

E-Discovery Computer Consultant's Fees Recoverable as Costs under 28 U.S.C. §1920(4)

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Acknowledging the "division" of authority, the court in *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376 (N.D. Ga. 2009) awarded under 28 U.S.C. §1920(4) a successful defendant in a patent infringement case nearly \$250,000 for the costs incurred in the collection and processing of more than 1.4 million electronic documents and six versions of its source code requested by the plaintiff. In the recently published opinion, the court reasoned that the services provided by the defendant's electronic discovery consultant, which included the preservation, collection and production of all relevant electronic documents, decryption, as well as extraction of proprietary data and statistical and keyword analysis, were "highly technical" and "not the type of services that attorneys or paralegals are

electronic documents from Cisco's network files and hard drives. The consultant's services included:

forensically sound preservation of custodian computers; extraction of documents from multiple operating systems, corporate servers, and network shares while preserving metadata; cataloging, extracting email and attachments, and processing; compilation of keyword and metadata indices for analysis and reporting as requested by the plaintiff....decryption and extraction of proprietary data; triage and advanced processing of files with errors; statistical and keyword analysis with related report-

"During discovery, the plaintiffs 'made overly broad' requests, refusing to engage in 'meaningful discussions' regarding their scope. Characterizing one of the discovery disputes as 'really nasty,' the court awarded Cisco \$86,000 in attorneys fees.

trained for or are capable of providing." According to the court, the e-discovery consultant's services are the "21st Century equivalent of making copies." The court further stated that "[t]axation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery."

In this case, the plaintiff sued its competitors, defendants Return Path, Inc. and Cisco IronPort Systems, LLC, for alleged infringement of its patent relating to filtering unwanted and unsolicited email. During discovery, the plaintiffs "made overly broad" requests, refusing to engage in "meaningful discussions" regarding their scope. Characterizing one of the discovery disputes as "really nasty," the court awarded Cisco \$86,000 in attorneys fees.

To respond to the requests, Cisco retained an e-discovery consultant to collect, search, identify and help produce the

ing; and compilation of native file production and load files [for] the plaintiff.

During discovery, Cisco produced more than 1.4 million electronic documents, including six versions of its source code requested by the plaintiff.

The court granted summary judgment in favor of Cisco, acknowledging that the plaintiff exhibited a "stubborn recklessness" in bringing the lawsuit and sought "to stretch the claims of the patents way beyond anything in the specifications or the prosecution history." In addition to attorneys' fees of \$1.2 million, Cisco then asked the court to tax costs, including \$243,000 for its e-

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discovery consultant under 28 U.S.C. §1920(4). Section 1920(4) provides that a court may tax costs for “[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case....” (The plaintiff opposed each and every item of cost submitted by Cisco, filing more than 35 pages of briefing which the court regarded as “an incredible waste of time.”)

Addressing whether the e-discovery consultant's costs were recoverable under section 1920(4), the court acknowledged the “division of opinion” on the issue.” For example, in *Kellogg Brown & Root Intern., Inc. v. Altanmia Commercial Co., K.L.L.*, 2009 WL 1457632 (S.D. Tex. 2009), the court refused to tax costs incurred by the plaintiff for its electronic discovery consultant, stating the extraction of electronic data and storage costs were not recoverable un-

of data.” The parties did agree that had the 1.4 million documents been produced in paper, the cost would have been “far more than the fees sought for the e-discovery consultant.” In the court's view,

[a] careful review of the [consultant's] invoices reveals that the services provided are not the type of services that attorneys or paralegals are trained for or are capable of providing. The services are highly technical. They are the 21st Century equivalent of making copies.

Accordingly, the court held that the Cisco was entitled to recover under section 1920(4) all of the costs charged by its e-discovery consultant for the collection and production of the electronic documents and data in the case. Additionally, the court considered the impact

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der section 1920(4). However, in *Cargill Inc. v. Progressive Dairy Solutions, Inc.*, 2008 WL 5135826 (E.D. Cal. 2008), the court held that such costs were recoverable. According to the CBT court, the courts that have disallowed the recovery of these costs under section 1920(4) have done so on the ground that “assembling records for production is ordinarily a task done by attorneys and paralegals and is not a recoverable cost.”

Turning to the facts in this case, the court noted that the plaintiff requested, and Cisco produced, “a massive quantity

that awarding such costs may have on the discovery process. Noting that,

[t]he services are certainly necessary in the electronic age. The enormous burden and expense of electronic discovery are well known. Taxation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery.

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