SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Immedient Corp. v. HealthTrio, Inc.
C.A. No. 01C-08-216 RRC

Submitted: December 8, 2006
Decided: March 5, 2007

On Plaintiff's Application for an Award of its Attorneys' Fees and Costs
GRANTED IN PART AND DENIED IN PART.

On Defendant's Cross-Motion for Limited Discovery
DENIED.

Dear Counsel:

Before the Court is Plaintiff's Application for an Award of its Attorneys' Fees and Costs and Defendant's Cross-Motion for Limited Discovery in connection therewith. The Court finds that Plaintiff is entitled to $674,382.20 in attorneys' fees (an amount less than Plaintiff has sought), plus reasonable attorneys' fees incurred in the preparation of its fee application, and pre- and post-judgment interest. Therefore, Plaintiff's application is **GRANTED IN PART and DENIED IN PART**. Additionally, Defendant's motion for "limited discovery" on the attorneys' fees issue is **DENIED**.

I. FACTS AND PROCEDURAL BACKGROUND

The underlying dispute in this case arose out of a Professional Services Agreement ("PSA") entered into in November 2000 by Plaintiff and Defendant whereby Plaintiff was to develop computer software for Defendant. Plaintiff filed a complaint in this Court in August 2001 alleging that Defendant had improperly refused to pay Plaintiff under the terms of their agreement. In response, Defendant argued it was not liable because Plaintiff's alleged failure to perform under the contract constituted a prior breach. Defendant further counterclaimed that Plaintiff failed to deliver the completed product, fraudulently induced Defendant to enter the contract, and breached the implied covenant of good faith and fair dealing.

After a non-jury trial, this Court issued an opinion holding that Defendant had breached the contract and that none of Defendant's counterclaims were meritorious.[1] The Court awarded Plaintiffs $721,579 plus interest at the legal rate and costs. In addition, the Court held that under the terms of the PSA, Plaintiff was entitled to attorneys' fees. Defendant filed a motion for reargument which the Court denied on March 28, 2006. After then attempting for many months to resolve the case with Defendant, Plaintiff filed an application for attorneys' fees on November 3, 2006. The application included copies of all its attorneys' invoices totaling $923,077.68 (attorneys' fees and costs) and affidavits from two of Plaintiff's attorneys describing the work performed. Subsequently, Plaintiff also wrote a letter to the Court requesting it to liquidate the pre-judgment interest award. Defendant filed a motion for limited discovery on the attorneys' fees issue.

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[1] *Immedient Corp. v. HealthTrio, Inc.*, 2005 WL 1953027 (Del. Super. 2005).

II. THE PARTIES' CONTENTIONS

Plaintiff contends that it is entitled to an award of $923,077.68 in attorneys' fees and costs. Furthermore, Plaintiff claims that it has submitted sufficient evidence for the Court to determine and award Plaintiff this amount and therefore opposes Defendant's request for further discovery on this matter. In addition, Plaintiff asserts that it should be awarded pre- and post-judgment interest.

In response, Defendant contends that Plaintiff has not submitted sufficient evidence under California law to support the claimed fee award. Specifically, Defendant alleges that Plaintiff has not provided justification that its billing rates or hours expended are reasonable. Defendant accuses Plaintiff of block billing, vague billing entries, over-staffing, and duplication of effort by multiple attorneys. In addition, Defendant claims that Plaintiff should not be allowed to recover for fees related to the litigation of Defendant's tort counterclaims or for its expenses and costs. In the alternative, Defendant seeks what it terms "limited discovery" of Plaintiff's litigation files to determine the reasonableness of its requested attorneys' fees and costs.

III. DISCUSSION

a. California Law Applies

This Court previously held that the choice of law clause in the PSA was valid and that therefore California law governed the contract dispute between the parties.[2] Defendant contends that California law should also govern Plaintiff's application for attorneys' fees. Plaintiff agrees that California law governs the substantive right to attorneys' fees,[3] but states "it is not clear . . . that [California law] controls the Court's determination of either the amount or reasonableness of the award." Plaintiff does not strongly contest the issue, however, because it contends that under either Delaware or California law, it is entitled to recover all of its claimed fees and expenses. Because the ability to collect attorneys' fees in this case is

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[2] *Immedient*, 2005 WL 1953027, at *3.

[3] Cal. Civ. Code § 1717 states that where a contract specifically provides for such an award, a prevailing party in an action to enforce that contract "shall be entitiled to reasonable attorney's fees in addition to other costs."

provided by a contract bound by California law, the Court agrees with Defendant that California law governs the reasonableness of those fees.[4]

b. No Further Discovery on Plaintiff's Application Is Needed

In addition to opposing Plaintiff's application, Defendant also requests "limited" discovery consisting of an "on-site review by [Defendant's] expert of [Plaintiff's] counsel's litigation files, which may be redacted to protect attorney-client privileged communications only." Defendant asserts that this discovery is necessary in order to "identify[] duplicative and unnecessary charges, and test[] any future apportionment of fees between contractual and tort claims."

Discovery is subject to the exercise of the trial court's sound discretion.[5] Moreover, courts have recognized that an application for attorneys' fees should not turn into a "second major litigation."[6]

The Court can find no California precedent (and Defendant has cited none) for the relatively extensive discovery that Defendant requests. Reviewing and redacting over five years of litigation files, which are in computers and off-site storage of three law firms can hardly be deemed "limited" discovery. In California, generally, submissions of detailed time records, justification for the hourly rates charged, and evidence of issues litigated are enough to support an application for attorneys' fees. Verified time statements are entitled to credence in absence of clear indication that

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[4] *See El Paso Natural Gas Co. v. Amoco Prod. Co.*, 1994 WL 728816 (Del. Ch.) (applying Texas law to determine the amount and reasonableness of fees arising from a Texas contract litigated in Delaware).

[5] *See, e.g., Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 871 (Cal. Ct. App. 2000) ("[m]anagment of discovery lies within the sound discretion of the trial court"). *See also Bell v. Farmers Ins. Exch.*, 2004 WL 1281818, at *3 (Cal. Ct. App.) ("The trial judge is not only in the best position to evaluate professional services rendered in his or her court, but is also best able to evaluate the need for discovery of facts required to guide the exercise of his or her discretion." (internal citations omitted)).

[6] *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *See also Serrano v. Unruh*, 652 P.2d 985, 998 (1982) (stating that it is "not our intention that the inquiry into the inadequacy of the fee assume massive proportions, perhaps dwarfing the case in chief").

the records are erroneous.[7] In fact, even in the absence of detailed time records, California courts have awarded attorneys' fees.[8]

In support of its application, Plaintiff has produced all of its attorneys' invoices as well as two affidavits from its attorneys that describe their qualifications, billing arrangement and rates, and work performed. Plaintiff has produced sufficient evidence for this Court to determine reasonable attorneys' fees.

Furthermore, discovery is not required to determine any apportionment of fees between the contract and tort claims. The PSA states that "[a]ny and all attorneys fees expended to collect unpaid undisputed amounts under this agreement shall be the responsibility of [Defendant]." California law is settled that an obligation to pay attorney fees incurred in the enforcement of a contract "includes attorneys' fees incurred in defending against a challenge to the underlying validity of the obligation."[9] Plaintiff was forced to defend against Defendant's aggressively litigated tort counterclaims in order to collect unpaid amounts under the contract. This dispute has been intensely fought for many years, in large part due to Defendant's energetic efforts which, this Court has found, were ultimately unsuccessful. Therefore, apportionment between tort and contractual claims is not needed. Consequently, Defendant's cross-motion for limited discovery is denied. This Court will not allow Defendant's challenge to Plaintiff's request for attorneys' fees and costs to "assume massive proportions, perhaps dwarfing the case in chief," (or at least beginning to resemble the case in chief).[10]

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[7] *Horsford v. Bd. of Trs. of Cal. State Univ.*, 33 Cal. Rptr. 3d 644, 673 (Cal. Ct. App. 2005) (holding that "the trial court abused its discretion in failing to use counsels' time records as the starting point for its lodestar determination").

[8] *See Wershba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 170 (Cal. Ct. App. 2001) (approving an award of $875,000 in attorneys fees where the application contained no time sheets but only attorney declarations of the amount of hours spent and their reasonable rate). *See also Martino v. Denevi*, 227 Cal. Rptr. 354, 358 (Cal. Ct. App. 1986) ("Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.").

[9] *Siligo v. Castellucci*, 26 Cal. Rptr. 2d 439, 442 (Cal. Ct. App. 1994) (holding that the trial court erred by denying the plaintiffs attorneys' fees apportioned to defending against a fraud cross-complaint because the cost of litigating the fraud claim was part of the cost of enforcing the contract).

[10] *Serrano*, 652 P.2d at 998.

c. Lodestar Analysis

The exercise of the Court's discretion in its determination of reasonable attorneys' fees under California law must be based on the "lodestar" figure, the reasonable hourly rate multiplied by the number of hours reasonably expended.[11] The reasonable hourly rate is that prevailing in the community for similar work.[12] The lodestar figure may then be adjusted either up or down based on consideration of specific factors such as "nature of the litigation, its difficulty, the amount involved the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case."[13]

Plaintiff's application requests $842,977.75 in attorneys' fees. Defendant urges that Plaintiff's award should be drastically reduced by at least $488,349.84 because it believes that the billing statements and affidavits that Plaintiff has produced are insufficient to support the reasonableness of the time spent. Specifically, Defendant asserts that the invoices Plaintiff has produced demonstrate block billing and duplication of work due to staffing issues. Thus, the majority of Defendant's argument is directed at the hours billed, not the rates charged. Defendant's only complaint with regard to the hourly rates is that local counsel's rate per hour is "significantly higher" than lead counsel's rate. The Court finds nothing unreasonable in the fact that local counsel's hourly rate is higher than that of lead counsel. Local counsel stated in his affidavit that his rate is "consistent with or below market for attorneys of comparable skill, reputation and experience." In addition, he explained that while his hourly rate steadily increased over the five years the litigation spanned from $325 in 2001 to $475 in 2006, he billed Plaintiff at a rate of $325 from August 2001 to January 2003 and at rate of $350 from that time forward. The Court therefore will not adjust the hourly rate billed by any attorney.

Defendant more strongly contests the number of hours billed. In considering the hours reasonably expended, the Court notes that California courts considering this issue have stated that verified time records, submitted by attorneys, as officers of the court, should be given a presumption of credibility.[14] Furthermore, the affidavits accompanying the invoices assure

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[11] *PLCM Group, Inc. v. Drexler*, 997 P.2d 511, 518 (Cal. 2000) (stating that "the fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate").

[12] *Id*.

[13] *Id*. at 519.

[14] *Horsford*, 33 Cal. Rptr. 3d at 673.

the Court that counsel reviewed the invoices for "accuracy, fairness and reasonableness" and made adjustments where necessary. While the Court does share some of Defendant's general concerns about the invoices, such as the use of block billing and the number of attorneys working on the case, these issues will be addressed *infra* when selecting a multiplier to apply to the lodestar.[15] Therefore, the lodestar figure is $842,977.75.

Once the court arrives at a lodestar figure, the court may use a multiplier to adjust that figure either upward or downward. In determining that multiplier, there is "no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation."[16]

The factors that the Court finds significant are the multiple instances of block billing as well as the large number of attorneys billing in this case. Specifically, Defendant argues correctly that many invoices produced by Plaintiff contain block billing and vague entries "making it difficult if not impossible to assess the reasonableness of the charges." In addition, Defendant alleges that overbilling occurred as a result of the number of individuals who have billed in this case. Defendant contends that the large turnover of attorneys and staff caused inefficiencies and duplication of effort. For example, it alleges that "certain attorneys billed substantial amounts of time preparing for hearings, trial, and other events that they never attended because they departed or were reassigned before those events occurred."

While block billing is not prohibited *per se*, it can make it more difficult for a court to assess the reasonableness of the hours claimed. Therefore, a court may "exercise its discretion in assigning a reasonable percentage to the entries, or simply cast them aside."[17] Several of the entries in Plaintiff's invoices lump more than five separate activities in one time entry. For example, one such entry reads:

> Strategy conferences regarding the Mediation Position Paper, revise the Mediation Position Paper, conference calls with and draft e-mail correspondence to local counsel's secretary regarding

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[15] *Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001) (stating that factors considered when calculating the lodestar should not be considered again when fixing a multiplier).

[16] *Thayer v. Wells Fargo Bank*, 112 Cal. Rptr. 2d 284, (Cal. Ct. App. 2001).

[17] *Bell v. Vista Unified School District*, 98 Cal. Rptr. 2d 263, 275 (Cal. Ct. App. 2000) (stating that "the blocked-billing entries render it virtually impossible to break down hours on a task-by-task basis between those related to [the claim entitled to statutory fees] and those that are not").

> forwarding the Mediation Paper and supporting exhibits to Grover Brown in preparation of the Mediation . . . research California law regarding . . . review and analyze documents in preparation for Kim Ivkov's deposition, strategy conference regarding John Carnahan's deposition and forward draft deposition transcript to J. Ortega, J. Robosson, and H. Ringstad . . . 7.30 hours at 150.00 per hour.[18]

Another example of block billing contained in Plaintiff's invoices is:

> Conference call . . . addressing the mediation date, pretrial issues, and the trial date; status conference addressing upcoming depositions, trial witnesses, and key dates; draft correspondence . . . regarding rescheduled trial date and issues surrounding the trial; conference regarding Cano's second deposition; conference regarding HealthTrio's reformation claim and subpoena duces tecums regarding HeathTrio's experts; analyze and revise notice of deposition . . . review D. Margules' letter . . . strategy conference regarding same; teleconference with Robosson . . .analyze HeathTrio's reply to Immedient's Motion in Limine and review pleadings . . . 8.40 hours at 150.00 per hour.[19]

The Court also agrees with Defendant's claim that at least some inefficiencies apparently resulted due to the large number of people billing. While of course some duplication is inevitable and appropriate in a case of this length, the fact that forty individuals, the vast majority being attorneys, billed to this case strikes the Court as unnecessarily high.[20]

Furthermore, the Court notes that the requested amount of attorneys' fees exceeds the amount recovered in the underlying action. However, the Court is also aware that much of the litigation in this case was spawned by Defendant, especially with respect to its aggressive prosecution of the counterclaims. This breach of contract action turned into over five years of litigation.

As previously stated, after calculating the lodestar, a court may apply a positive or negative multiplier, to arrive at what it considers to be a

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[18] Ex. B to Plaintiff's Application for an Award of its Attorneys' Fees and Costs, at 3/21/03 invoice.

[19] Ex. B to Plaintiff's Application for an Award of its Attorneys' Fees and Costs, at 2/27/03 invoice.

[20] *Thayer*, 112 Cal. Rptr. 2d at 303 (stating that the application of a negative multiplier to the lodestar figure was warranted where there was unnecessary duplication of work by the plaintiffs' numerous counsel).

reasonable award in light of the circumstances of the case. As one California court explained: "After the trial court has performed the calculations [of the lodestar], it shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the . . . award so that it is a reasonable figure." Therefore, after presiding over this case for its entirety and considering all of the above relevant factors, the Court in its discretion finds that a reasonable attorneys' fee award requires the application of a 0.2 negative multiplier.[21] Or, in other words, the Court finds that Plaintiff is entitled to 80 percent of its claimed attorneys' fees.

Therefore, the Court awards Plaintiff $674,382.20 in attorneys' fees. Furthermore, it is undisputed by Defendant that Plaintiff may also recover reasonable fees incurred in connection with its fee application.[22]

d. Other Costs

Plaintiff also seeks reimbursement of its costs in the amount of $80,099.93. Plaintiff's application does not contain any summarized break-down of how it reached this number, nor does it cite to any authority for the reimbursement of these costs. Defendant's response alleges that costs are not recoverable under the terms of the PSA and that, in any event, Plaintiff must justify any costs when it submits a bill of cost after entry of final judgment pursuant to Superior Court Civil Rule 54.

After reviewing the voluminous invoices submitted, the Court requested further briefing on the issue of whether California or Delaware law should apply to Plaintiff's request for costs. Plaintiff takes no position on the issue, but rather defers to the Court. Defendant maintains its position that Delaware law should be applied to this "procedural right." Therefore, the Court will apply Delaware law.

Pursuant to Rule 54, "costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs." Accordingly, the Court will not award any of the $80,099.93 at this time. Plaintiff may submit an itemized bill of costs pursuant to Rule 54 and the Court will then determine which of its costs are recoverable, to the extent the parties cannot agree.

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[21] *Sternwest Corp. v. Ash*, 227 Cal. Rptr. 804, 806 (Cal. Ct. App. 1986).
[22] *See Ketchum*, 17 P.3d at 747-48.

e. Pre- and Post-judgment Interest

Plaintiff also claims that it is entitled to pre-judgment interest on the principal amount of $721,579 at the legal rate of eight percent starting from September 1, 2001.[23] Defendant does not contest this. Therefore, the Court will award the amount sought.[24] Plaintiff also asserts, and Defendant does not dispute, that it is entitled to post-judgment interest. Consequently, Plaintiff is also awarded post-judgment interest, which begins to accrue when the judgment is entered as final.[25]

IV. CONCLUSION

For the above reasons, Plaintiff's application for award of its attorneys' fees and costs is **GRANTED IN PART** and **DENIED IN PART**. The Court awards Plaintiff $674,382.20 in attorneys' fees, attorneys' fees incurred in the preparation of its fee application, and pre- and post-judgment interest. Additionally, Defendant's cross-motion for limited discovery is **DENIED**.

This decision is not a final judgment. Plaintiff shall submit a final order to the Court, implementing this opinion (including the attorneys' fees involved in connection with the filing of this application), on notice to Defendant. The parties shall confer to see if agreement can be reached with regards to the amount of attorneys' fees owed for time spent by Plaintiff on this fee application. The Court expects such agreement to be attained. Otherwise, the parties shall submit their respective positions on this matter for the Court to determine the amount of attorneys' fees allowable to Plaintiff in connection with its application.

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oc: Prothonotary

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[23] Plaintiff applies Delaware law in its request for pre-judgment interest. Defendant does not object or respond to Plaintiff's request for pre-judgment interest. Therefore, the Court will apply Delaware law to this issue.

[24] *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1982) ("In Delaware, prejudgment interest is awarded as a matter of right.").

[25] *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000) (holding that post-judgment interest under Delaware law "is a right belonging to the prevailing plaintiff and is not dependant upon the trial court's discretion").