

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No. ML 12-2404 DSF (SSx)

Date 8/26/15

Title In re Nexium (Esomeprazole) Products Liability Litigation

Present: The
Honorable

DALE S. FISCHER, United States District Judge

Debra Plato

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (In Chambers) Order GRANTING Plaintiffs' Motion to Retax Costs (Dkt. No. 366)

Plaintiffs move the Court to review and retax the Clerk's taxation of costs in this matter. Of the requested \$1,691,398.08, the Clerk found \$640,595.22 to be taxable under 28 U.S.C. § 1920. Plaintiffs argue both that costs should not be awarded at all and that, if they are awarded, the taxed amount should be further reduced.

I. Award of Costs Generally

Plaintiffs' motion to be relieved entirely from costs is denied. "[A] district court need not give affirmative reasons for awarding costs; instead, it need only find that the reasons for denying costs are not sufficiently persuasive to overcome the presumption in favor of an award." Save Our Valley v. Sound Transit, 335 F.3d 932, 945 (9th Cir. 2003). Only on "rare occasion[s] where severe injustice will result from an award of costs" will a district court's award of costs be an abuse of discretion. This is not one of those "rare occasions." Plaintiffs argue that they have (1) limited financial resources to pay costs, (2) brought their cases in good faith, (3) the case was close, and (4) an award of costs would have a chilling effect on later plaintiffs. None of these is persuasive. Plaintiffs have provided no evidence of an inability to pay, or, as Defendant points out, that counsel has not agreed to pay costs. And while the total amount of costs is high, there are many plaintiffs in this case – more than 500 – which makes the pro rata share of costs much closer to the costs awarded in the typical case. Plaintiffs may have brought their cases in subjective good faith, but there was very little evidence of general causation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

and Plaintiffs lost the case on that issue at summary judgment. For the same reason, the case was not “close” in any meaningful way. Finally, an award of costs will not “chill” prosecution of claims any more than a cost award would in any other case. This is not a situation where a civil rights plaintiff with a colorable, but ultimately unsuccessful, claim is taxed with tens of thousands of dollars in costs.

II. Retaxing of Amount of Costs Awarded

Review of the Clerk’s taxation of costs may be obtained by a motion to retax costs filed and served within seven (7) days of the Clerk’s decision. That review will be limited to the record made before the Clerk, and encompass only those items specifically identified in the motion.

L.R. 54-8.

Both the Plaintiffs’ arguments and the Clerk’s prior reductions are focused on Defendant’s claimed costs for certification, exemplification, and reproduction of documents.¹ Defendant requested \$1,683,015.35 in this category; the Clerk awarded \$634,750.98.

The Ninth Circuit has recently provided guidance on costs in the electronic discovery context. See In re Online DVD-Rental Antitrust Litig., 779 F.3d 914 (2015). “Section 1920(4) speaks narrowly of ‘fees for exemplification and copies of papers,’ suggesting that fees are permitted only for the physical preparation and duplication of documents, not the intellectual effort involved in their production.” Id. at 927 (quoting Romero v. City of Pomona, 883 F.2d 1418, 1428 (9th Cir. 1989)). Section 1920(4) limits recovery of costs to those copies “necessarily obtained for use in the case.” Id. This means, among other things, that costs can be recovered “where the copies were obtained to be produced pursuant to Rule 34 or other discovery rules.” Id. Further,

[t]he faithful production of electronically stored information may require processes such as optical character recognition (which renders material text-searchable), preservation of metadata, and conversion to a non-editable file format. Parties might agree to employ a particular file format or methodology for electronically stored information production, or the court might order them to produce electronically stored information with certain characteristics.

Id. at 927-28.

¹ For convenience, the Court will refer to these as reproduction costs.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**MEMORANDUM**

Therefore, when copies are made following procedures ordered by the district court or pursuant to stipulation, the costs will be taxable as long as the copies are also “necessarily obtained for use in the case.” *Id.* at 928. However, even if extensive processing of electronic material is essential to production of electronic documents, it does not mean that all of those services leading up to the actual production constitute “making copies.” *Id.* (quoting *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 169 (3d Cir. 2012); *see also id.* at 930 (“That a chosen ‘document production process’ requires the creation of a copy does not establish that the copy is necessarily obtained for use in the case.”)).

“The proper application of a narrowly construed § 1920(4) requires that the tasks and services for which an award of costs is being considered must be described and established with sufficient specificity, particularity, and clarity as to permit a determination that costs are awarded for making copies.” *Id.*

Defendant provided an itemization of the reproduction costs to the Clerk and Plaintiffs take issue with most of them. The Court will discuss each subcategory individually and explain why it believes those costs to be taxable or not taxable under § 1920.

A. Chambers Copies Filing and Delivery Costs

Plaintiffs do not challenge the recoverability of these costs in the abstract, but argue, without much support, that they are too high. The Court agrees that the amounts charged – even for overnight services – seem high in general and certainly high in the aggregate. However, there is no evidence to contradict Defendant’s statements that these costs were necessary to produce chambers copies to the Court by noon on the day after filing as required by the Local Rules. Therefore, the Court will allow the entire amount.

B. “In-house Information Technology/Miscellaneous Charges.”

The Court cannot understand what these charges represent based on the description given by Defendant. They do not on their face appear to be necessary for the litigation of the case as defined by the Ninth Circuit. Therefore, they will not be taxed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

C. “Costs to Obtain Medical Literature”

These appear to be costs associated with obtaining documents from medical journals. These are not “exemplification” or “reproduction” costs in any meaningful sense. They are costs to obtain copyrighted material akin to purchasing a book. Therefore, they will not be taxed.

