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

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SILICON GRAPHICS, INC.,

Plaintiff,

v.

ATI TECHNOLOGIES, INC,

Defendant,

ORDER

06-C-611-C

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On August 8, 2007, I denied ATI's motion for an order modifying the protective order, granted in part SGI's motion to enforce the protective order and directed cost-shifting pursuant to Rule 37(a)(4)(A) & (B). *See* dkt. 169. SGI timely submitted an itemized claim for a total of $44,269, representing about 88 hours of work by four attorneys billing their time at between $300/hr. and $720/hr. *See* dkts. 173-74. ATI opposes any payment, arguing first that Rule 37(a) does not apply to motions to modify a protective order, and second that its motion was substantially justified. Indeed, ATI has a motion for reconsideration pending with the district judge. *See* dkt. 179. SGI tossed a short reply into the mix (dkt. 189).

Preliminarily, ATI is cutting the loaf too thin by arguing that this dispute lies outside the purview of Rule 37(a). To state the obvious, the order at issue represents a court endorsement of an agreement between the parties about how to manage their confidential information during discovery. Rule 37(a)(4) specifically cites Rule 26(c) as a tool for mending discovery disputes. The Seventh Circuit's seminal case on discovery cost-shifting involved a disputed protective order. *See Rickels v. City of South Bend, Ind.*, 33 F.3d 785, 786 (7th Cir. 1994). In the instant case, as a practical matter ATI was moving to compel disclosure to third parties of information that SGI did not want disclosed. So, the cost-shifting mechanism of Rule 37(a) applies to this dispute.

Next, although I agree with ATI that it had the right to seek modification of the protective order, this right was not a license to shake up the status quo without consequence. Rule 37(a)(4)

is a fee-shifting rule, not a sanction for being wrong, so any party that invokes its right– whether that right is provided by the rules or by the terms of an agreement–to change the contours of discovery runs the risk of picking up its opponent's tab if it loses. But, as ATI observes, "a loser may avoid payment by establishing that [its] position was substantially justified." *Rickels,* 33 F.3d at 787. Understanding that this is not a particularly demanding burden of persuasion, I conclude that ATI has not met it in this case. As explained in my order denying ATI's motion and granting in part SGI's counter-motion, to treat a protective order in a patent case like disposable tissue pretty much defeats the whole point. ATI will have to pay SGI's reasonable expenses on this one. That said, this bill won't come due until after the district judge rules on ATI's motion for reconsideration.

The last question is whether SGI's request for $44,269 is reasonable. In 99% of the cases litigated in this court, it would not be. But in a genuinely high-stakes patent lawsuit where the motion in question sought to open a second front in this war, slow down the calendar by months if not years, and had the potential to drag SGI's highly confidential information by the heels through a new forum that SGI did not anticipate when it signed the protective order, ATI had to be expected that every hoplite in the phalanx would close ranks to defend against this one. Under the circumstances, 88 hours were a lot but not too many, and $720/hr. is steep but not too dear.

ORDER

Pursuant to Rule 37(a)(4)(B), it is ORDERED that ATI and its attorneys are jointly and severally liable to pay to SGI's attorneys $44,269 not later than 30 days after Judge Crabb rules on ATI's motion to reconsider, unless Judge Crabb provides otherwise in her order.

Entered this 21st day of September, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge