

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.

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ORDER

04-C-315-C

This is a patent lawsuit in which plaintiffs accuse defendants of willfully infringing plaintiffs' patented method for rehabilitating water wells. Before the court are three discovery motions: defendants' motion to enforce the protective order (dkt. 41), defendants' motion to compel (dkt. 45) and plaintiffs' motion to strike interrogatory answers (dkt. 61). For the reasons stated below, I am: sanctioning plaintiffs for violating the protective order but not striking their witnesses; granting defendants' motion to compel in most respects but not all; and granting in part and denying in part plaintiffs' motion to strike interrogatory responses.

Finally, I am directing the parties to attend to the remaining discovery more professionally: they must be more diligent in responding to each other's requests while increasing the level of accommodation to ensure that all relevant information is exchanged efficiently with less rancor.

#### Dkt. 41: Motion By Defendants To Enforce the Protective Order

Defendants claim that plaintiffs violated the stipulated protective order by improperly disclosed defendants' highly confidential documents to potential expert witnesses who are defendants' business competitors. Defendants have moved to strike three of these witnesses, Paul Chelminski, Fletcher Driscoll and George Gerstman.<sup>1</sup> Plaintiffs admit that they screwed up by prematurely divulging confidential documents without following the process required by the protective order but claim that this is a no harm-no foul situation that does not merit sanctions.

If defendants' substantive claim were valid, then this court likely would strike the challenged witnesses. To be entitled to this remedy, defendants have to show that (1) the interest for which it is seeking protection is confidential business information qualified for protection, and (2) there is good cause to protect this information from disclosure to these particular witnesses. *See Promega Corp. v. Applera Corp.*, 2002 WL 32359938 (W.D. Wis.) at \*7. Defendants must prove the second point by specific examples of articulated reasoning as opposed to stereotyped and conclusory statements. *Id.* If this court finds no substantive violation, then it still must determine what sanction is commensurate with plaintiffs' confessed procedural violation of the protective order.

Having reviewed the submissions and case law, I conclude that plaintiffs' violation of the protective order was not substantive and that striking plaintiffs' witnesses under these

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<sup>1</sup> Plaintiffs improperly disclosed confidential materials to a fourth expert witness, Francis Burns, but defendants are not seeking to strike Burns because they do not view him as a competitor. However, Burns remains important for sanction purposes.

circumstances would be a disproportionately harsh sanction. I further conclude, however, that plaintiffs' attorneys' sloppy handling of this matter merits its own sanction.<sup>2</sup>

By way of overview, on September 22, 2004, this court entered the parties' stipulated protective order. *See* dkt. 37. Following a format common in patent lawsuits, the parties created two levels of confidentiality which limited disclosure to "Qualified Persons." The order designated expert witnesses as Qualified Persons for both types of information but it required a party to obtain pre-approval of its proposed experts from opposing counsel and it required all experts to sign a confidentiality agreement. *See* ¶¶ 5, 6 and 16.

During the fall, the parties started recruiting their experts. Plaintiffs' attorney consulted with plaintiff William Frazier in an attempt to find qualified experts who were not competitors of defendants. However, plaintiffs did not seek or obtain pre-approval of their experts prior to disclosing confidential information to them. Plaintiffs' attorney claims that she forgot to do this because of the press of other responsibilities in this case. Each of the experts has signed the required confidentiality agreement.

Thereafter, defendants learned of plaintiffs' unauthorized disclosures to its experts. Now defendants seek to strike three of plaintiffs' expert witnesses because defendants object to these people serving as experts and because plaintiffs deserve to be punished in order to vindicate the efficacy of protective orders in IP cases.

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<sup>2</sup> This is not the only discovery snafu by plaintiffs' lawyers. In addition to "forgetting" the terms of a protective order they helped draft, they "misplaced" two of defendants lengthy discovery requests for over a month in the bowels of their law firm. This is not the level of professionalism expected in a federal patent suit.

According to plaintiffs, Paul Chelminski is an independent consultant who for decades worked for Bolt Technology Corporation, a company that sells air guns mainly to the seismic exploration industry. Bolt Technology is not directly involved with water wells but it sells air guns to plaintiffs. In 1998, defendant Layne contacted Bolt about obtaining air guns; Chelminski made a pitch to Layne but apparently no sale took place. *See* “GAluce memo,” Bates # LC007454, (“CONFIDENTIAL-ATTORNEYS ONLY”), attached to dkt. 42, under seal. Chelminski has retired from Bolt Technology and now works as a private consultant. Plaintiffs hired Chelminski in this case to explain air guns and the scientific and physical issues relevant to this patent dispute, and to opine that defendants’ well rehabilitation methods infringe plaintiffs’ patent. Given the chance, defendants would have objected to Chelminski serving as an expert. Defendants claim that Chelminski is a “competitor” because Bolt Technology sells to plaintiffs the air guns that plaintiffs use in their patented well rehabilitation method.

George Gerstman is a patent attorney with the Seyfarth Shaw law firm in Chicago. Plaintiffs hired Gerstman to explain how the Patent Office works, how patent attorneys practice, the prosecution of plaintiffs’ ‘845 patent, then to opine that defendants’ reclamation system directly and contributorily infringe on this patent. Defendants have moved to strike Gerstman’s report on the ground that his opinions are based on his discussions with Chelminski, whom defendants have challenged on substantive grounds: “thus without Chelminski, Gerstman by his own admission would have no basis for his report.” Dkt. 42 at 12.

Fletcher Driscoll is a hydrogeologist who owns his own consulting firm and who is the primary author of the book “Groundwater and Wells, 2<sup>nd</sup> Ed.” Driscoll’s consulting firm does

not construct water wells or perform well rehabilitation. Plaintiffs hired Driscoll to explain generally about water wells and well rehabilitation methods, and to opine that defendants' tools and procedures operate similarly to the methods patented by plaintiffs. Given the chance, defendants would have objected to Driscoll serving as an expert because Driscoll serves as a consultant in well development and remediation on projects of the type in which defendants are heavily involved, "and where he influences whether Layne is hired to do work." Dkt. 42 at 4.

Plaintiffs respond by admitting that their attorneys did not identify these experts to defendants and did not wait for defendants' approval before disclosing to these experts the materials that defendants had labeled confidential. Plaintiffs concede that this failure violated ¶ 16 of the protective order, but they claim to have forgotten about this requirement during the pell mell exchange of discovery at the outset of this case.

Having offered their *mea culpa*, plaintiffs contend that because neither Chelminski nor Driscoll actually is a competitor of defendants, defendants' claim of irreparable harm is overstated. (Because defendants' challenge to Gerstman hinges on their challenge to Chelminski, it is unnecessary to consider him separately at this point). Further, argue plaintiffs, because each of these witnesses has signed the required promise to be bound by the protective order, defendants' confidential information is sufficiently protected. In other words, had plaintiffs actually obeyed the terms of the protective order, we would have ended up at the same spot, so exclusion is unnecessary. As something of an equitable corollary to this last point, plaintiffs report that they accommodated defendants' request to disclose plaintiffs' confidential materials to a potential defense expert whom defendants declined to identify because they had not decided yet

whether to retain him/her. According to plaintiff, it's not cricket for defendants to request and receive such an accommodation and then seek to exclude opposing experts who obtained access to confidential materials in a similar fashion.

I conclude that defendants claims of substantive harm are exaggerated. Defendants' assertions that Chelminski, Bolt Technology Corp., Driscoll and his consulting firm are defendants' "competitors" are incorrect.

The fact that Bolt Technology sells air guns to plaintiffs does not make Bolt defendants' competitor. A manufacturer that sells its product on the open market is not a "competitor" of its customer's competitors. As plaintiffs point out, Bolt Technology probably would sell air guns to defendants if they could negotiate a deal; in fact, Chelminski himself once met with defendants to talk business..

As for Driscoll, the fact that his consulting firm works in the water industry hardly qualifies as news in a case about water well rehabilitation. Common sense suggests that any consulting firm with sufficient expertise to offer opinions relevant to the disputes in this case probably works at least a bit in the water well rehabilitation market. From this, it is logical to hypothesize that such a firm might in the future consult with a client who might need the services of a water well reclamation company such as plaintiffs or defendants; in such a situation, the consulting firm's client might ask it for a recommendation. But if this scenario is enough to declare a consulting firm a "competitor," then we have a paradox: any firm qualified to offer an expert opinion is disqualified from reviewing the confidential information necessary to form that opinion. *Cf. Promega v. Applera, supra, at \*\* 7-8.*

The paradox, however, is ephemeral because such a consulting firm does not actually “compete” with service providers like the defendants. The competitive disadvantage hypothesized by defendants is equally ephemeral. If defendants’ concern is that Driscoll might disparage them in the future because Driscoll might develop an unfavorable impression of them during this lawsuit or because plaintiffs are paying him in this case, then their concern is with the practice of hiring of expert witnesses in general and with Driscoll’s trustworthiness and professionalism in specific. This court has no intention of assuaging either of these concerns by striking Driscoll as a witness.

In short, defendants have not shown substantive good cause to strike any of plaintiffs’ expert witnesses. This could end the substantive inquiry, but I will circle back briefly to the first prong of the test: that the documents to be protected actually qualify for protection. Acknowledging that more context would be helpful, and giving the parties the benefit of the doubt, I am skeptical of some of the designations. Why is a May 31, 2000 letter from Layne Northwest to the Wisconsin Department of Natural Resources regarding the Dorchester well rehabilitation (LC6112) confidential at all, let alone “attorneys only?” This is a public document that could be obtained by a records request to the DNR. What is even marginally confidential, let alone “attorneys only” confidential, about Layne’s January 25, 2002 letter to Gennady Carmi of ProWell Technologies offering to cover travel expenses for ProWell’s demonstration of the Airshock process? *See* LC2168. Everyone knows ProWell is selling equipment to Layne; that’s why ProWell is a codefendant in this lawsuit. What is “attorneys only” about photographs of people meeting and shaking hands? *See* LC5155-58. I also question

the asserted confidentiality of other customer brochures and handbooks presented to the court by defendants as part of their motion to strike, but because it is not clear from the packet whether these are drafts that have not yet been disseminated to Layne's customers, I cannot say that they are not entitled to some protection. But if Layne has distributed these materials to any customers or prospective customers, then it cannot possibly qualify for "attorneys only" protection.<sup>3</sup> The upshot is that although defendants have a right to complain about plaintiffs' violation of the protective order, their claims of actual harm are undermined by their apparent misuse of the upper level confidentiality designation reserved exclusively for the most closely held information.

That said, the protective order is not a paper tiger. Although defendants have not made a case for striking plaintiffs' expert witnesses, the price extracted from plaintiffs for their disregard of the court's orders must be sufficient to constitute actual punishment and must serve as a specific and general deterrent to future violations in this case and in others. Pursuant to Rule 37(b)(2) I am imposing a fine of \$1000 for each of the four violations of the protective order, for a total of \$4000. Plaintiffs and their attorneys are jointly and severally liable for payment.

Additionally, pursuant to Rule 37(a)(4), I am shifting at least some of defendants' costs to plaintiffs. Because defendants overstated their case and did not prevail completely, I do not

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<sup>3</sup> For instance, why is the information in the brochure numbered LC7595-97 labeled "CONFIDENTIAL" when a brochure containing the same information in a different format, LC3445-47, is not? This court doesn't expect perfection from counsel or their staff when thousands of documents are being exchanged, but such inconsistencies belie defendants' dudgeon at plaintiffs' mishandling of their purportedly confidential information.



intend to make them whole, but they had a right to seek relief from the court for plaintiffs' conceded violation of the protective order. Defendants' attorneys may submit an itemized bill to the court along with brief argument as to the proportion to be paid. Defendants may not bill their reply brief because the court did not request it. Plaintiffs may respond as they see fit to the itemization and the proportion they should pay.

**Dkt. 45: Motion by Defendants to Compel Answers to Interrogatories  
or in the Alternative for Leave to Exceed the Interrogatory Limit**

Frustrated with plaintiffs' responses to their discovery, defendants have filed a motion requesting six types of relief: 1) compel plaintiff William Frazier (Frazier) to answer all questions posed in defendant Layne's first set of interrogatories; 2) compel Frazier to answer all of defendant ProWell's interrogatories; 3) compel plaintiffs Frazier Industries, Inc. (FII) and Airburst Technologies to answer all questions posed in ProWell's interrogatories; 4) Deem waived plaintiffs' objections to defendants' interrogatories due to untimeliness; 5) Deem admitted by FII and Airburst Layne's first set of requests for admissions (RFAs); and 6) Shift costs pursuant to Rule 37(a)(4). Plaintiffs oppose all portions of this motion. *See* dkt. 57.

The heart of defendants' motion is plaintiffs' unilateral decision to stop answering defendants' interrogatories at the point where plaintiffs decided 25 questions had been posed, which was at number 7 out of 19. Defendants want this court to order plaintiffs to answer all of the interrogatories. Defendants also complain that because plaintiffs dallied so long in

responding that this court should deem the objections waived. Finally, defendants want *each* plaintiff to answer the interrogatories and requests for admissions, not just William Frazier.

Plaintiffs resist, claiming that defendants did not attempt to meet and confer; defendants tried to sneak unnumbered subparts into their interrogatories, violating the letter and spirit of Rule 33; plaintiffs did not wait too long to answer, since both sides have been giving each other extensions in these matters; and that because plaintiff William Frazier is 100% owner of both of the corporate co-plaintiffs, his answers should be binding on all of them.

The parties see no irony in claiming, while arguing such an unnecessary discovery dispute, that they are out-doing each other in granting discovery accommodations. It is time for their deeds to match their words. This is a complex commercial lawsuit involving specialized engineering and scientific procedures. For either side to invoke the 25 interrogatory limit of Rule 33 is absurd; for plaintiffs to have done this by unilaterally re-numbering defendants' interrogatories demonstrates rigidity bordering on OCD. Additionally, for plaintiffs to claim that Frazier and his companies are one in the same tosses the principle of corporate personality into a cocked hat.

All three plaintiffs forthwith shall provide complete answers to all unanswered interrogatories and requests for admissions. I will not deem objections waived. From now until the end of discovery, the parties actually shall cooperate with each other to ensure timely, complete and efficient exchange of information.

Defendants are entitled to cost-shifting on this motion.

**Dkt. 61: Motion by Plaintiff To Strike Defendant's Answers  
to Interrogatories Nos. 4, 8 and 9**

Plaintiffs claim that defendant Layne lied in its answers to plaintiffs' contention interrogatories. From plaintiffs' perspective the only "true" answers would have been for defendant to admit infringement of plaintiffs' patent. According to plaintiffs, the fact that defendant declined to do so forced plaintiffs to take unnecessary depositions at which defendant's employees essentially confessed to infringement. The appropriate remedy, suggest plaintiffs, is for this court to declare that defendant has infringed the elements covered by the disputed discovery and reimburse plaintiffs' attorneys for the avoidable depositions in Kansas City and Milwaukee. Defendant responds that its interrogatory responses were accurate and complete because plaintiffs' patent is for a method, which requires analysis of the totality of the circumstances. Defendant also questions the authority of this court essentially to grant a directed verdict for a discovery violation.

Having considered all the submissions, I conclude that for the most part, defendants are correct and plaintiff is incorrect. Defendant is not required to confess infringement; had it been willing to do so, this lawsuit never would have reached this stage. Defendant—with a few troubling exceptions—properly qualified its responses to the contention interrogatories. The statements by defendant's employees at their depositions *did* show that some of defendant's unqualified denials of particular steps in the process were false, but these statements did not—indeed could not—establish actual infringement.

These are the disputed contention interrogatories that plaintiffs served on defendant Layne:

4. Identify all facts supporting your contentions that Layne has not infringed the '845 patent.

8. Identify all facts that support your contentions that BoreBlast does not infringe the '845 patent.

9. Identify all facts that support your contentions that BoreBlast II does not infringe the '845 patent.

Defendant response to Int. 4 was 3½ pages long, and it incorporated this answer as its response to Ints. 8 and 9. *See* Schlicht Affidavit, dkt. 64, Exh. 2. Defendant broke out its answer by sets of claims, asserting in some instances that it did not infringe specific claims because it did not use certain techniques. In denying use of certain techniques, sometimes defendant qualified its answers. For instance, defendant stated that “Claim 18 is not infringed because Layne has used no percussive impact as defined in patent.” Sometimes defendant did not qualify its answers. For instance, defendant stated that “Claims 2-7 are not infringed because Layne has not used a ‘percussive’ gas venting apparatus.” Defendant’s Vice President of Finance, Jerry W. Fenska swore to the interrogatory responses as defendant’s corporate representative.

At his deposition, Fenska admitted that he had no personal knowledge as to the truth or accuracy of any of the interrogatory responses but had relied upon the assurance of one of defendant’s attorneys that the answers to which he was averring were true “to the best of his knowledge any belief.”

Thereafter, plaintiffs' attorneys received the bulk of defendants' documents and deposed some of defendant's hands-on employees. According to plaintiffs, these documents and depositions established that a number of the facts asserted by defendant in its response to Int. 4 were incorrect. Plaintiffs further assert that some of defendant's witnesses "admitted that BoreBlast and BoreBlast II met elements in the claims at issue in this Action." Brief in Support, dkt. 62, at 3. Specifically, plaintiffs challenge the truthfulness of defendant's answers distinguishing Claim 1, limitations A and B, and Claim 19, limitations A and B. Here are Layne's responses to these four claims:

[1.A.]: Layne has used no means for generating pressure waveforms and mass displacement that is the same as or equivalent to what the '845 patent describes, nor has Layne used any percussive gas venting apparatus or arc generator.

[1.B.]: Layne has used no 'generation means' and thus has not activated any such means.

[19.A.]: Layne has used no 'means for generating percussive energy' at all and no such 'means' that is the same or equivalent to what the '845 patent describes, or arc generator.

[19.B.]: Lane has initiated no percussive means as defined in the patent.

In contrast to these pronouncements, plaintiffs point to defendant's documents and the deposition testimony of defendant's employees. For instance, defendant's pamphlet touting its BoreBlast system states:

Here's how it works . . . The types of physical energy commonly required in well rehabilitation include: percussive energy – to loosen and break apart hard mineralized deposits and penetrate biofouling . . . A controlled percussive mechanism within the tool

provides adjustable volumes and pressures of jetted gas. The gas pulses outward beyond the screen or borehole wall, breaking up mineral and biological deposits. When the pulse pauses, reciprocal pressures provide agitation, carrying gas bubbles and dislodged debris into the well bore. As the tool is moved vertically through the well, it delivers surging energies deep into the water bearing formation.

Barham deposition Exh. 25 (attached to dkt. 64).

In a different pamphlet (LC3448-67), defendant again describes the BoreBlast as “provid[ing] percussive energy needed to fragment scale & biosolids. Provides fluid displacement & surging energy needed for deeper cleaning and distribution chemicals.”

At a November 9, 2004 deposition in Kansas City, defendant’s employee William Barham testified in response to questioning that when the BoreBlast was used

the effect was the percussive wave would release incrustations on the screen and, more importantly, it actually stimulated behind the screen and then the gravel pack of the well to . . . redevelop the well and . . . reform the gravel pack.

The deposition continued:

Q: Do you know if that pressure relief valve is a means for generating pressure wave forms?

\* \* \*

A: I think I said earlier when we first started that it released the pressure or it released a percussive wave.

Q: It generates a pressure wave form, right? The pressure relief valve, right?

A: The pressure relief valve just releases – it releases the pressure.

Q: It releases the pressure which generates a pressure wave form, correct?

A: Yes. Out of the outlet of the tool.

Q: Right. And that also causes mass displacement in the bore volume, right?

A: I would assume.

Q: Okay. In the airgun that is used with BoreBlast II also generates pressure wave forms, right?

A: Yes.

Q: And it generates mass displacement, right?

A: Yes.

\* \* \*

Q: And what is a percussive gas venting apparatus?

A: An apparatus that vents a percussive wave.

Q: And the pressure relief valve does that, right?

A: Yes.

Q: And so does the ProWell air gun, right?

A: Yes.

\* \* \*

Q: And so by virtue of the wave form interacting with those fines, ProWell production is enhanced, right?

A: Yes.

Q: And that happens with the pressure relief valve as well as the ProWell air gun, right?

A: Uh-huh.

*See Dkt. 64, Exh. 7.*

On November 10, 2004, defendant's employee Paul Buozis was asked these questions and gave these answers:

Q: Do you know if BoreBlast involves the inserting into a bore volume of a means of generating pressure wave forms?

A: Yes.

Q: It does?

A: Yes.

Q: And that's through the inserting of the pressure relief valve into the bore volume?

A: Correct.

Q: And by inserting the pressure relief valve into the bore volume and firing it, it generates pressure wave forms; right?

A: Correct.

Q: And it generates mass displacement; correct?

A: Correct.

Q: And likewise with regard to BoreBlast II, the insertion of the ProWell gun into the bore volume generates pressure wave forms; right?

A: Correct.



Q: And it also generates mass displacement; correct?

A: Correct.

Q: The pressure relief valve and BoreBlast is a percussive gas venting apparatus; correct?

A: Yes.

Q: So is the ProWell air gun, right?

A: Yes. They could interpret it that way.

Q: Okay in the BoreBlast process, the wave forms that are generated by the pressure relief valve interact with the impediments to remove them; correct?

A: Correct.

Q: Similarly in BoreBlast II, the ProWell air gun generates wave forms which then interact with the impediments to remove them, right?

A: Correct.

\* \* \*

Q: Okay. Do you understand the term “percussive gas apparatus”?

A: Yes.

Q: What do you understand that to mean?

A: It means a device that will release pressure.

Q: Pressure relief valve does that; right?

A: Pressure relief valve.

Q: And the ProWell air gun does that; right?

A: Correct.

Dkt. 64, Exh. 8.

On November 16, 2004, defendant's employee Gregory Buffington was deposed in Milwaukee and provided this testimony:

Q: Do you have an understanding of mass displacement in the conjunction [sic] of using an agitation process in the water well?

A: No. It causes a pressure surge and moves water out through the screen openings and comes back in.

Q: Is that a mass displacement?

A: I guess.

Q: Okay. The ProWell device. That generates pressure wave forms, right?

A: Yes.

Q: And it does so in the well? Right?

A: Yes.

Q: And it also creates mass displacement, right?

A: Yes.

Q: And you would agree that the pressure relief valve is a percussive gas apparatus?

A: Yes.

Q: As is the ProWell device?

A: The simplistic answer is yes.

Q: You would agree that the BoreBlast process generates the pressure wave forms which in turn interact with the impediments to remove them?

A: Yes.

Q: And the ProWell device does the same thing?

A: Yes. As does any treatment device that's used in the last 20 years.

Dkt. 64, Exh. 10.

On November 17, 2004, defendant's employee Jeffrey Gibson was deposed in Milwaukee and provided this testimony:

Q: And what's happening is a percussive gas venting apparatus is venting gas in the process of water well rehabilitation, right?

A: Hopefully.

Q: And the purpose of emitting that gas and that energy is to loosen, dislodge or remove impediment to a well production, right?

A: It can be.

\* \* \*

Q: Okay. Well, in any event, both BoreBlast I and BoreBlast II produce energy which serves to dislodge, loosen, remove mineral encrustations and impediments to water well production, right?

A: Yes it can.

Dkt. 64, Exh. 11.

In response to the palpable contradictions, defendant concedes nothing, maintaining that its challenged interrogatory responses “are true and correct.” *See* Brief in Opposition, Dkt. 98, at 4. Defendant argues that in a “means plus function” patent claim, interpretation of the claim requires a comprehensive analysis whether the means in the accused product which performs the function stated in the claim is the same as or an equivalent of the corresponding structure described in the patent specification. *See* 35 U.S.C. § 112, ¶6. Because plaintiffs in their patent specify a “gas gun . . . available under the BOLT trademark from Bolt Technology Corporation,” and because defendant does not use a BOLT airgun or an equivalent, there is no evidence of infringement. Dkt. 98 at 4-5. Therefore, “Layne is clearly justified in making the interrogatory answers that were made.” *Id.* at 6.

Each side is partially correct. First, contrary to plaintiff’s argument, defendant does not have to concede during discovery that its methods infringe the patent. Therefore, it was not improper for defendant to qualify its denials in response to Claims 1 and 19 with the phrases “that is the same as or equivalent to what the ‘845 patent describes” and “as defined in the patent.” This placed plaintiffs on notice that claims construction in this lawsuit was going to be a dog fight. Thus, plaintiff had no genuine alternative to plaintiff deposing witnesses such as Barham, *et al.*, to hone in on defendants’ claimed differences in methodology. The fact that these witnesses acknowledged that defendants’ process involved percussive techniques, mass displacement, *etc.* does not establish the falsity of any of defendant’s interrogatory responses that defendant qualified. Therefore, plaintiffs are not entitled to any relief or cost-shifting on this basis.

However, there is a residuum of discovery misconduct by defendant: in response to plaintiff's intentionally broad contention interrogatories, defendant asserted without qualification that certain processes were not used at all: "nor has Layne used *any* percussive gas venting apparatus"; "nor has Layne used *any* gas gun." "Layne has used *no* 'means for generating percussive energy' *at all*." See p. 13, *supra*, (emphasis added). The deposition testimony quoted above demonstrates that these answers, which were *not* conditioned on claim interpretation, are wrong.

Why didn't defendant qualify these portions of its responses the way it qualified other portions? After comparing the deposition testimony to the interrogatory answers, why didn't defendant move to amend these answers? Defendant's failure to acknowledge the palpable contradictions is troubling. Defendant's claim that these techniques are part of a larger process doesn't excuse the unequivocal but false denial of *any* use of these techniques.

Accordingly, plaintiffs are entitled to relief on this portion of their motion. First, Defendant forthwith must correct all interrogatory answers that are contradicted by the deposition testimony of its employees. In this regard, it is unacceptable for defendant to maintain its position that there are no incorrect answers: defendant must resolve the apparent contradictions, even if this resolution means simply conditioning a currently unconditioned denial.

Second, defendant must reimburse plaintiffs in part for the cost of filing this motion. Partial reimbursement is all plaintiffs will get: although they established that the challenged responses contain some incorrect information, plaintiff's interpretation of the qualified responses

was incorrect and plaintiffs requested an unrealistic remedy. Plaintiffs may not bill their reply brief because it was not requested by the court.

Third, defendant must reimburse plaintiffs for the costs they incurred deposing Jerry Fanska. Plaintiffs are not entitled to be reimbursed for deposing the other witnesses: even if defendant had admitted using a percussive gas venting apparatus in its well reclamation method, this would not have spared plaintiffs the time and expense of the employee depositions. Plaintiffs still would have been required to learn the details in order to bolster their infringement claim. Therefore, shifting the costs of these depositions to defendant would be a windfall to plaintiffs.

But Fanska is different. Plaintiffs have challenged defendant's designating Fanska as its representative for the interrogatory answers. Plaintiffs protest that defendant essentially committed fraud by having Fanska sign off on a set of interrogatories which were answered by an attorney and about which Fanska had no independent knowledge. But it was not a direct violation of the rule for defendant to use Fanska in this fashion, and as a practical matter in the instant dispute, it may not have mattered which employee verified the interrogatories because the answers to the contention interrogatories regarding infringement would have to be prepared by an attorney skilled in patent law.

Realistically, no one could have expected a non-attorney to present a cogent, thorough response to Interrogatories 4, 8 and 9. Thus, one might have expected plaintiffs' attorney to get on the phone with defendant's attorney to get the low-down on who had the first-hand knowledge so that efficient depositions could be scheduled. Absent that, this court did expect

defendant's attorney, upon receiving notice of Fanska's deposition, to volunteer this information to forestall the fiasco that resulted. Plaintiffs might still have objected to the legitimacy of the interrogatory responses but that dispute could have been resolved with a motion to the court at the front end rather than after the fact. Therefore, the court is holding defendant responsible for the costs plaintiffs incurred deposing Jerry Fanska. This includes transportation costs incurred to and from Kansas City notwithstanding the fact that plaintiffs deposed other necessary witnesses during this same trip.

Plaintiff is entitled to no other relief on this motion.

### **Conclusion**

Discovery is not proceeding smoothly in this case. In this court discovery is a nonadversarial undertaking that provides both sides with all relevant information necessary to fuel the adversarial portions of this lawsuit: dispositive motions and trial. Accordingly, I am directing counsel to adopt a more irenic approach to discovery. This does not mean that the lawyers have to roll over and play dead, but they had better make genuine best efforts at mutual accommodation: failure to conciliate and cooperate will have consequences.

ORDER

For the reasons stated above, it is ORDERED that:

1) Defendants' motion to enforce the protective order is GRANTED IN PART and DENIED IN PART. Not later than March 11, 2005, plaintiffs and their attorneys shall pay a sanction of \$4000 to the Clerk of Court.

2) Defendants' motion to compel discovery is GRANTED IN PART and DENIED IN PART as described in the body of this order. All three plaintiffs forthwith shall complete their responses to defendants' outstanding discovery requests. Not later than February 18, 2005, defendants may submit an itemized bill of costs for this motion. Not later than February 25, 2005, plaintiffs may file a response to this bill.

3) Plaintiff's motion to strike interrogatory answers 4, 8 and 9 is GRANTED IN PART and DENIED IN PART. Defendant Layne forthwith shall amend the answers found incorrect by the court. Not later than February 18, 2005, plaintiffs may submit an itemized bill of costs for the Fanska deposition and for the preparation of this motion along with a terse argument on how much of this bill should be shifted to defendant Layne. Not later than February 23, 2005, defendant Layne may file a response to this bill.

4) All parties and attorneys shall cooperate to ensure the timely, complete and efficient exchange of information during discovery.

Entered this 11<sup>th</sup> day of February, 2005.

BY THE COURT:

STEPHEN L. CROCKER  
Magistrate Judge