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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CAMBRIAN SCIENCE CORPORATION,

Plaintiff,

v.

COX COMMUNICATIONS, INC. ET AL.

Defendants.

CASE NO. SACV 11-01011 AG (JPRx)

ORDER SETTING AMOUNT OF FEE AWARDS UNDER 35 U.S.C. § 285

1 **INTRODUCTION**

2
3 The Court has held that Defendants Cox Communications, Inc. (“Cox”); XO
4 Communications Services, LLC; Global Crossing Telecommunications, Inc.; Level 3
5 Communications LLC; 360networks (USA), Inc.; Electric Lightwave, LLC, dba Integra Telecom;
6 IXC Holdings, Inc. dba Telekenex; and Infinera Corporation (“Infinera”) (collectively,
7 “Defendants”) were entitled to fees under 35 U.S.C. § 285. (Dkt. No. 406.) The Court awarded Cox
8 its fees for defense of the whole case, but limited the fees incurred on behalf of other Defendants
9 by time and issue. (*Id.*) Defendants have now submitted material supporting the specific amounts
10 sought. (Dkt. Nos. 407, 409.) The Court stated that it would “notify the parties if it requires a
11 hearing on the amount of fees.” (Dkt. No. 406 at 14.) Having considered the parties’ submissions,
12 the Court finds the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R.
13 7-15. Further, the Court delayed this Order while other matters were pending, and has now
14 completed review of some very recent cases. The Court now sets the fee awards.

15
16 **LEGAL STANDARD**

17
18 “35 U.S.C. § 285 permits a district court to award reasonable attorneys’ fees in an exceptional
19 case.” *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1068 (Fed. Cir. 1983). “Section 285’s
20 requirement that the fees awarded be ‘reasonable’ is a safeguard against excessive reimbursement.”
21 *Mathis v. Spears*, 857 F.2d 749, 754 (Fed. Cir. 1988). The “purpose of § 285 is, in a proper case and in
22 the discretion of the trial judge, to compensate the prevailing party for its monetary outlays in the
23 prosecution or defense of the suit.” *Id.* at 755 (emphasis omitted) (quoting *Cent. Soya Co. v. Geo. A.*
24 *Hormel & Co.*, 723 F.2d 1573, 1578 (Fed. Cir. 1983)). Where “a prevailing party ‘has obtained
25 excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass
26 all hours reasonably expended on the litigation.” *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435
27 (1983)). If a prevailing party has obtained limited success, a reduced fee award is appropriate.
28 *Hensley*, 461 U.S. at 440.

1 “The methodology of assessing a reasonable award under 35 U.S.C. § 285 is within the
2 discretion of the district court.” *Mathis*, 857 F.2d at 754 (citing *Lam*, 718 F.2d at 1068). “[T]he fee
3 applicant bears the burden of establishing entitlement to an award and documenting the appropriate
4 hours expended and hourly rates.” *Hensley*, 461 U.S. at 437. The applicant “is not required to record
5 in great detail how each minute of his time was expended. But at least counsel should identify the
6 general subject matter of his time expenditures.” *Id.* at 437 n.12. “There is a growing trend that
7 District Court judges should award fees based on an overall global understanding and review of a
8 case, rather than on a tedious review of voluminous time entries and hourly rates.” *Universal Elecs.,*
9 *Inc. v. Universal Remote Control, Inc.*, ___ F. Supp. 3d ___, No. SACV 12-00329 AG (JPRx), 2015 WL
10 5470164, at *2 (C.D. Cal. Sept. 4, 2015); *cf. Foley v. City of Lowell, Mass.*, 948 F.2d 10, 20 (1st Cir.
11 1991) (citations, quotation marks, and alterations omitted) (“[Fee findings] need not be infinitely
12 precise, deluged with details, or even fully articulated. We, ourselves, have felt free to abjure both a
13 comprehensive accounting and line-by-line review of a prevailing plaintiff’s counsel fee application,
14 and we will not hold the court below to a more rigorous standard.”). Former Supreme Court Justice
15 Sandra Day O’Connor has written that “[t]he net result of fee-setting jurisprudence . . . is that the
16 district courts must engage in an equitable inquiry of varying methodology while making a pretense
17 of mathematical precision.” *Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cty. of Albany*, 522 F.3d
18 182, 189 (2d Cir. 2007) (O’Connor, J., sitting by designation, joining in the opinion). Justice Elena
19 Kagan echoed these sentiments when she wrote,

20 trial courts need not, and indeed should not, become green-eyeshade accountants.

21 The essential goal in shifting fees (to either party) is to do rough justice, not to
22 achieve auditing perfection. So trial courts may take into account their overall sense of
23 a suit, and may use estimates in calculating and allocating an attorney’s time. And
24 appellate courts must give substantial deference to these determinations, in light of
25 “the district court’s superior understanding of the litigation.”

26 *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2216 (2011) (quoting *Hensley*, 461 U.S. at 437); *cf. Hensley*,
27 461 U.S. at 437 (“A request for attorney’s fees should not result in a second major litigation.”). “The
28 statements of Justices O’Connor and Kagan reflect what is happening in the legal profession as

1 hourly billing has become increasingly unpopular and clients prefer to look at aggregate, global
2 numbers.” *Universal Elecs.*, 2015 WL 5470164, at *2.

3 “The award of expenses [is] properly within the scope of § 285.” *Cent. Soya*, 723 F.2d at 1578;
4 accord *Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc.*, 549 F.3d 1381, 1391 (Fed. Cir. 2008) (citing
5 *Mathis*, 857 F.2d at 759).

6 7 **ANALYSIS**

8
9 The Court analyzes the requested fees consistent with Justice Kagan’s charge to avoid
10 becoming a “green-eyeshade” accountant, while still providing detail that may be helpful in this case.
11 The Court awarded two categories of fees: (1) to all Defendants for all work after June 17, 2013 for
12 the accused Generation 1 and 3 products, and (2) to Cox “for its defense of the entire case.” (Fee
13 Order, Dkt. No. 406 at 8, 13.) Cox is part of the group of Defendants represented by Fish &
14 Richardson P.C. (“Fish”), but was also separately represented by Kilpatrick Townsend & Stockton
15 LLP (“Kilpatrick”) and before that, Dow Lohnes PLLC (“Dow”). The supporting materials were
16 filed separately by Fish and Kilpatrick. This has led to some murkiness in the briefing, and in the
17 interest of clarity, the Court has organized the fees somewhat differently than Defendants did.

18 Plaintiff objects that the Cox fees incurred by Fish should not be awarded on the ground that
19 they were not incurred “by” Cox. (Obj., Dkt. No. 419 at 5.) But as Cox points out (Cox’s Reply,
20 Dkt. No. 420 at 3), § 285 fees are not “limited to reimbursement of only those amounts actually paid
21 by the injured named party. . . . [T]he company is no less due an award of attorney fees for the total
22 amount it would have paid had it defended against the action on its own. The terms under which
23 [subsidiary] arranged for payment of at least some of its legal fees with [parent] is not relevant in
24 such a case.” *Automated Bus. Cos., Inc. v. NEC Am., Inc.*, 202 F.3d 1353, 1356 (Fed. Cir. 2000); *see also*
25 *Caron v. QuicKutz, Inc.*, Case No. 09-2600 PHX, 2013 WL 819800, at *3 (D. Ariz. Mar. 4, 2013) (“In
26 determining the amount of an award under § 285, courts are not limited to reimbursement of only
27 those amounts actually paid by the injured named party.”); *Aviva Sports, Inc. v. Fingerhut Direct Mktg.*,

1 *Inc.*, Case No. 09-1091 JNE, 2014 WL 702128, at *1 (D. Minn. Feb. 24, 2014) (“The indemnification
2 agreements do not preclude an award to [indemnitees].”).

3 Thus, the Court will award the Cox-specific fees billed by Fish, after making the appropriate
4 adjustments described in Section 2. First, the Court turns to the other category of fees awarded:
5 those to all Defendants for the Generation 1 and 3 accused products.

7 **1. FEES FOR GENERATION 1 AND 3 DEVICES AFTER JUNE 17, 2013**

9 **1.1 Fee Order**

10
11 The Court awarded partial fees to Defendants because “Cambrian’s infringement claims for
12 the accused Generation 1 and 3 photonic integrated circuits were exceptionally weak after the June
13 17, 2013 claim construction order.” (Dkt. No. 406 at 8.) “Cambrian never articulated an
14 infringement theory against the Generation 1 and 3 devices” and “Cambrian’s only infringement
15 theory as to the Generation 2 device could not reasonably be applied to the Generation 1 and 3
16 devices.” (*Id.* at 6.) Therefore, “Defendants are entitled to recover reasonable attorneys’ fees paid
17 since June 17, 2013 to defend against Cambrian’s Generation 1 and Generation 3 infringement
18 claims only.” (*Id.* at 8.) “To be clear, the only fees allowed are those Defendants would not have
19 incurred but for Cambrian’s continued inclusion of the Generation 1 and 3 products in the case
20 after June 17, 2013.” (*Id.*)

22 **1.2 Defendants’ Submission**

23
24 Defendants seek \$554,815.05 (\$623,222.18 less the \$68,407.13 in Cox-specific fees addressed
25 in Section 2) for “fees paid to Fish & Richardson since June 17, 2013 to defend against Cambrian’s
26 Gen 1 and 3 infringement claims.” (Defs.’ Mot., Dkt. No. 409 at 1-2; Defs.’ Reply, Dkt. No. 422 at
27 5.) Defendants did not include any time billed by paralegals or summer associates. (Defs.’ Mot. at 4
28 n.1.) To support the hours and rates claimed, Defendants submitted Fish’s time entries and rates

1 together with comparable attorney rate data from surveys. (May Decl., Exhs. A-D, Dkt. No. 411;
2 May Decl., Exh. A, Dkt. No. 424.) The time entries are categorized as either reflecting: (1) tasks
3 directly relating to the Generation 1 and 3 products, or (2) tasks relating to Generation 1, 2, and 3
4 products that were too “closely intertwined” to be separated. (Defs.’ Mot. at 4.) For the “closely
5 intertwined” tasks, Defendants applied a 50% discount to account for the fact that Generation 2
6 products were also the subject of the work. (*Id.* at 4-5.) Defendants explain that the “closely
7 intertwined” tasks include: “written discovery, depositions, preparation of expert reports, expert
8 depositions, briefing on the motions for summary judgment, trial preparation, and briefing on the
9 motion for fees.” (*Id.* at 4.) Defendants state that “keeping time separately was impracticable” for
10 these tasks. (*Id.*)

11 12 **1.3 Plaintiff’s Objections**

13
14 Plaintiff objects that large portions of the requested fees fall outside the scope of the Court’s
15 limited fee award. (Obj. 2-3.) Plaintiff argues that Defendants’ fees should be reduced because “the
16 post-June 17, 2013 litigation focused almost exclusively on the Gen 2 products,” and that it “was
17 not even able to get discovery on the Generations 1 and 3 products.” (*Id.* at 4 (citing Dkt. 325 at 2-
18 3).) Plaintiff points out that Defendants only devoted four lines of their 21-page Summary Judgment
19 memorandum to the Generation 1 and 3 issues. (*Id.* (citing Dkt. No. 313 at 6).) Plaintiff states that
20 several of Defendants’ time entries do “not clearly relate to only Gen 1 and Gen 3” products and
21 should be excluded. (Obj., Exh. A, Dkt. No. 419 at 13-38.) Further, Plaintiff argues that
22 Defendants’ “closely intertwined” time entries should be excluded, because the Court only awarded
23 fees for tasks that would not have occurred but-for Plaintiff’s continued assertion of the Generation
24 1 and 3 products, and “closely intertwined” tasks “would have occurred anyway.” (Obj. 5.)
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1 **1.4 Apportionment**

2
3 *1.4.1 Reasonableness of the Rates Billed and Hours Spent*

4
5 The Court has compared Defendants’ rates to the customary patent litigation rates disclosed
6 in the Thomson Reuters Peer Monitor survey submitted by Defendants, and finds that they are
7 within the customary prevailing rates and appropriate given the skill required for this sophisticated
8 patent case. (May Decl., Exhs. B and D, Dkt. No. 411 at 28, 33.) And Plaintiff does not dispute the
9 reasonableness of Defendants’ rates, the validity of the survey rates, the ability of Defendants’
10 attorneys, or the reasonableness of the hours expended.

11 Still, Defendants expended significant time preparing three motions for summary judgment
12 that were stricken by the Court. (Dkt. Nos. 301, 302, 303, 312.) The Court will award fees for
13 preparing the original motions for summary judgment, because that work would likely have been
14 done even to prepare a single motion, but the Court excludes the time Defendants spent
15 conforming the subsequent motion to the Court’s Order. This results in a reduction of \$15,732.95.

16
17 *1.4.2 The “Closely Intertwined” Adjustment*

18
19 Defendants’ time sheets show a total of 1,360.3 hours of work expended on “closely
20 intertwined” tasks involving the Generation 1, 2, and 3 products. Defendants claim that at least 50%
21 of the “closely intertwined” time—680.2 hours—was spent on the Generation 1 and 3 products.
22 Although Defendants’ counsel was “not required to record in great detail how each minute of [its]
23 time was expended,” *Hensley*, 461 U.S. at 437 n.12, 50% is too high an estimate.

24 The Generation 1 and 3 products played a much smaller role at the summary judgment stage
25 than the Generation 2 products. Defendants’ claim that 50% must be reasonable because it is less
26 than the 66% of the product categories that Generation 1 and 3 products comprise ignores the
27 amount of work required to defend against each category. Defendants’ entire argument at summary
28 judgment was that Plaintiff never produced any evidence, expert opinion, or theory of infringement

1 regarding the Generation 1 and 3 products. (Dkt. No. 313 at 16.) That argument was successful, but
2 could not have reasonably constituted 50% of the time expended on “intertwined” issues. The
3 Court will therefore award Defendants only 25% of the “intertwined” time. The Court does not
4 award less than that because Plaintiff’s continued assertion of infringement did require Defendants
5 to continue to track and argue issues concerning the Generation 1 and 3 products, and Defendants
6 are not seeking any fees for time that relates solely to the Generation 2 products. This results in a
7 reduction of \$223,148.51.

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9 **1.5 Fees For Fees**

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11 “It is proper to include in the award of attorney’s fees the attorney time expended in
12 connection with the Defendants’ claim for attorney’s fees.” *Mathis v. Hydro Air Indus., Inc.*, Case No.
13 CV 80-4481, 1986 WL 84360, at *33 (C.D. Cal. Feb. 20, 1986) (Pfaelzer, J.) (citing *Cent. Soya*, 723
14 F.2d at 1578), *aff’d sub nom. Mathis v. Hydro Air Indus.*, 818 F.2d 874 (Fed. Cir. 1987) and *aff’d and*
15 *remanded sub nom. Mathis v. Spears*, 857 F.2d 749 (Fed. Cir. 1988). Defendants included that time in
16 their submission, and the Court includes it in the award.

17
18 **1.6 Conclusion**

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Description	Amount
Fees sought for Gen 1 & 3 work (including fee motion)	\$554,815.05
Adjustment 1 (only 25% of intertwined time allowed)	(\$223,148.51)
Adjustment 2 (stricken summary judgment motions)	(\$15,732.95)
Total fee award for Gen 1 & 3 work	\$315,933.59

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1 **2. FEES FOR COX’S DEFENSE**

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3 **2.1 Fee Order**

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5 For the reasons described in the Fee Order discussed in Section 1.1 above, the Court
6 awarded Cox fees for the defense of its entire case. (Dkt. No. 406 at 8-13.)
7

8 **2.2 Cox’s Submission (Kilpatrick & Dow)**

9
10 Separate from the Cox-specific time submitted by Fish, Cox submitted fees and expenses
11 incurred by Dow and Kilpatrick. (Dial Decl., Exhs. A-D, Dkt. No. 407-1.) For those firms, Cox
12 seeks fees of \$598,629.05 for 1,432.4 hours, and \$3,274.90 for non-taxable expenses, totaling
13 \$601,903.95. (Dial Decl., Dkt. No. 407-1 at ¶ 19; Cox Mot., Dkt. No. 407 at 4, 5.) Dow represented
14 Cox from the start of the case until early 2013. (Dial Decl., Dkt. No. 407-1 at ¶ 19; Dial Decl., Exh.
15 D, Dkt. No. 407-5 at 2-22.) Kilpatrick took over in late 2013. (Dial Decl., Exh. B, Dkt. No. 407-3 at
16 2-31.)

17 Cox’s submitted attorney invoices, time entry spreadsheets, an expense spreadsheet, articles,
18 summaries for each timekeeper, and billing surveys. (Dial Decl., Exhs. A-D, Dkt. No. 407-1;
19 Murphy Decl., Exhs. A-E, Dkt. No. 407-6.) Plaintiff has not objected to Cox’s counsel’s rates,
20 number of hours billed, or the validity of the billing surveys. The Court has compared the rates of
21 the Dow and Kilpatrick attorneys to the billing surveys and determined that Cox’s billing rates fall
22 within the range customarily charged by firms of similar caliber for similar work, and are appropriate
23 given the skill required for this sophisticated case. (*See* Dial Decl., Dkt. No. 407-1 at ¶ 8; Murphy
24 Decl., Exhs. B-E, Dkt. No. 407-8, 407-9, 407-10, 407-11.)

25 As to fees billed by Fish for Cox’s defense, “Defendants seek fees only for the time spent on
26 tasks specific to Cox throughout the case.” (Defs.’ Mot., Dkt. No. 409 at 5.) Defendants “do not
27 seek any of the pre-June 17, 2013 fees pertaining to the tasks where issues relevant to Cox were
28

1 intertwined with issues relevant to other Defendants.” (*Id.* at 5). The Court discussed the
2 reasonableness of Fish’s rates in Section 1.4.1.

3 Plaintiff did not submit any line-item objections to the Kilpatrick or Dow fees. (*See* Obj.,
4 Dkt. No. 419.) Instead, Plaintiff asserted a blanket objection: “Cox is not entitled to any attorney
5 fees because it was indemnified by Infinera and therefore incurred no fees.” (Obj. 6.) Plaintiff claims
6 that paying fees to Cox would be “tantamount to requiring Plaintiff to ‘pay double’: fees to Cox, and
7 fees to Cox’s indemnitor, Infinera.” (*Id.* at 7.) And, Plaintiff proposes that “[b]ecause of the
8 duplicative nature of Cox’s attorney fees . . . the Court should discount Cox’s fees by at least 60%.”
9 (*Id.*) Plaintiff also suggests that “the Court should allow Plaintiff to engage in limited discovery to
10 find out how Cox was able to run up \$500,000 in fees, and to determine which, if any, of those fees
11 were reasonable.” (*Id.*)

12 As discussed in Section 1, the fact that Cox itself did not pay the Fish fees is not a barrier to
13 awarding them. The Court denies Plaintiff’s request to engage in limited discovery regarding Cox’s
14 fees because Plaintiff has not shown that additional discovery would likely be useful to Plaintiff or
15 helpful to the Court. But the Court agrees with Plaintiff that in certain instances, Fish’s fees were
16 duplicative of those billed by Cox’s other lawyers. The Court will adjust the fee award accordingly.

17 18 **2.3 Adjustments**

19 *2.3.1 Overlap in Fish’s Work*

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21
22 Defendants seek \$68,407.13 billed by Fish for Cox’s defense. (*See* May Decl., Exh. A, Dkt.
23 No. 424 at 2-4, 25-26.) Certain billing entries reflect a degree of duplication or inefficiency caused by
24 the multiple teams of lawyers working on the case for Cox. The Court therefore makes the
25 following adjustments to Fish billing entries submitted in the Cox defense category that reflect such
26 duplication. The Court recognizes that Defendants actually paid these fees, and that the use of two
27 firms was considered strategically beneficial and financially prudent by the clients. The Court
28 therefore does not exclude these entries in their entirety, but instead applies a 50% discount.

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Date	Atty	Description	Billed Amount	Discount (50%)
12/15/2011	JVC	Call with Cox counsel re draft Rule 26(f) report	\$342.00	(\$171.00)
2/20/2012	OIM	Prepare admission forms for Cox's counsel	\$173.85	(\$86.93)
2/27/2012	JVC	Call with counsel for Cox re document collection	\$356.25	(\$178.13)
3/1/2012	JVC	Call with Cox re document collection to satisfy P.R. 3-4	\$356.25	(\$178.13)
3/20/2012	OIM	Review and revise Cox's draft discovery requests prepared by Cox's outside counsel	\$405.65	(\$202.83)
5/17/2012	JVC	Call with Cox re discovery issues	\$356.25	(\$178.13)
5/20/2012	JVC	Correspondence with counsel for Cox re discovery issues	\$427.50	(\$213.75)
6/8/2012	OIM	Call with Cox's counsel re discovery issues	\$289.75	(\$144.88)
7/30/2012	OIM	Call with counsel for Cox re discovery issues; at Cox's request, research requirements for meet and confer on supplemented responses	\$1,854.40	(\$927.20)
7/31/2012	OIM	Review Cox's letter re Cambrian's responses to requests for admission	\$115.90	(\$57.95)
8/7/2012	OIM	Call with Cox's counsel re discovery issues	\$289.75	(\$144.88)
8/10/2012	OIM	Review Cox's counsel's outline of additional points for opposition to motion to compel; call with Cox's counsel re opposition	\$637.45	(\$318.73)

1	8/20/2012	OIM	Review Cox's counsel's outline for	\$405.65	(\$202.83)
2			supplemental briefing and declaration re		
3			Cambrian's motion to compel; provide		
4			feedback		
5	8/22/2012	OIM	Review Cox's counsel's outline for	\$405.65	(\$202.83)
6			supplemental brief and declaration re		
7			opposition to Cambrian's motion to compel		
8	11/1/2012	JVC	Analyze Cambrian's opposition to Cox's	\$783.75	(\$391.88)
9			motion for review of the magistrate's order		
10	11/1/2012	OIM	Review Cambrian's opposition to motion for	\$1,043.10	(\$521.55)
11			review; review Cox's co-counsel's notes on		
12			reply re motion for review' provide		
13			comments		
14	11/19/2012	OIM	Meet with Cox's co-counsel re hearing on	\$811.30	(\$405.65)
15			the defendants' motion for review and		
16			Cambrian's counsel's motion to withdraw		
17	12/10/2012	OIM	Review Cox's application for motion for stay	\$289.75	(\$144.88)
18	11/4/2013	JVC	Call with counsel for Cox re objections to	\$441.75	(\$220.88)
19			Cambrian's Rule 30(b)(6) deposition notice		
20	11/12/2013	LZ	Meeting with Mark Pellegrini (Cox 30(b)(6)	\$6,104.70	(\$3,052.35)
21			witness) to prepare for deposition		
22	11/12/2013	JVC	Meeting with Mark Pellegrini (Cox) for	\$6,258.13	(\$3,129.06)
23			deposition; prepare opposition to		
24			Cambrian's motion to compel		
25	11/19/2013	LZ	Prepare Mark Pellegrini (Cox 30(b)(6) witness)	\$1,556.10	(\$778.05)
26			for deposition		
27	11/20/2013	LZ	Prepare for deposition of Mark Pellegrini (Cox	\$1,915.20	(\$957.60)
28			30(b)(6) witness)		

1	11/21/2013	LZ	Defend the deposition of Mark Pellegrini (Cox	\$6,523.65	(\$3,261.83)
2			30(b)(6) witness)		
3	5/19/2014	OIM	Finalize and file response to Cambrian's	\$990.38	(\$495.19)
4			request for extension of time to file reply in		
5			support of Rule 56(d) motion re discovery		
6			related to Gen 1 and 3 PICs; communicate		
7			with Cox's counsel re meet and confer on		
8			pre-trial issues		
9	6/5/2014	OIM	Call with Cox re motions in limine; work on	\$1,122.43	(\$561.21)
10			case summaries re Rule 56(d) motion re		
11			discovery related to Gen 1 and 3 PICs in		
12			preparation for hearing		
13	7/8/2014	OIM	Review Cox's Bill of Costs; attention to	\$4,159.58	(\$2,079.79)
14			Cox's emails re Bill; research and work on		
15			motion for attorneys' fees		
16	7/11/2014	OIM	Attention to Cox's email re defendants' bills	\$462.18	(\$231.09)
17			of costs		
18	8/25/2014	OIM	Review Cox's reply re motion for fees,	\$528.20	(\$264.10)
19			redact Infinera's confidential information,		
20			provide a motion to seal to Cox		
21	9/5/2014	OIM	Call with Cox re hearing on motion for fees	\$246.10	(\$132.05)
22			Total:	\$39,670.58	(\$19,835.29)

2.3.2 *Transition From One Law Firm to Another*

During this case, Cox switched from Dow to Kilpatrick. The Court will exclude certain time entries that reflect time the new firm spent getting up to speed on the file. The Court excludes the time entries that follow.

Date	Atty	Description	Billed
10/16/2013	WGB	Review plaintiff's notice of rule 30(b)(6) deposition of Cox Communications, Inc.; discussion regarding preparation for deposition of Cox representative; review court documents and preserve same for attorney access and review.	\$594.00
10/17/2013	ANB	Evaluate patent-in-suit.	\$345.15
10/18/2013	AD	Communications with Fish & Richardson regarding status of matter and upcoming deadlines.	\$340.20
10/18/2013	WGB	Review court-filed documents pertaining specifically to Cox Communications and preserve for attorney access and review.	\$189.00
10/21/2013	VMB	Review matter, including patent in suit and additional information.	\$650.25
10/28/2013	VMB	Correspond regarding matter and review Fish & Richardson files.	\$2,027.50
10/28/2013	WGB	Review email correspondence from Fish & Richardson regarding transfer of discovery documents via Dropbox, preserve attorney work product and other materials for attorney access and review; review discovery documents provided by Fish & Richardson.	\$1,053.00
10/29/2013	VMB	Continue review of Fish & Richardson files.	\$1,491.75

1	10/31/2013	VMB	Review Fish & Richardson files.	\$1,491.75
2	10/31/2013	WGB	Review pleadings and prepare same for attorney access	\$1,296.00
3			and review; discussion regarding admissions; prepare list	
4			of parties and counsel; contact Fish & Richardson to	
5			request copy of Cox Communications, Inc.'s document	
6			production for use in preparing for Cox 30(b)(6)	
7			deposition.	
8	11/5/2013	VMB	Correspond regarding status; review Fish & Richardson	\$1,071.00
9			files and opposition to 30(b)(6) notice; review additional	
10			document requests; correspond regarding same	
11	11/11/2013	WGB	Email communication with Fish & Richardson regarding	\$27.00
12			documents produced by Cox Communications, Inc.	
13	11/12/2013	WGB	Review court-filed documents.	\$1,026.00
14	11/13/2013	WGB	Review court-filed documents and prepare for attorney	\$1,1161.00
15			access and review; preserve documents for attorney access	
16			and review.	
17			Total:	\$12,763.60

18 Therefore, the Court will reduce Cox's award by \$12,763.60 for this transition work.

19
20 *2.3.3 Stray Timekeepers and Other Issues*

21
22 The Court will exclude fees incurred by individuals who were only transiently involved in the
23 litigation due to the inefficiency of such fleeting involvement. From Dow, the Court will exclude all
24 fees incurred by Brown (1.10 hours), Cassat (2.80 hours), Meazell (2.60 hours), Radlick (5.30 hours),
25 Smith (4.70 hours), and Twedt (1.90 hours). From Kilpatrick, the Court will exclude all fees incurred
26 by Nelson (3.50 hours), Rylaarsdam (0.80 hours), and Wilkerson (2.60 hours). From Fish, the Court
27 will exclude all fees incurred by Sawert (0.60 hours). Accordingly, Cox's recoverable fees will be
28 reduced by \$7,653.80 for Cox's counsel's time, and \$356.25 for Defendants' counsel's time. Finally,

1 Baesel expended a total of 9.80 hours looking at local rules and preparing a list of pre-trial events
2 between April 24, 2014 and May 7, 2014. Given the task, 9.80 hours seems excessive, so the Court
3 reduces Cox’s award on these entries by 50% for inefficiency, resulting in a discount of \$2,910.60.
4

5 **2.4 Cox’s Expenses**

6
7 Cox seeks \$3,274.90 for non-taxable expenses “relate[d] to courier costs for delivery of
8 chambers copies of filings and travel expenses for counsel to appear at hearings on Defendant’s
9 Motion for Summary Judgment and Motion for Attorneys’ Fees.” (Cox Mot. at 5.) Beyond its
10 blanket objection, Plaintiff does not address Cox’s request for reimbursement of non-taxable costs.

11 Expenses may be awarded under § 285. *Cent. Soya*, 725 F.2d at 1578 (“[W]e conclude that the
12 award of expenses was properly within the scope of § 285.”); *Universal Elecs.*, 2015 WL 5470164, at
13 *7 (“Generally, expenses may be awarded under section 285.”); *Lakim Indus., Inc. v. Linzer Prods.*
14 *Corp.*, Case No. 12-CV-04976 ODW, 2013 WL 1767799, at *9 (C.D. Cal. Apr. 24, 2013) (awarding
15 non-taxable costs that “appear reasonable in light of the case activity”). Expert fees are treated
16 separately, but are not at issue here. *See Amsted Indus. Inc. V. Buckeye Steel Castings Co.*, 23 F.3d 374,
17 377 (Fed. Cir. 1994) (reversing a district court’s award of non-taxable expert fees); *cf. MarcTec, LLC*
18 *v. Johnson & Johnson*, 664 F.3d 907, 922 (Fed. Cir. 2012) (affirming a district court’s award of non-
19 taxable expert fees). After *Octane*, District courts have continued to recognize that non-expert, non-
20 taxable costs may be compensable under § 285. *See Universal Elecs.*, 2015 WL 5470164, at *7; *Kilopass*
21 *Tech., Inc. v. Sidense Corp.*, Case No. 10-CV-02066 SI, 2015 WL 1065883, at *14 (N.D. Cal. Mar. 11,
22 2015) (awarding non-taxable travel and lodging expenses and document delivery fees, but declining
23 to award non-taxable expert fees).

24 Because the costs requested are reasonable, and because Plaintiff has not raised specific
25 objections to the non-taxable expenses, the Court will award Cox \$3,274.90 for non-taxable
26 expenses.
27
28

1 **2.5 Conclusion**

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3

Description	Amount	
Fish Fees	\$68,407.13	
Adjustment 1 (50% discount for overlap)	(\$19,835.29)	
Adjustment 2 (transient time)	(\$356.25)	
Fish Subtotal		\$48,215.59
Dow Fees	\$269,054.80	
Kilpatrick Fees	\$329,574.25	
Adjustment 1 (transition time)	(\$12,763.60)	
Adjustment 2 (transient time)	(\$7,653.80)	
Adjustment 3 (50% discount for inefficiency)	(\$2,910.60)	
Dow & Kilpatrick Subtotal		\$575,301.05
Fees Total:		\$623,516.64
Costs Total:		\$3,274.90

14

15

16

17 **DISPOSITION**

18

19 The Court awards Defendants \$315,933.59 in fees for the post-June 2013 Generation 1 and

20 3 work.

21 The Court awards Cox \$623,516.64 in fees, and \$3,274.90 in non-taxable expenses for its

22 defense of the entire case.

23

24 IT IS SO ORDERED.

25 DATED: November 20, 2015

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Andrew J. Guilford
United States District Judge