IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ICON INTERNET COMPETENCE NETWORK B.V.,	§	
Plaintiff,	§	
	§	**Civil Action No. 3:11-cv-01131-O**
v.	§	
TRAVELOCITY.COM LP,	§	
Defendant.	§	

ORDER

Following entry of a final judgment in its favor on February 22, 2013, Defendant Travelocity.com LP ("Travelocity"), as the prevailing party in this patent infringement action, filed a Bill of Costs with the Clerk of Court and a Post-Judgment Motion for a Finding of Exceptional Case and Award of Attorney's Fees and Brief in Support (ECF No. 198) (hereinafter, "Motion for Attorney's Fees"). Plaintiff ICON Internet Competence Network B.V. ("ICON") opposes Travelocity's Bill of Costs (ECF No. 202) (hereinafter, "ICON's Objections to Bill of Costs"). ICON has also filed a Motion to Strike Travelocity's Motion for Attorney's Fees (ECF No. 212) (hereinafter, "Motion to Strike"). Having considered Travelocity's Bill of Costs and its Motion for Attorney's Fees, ICON's Objections to Bill of Costs, ICON's Motion to Strike, the parties' responses and replies to pending motions, the record and applicable law, the Court **overrules** ICON's Objections to Bill of Costs, **denies** Travelocity's Motion for Attorney's Fees, and **denies as moot** ICON's Motion to Strike.

I. Relevant Facts and Procedural History

On May 27, 2011, Plaintiff ICON filed this lawsuit against Defendant Travelocity alleging infringement of United States Patent No. 6,002,853 (the "'853 Patent"), entitled "System for Generating Graphics in Response to Database Search," which generally relates to "systems including databases," "systems including displays for displaying the results of a database search," and "computer networks." U.S. Patent No. 6,002,853 col. 1 1.11-14 (filed oct. 26, 1995). On May 1, 2012, the Court issued its claim construction ruling concerning the '853 Patent which: "provides for a virtual reality Yellow Pages system that creates a graphical depiction of business storefronts through which the viewer can navigate to obtain information about the respective businesses." ECF No. 55, Claim Construction Ruling. Following the claim construction ruling, counsel for Travelocity contacted counsel for ICON, urging ICON to dismiss its case against Travelocity in light of the Court's claim construction. Travelocity Sealed App. in Supp. of Mot. for Atty. Fees at 237, ECF No. 199.

On February 22, 2013, the Court entered summary judgment in Travelocity's favor, dismissing all claims with prejudice after finding that "there is no genuine issue of material fact as to whether Travelocity's accused website infringes the '853 patent either literally or under the doctrine of equivalents, and Travelocity is entitled to summary judgment of non-infringement." Mem. Op. at 10-11, ECF No. 194. On the same day, the Court issued a final judgment in Travelocity's favor. Final Judg., ECF No. 195. On March 22, 2013, ICON filed a Notice of Appeal with the Federal Circuit Court of Appeals. *See* Notice of Appeal, ECF No. 204.

II. Discussion

A. Travelocity's Bill of Costs

As the prevailing party, Travelocity originally sought $81,386.52 in taxable court costs. ECF No. 197, Bill of Costs. ICON filed objections to the Bill of Costs, asking the Court to deny all costs, since costs were not explicitly awarded in the final judgment or, alternatively, to exercise its discretion to deny certain of the costs itemized by Travelocity since the costs were "bloated" and "Defendant is attempting to improperly collect for videotaped depositions, expedited or certified copies of transcripts, rough drafts of transcripts, internal copying, postage, and more." ICON Obj. at 3, ECF No. 202. In response to ICON's Objections, and after further independent review of its Bill of Costs, Travelocity agreed to reduce its bill of costs to $75,524.62. *See* Travelocity Resp. to Obj. at 11, ECF No. 207. Having been fully briefed, ICON's objections to Travelocity's Bill of Costs are ripe for review.

First, the Court rejects ICON's contention that Travelocity is not entitled to costs simply because the Court did not explicitly award costs in its Final Judgment. As a prevailing party in a civil action, Travelocity is entitled to recover its taxable costs "unless . . . a court order provides otherwise." Fed. R. Civ. P. 54(d)(1).[1] "Rule 54(d)(1) contains a strong presumption that the prevailing party will be awarded costs." *Pacheco v. Mineta,* 448 F.3d 783, 793 (5th Cir.2006) (citing *Schwarz v. Folloder,* 767 F.2d 125, 131 (5th Cir.1985)). "Indeed, [the Fifth Circuit] has held that

[1]28 U.S.C. § 1920 provides recovery for these taxable costs:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

'the prevailing party is prima facie entitled to costs,' and has described the denial of costs as 'in the nature of a penalty.'" *Id.* at 793–94 (quoting *Schwarz,* 767 F.2d at 131). "As a result of this cost-shifting presumption, the general discretion conferred by Rule 54(d)(1) has been circumscribed by the judicially-created condition that a court 'may neither deny nor reduce a prevailing party's request for cost without first articulating some good reason for doing so.'" *Id.* at 794 (quoting *Schwarz,* 767 F.2d at 131). If the party being taxed has not specifically objected to a cost, the presumption is that the costs being sought were necessarily incurred for use in the case and will be taxed. *See Embotelladora Agral Regiomontana, S.A. de C.V. v. Sharp Capital, Inc.,* 952 F.Supp. 415, 417 (N.D.Tex.1997) ("[I]n the absence of a specific objection, deposition costs will be taxed as having been necessarily obtained for use in the case.").

In sum, the Court's failure to mention costs in its Final Judgment has no impact on Travelocity's right to seek costs as the prevailing party. The Court therefore turns to ICON's objections to the Bill of Costs.

ICON objects, asserting that Travelocity's costs were "bloated" and "Defendant is attempting to improperly collect for videotaped depositions, expedited or certified copies of transcripts, rough drafts of transcripts, internal copying, postage, and more." ICON Obj. at 3. Once an objection has been raised, the party seeking costs bears the burden of verifying that the costs were necessarily incurred in the case rather than just spent in preparation and litigation of the case. *See Fogleman v. ARAMCO (Arabian American Oil Co.),* 920 F.2d 278, 286 (5th Cir.1991). The Court notes that ICON's objections are vague, and ICON provides no specific examples or cites to any invoices. Nevertheless, the Court has examined the Bill of Costs in light of the objections, and Travelocity has responded to the objections. *See* Travelocity Resp. to Obj., ECF No. 207

Travelocity has reduced its Bill of Costs from $81,386.52 to $75,524.62, based in part on ICON's objections, and in part on an independent review during which it determined that certain costs it sought to recover were unrecoverable under applicable law. *See* Travelocity Resp. to ICON's Obj. at 11, ECF No. 207. The Court has reviewed Travelocity's supporting documentation for its Bill of Costs (*see* ECF No. 197, Appendix at pp. 1-145), as well as its modification of its initial request (*see* ECF No. 207), and concludes that Travelocity has addressed ICON's objections, and even deleted some costs on its own. As ICON cites no case law or persuasive argument that would alter the cost-shifting presumption under the circumstances presented in this case, and given Travelocity's modification of its initial Bill of Costs, the Court **overrules** ICON's Objections and concludes that the costs sought were necessarily incurred in the case. *See generally Fogelman*, 920 F.2d at 285-86; *see also Hartnett v. Chase Bank of Texas Nat'l Ass'n*, 1999 WL 977757, at *3 (N.D. Tex. Oct. 26, 1999) (citing C. Wright & A. Miller, Federal Practice and Procedure § 2676 at 424 (3d ed. 1998)("[C]osts should not be disallowed merely because the deposition was not ultimately used at trial or in connection with a dispositive motion. Such costs are taxable if the deposition appeared reasonably necessary at the time it was taken.")); *Halliburton Energy Svc's, Inc. v. M-1, LLC*, 244 F.R.D. 369, 371 (E.D. Tex. 2007) ("The costs of a deposition are allowed if the taking of the deposition is shown to have been reasonably necessary in the light of the facts known to counsel at the time it was taken.") (internal punctuation and citation omitted); *Summit Tech. Inc. v. Nidek Co.*, 435 F.3d 1371, 1378 (Fed. Cir. 2006) ("[i]n complex patent litigations, involving hundreds of thousands of documents and copies, parties cannot be expected to track the identity of each photocopied page along with a record of its relevance to the litigation.").

Specifically, the allowable costs are, as modified by Travelocity:

i. "Fees for printed or electronically recorded transcripts necessarily obtained for use in this case" in the amount of $17,482.99 (*see* 28 U.S.C. § 1920(2)); and

ii. "Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case" in the amount of $58,045.63 (*see* 28 U.S.C. § 1920(4)).

Accordingly, as the prevailing party, Travelocity is entitled to an award in costs in the amount of $75,524.62.[2] *See* Fed. R. Civ. P. 54(d)(1); 28 U.S.C. § 1920.

B. Travelocity's Motion for Attorney's Fees

Travelocity seeks a finding that this is an "exceptional case" under 35 U.S.C. § 285, justifying an award of attorney's fees. Travelocity Brief in Supp. of Mot. for Atty. Fees at 2, ECF No. 201. Travelocity contends that this case is exceptional "because after the Court's claim construction order, ICON's infringement allegations were objectively and subjectively baseless." *Id.* at 9. ICON opposes the motion, arguing that Travelocity has "failed to prove by clear and convincing evidence that this is an exceptional case warranting an award of attorney's fees." ICON Resp. at 5, ECF No. 208.

"The district court may, in 'exceptional' cases, award reasonable attorney fees to the prevailing party." *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1467-68 (Fed. Cir. 1997) (citing 35 U.S.C. § 285). "The decision whether to award fees is a two-pronged inquiry that requires, first, a factual finding that the case is 'exceptional' and, second, a discretionary decision

[2]Although the allowable costs actually total $75,528.62, Travelocity has submitted a modified request for a lesser amount, $75,524.62, which the Court therefore awards.

to award fees." *Id.* at 1468 (citing *Reactive Metals & Alloys Corp. v. ESM, Inc.*, 769 F.2d 1578, 1582 (Fed. Cir. 1985)). "Bad faith and willful infringement are not the only criteria whereby a case may be deemed 'exceptional,' although when either is present the requirement is more readily met. Litigation misconduct and unprofessional behavior are relevant to the award of attorney fees, and may suffice to make a case exceptional under § 285." *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1574 (Fed. Cir.1996). "It is the judicial duty to refuse to condone behavior that exceeds reasonable litigation tactics." *Id.* at 1575. However, "the court may consider the litigation actions of both sides in connection with § 285." *Id.*

Reviewing the evidence regarding ICON's alleged litigation misconduct and pursuit of what Travelocity deems are unreasonable patent infringement claims following the Court's claim construction, the Court finds insufficient evidence to deem this case "exceptional," and, accordingly, denies Travelocity's request for attorney's fees. Among other things, the Court has considered the sworn declaration of ICON's technical expert, Dr. Tewfik, submitted in opposition to Travelocity's motion for summary judgment. Although ICON did not prevail on Travelocity's summary judgment motion, the Court cannot say that its attempts to oppose the motion were objectively or subjectively unreasonable, or that ICON engaged in sufficient levels of litigation misconduct to deem this case "exceptional." The Court further declines to use its inherent discretionary powers to impose sanctions on the record before it.

C. ICON's Motion to Strike Travelocity's Motion for Attorney's Fees

In light of the Court's determination that this is not an "exceptional case" under 35 U.S.C. § 285 justifying an award of attorney's fees, the Court denies as moot ICON's Motion to Strike Travelocity's Motion for Attorney's Fees (ECF No. 212).

III. Conclusion

Based on the foregoing, the Court **overrules** ICON's Objections to Travelocity's modified Bill of Costs (ECF No. 202), **denies** Travelocity's Post-Judgment Motion for a Finding of Exceptional Case and Award of Attorney's Fees (ECF No. 198), and **denies as moot** ICON's Motion to Strike Travelocity's Motion for Attorney's Fees (ECF No. 212). In accordance with the foregoing, the Clerk shall tax costs against Plaintiff ICON in the amount of **$75,524.62**.

SO ORDERED this **18th day** of **November, 2013.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE