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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAVE CONSULTING GROUP, INC.,
Plaintiff,
v.
TRUVEN HEALTH ANALYTICS INC.,
Defendant.

Case No. [15-cv-02177-SI](#)

**ORDER RE: TRUVEN'S MOTION FOR
ATTORNEYS' FEES AND COSTS**

Re: Dkt. Nos. 366, 371, 374

In an order filed March 14, 2018, the Court granted in part defendant Truven Health Analytics's ("Truven") motion for attorneys' fees and nontaxable expenses related to Truven's defense against plaintiff Cave Consulting Group's ("CCGroup") assertion of U.S. Patent No. 8,340,981 ("the '981 patent"). Dkt. No. 365. The Court held that this case was "exceptional" under 35 U.S.C. § 285 because CCGroup asserted the '981 patent when CCGroup knew or should have known that the '981 patent was invalidated by its own product. The Court found that Truven was entitled to its fees and costs incurred as a result of litigating the '981 patent.

With regard to the calculation of a reasonable fee, Truven contended that CCGroup's assertion of the '981 patent at most doubled the amount of work that it performed in this case, and Truven "conservative[ly]" request[ed] 25% of the total fees for patent-related work incurred from the filing of the complaint until the '981 patent was withdrawn to account for the "overlap in defending against the two related patents." Dkt. No. 362 at 6:24-7:4. In support of the fee motion, Truven submitted a declaration from counsel, with supporting exhibits, setting forth the total time spent on the patent claims between May 14, 2015 to February 21, 2017, as well as Truven's total expenses. Dkt. No. 348-1 to 348-14. Truven's fee request entirely excluded work not related to the patent claims (for example, discovery related to the later-dropped trade secret claims) before

1 applying the 25%.

2 In addition to opposing the award of any fees, CCGroup’s opposition argued that if the
3 Court granted fees it was required to apply the “but for” standard articulated in Supreme Court
4 case law, and that Truven was entitled to recover only those fees and costs it incurred because of
5 CCGroup’s assertion of the ’981 patent. CCGroup argued that Truven had not shown that the fees
6 it sought would have been incurred “but for” CCGroup’s assertion of the ’981 patent, and
7 CCGroup took the position that it was “impossible” to determine what fees and costs were
8 attributable to the ’981 patent because the ’981 and ’726 patents are nearly identical, and there
9 were only a few claim construction issues specific to the ’981 patent. Dkt. No. 358 at 1, 11-12.

10 In the March 14, 2018 order, the Court agreed with CCGroup that the “but for” standard
11 set forth in *Fox v. Vice*, 563 U.S. 826, 836 (2011), applied to Truven’s motion for fees and
12 expenses. Dkt. No. 365 at 13-14. The Court found that while Truven’s 25% flat request was not
13 unreasonable in theory, Truven had not cited any authority that would permit the Court to award
14 Truven’s fees under the proposed 25% methodology (nor did Truven argue that its percentage
15 methodology was consistent with the “but for” standard). *Id.* at 14. The Court directed Truven to
16 submit a revised fee and cost request that sought only those fees and expenses that were incurred
17 as a result of defending against CCGroup’s claims under the ’981 patent.

18 In April 2018, the parties filed supplemental letter briefs and documentation. Dkt. Nos.
19 366, 371-372, 374. As with its initial fee motion, Truven’s supplemental fee request seeks fees
20 and expenses calculated under a percentage methodology – 25% of its total patent fees and costs
21 during the period of time that the ’981 patent was pending, as well as fees related to the fee motion
22 through March 31, 2018, for a total of \$280,858.48.¹ Dkt. No. 366. Truven’s supplemental letter
23 briefs cite a number of cases, which were not cited in Truven’s initial fee motion or reply brief, in
24 support of its position that the Court may award fees under a “but for” standard using a percentage
25 methodology. *See generally* Dkt. No. 366 at 1-4; Dkt. No. 374 at 3-5. The cases cited by Truven
26 generally stand for the proposition that when a district “court cannot determine precisely which

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28 ¹ Truven’s initial fee motion and reply did not seek fees for time spent litigating the fee motion.

1 hours were spent pursuing [frivolous] claims as opposed to [non-frivolous] claims,” the “court
2 may exercise its discretion to award a percentage of the fees requested, provided that its choice of
3 a percentage is guided by reason.” *Zaman v. Kelly Servs.*, Case No. 15-cv-04601-HRL, 2017 WL
4 2335601, at *7 (N.D. Cal. May 30, 2017).

5 Truven argues that it is appropriate to award 25% of its patent fees in this case because it is
6 not possible to determine with absolute precision which hours Truven spent defending against the
7 ‘981 claims as opposed to the ‘726 claims because Truven’s billing items are not segregated by
8 patent claim. *See Vega Decl.* ¶ 2 (“At Turner Boyd, time records are maintained electronically
9 and entered in tenths of an hour increments. Time records are entered in block format, meaning
10 that entries are not segregated on a claim-by-claim basis nor on an activity-by-activity basis.”)
11 (Dkt. No. 366-1); *Vega Decl. Ex. B* (example time entries) (Dkt. No. 366-3). In support of its
12 supplemental fee request, Truven has submitted declarations from the lawyers who worked on this
13 case, an exhibit summarizing the time spent by all timekeepers, a table containing example time
14 entries for each timekeeper, and other pleadings in this case. Dkt. No. 366-1 to 366-7; Dkt. No.
15 374-1 to 374-5.² In their declarations, the lawyers state that they have reviewed all of their time
16 entries for work done on this case, and that based upon their knowledge of the litigation and how
17 the team analyzed and litigated the case, it is their view that 25% is a fair approximation of the
18 time billed solely because of the ‘981 patent claims. *See Vega Decl.* ¶¶ 6-7 (Dkt. No. 366-1)³;
19 *Boyd Decl.* ¶ 2 (Dkt. No. 366-5); *Wai Decl.* ¶ 2 (Dkt. No. 366-6).

20
21 ² One of the exhibits submitted by Truven in support of its supplemental reply brief is a
22 declaration filed by CCGroup’s counsel of record in this case in support of CCGroup’s fee request
23 in *CCGroup v. OptumInsight, Inc.*, Case No. 5:11-cv-0469 EJD (N.D. Cal. 2015). Dkt. No. 374-2.
24 In that declaration, CCGroup’s counsel explained the methodology CCGroup used to prepare its
25 fee request, which sought fees incurred litigating some but not all of the patents asserted in that
26 case. *Id.* at ¶ 22. Mr. Brophy stated, “First, counsel identified all time entries that related solely
27 to the Dang patents, and claimed 100% of the associated fees. Second, counsel identified all time
28 entries that encompassed work involving both the Dang patents and other patents in suit (for
example, claim construction briefing or document review), and claimed 75% of the associated
fees. . . . Third, counsel excluded all time entries that related solely or almost entirely to work
regarding patents other than the Dang patents.” *Id.* Truven argues that the position taken by
CCGroup in *OptumInsight* undercuts its arguments here that a percentage methodology is
inappropriate.

³ Ms. Vega also reviewed the time entries of another lawyer who worked on the case,
Letitia Lee, who is no longer employed by Turner Boyd.

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Truven’s supplemental submission argues that a 25% fee award is supported by the fact that the ‘981 patent claim was one of two patents asserted during the relevant time period (indeed, Truven argues that this fact would support a 50% fee award). Truven also analyzes the number of pages dedicated to briefing on claim construction, infringement, and validity issues specific to the ‘981 patent, as well as discovery that was specific to the ‘981 patent, to demonstrate that a 25% fee award is reasonable and supported. For example, Truven notes that on claim construction, Truven dedicated 25.8% (approximately 6 out of 23¼ pages) of its responsive brief to the maximum duration rule and static/variable window periods limitation, a limitation unique to the ‘981 patent. *See* Dkt. No. 65 at 1, 4, 7, 16-24.⁴ Truven also asserts that for infringement, the independent claims from the two patents include eight overlapping (but not identical) claim elements and two elements unique to the ‘981 patent (maximum duration rule and the apparatus claim preamble of claim 20), and Truven argues that but for the frivolous ‘981 patent claim, Truven would not have incurred the work performed on 2 out of 10 total claim elements (20%). Truven also identifies invalidity arguments specific to the ‘981 patent, as well as discovery. *See* Dkt. No. 366 at 8; Dkt. No. 374 at 7.

The Court is persuaded by the arguments in Truven’s supplemental submission, and concludes that the fees⁵ that Truven seeks are reasonable and represent a fair apportionment of the time and costs attributable to the ‘981 patent. In *Goodyear Tire & Rubber Company v. Haeger*, the Supreme Court held that a court retains discretion to award fees based on estimates to calculate and allocate an attorney’s time spent on frivolous versus non-frivolous claims:

⁴ Truven notes that CCGroup devoted a similar amount of pages to that limitation: 4 out of 20¼-pages (19.8%) of its opening brief, and 5 out of 15 pages (33%) of its reply brief. *See* Dkt. No. 64 at 4, 9-13; Dkt. No. 68 at 1, 9-15.

⁵ However, the Court does not find it appropriate to award “fees on fees” in this case. Truven’s initial fee motion and reply did not seek fees related to litigating the fee motion. Truven’s April 6, 2018 supplemental letter brief seeks \$66,939 in fees for work performed on the fee matters between December 15, 2017 and March 31, 2018. The Court finds that Truven should not recover these fees because Truven did not seek any of these fees in the original fee petition. Further, the Court does not find it appropriate to award fees incurred for the supplemental filings because the analysis and documentation contained in the supplemental filings should have been included in the initial fee motion.

1 This but-for causation standard generally demands that a district court
 2 assess and allocate specific litigation expenses—yet still allows it to exercise
 3 discretion and judgment. The court’s fundamental job is to determine whether a
 4 given legal fee—say, for taking a deposition or drafting a motion—would or would
 5 not have been incurred in the absence of the sanctioned conduct. The award is then
 6 the sum total of the fees that, except for the misbehavior, would not have accrued.
 7 See [*Fox v. Vice*, 562 U.S. 826] at 837-838, 131 S.Ct. 2205 (providing illustrative
 8 examples). But as we stressed in *Fox*, trial courts undertaking that task “need not,
 9 and indeed should not, become green-eyeshade accountants” (or whatever the
 10 contemporary equivalent is). *Id.*, at 838, 131 S.Ct. 2205. “The essential goal” in
 11 shifting fees is “to do rough justice, not to achieve auditing perfection.” *Ibid.*
 12 Accordingly, a district court “may take into account [its] overall sense of a suit, and
 13 may use estimates in calculating and allocating an attorney’s time.” *Ibid.* The
 14 court may decide, for example, that all (or a set percentage) of a particular category
 15 of expenses—say, for expert discovery—were incurred solely because of a litigant’s
 16 bad-faith conduct. And such judgments, in light of the trial court’s “superior
 17 understanding of the litigation,” are entitled to substantial deference on appeal.
 18 *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

19 *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187 (2017); see also *Fox v. Vice*, 563
 20 U.S. at 838 (“The essential goal in shifting fees (to either party) is to do rough justice, not to
 21 achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and
 22 may use estimates in calculating and allocating an attorney’s time.”); *Zaman*, 2017 WL 2335601,
 23 at *7 (in fee award for time spent litigating some but not all claims, awarding 33% of total fees
 24 incurred based on review of, *inter alia*, percentages of briefing devoted to particular claims); see
 25 also *Environmental Manufacturing Solutions, LLC v. Peach State Labs, Inc.*, 274 F. Supp. 3d
 26 1298, 1319 (M.D. Fla. 2017) (awarding fees incurred due to misconduct, and holding “with regard
 27 to the pre-trial preparation, trial, and post-trial motion stages, the Court estimates that only twenty-
 28 five percent of the fees incurred were dedicated to litigating literal infringement, which would
 have been resolved with true product formulas and samples; thus, only that portion of the fees is
 recoverable”).

CCGroup’s supplemental opposition argues that Truven has failed to comply with the
 Court’s March 13, 2018 order, and that Truven’s supplemental filings are insufficient.⁶ The Court
 finds that these arguments are largely without merit. CCGroup complains that Truven did not
 provide its billing records in support of its fee request (although Truven did offer to provide them
 for *in camera* review), and CCGroup argues that “[b]ecause Truven withholds the actual best

⁶ CCGroup does not object to Truven’s hourly rates.

1 evidence of the fees it incurred—its invoices and time records—neither CCGroup nor this Court has
2 any opportunity to test what fees Truven actually incurred on CCGroup’s claim for infringement
3 of the ‘981 patent.” Dkt. No. 371 at 1. However, as Truven notes, courts have held that when
4 exact apportionment is not possible—such as when attorneys use block billing—courts may award
5 fees by estimating what percentage of time was spent on recoverable claims, and courts have done
6 so by, *inter alia*, reviewing the percentage of time devoted to different claims and issues in the
7 briefing. Based upon the Court’s familiarity with this litigation and the issues related to the ‘981
8 patent versus the ‘726 patent, the Court finds that it is reasonable to estimate that 25% of the total
9 patent work during the relevant time period is attributable to the ‘981 patent. Further, the Court
10 finds that based upon the declarations of defense counsel as well as the example time entries
11 which show that counsel block billed their time, requiring Truven to provide their billing records
12 would not aid this Court in determining a reasonable fee.

13 CCGroup also argues that Truven continues to seek time for non-patent work. However,
14 as set forth in Truven’s initial and supplemental fee filings, Truven’s fee motion excludes all time
15 spent on non-patent work prior to applying the 25%. CCGroup also asserts that much of the work
16 performed in this case, such as discovery and motion practice, would have been done regardless of
17 the ‘981 patent. The Court has taken that point into consideration in concluding that 25% is a
18 reasonable allocation.

19 Finally, CCGroup objects to Truven’s request for nontaxable expenses on the ground that
20 Truven has not shown that the expenses are attributable to the ‘981 patent. Truven states that for
21 the time period from May 14, 2015 to February 21, 2017, its expenses totaled \$38,956.06. Vega
22 Decl. ¶ 10 (Dkt. No. 366-1). These expenses include: travel expenses, including lodging
23 (\$10,896.20), ediscovery (\$24,014.76), document delivery (\$654.75), patent searching services
24 (\$2687.25), and court transcripts (\$703.10). *Id.* Truven seeks 25% of these expenses, for a total
25 of \$9,739.02.

26 The Court agrees with CCGroup that some of these expenses, such as travel and lodging,
27 would have been incurred regardless of CCGroup’s assertion of the ‘981 patent, and Truven has
28 not identified any travel undertaken solely to litigate an issue regarding the ‘981 patent, such as a

1 hearing specific to that patent. Thus, the Court does not find it appropriate to award any portion of
2 those expenses. With regard to the other expenses sought—for ediscovery, document delivery,
3 patent searching services, and transcripts—the Court finds that it is reasonable to award 25%
4 because as a matter of common sense those expenses were greater than they would otherwise have
5 been if the ‘981 patent was not asserted.

6 Accordingly, the Court GRANTS IN PART Truven’s request for fees and costs and
7 awards \$204,180.46 in fees and \$7,014.96 in nontaxable expenses. The fees are the amount
8 sought in Truven’s initial fee motion and reply and thus do not include any fees related to the
9 litigation of the fee motion, and the expenses do not include the travel/lodging expenses.

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IT IS SO ORDERED.

Dated: June 6, 2018



SUSAN ILLSTON
United States District Judge