , and the \$28,776.49 in  
2 “additional costs” is described in the Confidential Ross Declaration at Exhibit A. These  
3 sums incurred by the “prevailing party” may properly be awarded under section 285,  
4 and based on the evidence submitted—to which Intamin has not responded—the Court  
5 concludes that such an award is proper.

### 6 **3. PREJUDGMENT INTEREST ON SECTION 285 AWARD**

7 The determination is discretionary, and the Court also has discretion to set the  
8 rate of interest. See Mathis v. Spears, 857 F.2d 749, 761 (Fed. Cir. 1988). Magnetar  
9 suggests four different approaches to the calculation of interest (Supp. Memo. at 18.),  
10 and urges the Court to award interest at a fixed rate of 10% par annum (Id. at 19.))]  
11 However, in the Court’s view, an award of prejudgment interest would be appropriate in  
12 cases of highly egregious conduct. While the Court has found misconduct in this case,  
13 the Court does not believe that it rises to a level that would support an award of  
14 prejudgment interest in addition to the award of fees and costs described above. Under  
15 the circumstances, the Court is satisfied that its award meets the objectives of Section  
16 285, and declines to include an interest component.

### 17 **IV.**

### 18 **CONCLUSION**

19 For the reasons discussed in detail above, the Court hereby **GRANTS**  
20 Magnetar’s motion for attorneys’ fees in the amount of \$779,100.34. This amount  
21 represents the \$804,686.28 in legal charges, less \$25,585.66 in time written off. (See  
22 Confidential Ross Decl., Ex. A.) Additionally, Magnetar’s motion for expenses in the  
23 amount of \$11,769.20, and other costs in the amount of \$28,776.49 is **GRANTED**.

24 **IT IS SO ORDERED.**

25 DATED: December 28, 2009



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Judge Gary Allen Feess  
28 United States District Court