

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

MEMORANDUM OPINION

(May 12, 2003)

This case comes before the Court on Defendant Microsoft's Motion for Protective Order Denying States' Request for Production of Documents ("Microsoft Mot."), which is opposed by Plaintiffs. Microsoft's Motion objects to the following requests for information:

1. Attorney time records, including contemporaneous time records, concerning all legal services provided to Microsoft, whether by outside or in-house counsel, in connection with the Litigation, from January 1, 1997 through the present.
2. Documents sufficient to identify, with respect to each attorney who provided legal services to Microsoft in connection with the Litigation: a) the name of the attorney; b) the work or tasks performed by each attorney and the date the work was performed; and c) the amount of time spent on each such task.
3. All documents: a) concerning Microsoft's agreement to pay any State money for attorneys fees or costs incurred in the Litigation, including any written agreement(s), and any communications between Microsoft and any State concerning Microsoft's payment of fees or costs incurred by any State; b) concerning any review, analysis, or investigation of attorneys fees or costs incurred by any other State(s), conducted by or on behalf of Microsoft prior to paying any other State(s) money for attorneys fees or costs incurred in the Litigation; and c) sufficient to identify the total amount paid to other States for attorneys fees or costs.

Microsoft Mot. at 1-2; Microsoft Mot. Ex. A at 1-2.¹ Microsoft claims that these requests “seek production of massive amounts of irrelevant information. Microsoft Mot. at 1. Microsoft claims that its attorneys’ time records “do not impact whether the states prevailed upon certain legal claims or whether the states kept contemporaneous and proper time records,” the bases on which it challenges Plaintiffs Commonwealth of Massachusetts and State of West Virginia’s request for attorneys fees. *Id.* at 2. Furthermore, Microsoft maintains that documents related to its settlement with the other States which settled their antitrust actions against Microsoft are irrelevant because those fees were agreed to as part of a settlement agreement and here the fees are in dispute. *Id.*

Plaintiffs Commonwealth of Massachusetts and the State of West Virginia (“Plaintiff States”) assert that their requests are targeted at arguments made by Microsoft in its opposition to their fee request. Plaintiffs’, Commonwealth of Massachusetts and State of West Virginia, Opposition to Microsoft’s Motion for Protective Order to Quash States’ Limited Request for Documents (“Pl. States’ Opp’n) at 2. They claim that since “Microsoft contends that *zero dollars* would reasonably compensate the States for more than five years of litigation[,]

¹ Microsoft does not seek a protective order for a fourth discovery request made for All documents concerning any changes, revisions, or clarifications made by Microsoft to its proposed settlement of this litigation, between the Revised Proposed Final Judgment and the Second Revised Proposed Final Judgment, including any documents reflecting or discussing the reasons for any change, revision or clarification.

Microsoft Mot. Ex. A at 2. Despite this fact, and the fact Plaintiff States acknowledge that “Microsoft has indicated that it is willing to respond to the States’ document request number 4 (settlement changes)”, Pl. States’ Opp’n at 7 n.7, Plaintiff States still address this discovery request in their briefing, *see id.* at 5. Since Microsoft does not seek a protective order with regard to this request, and Plaintiff States do not seek to compel discovery of matters related to this request, the Court does not address Plaintiff States’ fourth discovery request in this opinion.

Microsoft . . . has challenged the reasonableness of the States’ entire request, regardless of Microsoft’s strained characterization that it has ‘not challeng[ed] the reasonableness of the States’ fees.’” *Id.* at 2-3 (emphasis in original).

Upon review of Microsoft’s Motion for a Protective Order, Plaintiff States’ Opposition thereto, Microsoft’s Reply, the relevant law and Microsoft’s Opposition to Plaintiff States’ Motion for Attorneys Fees and Expenses (“Microsoft Opp’n”), the Court shall grant Microsoft’s Motion for a Protective Order. Plaintiff States shall have ten (10) calendar days, until May 22, 2003, to file a Reply to Microsoft’s Opposition to their Motion for Attorneys Fees and Expenses.

I: DISCUSSION

The point of contention is whether or not Plaintiff States’ discovery requests are aimed at relevant information. Rule 26 of the Federal Rules of Civil Procedure provides that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . .” Fed. R. Civ. P. 26(b)(1). Upon review of the briefings in this case, it is clear that the discovery requests, contrary to Plaintiff States’ assertions, are not aimed at evidence relevant to Microsoft’s opposition to Plaintiff States’ request for attorney’s fees and costs.

Discovery Requests #1 and #2

Plaintiff States assert that Microsoft is challenging the reasonableness of their attorneys fees request, and that the “firm majority of courts considering the issue . . . have ruled that the hours spent by counsel for opposing parties are relevant to determining a reasonable fee award. Pl. States’ Opp’n at 2-3. For this reason Plaintiff States maintain that their first two discovery requests are aimed at relevant information.

Microsoft concedes that the cases cited by Plaintiff States “support the undisputed

contention that when a party challenges the reasonableness of the *hourly rate* or the *number of hours* expended, discovery into opposing counsel's fees may be appropriate." Microsoft Reply at 2 n.1 (emphasis in original). However, Microsoft asserts that it is not challenging the reasonableness of the hours expended nor the hourly rate Plaintiff States present to the Court in support of their fee petition. Rather, Microsoft states it makes "only legal challenges" to the request for court-ordered fees. Microsoft Reply at 2; Microsoft Mot. at 2, 4; *see also* Microsoft Opp'n at 2-3. Microsoft in its Reply brief makes this clear, stating: "Microsoft objected to the states' fee requests because the states failed to substantially prevail on many of their legal claims, failed to keep contemporaneous time records required of fee petitioners, failed to exercise the billing judgment demanded of fee petitioners, and engaged in block billing forbidden to fee petitioners." Microsoft Reply at 3.

Given Microsoft's representations, and Plaintiff States' failure to point to any part of Microsoft's Opposition to their fees request where it challenges the reasonableness of hours and/or rates used to calculate the fees they requested,² the Court determines that Microsoft's

² Plaintiff States do state in a footnote that:

Microsoft contends, remarkably, that it "is not challenging the reasonableness of the time spent on particular tasks or on the litigation as a whole." But in its Opposition Microsoft asserted that the States should receive no fees or costs attributable to any remedy proceedings. Microsoft also requests that all, or at least 86%, of the States [sic] investigation and liability litigation hours be stricken. And Microsoft further suggests that a portion of certain attorney hours should be stricken, for instance, hours attributable to phone conferences or administrative tasks. It strains credulity to suggest that Microsoft has not challenged the reasonableness of particular tasks or fees for the litigation as a whole, when Microsoft has challenged the reasonableness of virtually every hour claimed by the States.

Plaintiff States Opp'n at 3 n.4 (citations omitted) (emphasis in original). The Court notes that by virtue of challenging Plaintiff States' request for attorney fees, Microsoft is necessarily questioning the reasonableness of the request. *See, e.g.,* *Farrar v. Hobby*, 506 U.S. 103, 114

challenge to Plaintiff States' attorneys fee request is based on the legal sufficiency of the request and does not dispute the reasonableness of the Plaintiff States' calculations. None of the cases cited by Plaintiff States stand for the proposition that discovery of a defendant's attorney's billing records is appropriate when the defendant does not challenge the reasonableness of the plaintiff's representations of the hours expended or hourly rate charged.³ In fact, some of the cases

(1992) (“[T]he degree of the plaintiff’s overall success goes to the reasonableness’ of a fee award under *Hensley v. Eckerhart*”) (quoting *Texas State Teachers Ass’n v. Garland Independent Sch. Dist.*, 489 U.S. 782, 793 (1989)). However, Plaintiff States do not demonstrate that Microsoft’s challenge is based on their *representations of hours expended or hourly rates*.

³ See, e.g., *McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805, 809 (9th Cir. 1994) (comparing plaintiffs’ and defendant’s counsel’s fees and costs in determining that plaintiffs’ request should be reduced by 51.5 hours “because of duplication of plaintiff’s counsel’s efforts”); *Lubrizol Corp. v. Exxon Corp.*, 957 F.2d 1302, 1308 (5th Cir. 1992) (noting that the district court had “bestowed upon Lubrizol the opportunity to conduct discovery into Exxon’s litigation expenses,” but not discussing the basis of the district court’s decision); *Liberty Mutual Ins. Co. v. Continental Casualty Co.*, 771 F.2d 579, 588 (1st Cir. 1985) (comparing both sides’ attorneys’ fees to determine whether remittitur was appropriate, but providing no information as to how both sides’ fees were entered into the record); *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1575 (11th Cir. 1985) (“In light of the concerns the district court expressed regarding the reasonableness of the *hours* claimed in Henson’s petition, it would seem most appropriate for the court to have allowed discovery of” defendant’s attorney’s fees) (emphasis added); *Chrapiwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 & n.18 (7th Cir. 1982) (“The rates charged by defendant’s attorneys provide a useful guide to *rates* customarily charged in this type of case.”) (emphasis added); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1220 (8th Cir. 1981) (affirming an attorneys fee award, noting that the award appeared “appropriate and reasonable, as Kalmanovitz testified at trial that Falstaff had expended close to one million dollars in attorney fees in this case”) (emphasis added); *Mitroff v. XOMOX Corp.*, 631 F. Supp. 25, 28 (S.D. Ohio 1985) (“Pertinent to any consideration of a *reasonable amount of time expended* in the prosecution of a law suit is the amount of time expended by the defendant in defending that law suit) (emphasis added); *Ruiz v. Estelle*, 553 F. Supp. 567, 589 (S.D. Tex. 1982) (“In an action for which no adequate parallel can be found, the best example of a fee paid for similar work is that paid by opposing counsel in the same action.”); *Murray v. Stucky’s Inc.*, 153 F.R.D. 151, 152-53 (N.D. Iowa 1993) (noting that “[w]hether discovery is appropriate depends, in part, on the objections raised by the opponent to the fee petition going to the reasonableness of the fee petition,” and that since “defendants have resisted plaintiffs’ fee claim both on the basis of the *number of hours claimed and the hourly rate applied* . . . [t]he hours expended by all attorneys . . . for the defendants, must be disclosed.”) (emphasis added) (citation

explicitly note that “[w]hether discovery is appropriate depends, in part, on the objections raised by the opponent to the fee petition going to the reasonableness of the fee petition.” *Murray v. Stucky’s Inc.*, 153 F.R.D. 151, 152-53 (N.D. Iowa 1993); *see also Coalition to Save our Children v. State Bd. of Educ. of the State of Delaware*, 143 F.R.D. 61, 64-66 (D. Del. 1992). Given that Microsoft does not challenge the reasonableness of Plaintiff States’ representations of hours expended or the appropriate hourly rate, the Court fails to see how the request for an accounting of Microsoft’s attorneys’ hours spent and tasks performed during the litigation “is relevant to the claim or defense of any party.” Fed. R. Civ. P. 26(b)(1). As such, the Court shall grant Microsoft’s Motion for Protective Order with regard to the first two discovery requests made by

omitted); *Coalition to Save our Children v. State Bd. of Educ. of the State of Delaware*, 143 F.R.D. 61, 64-66 (D. Del. 1992) (noting that [w]hether discovery is appropriate depends, in part, on the objections raised by the opponent to the fee petition going to the reasonableness of the fee petition,” and ordering defendant to disclose its attorneys’ billing rates and time spent on the case in part because defendant “raised the issues of reasonableness and ‘overlap’ [of hours] by plaintiff”); *Cohen v. Brown Univ.*, No. CA 92-197 L, 1999 WL 695235, at *1, 6 (May 19, 1999 D.R.I.) (granting plaintiffs’ motion for limited discovery where defendants “challenge both the number of hours for which Plaintiffs’ attorneys seek compensation and the hourly rates at which those hours should be compensated”); *Grumman Corp. v. LTV Corp.*, 533 F. Supp. 1385, 1391 (E.D.N.Y. 1982) (granting plaintiff “leave to take comparative discovery from LTV’s counsel . . . as bearing on the issue of reasonableness of rates and time charged in prosecuting LTV’s opposition to Grumman’s preliminary injunction application”) (emphasis added); *Blowers v. Lawyers Coop. Publ’g Co.*, 526 F. Supp. 1324, 1327 (W.D.N.Y. 1981) (allowing discovery by plaintiff regarding the “amount of time spent by defendant’s attorneys in the case and the amount of costs and disbursements incurred by them,” after finding that this information “may have significant bearing” on the reasonableness of amount of time spent and amount of costs and disbursements incurred by plaintiff’s attorney); *Naismith v. Prof’l Golfers Ass’n*, 85 F.R.D. 552, 562-63 (N.D. Ga. 1979) (allowing discovery of “the time of [defendants’] attorneys” as such information “is reasonably calculated to lead to the discovery of admissible evidence” related to the reasonableness of the hours plaintiffs’ attorneys expended); *Stastny v. S. Bell Tel. & T. Co.*, 77 F.R.D. 662, 663-64 (W.D.N.C. 1978) (“*In a contest over what time was reasonably and necessarily spent in the preparation of a case, it is obvious that the time that the opposition found necessary to prepare its case would be probative. . . . The defendant must provide information as to the number of hours that each attorney . . . spent on this case.*”) (emphasis added).

Plaintiff States.⁴

Discovery Request #3

Plaintiff States also request “agreements and correspondence concerning Microsoft’s payment of full fees and costs to all prevailing states, provided they did not appeal.” Pl. States’ Opp’n at 2. Plaintiff States maintain that since they

prevailed to the same degree as other litigating states[, t]here is no reasonable basis to distinguish between Massachusetts and West Virginia’s entitlement to fees and that of other States. It appears, however, that Microsoft paid every other state their full fees and costs, including all fees for the remedy proceedings, fees attributable to all causes of action, and apparently without regard to the level of documentation supporting the claimed fees. The States should be allowed to learn the basis for, and the circumstances surrounding Microsoft’s decision, in this very litigation, to pay full fees and costs to those identically situated States.

Pl. States’ Opp’n at 6 (citations omitted) (emphasis in original). In support of this position, Plaintiff States point to *Kyles v. Sec’y of Agric.*, 604 F. Supp 426, 436 (D.D.C. 1985) which they claim stands for the proposition that “a fee opponent’s settlement practices in connection with other fee petitions should be considered in evaluating its opposition to a fee award.” Pl. States’ Opp’n at 6. The Court disagrees with Plaintiff States’ characterization of *Kyles*. In *Kyles*, Judge Oberdorfer was concerned with what appeared to be a practice within the Executive Branch of forcing parties or lawyers who seek attorneys fees at a rate greater than \$75 per hour

to fight for it – through formal discovery and dilatory motions for extensions of time and for reconsideration, capped by automatic appeals, many of them abandoned when briefing time approaches. By this form of “jaw-boning,” these officers may well be attempting to enact a *de facto* ceiling of \$75, contrary to statutes enacted by Congress and authoritatively interpreted by the Courts.

⁴ The Court notes that should the matter of the reasonableness of the Plaintiff States’ hourly rates or hours spent arise in the future, the Plaintiff States will be free to raise the matter again for the Court to revisit the issue.

Kyles, 604 F. Supp. at 436. It was in relation to this concern that Judge Oberdorfer noted that

Defendant fails to explain satisfactorily why it opposed an *interim* distribution at the \$75 rate that it had advised the Court of Appeals was the basis for settlements generally and at which defendant had already agreed to settle the attorney's fee for services provided by plaintiff's former partner during the administrative stage of this very case. Our Court of Appeals has admonished that "the interests of justice will be served by awarding the prevailing party his fees as promptly as possible."

Id. (citation omitted) (emphasis added). Judge Oberdorfer did not order discovery of the Government's settlement practices, or of its settlement with another attorney in the case, in order to determine the reasonableness of the attorney's fee award under consideration. Nor did he propose as a general rule that "a fee opponent's settlement practices in connection with other fee petitions should be considered in evaluating its opposition to a fee award." Pl States' Opp'n at 6. Rather, he pointed out that the Government had failed to adequately explain its delay in the attorney's fee phase of the case.⁵

In addition to the lack of support in the caselaw for Plaintiff States' discovery request, the Court agrees with Microsoft that their claim

for fees has nothing to do with the other states' claims. Microsoft settled with the other states, and, in return for their cases coming to an end, Microsoft agreed to pay the settling states' fees, giving up any challenge to the amount of or the legal propriety of these fees. . . . Whether Microsoft was willing to pay the full fee request of the settling states is simply irrelevant to whether Massachusetts and West Virginia complied with the legal requirements for petitioning this Court for fees when such a petition is contested.

Microsoft Reply at 4. The Court notes that many variables and considerations that may or may

⁵ Plaintiff States' citation to *In re Fine Paper Antitrust Litig.*, 751 F.2d 565, 587 (3d Cir. 1984) also fails to support their position that Microsoft's settlement terms with the other State parties in this suit should be considered in evaluating their fee award. In *In re Fine Paper*, the Court of Appeals found that while such information could be helpful in determining reasonable hours and hourly rates, the trial court did not err in denying a motion compelling such disclosure *in camera*. *In re Fine Paper Antitrust Litig.*, 751 F.2d 565, 587 (3d Cir. 1984)

not have to do with the merits of the claims often play a role in decisions to enter into settlements. Therefore, the Court shall grant Microsoft's Motion for Protective Order with regard to this third discovery request as well.

In reaching its decision, the Court notes that granting Microsoft's motion also comports with the Supreme Court's instruction that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Court is also cognizant of the rationale behind its decision to deny Plaintiff States' Motion to Hold in Abeyance Proceedings on the Fee Petitions. *State of New York v. Microsoft Corp.*, 98-1233, WL 299440 (D.D.C. Jan. 15, 2003). In reaching its decision to deny Plaintiff States motion, the Court followed the direction provided by this District Court's Local Rules, the Federal Rules of Civil Procedure, and the D.C. Circuit Court of Appeals, which noted that "from the appellate court's perspective, it would be desirable if the merits appeal and the appeal from the final order on fees could be decided together. Indeed, this appears to be the import of the 1993 amendments to the civil and appellate rules." *Id.* at *1-2 (quoting *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 680 n.5 (D.C. Cir. 1996) (referring to Fed. R. Civ. Pro. 54(d)(2)(B)) (citations omitted)). This Court concluded that "the circumstances of this case counsel proceeding immediately with the attorneys fees phase so that the Court of Appeals might deal with any attorneys fees issue that is appealed along with the merits appeal in this case." *Id.* at *2.

Given the basis for this decision on the Plaintiff States' Motion to Stay Proceedings, and the fact that the Court shall grant Microsoft's Motion for Protective Order, the Court declines to grant Plaintiff States' request for 30 days to file their Reply in support of their fee petition. *See* Pl. States' Opp'n at 7. Since no additional discovery is required as a result of today's decision,

Plaintiff States shall file their reply by May 22, 2003.

II: CONCLUSION

After considering Microsoft's Motion for Protective Order, Plaintiff States' Opposition thereto, Microsoft's Reply, the relevant law and Microsoft's Opposition to Plaintiff States' Motion for Attorneys Fees and Expenses, this Court shall grant Microsoft's Motion for Protective Order. An Order accompanies this Memorandum Opinion.

May 12, 2003

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge