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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
10

11 ROGER McINTOSH,

12 Plaintiff,

13 vs.

14 NORTHERN CALIFORNIA  
15 UNIVERSAL ENTERPRISES,  
INC., et al,

16 Defendants.  
17 \_\_\_\_\_/

CASE NO. CV F 07-1080 LJO GSA

**ORDER ON DEFENDANTS' MOTIONS TO  
DENY PLAINTIFF'S COSTS**  
(Docs. 408, 409.)

18 **INTRODUCTION**

19 Defendants Northern California Universal Enterprises Company ("NCUE"), Lotus  
20 Developments, LP ("Lotus") and Dennis DeWalt, Inc. ("DeWalt")<sup>1</sup> seek to deny plaintiff Roger  
21 McIntosh's ("Mr. McIntosh's") requested \$17,352.78 costs. Mr. McIntosh contends that he is entitled  
22 to costs as the prevailing party. This Court considered defendants' objections to Mr. McIntosh's costs  
23 on the record and VACATES the September 2, 2010 hearing erroneously set by NCUE and Lotus.<sup>2</sup> For  
24 the reasons discussed below, this Court GRANTS Mr. McIntosh \$17,081.78 costs against defendants.  
25 \_\_\_\_\_

26 <sup>1</sup> NCUE, Lotus and DeWalt will be referred to collectively as "defendants."

27 <sup>2</sup> Counsel for NCUE and Lotus continues to disobey this Court's Local Rules, in this instance, by filing a  
28 premature motion to review costs prior to the clerk taxing costs. Nonetheless, to expedite a ruling on costs, this Court considers NCUE and Lotus' motion and DeWalt's objections.

1 **BACKGROUND**

2 **Summary**

3 This action arises from alleged infringing use of Mr. McIntosh's tentative map and improvement  
4 plans to develop 33.51 acres as a subdivision in the City of Wasco ("Wasco").<sup>3</sup> Mr. McIntosh, a  
5 Bakersfield civil engineer, prepared for subdivision development a tentative map and improvement plans  
6 (streets, sidewalks, curbs, gutters, storm drains, sewer, water and utilities).

7 Mr. McIntosh registered his copyright on his map and improvement plans on February 22, 2007.  
8 Mr. McIntosh proceeded on this third-amended complaint ("TAC") against defendants and Wasco to  
9 allege "Defendants' construction of the Subdivision is based on landscape and subdivision designs  
10 substantially similar to the subdivision and landscape design conceived and created by McIntosh that  
11 is represented in the plans and that is the subject of Copyright Registration Certificate No. VAU-721-  
12 180." The TAC alleges that the "copying of the Plans by defendants constitutes infringement of  
13 McIntosh's registered copyright and the technical drawings depicted in the Plans, in violation of the  
14 Copyright Act."

15 **Jury Verdict**

16 This Court conducted a jury trial on March 1-4 and 8-9, 2010. With its verdict, the jury found  
17 that:

- 18 1. Defendants and Wasco copied Mr. McIntosh's map and that only Wasco had copied Mr.  
19 McIntosh's improvement plans;
- 20 2. NCUE, Lotus and Wasco profited directly from copying of either the map or  
21 improvement plans done by any of the other defendants;
- 22 3. NCUE, Lotus and Wasco failed to exercise their right and ability to supervise or control  
23 the other defendants' copying of the map or improvement plans;
- 24 4. Mr. McIntosh is entitled to \$1.4 million in actual damages;
- 25 5. NCUE and Lotus each profited \$1,992,107.50 from their respective infringing activity;
- 26 6. Wasco profited \$1.5 million from its infringing activity;

27  
28 <sup>3</sup> Wasco is a former a defendant and settled with Mr. McIntosh during the pendency of post-trial motions.

7. DeWalt did not profit from its infringing activity; and

8. NCUE and Lotus acted as partners or practically partners in committing infringing activity.

In total, the jury award Mr. McIntosh \$6,884,215

## Post-Trial Matters

With post-trial motions, pending Wasco reached a \$750,000 good faith settlement with Mr. McIntosh whereby \$150,000 was apportioned to actual damages and \$600,000 to Wasco's profits.

This Court's July 7, 2010 order granted defendants a new trial on actual damages and infringing profits unless Mr. McIntosh accepted an amended judgment of \$161,500 for Mr. McIntosh's actual damages and \$0 for infringing profits. Mr. McIntosh accepted such an amended judgment which was entered on July 23, 2010.

### Mr. McIntosh's Bill Of Costs

On July 27, 2010, Mr. McIntosh filed his revised bill of costs by which he claims to seek \$17,352.78 costs only as to defendants and not Wasco. The costs comprise:

1. \$120 for filing fees;
2. \$1,762 for subpoena and service fees;
3. \$1,806.30 for witness fees;
4. \$10,507.95 for deposition transcripts; and
5. \$3,156.53 for copy costs.

## DISCUSSION

## Standards For Cost Awards

F.R.Civ.P. 54(d)(1) provides in part: “Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney’s fees – should be allowed to the prevailing party.” F.R.Civ.P. 54(d)(1) “generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party.” *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442, 107 S.Ct. 2494 (1987).

F.R.Civ.P. 54(d)(1) “creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs.” *Assoc. of Mexican-American Educators*

1 v. *State of California*, 231 F.3d 572, 591 (9<sup>th</sup> Cir. 2000); see *Amarel v. Connell*, 102 F.3d 1494, 1523  
2 (9<sup>th</sup> Cir. 1996). A district court's discretion "is not unlimited" to require the district court to "specify  
3 reasons" for refusal to award costs. *Mexican-American Educators*, 231 F.3d at 591. The Ninth Circuit  
4 Court of Appeals has denied costs to a prevailing party based on the losing party's "limited financial  
5 resources" or the prevailing party's "misconduct." *Mexican-American Educators*, 231 F.3d at 592  
6 (citing cases).

7 Other circuits have addressed other factors to deny costs to the prevailing party, such as: (1) the  
8 issues in the case were close and difficult; (2) the prevailing party's recovery was nominal or partial; and  
9 (3) the losing party litigated in good faith. *Mexican-American Educators*, 231 F.3d at 592, n. 15; see  
10 *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1023 (9<sup>th</sup> Cir. 2003) (in breach of  
11 contract actions, prevailing party's recovery of substantially less damages than sought may support  
12 discretion to deny costs).

13 Defendants seek to deny all of Mr. McIntosh's costs given what they appear to characterize as  
14 his mixed success. DeWalt notes that the jury found that it had infringed on only Mr. McIntosh's  
15 tentative map and had not profited from its infringing activity. DeWalt contends that "both parties  
16 prevailed on certain claims." NCUE and Lotus advocate a denial of costs based on Mr. McIntosh's  
17 "meager, near meaningless recovery obtained from them" and Mr. McIntosh's "windfall" from  
18 settlement with Wasco. NCUE and Lotus conclude that Mr. McIntosh "has already been over  
19 compensated and should not be awarded costs on top."

20 In the absence of complete denial of costs, defendants seek to allocate a portion of the costs to  
21 Wasco. NCUE and Lotus note that Wasco "was found to have violated Plaintiff's copyright to a  
22 significantly greater degree than the other three defendants." DeWalt asks this Court to "impute into the  
23 [Wasco] settlement a reasonable amount of costs that would have been awarded" in Mr. McIntosh's  
24 favor and against Wasco. DeWalt further advocates to allocate costs to NCUE and Lotus given their  
25 "substantial profits" and DeWalt's loss on the subdivision project.

26 Mr. McIntosh responds that NCUE and Lotus seek an apportionment between the parties "which  
27 was never made by the jury." Mr. McIntosh characterizes as "irrelevant" distinguishing costs between  
28 the parties. Mr. McIntosh accuses Northern and Lotus of an "arbitrary" division of costs "which would

1 have been incurred regardless of whether or not Wasco was a party.”

2 Defendants offer little which is meaningful to overcome the presumption to award costs to Mr.  
3 McIntosh as prevailing party. Although this Court substantially discounted the jury’s award, Mr.  
4 McIntosh established defendants’ infringing activity and copyright liability. Mr. McIntosh prevailed on  
5 most of his claims. Defendants provide no binding authority to support a complete denial of costs or  
6 a discount based on the Wasco settlement. Mr. McIntosh is the prevailing party entitled to costs.

7 Short of a complete denial of costs, defendants nitpick without substance at particular costs.  
8 Costs incurred prior to DeWalt’s appearance address the overall litigation to which DeWalt was  
9 subjected to in the end. DeWalt’s only meritorious objections are \$166 costs related to improper  
10 defendant DeWalt CM, Inc. and \$105 costs for excluded witness Heath James. NCUE and Lotus’  
11 nitpickings are indecipherable. As such, Mr. McIntosh is entitled to \$17,081.78 costs.

12 **CONCLUSION AND ORDER**

13 For the reasons discussed above, this Court GRANTS Mr. McIntosh \$17,081.78 costs against  
14 defendants (NCUE, Lotus and DeWalt) jointly and severally.

15 This Court concludes that this award of costs is the final matter at this stage of this litigation.  
16 Short of remand from an appeal, this Court can conceive of not further matters which would involve this  
17 Court. Further law and motion activity, including an attempt to recover sanctions, will not be well  
18 received by this Court unless well supported and for legitimate purposes to serve the interests of the  
19 parties, not counsel.

20 IT IS SO ORDERED.

21 **Dated: August 23, 2010**

**/s/ Lawrence J. O'Neill**  
**UNITED STATES DISTRICT JUDGE**