

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

PRIMEX, INC.,

Plaintiff,

v.

VISIPLEX TECHNOLOGIES, INC.,

Defendant.

MEMORANDUM AND ORDER

05-C-515-S

Plaintiff Primex, Inc. commenced this patent infringement action alleging defendant Visiplex Technologies, Inc.'s VS2800 and VS3100 products infringe plaintiff's United States Patent No. 6,873,573. Defendant counterclaimed its products do not infringe any of the asserted claims of the '573 patent and the '573 patent is invalid and unenforceable. Jurisdiction is based on 28 U.S.C. § 1338(a). The matter is presently before the Court on plaintiff's motion for an award of attorney's fees and costs attributable to three motions to compel which the Court granted on December 21, 2005. The following facts relevant to plaintiff's motion are undisputed.

BACKGROUND

On November 18, 2005 plaintiff Primex, Inc. filed its first motion to compel with the Court seeking production of documents and responses to interrogatories. Plaintiff also sought an award of the attorney's fees and costs it incurred in connection with bringing its motion to compel. On November 29, 2005 defendant

Visiplex Technologies, Inc. filed: (1) its opposition to plaintiff's motion to compel; and (2) its cross-motion for entry of a protective order. On November 30, 2005 pursuant to stipulation between the parties the Court: (1) granted plaintiff's motion to compel and ordered defendant to produce its documents by noon on December 1, 2005; and (2) accepted and affirmed the protective order offered by defendant. However, the Court did not award plaintiff its costs or attorney's fees.

On December 9, 2005 plaintiff filed its second motion to compel document production with the Court. Plaintiff's December 9, 2005 motion concerned documents and "things" which had been requested in its first set of requests for production. Specifically, plaintiff sought production of material encompassed in its requests 1-75. Plaintiff's requests 1-75 were the subjects of its first motion to compel which the Court granted on November 30, 2005. Plaintiff alleged defendant failed to comply with the Court's November 30, 2005 order because it failed to produce all relevant documentation concerning requests 1-75. Additionally, plaintiff sought an award of the attorney's fees and costs it incurred in connection with bringing its second motion to compel.

On December 16, 2005 plaintiff filed two additional motions to compel with the Court. In its first motion to compel plaintiff sought an order compelling defendant to completely respond to its first and second sets of interrogatories. Plaintiff specifically requested that defendant address deficiencies in its

responses to interrogatory numbers 1-10. In its second motion to compel plaintiff sought an order compelling defendant to produce sample products as well as all relevant separate executable files of its source code for the products at issue in this action. Additionally, plaintiff sought an award of the attorney's fees and costs it incurred in connection with bringing the additional motions to compel.

On December 19, 2005 defendant responded by filing its own motion to compel with the Court. Defendant sought an order compelling plaintiff: (1) to produce all documents and "things" which defendant had previously requested; and (2) to fully supplement its responses to interrogatory numbers 1,5,6, and 7. Additionally, defendant sought an award of the attorney's fees and costs it incurred in connection with bringing its motion to compel.

On December 21, 2005 the Court granted plaintiff's motions to compel as well as defendant's motion to compel. Additionally, the Court awarded each party "reasonable attorney's fees and costs attributable to said motions." On January 30, 2006 plaintiff's attorneys submitted their time sheets and invoices which they assert are attributable to plaintiff's motions to compel. Plaintiff seeks attorney's fees in the amount of \$21,280.00 and costs in the amount of \$1,045.57.

MEMORANDUM

Plaintiff argues the amount it requests is reasonable considering the effort expended by its attorneys to: (1) review

documents; (2) make telephone calls; (3) write e-mails and letters to opposing counsel; (4) conduct legal research; and (5) prepare and file three separate motions to compel. Accordingly, plaintiff argues defendant should be required to pay the full amount it requests which is \$22,325.57.

Defendant argues plaintiff's requested amount is unreasonable and excessive because: (1) it seeks an award for time which was not directly attributable to its motions to compel; (2) it requests fees for its unsuccessful opposition to defendant's motion to compel; (3) it requests fees for its general review of discovery materials provided by defendant; and (4) it had multiple partners and paralegals reviewing and working on the same motions. Accordingly, defendant asserts plaintiff's request should be denied or significantly reduced in amount.

Pursuant to Federal Rule of Civil Procedure 37(a)(4) a court upon granting a motion to compel shall require "the party ... whose conduct necessitated the motion ... to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(4)(A). The court itself must determine whether the amount sought is reasonable. Equal Employment Opportunity Comm'n. v. Accurate Mech. Contractors, Inc., 863 F.Supp. 828, 834 (E.D.Wis. 1994). Accordingly, a court may properly rely on its own experience to estimate the time reasonably required for the work claimed. Vocca v. Playboy Hotel of Chicago, Inc., 686 F.2d 605, 607 (7th Cir.

1982) (*citing* Boe v. Colello, 447 F.Supp. 607, 610 (S.D.N.Y. 1978)). However, it is the moving party that bears the burden of demonstrating its hours and fees are reasonable, Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). Accordingly, a court can reject unsatisfactorily supported claims of attorney time. Vocca, at 607.

The most useful starting point for determining the amount of a reasonable fee is "the number of hours reasonably expended ... multiplied by a reasonable hourly rate." Hensley, at 433, 103 S.Ct. at 1939. The product of this determination is the lodestar. Estate of Borst v. O'Brien, 979 F.2d 511, 515 (7th Cir. 1992). However, hours that are not reasonably expended by virtue of duplicity or excessiveness cannot be billed to an adversary and should be excluded. Jardien v. Winston Network, Inc., 888 F.2d 1151, 1160 (7th Cir. 1989) (*citing* Hensley, at 434, 103 S.Ct. at 1940). Accordingly, while a flat rule mandating one attorney per case does not exist "the tendency of law firms to overstaff a case should cause [a] ... court to scrutinize a fee petition carefully for duplicative time." Id. (citations omitted). In other words the hours expended must be productive. See Hensley, at 434, 103 S.Ct. at 1939-1940.

Ordinarily, once a court establishes the number of hours reasonably expended on an action it must proceed to determine the reasonableness of the rate charged. However, defendant does not challenge the reasonableness of plaintiff's attorneys' rates in

this action. It only objects to the number of hours submitted as unreasonable and excessive. Accordingly, the Court finds that plaintiff's attorneys' rates are reasonable and will proceed to examine the number of hours requested to determine whether the hours expended on the motions to compel were reasonable.

On November 9, 2005 counsel spent 0.5 hours preparing and sending a letter to defendant's attorney concerning document production. However, plaintiff filed its first motion to compel on November 18, 2005 as such this request necessarily concerns its first motion to compel in which the Court did not award attorney's fees. Accordingly, this amount is disallowed.

On December 1, 2005 attorney Reynolds spent 0.8 hours reviewing defendant's documents and considering a response to defendant regarding its produced documents. Additionally, attorney Marschall spent 2.4 hours studying defendant's produced documents including its source code and identifying subject areas that were not provided. While general document review by the attorneys may have been tangentially related to plaintiff's motions to compel it most likely would have been performed regardless. See Mosaid Techs., Inc. v. Samsung Elecs. Co., 224 F.R.D. 595, 598 (D.N.J. 2004) (*citing* Creative Res. Group of New Jersey, Inc. V. Creative Res. Group, Inc., 212 F.R.D. 94, 104 (E.D.N.Y. 2002)). Accordingly, the hours spent on simply reviewing the documents are disallowed and the total amount of time is reduced to .4 hours. Said amount of time is reasonable and accounts for time expended by

attorney Marschall to identify areas that were not provided by defendant because such a task is directly attributable to preparing a motion to compel.

On December 2, 2005 counsel spent 2.1 hours studying defendant's produced documents including its source code and identifying subject areas that were not provided. The requested hours are reduced to .4 hours for reasons stated above.

On December 5, 2005 counsel spent 1.9 hours studying defendant's discovery responses and "need for further information in response to interrogatory responses." The requested hours are reduced to .4 hours for reasons stated above concerning hours expended on December 1, 2005.

On December 6, 2005 counsel spent 1.5 hours studying defendant's discovery responses in preparation for plaintiff's motion to compel. However, plaintiff asserted in its December 9, 2005 motion to compel that defendant's document production was insufficient because it only produced 161 pages of non-public information. Accordingly, because defendant produced such limited information 1.5 additional hours is excessive considering the amount of time counsel indicated was previously expended reviewing defendant's discovery responses. Accordingly, the requested hours are reduced to .4 hours which takes into consideration time to identify deficiencies in defendant's discovery production.

On December 7, 2005 counsel spent .4 hours "considering [defendant's] discovery deficiencies." This is a vague entry.

When an entry on a fee petition is vague a court may strike the problematic entry. Harper v. City of Chicago Heights, 223 F.3d 593, 605 (7th Cir. 2000)(citations omitted). Accordingly, this entry is stricken because the Court cannot verify what counsel meant by "considering."

On December 8, 2005 attorney Wilke spent 3.0 hours preparing plaintiff's motion to compel production of documents. Additionally, attorney Marschall spent 5.5 hours: (1) studying defendant's discovery responses in preparation for plaintiff's motion to compel; (2) attempting to resolve discovery issues with opposing counsel; and (3) preparing plaintiff's motion to compel production. While the Court does not consider time expended for general review of defendant's discovery responses it finds attorney Marschall's time is reasonable because he was responsible for preparing plaintiff's motion to compel and he spent time corresponding with opposing counsel regarding discovery issues. However, attorney Wilke's time was duplicative. Plaintiff's motion to compel was not legally complex. Additionally, it was only eight pages long and failed to cite any legal authority which indicates that additional assistance for legal research was unnecessary. Accordingly, attorney Wilke's hours are disallowed as duplicative.

On December 9, 2005 plaintiff had three attorneys as well as a paralegal working on its motion to compel. Attorney Reynolds spent 1.0 hour corresponding with opposing counsel concerning discovery issues. Attorney Wilke spent an additional 3.3 hours

preparing plaintiff's motion to compel production of documents which included time spent preparing attorney Marschall's declaration and its accompanying documents. Attorney Marschall spent another 6.8 hours: (1) preparing plaintiff's motion to compel; (2) finalizing plaintiff's motion and supporting declaration with exhibits; (3) filing plaintiff's motion and related material; and (4) confirming the filing of material with the paralegal. Finally, the assigned paralegal spent an additional 2.5 hours filing plaintiff's motion to compel. Accordingly, the total amount of hours requested for December 9, 2005 is 13.6 hours. Considering the nature of plaintiff's motion said hours are clearly excessive and duplicative.

First, attorney Marschall indicates he spent time filing plaintiff's motion and related material. However, the assigned paralegal requests costs for 2.5 hours expended on filing plaintiff's motion to compel. It was unnecessary to have two individuals spend time filing the same motion to compel. Additionally, it does not take 2.5 hours to file one motion with the Court and such a request is excessive. Accordingly, any hours expended by attorney Marschall concerning filing issues were not reasonable and are disallowed. Further, the paralegal's hours are reduced to .5 hours for this less than complex task.

Second, attorney Marschall asserts he spent time preparing plaintiff's motion to compel which included time to finalize said motion and its supporting declaration with exhibits.

However, as the Court previously explained plaintiff's motion to compel was not legally complex and counsel had spent significant time preparing it on December 8, 2005. Accordingly, attorney Marschall's hours are reduced to 1.5 hours. Said amount is a reasonable allotment for the task of completing and finalizing plaintiff's motion to compel.

Additionally, attorney Wilke asserts she spent 3.30 hours preparing plaintiff's motion to compel which included time to prepare attorney Marschall's declaration and its accompanying documents. As the Court previously explained it was duplicative to have both attorney Wilke and attorney Marschall prepare plaintiff's motion to compel. Accordingly, attorney Wilke's hours are reduced to 1.0 hour. An hour is a reasonable amount of time to prepare a declaration and compile its attached documentation. Finally, attorney Reynolds indicates he spent 1.0 hour corresponding with opposing counsel regarding discovery issues. This amount is reduced to .5 hours which is a reasonable amount of time for telephone correspondence.

On December 12, 2005 counsel spent 2.5 hours studying defendant's document production and identifying materials that were "lacking in the production." The requested hours are reduced to .4 hours for reasons stated above concerning hours expended on December 1, 2005.

On December 13, 2005 counsel spent 2.7 hours preparing and studying correspondence with opposing counsel regarding

discovery issues and possible motions to compel which included time for studying defendant's discovery responses. The requested hours are reduced to .9 hours. This amount includes .4 hours for studying defendant's production and identifying areas that were not produced because such an amount is reasonably attributable to preparing a motion to compel and it also includes .5 hours for studying correspondence with opposing counsel. Said amount is a reasonable amount of time for telephone correspondence.

On December 14, 2005 attorneys Marschall, Wilke, and Reynolds all worked on plaintiff's motions to compel in various capacities. Attorney Marschall indicates he spent 4.5 hours: (1) preparing plaintiff's motions to compel discovery and their supporting declarations and exhibits; and (2) studying correspondence with opposing counsel regarding discovery issues and possible motions to compel. This amount is reasonable considering plaintiff filed two separate motions to compel on December 16, 2005. Accordingly, it is not reduced.

Attorney Wilke asserts that on December 14, 2005 she spent 4.0 hours: (1) researching case law regarding attempts to compel executable source code; and (2) preparing motion to compel document production and accompanying documents. Plaintiff's motion to compel concerning executable source codes contained only one cite to legal authority a case from the district of Kansas. Such limited citation to legal authority demonstrates that 1.0 hour is a reasonable amount of time to conduct legal research on this

subject. Additionally, any hours attorney Wilke expended on preparing plaintiff's motions to compel are disallowed as duplicative because neither motion was particularly lengthy or legally complex. Accordingly, attorney Marschall was capable of preparing the motions himself. Attorney Wilke's requested hours are reduced to 1.0 hour.

Finally, attorney Reynolds indicates that on December 14, 2005 he spent 1.0 hour receiving and reviewing correspondence with opposing counsel regarding discovery issues. However, attorney Marschall also studied correspondence and discussed discovery issues with opposing counsel on December 14, 2005. Accordingly, attorney Reynolds' hours are disallowed as duplicative.

On December 15, 2005 attorney Marschall spent 8.8 hours: (1) preparing plaintiff's motions to compel discovery and their supporting declarations and exhibits; and (2) studying correspondence with opposing counsel regarding discovery issues and possible motions to compel. However, as the Court previously explained neither of plaintiff's motions to compel were legally complex and counsel had spent significant time preparing them on December 14, 2005. Accordingly, 8.8 hours is excessive and attorney Marschall's hours are reduced to 2.0. Said amount is reasonable to account for both corresponding with opposing counsel and continuing to prepare plaintiff's motions to compel.

Additionally, attorney Wilke indicates she spent an additional 6.2 hours on December 15, 2005 preparing plaintiff's

motions to compel and their accompanying documents. These requested hours are disallowed as duplicative for reasons stated above concerning the hours expended by attorney Wilke on December 14, 2005.

On December 16, 2005 plaintiff once again had three attorneys and a paralegal working on its motions to compel. Attorney Reynolds spent 5.0 hours: (1) drafting a motion to compel; and (2) corresponding with opposing counsel by telephone regarding discovery issues relating to plaintiff's motion to compel. Attorney Wilke spent an additional 1.0 hour revising plaintiff's motion to compel responses to interrogatories. Attorney Marschall spent another 5.5 hours: (1) preparing plaintiff's motions to compel; (2) finalizing plaintiff's motions and supporting declarations with exhibits; and (3) filing motions and related material. Finally, the assigned paralegal spent an additional 2.5 hours filing plaintiff's motions to compel. Accordingly, the total amount of hours requested for December 16, 2005 is 14 hours. Considering the nature of plaintiff's motions to compel 14 hours is clearly excessive and duplicative.

First, attorney Marschall indicates he spent time filing motions and related material. However, the assigned paralegal also indicates she spent 2.5 hours filing plaintiff's motions to compel. The Court once again fails to see why it was necessary to have two individuals file the same motions to compel. Additionally, it reiterates that it does not take 2.5 hours to file motions with the

Court. Accordingly, any hours expended by attorney Marschall concerning filing issues were not reasonable and are disallowed. Further, the paralegal's hours are once again reduced to .5 hours for this less than complex task.

Second, attorney Marschall asserts he spent time preparing plaintiff's motions to compel which included time to finalize said motions and their supporting declarations with exhibits. However, as the Court previously explained neither of plaintiff's motions to compel were legally complex. Additionally, according to attorney Marschall's time sheets he had previously spent approximately 13.3 hours preparing plaintiff's motions to compel. Considering the complexity of plaintiff's motions and the amount of time previously devoted to preparing the motions to compel 5.5 additional hours is excessive. Accordingly, attorney Marschall's hours are reduced to 1.5 hours. Said amount is reasonable to complete and finalize plaintiff's motions to compel.

