

McDOWELL KNIGHT

McDOWELL KNIGHT ROEDDER & SLEDGE L.L.C.
LAWYERS

ANNE LAURIE MCCLURKIN
DIRECT DIAL: 251-544-8846
amccurkin@mcdowellknight.com

November 2, 2009

VIA EMAIL AND
U. S. CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Catherine Austin Fitts
Solari, Inc.
Post Office Box 157
Hickory Valley, TN 38042

Ms. Catherine Austin Fitts
Solari, Inc.
Post Office Box 880
Kalispell, Montana 59903

Re: "Mapping the Real Deal: Piracy on the Delaware"
Thomas C. Weller, Jr.

Dear Ms. Fitts:

This firm represents Mr. Thomas C. Weller, Jr. We recently learned that your article "Mapping the Real Deal: Piracy on the Delaware" includes a link to "Piracy on the Delaware" written by Paul E. Atkinson. Mr. Atkinson's article contains numerous false and libelous statements concerning Mr. Weller, including that he and entities with which he is affiliated (City Capital Corporation and Capital Marine Corporation) participated in acts to deceive and defraud the United States Navy. His article apparently was copied from a website once hosted by Mr. Atkinson - <http://www.chesterchallenge.org>. I am enclosing for your information correspondence between my firm and Mr. Atkinson and his associate, Mr. Eugene Schorsch. In response to our demand that Messrs. Atkinson and Schorsch cease publishing false and libelous statements concerning Mr. Weller, City Capital Corporation, and Capital Marine Corporation, the Chester Challenge website has been removed from the internet.

Also enclosed is correspondence between my firm and the organization Sanders Research. Sanders Research previously published the "Piracy of the Delaware" article on its website, <http://www.sandersresearch.com>. In response to our demand that Sanders Research cease publishing Mr. Atkinson's false and libelous article, Sanders Research removed his article from its website.

As you can see from the enclosed, both the author and the former publisher of the "Piracy on the Delaware" article, in recognition of their potential liability for continuing to publish false and libelous statements concerning Mr. Weller and certain entities with which he is affiliated, immediately ceased publishing this article. Since your article endorses the "Piracy on the Delaware" article and republishes the article via a web link, you should know that the false claims act suit that is referenced in the "Piracy on the Delaware" article was filed against Pennsylvania Shipbuilding Company. Mr. Weller was not a party to that suit, and there is no

11 NORTH WATER STREET BATTLE HOUSE TOWER SUITE 13290 MOBILE, ALABAMA 36602
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basis for the defamatory remarks concerning him that appear throughout the article. The same is true for City Capital Corporation and Capital Marine Corporation. Moreover, you should know that the false claims act suit was in fact decided in favor of Penn Shipp, and a judgment awarding costs against Mr. Atkinson was entered on January 22, 2008. *See Atkinson v. Pennsylvania Shipbuilding Company, et al.*, 2008 WL 191167 (E.D. Pa. Jan. 22, 2008). (See attachment). The order awarding costs against Mr. Atkinson specifically states that Mr. Atkinson's claims were "meritless," that the court had warned Mr. Atkinson on numerous occasions to "proceed with caution," and that "Penn Shipp was totally successful and ultimately vindicated."

The "Piracy on the Delaware" article is libel *per se*, and is a threat to Mr. Weller's reputation and good name. On behalf of Mr. Weller, City Capital Corporation, and Capital Marine Corporation, we ask that you remove your article endorsing the "Piracy on the Delaware" article and the link to the "Piracy on the Delaware" article from the internet by or before November 9, 2009.

If you have any questions about this matter, please contact me at the above direct phone number. Thank you.

Yours very truly,



Anne Laurie McClurkin
For the Firm

ALM/tr
M#191952
Attachment

cc: Russel Myles, Esq. (w/o attachments)

FILE COPY

MCDOWELL KNIGHT

MCDOWELL KNIGHT ROEDDER & SLEDGE L.L.C.
LAWYERS

RUSSEL MYLES
DIRECT DIAL: 251-431-8805
rmyles@mcdowellknight.com

December 30, 2008

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Mr. Paul Atkinson
Chester Challenge, LLC
2850 Middlefield Road #119
Palo Alto, California 94306.

Mr. Eugene Schorsch
Chester Challenge, LLC
4849 East Bayaud Avenue
Denver, Colorado 80246-1107

Re: Thomas C. Weller Jr.

Dear Mr. Atkinson and Mr. Schorsch:

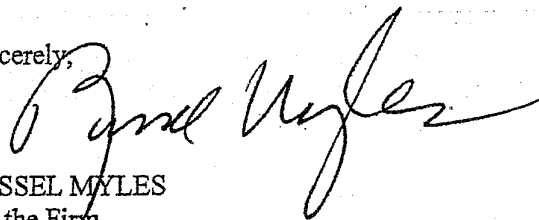
This firm represents Mr. Thomas C. Weller, Jr. We recently learned that your company's website <http://www.chesterchallenge.org>, last updated May 4, 2008, contains numerous false and libelous statements concerning Mr. Weller, including that he (and entities with which he is affiliated, City Capital Corporation and Capital Marine Corporation) participated in acts to deceive and conspired to defraud the United States Navy. As stated on the website, the objective of Chester Challenge, LLC is to pursue and successfully conclude a False Claims Act lawsuit Mr. Atkinson filed against Pennsylvania Shipbuilding Company. As you know, Mr. Weller was not a party to that lawsuit, and there is no basis for the defamatory remarks directed at him that appear throughout the Chester Challenge website. The same is true for City Capital Corporation and Capital Marine Corporation. Moreover, as you know, the False Claims Act suit was decided in favor of Pennsylvania Shipbuilding Company, and a judgment awarding costs against Mr. Atkinson was entered on January 22, 2008. See Atkinson v. Pennsylvania Shipbuilding Co., et al., 2008 WL 191167 (E.D. Pa. Jan. 22, 2008). The Order awarding costs against Mr. Atkinson specifically states that Mr. Atkinson's claims were "meritless," that the Court had warned Mr. Atkinson on numerous occasions to "proceed with caution," and that Penn Ship was "totally successful" and "ultimately vindicated."

On behalf of Mr. Weller, City Capital Corporation, and Capital Marine Corporation, we demand that you remove all references to Mr. Weller, City Capital Corporation, and Capital Marine Corporation from the Chester Challenge website. The removal of all such references should be completed no later than January 13, 2009.

63 SOUTH ROYAL STREET SUITE 900 RIVERVIEW PLAZA MOBILE, ALABAMA 36602
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Weller-00236

Sincerely,



RUSSEL MYLES
For the Firm

RM/als
M:191952

cc: Anne Laurie Smith, Esq.

Weller-00237

By fax

Chester Challenge LLC
4849 East Bayaud Avenue
Denver, CO 80246-1107

January 11, 2009

Russel Myles, Esq.
McDowell Knight Roedder & Sledge
RSA Battle House Tower
11 North Water Street, Suite 13290
Mobile, AL 36602

Re: McDowell Knight letter 12/30/08

Dear Mr. Myles:

Steps are being taken to promptly disconnect the Chester Challenge website from the internet.

Sincerely,


Eugene Schorsch
Manager

cc: Mr. Paul E. Atkinson

Weller-00238

McDOWELL KNIGHT

McDOWELL KNIGHT ROEDDER & SLEDGE L.L.C.
LAWYERS

RUSSEL MYLES
DIRECT DIAL: 251-431-8805
rmyles@mcdownellknight.com

February 20, 2009

**VIA EMAIL AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Dr. Elizabeth Savage
Director
Post Office Box 221
Hemel Hempstead
Hertfordshire
United Kingdom
HP1 3TJ

Re: **SandersResearch.com**
"Piracy on the Delaware"
Thomas C. Weller Jr.

Dear Dr. Savage:

This firm represents Mr. Thomas C. Weller, Jr. We recently learned that your website, <http://www.sandersresearch.com>, is posting an article – "Piracy on the Delaware" – written by Mr. Paul Atkinson. The article contains numerous false and libelous statements concerning Mr. Weller, including that he (and entities with which he is affiliated, City Capital Corporation and Capital Marine Corporation) participated in acts to deceive and defraud the United States Navy. The article apparently was copied from a website once hosted by Mr. Atkinson – <http://www.chesterchallenge.org>. I am enclosing for your information correspondence between my firm and Mr. Atkinson and his associate Mr. Eugene Schorsch. In response to our demand that Messrs. Atkinson and Schorsch cease publishing false and libelous statements concerning Mr. Weller, City Capital Corporation, and Capital Marine Corporation, the Chester Challenge website has been disconnected from the internet.

Accordingly, we ask that you immediately remove the "Piracy on the Delaware" article from your website. The False Claims Act suit that is referenced in the article was filed against Pennsylvania Shipbuilding Company. Mr. Weller was not a party to that suit, and there is no basis for the defamatory remarks directed at him that appear throughout the article. The same is true for City Capital Corporation and Capital Marine Corporation. Moreover, you should know that the False Claims Act suit was in fact decided in favor of Penn Ship, and a judgment awarding costs against Mr. Atkinson was entered on January 22, 2008. See Atkinson v. Pennsylvania Shipbuilding Co., et al, 2008 WL 191167 (E.D. Pa. Jan. 22, 2008). (See attachment). The Order awarding costs against Mr. Atkinson specifically states that Mr. Atkinson's claims were "meritless," that the Court had warned Mr. Atkinson on numerous Dr.

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Weller-00234

Dr. Elizabeth Savage
Page 2

occasions to "proceed with caution," and that Penn Ship was "totally successful" and "ultimately vindicated."

The "Piracy on the Delaware" article is libel per se, and it is a threat to Mr. Weller's reputation and good name. On behalf of Mr. Weller, City Capital Corporation, and Capital Marine Corporation, we ask that you remove the article from your website by or before February 27, 2009.

If you have any questions about this matter, please contact me at the above direct line number.

Thank you.

Sincerely,



RUSSEL MYLES
For the Firm

RM/als

M:191952

Enclosures

cc: Anne Laurie Smith, Esq.

Weller-00235

SANDERS RESEARCH ASSOCIATES LTD.

February 24, 2009

Mr. Russel Myles
McDowell Knight Roedder & Sledge LLC
11 North Water Street
Battle House Tower Suite 13290
Mobile Alabama, 36602

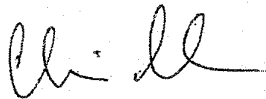
Dear Mr. Myles,

Thank you for your letter of February 20 sent by e-mail in which you requested that we remove the article *Piracy on the Delaware* from our web site www.sandersresearch.com.

The article has been removed from the site and we have requested that Google remove it from their web cache. While the article is no longer accessible from our web site, be advised that it can take several days for an article to be purged from the Google web cache.

We acknowledge no responsibility or liability for Google's actions.

Sincerely yours,



Chris Sanders, Managing Director
Sanders Research Associates Limited

P.O. BOX 221, HEMEL HEMPSTEAD, HERTS HP1 3TJ
UNITED KINGDOM
TEL/FAX: +44 1442 842401
EMAIL info@www.sandersresearch.com

Weller-00243

HOnly the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
UNITED STATES of America, ex rel., Paul E.
ATKINSON, Plaintiff,
v.
PENNSYLVANIA SHIPBUILDING CO. and First
Fidelity Bank, N.A., Defendants.
Civil Action No. 94-7316.

Jan. 22, 2008.

Diane McFadin, William N. France, New York, NY,
Edward V. Cattell, Hollstein, Keating, Cattell, et al.,
Thomas H. Lee, II, Dechert Price Rhoads, Philadelphia, PA, for Plaintiff.

John T. Boese, Fried Frank Harris, et al., Joseph O. Click, Margaret A. Dillenburg, Patrick O. Cavanaugh, Richard A. Kirby, Dyer, Ellis & Joseph, Michael Joseph, Blank Rome LLP, Washington, DC, Matthew Miner, Thomas H. Lee, II, Jennings F. Durand, Dechert Price & Rhoads, Joseph G. Derespino, Derespino & Dougher PC, Philadelphia, PA, Gregory H. Mathews, Law Offices of Gregory Mathews, West Chester, PA, for Defendants.

Memorandum and Order

YOHN, District Judge.

*1 After extensive litigation, in which it was totally successful, defendant Pennsylvania Shipbuilding Co. ("Penn Ship") moves for \$28,275.99 in costs pursuant to 28 U.S.C. § 1919. Plaintiff Paul E. Atkinson opposes an order awarding costs. For the reasons explained below, the court will grant Penn Ship's motion and award the requested costs.

I. Procedural History

On July 28, 2004, this court granted Penn Ship's and codefendant First Fidelity Bank's motions for summary judgment, resolving the underlying action, and Atkinson appealed that judgment. On August 11, 2004, Penn Ship filed its bill of costs. The Clerk

stayed consideration of the bill of costs until after the Third Circuit ruled on the case. On April 3, 2007, after the court of appeals dismissed the case for lack of subject matter jurisdiction under the False Claims Act, 31 U.S.C. § 3730(e)(4), see United States ex rel. Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 531 (3d Cir.2007), the Clerk reinstated Penn Ship's bill of costs. On May 15, 2007, the Clerk taxed Atkinson for costs incurred by Penn Ship under authority of Rule 54(b)(1) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920 and entered judgment awarding Penn Ship costs. (Docket Nos. 257 & 258.) Atkinson timely filed a petition for review on May 22, 2007, and Penn Ship did not file a response. Because Rule 54(b)(1) and § 1920 did not grant the Clerk authority to tax costs after the Third Circuit dismissed the case for lack of subject matter jurisdiction, this court granted Atkinson's petition on November 30, 2007, vacated the order taxing costs against him, and allowed Penn Ship to seek costs under 28 U.S.C. § 1919, the proper statutory authority. See United States ex rel. Atkinson v. Pa. Shipbuilding Co., No. 94-7316, 2007 U.S. Dist. LEXIS 88346, at *8, 2007 WL 4233471 (E.D.Pa. Dec. 3, 2007).

Pursuant to the court's order, on December 17, 2007, Penn Ship moved under § 1919 for \$28,275.99 in costs solely incurred in the recording and transcribing of depositions in its defense of this case.^{FN1} Penn Ship's motion included the declaration of Thomas H. Lee (the "Lee Declaration"), certifying the overall costs and reasons for the depositions, a list of depositions and corresponding costs, and copies of the specific invoices that Penn Ship paid. Atkinson filed his opposition on January 7, 2008.

^{FN1}. The deposition costs can be grouped into three categories: (1) Penn Ship's depositions of Atkinson and Eugene Schorsch, (2) Penn Ship's depositions of Navy personnel, and (3) Atkinson's depositions of other individuals.

II. Award of Costs

This court has jurisdiction under § 1919 to award just costs because the Third Circuit dismissed the entire complaint for lack of subject matter jurisdiction.

See 28 U.S.C. § 1919 (“Whenever any action or suit is dismissed in any district court ... for want of jurisdiction, such court may order the payment of just costs.”); see also, e.g., Hygienics Direct Co. v. Medline Indus., Inc., 33 F. App’x 621, 625 (3d Cir.2002) (concluding that “there is a statute, 28 U.S.C. § 1919, that expressly covers the situation here, i.e., dismissal for lack of subject matter jurisdiction”); Callicrate v. Farmland Indus., 139 F.3d 1336, 1339 (10th Cir.1998) (noting that “when an action is dismissed by a district court, or a few other enumerated courts, for want of jurisdiction ..., the payment of ‘just costs’ may be ordered”).

*2 Section 1919’s grant of authority was “manifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs.” Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 387, 4 S.Ct. 510, 28 L.Ed. 462 (1884). Under § 1919, however, “there is no presumption that costs will be awarded.” Hygienics, 33 F. App’x at 625. “The awarding of costs under § 1919 turns on whether such an award is ‘just.’” Id. (citing Edward W. Gillen Co. v. Hartford Underwriters Ins. Co., 166 F.R.D. 25, 27 (E.D.Wis.1996)); see also Ericsson GE Mobile Commc’ns, Inc. v. Motorola Commc’ns & Elec., Inc., 179 F.R.D. 328, 331 (N.D.Ala.1998) (“The sole question before the court in this case can be restated simply as ‘What is fair here?’”). This highly discretionary determination is vested with the district court, and the court’s decision should be based on the particular facts and circumstances of the case. Hygienics, 33 F. App’x at 624.

As a preliminary matter, Atkinson opposes an award of costs because Penn Ship filed its motion without an official bill of costs and because the Lee Declaration purportedly does not comply with 28 U.S.C. § 1924.^{FN2} The court concludes that the Lee Declaration sufficiently documents the costs sought in the present motion by properly certifying the attached list of depositions with their corresponding costs and the attached copies of the invoices as necessarily incurred and actually performed in this litigation. See Schaufler v. United Ass’n of Journeymen, Local 420, 246 F.2d 867, 870 (3d Cir.1957) (affirming that “[i]n any event, the costs were verified ... to the satisfaction of the district court even though the precise procedure of Section 1924 was not followed”).^{FN3}

FN2. Section 1924 provides:

Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

FN3. The court also notes that Atkinson disputes only the form of the submission, not the veracity of the deposition costs claimed by Penn Ship.

The court now turns to the substance of the request. Atkinson opposes an order awarding costs because his pursuit of this action was not frivolous or vexatious. Atkinson argues that the Third Circuit’s unpublished opinion in Hygienics Direct Co. v. Medline Indus., Inc. mandates that this court cannot award costs because this court has already determined that Atkinson did not act in a frivolous or vexatious manner when the court denied Penn Ship’s request for attorney fees and expenses, see United States ex. rel. Atkinson v. Pa. Shipbuilding Co., No. 94-7316, 2007 WL 4233471 (E.D.Pa. Nov.30, 2007). In Hygienics, the Third Circuit applied an abuse of discretion standard to affirm the district court’s denial of costs under § 1919, 33 F. App’x at 624-25. The Third Circuit did not announce a test to determine “just” costs and did not adopt a “frivolous or vexatious” standard. It merely reviewed the district court’s determination that costs were not warranted in that case and ruled that the district court had not abused its discretion in concluding that “the award of costs would not be ‘just’ because Hygienics had acted in a reasonable manner.” Id. at 626.

*3 The court disagrees with Atkinson’s assessment of the persuasive value of Hygienics. The Third Circuit’s affirmation of the district court’s denial of the award in Hygienics provides an example of a case where the district court did not abuse its discretion in denying costs under the “just” standard, but Hygienics is not a statement of precedent that this and all district courts must deny a request for an award of costs under § 1919 where pursuit of the case was not frivolous or

vexatious. To construe the holding in *Hygienics* as requiring a showing of frivolousness or vexatiousness to award costs under § 1919 would add additional requirements to the statute that are not contained in its express terms and read a standard into *Hygienics* that is not there. The “vexatious and frivolous” language belongs to the district court in that case, not the court of appeals.

Penn Ship argues that an award is appropriate where the amounts are “reasonably necessary for use in this case,” relying on the Tenth Circuit’s ruling in *Callicrate v. Farmland Indus., Inc.*, 139 F.3d at 1340, which the Third Circuit cited with approval in *Hygienics*. This decision, while useful in its guiding application of the term “just” to the types of deposition costs sought here, offers little additional guidance to the court because it stands for nothing more than the obvious proposition that costs incurred without reasonable necessity for use in the litigation cannot be just. To construe the holding in *Callicrate* as a mandate requiring the district court to award costs any time the costs were reasonably necessary would limit the court’s statutorily granted flexibility to award costs only when just.

Instead of equating “just” with “not frivolous or vexatious” or “necessary and reasonable,” the court will evaluate the justness of ordering payment of costs by giving “careful scrutiny” to “items proposed by winning parties as costs.” *Callicrate*, 139 F.3d at 1340 (citing *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964)). In this case, Penn Ship seeks \$28,275.99 in deposition costs. The court first notes that other courts have not hesitated to order payment of deposition costs under § 1919 when justice so requires. See *id.* at 1339-42; *Mashak v. Hackler*, 303 F.2d 526, 526-27 (7th Cir.1962); *Ericsson GE Mobile Commc’ns, Inc.*, 179 F.R.D. at 334; *Oster v. Rubinstein*, 142 F.Supp. 620, 621 (S.D.N.Y.1956).

Considering the factual basis and procedural history of this case, the court concludes that it would be just to award the requested deposition costs to Penn Ship because Penn Ship endured lengthy litigation in which it ultimately prevailed on its early jurisdictional challenge. Penn Ship was forced to defend through the summary judgment stage a claim that this court eventually found to be meritless. See *Atkinson v. Pa. Shipbuilding Co.*, No. 94-7316, 2004 U.S. Dist.

*LEXIS 14532, *45-49, 2004 WL 1686958 (E.D.Pa. July 28, 2004)*, *aff’d*, 437 F.3d at 531. Furthermore, the court warned Atkinson on numerous occasions to proceed with caution, see *Atkinson v. Pa. Shipbuilding Co.*, No. 94-7316, 2000 U.S. Dist. LEXIS 12081, *6, 81, 2000 WL 1207162 (E.D.Pa. Aug. 24, 2000), so the imposition of costs against Atkinson cannot be considered unjust. Penn Ship was ultimately vindicated, but was forced to pay for extensive litigation. The specific deposition costs Penn Ship requests are directly related to its success and are minimal when compared to the overall costs it has spent to defend this case. Justice requires that the court award the deposition costs Penn Ship now seeks to recoup. It would be inequitable and unjust to penalize Penn Ship by not awarding deposition costs that were clearly necessary to properly prepare for this case at the time the depositions were taken.^{FN4} The court will grant Penn Ship’s motion and order Atkinson to pay \$28,275.99 in costs pursuant to 28 U.S.C. § 1919.

^{FN4}. Atkinson asks the court to reduce the award to cover only the deposition transcripts for one day each for Atkinson and Schorsch, since the current federal rules provide for a presumption that each witness will be deposed for only one seven hour day. See Fed.R.Civ.P. 30(d)(2). The court will deny this request. Rule 30(d)(2) did not take effect until after the depositions of Atkinson and Schorsch were taken, those depositions were integral to defendants’ success in this case on the issue of the public disclosure-original source jurisdictional bar, and Atkinson did not oppose the number or length of the depositions during discovery at that time. The court finds that Atkinson has presented no persuasive evidence that the deposition costs at issue were not reasonably necessary.

Order

*4 And now, this _____ day of January 2008, upon careful consideration of defendant Pennsylvania Shipbuilding Co.’s motion for costs (Docket No. 276), plaintiff Paul E. Atkinson’s response thereto, and Penn Ship’s reply, it is hereby ORDERED that Pennsylvania Shipbuilding Co.’s motion for costs is GRANTED. Judgment is ENTERED for Pennsylvania Shipbuilding Co. and against Paul E. Atkinson

in the amount of \$28,275.99.

E.D.Pa.,2008.

U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding
Co.

Slip Copy, 2008 WL 191167 (E.D.Pa.)

END OF DOCUMENT