

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

RETRACTABLE TECHNOLOGIES, INC.
AND THOMAS J. SHAW,

Plaintiff,

-against-

BECTON, DICKINSON AND COMPANY,
INC.

Defendant.

Civil Action No. 2:08-cv-16

Chief Judge Leonard Davis

(Jury Trial)

**DEFENDANT BECTON DICKINSON AND COMPANY'S
MOTION TO ALTER OR AMEND THE JUDGMENT**

Pursuant to FED. R. CIV. P. 59(e), Defendant Becton, Dickinson & Company ("BD") respectfully asks this Court to alter or amend the Final Judgment entered on January 15, 2015 (Document 690), to delete the award of pre-judgment interest. In making this targeted motion, BD does not waive any of its other challenges to the entry or terms of the Final Judgment.

I

Out of an abundance of caution, BD respectfully incorporates all its post-trial motions and asks the Court to enter judgment as a matter of law, grant a new trial or suggest a remittitur, and deny the injunctive relief, disgorgement of profits, and attorney's fees requested by RTI. (See Docs. 589, 602, 603, 604, 605, 613, 618, 647.) Recognizing that the Court has ruled on all those issues and preferred to resolve them all prior to entry of judgment (Doc. 579), however, BD will not brief them again and respectfully incorporates them here simply to leave no question that it has fully preserved its grounds for appeal.

II

There is one error in the Final Judgment that has not been addressed previously because BD had neither notice of it nor an opportunity to be heard: the award of pre-judgment interest. Because RTI did not seek pre-judgment interest in its initial motion for judgment (Doc. 590 ¶ 6) or its recently-filed proposed form of judgment (Doc. 673-1 ¶ 5), this issue could not have been addressed in accordance with the Court's order governing post-trial briefing (Doc. 579).

Based on the verdict finding an attempt to monopolize in violation of Sherman Act § 2 and a damage award pursuant to Clayton Act § 4, Paragraph 5 of the Final Judgment awards RTI pre-judgment interest.

Under Clayton Act § 4, however, courts may award "simple interest on actual damages" over a specified time frame only if such an award is "just in the circumstances." 15 U.S.C. § 15; *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Authority*, 133 F.R.D. 481, 485-86 (E.D. La. 1990). Under the Clayton Act, pre-judgment interest may not "be awarded as a matter of course." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 561-62 (7th Cir. 1986); *see Law v. NCAA*, 185 F.R.D. 324, 345-46 (D. Kan. 1999). There is no basis for such an award here.

First, the Clayton Act expressly provides that courts may consider only three factors when considering a request for pre-judgment interest; each statutory factor involves some form of bad faith or sanctionable conduct in the course of the litigation. *See* 15 U.S.C. § 15; *see also Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 435-36 (2d Cir. 2007) (Clayton Act "does not allow for prejudgment interest in the absence of a finding of" one of these factors).

Under these factors, there is no basis to find bad faith conduct by BD in this litigation; certainly, the Court has not made any such findings in support of its Final Judgment, and none would be appropriate based on the record of this litigation. Thus, BD respectfully submits that pre-judgment interest should not be awarded under the Clayton Act.

Second, the Clayton Act itself requires that a “motion be promptly made” by the party seeking pre-judgment interest. 15 U.S.C. § 15. RTI did not comply with this prerequisite. There was no request for pre-judgment interest in its initial motion for judgment (Doc. 590 ¶ 6), or its recently-filed proposed form of judgment (Doc. 673-1 ¶ 5). This silence was no oversight. RTI’s motions for entry of judgment were comprehensive and aggressive, seeking all the relief RTI’s counsel believed could be justified under the circumstances – including treble damages, disgorgement of BD’s profits, prohibitory and mandatory injunctive relief, and attorney’s fees. If RTI believed it was entitled to pre-judgment interest and wanted to press for such an award, then it would have done so. RTI’s failure to request pre-judgment interest itself signals that the award is inappropriate (as well as making it unavailable as a procedural matter).¹

Conclusion

The Court should alter the Final Judgment to remove the award of pre-judgment interest (in the alternative to granting the relief requested by BD’s prior post-trial motions, all of which are incorporated here for purposes of preservation). BD requests all relief to which it is entitled.

¹ In addition, the Final Judgment is defective and indefinite because it fails to specify any rate of “simple interest.” See *United States v. Texas*, 479 U.S. 305, 308-09 (1993) (in federal question cases, pre-determined interest rates do not apply); *Reeled Tubing, Inc. v. M/V Chad G*, 794 F.2d 1026, 1029 (5th Cir. 1986) (same).

Respectfully submitted,

/s/ Robert A. Atkins

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Certificate of Conference

The undersigned hereby certifies that counsel for BD conferred with counsel for RTI, which opposes the relief requested in this motion.

/s/ Russell S. Post

Certificate of Service

The undersigned hereby certifies that on February 12, 2015, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Russell S. Post