Additionally, attorney Wilke indicates she spent 1.0 hours revising plaintiff's motion to compel responses to interrogatories. However, as the Court previously explained it was duplicative to have both attorney Wilke and attorney Marschall prepare plaintiff's motions to compel. Accordingly, attorney Wilke's hours are disallowed. Finally, attorney Reynolds asserts he spent 5.0 hours: (1) drafting a motion to compel; and (2) conducting a telephone conference with opposing counsel regarding discovery issues. This amount is reduced to .5 hours which is a

reasonable amount of time for telephone correspondence. The Court disallows any time attorney Reynolds requests for drafting a motion to compel as unnecessary because plaintiff's motions to compel were finalized on December 16, 2005 as indicated by the requests of attorneys Wilke and Marschall. Accordingly, any drafts created by the attorneys necessarily would have been completed before the day the attorneys assert they were finalized which was on December 16, 2005.

On December 19, 2005 counsel spent 2.3 hours "consider[ing] [defendant's] discovery delinquencies and considering action with respect to same." This is a vague entry. When an entry on a fee petition is vague a court may strike the problematic entry. Harper v. City of Chicago Heights, 223 F.3d 593, 605 (7th Cir. 2000) (citations omitted). Accordingly, this entry is stricken because the Court cannot verify what counsel meant by "considering."

On December 20, 2005 attorney Wilke indicates she spent 1.0 hour preparing attorney Marschall's declaration for plaintiff's opposition to defendant's motion to compel discovery. This amount is reasonable and is not reduced. Additionally, attorney Marschall asserts he spent 1.5 hours preparing for the December 21, 2005 court hearing concerning plaintiff's motions to compel. This amount is also reasonable and is not reduced.

Attorney Reynolds also requests time for work he conducted on December 20, 2005. He indicates he spent 2.1 hours:

(1) receiving and reviewing defendant's products; and (2) preparing plaintiff's opposition to defendant's motion to compel discovery. This amount is reduced to 1.5 hours which is a reasonable amount of time to prepare plaintiff's opposition motion. Any time attorney Reynolds spent receiving and reviewing defendant's products is disallowed because such tasks would have been completed regardless. Finally, on December 20, 2005 the assigned paralegal indicates she spent 1.0 hour filing: (1) the original documents from December 9, 2005; (2) the original documents from December 16, 2005; and (3) new documents for December 20, 2005. This amount is reduced to .5 hours which is a reasonable amount of time to file the document for December 20, 2005. Any time the paralegal spent filing "original" documents is disallowed because the Court expects parties to file original documents in the first instance.

On December 21, 2005 attorneys Marschall, Wilke and Reynolds each request time for preparing for and attending the hearing before the Court concerning the motions to compel. Attorney Marschall requests 1.0 hour. This is reasonable and is not reduced. Attorney Reynolds requests 2.7 hours. This amount is excessive for an 8:00 a.m. telephone motion hearing which lasted approximately 30 minutes. Accordingly, this amount is reduced to 1.0 hour. Finally, attorney Wilke requests 1.0 hour. This amount is disallowed. According to the Court's December 21, 2005 order attorney Wilke did not participate in the hearing and she is not allowed to request fees for a hearing she did not attend.

On December 21, 2005 the assigned paralegal requests 1.5 hours for filing the original motions with the Court. This amount is disallowed because as the Court previously indicated it expects parties to file original motions with the Court in the first instance. Finally, plaintiff requests \$145.57 in costs for photocopying expenses. This amount is reasonable and is not reduced.

Accordingly, the amount claimed by plaintiff is designated as follows:

Attorney Reynolds: 3.5 hours at \$275.00/hour	\$962.50
Attorney Wilke: 3.0 hours at \$165.00/hour	\$495.00
Attorney Marschall: 20.4 hours at \$295.00/hour	\$6,018.00
Costs (paralegal services and photocopying)	\$325.57
Total	\$7,801.07

ORDER

IT IS ORDERED that plaintiff's motion for attorney's fees and costs in the amount of \$7,801.07 is GRANTED and that judgment will be entered accordingly.

Entered this day 24th of February, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge