

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

CAPITOL RECORDS, INC., a Delaware)
corporation; UMG RECORDINGS, INC., a)
Delaware corporation; MAVERICK)
RECORDING COMPANY, a California joint)
venture; BMG MUSIC, a New York general)
partnership; ARISTA RECORDS, LLC, a)
Delaware limited liability company; SONY BMG)
MUSIC ENTERTAINMENT, a Delaware general)
partnership; WARNER BROS. RECORDS INC.,)
a Delaware corporation,)
Plaintiffs,)
v.)
DEBBIE FOSTER,)
Defendant.)

Case No. CIV-04-1569-W

**DEFENDANT DEBORAH FOSTER’S SUPPLEMENT TO HER APPLICATION FOR
COSTS AND ATTORNEYS’ FEES PURSUANT TO THE COPYRIGHT ACT**

Comes now the Defendant Deborah Foster a/k/a Debbie Foster and hereby supplements her application for costs and attorneys’ fees pursuant to the Copyright Act previously filed herein, to wit:

1. Defendant Debbie Foster’s Memorandum of Points and Authorities In Support of Award of Attorneys’ Fees, docket no. 129, filed August 7, 2006 with attached declaration of defendant’s expert witness Richard B. Wilkinson dated August 7, 2006;
2. Defendant Deborah D. Foster’s Notice of Authority Cited In Defendant’s Memorandum of Points and Authorities in Support of Award of Attorneys’ Fees, docket no. 136, filed August 15, 2006;
3. Defendant Deborah Foster’s supplement, docket no. 134, in accordance with the Court’s August 10, 2006 Order [Docket No. 133]:
 - a. Attachment 1 August 14, 2006, Declaration of Marilyn D. Barringer-Thomson
 - b. Attachment 2 August 14, 2006 Declaration of Warren W. Henson, III
 - c. Exhibit 1 Interim billing statement reflecting attorneys’ time, paralegal/legal assistant time, costs/expenses and defendant’s payments
 - d. Exhibit 2-8, Docket No. 136.
4. Index to Defendant’s Supplements filed on May 3, 2007:

- a. Attachment 3, 5-3-07 Supplemental Declaration of Marilyn D. Barringer-Thomson
- b. Attachment 4, 5-3-07 Supplemental Declaration of Warren W. Henson, III
- c. Attachment 5, 5-3-07 Supplemental Declaration of Richard B. Wilkinson, Defendant's Expert Witness
- d. Attachment 6, 4-12-07 transcript of deposition of Defendant's Expert Witness Richard B. Wilkinson taken by Plaintiffs (Volumes 1 & 2, with confidential pages in separate volume).
- e. Defendant's Exhibit 1, 5-3-07 work in progress report for account 249.00
- f. Defendant's Exhibit 2, 5-3-07 work in progress report for account 249.01
- g. Defendant's Exhibit 3, 2-19-07 redacted contract for representation

I. Amount Sought by the Defendant Deborah Foster

A. Account Numbers 249.00 and 249.01 (Defendant's Exhibits 1 & 2)

Defendant seeks to recover her costs and attorneys' fees under the Copyright Act. Defendant also seeks to recover under the Copyright Act for the costs incurred for the services rendered and the testimony given by her expert witness Richard B. Wilkinson. The lodestar equals the reasonable number of hours expended on the matter times the reasonable hourly rate. The lodestar calculation for this case as shown by the work in progress statement for accounts 249.00-249.01 is as follows:

The total number of hours for lead counsel Marilyn Barringer-Thomson is 426.25 [hours] at \$225.00 per hour equals \$95,906.26.

The total number of hours for co-counsel Warren W. Henson, III is 39.90 at \$175.00 per hour equals \$6,982.50.

The total number of hours for lead counsel's legal assistant is 34.90 hours at \$80.00 per hour equals \$2,792.00.

1.	Account number 249.00 fees:	\$54,276.75 ¹
2.	Account number 249.00 costs/expenses:	618.21 ²

¹*Defendant's Exhibit 1 (work in progress account 249.00)*, pgs. 1-12; at 12 (recap).

²*Defendant's Exhibit 1, (work in progress account 249.00)* pgs. 10-12, at 12 (recap).

3.	Account number 249.01 fees:	51,404.00 ³
4.	Account number 249.01 costs/expenses:	3,395.47 ⁴
5.	Expert witness fees/costs/expenses:	<u>4,668.75</u> ⁵
		\$114,363.18

The costs and expenses reflected by the work in progress reports (\$3,395.47 plus 618.21) equals \$4,013.68. *Defendant's Exhibits 1-4.*

B. Evidence In Support of Hourly Rate and Reasonableness of Hours Expended

Defendant submits the declarations of her counsel of record and her expert witness Richard B. Wilkinson as supplemented to support the hourly rates sought and the reasonableness of the hours expended.

The transcript of the deposition of defendant's expert witness volumes 1 and 2 is filed herewith as **Attachment 6**. Mr. Wilkinson's deposition testimony is offered in the event that the Court determines that a hearing on the issue of Copyright Act costs and attorneys' fees would not assist the Court in its determination of the pending issues. **Attachment 6**, pgs. 71-79 (Wilkinson reviewed defense counsel's pleading files maintained in this case in preparation of his August 2006 declaration). Mr. Wilkinson testified regarding his significant experience with attorneys' billing, fee applications and other related issues arising from his employment with the Oklahoma Education Association, Attachment 6 pgs. 80-91. Mr. Wilkinson did not consider Deborah Foster's representation agreement in arriving at his opinions. Attachment 6, pgs. 92-93. Mr. Wilkinson

³*Defendant's Exhibit 2, (work in progress account 249.01)* pgs. 1-9; at 15 (recap).

⁴*Defendant's Exhibit 2 (work in progress account 249.01)*, pgs. 9-15; at 15 (recap).

⁵*Defendant's Attachment 5 (Declaration of Richard B. Wilkinson)*, pgs.1-4; at 3-4 (itemization of time).

testified that the OEA typically pays lawyers a discounted fee to assist members and in his experience these lawyers apply for fees based upon their normal, non-discounted hourly rates and the Courts usually analyze the fee applications based upon the reasonable hourly rate for this locale times the number of hours expended. Attachment 6, pgs.92 -96; 101-103; 104-108; 113 -115; 119(also testified regarding prevailing party status and secondary liability issue).

C. *Johnson Factors*

The Tenth Circuit has utilized various factors set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

The novelty and difficulty of the questions raised in this litigation were of first impression in the plaintiffs' national and international litigation brought against alleged infringers of plaintiffs' copyrights. The District Court Clerk's records for the Western District of Oklahoma will reflect that numerous cases were filed by plaintiffs against various individual defendants who were internet account holders with Cox Communications on or around the same date that plaintiffs' commenced their case against Defendant Deborah Foster. The District Court Clerk's records for these cases will reflect that in vast majority of the cases, few, if any, defendants lodged a (successful) defense and counterclaims against the plaintiffs' copyright claims and the majority of the defendant's stipulated to the entry of an injunction and judgment to be taken against them. The majority of the individuals apparently decided that (although they were not culpable or regardless of not being culpable) it would be less costly to pay the sums sought by the Plaintiffs than to retain counsel to assert defenses and counterclaims against the Plaintiffs. Deborah Foster is a licensed registered nurse who is required by the State of Oklahoma to maintain certain standards as a condition to her practicing her profession and earning a livelihood.

In light of the Plaintiffs' substantial national and international interest in protecting their copyrights from massive infringement, the defense of Deborah Foster was not a desirable undertaking. This is further shown by the Plaintiffs' relentless prosecution of Deborah Foster during the course of this litigation.

Defendant Deborah Foster's limited financial resources would delay payment of any legal services rendered in her behalf for the date that counsel entered their appearance and continuing through the conclusion of the litigation. The Court is intimately familiar with the history of this litigation: Defendant's disclosures under oath in her April 25, 2005 discovery responses provided the basis for Defendant's exhaustive, unsuccessful attempts to settle the case by a dismissal with prejudice to include compensation for her attorneys' fees and costs. The plaintiffs continuously refused to dismiss their claims against Deborah Foster with prejudice although they knew that she did not participate in any activities relating to unlawful downloading of plaintiffs' copyrighted music.

The results obtained as reflected by the District Court's orders in favor of Defendant Deborah Foster are exceptional in the music downloading area of copyright law. The undisputed facts are that Defendant was unable to compensate her counsel during this litigation. Under the circumstances presented in this case, most hourly rate defense attorneys would have withdrawn from representation because of the Defendant's inability to pay and the Defendant would have returned to the pro se status she held at the time that she filed her pro se answer. Deborah Foster's situation is most analogous to a contingency fee case as opposed to an hourly rate case because Deborah Foster is very similar to the contingency client who lacks the financial resources to compensate her counsel during the prosecution of her claims. Moreover, Deborah Foster's counsel does not have

numerous similar cases wherein they are defending individuals (or a party's insurance carrier) for the purpose of establishing a lengthy business relationship between counsel and the defendant. Defendant submits that the history of the litigation in this case, the material facts at issue and the District Court's Orders establish a case of first impression and precedent on a national scale. Other defendants who are similarly situated to the defendant Deborah Foster will benefit for this litigation in the evaluation of their defenses and counterclaims and hopefully will be able to retain counsel to represent them in actions filed by the plaintiffs.

Conclusion

The Court should enter an order awarding Defendant Deborah Foster the amounts sought as costs and attorneys' fees under the Copyright Act.

Respectfully submitted,
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Counsel for Defendant

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of May, 2007, I electronically transmitted the above and forgoing to the Clerk of the Court using the ECF System for filing. Based on the electronic records current on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the all ECF registrants in this case:

<p>Richard Gabriel James C. Ruh Colorado Bar 00927 Nadia Sarkis Holme Roberts & Owen, LLP 1700 Lincoln, Suite 4100 Denver, CO 80203-4541 Telephone: 303-861-7000 Telecopier: 303-866-0200 Admitted <i>Pro Hac Vice</i></p>	<p>Colin G. Martin, OBA 19165 Attorney for Plaintiffs GARDERE WYNNE SEWELL LLP 1601 Elm Street, Suite 3000 Dallas, Texas 75201-4761 Telephone: 214-999-4227 Telecopier: 214-999-3227 cmartin@gardere.com</p>	<p>Shawn Harrell, OBA 16660 Charles MacLawhorn McAfee & Taft, P.C. Tenth Floor, Two Leadership Square 211 North Robinson Oklahoma City, OK 73102-7103 Telephone: 405-235-9621 Telecopier: 405-235-0439</p>
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