

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL DIVISION

BENZ RESEARCH AND DEVELOPMENT
CORPORATION, a Florida corporation,



Plaintiff,

vs.

Case No. 97-2402-CA-01

JOSEPH SCHWARTZINGER, a resident of Florida; EMERALD TECHNOLOGIES OF SARASOTA, INC., a Florida corporation; ETS INTERNATIONAL INCORPORATED, a Florida corporation; OPTICAL SCIENCE & TECHNOLOGY, INC., a Florida corporation; JACK McCANN, a resident of Florida; SAMUEL LOGAN, a resident of Florida; STERLING INTERNATIONAL TECHNOLOGIES, INC., a Florida corporation; ELIZABETH T. SCHWARTZINGER, a resident of Florida; LOGAN-McCANN PHARMACEUTICALS, INC., a Florida corporation; DRAXX, INC., a Florida corporation; PETER B. LANGE, a resident of Florida; RICHARD LEE MOOERS, a resident of Florida; GENEVA CAPITAL, INC., a Florida corporation; and MOOERS & COMPANY, a Florida corporation.

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KAREN E. RUSHING
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL

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Defendants.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PARTIAL FINAL JUDGMENT
ON SANCTIONS AGAINST DEFENDANT STERLING INTERNATIONAL
TECHNOLOGIES, INC.**

THIS CAUSE came on for evidentiary hearing on December 19, 2001 to determine the amount of sanctions to be awarded in favor of Plaintiff, Benz Research and Development Corporation (hereinafter "BRD"), and against Defendant, STERLING INTERNATIONAL TECHNOLOGIES, INC. (hereinafter "Sterling"), pursuant to the "Order Granting in Part Plaintiff's Second Amended Motion for Contempt, Fees and Expenses, And Striking of Pleadings Against Defendant Sterling" dated March 6, 2001 (hereinafter, the "Sterling Sanctions Order"). The Sterling Sanctions Order reserved jurisdiction for the



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purpose of determining BRD's "actual compensatory losses" resulting from Sterling's discovery violations, including attorney's fees and costs, and directed that "BRD should be made whole . . .".

The Court has considered the deposition testimony of Robert J. Asti, Esq., and Martin Garcia, Esq., which was admitted into evidence, and the in-court testimony of James L. Essenson, Esq., Dr. Patrick H. Benz, and Steve J. Chase, Esq. A composite Exhibit #3 for the Plaintiff was admitted into evidence. This exhibit contained, inter alia, the detailed, itemized billing statements of the Holland & Knight Law Firm, the Asti Law Firm and the Essenson Law Firm. These statements describe the tasks performed, the amount of time charged for each task, the attorney or other law office personnel who performed the task, and the billing rate for the individual performing the task. The court has considered the arguments of counsel, written memoranda of law submitted by Plaintiff, and the written closing arguments submitted by counsel, and being otherwise advised in the premises, the Court makes the following

FINDINGS OF FACT:

1. For purposes of analyzing the fees incurred in this case, the Plaintiff divided its presentation into four analytical categories, which were utilized by both sides to present their respective cases. Each analytical category identifies certain particular points in time, and are as follows:

i. Category One consists of work performed subsequent to March 19, 1998, the date of the service of Sterling's Summary Judgment Motion, up to June 22, 1998, the date of an Order entered by the Honorable Lee Haworth, Circuit Court Judge, which Order, in part, requires the parties to submit memoranda of law ". . . addressing the inferences which the court is permitted to make from circumstantial evidence when ruling on a motion for summary judgment".

ii. Category Two consists of work performed subsequent to the June 22, 1998 Order, through and including February 22, 1999, when Judge Haworth entered an Order Denying Sterling's Motion for Summary Judgment.

iii. Category Three consists of fees incurred in obtaining the Sterling Sanctions Order on March 6, 2001.

iv. Category Four consists of the fees incurred by the Plaintiff in establishing the amount of the sanction.

With regard to Category Four, the court reserved jurisdiction to enter a subsequent award, if appropriate, and ordered the parties to submit memoranda of law on the issue of entitlement to fees in Category Four. Accordingly, this Order concerns only Categories One, Two and Three.

2. Attached to this Order as Exhibit "A", and incorporated herein by reference, is a portion of an exhibit submitted by Plaintiff as an aid to the Court at the hearing held by this Court on December 19, 2001, less a one-hour (\$225.00) charge which was identified in the record as a typographical error in Mr. Grady's time in Category One. The exhibit reflects the total time expended and the rate for each lawyer involved in the Plaintiff's case in each analytical category, as proven by the testimony of Mr. Asti and Mr. Essenson and the Plaintiff's composite Exhibit #3 in evidence. The Court finds that the rates for specific lawyers and paralegals, and the amount of time expended for specific tasks, are reasonable, necessary, and supported by the evidence adduced at the hearing. The Defendant offered no credible testimony in opposition to the amounts set forth on Exhibit "A" for Categories One, Two, and Three.

3. The court finds that the fees set forth on exhibit "A" resulted from the unreasonable delay in "producing" the fax version of the Gunther Pries letter.

4. Defendant failed to meet its burden of proving, with specificity, which fees incurred by the Plaintiff, if any, were unreasonable. The Defendant's only witness, Mr.

Chase, was biased, in that he was a former attorney in the case. Furthermore, Mr. Chase offered no lodestar analysis, preferring, rather, to attempt to offer an opinion based on his personal view of the appropriate interpretation of the Sterling Sanctions Order. As such, the Court had sustained an objection to portions of Mr. Chase's testimony.

5. Plaintiff's actual compensatory losses as a result of Sterling's discovery violations are in the amount of NINETY-THREE THOUSAND EIGHT HUNDRED THIRTY-NINE DOLLARS AND TEN CENTS (\$93,839.10). The testimony of Dr. Banz confirmed that this amount was paid by BRD to its attorneys for the services rendered, which are described in detail in Plaintiff's composite Exhibit #3.

6. Payment by Sterling to BRD in the amount of NINETY-THREE THOUSAND EIGHT HUNDRED THIRTY-NINE DOLLARS AND TEN CENTS (\$93,839.10) is necessary to make Plaintiff whole and to compensate Plaintiff for its reasonable expenses incurred as a result of Sterling's contumacious disregard of the discovery process.

Based on the foregoing, the Court hereby makes the following

CONCLUSIONS OF LAW:

A. Plaintiff bears the initial burden of proving its actual attorney fees incurred. *Centex-Rooney Construction Co., Inc. v. Martin County*, 725 So. 2d 1255 (Fla. 4th DCA 1999).

B. This burden was met by the Plaintiff's detailed presentation of the attorney fee expenses incurred, using the lodestar method and applying the criteria in Florida Rules of Professional Conduct Rule 4-1.5. *Centex-Rooney Construction Co., v. Martin County*, 725 So. 2d 1255, 1259 (Fla. 4th DCA 1999). The Plaintiff met its burden of presenting a *prima facie* case using the lodestar method based on the testimony of Mr. Asti and Mr. Essenson, and the detailed billing statements admitted into evidence.

C. Once BRD has established a *prima facie* case, Sterling bears the burden of proving, with reasonable specificity, which, if any, of the fees incurred by Plaintiff is unreasonable or unnecessary. *Centex-Rooney; Id; Norman v. Housing Authority of Montgomery*, 836 F. 2d 1292, 1301 (Ala., 11th Cir. 1988). Sterling failed to meet this burden.

D. The award of attorney fees as a discovery sanction in this matter is in the nature of an order of restitution and is intended to make the Plaintiff whole for its losses incurred as a result of Sterling's contumacious disregard for the discovery process. Thus, the purpose of the sanction to be awarded in this matter is both to punish Sterling and to reimburse Plaintiff (i.e., to make the Plaintiff whole). The award will also hopefully serve as a deterrent of similar conduct by others in future litigation. *Eve's Garden, Inc. v. Upshaw & Upshaw*, 2001 WL 1575569 (Fla. 2nd DCA 2001).

E. Because the award of fees in this matter is in the nature of an order of restitution, Plaintiff is entitled to receive an award based on the actual hourly rates charged by its attorneys, as long as the rates are reasonable in light of all the circumstances. *Eve's Garden, Id.* The court concludes, as a matter of law, that the hourly rates charged by Plaintiff's attorneys, and the amount of time expended for particular tasks, are reasonable in light of all the circumstances¹.

Accordingly, based on the foregoing, it is hereby

ORDERED AND ADJUGED as follows:

1. Final Judgment is hereby awarded in favor of Plaintiff, Benz Research and

¹ (See also *Trustees of Cameron Brown Investment Group v. Tavormina*, 385 So. 2d 728, 731 (Fla. 3rd DCA 1980), which states that in the context of an indemnity agreement, a court should award the actual fees, provided the same do not violate Rule 4-1.5 of the Rules Regulating the Florida Bar. In the instant case, the legality, or non-excessive nature of the fees charged to the Plaintiff was established by the expert testimony of Mr. Garcia, and there was no testimony to the contrary).

Development Corporation, a Florida corporation, P.O. Box 1839, Sarasota, Florida 34230, and against Sterling International Technologies, Inc., a Florida Corporation, in the amount of NINETY-THREE THOUSAND EIGHT HUNDRED THIRTY-NINE DOLLARS AND TEN CENTS (\$93,839.10), plus interest at the statutory rate of 9% per annum on any unpaid balance, for which amount let execution issue. The Court will execute a final judgment in this amount, in a shorter form, to facilitate enforcement and execution, if requested by the Plaintiff.

2. The Court reserves jurisdiction of the subject matter hereof and the parties hereto to consider an award to Plaintiff as to Category Four damages, i.e. the cost of determining the amount of the sanction, and costs incurred as to all Categories. The Court also reserves jurisdiction to enter a supplemental final judgment, if appropriate.

DONE AND ORDERED in Chambers, Sarasota County, Florida this 28th day of January, 2002.


Honorable Nancy Donnellan
Circuit Court Judge

cc: James L. Essenson, Esq.
Richard Candelora, Esq.

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ACTUAL			
CATEGORY 1 (Holland and Knight)	\$16,028.50		
	Hours	Rate	\$
Grady	58.4	\$225	\$12,700
Borucke	8.6	\$140	\$1,204
O'Dear	20.1	\$95	\$1,909.50
CATEGORY 1 (Asti)	59.6	\$170	\$10,132
TOTAL CATEGORY 1	\$25,925.80		
CATEGORY 2 (Holland and Knight)	\$18,226.50		
Grady	4	\$225	\$900
	22.9	\$240	\$5,496
Goetz	10.4	\$175	\$1,820
	43.7	\$185	\$8,521.50
O'Dear	14.2	\$95	\$1,349
	7.4	\$100	\$740
Kimbro	2	\$150	\$300
CATEGORY 2 (Asti)	15.7	\$170	\$2,669
TOTAL CATEGORY 2	\$21,795.50		
CATEGORY 3 (Holland and Knight)	\$9,850.60		
Grady	6.7	\$265	\$1,775.5
	.3	\$295	\$88.50
Odear	14.1	\$100	\$1,410
	11.1	\$115	\$1,278.5
Asti	21.6	\$250	\$5,400
CATEGORY 3 (Essenson)	\$36,167.50		
Essenson	74.8	\$200	\$14,960
	30.5	\$225	\$6,862.5
Grimm	91.4	\$100	\$9,140
	32.7	\$150	\$4,905
Wallace	5	\$60	\$300
TOTAL CATEGORY 3	\$46,118		
CUMULATIVE TOTALS	\$93,838.10		

LEGEND

Category One: Work leading up to Judge Haworth's 6/22/88 Order): Holland & Knight; Asti

Category Two: Work performed subsequent to 6/22/88 Order through 2/22/99 Order Denying Sterling's Motion for Summary Judgment): Holland & Knight; Asti

Category Three: Fees incurred in obtaining the sanctions order: Holland & Knight; The Law Firm of James L. Essenson

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EXHIBIT "A"