

1
2
3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 AVAGO TECHNOLOGIES FIBER IP
8 (SINGAPORE) PTE. LTD., et al.,

9 Plaintiffs,

10 v.

11 IPTRONICS INC., et al.,

12 Defendants.

Case No. [5:10-cv-02863-EJD](#)

**ORDER GRANTING-IN-PART
FINISAR'S MOTION FOR FEES**

(Re: Docket No. 780)

13 Last August, the court refereed several discovery disputes between Plaintiffs Avago
14 Technologies, Inc., et al. and Defendants IPtronics Inc., et al. as well as third parties, including
15 Finisar Corp.¹ The upshot of these proceedings was that Avago was allowed to depose third
16 parties that it had not previously deposed, and that Avago would bear the fees and costs of these
17 depositions and document production.² Unfortunately, this straightforward order has predictably
18 spawned further bickering, and Finisar now moves for an order to show cause why Avago should
19 not be held in contempt for its failure to pay Finisar's fees and costs, or alternatively, to compel
20 payment.³

21 In June and July, Avago served deposition and document subpoenas on Finisar.⁴ Finisar
22

23
24 ¹ See Docket No. 697.

25 ² See Docket No. 703 at 2.

26 ³ See Docket No. 780.

27 ⁴ See Docket No. 780 at 1.

1 objected,⁵ Avago moved to compel compliance with the subpoenas,⁶ and Finisar both opposed
2 Avago's motion⁷ and moved for a protective order and to quash the deposition subpoena.⁸ While
3 this motion practice proceeded, Finisar also worked on analyzing the subpoenas and began
4 identifying potentially responsive documents and potential witnesses for deposition.⁹ Following a
5 hearing on these (and other) motions,¹⁰ the court issued a written order on August 7, 2015.¹¹ The
6 court held that Avago could "only take deposition of third parties it [had] not previously deposed,
7 including Finisar Corporation."¹² It also held that "Avago shall pay for any fees and costs
8 associated with document production and depositions."¹³ Following the court's August 7 order,
9 Finisar and Avago proceeded with discovery through October.¹⁴ Finisar produced approximately
10 1,130 pages and Avago deposed three Finisar witnesses on October 7, for a total of fewer than
11 seven hours.¹⁵

12 On August 12, 2015, Finisar sent Avago its first fees and costs invoice, for \$52,541.07,
13 covering work done by Finisar personnel and outside counsel from June 2 to August 10.¹⁶ On

14
15 ⁵ See *id.*

16 ⁶ See Docket No. 649; Docket No. 674 at 3-4.

17 ⁷ See Docket No. 678.

18 ⁸ See Docket No. 677.

19 ⁹ See Docket No. 780 at 2.

20 ¹⁰ See Docket No. 697.

21 ¹¹ See Docket No. 703.

22 ¹² *Id.* at 2.

23 ¹³ *Id.*

24 ¹⁴ See Docket No. 780 at 3.

25 ¹⁵ See Docket No. 794 at 1.

26 ¹⁶ See Docket No. 780-6.

1 October 13, 2015, Finisar sent its second invoice, for \$130,754.92, covering August 11 to October
2 13.¹⁷ As detailed in a letter to Avago, Invoices One and Two include fees and costs for Finisar’s
3 motion for a protective order and its opposition to Avago’s motion to compel, as well as fees and
4 costs relating to the depositions and document production.¹⁸ On December 10, 2015, Finisar sent
5 its third invoice, for \$44,812.08, covering October 13 to November 30.¹⁹ Invoice Three includes
6 Finisar’s fees and costs for its motion to compel payment.²⁰ In total, Finisar requests
7 \$228,108.07.²¹ Avago opposes and disputes the reasonableness of the fees and costs that Finisar
8 seeks.²²

9 The court’s order allowed Avago to depose third parties it had not previously deposed, and
10 to pay “any fees and costs associated with document production and depositions.”²³ As Finisar’s
11 counsel admitted at oral argument, this means “reasonable” fees and costs associated with
12 document production and depositions.²⁴ The “any” is not to be construed as a blank check.
13 Furthermore, the language of the order plainly states that the fees and costs must be “associated
14 with document production and depositions.”²⁵ With those principles as guides, the court
15 GRANTS-IN-PART Finisar’s motion to compel payment of fees and costs as follows.

16 Finisar is entitled to payment of fees and costs associated with the depositions and
17

18 ¹⁷ See Docket No. 780-11.

19 ¹⁸ See Docket No. 780-14 at 4-6.

20 ¹⁹ See Docket No. 816.

21 ²⁰ See Docket No. 816 at ¶ 5.

22 ²¹ See *id.* at 2.

23 ²² See Docket No. 794 at 1.

24 ²³ Docket No. 703 at 2.

25 ²⁴ See Docket No. 817.

26 ²⁵ Docket No. 703 at 2.

1 document production, but not with its motion for a protective order²⁶ or its opposition to Avago's
2 motion to compel.²⁷ These filings preceded the court's order on fees and costs and were unrelated
3 to conducting the depositions and document production that eventually took place. Moreover,
4 Finisar lost both motions.²⁸ Granting fees and costs for this motion practice would give Finisar an
5 inappropriate windfall. Finisar also is not entitled to the fees and costs associated with its motion
6 to compel payment, because these also are not related to the depositions and document production.

7 Finisar's invoices are block-billed and provide only monetary totals for each Finisar
8 employee and outside counsel's work during the period covered by each invoice,²⁹ rather than
9 discrete time entries setting forth the amount of time spent per task, a description of the work
10 performed and the relevant billing rate. The court thus relies on the dates that document
11 production and the depositions occurred to determine which invoiced fees and costs were incurred
12 in complying with the depositions and document production.

13 On August 19, 2015, Avago sent a letter to Finisar, which stated,

14 As you well know, Finisar steadfastly refused to produce any documents until
15 ordered to do so by the Court on August 7. There has been no document production
16 by Finisar, and Finisar refuses even to respond to Avago's proposed significant
17 narrowing of the Requests for Production in the document subpoena, so that the
18 document collection process may begin. In the face of this refusal to cooperate,
19 Avago is concerned about the ability of Finisar to comply with the Court's Order
20 specifying a deadline of September 21, 2015. . . .

21 During the August 11 call, you stated that Finisar had not yet begun even to collect
22 documents, and I proposed that we cooperate to develop a reasonable plan for the
23 production of documents, based upon the narrowed scope of the revised Requests
24 for Production, provided to you on August 13, 2015.³⁰

25 Invoice One covered June 2 to August 10. It is apparent from Avago's letter that Finisar

26 See Docket No. 677.

27 See Docket No. 678.

28 See Docket No. 703.

29 See Docket Nos. 780-6, 780-11, 816.

30 Docket No. 780-7.

1 had not begun collecting documents or producing documents as of August 11. Taken in
2 combination with Finisar’s letter stating that Invoices One and Two included attorney work on
3 Finisar’s motion for a protective order and its opposition to Avago’s motion to compel,³¹ these
4 facts make it apparent that the work charged in Invoice One was likely not “associated with [the]
5 document production and depositions”³² that the court compelled, but primarily related to Finisar’s
6 unsuccessful motion practice. Finisar argues that during June and July, the period before the
7 court’s order, it worked on “evaluating and responding” to Avago’s subpoenas and this work “was
8 part and parcel of Finisar’s document production and depositions.”³³ However, given Finisar’s
9 continued refusal as of August 19 to begin collecting documents, producing documents or
10 responding to Avago’s proposed narrowing of document production, this pre-order work was
11 extraordinarily unproductive and it is not obvious that they were related to the document
12 production and depositions that actually took place, rather than the motions. Finisar may not
13 receive the monies requested in Invoice One.

14 Invoice Two covered August 11 to October 13. Avago and Finisar began corresponding
15 on narrowed subpoena topics as early as August 13,³⁴ and document production presumably
16 occurred sometime afterward.³⁵ The Finisar depositions occurred on October 7.³⁶ Based on these
17 facts, the fees and costs in Invoice Two were associated with the depositions and document
18 production ordered by the court. Finisar may receive the monies requested in Invoice Two.

19 Invoice Three covered October 13 to November 30. The depositions already had
20

21 _____
22 ³¹ See Docket No. 780-14 at 3-5.

23 ³² Docket No. 703 at 2.

24 ³³ Docket No. 797 at 4-5.

25 ³⁴ See Docket No. 780-7 at 2-3.

26 ³⁵ See, e.g., Docket No. 780-9 (confirming partial document production on September 15, 2015).

27 ³⁶ See Docket No. 780 at 3.

1 concluded before this period. It is apparent from Finisar’s own papers that the bulk of the work
2 performed in this period related to invoices, correspondence, meet and confers and motion practice
3 for Finisar’s fees and costs.³⁷ Strictly speaking, none of this work is “associated with document
4 production and depositions.”³⁸ The court’s order was intended to mitigate the burden that third
5 party Finisar faced in complying with Avago’s discovery subpoenas.³⁹ It was not intended to
6 allow Finisar to run up fees and costs tangentially related to discovery compliance and charge
7 them to Avago. Finisar may not receive the monies requested in Invoice Three.

8 Finisar’s motion is GRANTED-IN-PART. Avago shall pay Finisar for Invoice Two,
9 \$130,754.92, within 14 days.

10 **SO ORDERED.**

11 Dated: December 17, 2015

12 
13 PAUL S. GREWAL
14 United States Magistrate Judge

15
16
17
18
19
20
21
22
23
24
25

³⁷ See Docket No. 780 at 4-5.

26 ³⁸ Docket No. 703 at 2.

27 ³⁹ See id.