UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
CHARLES B. DAY
UNITED STATES MAGISTRATE JUDGE

U.S. COURTHOUSE
6500 CHERRYWOOD LANE
GREENBELT, MD 20770
(301) 344-0393
FAX (301) 344-0394

May 18, 2011

VIA ELECTRONIC FILING

Stephen Howard Ring, Esq.
Stephen H. Ring, PC
506 Main Street, Suite 215
Gaithersburg, MD 20878

Sanford M. Saunders, Jr., Esq.
Nicoleta Burlacu, Esq.
Greenberg Traurig, LLP
2101 L Street, NW, Suite 1000
Washington, DC 20037

Michael Stephen Rothman, Esq.
Law Office of Michael S. Rothman
401 East Jefferson Street, Suite 201
Rockville, MD 20850

John L. McManus, Esq.
Kenneth A. Horky, Esq.
Greenberg Traurig, PA
401 East Las Olas Blvd, Suite 2000
Fort Lauderdale, FL 33301

Re: Beyond Systems, Inc. v. World Avenue USA, LLC, et al.
Civil Action No.: PJM-08-921

Dear Counsel:

The Court has received Petitioner's World Avenue USA, LLC's Application As to Amount of Attorney's Fees (ECF No. 478) ("Defendant's Request"). The Court has reviewed Defendant's Request and all related briefings. No hearing is deemed necessary. Local Rule 105.6 (D. Md.). For the reasons stated below, the Court GRANTS Defendant's Request in the amount of $5,580.00.

Defendant seeks $12,334.68 in attorneys' fees and costs in connection with the Motion to Compel Complete Answers to Third Set of Interrogatories.[1] The award to Defendant was specifically for attorney's fees and costs "incurred in connection with its Motion." (ECF No. 444). Defendant's Request arises under Fed. R. Civ. P. 37(a)(5)(A). This rule regarding discovery abuses states that: "[i]f the motion is granted . . . the court must, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including the attorney's fees."

[1] Defendant discusses other rulings issuing sanctions against Plaintiff in this case and a case in another jurisdiction. For the purpose of the instant award, the Court will confine the focus to Defendant's efforts related to Defendant's Third Motion to Compel Complete Answers to Third Set of Interrogatories.

Plaintiff, Beyond Systems, Inc., ("BSI"), attempts to position itself under two of the three exceptions mentioned in Rule 37. The relevant portions state that the court shall not order payment if: "the opposing party's nondisclosure, response, or objection was substantially justified," or "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(ii)-(iii). Plaintiff claims that it was substantially justified "in that the response included the production of the documents described above, which substantially satisfied the requests."

The Court notes that under the rule, late production is not a recognized exception. The underpinnings of the "substantially justified" prong involve a genuine discovery dispute. See Fed. R. Civ. P. 37 advisory committee's note (1970) (stating that "Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery." It goes on to state that in "many occasions, to be sure, the dispute over discovery between the parties is genuine . . . [i]n such cases, the losing party is substantially justified in carrying the matter to court."); See also Bank of Mong. v. M&P Global Fin. Servs., Inc., 258 F.R.D. 514, 522 (S.D. Fla. 2009) (where the Court awarded fees and noted that counsel conceded its failure to comply with discovery requests was not substantially justified.) Plaintiff raises no legitimate basis for resisting discovery. Rather Plaintiff seeks mercy from the Court for the burden imposed in trying to comply with the discovery requested by Defendant. In this instance, this is not a reasonable argument and is therefore outside the scope of what is contemplated by the Rule. The Court finds that Plaintiff is not excused from paying expenses associated with Defendant's motion on the basis Plaintiff's conduct was "substantially justified."

Plaintiff also claims "other circumstances" existed "in the form of rapid succession of discovery motions and other motions as reflected in the docket entries, creating time demands that impaired the drafting of more elaborate written responses." Both parties have engaged in a prolific flurry of filings in this case. Plaintiff cannot cloak itself in the mantel of being a victim of something it shared equally in creating. Finally Plaintiff notes that the "bulk of the information sought had been obtained prior to the filing of the Motion."

The Court fails to see how these "other circumstances" in anyway factor in to make an award here unjust. The Court also finds unpersuasive Plaintiff's argument that the substance of the production was largely responsive to Defendant's request.

Plaintiff next suggests that this Court should apply the principle of proportionality that it applied in another case. In EEOC v. Bardon, Inc., 2010 WL 989051 (D. Md. 2010) (Slip Copy), the Court's award was based on a finding that the defendant prevailed upon 52% of its motion to compel. In the instant matter, the Court makes no such finding of partial victory and finds no reason to reduce the award. In awarding fees, the Court said: "Plaintiff shall provide full and factual responses to all interrogatories, signed under oath, within seven (7) days. Plaintiff's failure to do so before the serving of Defendant's Motion is unacceptable and is singularly sufficient for the award of sanctions." Therefore, the Court rejects Plaintiff's proportionality argument.

I. Calculation of Fees

This Court uses a lodestar analysis to determine attorneys' fees awards, an analysis which involves multiplying a reasonably hourly rate by the number of reasonable hours expended. Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 243 (4th Cir. 2009), citing Grissom v. Mills Corp., 549 F.3d 313, 320 (4th Cir. 2008). Reasonableness is key in the analysis and the twelve Johnson factors guide the Court in determining what are "reasonable" hours and rates. The twelve Johnson factors are:

> (1) time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work: (6) the attorney's expectation at the out-set of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; (12) attorneys' fees awards in similar cases.

See Robinson, 560 F.3d at 243; Barber v. Kimbrell's Inc., 577 F.2d 216, 226, n.28 (4th Cir. 1978) (where the court adopted the factors established in Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), abrogated on other grounds by Blanchard v. Bergeron, 489 U.S. 87 (1989)). In determining the reasonableness of the fees requested, the Court also relies upon the Guidelines in Appendix B, of the Local Rules (D. Md.) (the "Guidelines"), which will be discussed in greater detail below.

For the analysis in the instant case, the Court finds Johnson factors one, two, three and nine most persuasive. Turning to factor one, it is clear that the amount of time and effort invested by Defendant's attorneys was significant. Factor two is applicable because this case involves some unique challenges, especially those that stem from the underlying controversy: whether certain emails were sent by a particular corporate entity or received by a particular email address. Factor three is relevant because of the various parent and subsidiary corporate identities implicated. Finally, the experience, reputation and ability of the attorney will be a relevant factor in virtually every case. The more experienced an attorney, the more efficiently he or she is expected to perform. Likewise, one would expect the more experienced attorney to charge higher fees when compared to an inexperienced attorney.

Defendant's primary support of the reasonableness of the billing rates of counsel is offered by the declarations of two attorneys: Sanford M. Saunders, Jr. and John L. McManus.[2] Standing alone, the Court finds these declarations are insufficient. Parties seeking fee awards generally must submit affidavits from non-trial counsel attesting to the reasonableness of their rates. In addition, Defendant provides an article from The National Law Journal. This document

[2] An affidavit is also provided by Dr. Neal A. Krawetz, who is presented as an ESI expert. This will be covered in Section V Costs.

provides a list of law firms and the rates charged by partners therein. This is offered as support for the general fees charged in the geographic market. However, it does not speak to the issue of what is customary in the particular area of law involved here. Defendant also provides a summary chart, stating the date, the name of the attorney, a description of the task being performed, the amount of hours to complete said task or tasks, and the total being charged, which synthesizes the redacted copies of time records kept. Ultimately the appropriate amount for an award of attorney's fees is a matter that is left to the discretion of the Court. Both the reasonableness of the hourly billing rates and the reasonableness of the hours incurred are discussed in turn.

II. Reasonable Billing Rate

When submitting a fee petition, a party should submit affidavits from other attorneys attesting to the reasonableness of the hourly rates. Robinson, 560 F.3d at 245; Grissom, 549 F.3d at 323. In both cases, the Fourth Circuit found that the moving party had not provided sufficient evidence of the reasonableness of the hourly rates proposed and both cite the use of affidavits as the preferred method of doing so. The Grissom court stated that the affidavits were necessary because they ensured that the hourly rates requested by the party "coincided with the then prevailing market rates of attorneys in the Eastern District of Virginia of similar skill and for similar work, which our case law required him to do." Grissom, 549 F.3d at 323. See also Robinson, 560 F.3d at 245.

While affidavits are the preferred evidence of understanding reasonableness in the context of prevailing market rates, "in the absence of sufficient documentation, the court may rely on its own knowledge of the market." Costar Grp. v. Loopnet, Inc., 106 F. Supp. 2d 780, 788 (D. Md. 2000). See also Hensley v. Eckerhart, 461 U.S. 424, 433 (inadequate information is not necessarily fatal; a court may instead adjust fees accordingly). The Court may supplement with its own knowledge because it "is itself an expert on the question of reasonableness and . . . may form an independent judgment either with or without the aid of witnesses as to value." Id., at 788 (quoting Campbell v. Green, 112 F.2d 143, 144 (5th Cir. 1940)). In the District of Maryland, this market knowledge is embedded in the Rules and Guidelines for Determining Attorneys' Fees in Certain Cases, Appendix B, Local Rules (D. Md.) (the "Guidelines"). This Court's Local Rules are instructive on the range of reasonable hourly rates based on counsel's years of experience. While the Guidelines are not binding, generally this Court presumes that a rate is reasonable if it falls within these ranges.[3] In light of this, Defendant has provided

[3] Footnote 6 in Appendix B, Local Rules (3) provides important insight regarding the purpose and use of the fee ranges in the Local Rules:

> These rates are intended solely to provide practical guidance to lawyers and judges when requesting, challenging and awarding fees. The factors established by case law obviously govern over them. One factor that might support an adjustment to the applicable range is an increase in the cost of legal services since the adoption of the guidelines. The guidelines, however, may serve to make the fee petition less onerous by narrowing the debate over the range of a reasonable hourly rate in many cases.

sufficient information for this Court to determine whether the proposed attorneys' fees are reasonable.

Defendant has not presented the Court with anything that persuades it to deviate from the figures provided in the Guidelines. While Defendant notes cases decided in the Fourth Circuit and in the District of Maryland that found the situation warranted going beyond the rates published in the Local Rules, those cases are each distinguishable. These cases notwithstanding, the result here would remain the same as Defendant has not demonstrated a satisfactory basis to permit rates higher than the Guidelines under these circumstances. Further, even if the Court were to conclude that said cases were binding, Defendant fails to show how the situation in those cases is analogous to the circumstances here, thus warranting the fees it seeks to recover here. Below, the three attorneys who participated in Defendant's Request are discussed in turn.

Nicoleta Burlacu graduated from law school in 2000. She received her L.L.M. in 2006. It appears from Mr. McManus' Declaration that she then worked for Greenberg Traurig, LLP from 2006 to 2008. She was admitted to the New York bar in 2008. While the Guidelines are fashioned in terms of "years admitted to the bar," the Court accepts Defendant's representation that she has ten years of experience and includes her international law experience for purposes of determining her reasonable hourly billing rate. As such, the Court finds $290.00 per hour reasonable as it is within the Guidelines.

Kenneth Horky has 24 years of experience. The Guidelines provide that $275-440 is reasonable for an attorney with more than 15 years of experience. Defendant does not provide the Court with any evidence or other information that persuades it to go beyond the range provided by the Local Rules. Therefore the Court finds the reasonable rate for Mr. Horky is $400.00 per hour for the work performed in connection with Defendant's Request.

John McManus has 13 years of experience. The Guidelines provide that the reasonable rate for an individual with his experience is between $225 – 300. As such the Court will apply a rate of $300.00 per hour for the work performed in connection with Defendant's Request.

III. Reasonable Hours

Defendant has the burden of demonstrating that the fees and hours requested are reasonable. Costar Group, 106 F. Supp. 2d at 788. Contemporaneous time records are the preferred method to account for the hours requested by a moving party. Costar Group, 106 F. Supp. 2d at 788. However, summary charts can be sufficient. Id. (Noting a summary chart was adequate, though contemporaneous time records are ideal). An adequate summary chart must include enough information for the Court to rule on the reasonableness of the award; "the records must specify, for each attorney, the date, the hours expended and the nature of the work done."

Appendix B, Local Rules (3) n.6 (D. Md.).

Id. Cf. Hensley v. Eckerhart, 461 U.S. 424, 437 n. 12 (1983) (a party "is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures."). Here, Defendant provides both contemporaneous time records and a summary chart, which together provide an adequate description of each task worked on, the attorney working on the task, the date, and the amount of time spent on the specific task. The Court provides a summary of those invoice entries below.

NAME	HOURS	RATE	AMOUNT
Nicoleta Burlacu, Esq.	2	$290.00/hr	$580.00
Kenneth Horky, Esq.	2	$400.00/hr	$800.00
John McManus, Esq.	14	$300.00/hr	$4,200.00
TOTALS	28.5		$5,580.00

V. Costs

Defendant seeks $4,590.68 for costs associated with its motion. These include expert fees of Dr. Neal A. Krawetz in the amount of $4,562.50 and $28.18 for a Federal Express delivery. According to Dr. Krawetz's declaration, he was "engaged by [Defendant] to provide expert opinions in connection with this litigation." In addition, he indicates that he "reviewed the matter, communicated with counsel, reviewed documents, and worked on a responsive Declaration in opposition to the Declaration of Paul A. Wagner."

The Court finds the declaration provided by Dr. Krawetz to be inadequate for the purposes of an award of "costs." With regards to the reasonableness of his hourly rate, Dr. Krawetz states:

> My hourly rate is $250.00 per hour, and that is the rate that I charge for all litigation matters. Based on my knowledge, this is a reasonable hourly rate for experts in this subject matter. Specifically, I have personal knowledge that one of [Plaintiff's] experts who submitted a report in this case stated that he bills at a rate of $400 per hour.

In addition, Dr. Krawetz does not provide any information regarding his educational background or his experience. See Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010) (finding that Defendant's ESI expert left "much to be desired," the court found Plaintiff's ESI expert's testimony to be credible, noting that by contrast "Plaintiff's ESI expert . . . has passed Microsoft tests, teaches a college-level computer forensic course, and has worked on computers professionally since 1993.")

The Court recognizes that it may be difficult to provide support that a particular rate is reasonable in the context of ESI experts. Costs can vary among geography and the various vendors. However, until such time that reliable independent sources are produced, which afford the courts with some basis for reasonableness within the industry, affidavits of ESI experts

should include at a minimum the expert's education, publications, and other relevant background information . In addition, the expert should provide some indication of what other similarly situated experts (i.e. same educational and experience) are charging. That said, it is not entirely clear from the face of Dr. Krawetz's declaration what his expertise is or why he was "engaged." From the record before the Court at best it appears he reviewed documents for Defendant.

Defendant sites ASIS Internet Services v. Optin Global, Inc., 2010 WL 2035327 (N.D. Cal. 2010) as an example involving an award of attorney's fees in a spam email case. The court awarded attorneys' fees in the amount of $806,978.84. The court concluded that "while ASIS may not have acted out of bad faith in initiating litigation against Azoogle, it at least acted unreasonably." Id. at *4. So in reaching its award, the court reasoned that "an award of attorneys' fees here is necessary to deter ASIS and other plaintiffs hoping to profit under the CAN-SPAM Act [of 2003, 15 U.S.C. §§ 7701 et seq.] from casting such a wide net." Id. The court found the rates charged were reasonable "based on its familiarity with the prevailing rates in this district." Id. at * 6.

Interestingly, Azoogle also asked the court to award fees for its expert. In accordance with the "general rule," the court noted that expert fees are not recoverable under the CAN-SPAM Act. Specifically the court declined to award "expert fees under the CAN-SPAM Act as it has found nothing in the statute or the case law indicating a clear intent on the part of Congress to override the general rule that expert fees are not available except as allowed under 28 U.S.C. § 1821." Id. at *6. The Court notes that this statute permits witness fees of a "witness in attendance at any court of the United States . . . or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section." 28 U.S.C. § 1821(a)(1). Here Dr. Krawetz did not testify in any court of the United States or at a deposition. That is not to suggest that experts cannot be compensated but that in these circumstances, such is not appropriate. Further, under Rule 37, the point of the sanctions is to compensate attorneys for the effort of having to file an unnecessary motion. While the declaration and supporting motion detail the expert's efforts, presumably such work would have been done in preparation for trial.

VI. Conclusion

For the reasons stated herein, the Court awards Plaintiffs fees in the total of $5,580.00. Despite the informal nature of this letter, it should be flagged as an opinion and docketed as an Order of the Court.

/s/

Charles B. Day

United States Magistrate Judge