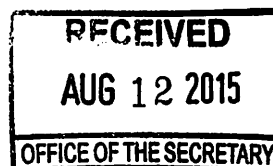


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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DENVER REGIONAL OFFICE
Byron G. Rogers Federal Building
1961 Stout Street
Suite 1700
Denver, CO 80294-1961

August 10, 2015



Via E-Mail and Overnight Mail

Honorable Jason S. Patil
Administrative Law Judge
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549

Re: *In the Matter of Delaney*, Admin Proc. No. 3-15873

Dear Judge Patil:

The Division writes in response to Delaney's July 31, 2015 submission seeking fees associated with making his EAJA claim, which also raises other issues. This is now Delaney's fourth submission in support of his EAJA application. This submission, like the others, demonstrates that Delaney has failed to meet his burden of proving that the substantial fees and expenses that he has requested are reasonable. In failing to meet his burden, Delaney again demonstrates that he is ineligible for any award of fees or expenses.

Professor Sirri

In Delaney's original application and supplemental submission, Delaney never identified a specific amount that he was seeking for expert expenses. Instead, he attached bills for Professor Sirri's expenses, the last of which, dated November 2014, indicated that Professor Sirri was owed over \$750,000. At the hearing, Delaney informed the Court that he was seeking over \$1 million for expert expenses. Now, for the first time, Delaney has submitted Professor Sirri's bill for December 2014 (a bill received six months before Delaney's original EAJA application) showing the outstanding balance owed to Professor Sirri at that time was approximately \$350,000. Further, Delaney now concedes Professor Sirri has been paid this agreed-upon amount. Nevertheless, Delaney apparently still believes he should receive an award, despite the fact that he has incurred no expense. Delaney has failed to meet his burden to show he has incurred any expense related to Professor Sirri, and his request should be denied.

Attorneys' Fees

Delaney also notes that the insurance company recently made a significant payment of fees, reducing Delaney's original EAJA claim from approximately 4,000 hours to approximately 3,100 hours. Delaney claims to have used a "first in, first out" method, which the Division understands to mean he applied the insurance company's payment to the oldest fees first. Delaney's original EAJA application stated that insurance had already paid attorneys' fees until approximately September 9, 2014. However, in the fee schedule attached as Exhibit B to his July 31, 2015 letter, Delaney continues to seek reimbursement for fees incurred related to the "motive" argument as early as September 8, 2014. (*See* Ex. B, 9/8 entry for MLS). Thus, it does not appear that Delaney has reduced the fees sought on a "first

in, first out” basis. Moreover, Delaney claims that this method only led to a minor reduction in the hours spent responding to the Division’s “motive” argument, which Delaney states were reduced from approximately 1,850 to approximately 1,790. This is inconsistent with Delaney’s argument that motive was a major component of the case from the very beginning. In any event, this submission further underscores that Delaney has failed to prove what fees he has actually incurred, or their connection to a portion of the proceeding upon which he prevailed, and he is, therefore, ineligible for an award of any fees.

In addition, many of the facially unreasonable items remain in the schedule of fees Delaney still claims are related to the motive argument. Incredibly, Delaney still seeks payment for, by way of example, the unrelated “PTL” litigation (*see* Ex. B, BRB entries for 12/17 and 12/18) and work with a compliance expert that was not presented at trial (*see* Ex. B, BRB entry for 9/10).¹ Delaney has failed to meet his burden of proving the fees that he has actually incurred were in connection with a portion of this proceeding upon which he prevailed, or that the expenses he claims are reasonable. He is, therefore, ineligible for any award.

Expenses

Delaney also notes that the insurance company recently paid an additional nearly \$87,000 in costs, but does not delineate what costs were paid. In its Answer, the Division identified numerous expenses, including thousands of dollars of travel to locations where no witness lived, that had no clear connection to this litigation. As the record stands, most of these expenses are still unexplained. Moreover, neither the Division nor the Court can tell if Delaney has paid those unexplained expenses with an insurance payment, or whether he still claims those expenses.² Thus, Delaney continues to fail to meet his burden to show that whatever unpaid expenses remain were reasonable and were incurred in connection with a portion of the proceeding upon which he prevailed. He is, therefore, ineligible for any award.

EAJA Related Expenses

Finally, Delaney seeks nearly 330 hours of attorney time related to his EAJA application. This request is, on its face, unreasonable. Delaney’s counsel seeks reimbursement for over 170 hours spent on the original EAJA application – a 12-page application that, among other things, cites the wrong EAJA statute, argues an inapplicable cost-of-living escalator, and does not include the information required by the rules. The amount of hours expended is not reasonably related to the work product created. In addition, the itemized fees further demonstrate that the request is unreasonable. Among other things, Delaney seeks fees that appear to be related to a different case altogether (*see* Ex. A, 4/6 entry for WAR) and one of Delaney’s attorneys seeks reimbursement for 12 hours drafting and revising the EAJA filing on the day it was filed, despite the fact that it was sent to the Division by 3:00 p.m. Mountain Standard Time (*see* Ex. A, 5/29 entry for BRB). In short, Delaney has not met his burden to show that the fees claimed were reasonably expended on the EAJA application, and thus his request for those fees should be denied.

¹ The Division responded to the billing statement included in Delaney’s supplemental submission in its Answer. (*See* Answer at Appendix 3.)

² Delaney should not be permitted to waste the insurance payment on unrelated or unreasonable expenses, while asking the Commission to pay the remainder.

Sincerely,

A handwritten signature in black ink, appearing to read 'Polly Atkinson', with a large, sweeping flourish extending to the right.

Polly Atkinson
Trial Counsel
Division of Enforcement