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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Vernon Dower, et al.,

NO. C 06-06837 JW

Plaintiffs,

v.

Bridgestone Firestone North American Tire,
LLC, et al.,

Defendants.

**ORDER OVERRULING DEFENDANTS'
PARTIAL OBJECTION TO
MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION RE:
DETERMINATION OF ATTORNEYS
FEES AND COSTS**

Presently before the Court is Defendants' Objection in part to Magistrate Judge's Report and Recommendation Re: Determination of Attorneys Fees and Costs. (hereafter, "Objection," Docket Item No. 223.) Defendants seek an order declining to adopt portions of the Magistrate Judge's Report and Recommendation concerning the amount of attorney fees awarded to Simons.

On October 17, 2008, the Court issued an Order granting in part and denying in part Simons' Motion for Attorney Fees. (See October 17, 2008 Order, hereafter, "October 2008 Order," Docket Item No. 185.) The Court awarded Simons attorney fees because Defendants filed an Amended Third-Party Complaint that was contrary to the Court's March 30, 2007 Order detailing the requirements for Defendants to have standing to assert counter-claims or third party claims pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6972(a)(1)(A)-(B). (See Docket Item No. 37.) The Court also found that Defendants continued to proceed against Simons by filing a motion for clarification of the Court's October 2008 Order and, in the alternative, reinstatement of Defendants' indemnity and contribution claims against Simons. (October 2008

1 Order at 6.) Defendants did this despite having already completed their environmental tests and
2 finding that there was no evidence of contamination on the Simons' property. (Id. at 6-7.) Thus, the
3 Court ordered Defendants to pay attorney fees and costs "related to [Simons'] motion to strike the
4 Amended Third-Party Complaint and any costs and fees incurred after [Defendants'] received the
5 results of the environmental tests on Simons' property." (Id. at 7.) The Court referred the
6 determination of the amount of fees and costs to Judge Seeborg for a report and recommendation.

7 On March 16, 2009, Judge Seeborg filed a Report recommending that Defendants pay
8 Simons \$115,300.40 in fees and costs. (March 16, 2009 Report and Recommendation Re:
9 Determination of Attorneys' Fees and Costs at 8, hereafter, "Magistrate Report," Docket Item No.
10 218.)

11 Defendants object to Judge Seeborg's recommendation on the ground that \$96,525 of the
12 amount recommended concerns fees and costs incurred by Simons after Defendants completed their
13 environmental tests on Simons' property, but that are unrelated to the Simons' Motion to Strike
14 (Objection at 2.) In particular, Defendants contend that Judge Seeborg's recommendation in
15 unreasonable because he failed to identify the conduct giving rise to sanctions and failed to consider
16 what fees and costs were incurred as an actual result of the sanctionable conduct. (Id. at 3-5.)

17 A district court may modify a magistrate judge's ruling on a non-dispositive matter, such as
18 an order to recommending attorney fees, if the order is "clearly erroneous" or "contrary to law." 28
19 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Bahn v. NME Hospitals, Inc., 929 F.2d 1404, 1414
20 (9th Cir. 1991).

21 Here, Judge Seeborg properly identified the conduct giving rise to the sanctions as follows:

22 On February 22, 2008, the presiding judge struck allegations from the second
23 amended counterclaim that the Simons violated the RCRA. The presiding judge
24 based his ruling on the fact that Firestone did not follow his March 30, 2007 Order,
25 detailing what facts it needed to allege to plead standing under the RCRA against the
26 Simons. Instead of curing the defects identified previously, Firestone filed an
27 amended third party complaint, which burdened the Simons by forcing them to bring
28 their motion to strike the RCRA claim. . . . Shortly thereafter, Firestone filed a motion
for clarification of whether the Simons were dismissed with prejudice. At the time of
the motion, however, Firestone had completed its environmental tests of the area
surrounding the landfill and found no evidence of any contamination stemming from
the Simons' property. This demonstrated that Firestone did not have any viable claim

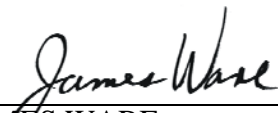
1 against the Simons, yet it failed to dismiss them voluntarily. The presiding judge
2 further concluded that this evidence indicated that the RCRA claim was not made in
good faith.¹

3 (Magistrate Report at 2.)

4 With respect to the amount of fees and costs incurred as a result of Defendants' conduct,
5 Judge Seeborg properly considered "any costs and fees incurred after [Defendants] received the
6 results of the environmental tests on Simons' property" as was previously ordered by the Court.
7 (October 2008 Order at 7.) Indeed, Judge Seeborg carefully considered the submissions of the
8 parties and adjusted the fees where he deemed excessive. (Magistrate Report at 6.) Further, Judge
9 Seeborg found that certain fees that were incurred after the Court's October 2008 Order, should be
10 awarded because Simons "never would have had to bill these fees if Firestone had dismissed the
11 Simons as parties when they knew after November 2, 2007, that no remaining claims existed against
12 them." (Magistrate Report at 7.) Thus, the Court finds that Judge Seeborg's Report and
13 Recommendation is not clearly erroneous or contrary to law.

14 Accordingly, the Court OVERRULES Defendants' Objection. The Court ADOPTS Judge
15 Seeborg's Report and Recommendations and awards Simons fees and costs in the amount of
16 \$115,300.40. Defendants shall pay this amount within thirty (30) days from the date of this Order.

17
18 Dated: April 10, 2009



JAMES WARE
United States District Judge

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26 ¹ Defendants contend that Judge Seeborg's statement that the Court found the "RCRA claim
27 was not made in good faith" is inconsistent with the Court's finding that the Third-Party Complaint
was not improperly brought. (October 2008 Order at 6.) However, the Court finds that the Judge
Seeborg properly referred to Defendants pursuit of the Amended Third-Party Complaint even after
they knew that they had no viable claims against Simons.

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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Dated: April 10, 2009

Richard W. Wieking, Clerk

**By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy**