

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

TRIANAFYLLOS TAFAS,

Plaintiff,

v.

**JON W. DUDAS, in his official capacity as
Under-Secretary of Commerce for Intellectual
Property and Director of the United States
Patent and Trademark Office, and the UNITED
STATES PATENT AND TRADEMARK
OFFICE,**

Defendants.

**CIVIL ACTION: 1:07cv846 (JCC/TRJ)
and Consolidated Case (below)**

SMITHKLINE BEECHAM CORPORATION,

Plaintiff,

v.

**JON W. DUDAS, in his official capacity as
Under-Secretary of Commerce for Intellectual
Property and Director of the United States
Patent and Trademark Office, and the UNITED
STATES PATENT AND TRADEMARK
OFFICE,**

Defendants.

**PLAINTIFF TRIANAFYLLOS TAFAS' POST-JUDGMENT
MOTION FOR ATTORNEYS FEES AND EXPENSES
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

The Plaintiff, Triantafyllos Tafas ("Tafas" or "Plaintiff"), hereby moves this Court pursuant to 28 U.S.C. § 2412 *et seq.* (the Equal Access to Justice Act) for an award of his attorneys' fees and expenses incurred as the prevailing party in this Action (both at the District Court and on appeal at the Federal Circuit), along with such other, further and different relief as

the Court may deem just, equitable and proper, for the reasons set forth herein, as well as those set forth in Plaintiff's supporting memorandum of law, and the supporting Declarations of Triantafyllos Tafas, Steven J. Moore, Esq., Shaun M. Gehan, Esq., David M. Boundy, Esq. and Richard B. Belzer, Esq., and exhibits thereto,¹ submitted in support of the Motion.

Tafas is entitled to an award of attorneys fees and expenses pursuant to 28 U.S.C. § 2412(d)(1) because:

- (i) Tafas has obtained a "final judgment" within the meaning of 28 U.S.C. § 2412(d)(1)(D)(2)(G);
- (ii) Tafas qualifies as a "party" under 28 U.S.C § 2412(d)(1)(D)(2)(B) as the owner of an unincorporated business, the net worth of which did not exceed \$7,000,000 and which business did not have more than 500 employees at the time this Action was filed. (*See* Declaration of Plaintiff Triantafyllos Tafas in Support of Petition for Fees and Expenses, ¶¶ 14-26);
- (iii) Tafas is a "prevailing party" within the meaning of 28 U.S.C. § 2412(d)(1)(D)(2)(H) having obtained a final judgment in his favor that granted the relief originally sought by Tafas when he filed this Action;
- (iv) Tafas' fees and expenses submitted in connection with the instant application are within the allowed types of fees and expenses as defined in 28 U.S.C. § 2412(d)(1)(D)(2)(A) and his application is supported by proper written itemization and backup (attached hereto, with a request to file under seal);
- (v) Defendants' pre-litigation enactment of the Final Rules and subsequent defense of the PTO's transparently *ultra vires* rules package throughout the course of this Action was not substantially justified within the meaning of 28 U.S.C. §§ 2412(d)(1)(B) and 2412(d)(1)(D)(2)(D) on the basis of the record in this Action;

¹ Exhibits A and E to the Moore Declaration, Kelley Drye's billing statements, are appended to the Moore Declaration in a partially redacted manner so as to excise the narrative descriptions for each billing entry. The narrative entries are appropriately redacted because they contain information that is either confidential attorney-work product, reflects the confidential mental impressions or litigation strategy of Kelley Drye's attorneys, or would otherwise constitute confidential attorney-client privileged material. Tafas is filing a separate motion asking that he be permitted to present the complete, un-redacted billing statements to the Court, either under seal or for *en camera* review only so as to avoid a waiver of attorney-client privilege. Alternatively, Tafas is asking the Court to bifurcate the fee application so as to first determine whether the Defendants are liable under EAJA for an award of fees and to only require disclosure of the actual billing statements (and narratives to the extent not deemed privileged) until after a finding of liability. Of course, if there is liability on the part of the Defendants to pay EAJA fees, there can be no question of any relevance concerning the reasonableness of the fee amount, which would then be moot.

- (vi) Tafas' applications for fees and expenses has been timely filed within the 30 day time limit after the entry of a final and un-appealable judgment in compliance with 28 U.S.C. §§ 2412(d)(1)(B) and (d)(1)(D)(2)(H); and
- (vii) Tafas has also contemporaneously and timely filed a similar EAJA application for his appellate level fees and expenses in the United States Court of Appeals for the Federal Circuit as required by its Rule 47.7, but this application is solely limited to Tafas' fees and expenses incurred in connection with Defendants' appeal from this Court's grant of summary judgment in favor of Plaintiffs.²

Additionally, and as set forth more particularly in Tafas' aforementioned supporting papers, Tafas is entitled to an award of attorneys fees' and expenses pursuant to 28 U.S.C. § 2412(a)(1)(2)(b), which provides in pertinent part that the United States (including any official of the United States acting in his official capacity) shall be liable for such fees and expenses to the same extent that any other non-governmental party would be liable under the common law and/or under the terms of any statute that specifically provides for such an award. As applied here, Defendants are liable for Tafas' fees and expenses under the "common benefit doctrine" and/or based on bad faith/litigation misconduct -- both of which are exceptions to the so called "American Rule."

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Tafas will, however, be filing a motion in the Federal Circuit asking it to abstain and/or remand so as to allow this Court to decide Tafas' entire fee application for the Action (inclusive of both Tafas' claims to fees in the District Court and on appeal) or, in the alternative, for the Federal Circuit to stay any further proceedings on Tafas' claim for appellate fees in the Federal Circuit until after this Court has first ruled on Tafas' present fee application in the District Court.

CONCLUSION

WHEREAS, for all the foregoing reasons, Plaintiff Triantafyllos Tafas respectfully requests that this motion be granted and that he be granted all of his reasonable attorneys fees and expenses in connection with this Action, which fees and expenses are set forth more particularly in the Moore Declaration and supporting exhibits, along with such other, further and different relief as the Court may deem just, equitable and proper.

Dated: March 15, 2010

Respectfully submitted,

s/ Joseph D. Wilson
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(Counsel for Plaintiff Triantafyllos Tafas)

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March 2010, I caused Plaintiff Triantafyllos Tafas' foregoing Post-Judgment Motion for Attorneys Fees and Expenses, Notice of Hearing, Tafas' supporting Memorandum of law, Declaration of Steven J. Moore, Declaration of Shaun M. Gehan, Declaration of David Boundy, Declaration of Triantafyllos Tafas and Declaration of Richard B. Belzer, and exhibits, to be electronically filed using the Court's CM/ECF system, which will then send a notification of such filing (NEF) to all parties. I have also caused copies of the foregoing to be sent to the following non-ECF users by first-class mail (where an address has been provided to the Court) or electronic mail (where it has not been):

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