

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

TOCCATA GAMING INTERNATIONAL, LLC and
BIG DADDY GAMES, LLC,

ORDER

Plaintiffs,

11-cv-600-bbc

v.

REEL SPIN STUDIOS, LLC, *et al.*,

Defendants.

Before the court is defendants' Rule 37(a)(5)(A) request for cost shifting (dkt. 77), seeking \$14,767 for 51.9 hours of work by four attorneys preparing plaintiffs' successful motion to compel plaintiffs to meet their outstanding discovery obligations. (Dkt. 67). Plaintiffs take issue with the request, arguing that they provided much of the requested material after the motion was filed but before the motion hearing, the court narrowed five of the 11 requests, demonstrating that plaintiff's objections were "substantially justified," and that defendants have included line items unrelated to the motion to compel.

Plaintiffs' first argument is a nonstarter under the plain language of Rule 37(a)(5): a party is entitled to its costs "if the disclosure or requested discovery is provided after the motion was filed." Plaintiffs' second argument is a slight stretch: this court's usual agenda during a hearing on a motion involving discovery does not routinely involve declaring winners and losers, but to find a quick, pragmatic solution to the problem that is not going to have unnecessary negative repercussions later in the lawsuit. Rarely does a movant obtain everything it requested in its motion because that's usually a sure path to unnecessary negative repercussions later in the lawsuit. For the same reason, the court rarely shifts costs on discovery motions, notwithstanding the mandatory language of Rule 37(a)(5). Therefore, just because the court did not force

plaintiffs to meet every demand made by defendants does not mean that plaintiffs' failure to produce this information was substantially justified, or that plaintiffs are entitled to a discount against defendants' bill. That said, I will take into account the fact that the court did not order plaintiffs to produce everything requested in the motion.

Finally, plaintiffs ask why they should have to reimburse defendants for time spent drafting a "deficiencies" letter and preparing for, then memorializing a meet and confer session at which most of the disputes were resolved without resort to a discovery motion. Plaintiffs also wonder about 1.9 hours opposing counsel spent "expediting" the motion hearing. These all are valid concerns up to a point but only up to a point: the defendants are entitled to trace back to their origins the costs associated with those parts of the discovery motion they won. Since this cannot be done with precision (and the court wouldn't expect it to be), the court will discount some but not all of the disputed time entries. Finally, when we get to this juncture, the court often applies a "piling on" discount under the "other circumstances" clause of Rule 37(a)(5)(A)(iii). Without doubting for a minute that plaintiffs' four attorneys really put in 51.9 hours on this matter, taking into account the other matters discussed above, the court does not see this as a matter that required 6½ billable days of attorney time, although the average hourly rate of \$284.50 is reasonable.

Having read all the parties submissions, having carefully considered their arguments and taking into account the relevant factors under Rule 37(a)(5) as discussed above, the court finds that four eight-hour days at an average rate of \$284.50, for a total of \$9104 constitutes defendants' reasonable expenses incurred in making their successful motion to compel discovery.

ORDER

Pursuant to F.R. Civ. Pro. 37(a)(5)(A), IT IS ORDERED that plaintiffs and their attorneys are jointly and severally responsible to pay \$9104 to counsel for defendants not later than May 11, 2012.

Entered this 10th day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge