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## IN THE UNITED STATES DISTRICT COURT

## DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware  
corporation,

Plaintiff,

v.

NOVELL, INC., a Delaware corporation,

Defendant.

Case No. 2:04CV00139

**NOVELL'S RESPONSE TO SCO'S  
OBJECTIONS TO BILL OF COSTS**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

SCO objects to five categories of costs requested by Novell: (1) trial technician, or trial presenter, fees; (2) graphics slides used in mock trial; (3) graphics slides used in trial; (4) copying costs; and (5) other miscellaneous expenses. (SCO's Objections to Novell's Bill of Costs, Dkt. No. 890) ["Objections to Bill of Costs"]. SCO does not contest Novell's other requests for costs. Novell withdraws its request for costs incurred in connection with a mock trial and other miscellaneous expenses, but respectfully requests that the Court reject the remainder of SCO's objections.

1. Trial technician fees. SCO challenges Novell's request for trial presenter fees and graphics presentation costs, arguing that these costs are not authorized by the statute, were not reasonably necessary, are unreasonably high, and were not approved by the Court before being incurred. (Objections to Bill of Costs at 3.)

As a preliminary matter, SCO misleadingly merges trial presenter fees and graphics fees into a heading of its own creation, "Professional Services Costs," so that its citation of *Pehr v. Rubbermaid, Inc.*, 196 F.R.D. 404, 408 (D. Kansas), addressing "professional services rendered," appears on-point. (*Id.*) But, *Pehr* involved an attempt to recover costs for prior art searches. The costs that are at issue here are properly classified as exemplification services, which are explicitly authorized by statute and interpreting case law as recoverable. *See* 28 U.S.C. § 1920(4) (allowing recovery of costs for exemplification); *Battenfeld of Am. Holding Co. v. Baird, Kurtz & Dobson*, 196 F.R.D. 613, 616 n.4 (D. Kan. 2000) ("'Exemplification' has been interpreted to embrace all manner of demonstrative exhibits, including . . . graphic aids.").

Both parties used trial technicians in this case (SCO, a Mr. Michael Calvin; and Novell, a Mr. Thomas Lee), making it odd and surprising for SCO to protest that such services are unnecessary. In a complicated case such as this one, with 11 witnesses presented via deposition testimony and roughly 170 exhibits introduced to the jury, a trial presenter or trial technician is particularly necessary to efficiently present the voluminous information to the jury. *See Smith & Nephew, Inc. v. Arthrex, Inc.*, 2010 U.S. Dist. LEXIS 59029, at \*6 (E.D. Tex. June 15, 2010) ("The use of technology support during trial, particularly in complicated cases such as this case,

is an anticipated, useful, and necessary tool to assist in the efficient presentation of cases.”) This Court even commented on the value of trial presenters at the close of trial, stating:

I also think that on behalf of the Court I have a special expression of gratitude to Mr. Calvin and Mr. Lee, because they have played an extraordinary role on behalf of both sides as well as the Court’s interest in this case, and with the way they have applied the technology that federal taxpayer dollars have recently paid to upgrade this courtroom.

(March 2010 Trial Tr. at 2735:16-22.)

SCO provides no support for its assertion that the trial technician cost is unreasonable. (Objections to Bill of Costs at 3.) As the invoice submitted with Novell’s Bill of Costs demonstrates, the trial technician cost covered two weeks of trial and only one week of preparation, billed at \$195 per hour. (Ex. F to Verified Memorandum in Support of Defendant Novell, Inc.’s Bill of Costs, Dkt. No. 880-6, at 34-36.) Novell has not requested reimbursement for months of preparation, nor did it select a trial technician with an unreasonable billing rate. *See Finsar Corp. v. DirecTV Group*, 2006 U.S. Dist. LEXIS 71138, at \*7 (E. D. Tex. Aug. 4, 2006) (denying request for \$410,999.65 for trial technician costs, which included two months of “war room” setup, but granting request for total of \$18,225.00 based on hourly rate of \$225).

2. Graphics presentations. SCO challenges Novell’s request for reimbursement of graphics presentations costs, arguing again that these costs are not authorized by the statute, were not reasonably necessary, are unreasonably high, and were not approved by the Court before being incurred. (Objections to Bill of Costs at 3-4.)

As with the trial technician, both parties used graphics consulting services to prepare demonstratives for trial. Novell is not seeking to recover costs that were mere glitz or frills. It is seeking to recover costs that were necessarily incurred in order to provide an effective presentation of a complex matter to aid the fact finder. The Court clearly anticipates such presentations, as it has an electronic evidence presentation system for this very purpose. Courts interpret the statute to allow litigants to take advantage of such technological advances and be reimbursed for the resulting costs. *See, e.g., MarcTec, LLC v. Johnson & Johnson*, 2010 U.S. Dist. LEXIS 15300, at \*11 (S.D. Ill. Feb. 22, 2010) (holding that “the Court believes that

providing an effective presentation of the matter during a hearing (or at trial) in order to aid the fact finder *is* a reasonable necessity” and awarding \$8,100 in costs for slide show presentation at *Markman* hearing) (emphasis in original).

The total cost of \$32,725.75, based on hourly billing rates ranging from \$160 to \$195, can hardly be said to be unreasonably high given the complexity of this case and the immensely high stakes for Novell. See *Competitive Techs. v. Fujitsu Ltd.*, 2006 U.S. Dist. LEXIS 98312, at \*27-28 (N.D. Cal. Aug. 23, 2006) (stating “[g]iven the potential financial impact of this lawsuit, the cost of the demonstratives was reasonable in light of their usefulness” and awarding \$133,003.09 for cost of demonstratives).

With respect to both of the costs discussed above, SCO argues that the Court should disallow their recovery because Novell did not procure the Court’s prior approval. (Objections to Bill of Costs at 4.) The sole case SCO cites in support is *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 878 F. Supp. 1417 (D. Kans 1995). (*Id.*) Yet, even the quote chosen by SCO points out that such approval is “not absolutely necessary.” (Objection at 4 [citing *Manildra*, 878 F. Supp. at 1428].) In fact, one year after *Manildra*, the same court stated, “Defendants also complain that plaintiff did not seek pre-approval from the Court of certain trial-related costs, but *such approval is not a condition for taxing costs.*” *Seyler v. Burlington Northern Santa Fe Corp.*, 2006 U.S. Dist. LEXIS 92637, at \*20 n.9 (D. Kan. Dec. 20, 2006) (emphasis added).

In light of the above, Novell’s costs of \$72,832.50 for trial presenter fees and a total of \$32,725.75 for graphics costs are properly awarded under 28 U.S.C. § 1920(4).

3. Copying costs.

SCO objects to 25 separate entries of commercial copy services costs that Novell necessarily incurred for deposition transcripts and other documents that were copied, bound, or otherwise prepared for use in this case and specifically at trial, and one entry of commercial copy service costs for oversize mounting of exhibits used at trial. (Objections to Bill of Costs at 5-6.)

28 U.S.C. § 1920(4) permits recovery by the prevailing party of the costs of making copies of any materials where the copies are necessarily obtained for use in the case. Novell

“need not identify every xerox [sic] copy made for use in the course of the legal proceeding when seeking costs,” but instead need only demonstrate that the need for the copies in question necessarily resulted from the litigation. *Sorkin v. Universal Building Prod., Inc.*, 2010 U.S. Dist. LEXIS 11112, at \*22 (E.D. Tex. Feb. 9, 2010) (internal quotation omitted).

Novell’s Bill of Costs indicates that the documents at issue were copied and bound for use at trial. As the Court is aware, this case has been pending for more than six years and the litigation has generated a large amount of documents. With only a single exception, all of the copies for which Novell seeks recovery were made during the two weeks preceding the trial or during the trial itself. Thus, these copies were made as the parties were heavily involved in final trial preparation and trial.

With respect to the single entry for oversize exhibits, courts have permitted these costs to be taxed under Section 1920(4). *See Arcadia Fertilized, L.P. v. MPW Indust. Serv., Inc.*, 249 F.3d 1293, 1297 (11th Cir. 2001) (costs for oversize exhibits taxable under Section 1920(4)). Thus, Novell’s costs of \$37,649.98 for documents copied for use at trial and for oversize mounting of trial exhibits are properly awarded under 28 U.S.C. § 1920(4).

SCO also objects to Workman Nydegger’s in-house copy services of \$18,809.10 and to Morrison & Foerster’s in-house copy services of \$5,924.20, claiming that Novell has not provided sufficient documentation to permit an award of these costs. (Objections to Bill of Costs at 4-5.) However, “[a] party is not required to submit a bill of costs containing a description so detailed as to make it impossible to economically recover photocopying costs, rather they are required to provide the best breakdown obtainable from *retained records*.” *Merryman Excavation v. Int’l Union of Operating Eng.*, 2010 U.S. Dist. LEXIS 3003, at \*6-7 (N.D. Ill. Jan. 4, 2010) (internal citations and quotations omitted) (emphasis added).

In support of its copying costs, Novell provided the retained records generated by Workman Nydegger’s and Morrison & Foerster’s in-house tracking reports for their respective copying systems. Novell also described in its Verified Memorandum how these costs were tracked by each firm. (See Verified Memorandum in Support of Defendant Novell, Inc.’s Bill of

Costs, Dkt. No. 880, ¶ 16.) Workman Nydegger's involvement as co-counsel to Morrison & Foerster was considerable and began near the commencement of trial. It entailed preparing for many of the pre-trial motions, including an outstanding summary judgment motion and a Rule 60 motion, as well as a number of motions in limine.

SCO attempts to discredit the reasonableness of Novell's copying costs. The long history of this case, the large volume of documents produced over the course of that long history, and Workman Nydegger's heavy involvement in preparation for trial and trial itself as well as all post-trial motions, is strong evidence that Novell's copying costs are reasonable and were necessarily obtained for use in the case. *See Biomedical Disposal, Inc. v. Mediq/PRN Life Support Serv., Inc.*, 2007 U.S. Dist. LEXIS 65494, at \*8 (N.D. Ga. Sept. 4, 2007) (denying motion to disallow in-house copying costs and stating that it was "reasonable to assume" all in-house copying charges were necessarily incurred in course of litigation in light of length of litigation and number of pleadings and motions that were filed).

4. Other miscellaneous expenses.

SCO objects to \$2,914.74 in costs for folders and binders, which were part of the copy costs. Rather than further dispute entitlement to such costs, Novell withdraws its request for them. However, SCO's assertion that because Novell failed to disaggregate these costs, the Court should "deny Novell's Bill of Costs in its entirety," is absurd. (Objections to Bill of Costs at 7.) Novell's Bill of Costs contains several entries that are not even addressed in SCO's Objections, not the least of which is \$99,639.09 in costs that were *previously awarded* by the Court following the initial bench trial and simply have never been paid by SCO. (*See Ex. B to Verified Memorandum in Support of Defendant Novell, Inc.'s Bill of Costs, Dkt. No. 880-2.; Taxation of Costs, Dkt. No. 595.*) SCO provides no basis for denying these previously approved costs.

As set out above, Novell withdraws its request for \$21,936 in mock trial graphics costs and \$2,914.74 in folders and binders costs, but respectfully requests that the Court reject the remainder of SCO's challenges to Novell's request for costs.

DATED: September 7, 2010

Respectfully submitted,

Sterling A. Brennan

By:           /s/ Sterling Brennan          

WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and  
Counterclaim-Plaintiff Novell, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on September 7, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which sent notification of such filing to those listed on the Court's Electronic Mail Notice List and I hereby certify that I have mailed by United States Postal Service the documents to the following non-CM/ECF participants:

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DATED September 7, 2010.

WORKMAN NYDEGGER

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