

Federal Court



Cour fédérale

Date: 20150611

Docket: T-1399-09

Citation: 2015 FC 743

BETWEEN:

**RED LABEL VACATIONS INC., CARRYING
ON BUSINESS AS REDTAG.CA OR
REDTAG.CA VACATIONS OR BOTH**

Plaintiff

and

**411 TRAVEL BUYS LIMITED CARRYING
ON BUSINESS AS 411TRAVELBUYS.CA,
CARLOS MANUEL LOURENCO**

Defendants

REASONS FOR ASSESSMENT OF COSTS

[Bruce Preston – Assessment Officer]

[1] By way of Judgment dated January 7, 2015, the Court dismissed the Plaintiff's Action, dismissed the Defendants' Counterclaim and awarded costs to the Defendants under Tariff B Column III.

[2] On February 11, 2015, the Defendants filed their Bill of Costs. The parties exchanged Written Submissions and the hearing of the assessment of costs was held in Toronto on April 23, 2015.

[3] Prior to proceeding with the assessment, there are two preliminary matters. First, at the commencement of the assessment, the parties were provided an opportunity to discuss the Bill of Costs to determine whether the issues could be narrowed. After a brief discussion, counsel for the Defendants submitted that Item 5 and Item 6 were being withdrawn as no costs were awarded for the motion. Further, counsel for the Defendants submitted that the claims under Item 10 and Item 11 for September 24, 2014 were being withdrawn, as the Case Management Conference related to the counterclaim against Robert Gennaro, which was dismissed with costs awarded to Mr. Gennaro.

[4] Second, at the hearing of the assessment, counsel for the Defendants requested permission to provide copies of his personal notes from the case conferences claimed in the Bill of Costs. After a short discussion, I determined that the notes could not be used and indicated I would provide brief reasons. At the hearing, counsel for the Defendants submitted that the notes would provide clarification concerning what was discussed at the conferences and that he was willing to waive any confidentiality. Counsel for the Plaintiff submitted that he objected to the use of opposing counsel's personal notes as he had not had occasion to review them and that he did not have his own notes with him for reference. Under these circumstances, as the Defendants had not produced the notes as evidence under cover of an affidavit and counsel for the Plaintiff had objected to their use, I found that the potential prejudice to the Plaintiff far out ways the

potential benefit which could be drawn from producing the handwritten notes without notice, especially given that the Abstracts of the Case Conferences are available on the Court file should additional information be required. Therefore, the use of the notes was not allowed.

I. General Submissions on Costs

[5] By way of Written Submissions, counsel for the Defendants submits that in this matter the relevant factors under subsection 400(3) of *the Federal Courts Rules* are: the amount claimed and the amount recovered, the importance and complexity of the issues, any written offer to settle and the amount of work. Counsel submits that the Plaintiff sought \$1.2 million and the action was dismissed, that the factual issues were complex with eighteen volumes of documents and three expert witnesses on behalf of the parties and that the Defendants made two offers to settle, on a without costs basis, on February 2, 2010 and April 3, 2013. Concerning the amount of work, counsel submits that a total of 427.9 hours were expended defending this action. Counsel's final submission is that the costs claimed are what one would reasonably expect for an action spanning five years.

[6] At the hearing, counsel for the Plaintiff submitted that the Defendants' Bill of Costs is excessive in respect of most of the work claimed and that the relief sought by the Plaintiff was revised to \$760,000.00 prior to the commencement of the trial. Concerning complexity, counsel submitted that the action related to copyright and trade-mark infringement and that the actual evidence relied upon by the parties was substantially less than the eighteen volumes which were made exhibits and that the trial ran for only 4.5 days. Counsel also submitted that the costs were awarded for the defence of the Plaintiff's claim and that the Defendants' Counterclaim was

dismissed so no costs should be allowed for the Counterclaim. Concerning Robert Gennaro, counsel submitted that although he was called as a Plaintiff witness, the Counterclaim against Mr. Gennaro was separately defended by Mr. Das and that the present costs are in no way related to the Gennaro Counterclaim, which was dismissed with costs awarded to Mr. Gennaro. Counsel argued that when the Counterclaims are taken into consideration, the amounts claimed under Items 2, 3, 10 and 11 must be reduced. Referring to the table on page 17 of the Plaintiff's Cost Submissions, counsel argued that a reasonable amount for cost would be between \$22,577.75 if it is determined that there was no valid offer to settle and \$38,442.75 if it is determined that the February 2, 2010 offer is valid. Counsel also contended that the Appeal from the Judgment of January 7, 2015 remains outstanding and that the results of the Appeal could affect the award of costs which is the subject matter of the present Assessment of Costs.

II. Item 2 and Item 3

[7] Concerning the assessable services claimed, Plaintiff's counsel referred to *Truehope Nutritional Support Ltd. V Canada (Attorney General)*, 2013 FC 1153 (*Truehope*), at paragraph 14, in support of the contention that costs should be assessed around the mid-point of column III, unless exceptional circumstances dictate otherwise. Concerning Item 2, counsel submitted that an allowance of 5 units would be reasonable due to the fact that the Defendants' Counterclaims against Mr. Gennaro and Red Label were dismissed. Having regard to Item 3, counsel contended that there were two amendments filed by the Defendants, the first related to the Counterclaim against Mr. Gennaro and the second was to respond to the alleged registration of infringing domain names by Mr. Lourenco. Counsel argued that no costs should be allowed for the first amendment as it was further to an Order of the Court dated April 15, 2013 and the Counterclaim

against Mr. Gennaro was dismissed before trial. Concerning the second amendment, counsel argued that the amendment only related to the addition of paragraph 8A and that a minimum allowance of 2 units is appropriate.

[8] In reply, counsel for the Defendants submitted that the claim under Item 2 does not relate to the Counterclaim against Mr. Gennaro and that the claim solely relates to the Defendants' Defence to the Plaintiff's Statement of Claim. Counsel further argued that the Court's award of costs did not specify that the costs were for the Plaintiff's claim and did not distinguish between the costs of the claim and costs of the counterclaim. Concerning Item 3, counsel submitted that the claim does not relate to the amendment to the Statement of Defence to add Mr. Gennaro to the Counterclaim. Counsel argued that the claim under Item 3 only relates to the second amendment which responded to the Plaintiff's Amended Amended Reply and Defence to Counterclaim.

[9] Although the counterclaims against Mr. Gennaro and the Plaintiff were dismissed, I find that to allow Item 2 at 5 units would not recognise the complexity of the issues before the Court. Central to this action was the question of whether metatags fit within the scope of copyright protection in Canada. At paragraph 95 of the Judgment and Reasons, the Court states: "That question is still being debated in Canada as well as the United States, England and elsewhere in the world". Also, although counsel for the Defendants has submitted that the claim does not relate to the Counterclaim, I find that some allowance must be made for the Counterclaim as it was not a separately filed document. Therefore, given that one of the issues which the Defendants was required to address was "still being debated" in several jurisdictions, I find that,

even though the Counterclaims are being factored out of the assessment, the Defendants' claim under Item 2 should be allowed at 6 units.

[10] From counsel's submissions it is clear that the Plaintiff is not contesting the Defendants' entitlement to costs under Item 3 for the Further Amended Statement of Defence and Counterclaim, the second amendment. I have reviewed the file and find the Defendants' claim of 6 units to be excessive. As submitted by the Plaintiff, this amendment related to the addition of one paragraph, paragraph 8A. Although it is clear that the Defendants are entitled to their costs for the amendment, I find that an allowance of 3 units is reasonable when considering the brief nature of the amendment.

III. Item 7, Item 8 and Item 9

[11] Concerning Item 7, counsel for the Plaintiff argued that the discovery of documents was not significant, consisting of computer printouts and source codes. Counsel argued that no more than 3 units should be allowed. Having regard to the claims under Item 8 and Item 9 for the Examinations for Discovery of Enzo Demarinis, Carlos Lourenco and Aniema Ntia, counsel for the Plaintiff submitted that the number of hours claimed for the discoveries is not contested. Having regard to the Examination for Discovery of Enzo Demarinis, counsel submitted that there were two attendances which were not particularly long or complex with the second attendance being limited to undertakings and refusals. Concerning Item 8, for preparation for the examination of Mr. Demarinis, counsel referred to a summary of the billable hours charged to the Defendants (the Defendants' Docket), presented at Tab 8 of the Defendants' Costs Submissions. Counsel argued that because only 8.5 hours were recorded on the Defendants'

Docket for preparation for the examination only 3 units should be allowed and as only 2 hours were recorded for the continued examination, 2 units should be allowed. Concerning Item 9, counsel argues that only two units per hour should be allowed for the two attendances at the discovery of Mr. Demarinis, for a total of 5 units and 4 units respectively.

[12] Concerning the Examination of Carlos Lourenco, counsel for the Plaintiff submitted that there were three attendances. Having regard to the first two attendances, counsel argues that because the Defendants' Docket shows no time for any preparation prior to the examinations, Item 8 should not be allowed as a party may not claim fees which were not actually incurred. Counsel also argued that because the examinations also related to the dismissed counterclaim only 1 unit per hour should be allowed under Item 9 for each of the first two examinations. Concerning the third attendance, in March 2014, counsel submitted that it was primarily undertaken by Mr. Das, Mr. Gennaro's counsel as part of a without prejudice judgment-debtor examination within a mediation, on the consent of all parties and subject to confidentiality. Counsel argued that Item 8 and Item 9 should not be allowed as the examination was, without prejudice and within the context of a mediation hearing. Counsel argued that as mediations are not included within Tariff B, and are voluntary, any examination which emanates from the mediation should not be allowed. Counsel further argued that the examination related to the counterclaim against Mr. Gennaro and that the counterclaim was dismissed prior to Trial.

[13] Concerning the Examination of Aniema Ntia, counsel for the Plaintiff submitted that pursuant to an order of the Court, she was a non-party witness. Referring to Tab 9 of the Plaintiff's Costs Submissions, counsel argued that although Defendants' counsel was present, the

transcript of the examination suggests that he was representing Ms. Ntia, not the Defendants at the examination. Counsel submitted that at Trial the Plaintiff wanted to refer to the Transcript of Ms. Ntia's examination, so ultimately she was called as a Plaintiff witness. Also, at paragraph 40 of the Plaintiff's Costs Submissions counsel submits:

No costs were awarded to Ms. Ntia in the decision, nor were any directions provided authorizing the Defendants to be entitled to fees relating to Ms. Ntia's legal representation. As such, it is inappropriate to award the Defendants costs for the representation of a third party witness. The Plaintiff submits that preparation and attendance fees for this examination should be 0 units.

[14] In reply, concerning Item 7, counsel for the Defendants submitted that the Plaintiff's documents were voluminous and, referring to page 3 of Tab 8 in the Defendants' Costs Submissions, counsel contended that 2.3 hours was spent reviewing the documents and communicating with the client concerning the Plaintiff's documents.

[15] Concerning Item 8 and Item 9 for the examination of Mr. Demarinis, Mr. Lourenco and Ms. Ntia, counsel referred to pages 3 and 6 of the Defendants' Docket, at Tab 8 of the Defendants' Costs Submissions, in support of the claims and submitted that with the exception of 1/3 of the examination of Mr. Demarinis, which related to the counterclaim, the remainder of all other examinations related to the main action. Counsel argued that the number of undertakings, under advisements and refusals in the examinations of Mr. Demarinis, Mr. Lourenco and Ms. Ntia justified the claims at the upper end of Column III of the Table to Tariff B for Item 8 and Item 9. Concerning the examination of Ms. Ntia, counsel referred to the Order of the Court, referenced in the Hearing Recorded Entry from September 23, 2011, which ordered Ms. Ntia to attend examination for discovery as a non-party witness pursuant to Rule 238 of the *Federal*

Courts Rules. Counsel submitted that Defendants' counsel attended to represent the Defendants but that it was also the Defendants' counsel who objected to questions and provided answers to undertakings for Ms. Ntia. Concerning the examination of Mr. Lourenco held March 27, 2014, counsel submitted that the examination related to the Mediation held in January 2014 and an offer to settle. Counsel argued that as a result of the offer, a judgment debtor examination was held to determine whether or not to accept the offer and that in the end the matter did not settle. Counsel submitted that, pursuant to Rule 403, it was open to the Plaintiff to seek a direction of the Court concerning costs. Counsel argued that the Court awarded costs to the Defendants with no direction barring costs related to the mediation. Counsel argued that the Defendants should not be penalized by not allowing costs to which they are entitled and that in the absence of a direction excluding the costs, the Assessment Officer must allow the costs of the examination. Counsel final argument was that if the costs related to a mediation hearing were, in fact, excluded from the Tariff, it would not be necessary to explain why the costs should be excluded from the Bill of Costs.

[16] I find that the Examination for Discovery of Ms. Ntia presents an interesting situation. Ms. Ntia was a non-party witness who was ordered to attend on discovery. Although she was ultimately called as a witness by the Plaintiff, she was, at the time of the discovery, an employee of the Defendant 411 Travel Buys. As such, counsel for the Defendant has submitted that he objected to questions and provided undertakings for Ms. Ntia. In determining whether the Defendants are entitled to their costs of the examination of Ms. Ntia, it is necessary to determine in what capacity counsel for the Defendants was acting when attending on the examination. At Tab 9 of the Plaintiff's Costs Submission, counsel provided page 4 of the transcript of the

examination of Ms. Ntia. At the hearing of the assessment both parties agreed to providing pages 5 and 6 of the transcript. I find it useful to include excerpts from these pages. Commencing at question 11, counsel for the Plaintiff asks Ms. Ntia the following:

11.Q. And you are attending today in response to a Direction to Attend on this Examination on behalf of Red Label Vacations Inc., sorry, on behalf of 411 Travel Buys Limited, carrying on business as 411travelbuys.ca and Carlos Manuel Lourenco, the Defendants. Correct?

MR. TINGLEY: As you correctly ascertained prior to the commencement of this examination, there is a debate about that in my view. This lady is just here as a non-party witness pursuant to the Order of Prothonotary Milczynski and whatever Rule it is, 238 or 239. I can't recall.

12. MR. ALDERSON: Well we don't accept that. We have summonsed Annie here, as I have described, as a witness on behalf of the Defendants and so I am going to ask you some questions, Counsel. Are you retained by this witness?

MR. TINGLEY: I don't think I am in terms of there is not a – she hasn't hired me, I guess, if that is what you are asking.

13. MR. ALDERSON: I am trying to understand your purported role here.

MR. TINGLEY: Okay.

14. MR. ALDERSON: What is your role?

MR. TINGLEY: To object to any improper questions.

15. MR. ALDERSON: But this is not your witness, in your view?

MR. TINGLEY: To be honest, I hadn't thought about it beyond that. I am just here and I am going to object to any questions that are wrong. I don't know what to tell you. Would you prefer that I ---

16. MR. ALDERSON: That would be improper on your purported case that Annie is attending as a third party witness. You are not her counsel, or is it your position you are her counsel?

MR. TINGLEY: For the limited purposes of this morning, it is. Now, if you have got any issue with that, I would not object to adjourning this.

....

20. MR. ALDERSON: What about these proceedings, same question?

MR. TINGLEY: I don't think I am.

21. MR. ALDERSON: I don't think you can have it both ways, counsel. I don't think you can pretend that she is a third party witness and then act as her counsel.

MR. TINGLEY: Then we will have to agree to disagree.

[17] It is apparent from this excerpt that the roles of Ms. Ntia and the Defendants' counsel were not clear at the examination. I find it interesting that, at the examination, Plaintiff's counsel was adamant that Ms. Ntia was a Defendants' witness and now, at the assessment of costs, he is arguing that she was a non-party called to appear at trial by the Plaintiff. I also find it interesting that, at the examination, Defendants' counsel contended that he was representing Ms. Ntia, but now, at the assessment, he is claiming fees for the Defendants for his role at the examination. Regardless, I find that, at the time of the examination, Defendants' counsel made no mention of representing the Defendants at Ms. Ntia's examination and was insistent that he was representing Ms. Ntia, a non-party witness. This being the situation, he could not have been representing the Defendants at the examination as to do so could give the perception of a conflict of interests. Further, as submitted by Plaintiff's counsel, there is no costs award in favour of Ms. Ntia, the award of costs being assessed is the costs of the Defendants. Therefore, as the Defendants' counsel was representing Ms. Ntia at the examination, I find that the Defendants are not entitled

to the claims under Item 8 and Item 9 for the costs of counsel's preparation and attendance at the discovery of Ms. Ntia.

[18] The examination of Mr. Demarinis is somewhat more straightforward as the entitlement to costs and the duration of the Examination for Discovery are not contested. Counsel for the Plaintiff has argued that the number of units allowed should be reduced as the examinations were not long or complex and did not require substantial preparation. Further, counsel for the Defendants has presented evidence to justify the claim but has not disputed the argument concerning the lack of complexity. It is also noted that counsel for the Defendants has indicated that 1/3 of the transcript of the examination of Mr. Demarinis relates to the counterclaim. Under these circumstances, I find the amounts claimed by the Defendants to be excessive. Concerning Item 8 for preparation for the examination and continued examination, I find that, given the amount of time occupied by the counterclaim, 3 units for each are reasonable. Considering my findings concerning Item 8, the Defendants' attendance at the examination and continued examination is allowed at 2 units per hour, for a total of 5 units and 4 units respectively.

[19] The Defendants have presented three claims for preparation and attendance at the examinations and continued examination of Mr. Lourenco. Concerning the examination held March 27, 2014, there is no dispute that the examination emanated from a mediation held in January 2014. Counsel for the Defendants has argued that in the absence of a direction excluding the costs, the Assessment Officer must allow the costs of the examination. I do not agree. Although there are Items for which the Court must exercise its discretion to grant an Assessment Officer jurisdiction (see: Item 15 and Item 24), by and large, Assessment Officers have

discretion in the determination of the number of units in an assessment of Items claimed under Tariff B. However, concerning mediations, in *DS-Max Canada Inc. v Nu-Life Inc.*, 2005 FC 25, the Court has rendered a decision which is instructive of the approach an Assessment Officer may choose to take on an assessment. At paragraph 18, the Court held:

I am not prepared to grant any costs to the Defendants for the mediation session conducted on November 24, 2003. Parties should be encouraged to resort to less costly and non-confrontational ways to resolve disputes, and generally should not be penalized by an award of costs in the event the mediation fails. Each party should therefore bear their own costs for the dispute resolution conference.

[20] I find the approach taken by the Court to be helpful in reaching a determination concerning the examination of Mr. Lourenco held March 27, 2014. Just as a party should not be penalized by an award of costs in the event of a mediation hearing fails, I find that a party should not be penalized for participating in an examination of a judgment debtor, which emanated from a mediation hearing in an effort to settle a proceeding, even if the matter did not ultimately settle. Therefore, Item 8 and Item 9, claimed for the examination of Mr. Lourenco on March 27, 2014 are not allowed.

[21] The remaining claims for the examination of Mr. Lourenco relate to the examination held March 30, 2011 and the continued examination held February 6, 2012. Concerning Item 8, the Plaintiff has argued that the Defendants' Docket, at Tab 8 of the Defendants' Costs Submissions does not include any time for preparation to attend the examination and continued examination. Although there does not appear to be an entry for preparation for the examination, a review of the Docket reveals entries on pages 3 and 6 which relate to the undertakings of Mr. Lourenco. I find that these are directly related to the continued examination which occurred approximately

two weeks later. Therefore, Item 8 is not allowed for the examination, however, the claim under Item 8 for the continued examination is allowed as claimed. Concerning the claims under Item 9 for attendance at the examination and continued examination, the Plaintiff has not contested the duration claimed and, given the complexity of the proceeding, I find that the amounts claimed per hour are reasonable. Therefore, Item 9 is allowed at 5 units for the examination held March 30, 2011 and 4 units for the continued examination February 6, 2012.

IV. Item 10 and Item 11

[22] Concerning Item 10 and Item 11, counsel for the Plaintiff submitted that the conferences claimed for November 3, 2011, December 16, 2011, January 27, 2014, February 18, 2014, March 21, 2014 and May 14, 2014 were without prejudice mediation and dispute resolution conferences which are voluntary and are not included in the Table to Tariff B. Referring to *DS-Max Canada Inc. (supra)*, counsel argued that these without prejudice conferences are not recoverable. For the remaining conferences claimed, counsel submitted that there is little evidence of what transpired at the conferences and that you cannot distinguish whether the conferences related to issues concerning Mr. Gennaro or Ms. Ntia. Counsel referred to *Taylor Made Golf Co. v Sully Imports Ltd.*, [1997] F.C.J. No. 1407, at page 3, in support of the contention that claims may not be allowed when there is a lack of details on what transpired at the conferences. Further, at paragraph 43 of the Plaintiff's Costs Submissions, counsel contends that the Defendants' Docket suggests that no preparation time was recorded for most of the conferences and that *Suresh v Canada*, [2000] F.C.J. No. 1108, at paragraph 30, held that if a party was not liable to pay a fee to its solicitor then an unsuccessful litigant is not obliged to indemnify said opponent on an assessment of costs. Counsel argued that it is inappropriate to allow \$9,240.00 for a maximum of

4.5 hours of preparation and that Item 10 should be allowed at 3 units total for all of the conferences. Concerning Item 11, counsel argued that the conferences were brief and generally related to procedural and scheduling matters and that the Defendants should be allowed 1 unit per hour for a total of 7 units for all of the conferences.

[23] Concerning the Defendants' claim under Item 10 and Item 11 for pre-trial conferences, counsel for the Plaintiff submitted that the Defendants' Docket indicates only 0.8 hours was billed for preparation, including the drafting of a Memorandum and that only 1 unit should be allowed under Item 10. Concerning Item 11, counsel argued that 1 unit per hour for 3 hours is appropriate.

[24] In reply, counsel for the Defendants submitted that, with the exception of the September 24, 2014 conference which has been withdrawn, the remaining case conferences did not specifically concern the Defendants' counterclaim but for the case conferences when Mr. Das, counsel for Mr. Gennaro, was present. Counsel submitted that when Mr. Das was present the counterclaim against Mr. Gennaro was only one of the issues discussed. Counsel submitted that the case conferences which related to Mr. Gennaro commenced at the time when the motion to have Mr. Gennaro added as a party was filed. Concerning the conferences which were part of a mediation, as submitted concerning Mr. Lourenco, above, counsel argued that the fact that mediations are not included under Items 10 and 11 does not mean that a party cannot claim them since there is nothing excluding them from Tariff B. Counsel also submitted that the Defendants' Docket could have been clearer in outlining exactly what services were being charged for the case conferences and argued that *Truehope (supra)*, at paragraphs 60 to 63 suggests that

preparation may be allowed in circumstances when there is no evidence of preparation time due to the importance of case conferences to the litigation process. Finally, concerning the Pre-trial Conference claimed, counsel argued that the claims under Items 10 and 11 are justified due to the fact that the Plaintiff's Pre-trial Memorandum consisted of five volumes.

[25] I will address the Defendants' claim for the Pre-trial Conference first. The Plaintiff has submitted that only 1 unit should be allowed for Item 10, however, the range of Column III to the Table in Tariff B is from 3 to 6 units. Further counsel for the Plaintiff argued that only 0.8 hours were spent preparing for the Pre-trial Conference. I have reviewed the Defendants' Docket and find that there were several hours claimed for trial preparation in the days leading up to the Pre-trial conference. I do not find it difficult to conclude that some of this preparation related to the upcoming Pre-trial Conference. Under this circumstance, the claim under Item 10 for the Pre-trial Conference is allowed as claimed at 6 units. Concerning Item 11 for the Pre-trial Conference, it is noted that the Court record indicates that the hearing lasted 1.5 hours. However, it is also noted that the Plaintiff does not dispute the duration claimed by the Defendants. Therefore, as the duration is not contested and having concluded that this matter contained complex issues, I find that Item 11 may be allowed at 3 units per hour for 3 hours.

[26] Concerning the remaining case conferences, there are three factors which must be addressed when assessing the Defendants' claims under Items 10 and 11. Concerning preparation under Item 10, *Truehope (supra)* held that in circumstances when there is no evidence of preparation for case conferences, the fact that the Court found it necessary to hold the case conference is ample indication that some meaningful preparation would have been required.

However, in the present assessment, the Defendants' Docket provided evidence that no preparation was charged to the parties for several of the case conferences. As was held in *Suresh (supra)*, if a party was not liable to pay a fee to its solicitor then an unsuccessful litigant is not obliged to indemnify said opponent on an assessment of costs. Despite counsel's submission that his docket could have provided more detail concerning what services were being charged for, given that the Defendants' Docket, as submitted, indicates that for several case conferences no preparation services were charged to the Defendants, I find that this is a situation where instead of there being no evidence that preparation was undertaken, there is evidence that preparation was not charged to the client. Therefore, in keeping with *Suresh*, for those conferences where no preparation is included in the Defendants' Docket, no preparation will be allowed under Item 10.

[27] The second issue to be considered relates to the Defendants' claims under Items 10 and 11 for the dates of the mediation hearings. In keeping with the decision in *DS-Max Canada Inc. (supra)* and my findings concerning the judgment debtor examination of Mr. Lourenco held March 27, 2014, above, I find that the Defendants' claims under Items 10 and 11 for any mediation hearings may not be allowed. I have reviewed the Court file and confirmed that, with the exception of February 18, 2014 and March 21, 2014, the dates submitted by the Plaintiff as being mediation hearings are correct. Concerning February 18, 2014 and March 21, 2014, these hearings were Case Conferences at which the progress of the mediation and Judgment Debtor Examination were discussed, but they were not part of the Mediation. Therefore, the claims for November 3, 2011, December 16, 2011, January 27, 2014 and May 14, 2014, which formed part of the Mediation, will not be allowed.

[28] The final issue to be considered relates to the claims under Item 10 and 11 for the case conferences when Mr. Das, Mr. Gennaro's counsel was present. In *Taylor Made Golf (supra)*, it was held that when there is a lack of details on what transpired at the conferences no costs should be allowed. However, from my review of the record, it is evident that the conferences to which Mr. Das attended related to issues other than the counterclaim against Mr. Gennaro. This being the situation, I find that for the case conferences where Mr. Das was present, the Defendants' claims under Item 10 and 11 may be allowed but at the low end of Column III to the Table in Tariff B to account for the fact that at least a portion of the case conferences related to the counterclaim against Mr. Gennaro.

[29] For the above reasons, Item 10 is allowed at 3 units for the case conferences Mr. Das attended on April 15, 2013, August 21, 2013, February 18, 2014, March 21, 2014 and September 4, 2014. Concerning the Trial Management Conference held October 29, 2014, Item 10 is allowed as presented. For the remaining claims under Item 10, I find that they were either mediations or case conferences for which no preparation was charged on the Defendants' Docket, therefore the claims for preparation are not allowed.

[30] Further, for the above reasons, the claims under Item 11, for the conferences Mr. Das attended (as above), are allowed at 2 units per hour. Also, for the conferences held November 3, 2011, December 16, 2011, January 27, 2014 and May 14, 2014, Item 11 is not allowed as these were mediations. The remaining claims under Item 11 are allowed as presented.

V. Item 12

[31] Having regard to Item 12 for the Notice to Admit Facts, counsel for the Plaintiff contended that the Defendants' Docket only recorded 1.2 hours for the preparation of the Defendants' Notice and the Plaintiff did not deliver a Notice to Admit. Counsel argues that as a result a minimal award of 1 unit is appropriate.

[32] In reply, counsel for the Defendants submitted that the request to admit was prepared and served on the Plaintiff and that the 3 units claimed are reasonable.

[33] I have been provided with very little evidence concerning Item 12. However, given that the Plaintiff did not serve a Notice to Admit, I find that 3 units is excessive given the amount charged to the Defendants as outlined in the Defendants' Docket for October 31, 2014.

Therefore, Item 12 is allowed at 1 unit.

VI. Item 13 and Item 14

[34] Concerning Item 13 (a), preparation for Trial, Plaintiff's counsel submitted that the Defendants' Docket does not reasonably establish what trial preparation was done making it difficult to assess the amount of work actually undertaken. Counsel argued that there was only one fact witness to prepare, Mr. Lourenco, and that the remaining witnesses were experts who must be treated separately. Concerning Item 13 (b), preparation for each day in Court after the first day, counsel argued that it is inappropriate to allow preparation for five full days when the hearing had a duration of 4.5 days. Counsel argues that an award of 3 units for preparation for the first day and 2 units for each of the following 3.5 days should be allowed. Further,

concerning Item 14, attendance at trial, counsel submitted that the hours claimed are not being contested but that an award of 2 units per hour is appropriate, for a total of 52.8 units.

[35] Concerning Item 13(a), in reply, counsel for the Defendants submitted that preparation time involved preparing the witnesses. Concerning Item 13(b) counsel argued that the last half day was for closing argument which required preparation.

[36] I have reviewed the Defendants' Docket and note that there are several entries for trial preparation in the days leading up to the trial. Further, I do not agree that the preparation of expert witnesses should be separated from trial preparation. Therefore, given my finding of complexity under Item 2 above, I allow Item 13(a) as presented at 5 units. Concerning Item 13(b), I do not agree that only 3.5 days should be allowed. The trial went into its fifth day for closing arguments. I do not read Item 13(b), preparation for trial or hearing, per day in Court after the first, as necessitating a breakdown by hours in Court. The closing arguments on the fifth day of hearing are considered a day in Court regardless of whether the day ended early. Therefore, in keeping with my finding of complexity, Item 13(b) is allowed as claimed for a total of 12 units. Concerning Item 14, the Plaintiff does not contest the hours in Court claimed in the Bill of Costs. Once again, in keeping with my finding concerning complexity, Item 14 is allowed as claimed for a total of 79.2 units.

VII. Item 15, Item 25 and Item 26

[37] Having regard to Item 15, counsel for the Plaintiff submitted that allowing 5 units, at the mid-range of Column III would be appropriate for the preparation of written argument. Counsel

also submitted that as the Defendants' Docket does not provide particulars of services provided after judgment, Item 25 should not be allowed. Finally, concerning the assessment of costs, counsel contends that Item 26 should not be allowed since the Defendants are claiming more than triple the costs the Plaintiff argues is reasonable. In the alternative, counsel submits that Item 26 should be allowed at no more than 2 units.

[38] Concerning Item 15, counsel for the Defendants submitted that the Defendants' Written Representations consisted of 30 pages with 26 authorities and were required for closing argument. Having regard to Item 25, counsel argued that there was a requirement to communicate with the Defendants after the Court's Judgment was rendered. Concerning Item 26, counsel submitted that he had nothing to add and that the materials and time spent speak for themselves.

[39] Given my finding of complexity, I find the amount claimed under Item 15 to be reasonable considering the length of the Written Representations and the number of authorities. Concerning Item 25, the claim is allowed as presented due to counsel's requirement to communicate with the Defendants after the Judgment was rendered. Having regard to Item 26 for the assessment of costs, the Defendants filed the Affidavit of Evan Tingley in support of their disbursements, Written Submissions on Costs and attended at the hearing of the assessment which lasted the majority of one day. Further, it is noted that, although the costs proposed by the Plaintiff were one third the costs claimed, the assessable services allowed were substantially higher. Under these circumstances I find that it is completely reasonable to allow 6 units under Item 26.

VIII. Disbursements

[40] Concerning disbursements, at paragraph 58 of the Plaintiff's Costs Submissions, counsel submitted that the Defendants have simply provided an Affidavit of Disbursements asserting that certain disbursements were made, a list of dates the disbursements were incurred and a bare statement that they are reasonable and necessary. At the hearing of the assessment counsel referred to *Taylor Made (supra)* to support the contention that in the absence of evidence, disbursements cannot be properly assessed and should be disallowed. Concerning the expert fees claimed, counsel argued that the Defendants' expert evidence was given little weight and was not relevant to the time period in dispute and should be reduced as a result. Counsel also argued that the expert's invoice dated November 10, 2014 lacked particularity and in light of these circumstances the claim for an expert should be reduced by 50%. Counsel concluded his submissions by suggesting that only disbursements where invoices were tendered and evidence of relevance to the action was provided should be allowed. At paragraph 61 of the Plaintiff's Costs Submissions, counsel submitted that only the following disbursements should be allowed:

Transaction Levy: \$50.00;

Transcripts: \$1,123.40;

Expert: \$850.00 (50% of invoices);

Photocopying: \$875.00 (reimbursement of cost incurred by Plaintiff), and;

Hearing Fee: \$587.50 (no HST).

[41] In reply, counsel for the Defendants submitted that Tab A to the Affidavit of Evan Tingley accounts for every disbursement claimed. Counsel contended that photocopying was

charged to the Defendants at \$0.25 per page until March 2010 and then \$0.30 per page was charged. When asked, counsel submitted that there is no evidence concerning to what the photocopies relate. Having regard to the disbursements for facsimiles, counsel submitted that facsimiles were charged at \$0.30 per page for those facsimiles which were sent. When asked if the charge related to time, counsel submitted that the charge was page based. Concerning expert fees, counsel submitted that the invoice dated November 10, 2014, found at Tab B to the Affidavit of Evan Tingley, related to the Expert's Report. Referring to *Merck & Co. v Canada (Minister of Health)*, 2007 FC 312, at paragraph 51, counsel argued that the expert's evidence was not found to be inadmissible or useless and that the Court did not address the witness' evidence because it was not needed to in order to reach a decision.

[42] The first issue which must be addressed when considering the disbursements claimed is the sufficiency of the evidence. The Plaintiff has submitted that many of the disbursements should be disallowed due to an absence of evidence. At paragraph 7 of *Taylor Made (supra)*, the Assessment Officer held:

Disbursements are claimed as well for telecopier charges, photocopying and binding. However, I have decided to disallow those items for the following reason. Charges for photocopies and telecopy appear among a plethora of other items in the solicitors' disbursement ledger, a copy of which is exhibited to the Knobel affidavit. It would appear then that they are in-house expenditures as opposed to out-of-pocket expenditures which would normally be supported by an invoice or a voucher. No detail is provided as to, for example, what was copied or telecopied, the number of copies that were made and the purpose, or the actual or estimated cost incurred by the law firm for making the calls or the copies. The ledger does not refer to binding at all.

[43] On the other hand, in *Abbott Laboratories v. Canada (Health)*, 2008 FC 693, at paragraph 71, the Assessment Officer held:

In *Almecon Industries Ltd. v. Anchortek Ltd.*, [2003] F.C.J. No. 1649 at para. 31 (A.O.), I found certain comments in the evidence, although self-serving, nonetheless to be pragmatic and sensible concerning the reality of a myriad of essential disbursements for which the costs of proof might or would exceed their amount. However, that is not to suggest that litigants can get by without any evidence by relying on the discretion and experience of the assessment officer. The proof here was less than absolute, but I think there is sufficient material in the respective records of the Federal Court and the Federal Court of Appeal for me to gauge the effort and associated costs required to reasonably and adequately litigate Apotex's position. A lack of details makes it difficult to confirm whether the most efficient approach was indeed used or that there were no errors in instructions, as for example occurred in *Halford*, requiring remedial work. A paucity of evidence for the circumstances underlying each expenditure make it difficult for the respondent on the assessment of costs and the assessment officer to be satisfied that each expenditure was incurred further to reasonable necessity. The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to the sense of austerity which should pervade costs, to preclude prejudice to the payer of costs. However, real expenditures are needed to advance litigation: a result of zero dollars at assessment would be absurd.

[44] When considering the approaches taken in these decisions, I find that the approach taken in *Abbott* balances the rights of the parties so that the claimant is not prejudiced by not being reimbursed for costs which were expended and the responding party is not prejudiced by being required to fully reimburse for costs which have not been adequately justified by the evidence presented. Also, I agree that an assessment which results in a zero dollar allowance would be absurd. Further, I find that facsimiles, postage and courier may be attributed to a specific file and the cost of justifying the individual expenditure may be greater than the amount claimed. Therefore, as the Defendants have proven that facsimiles, postage and courier disbursements

were charged to this specific matter, and having determined that the amounts claimed are reasonable, they are allowed as claimed.

[45] With regard to photocopying, counsel for the Plaintiff has submitted that the invoice in the amount of \$875.00 may be allowed but contests the remaining \$2,592.30 claimed. I have reviewed the Court file and note that there are numerous motions for which costs were not awarded and a Mediation Brief related to the Mediation hearing for which costs have not been allowed. Further, I have reviewed the Defendants' Submissions and note that there is no evidence concerning what was copied and no evidence that the copies for steps for which no costs were awarded have been removed. This being the situation, I find that it is reasonable to reduce the amount claimed for photocopies to account for the motions and Mediation. Under these circumstances I find that an allowance of \$2,000.00, inclusive of the \$875.00 the Plaintiff does not contest, is reasonable for the conduct of this litigation.

[46] The Defendants have claimed \$1,702.16 for printing and binding. In *Janssen Inc. v Teva Canada Ltd*, 2012 FC 48, beginning at paragraph 102, it was held that binding may be allowed but that absent evidence that the costs do not include a charge for labour, the assessment should be conservative with a view to a sense of austerity. Considering the above, I have reviewed the evidence presented and find that a reasonable amount for the printing and binding required for the litigation to proceed is \$250.00.

[47] Concerning the Defendants claim for Mr. Braggio, the Defendants' expert witness, at paragraph 82 of the Judgment and Reasons, the Court stated the following:

Mr. Braggio also admitted that much of the information and articles he relied upon in compiling his report were from long after the affected period, but with little explanation he insisted that much of the information is relevant to 2009. Aside from a 2007 article discussing the increased accuracy of Google's time-stamping, and a Google Analytics report of the Defendant's web traffic from January 1-March 16, 2009 (when the offending material was present on the Defendant's website), the information relied on by Mr. Braggio should be given little weight.

[48] I find this to be contrary to the submissions of the Plaintiff. In the decision, the Court found that some of the information relied upon by the expert should be given little weight. This is very different than the contention of the Plaintiff that the expert evidence was given little weight. Further, in *John A. Carruthers v The Queen*, [1983] 2 F.C. 350, as referred to in *Merck (supra)*, the Court held:

...In cases in which experts are called by both parties and they give conflicting opinions, the Court has to choose the opinion of one of the experts as preferable to the other, unless the Court chooses to reject both opinions and substitute its own based on the evidence, but the fact that one expert's report is rejected, or not accepted in full, would not justify non-payment of his fees for the preparation of same, unless the Court finds that the requisitioning of such a report was entirely unnecessary or the contents useless...

[49] Although the Court held that some of the information relied upon by Mr. Braggio should be given little weight, I find nothing in the Judgment and Reasons which suggests that Mr. Braggio's evidence was useless. Further, as submitted by the Defendants, I was able to confirm that Mr. Braggio's report was filed with the Court just prior to the November 10, 2014 invoice, which counsel for the Plaintiff suggests lacks particularity. Therefore, given that the Court made no finding concerning the usefulness of the evidence of Mr. Braggio and given that it is reasonable to conclude that Mr. Braggio's November 10, 2014 invoice is related to the

preparation of his Report, I find that the amount claimed by the Defendants, for disbursements related to Mr. Braggio, is reasonable and necessary and allowed as claimed at \$1,700.00.

[50] The Defendants have claimed \$2,859.16 for process servers. I am not able to locate any reference to process servers in the Affidavit of Evan Tingley or the Defendants' Costs Submissions. I note, however, in Exhibit A to the Affidavit of Evan Tingley, entries for Agency Fees. Without particularization it is difficult to determine whether these fees are intended to be claimed as process server expenses. Further, without clear evidence that this is the situation, I find that to allow process server expenses without evidence that the expenses were actually incurred would be prejudicial to the Plaintiff. Therefore, as the claim for process servers has not be adequately justified, it is not allowed.

IX. Offer to Settle

[51] As indicated above, counsel for the Defendants submitted that on February 2, 2010 and April 3, 2013 the Defendants made offers to settle the action and counterclaim on a without costs basis. Counsel submits that in the first offer the Defendants offered to pay \$2.00 in satisfaction of the claim and costs and that in the second offer the Defendants offered to pay \$1,500.00 in satisfaction of the claim and costs. Counsel submitted that both offers remained open until trial and that neither was accepted by the Plaintiff. Counsel also contended that if the February 2, 2010 offer is found to trigger the doubling of costs, the total for amount claimed would be \$140,119.76 and if the April 3, 2013 date is found to trigger the doubling of costs, the total amount claimed would be \$118,041.76. Further, referring to *GRK Fasteners Inc. v Canada (Attorney General)*, 2011 FC 1027, at paragraph 8, counsel argues that an Assessment Officer

does not have the jurisdiction to negate or vary the effect of Rule 420 and that *Culhane v ATP Aero Training Products Inc.*, 2004 FC 1667, at paragraph 6, held that an offer to waive ones costs is a sufficient element of compromise to trigger the application of Rule 420.

[52] In the Plaintiff's Costs Submissions, referring to *Astrazeneca AB v Novopharm Ltd.*, 2004 FCA 258, at paragraph 16 and *Apotex Inc. v Sanofi-Aventis*, 2012 FC 318, at paragraph 33, counsel submitted that an offer to settle must contain a real element of compromise and that the offer cannot simply require a complete capitulation. Concerning the offer from February 2010, counsel argued that the claim was in its infancy and that no significant costs had been incurred. At the hearing of the assessment, counsel submitted that the first offer was not an offer at all. Further, referring to *Kirkbi AG v Ritvik Holdings Inc.*, 2002 FCT 1109, at paragraph 22, counsel argued that an offer to forgo costs is not, on its own, a "legitimate compromise". Concerning the offer from April 2013, counsel argued that the value of a legitimate compromise is dependant in part upon the value of the claim and that the nominal increase in the offer to \$1,500.00 inclusive of costs and disbursements indicated no element of compromise when compared with the Plaintiff's claim of \$760,000.00. Counsel submitted that the only real change between the two offers was that the second offer includes a permanent injunction. Referring to *Canadian Olympic Assn. v Olymel Société en commandite*, [2000] F.C.J.No. 1725, at paragraphs 12 and 13, counsel argued that such a one-sided offer was made solely to obtain the benefit of Rule 420. At the hearing, in answer to a question concerning the effect of the counterclaim on the offer, counsel submitted that the counterclaim should have no effect as it was not successful. Counsel concluded by submitting that the counterclaim was not pursued by the Defendants and yet they contend that it indicates an element of compromise.

[53] In reply, counsel for the Defendants submitted that the offers did not constitute total capitulation since they offered to dismiss the counterclaim as well as the claim without costs. Counsel argued that both offers were open until trial in accordance with Rule 420 of the *Federal Courts Rules*. Counsel referred to *Astrazeneca AB (supra)*, at paragraph 36, in support of the contention that an element of compromise is not an absolute requirement in all circumstances of settlement offers. Counsel suggested that either offer represents an element of compromise due to the fact that costs were being waived. Counsel concluded by submitting that the counterclaim against Mr. Gennaro was not an issue in the offer to settle and that the offer was not sent to counsel for Mr. Gennaro.

[54] There are two Offers to Settle (“the Offers”). The first one, dated February 2, 2010 (“the February Offer”), states:

The defendants and plaintiff by counterclaim offer to settle this action and counterclaim upon the following terms and conditions:

1. The defendants and plaintiff by counterclaim shall pay to the plaintiff the sum of \$2.00 in full satisfaction of all claims for damages, interest and costs;
2. All parties hereto shall execute and exchange mutual full and final releases in a form satisfactory to their respective counsel; and
3. This action and counterclaim shall be dismissed on consent, without costs.

This offer shall remain open for acceptance until 30 second after the commencement of the trial of this proceeding, at which time it shall have expired or be deemed withdrawn.

[55] The second Offer, dated April 3, 2013 (“the April Offer”), states:

The defendants and plaintiff by counterclaim hereby offer to settle this action and counterclaim upon the following terms and conditions:

1. The defendant, 411 Travel Buys Limited, shall pay the plaintiff the sum of \$1,500.00 in full satisfaction of all claims for damages, interest and costs;
2. The parties shall consent to an order in the following terms;
 - A. Permanently enjoining the defendants from the following
 - (i) Directing public attention to the services of the defendant, 411 Travel Buys Limited (“Travel Buys”) in such way as to cause or be likely to cause confusion between the services of the plaintiff and those of the defendants;
 - (ii) Passing off Travel Buys’ services as those of the plaintiff and/or sanctioned, approved or authorized by the plaintiff;
 - (iii) Infringing the plaintiff’s trade-marks;
 - (iv) Using the plaintiff’s trade-marks in a manner that results in the depreciation of the goodwill attached thereto;
 - (v) Infringing the copyright in the plaintiff’s website, including the plaintiff’s exclusive right to reproduce same; and
 - (vi) Authorizing, inducing or assisting others to do any of the aforesaid acts;
 - And
 - B. In all other respects, dismissing the action and the counterclaim without costs: and
3. The parties shall execute and exchange mutual full and final releases in a form satisfactory to their respective counsel.

This offer shall remain open for acceptance until 30 second after the commencement of the trial of this proceeding, at which time it shall have expired or be deemed withdrawn.

[56] The relevant rules relating to these offers are Rule 419 and Rule 420 (1), (2) (b) and (3),

which state:

419. Rules 420 and 421 apply, with such modifications as are necessary, to parties bringing and defending counterclaims and third party claims, to applicants and respondents in an application and to appellants and respondents in an appeal.

420.

(1) Unless otherwise ordered by the Court and subject to subsection (3), where a plaintiff makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and costs calculated at double that rate, but not double disbursements, after that date.

(2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle,

...

(b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.

419. Les règles 420 et 421 s'appliquent, avec les adaptations nécessaires, au demandeur et au défendeur dans une demande, à l'appelant et à l'intimé dans un appel, ainsi qu'aux parties dans une demande reconventionnelle et une mise en cause.

420.

(1) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le demandeur fait au défendeur une offre écrite de règlement, et que le jugement qu'il obtient est aussi avantageux ou plus avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite, au double de ces dépens mais non au double des débours.

(2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante :

...

(b) si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.

| | |
|--|--|
| <p>(3) Subsections (1) and (2) do not apply unless the offer to settle</p> <p>(a) is made at least 14 days before the commencement of the hearing or trial; and</p> <p>(b) is not withdrawn and does not expire before the commencement of the hearing or trial.</p> | <p>(3) Les paragraphes (1) et (2) ne s'appliquent qu'à l'offre de règlement qui répond aux conditions suivantes :</p> <p>a) elle est faite au moins 14 jours avant le début de l'audience ou de l'instruction;</p> <p>b) elle n'est pas révoquée et n'expire pas avant le début de l'audience ou de l'instruction.</p> |
|--|--|

[57] Before proceeding further, it is noted that the Offers were made at least 14 days before the commencement of the trial and neither was withdrawn and did not expire before the commencement of the trial. Further, the Offers each contain offers to settle both the Action and the Counterclaim. As the Defendant 411 Travel Buys Limited is the Plaintiff by Counterclaim, I find that even though the Offers to settle the Counterclaim are contained in the same documents as the Offers to settle the Action, pursuant to Rule 419, Rule 420 (1) is applicable to the offer to settle the Counterclaim. Further, concerning the offer to settle the Action, the applicable rule is Rule 420(2)(b).

[58] Concerning the Counterclaim, pursuant to Rule 420(1), doubling only occurs “where a plaintiff makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle”. In the present proceeding, the Counterclaim was dismissed. Therefore, the Defendant 411 Travel Buys Limited, Plaintiff by Counterclaim, did not obtain a judgment more favourable than the offer to settle the Counterclaim. Under these circumstances, I find that there should be no doubling of costs with respect to the Counterclaim.

[59] Concerning the offers to settle the Action, the test used to determine whether circumstances exist in order to trigger the doubling of costs is found in *M.K. Plastics Corp. v. Plasticair Inc.*, 2007 FC 1029, at paragraph 39, which states:

In order to trigger the double costs rule, an offer must be clear and unequivocal in that the opposite party need only decide whether to accept or reject the offer (*Apotex Inc. v. Syntex Pharmaceuticals*, [2001] FCA 137, [2001] F.C.J. No. 727 (QL), at para. 10). The offer must also contain an element of compromise (or incentive to accept) (*Canadian Olympic Assn. v. Olymel, Société en commandite*, [2000] F.C.J. No. 1725 (QL), at para. 10). The offer must also be presented in a timely fashion such that the benefit would still be derived from the opposite party if accepted (*Sammammas Compania Maritima S.A. v. Netuno (the) Action in rem against the Ship "Netuno"*, [1995] F.C.J. No. 1442 (QL), at paras. 30 and 31). Finally, if accepted, the offer must bring the dispute between the parties to an end (*TRW, supra*, at p. 456).

[60] Concerning the February Offer and the April Offer, the Plaintiff has not suggested that the offers were not clear and unequivocal, that they were not presented in a timely fashion or that they would not have brought the dispute between the parties to an end. Therefore, having reviewed the offers, I find that these factors are met by the terms of the offers. This being the situation, I find that the determination as to whether the doubling of the Defendants' cost is triggered by one of both of the offers rests on whether the offers contained an element of compromise or incentive to accept. In *Canadian Olympic Association (supra)*, at paragraph 12, the Court held that an offer which amounts to capitulation does not trigger the doubling of costs. Further, in *Apotex (supra)*, at paragraph 32, the Court held:

...In order to be acceptable, Apotex' offer to settle should have combined more than the mere acknowledgement of infringement. Significantly, the offer to settle did not contain any element of compensation or even any reference to the prejudice caused by the infringement such as to incite Sanofi to cross the settlement bridge and settle the dispute.

[61] Although the above decision was overturned on its merits, I still find the comments concerning costs helpful. From the above, it appears that an element of compromise could contain an element of compensation or monetary incentive as well as some reference to the prejudice caused by the infringement or perhaps, put another way, acknowledgement of responsibility. Concerning monetary incentive to settle, in *Culhane (supra)*, at paragraph 6, the Court held:

The offer is criticized as not representing a compromise, a factor which has been mentioned in some of the case law. The rule does not specifically state that compromise is a necessary element. In any event, the forbearance of future costs in this case did represent, in my view, a considerable compromise. This point was noted by Mr. Stinson in the following words:

The Defendants were not prepared to surrender any part of their position, but their removal of costs in the second February 23, 2001 offer might be seen by some as compromise of some consequence, depending on one's opinion of the generosity of the partial indemnity permitted by the Tariff.

That is exactly how I see it. A "slackening of costs" is in itself "an ingredient of compromise" as noted by Blais J. in *Kirgan Holding S.A. v. Ship Panamax Leader* (2003), 227 F.T.R 200.

[62] It is important to note that the "slackening of costs", which is an ingredient of compromise, relates to "the forbearance of future costs" as well as the costs already incurred.

However, in *Kirkbi AG (supra)*, at paragraph 17, the Court held:

I determine not to adopt the position presented on behalf of the defendant. I am satisfied that an admission of functionality was not of such great import as to render an offer to forego costs on discontinuation, a "legitimate compromise". Evidence of this can be found in the fact that, approximately one (1) year after the offer was made on behalf of the defendant, the defendant brought a second motion for summary judgment based on the issue of functionality. In the final analysis, that motion for summary judgment was not pursued. Rather, it was discontinued. Once

again, based upon the foregoing brief summary of my considerations, I determine not to award the defendant double party-and-party costs for the period following the making of the written offer to forego costs on discontinuance of the action.

[63] From this it appears that although the “slackening of costs” is an “ingredient of compromise”, it may not, in all circumstances, be determinative of the “triggering” of a doubling of costs.

[64] The second factor in *Apotex (supra)*, “reference to the prejudice caused by the infringement”, was not addressed by the parties. However, it appears that this factor may be considered an “ingredient of compromise” which may be considered in conjunction with or separately from any element of compensation which may be included in an offer to settle.

[65] In the present case, the terms of the February Offer included an offered payment of \$2.00 to the Plaintiff and the dismissal of the Action and Counterclaim without costs. Although this offer does include an element of compensation in the form of a payment and a removal of the “forbearance of future costs”, it does not address the prejudice caused by infringement since the action would have been dismissed. Given this, I find that the nominal nature of the payment and the dismissal without costs are not sufficient enough to trigger the doubling of costs as they tend to invoke a sense of capitulation.

[66] On the other hand, the April Offer included an offered payment of \$1,500.00 to the Plaintiff and an order permanently enjoining the Defendants from taking specific actions and dismissing all other aspects of the Action and Counterclaim without costs. Although the element

of compensation in the April Offer is not significantly more substantial than the February Offer, it is important to note that not all compromise must be monetary in nature. I find that the inclusion of a permanent injunction enhances the element of compromise in the February Offer by acknowledging the prejudice caused by any infringement and that this contributes to the element of compromise to the extent that the doubling of costs is triggered. Therefore, the Defendants' costs as allowed, not including disbursements, Item 25 and Item 26, are doubled from April 3, 2013.

[67] For the above reasons, the Defendants' Bill of Costs is assessed and allowed at \$63,510.65. A Certificate of Assessment will be issued.

"Bruce Preston"

Assessment Officer

Toronto, Ontario
June 11, 2015

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1399-09

STYLE OF CAUSE: RED LABEL VACATIONS INC., CARRYING, ON BUSINESS AS REDTAG.CA OR, REDTAG.CA VACATIONS OR BOTH v 411 TRAVEL BUYS LIMITED CARRYING, ON BUSINESS AS 411TRAVELBUYS.CA., CARLOS MANUEL LOURENCO

PLACE OF ASSESSMENT: TORONTO, ONTARIO

DATE OF HEARING: APRIL 23, 2015

REASONS FOR ASSESSMENT OF COSTS: BRUCE PRESTON

DATED: JUNE 11, 2015

APPEARANCES:

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