IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

NOVOZYMES A/S and
NOVOZYMES NORTH AMERICA, INC.,

Plaintiffs,

v.

DANISCO A/S,
GENENCOR INTERNATIONAL WISCONSIN, INC.,
DANISCO US INC. and DANISCO USA INC.,

Defendants.

ORDER

10-cv-251-bbc

- -

Plaintiffs Novozymes A/S and Novozymes North America, Inc. have appealed the clerk of court's taxation of costs, in accordance with Fed. R. Civ. P. 54(d)(1). Plaintiffs acknowledge that defendants Danisco A/S, Genencor International Wisconsin, Inc., Danisco US Inc. and Danisco USA Inc. are entitled to costs as the prevailing party, but plaintiffs argue that the clerk awarded some costs that are outside the categories authorized by 28 U.S.C. § 1920 and other costs that were not reasonably incurred. In particular, plaintiffs argue that the clerk should not have awarded any of the following costs:

- costs related to electronic discovery that defendants produced to plaintiffs, with the exception of the scanning of hard copy documents and the conversion of native files (alternatively, plaintiffs argue that defendants' electronic discovery costs should be reduced as excessive);
- "unused" demonstrative exhibits and "unexplained work" on those exhibits;

- video recording depositions of defendants' witnesses; and
- copying expenses for local counsel that "are either entirely duplicative of copying costs otherwise taxed to Novozymes or unexplained."

In defending their respective positions, both sides have continued a practice that has been prevalent throughout the proceedings, which is to argue without any supporting authority that the court must reject the other side's position because it is inconsistent with an argument that side made previously. It is puzzling why the parties have continued this strategy because I have not relied on it once in any of the numerous rulings in this case. In fact, I have informed the parties on multiple occasions that it is not persuasive. E.g., Dkt. #399 at 18 ("Throughout this litigation, both sides have gone to great lengths to dig up old patents and expert materials of the other side in an attempt to demonstrate their opponent's allegedly inconsistent positions in different cases. However, neither side has cited any authority regarding the legal relevance of these materials."). See also May 5, 2012 order, dkt. #966, at 16; September 24, 2010 order, dkt. # 106, at 20. Because the parties again failed to cite any authority showing the relevance of this argument, I have disregarded it.

With respect to electronic discovery, the clerk of court noted that "[t]his district has typically included all reasonable costs associated with electronic discovery as part of 'fees for exemplification and the costs of making copies' within the meaning of 28 U.S.C. § 1920(4)." Dkt. #996 at 3 n.2. Plaintiffs do not cite any decisions from the Court of Appeals for the Seventh Circuit that contradict this approach, but they argue that it is inconsistent with both Taniguchi v. Kan Pacific Saipan, Ltd., 132 S. Ct. 1997 (2012) and Race Tires America, Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012).

Taniguchi is not on point. The sole question in that case was about the scope of a provision that allows costs for interpreters, which is not at issue in this case. Race Tires is on point but obviously not controlling. In the absence of more definitive authority, I decline to depart from this court's practice. Alternatively, plaintiffs argue that the amount defendants are claiming for electronic discovery is too high, but they fail in their opening brief to point to a single entry that is unreasonable, so that argument is waived.

With respect to defendants' demonstrative exhibits, plaintiffs concede that those costs may be recovered as "exemplification" under § 1920(4). However, they argue that defendants should be limited to $1313.74 because the remainder of the $87,034.95 awarded by the clerk of court is unexplained or for exhibits that were not used at trial. I agree with defendants that costs incurred for making exhibits may be reasonable even if they are not used at trial. In addition, the declaration of defendants' counsel is evidence that counsel and the contractors they hired expended significant effort on preparing exhibits for trial. Dkt. #987, ¶¶ 10-11, 17-22. The problem is that defendants' declaration is prepared at such a high level of generality it is impossible to evaluate the reasonableness of any particular exhibit. It is obvious that $1313.74 is not an accurate figure for a trial of this magnitude, but in the absence of more detailed support, I am reducing the awarded amount to $43,517.47, a reduction of 50%.

With respect to the video recordings for defendants' depositions, it is undisputed that § 1920 authorizes costs incurred for recording depositions. Because plaintiffs cite no authority for the view that it is unreasonable for a party to record depositions of its own

witnesses, I see no reason to disturb the clerk of court's award on this issue.

The clerk of court awarded $3253.40 for copies made by local counsel. Plaintiffs object to all but $340.77 of that amount either because the copies counsel made were "duplicative" or because defendants have failed to provide adequate documentation justifying the cost. Again, plaintiffs have not cited any authority for the proposition that it is unreasonable for local counsel to make their own copies of important trial documents, so I decline to reduce the award on the ground that the copies were duplicative. With respect to the remaining $1142.64, I agree with plaintiffs that defendants have failed to identify the documents they copied, so I cannot include that amount.

ORDER

IT IS ORDERED THAT the motion for review of the clerk of court's taxation of costs filed by plaintiffs Novozymes A/S and Novozymes North America, Inc., dkt. #988, is GRANTED IN PART. Defendants Danisco A/S, Genencor International Wisconsin, Inc., Danisco US Inc. and Danisco USA Inc. are AWARDED $791,739.17 in costs under Fed. R. Civ. P. 54.

Entered this 11th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge