IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM C. FRAZIER, FRAZIER INDUSTRIES, INC. and AIRBURST TECHNOLOGIES, LLC,

Plaintiffs,

v.

LAYNE CHRISTENSEN COMPANY and PROWELL TECHNOLOGIES, LTD.,

Defendants.

ORDER

04-C-315-C

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Pursuant to the court's July 17, 2006 opinion and order, the parties in this civil action have submitted itemizations of costs and attorney fees to be awarded them. The parties have also submitted objections to each other's submissions. This order will address the costs and fees to be awarded. (The latest two motions filed by plaintiff, a motion pursuant to Fed. R. Civ. P. 59 to amend the judgment entered on July 21, 2006, for reinstatement of the verdict reached by the jury on March 10, 2006 or alternatively for a new trial and a motion to correct the record for appeal, will be addressed in a separate order.)

A. Plaintiffs' Costs and Fees for Defendants' Discovery Violations

In the July 17 order, I determined that plaintiffs were entitled to recover costs and reasonable attorney fees under Rule 37(c) because defendants had failed to comply with this court's September 29, 2005 order in which I ordered them to identify all sites where the BoreBlast and BoreBlast II processes had been performed and produce all documents generated in connection with each site. I listed three examples of the expenses plaintiffs would be entitled to recover: expenses incurred in (1) sorting and analyzing the documents defendants disclosed after filing their motions for summary judgment on January 3, 2006; (2) drafting their January 18, 2006 and January 26, 2006 letters to the court; and (3) preparing and filing the January 19, 2006, motion for sanctions, including the briefs and affidavits filed on January 19, 2006, February 8, 2006 and June 9, 2006. In addition, I stated that I would add $10,000 as a sanction for defendants' failure to respond timely to plaintiffs' first set of requests for production by collecting and turning over all responsive documents located in defendant Layne's Fontana, California office before that office was flooded.

Shooting for the moon, plaintiffs have requested an award of $382,431.32. Their request is supported by copies of billing and expense records that are divided into ten invoices. Also, plaintiff William Frazier has submitted a declaration for trial expenses. Aff. of Jane Schlicht, July 25, 2006, dkt. #481; Dec. of William Frazier, July 24, 2006, dkt.

#480. Not surprisingly, defendants have a host of objections. First among them is that plaintiffs' submission is so excessive that the court should deny them any recovery. This suggestion is tempting because plaintiffs have requested reimbursement for substantial amounts of work that fall outside the scope of the award granted to them in the July 17 order. Budget Rent-A-Car System, Inc. v. Consolidated Equity LLC, 428 F.3d 717 (7th Cir. 2005) ("When an award of fees is permissive, denial is an appropriate sanction for requesting an award that is not merely excessive, but so exorbitant as to constitute an abuse of the process of the court asked to make the award."); see also Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980). On reflection, however, I am persuaded that it would be unfair to deny plaintiffs any recovery at all, particularly when reductions in their request can be made fairly easily.

Rule 37 requires that any monetary sanction imposed be tailored to the scope of the discovery violation. Maynard v. Nygren, 332 F.3d 462, 470 (7th Cir. 2003) ("Rule 37 supports only the reimbursement of fees resulting from the discovery violation."); In re Golant, 239 F.3d 931, 937 (7th Cir. 2001). In this case, the violation was defendants' belated disclosure of documents. In the July 17 order, I indicated that defendants violated the September 29 order by turning over approximately 8,600 documents beginning on January 9, 2006. Accordingly, January 9, 2006 is the first day on which plaintiffs could begin to incur expenses sorting through the documents defendants belatedly disclosed.

Plaintiffs are entitled to recover the costs and fees they incurred in sorting through the belatedly disclosed documents and drafting the letters, motions and supporting documents filed in response to those belated disclosures.

I will begin with defendants' argument that plaintiffs have requested reimbursement for work that was performed before defendants violated Rule 37. Plaintiffs have requested reimbursement for $51,151.95 for work performed in 2005. This work is itemized in four of plaintiffs' invoices, #115292 dated October 31, 2005, #115672 dated November 23, 2005, #115912 dated December 16, 2005 and #116296 dated January 20, 2006. Plaintiffs are not entitled to reimbursement for any of this work because it was performed before defendants' Rule 37 violation.

Defendants contend further that plaintiffs have requested reimbursement for work that falls outside the substantive scope of the July 17 order. I agree. Plaintiffs have assigned each time entry and expense a letter corresponding to different facets of their case: "D" for discovery-related work; "S" for work on sanctions materials; "SJ" for work done responding to defendants' second round of summary judgment motions; "CC" for work done to obtain "admissions from Layne that the claim construction they originally presented to the Court to be the correct claim construction was in fact not the claim construction; and "T" for trial-related work. The letter key plaintiffs use to categorize time entries and expenses is helpful in determining what entries do not contain recoverable work. In each of the six remaining

invoices, I have disregarded any entry with the letter designations "SJ", "CC" and "T." In addition, I have disregarded the declaration of William Frazier in its entirety because it relates solely to trial expenses.

Plaintiffs' attempt to impose the broadest possible gloss on the July 17 order is unpersuasive. For example, they argue that the trial was limited to the issue of invalidity because of defendants' discovery violation and "[s]hould the jury verdict be reinstated, Plaintiffs will need to incur the same fees and expenses a second time during the infringement phase of this case." Plts.' Submission of Fees and Costs, dkt. #479, at 4. Although plaintiffs are correct that the discovery problems in this case resulted in the issue of validity being tried first, plaintiffs are not entitled to recover their fees and expenses incurred in preparing for trial and trying the case. As noted above, reimbursement is limited to the costs and fees incurred in notifying the court of defendants' violation and the prejudice it caused them.

Next, defendants object to plaintiffs' use of "block billed" time entries and the alterations and redactions to those entries, which defendants contend make it impossible for the court to determine whether the requested reimbursements are reasonable. Similarly, defendants argue that plaintiffs have not provided enough specificity in describing the miscellaneous disbursements (copying costs, computer research, travel expenses, meals, etc.) listed at the end of each invoice for the court to determine whether the expenses are within

the scope of the July 17 order.

"A party seeking attorneys' fees must present a request from which the correct amount may be computed with reasonable dispatch." In re Central Ice Cream Co., 836 F.2d 1068, 1074 (7th Cir. 1987). Accordingly, in the six remaining invoices, where plaintiffs have combined work that is reimbursable and work that is outside the scope of the July 17 order into a single entry, I have disregarded the entry in its entirety. Johnson v. Kakvand, 192 F.3d 656, 661 (7th Cir. 1999) (district court has wide discretion in evaluating reasonableness of attorney fee request). Also, I have disregarded entries that have redactions which make it impossible to determine whether reimbursable work has been combined with non-reimbursable work.

With respect to the disbursements claimed at the end of the invoices, plaintiffs have not connected each disbursement to work performed in response to defendants' discovery violation. For example, invoice #116761 contains disbursements described as follows:

Date	**Disbursements**	**Value**	**Category**
12/20/05	Messenger Service - Federal Express Corporation	17.86	S/SJ
01/11/06	External Copying Expense - Action Legal Copy Service	268.91	S
01/12/06	External Copying Expense - Action Legal Copy Service	639.18	S

Plaintiff has labeled these disbursements with an "S", suggesting they were incurred in the

course of pursuing sanctions against defendants. But plaintiff has not indicated what documents were sent by messenger or copied. There is no way to tell whether these expenses were incurred in connection with motions, briefs and affidavits that fall within the scope of the July 17 order. Plaintiffs' lack of specificity would justify disallowing any recovery for these disbursements. However, that course of action would be unduly harsh. Therefore, I have totaled the disbursements labeled "S" and "D" in each invoice and will allow plaintiffs to recover one-third of that amount.

1. Invoice #116761 (February 16, 2006)

I have disregarded time entries and expenses listed in this invoice that are dated earlier than January 9, 2006. For the time entries from January 9-31, 2006, plaintiffs will be able to recover $22,496.00. I will disregard the disbursement dated December 20, 2005, the court reporter costs dated January 17, 2006 and January 31, 2006 and the long distance and fax charges dated January 31, 2006. The remaining disbursements total $4,436.44. Of this amount plaintiffs will be able to recover $1,478.81. The total amount recoverable for this invoice is $23,974.81.

2. Invoice #117055 (March 16, 2006)

For the time entries in this invoice, plaintiffs will be able to recover $10,203.00.

With respect to the disbursements at the end of this invoice, I will not allow any recovery for disbursements beginning on February 17, 2006 because plaintiffs' brief on the question of prejudice was filed on February 8, 2006. This leaves disbursements dated January 11, 2006 and February 1, 2006, which total $2787.13. Plaintiffs will be allowed to recover one-third of this amount, or $929.04. The total amount recoverable for this invoice is $11,127.04.

3. Invoice #117613 (April 13, 2006)

None of the time entries or disbursements appear to be for work that falls within the scope of the July 17 order. Plaintiffs are not entitled to any recovery for this invoice.

4. Invoice #118092 (May 15, 2006)

None of the time entries or disbursements appear to be for work that falls within the scope of the July 17 order. Plaintiffs are not entitled to any recovery for this invoice.

5. Invoice #118387 (June 30, 2006)

For the time entries in this invoice, plaintiffs are entitled to recover $507.00. With respect to the disbursements at the end of this invoice, plaintiffs may recover one-third of all of the disbursements listed except the long distance charge dated May 11, 2006 and the

Fax charge dated May 2, 2006. The rest of the disbursements total $5,104.13; one-third of this amount is $1,701.38. Total recovery for this invoice will be $2,208.38.

6. Invoice #119034 (July 24, 2006)

For the time entries in this invoice, plaintiffs are entitled to recover $22,824.50. I will disallow the disbursement for long distance charges dated June 1, 2006 and the disbursement for fax charges dated June 2, 2006. The rest of the disbursements total $333.26; one-third of this amount is $111.09. Total recovery for this invoice will be $22,935.59.

7. Total Award

Plaintiffs' total award is computed as follows:

Invoice #116761	$23,974.81
Invoice #117055	$11,127.04
Invoice #118387	$2,208.38
Invoice #119034	$22,935.59
Sanction for Fontana flood	$10,000.00
TOTAL AWARD	$70,245.82

B. Defendants' Costs and Fees for Moore Deposition

In the July 17 order, I granted defendants' motion for costs and fees incurred in traveling from Kansas City, Missouri to California and attending the deposition of Jeff Moore. Defendants have moved for an award of $8,672.83, which consists of $788.83 in costs and $7,884.00 in attorney fees. Plaintiffs raise six objections to the amount sought by defendants. The first two objections concern a time entry for defendants' attorney, Richard Johnson, for January 4, 2006, the day before the deposition was scheduled to take place. The entry indicates that attorney Johnson billed 7.5 hours to defendants that day with the following description of his activities: "Travel to California for deposition; file review; document review; review of summary judgment motion papers." Aff. of Richard Johnson, dkt. #478, exh. 1. Plaintiffs contend that the time Johnson spent reviewing documents and "summary judgment motion papers" is not related to the deposition of Moore and that a flight from Kansas City, Missouri to San Bernardino, California lasts approximately 5 hours.

The party requesting fees must submit billing statements that are sufficiently detailed so that opposing counsel and the court can determine the reasonableness of the requested fee. Stickle v. Heublein, Inc., 590 F. Supp. 630, 632-33 (W.D. Wis. 1984); Gilbreth International Corp. v. Lionel Leisure, Inc., 622 F. Supp. 478, 484 (E.D. Pa. 1985). The description of Johnson's time entry for January 4 does not indicate how the time he billed for that day was related to the Moore deposition. Accordingly, I will deduct 2.5 hours from

this entry at Johnson's rate of $315/hr. This will result in a reduction of $787.50.

Plaintiffs' third objection is that the cost of Johnson's airline ticket, $464.50, is $100-$200 higher than other flights available. Plaintiffs attached to their objections ticket prices from the on-line travel website Orbitz which show fares for flights from Kansas City, Missouri to Ontario, California for $303.00. However, these lower fares are for flights departing on August 30, 2006. Plaintiffs have not submitted any evidence showing that lower-priced airfares were available on January 4, 2006, when Johnson traveled to California. Also, plaintiffs note that the law firm to which Johnson belongs, Shook, Hardy and Bacon, has an office in Irvine, California. They argue that a lawyer from that office could have attended the deposition in Johnson's place. However, plaintiffs have not suggested that any lawyer in the Irvine office worked on or was familiar with the present case in any respect, much less that an lawyer in the Irvine office knew about the particular facts to be covered at Moore's deposition. I find it hard to believe that plaintiffs' attorneys would think it acceptable to send an uninformed lawyer from one of their branch offices to a deposition just because the deposition was occurring closer to that branch office. No deduction will be made pursuant to this objection.

Plaintiffs' fourth objection concerns Johnson's time entry for January 5, 2006, the day the deposition was scheduled to take place. On that day, Johnson billed 12.5 hours with the following explanation: "file and document review; attendance at deposition site;

communications with opposing counsel; return travel; review of summary judgment papers. Because the entry does not indicate Johnson reviewed documents and summary judgment papers during his travel back to Kansas City, I will assume this work occurred after his return trip and deduct 2.5 hours from this entry to account for time spent on activities other than attending the deposition, communicating with opposing counsel and returning to Kansas City. This will result in another deduction of $787.50.

Plaintiffs' fifth objection concerns the time defendants' counsel spent researching and drafting their Rule 30 motion. According to the itemization submitted by defendants, an associate at Shook, Hardy and Bacon named Christopher Howard spent a total of 9.6 hours over three days preparing the motion. Defendants' itemization of those hours provides as follows:

> February 22, 2006 (1.7 hours) – "Began drafting our motion to recover the costs and attorney fees related to Dick Johnson's travel to California for the deposition of American Restoration's Jeff Moore; examined all correspondents between the parties regarding Mr. Moore's deposition; retrieved copies of the deposition notice and subpoena plaintiffs sent to us."
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> February 23, 2006 (7.5 hours) – "Continued drafting motion to recover our costs and fees for having to travel to California for the deposition of Jeff Moore and having plaintiffs not show up; examined all cases interpreting Federal Rule of Civil Procedure 30(g) to find support for our position that plaintiffs should reimburse us; added exhibits to our motion."
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> March 3, 2006 (0.4 hours) – "Examined plaintiff's response to our motion for Rule 30(g) sanctions to determine whether we need to file a reply; checked to see when our reply brief was due with the court."

Plaintiffs contend that the time spent preparing the motion is excessive. I disagree. Defendants' explanation of the time spent by attorney Howard is detailed and the time spent preparing the motion is reasonable. Accordingly, no deduction will be made pursuant to this objection.

Plaintiffs' final objection is that defendants have provided no explanation for the out-of-pocket expenses listed in defendants' itemization. I assume that by "out-of-pocket expenses" plaintiffs are referring to the entries listed for a hotel room ($131.02), meals ($37.31), taxi ($120.00) and parking ($36.00). Defendants have submitted receipts for each of these expenses, which total 324.33. To be fair, I will allow defendants to recover one-third of this amount, or $108.11.

To summarize, defendants' requested award of $8,672.83 will be reduced by $1,791.22 for an award of $6,881.61. To simplify matters, I will subtract defendants' award from plaintiffs' award.

ORDER

IT IS ORDERED that plaintiffs are AWARDED attorney fees and non-taxable costs in the amount of $63,364.21 (total award of $70,245.82 minus defendants' award of $6,881.61). The clerk of court shall enter an amended judgment in

accordance with this order.

Entered this 16th day of August, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge