

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

E2INTERACTIVE, INC. and
INTERACTIVE COMMUNICATIONS
INTERNATIONAL, INC.,

OPINION and ORDER

09-cv-629-slc

Plaintiffs,

v.

BLACKHAWK NETWORK, INC.,

Defendant.

Following a six-day trial in this patent infringement lawsuit related to processing prepaid gift cards, the jury found that defendant Blackhawk Network, Inc. infringed U.S. Patent No. 7,578,439 (the '439 patent) and awarded plaintiffs e2Interactive, Inc. and Interactive Communications International, Inc. (collectively InComm) \$3,475,159.95 in reasonable royalties. Before the court is InComm's motion to alter or amend judgment with respect to pre- and post-judgment interest and supplemental damages. Dkt. 478.

InComm seeks (1) an award of supplemental damages in the amount of \$37,601.82 for additional transactions that were processed by Blackhawk prior to the date that Blackhawk removed the infringing source code, (2) pre-judgment interest calculated at the prime rate, compounded quarterly and running from August 25, 2009 (the date infringement began) through the date of the entry of an amended judgment (or the date of this order); and (3) post-judgment interest calculated in accordance with 28 U.S.C. § 1961. Blackhawk only opposes InComm's request that pre-judgment interest be awarded until the date of amended judgment. Because the pre-judgment interest rate is over 3% higher than the post-judgment rate, the date on which pre-judgment interest ends and post-judgment interest begins has a significant economic impact. According to Blackhawk, the dividing line between pre- and post-judgment interest should be the date the original judgment was entered: March 2, 2012.

Under 28 U.S.C. § 1961, post-judgment interest is to “be calculated from the date of the entry of judgment.” According to Blackhawk, the words “entry of judgment” refer to the original entry of judgment and not the final, appealable judgment. However, as noted by one district court in this circuit, federal courts disagree about what constitutes “entry of judgment” and the Court of Appeals for the Seventh Circuit has not addressed the issue in depth. *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co., LLC*, 500 F. Supp. 2d 1079, 1081 (N.D. Ind. 2007). Despite the confusion, it appears that the majority of circuits addressing the issue interpret the post-judgment statute to require both a monetary amount and a final, appealable judgment. *Id.* at 1081-82 (citing *MidAmerica Fed. Sav. & Loan Ass’n v. Shearson/Am. Express, Inc.*, 962 F.2d 1470, 1476 (10th Cir. 1992); *Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 991 (9th Cir. 2001); *Foley v. City of Lowell, Mass.*, 948 F.2d 10, 17 (1st Cir. 1991); *Scotts Co. v. Central Garden & Pet Co.*, 403 F.3d 781, 793 (6th Cir. 2005)). See also *R.E.I. Transp., Inc. v. C.H. Robinson Worldwide, Inc.*, 2007 WL 4225669, at *3 (S.D. Ill. July 10, 2007) (“Because the Court’s judgment entered March 16, 2007, was not final, post-judgment interest did not begin to accrue as to that judgment when it was entered”), *aff’d*, 519 F.3d 693 (7th Cir. 2008); *Finan v. Good Earth Tools, Inc.*, 2011 WL 147738, at *4 (E.D. Mo. Jan. 18, 2011) (noting that Eighth Circuit appears to take position that post-judgment interest is calculated from date of final judgment).

Ordinarily, the entry of judgment on a jury verdict is a final appealable judgment. However, when the determination of pre-judgment interest is left open, the judgment is not considered final. 19 *Moore’s Federal Practice* § 202.02, at 202-10 (3d ed. 2012). Although the March 2, 2012 judgment in this case did not include or in any way refer to pre-judgment interest, InComm timely moved to alter or amend the judgment pursuant to Rule 59(e). Applying Supreme Court precedent, the Seventh Circuit has held that pre-judgment interest is part of a plaintiff’s complete compensation and part of the merits of the underlying action,

making a motion for pre-judgment interest a Rule 59(e) motion to amend a judgment. *Pace Communications, Inc. v. Moonlight Design, Inc.*, 31 F.3d 587, 591 (7th Cir. 1994) (citing *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987); *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989)). According to the court of appeals, “[a] court that has decided to award prejudgment interest has not entered an appealable final judgment until that amount has been calculated.” *Id.* In fact, a timely filed Rule 59 motion divests the circuit court of jurisdiction and renders the final judgment temporarily nonfinal for appellate purposes until the district court disposes of the motion. 19 *Moore’s Federal Practice* § 202.12(1)(a), at 202-68.9-68.10.

Although it seems harsh for the losing party to be charged the higher *pre*-judgment interest while the court addresses the myriad motions that often *follow* a jury verdict in a patent trial, this appears to be the law. Accordingly, InComm will be awarded pre-judgment interest from August 25, 2009 through the date of this order. Because InComm’s proposed calculations of pre-judgment interest were based on dates that already have passed, I ask that it submit a new calculation based on the date that this order was entered. InComm will have until December 14, 2012 to submit its updated number.

ORDER

IT IS ORDERED that

- (1) Plaintiffs' motion to alter or amend the judgment (dkt. 478) is GRANTED.
- (2) The judgment is AMENDED to award plaintiff the following:
 - (A) \$37,601.82 in supplemental damages;
 - (B) Prejudgment interest calculated from August 25, 2009 through the date of this order using the Prime Rate, compounded quarterly and based upon all damages, including the supplemental damages;
 - (C) Post-judgment interest calculated in accordance with 28 U.S.C. §1961 on the full amount of damages and pre-judgment interest.
- (3) By December 14, 2012, InComm shall submit a revised calculation for pre-judgment and post-judgment interest based on the date of the entry of this order.

Entered this 6th day of December, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge