IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RICOH COMPANY, LTD.,

Plaintiff,

ORDER

v.

06-C-0462-C

ASUSTEK COMPUTER INC., et. al.,

Defendant.

Before the court is plaintiff Ricoh Company, Ltd.'s itemization of attorney fees and expenses incurred in connection with its unopposed motion to compel defendant NU Technology to produce documents responsive to Ricoh's first set of requests for production of documents. Defendant NU objects to paying the $4,469.17 sought by Ricoh on the ground that Ricoh's motion was unnecessary. According to NU, Ricoh knew before it filed the motion that NU did not have in its possession the vast majority of the documents Ricoh was demanding. NU avers that it told Ricoh that the only documents it had in its possession were electronic sales and financial records, and that it would provide these records to Ricoh as soon as this court determined, in the context of deciding Quanta's motion for a protective order, which optical disk drive products were at issue in the case. NU asserts that its failure to file a response in opposition to Ricoh's motion was the result of NU's incorrect assumption that the court would set a specific briefing schedule on the motion.

Rule 37(a)(4) of the Federal Rules of Civil Procedure is a fee-shifting rule, not a sanction for being wrong. But although "the great operative principle" of Rule 37(a)(4) is that "the loser pays," still "a loser may avoid payment by establishing that his position was substantially justified," *Rickels v. City of South Bend, Ind.,* 33 F.3d 785, 786, 787 (7th Cir. 1994), or if the court finds that "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(4)(A).

In this instance, I find that it would be unjust to require NU to pay the costs of Ricoh's motion. Ricoh won the motion by default as a result of an administrative gaffe by NU's legal team. A victory by default is still a victory, but as I recently noted in an order addressing a different discovery motion, not every miscue or misunderstanding merits drawing blood from one's opponent. NU's current submissions make out a good case that if NU had not blown the response deadline, it stood a reasonable if not good chance of defeating Ricoh's motion, in which case Ricoh would be the party on the hook for fees. Under these circumstances, and in keeping with the "no harm, no foul" spirit of recent discovery-related orders issued in this case, I am not going to order NU to pay Ricoh for its motion.

Entered this 7th day of March, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge