

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 16-81039-CV-BLOOM/VALLE

SHIPPING AND TRANSIT, LLC,

Plaintiff,

vs.

1A AUTO, INC., d/b/a 1AAUTO.COM,

Defendant.

**DEFENDANT 1A AUTO, INC.'S VERIFIED MOTION FOR ADDITIONAL
ATTORNEY FEES AND COSTS**

Pursuant to 35 U.S.C. § 285 and this Court's October 30, 2017 Order (ECF No. 56), Defendant 1A Auto, Inc. ("1A Auto") respectfully moves to recover its attorney fees and costs that were neither considered in the Magistrate Judge's Report and Recommendation (ECF No. 51) nor considered by the Court in its October 20, 2017 Order (ECF No. 53). The fees and costs sought in this motion were required to complete the briefing and oral argument on the original motion for attorney fees and costs (ECF No. 25), and much of that work was necessitated by Plaintiff's transparent efforts to avoid having to pay the fees and costs.

Magistrate Judge Valle's determination that this case is exceptional supports an award of these additional fees and costs. The additional fee award is also supported by the case law governing awards of attorney fees under 35 U.S.C. § 285, as set forth in Magistrate Judge Valle's Report and Recommendation. *See also Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1578 (Fed. Cir. 1983) (citing district court case for the proposition that Section 285 "include[s] lawyer's fees for time spent on the issue of attorney fees"); *Caron v. Lifestyle Crafts, LLC*, 2013 U.S. Dist. LEXIS 29301, at *7-8 (D. Ariz. March 4, 2013) (awarding fees incurred in preparing

fee motion because “[p]reparation of the fee application is part of legal services rendered in defense of Plaintiff’s patent infringement litigation”). This law compels a similar result here.

A. 1A Auto is Entitled to an Award of Additional Attorney Fees and Costs for Completing the Briefing and Oral Argument on its Motion.

Based on this Court’s adoption of Magistrate Judge Valle’s Report and Recommendation, the issue of 1A Auto’s entitlement to reasonable attorney fees and costs has already been firmly established. Through this motion, 1A Auto seeks to recover the additional fees and costs for the work required to complete the briefing and oral argument on its original motion. These fees and costs have not yet been considered by the Magistrate Judge or this Court.

Magistrate Judge Valle’s Report and Recommendation supports the award of these additional amounts. Indeed, after a thorough review of the totality of the circumstances of this litigation and consideration of Plaintiff’s “*modus operandi*,” Magistrate Judge Valle concluded that this is in fact an exceptional case. (ECF No. 51 at 15). Among other reasons, Magistrate Judge Valle found that considerations of compensation and deterrence weigh heavily in favor of an exceptional case finding. (*Id.*)

These same considerations are of even greater moment now, as it appears that Plaintiff may seek to evade paying some or all of the attorney fees awarded by the Court. Incredibly, despite having obtained hundreds of settlement payments from litigants over the years, Shipping & Transit is now claiming to be “broke” and unable to pay any of the amounts that have been awarded. (*See Swain Declaration* ¶ 7). Notably, however, Plaintiff’s counsel did not actually say that the owner of the patents, Mr. Jones, is broke, only that the Plaintiff entity in this case—Shipping & Transit—is broke. Thus, the additional fees and costs sought in this separate motion award support the policy and principle that “considerations of compensation and deterrence” weigh in favor of entitlement to an additional award, as explained in the Report and Recommendation.

As noted above, other courts have also awarded fees for time spent on the preparation of the fee motion. In fact, in *Shipping & Transit, LLC v. Hall Enterprises, Inc.* (C.D. Cal., No. 16-cv-06535-AG-AFM), Judge Andrew Guilford—an experienced patent jurist—recently imposed an attorney fee award against this very same Plaintiff in a very similar case. And that award included the fees and costs for work done through the oral argument and other post-argument submissions to the Court.¹

Here, the fees and costs sought are for work that was almost entirely necessitated by Plaintiff's extraordinary efforts to avoid an adverse attorney fee ruling in this case. That work included the following:

- Respond to Plaintiff's December 20, 2016 opposition (ECF No. 26), which, for the first time, raised issues concerning the reasonableness of 1A Auto's attorney fees after those arguments had been waived under Local Rule 7.3
 - 1A Auto had to address these issues in its reply brief, filed January 6, 2017 (ECF No.29)
 - 1A Auto had to address these issues, *again*, in its January 17, 2017 response (ECF No. 37) to Plaintiff's January 12, 2017 sur-reply brief (ECF No. 34)
- 1A Auto also had to prepare for and respond to Plaintiff's eleventh-hour filing, on June 14, 2017, of a Notice of Supplemental Authority (ECF No. 43) and a Notice of Filing of a Declaration of Kelly Jones (ECF No. 44), the owner of the patents at issue, attempting to justify the pre-filing investigation, on the day before the hearing on the attorney fee motion on June 15, 2017

¹ Judge Guilford awarded Defendant virtually all of the attorney fees sought, \$91,500 in attorney fees and \$500 in nontaxable expenses. See Swain Declaration, Exhibit 4 (Court Order dated October 31, 2017), Exhibit 5 (July 18, 2017 Declaration of Geoffrey M. Godfrey in Support of Defendant's Supplemental Submission Regarding Award of Attorney Fees), Exhibit 6 (August 15, 2017 Plaintiff's Objection's to Defendant's Supplemental Submission Regarding Award of Attorneys' Fees), Exhibit 7 (August 29, 2017 Defendant's Reply to Plaintiff's Objections regarding Award of Attorney Fees), and Exhibit 8 (August 29, 2017 Declaration of Geoffrey M. Godfrey in Support of Defendant's reply to Plaintiff's Objections Regarding Award of Attorney Fees).

1A Auto respectfully submits that it would be unjust for 1A Auto to be forced to bear the cost of responding to these unexpected filings, and addressing and responding to the other actions by Plaintiff, which were all part of its transparent efforts to avoid an adverse result.

B. Plaintiff Should Be Required to Pay an Additional \$65,660 in Fees and \$1,470.20 in Additional Costs.

1. Methodology for calculating fees.

As with its original motion, 1A Auto's request for reasonable attorney fees and costs complies with Local Rule 7.3, as well as the law governing an award of attorney fees under 35 U.S.C. § 285.

2. Description of fees.

For the attorney fees sought in this motion, the attorneys at Foley Hoag LLP in Boston again served as the lead outside counsel for 1A Auto, and Gelber Schachter & Greenberg, P.A. served as Florida counsel.

a. Foley Hoag LLP

At Foley Hoag, partner Philip Swain and associate Stephen Bychowski billed time on the case, billing their time by the hour for the work they performed on this matter. Redacted copies of Foley Hoag's invoices in this matter are attached as Exhibit 1 to the Swain declaration.

As noted by Magistrate Judge Valle in her Report and Recommendation, the Foley Hoag attorneys who billed time to these matters were Philip Swain, a partner at Foley Hoag with more than 30 years of experience, and Stephen Bychowski, a sixth year associate who graduated with high honors from Northwestern University School of Law. (ECF No. 51 at 18). Mr. Swain's rate was \$830 per hour and increased to \$850 per hour in 2017; Mr. Bychowski's rate was \$530 per hour and increased to \$585 per hour in 2017.

1A Auto, a Westford, Massachusetts company, chose Foley Hoag as its lead counsel because Foley Hoag, a firm based in Boston, has served as its principal general outside counsel, and Mr. Swain has served as its principal outside intellectual property counsel. As Magistrate Judge Valle noted in her Report and Recommendation, patent litigation is a specialized area, and continues to command high attorney rates, even in South Florida. And even though Plaintiff objected to counsel's rates, Plaintiff failed to provide the Court with comparable rates for South Florida attorneys. Therefore, Magistrate Judge Valle did not take issue with the hourly rates for the Foley Hoag attorneys. (ECF No. 51 at 19).

The total number of hours billed by the Foley Hoag attorneys in the attached invoices is 41.4 hours by Mr. Swain and 42.6 hours by Mr. Bychowski, for a total of 84 hours billed by the Foley Hoag attorneys. The attorney fees in the attached Foley Hoag invoices total \$56,229.95 (which includes a discount), and the costs in the attached invoices total \$1469.50. These invoices cover the period through July 31, 2017.²

a. Gelber Schachter & Greenberg, P.A.

For Gelber Schachter & Greenberg, P.A., attorneys Adam Schachter and Dan Gelber billed time for this case. Adam Schachter is a founding partner at the firm, and served as a law clerk for another Judge in this Court, and was also an attorney with the Stearns Weaver Miller law firm in Miami for approximately 10 years. Dan Gelber, another founding partner, has over 30 years of experience as an attorney, including serving as a federal prosecutor and as an attorney in private practice. Mr. Schachter's rate was \$515 per hour and Mr. Gelber's rate was \$700 per hour.

² 1A Auto is not seeking further attorney fees for any period beyond July 31, 2017, for either Foley Hoag or Gelber Schachter & Greenberg.

Redacted copies of Gelber Schachter & Greenberg's invoices are attached as Exhibit 2 to the Swain declaration.

Although the Plaintiff also previously objected to Mr. Schachter's hourly rate as excessive, 1A Auto respectfully submits that both Mr. Schachter and Mr. Gelber's rates are reasonable for the South Florida market, given the expense and expertise required for patent litigation. *See* ECF No. 51 at 19.

The total number of hours billed by the Gelber Schachter & Greenberg attorneys in the attached invoices is 9.3 hours (Mr. Schachter) and 6.9 hours (Mr. Gelber), for a total of 16.2 hours (the invoices also include time charges which were listed as "No Charge" by the firm). The total attorney fees in the attached invoices from Gelber Schachter & Greenberg are \$9,619.50, and the costs in the attached invoices are \$91.00, through July 31, 2017.

The total hours for which 1A Auto is seeking attorney fees for both Foley Hoag and Gelber Schachter & Greenberg in this motion is 100.2 hours, for a total of \$65,849 in attorney fees, and \$1560.50 in costs.

II. CONCLUSION

For the reasons set forth above, 1A Auto requests that the Court grant this motion and award 1A Auto \$65,849 in attorney fees and \$1560.50 in costs.

Dated: November 28, 2017

Respectfully submitted,

/s/Adam M. Schachter

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.3, 1A Auto provided a draft of this motion and exhibits to Plaintiff on November 10, 2017. Counsel for 1A Auto conferred with counsel for Plaintiff on November 27, 2017 in a good faith effort to resolve the matters raised in this motion. Plaintiff's counsel indicated that he objects to the relief sought in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 28th day of November 2017 a true and correct copy of the foregoing is being electronically filed with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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Counsel for Plaintiff Shipping and Transit, LLP

/s/Adam M. Schachter
ADAM M. SCHACHTER

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Preston Farrington, who, being by me first duly sworn, stated the following:

1. My name is Preston Farrington. I am over twenty-one years of age, of sound mind, and qualified to make this affidavit.

2. I am Chief Operating Officer and Chief Financial Officer of 1A Auto, Inc., and am authorized to make this verification on behalf of Defendant 1A Auto, Inc.

3. I verify that I have reviewed and verified that the facts set forth in Defendant 1A Auto, Inc.'s Verified Motion for Award of Additional Attorney Fees and Costs are true and correct to the best of my knowledge, information, and belief.

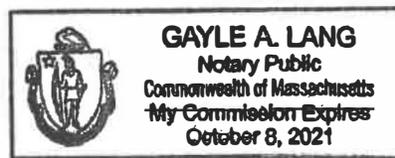


Preston Farrington

Sworn and subscribed to before me, the undersigned authority, on November 10, 2017.



Notary Public



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SHIPPING AND TRANSIT, LLC,

Plaintiff,

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Defendant.

**DECLARATION OF PHILIP C. SWAIN IN SUPPORT OF DEFENDANT'S SEPARATE
MOTION FOR ADDITIONAL ATTORNEY FEES**

I, Philip C. Swain, hereby certify and depose, on the basis of my personal knowledge except where otherwise stated, as follows:

1. My name is Philip C. Swain. I am a partner with the law firm Foley Hoag LLP. Foley Hoag was engaged to represent Defendant 1A Auto, Inc. ("1A Auto") in the above-referenced matter.

2. Attached as Exhibit 1 to this Declaration are Foley Hoag's invoices for services rendered in December 2016, January 2017, and June – July, 2017. During that that time, I billed 41.4 hours to this matter, and Steve Bychowski from Foley Hoag billed 41.8 hours to this matter. Information protected by the attorney-client privilege and/or the work product doctrine has been redacted from certain entries in the invoices attached as Exhibit 1. I have also redacted the time charges on the invoice for January 2017 charged by a paralegal, Alison Neugebauer, for whom we are not seeking fees in this motion. Foley Hoag billed \$56,229.50 in fees for the time spent by Mr. Bychowski and me, and \$1470.20 in costs during the months reflected in these invoices.

3. Attached as Exhibit 2 to this Declaration are Gelber Schachter & Greenberg, P.A.'s ("GSG") invoices for services rendered in November 2016, December 2016, January 2017, and June 2017. During that time, Adam Schachter from GSG billed 8.4 hours to this matter and Daniel Gelber from GSG billed 6.9 hours to this matter. Certain time entries that were recorded by Mr. Schachter were not actually billed to the client and are listed as "NO CHARGE" on the invoices. Information protected by the attorney-client privilege and/or the work product doctrine has been redacted from certain entries in the invoices attached as Exhibit 2. GSG billed \$9430.50 in fees and \$0 in costs during the months reflected in these invoices.

4. The time spent by the attorneys working on the matters described in the attached invoices was necessary to complete the work on our client's motion for attorney fees, including the completion of the brief in support of the original motion in December 2016, preparation of the reply brief in support of the motion in December 2016 and January 2017, responding to new arguments in the plaintiff's sur-reply brief in January 2017, and the supplemental briefing, preparation for and attendance at the oral hearing in this court on June 15, 2015, and the follow-up briefing and supplemental briefing after that oral hearing.

5. 1A Auto is therefore seeking to supplement the amount requested in its motion for attorney fees in the additional amount of \$65,660 based on the invoices attached to this declaration, and the amount requested for costs by an additional \$1470.20 based on the costs included in the invoices attached to this declaration.

6. On Monday, October 2, the first day after we filed the supplemental declaration requesting additional attorney fees after Judge Valle's report and recommendation on September 26, 2017, I received an email from Shipping & Transit's counsel, Jason Dollard, asking me to call him (copy attached as Exhibit 3 to this Declaration).

7. When I called Mr. Dollard, told me that his client is “broke,” and that they may not have the money to pay our attorney fee award. He said they could try and something together, but he is not sure how collectible it will be. I asked what about the settlements from the hundreds of lawsuits that they had filed, and he said it was simply not there any more, it was not worth berating him about. He said the two guys who bought the Shipping & Transit patents from their original owners, an entity called Melvino/Arrival Star, do not have any more money.

8. Mr. Dollard asked me to talk to my client whether they would consider a payment plan, but did not propose any specific payment plan. He did not indicate that any part of the conversation was part of a settlement discussion or was confidential. I agreed to pass on the information concerning Shipping & Transit to my client, but did not agree to anything else.

9. Attached as Exhibit 4 is the October 31, 2017 decision of the United States District Court for the Central District of California in *Shipping & Transit, LLC v. Hall Enterprises, Inc.*, No. 16-cv-06535-AG-AFM, awarding the Defendant Hall Enterprises \$91,500 in attorney fees and \$500 in nontaxable expenses.

10. Attached as Exhibit 5 is the July 18, 2017 Declaration of Geoffrey M. Godfrey in Support of Defendant’s Supplemental Submission Regarding Award of Attorney Fees (detailing the attorney fees and tasks for which fees were being sought, totaling \$83,856.50 in attorney fees plus \$558.45 in costs through the submission of the defendant’s brief in support of its motion for attorney fees filed in July 2017). Attached as Exhibit 6 is the August 15, 2017 Plaintiff’s Objection’s to Defendant’s Supplemental Submission Regarding Award of Attorneys’ Fees (containing plaintiff’s argument in objection to the defendant’s July 18, 2017 submission regarding the award of attorney fees). Attached as Exhibit 7 is the August 29, 2017 Defendant’s Reply to Plaintiff’s Objections regarding Award of Attorney Fees (containing the defendant’s

argument's in response to the plaintiff's objections, and also an argument for an award for additional fees for responding to the plaintiff's objections). Attached as Exhibit 8 is the August 29, 2017 Declaration of Geoffrey M. Godfrey in Support of Defendant's reply to Plaintiff's Objections Regarding Award of Attorney Fees (detailing an additional \$7980 in attorney fees and \$50 in costs), for a total of \$91,836.50 in attorney fees and \$608.45 in costs requested.

Dated: November 27, 2017

/s/ Philip Swain
Philip C. Swain
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02110
(617) 832-1150

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November 27, 2017, a true and correct copy of the foregoing is being electronically filed with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the attached Service List via transmission of Notice of Electronic Filing generated by the CM/ECF system.

/s/ Adam M. Schachter
ADAM M. SCHACHTER

SERVICE LIST

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Counsel for Plaintiff Shipping and Transit, LLP

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/s/ Adam M. Schachter
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