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28***E-FILED: August 20, 2012***

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ABAXIS, INC.,

No. C10-02840 LHK (HRL)

Plaintiff,

**ORDER RE DISCOVERY DISPUTE
JOINT REPORT #3**

v.

CEPHEID,

[Re: Docket No. 148]

Defendant.

In Discovery Dispute Joint Report #3, plaintiff Abaxis, Inc. (Abaxis) seeks Cepheid's deposition testimony as to the amount of fees it has paid in this litigation.¹ Abaxis contends that the information is relevant to willfulness. Cepheid asserted that the requested information was protected by the attorney-client privilege and instructed the deponent not to answer on that basis. Although defendant apparently no longer asserts privilege, it contends that the information is irrelevant.

This court concludes that the requested discovery is not relevant or reasonably calculated to lead to the discovery of admissible evidence. See generally In re Seagate Technology, LLC, 497 F.3d 1360, 1374 (Fed. Cir. 2007) ("[I]n ordinary circumstances, willfulness will depend on an infringer's prelitigation conduct So a willfulness claim

¹ Abaxis also sought an order requiring Cepheid to produce discovery concerning the development of defendant's dispensing parameters and Cepheid's decision to pursue a design-around of the patents-in-suit. Although Cepheid initially asserted that those matters were protected by the attorney-client privilege, defendant now advises that it has agreed to produce this discovery. (Dkt. No. 216). Accordingly, these issues are moot.

1 asserted in the original complaint must necessarily be grounded exclusively in the accused
2 infringer's pre-filing conduct.”). Abaxis argues that Cepheid should not be permitted to avoid a
3 further deposition on the subject of its litigation fees by now asserting relevance objections as a
4 basis for its instruction not to answer. See FED. R. CIV. P. 30(c)(2). This court, however, finds
5 that the burden and expense of the proposed discovery outweighs its likely benefit. FED. R.
6 Civ. P. 26(b)(2)(C). Abaxis' request for discovery is denied.

7 SO ORDERED.

8 Dated: August 20, 2012

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11 HOWARD R. LLOYD
12 UNITED STATES MAGISTRATE JUDGE
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5:10-cv-02840-LHK Notice has been electronically mailed to:

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