D. “Charges For Production/Processing/Maintenance of Documents”

This is the largest area of claimed costs. The original documentation produced to the Clerk related to this area was useless. The Clerk requested a more useful supplement, which Defendant provided as supplements “H1” and “H2.” Those two supplements are further broken down into numerous categories which the Court will consider in turn.

1. H1 Costs

a. ESI Processing

The Court will tax this category. The enumerated services, such as extraction of files and de-duplication, were necessary to the electronic production in this case and required by the parties’ stipulated order entered by the Court.

b. Concept Extraction and Visualization

These charges will not be taxed because they do not appear to have been necessary to the production of documents as requested by Plaintiffs and ordered by the Court. The description suggests that these costs were helpful to the discovery process, but they are not charges for actual copying or anything directly related to copying ordered by the Court or stipulated to by the parties.

c. Machine Language Translation

Contrary to Defendant’s representations to the Clerk, translation of documents was not required by the parties’ stipulated order. In fact, the stipulation explicitly called for production in the original language. Therefore, these costs will not be taxed.

d. Other Technology & Custom Ringtail Consulting Service

These charges are not, on their face, necessary to the conduct of the case. It is

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

possible that certain aspects of the category – e.g., password cracking – might be taxable,² but the description of the category as a whole is so vague and ambiguous that these costs will not be taxed.

e. Online Hosting Fees and Fixed Hardware Fees

Online hosting costs are not “exemplification” costs and are not taxable in the absence of a court order or stipulation that required Defendant to host documents online. Further, the descriptions, on their face, suggest that this online hosting was for the benefit of defense counsel’s review and not the actual copying or production of documents.

f. Ringtail Consulting and Review Support

To the degree that the Court can even understand what these charges are, they are not taxable. This seems to be consulting/technical support related to defense counsel’s review of documents.

g. TIFF Generation/Conversion Services and Optical Character Recognition “OCR” Services

Like the translation issue, TIFF conversion and OCR, contrary to Defendant’s representation, were not required by the ESI agreement for all documents.³ Therefore, not all of these charges will be taxed. At oral argument, Defendant’s counsel represented that approximately 35% of the TIFF conversion costs, or \$32,226.18, were attributable to TIFF generation for hard copy documents and redacted documents as contemplated by the ESI agreement. Plaintiffs’ counsel did not object to this number, so that amount will be allowed for TIFF conversion.

h. Production/Endorsing Services

This cost is properly taxed as it directly relates to the duplication and transfer of the electronic discovery.

² However, it is likely that this kind of cost would be considered the type of “processing” prior to production that is “essential,” but not compensable, because it does not actually constitute “making copies.” See In re Online DVD-Rental Antitrust Litig., 779 F.3d 914 at 928.

³ TIFF conversion was required by the ESI agreement for documents with redactions, but the TIFF conversion category of costs was not so limited.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

I. Data Import and Production Export Services

This cost is properly taxed as it directly relates to the duplication and transfer of the electronic discovery.

j. Computer Hard Drives and FedEx

This cost is properly taxed as it directly relates to the duplication and transfer of the electronic discovery.

2. H2 Costs

From what the Court can tell, these costs are related to actual extraction of data from Defendant's computers. Theoretically, some of the costs in this broad category could be taxable. However, the descriptions provided in Supplement H2 are so vague the Court will not tax any of them. In addition to liberal inclusion of the famously abused "related to," the description makes heavy use of vague terms like "technical time" and "forensic collection" that make it extremely difficult to understand what was actually done and whether it is taxable.

E. "Other Costs Associated with Production of Documents"

Other than the \$240.10 cost to convert hard copy documents to electronic format for electronic production, these costs are not taxable. The charge for unspecified "photocopies necessary in preparation for producing documents in response to Plaintiffs' discovery requests," might be taxable, but the Court would need further information to determine that. The intimation that they were "in preparation for producing documents" suggests, however, that this cost was not "necessary" as defined by the Ninth Circuit.

F. "Costs Associated with Plaintiff-produced Documents and Collected Documents"

The Court does not understand why Defendant thinks these are taxable. They are poorly described and seem to have something to do with regulatory compliance. While these costs might have been incurred in some "but-for" sense because of the litigation, they do not, on their face, seem to be necessary for, or even particularly related to, the conduct of the litigation.

G. "Copy/Printing Costs"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Normally, something labeled as “copy/printing costs” is likely to be taxable, but in this case, the description of the reason for the work is so poor, the Court cannot tax them. The description suggests that these are photocopies of working documents used by counsel. However, the large amounts involved – \$5,986.69 in normal copy costs and another \$2,010.00 in color copy costs⁴ – suggests that cannot be the case because it implies somewhere between 30,000 and 60,000 pages worth of copies.⁵ Even if this copying actually occurred and the copies were used in the conduct of the case, such gratuitous copying cannot reasonably be said to be “necessary,” and Plaintiffs should not have to pay for it.

III. Conclusion

The motion to retax costs is GRANTED IN PART and DENIED IN PART. Defendant is granted costs in the amount of \$547,445.88 consistent with this opinion. This reflects a reduction of the “Certification, Exemplification and Reproduction of Documents” costs from the \$634,750.98 taxed by the Clerk to \$540,457.91.

IT IS SO ORDERED.

⁴ It is difficult to fathom what in this case would require more than \$2,000 in color copy costs in a case that did not proceed to trial.

⁵ The Court recognizes that, for vague reasons that the Court does not fully understand, Defendant is only seeking 1/3 of these costs, or approximately \$2,600. But even that amount for internal working copies is far from reasonable.