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-0315-C

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It comes as no surprise that the parties in this case cannot agree upon taxable costs, given the contentiousness they have exhibited throughout this litigation. Even the usually unremarkable aspect of costs has generated two rounds of extensive briefing, first, before the clerk of court and now before the court on appeal from the clerk's taxation order. Despite the clerk of court's careful and thorough analysis of defendants' request for costs, plaintiffs have a plethora of objections.

Plaintiffs' objections can be divided into two groups: those attacking defendants' entitlement to any costs at all and those attacking the particular costs taxed by the clerk of

court. The first group can be disposed of fairly quickly.

Plaintiffs argue first that it is implicit from the judgment that the court was denying defendants any costs other than those ordered in the amended August 21, 2006 judgment. To understand plaintiffs' point, it is necessary to review the way matters unfolded after the jury returned a verdict on March 10, 2006, finding in favor of plaintiffs on defendants' claim that plaintiffs' patent was invalid as obvious. (Trial had proceeded on this claim rather than on plaintiffs' claim of infringement when discovery problems made it impossible to proceed with the infringement claim on the previously scheduled date of trial.) With infringement still to be tried, no judgment was entered.

Defendants moved promptly for judgment in their favor as a matter of law or for a new trial on invalidity. The motion was granted in an order entered on July 17, 2006, in which I found plaintiffs' patent invalid as a matter of law. At that point, it was no longer necessary to try the issue of infringement. Therefore, judgment was entered for defendants on July 22, 2006, granting their motion for judgment as a matter of law and dismissing the case "with fees, costs and sanctions."

Thereafter, the parties filed requests for fees, costs and sanctions relating to disputed discovery matters and plaintiffs filed motions for amendment of the July 22 judgment, for reinstatement of the verdict and for a new trial. In an order entered on August 17, 2006, I awarded plaintiffs attorney fees and costs in the net amount of $63,364.21 (after deducting

$6,881.61 of fees and costs awarded to defendants for attendance at a deposition at which plaintiffs failed to appear without notifying defendants). The next day, I denied plaintiffs' post-trial motions. Three days later, on August 21, 2006, the clerk entered judgment on the requests for fees, costs and sanctions that were the subject of the August 17 order.

It might appear from the wording of the August 21 judgment that it covered all "costs," but an informed reader who had been following the progress of the litigation would have understood that it referred to only those costs that had been the subject of the August 17 order. The judgment was not intended to deny defendants the opportunity to seek an award of costs as prevailing parties under Fed. R. Civ. P. 54(d)(1). Such parties are entitled to an award of costs "unless the court otherwise directs." Id. The direction need not be lengthy or detailed but it must be explicit. Hastert v. Illinois State of Election Commissioners, 28 F.3d 1430, 1437 (7th Cir. 1993). The judgment in this case contained no explicit denial of general trial costs; therefore, defendants were entitled to apply for them.

Second, plaintiffs contend that defendants waited too long to ask for costs. In fact, defendants filed their bill of costs on September 14, 2006, less than one month after the August 18 order and August 21 judgment. Before entry of the August 18 order, it was still questionable whether defendants were the prevailing parties. One month is not an unreasonable period of time in which to prepare a detailed accounting and the time expended did not violate any federal rule of procedure or local rule of court. Plaintiffs have

not alleged that they were prejudiced by the asserted delay in filing.

Third, plaintiffs argue that it is unjust to award defendants any costs, given their lack of candor, cooperation and timeliness in discovery. In the August 17 order, I dealt with the costs and fees the parties incurred in discovery; in this order, I am taking up the issue of the costs to which a prevailing party is entitled "unless the court otherwise directs." Fed. R. Civ. P. 54(d).

I turn then to plaintiffs' specific objections to the clerk of court's award of costs. Plaintiffs have failed to show that it was error for the clerk to award costs for defendants' copy of the videotape depositions of Michael Oleson and Ted Padilla. Although plaintiffs maintain that defendants did not need to see the videotape as well as the transcript when deciding what additional portions of testimony should be shown at trial, they are wrong. Defendants are entitled to review the tape to insure that it is complete and to determine which portions of the tape they think would be most persuasive to the jury.

As for the cost of taking Moore's deposition after plaintiffs failed to send a lawyer to the first scheduled deposition, I agree with plaintiffs that the deposition would not have been necessary had it not been for defendants' failure to produce all of the requested documents promptly. Therefore, I will reduce the award to defendants by $161.50, the amount defendants claimed to have incurred in connection with this deposition. I will take the same course with respect to the costs of the Scanlan deposition. Defendants were on notice that

plaintiffs would be entitled to recover the costs of this deposition if the court ruled that defendants made an untimely disclosure of Scanlan as an expert witness and she was not allowed to testify at trial. Because Scanlan was not allowed to testify for this reason, it is appropriate to deny defendants their costs for this deposition. I will reduce the award to defendants by $684.30 for this expense.

The clerk's award of costs associated with the depositions of witnesses Barham, Franska, Troutt, Miller, Buffington and Peplinski will stand. These depositions were necessary to the defense of the case at the time they were taken.

Defendants are entitled to reimbursement for the deposition transcripts of Dennis Williams and Charles Schuppe. They established the actual costs they paid to the court reporter to obtain the transcripts. Having done so, it was not necessary for them to provide the clerk the exact number of transcript pages. They are entitled to recover fees paid to a court reporter for any stenographic transcript "necessarily obtained for use in the case." 28 U.S.C. § 1920(2).

Defendants are entitled to reimbursement for the costs of daily copy of the trial transcript because the transcript was used at trial by both sides and the court. It makes no difference to their entitlement to reimbursement that defendants did not specify the number of pages when they had a bill from the court reporter to support their claim. In re Synthroid Marketing Litigation, 264 F.3d 712, 722 (7th Cir. 2001) ("[T]the amount of

itemization and detail required is a question for the market. If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more.") (citing Medcom Holding Co. v. Baxter Travenol Laboratories, Inc., 200 F.3d 518 (7th Cir. 1999)). I am not persuaded that in this case it was improper for the clerk of court to limit defendants to Judicial Conference rates for reimbursement for the costs of deposition and trial transcripts.

Defendants are entitled to reimbursement for their internal copying costs, despite plaintiffs' objections to the award of those costs. Defendants' costs were supported adequately; they are within the bounds of reason for a patent case like this one; and they are the costs actually charged to defendants' clients.

Plaintiffs object to any award of costs for the copying of trial exhibits on the ground that defendants did not provide documentation for all the costs. They object in particular to paying for any copying of exhibits that were not necessary after the trial was limited to infringement issues. Defendants respond by contending that the award is inadequate and that the clerk should have awarded them the full amount of costs incurred in copying all of their trial exhibits. The clerk of court made a reasoned decision to cut the amount requested by one-third, given the notice that defendants had that the trial would be limited to validity only. Disputes over costs are not supposed to overshadow the case itself or require the court to re-examine each and every item or evidence or document copied. I would make the same

cut if I were hearing the dispute for the first time. It is a fair, rational means of allocating the costs of copying that the litigation necessitated.

Plaintiffs object as well to any award of costs for graphics used during the trial, saying that defendants did not explain whether the graphics related to invalidity or infringement. In fact, defendants identified each graphic in a manner that makes it possible to determine that the individual exhibits were prepared for use at the validity trial.

Plaintiffs are wrong when they assert that the clerk erred in awarding defendants the costs of copying of any trial exhibits not admitted into evidence. Counsel cannot be expected to predict with precision exactly which documents will become necessary for use at trial.

ORDER

IT IS ORDERED that the appeal from the taxation of costs by plaintiffs William C. Frazier, Frazier Industries, Inc. and Airburst Technology, LLC is GRANTED in part and DENIED in part. The clerk of court's award of costs is reduced by $845.80. FURTHER, IS ORDERED that defendants Layne Christensen Company and ProWell Technologies, Inc.

are entitled to costs as prevailing parties in the amount of $43,050.51.

Entered this 21st day of February, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge