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16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA

18 U.S. EQUAL EMPLOYMENT
 19 OPPORTUNITY COMMISSION,

20 Plaintiff,

21 and

22 ADRIAN SCOTT DUANE,

23 Plaintiff Intervenor,

24 vs.

25 IXL Learning, Inc.,

26 Defendant.

Case No.: 3:17-cv-02979-VC

**PLAINTIFFS' OPPOSITION TO IXL'S
 MOTION TO RETAX COSTS**

Courtroom: 4, 17th Floor
 Judge: Hon. Vince Chhabria

1 Plaintiff U.S. Equal Employment Opportunity Commission (EEOC) and Plaintiff-Intervenor,
2 Adrian Scott Duane respectfully file this opposition to Defendant’s Bill of Costs (ECF No. 175)
3 pursuant to Fed. R. Civ. P. 54(d) and Civil Local Rule 54-3 because Defendant seeks costs not
4 “allowed by law.” Defendant originally sought costs in the amount of \$27,769.41. (ECF No. 155)
5 The EEOC filed objections and sought a reduction in the amount of \$13,897.38. (ECF No. 160)
6 The Clerk, after allowing Defendant to cure two deficiencies in its filing, reduced the allowable costs
7 by \$13,198.88. (ECF No. 173) Defendant now contests the Clerk’s reduction of the Bill of Costs in
8 the amount of \$6,635.70. (ECF No. 175) For the reasons set forth in greater detail below, Plaintiffs
9 support the Clerk’s reduction of costs and note that Defendant has failed to carry its burden of
10 showing its entitlement those costs.

11 12 I. INTRODUCTION

13 Federal Rule of Civil Procedure 54(d)(1) provides that the court may award or deny costs
14 against the United States and its agencies, but that any award may be imposed “only to the extent
15 allowed by law.” Title 28 U.S.C. §1920 further “enumerates expenses that a federal court *may* tax as
16 a cost under the discretionary authority found in Rule 54(d).” *Crawford Fitting Co. v. J.T. Gibbons*
17 *Inc.*, 482 U.S. 437, 441-42 (1987) (emphasis added). In addition, Civil Local Rule 54-3 provides
18 “standards for interpreting the costs” that §1920 allows. *Hesterberg v. United States*, 75 F. Supp. 3d
19 1220, 1223 (N.D. Cal. 2014) (*citing Fowler v. Cal. Highway Patrol*, No. 13-cv-01026-TEH, 2014
20 U.S. Dist. LEXIS 112540 at *2 (N.D. Cal. Aug. 13, 2014)); *see also Plantronics, Inc. v. Aliph, Inc.*,
21 No. C 09-01714 WHA (LB), 2012 U.S. Dist. LEXIS 152297 (N.D. Cal. Oct. 23, 2012) (finding no
22 conflict between Local Civil Rules and statute because “Civil Local Rule 54-3 provides guidance
23 regarding the taxable costs in each category [of Section 1920].”). The party seeking costs carries the
24 burden to establish the amount of compensable costs and expenses to which it is entitled. *City of*
25 *Alameda v. Nuveen Mun. High Income Opportunity Fund*, No. C 08-4575 SI, 2012 U.S. Dist. LEXIS
26 7403, at *7 (N.D. Cal. Jan. 23, 2012) (internal quotation marks and citation omitted). Defendant
27 fails to satisfy its burden in multiple instances.

1 **II. ARGUMENT**

2
3 **A. Full reduction of costs associated with defense counsel’s generalized discovery document management fees is appropriate.**

4 Plaintiffs object to Defendant’s claimed cost of \$4,510.00 for discovery management fees.
5 Defendant’s claimed cost for maintaining defense firm Young Basile Hanlon & MacFarlane’s
6 database is not recoverable because it not limited to “fees for exemplification and the costs of
7 making copies of any materials where the copies are necessarily obtained for use in the case.” *See*
8 28 U.S.C. § 1920(4); *see also* N. D. Cal. Local Civ. R. 54-3(d) (allowing the cost of *reproducing*
9 disclosure or formal discovery documents). Defendant cannot recover costs for maintaining or
10 uploading documents to Logikcull’s electronic management system – a system that defense
11 counsel’s firm paid an annual flat rate for irrespective of this lawsuit. *See Phoenix Techs. Ltd. v.*
12 *VMWare, Inc.*, No. 15-CV-01414-HSG, 2018 WL 4700347, at *5 (N.D. Cal. Sept. 30, 2018)
13 (overage costs and electronic database hosting fees were disallowed because such e-discovery
14 storage costs or hosting fees are not taxable); *see also Kwan Software Eng’g, Inc.*, No. 12-CV-
15 03762-SI, 2014 WL 1860298, at *4 (N.D. Cal. May 8, 2014); *Golden Bridge Tech., Inc. v. Apple*
16 *Inc.*, No. 5:12-CV-04882-PSG, 2015 WL 13427805, at *3 (N.D. Cal. Dec. 21, 2015), *aff’d*, 673 F.
17 App’x 1010 (Fed. Cir. 2017).

18 Moreover, to the extent that Defendant’s costs for the actual production of electronic
19 documents are taxable, Defendant has the burden of documenting that the costs were for
20 exemplification and copying. Here, Defendant has failed to meet this burden. *See In re Online*
21 *DVD-Rental Antitrust Litig.*, 779 F.3d 914, 928 (9th Cir. 2015) (a party required to produce
22 electronic documents in a particular format or with particular characteristics intact per 28 U.S.C. §
23 1920(4) must still describe and establish the costs with sufficient specificity, particularity and clarity
24 to permit a determination that *the costs* of creating the produced documents *were actually necessary*
25 for the case) (emphasis added); *see also Country Vintner v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249,
26 260 n. 19 (4th Cir. 2013) (“If, for instance, a case directly or indirectly required production of ESI-
27 unique information such as metadata, we assume, without deciding, that taxable costs would include
28

1 any technical processes necessary to copy [electronically stored information] in a format that
2 includes such information.”). “‘Document production’ and other similarly generic statements on the
3 invoices are unhelpful in determining whether those costs are taxable.” *Synopsys, Inc. v. Ricoh Co.*,
4 661 F.3d 1361, 1368 (Fed. Cir. 2011). Here, Defendant failed to provide itemized invoices
5 demonstrating that the costs were related to e-discovery production. The Clerk correctly rejected the
6 costs given Defendant’s failure to support the demand for costs.

7 Additionally, Defendant provides no evidence, other than counsel’s declaration, that the
8 amount the law firm billed Defendant (a monthly charge of \$205.00) is at all proportionate to the
9 amount of data stored in comparison to other cases in the law firm database. Defendant’s reliance on
10 courts accepting declarations in support of *in-house* copying costs that are routinely awarded is
11 misguided. (See ECF 175 at 3) Here, Defendant is not seeking costs for in-house copying but rather
12 seeking to recoup document management costs for an electronic document management service that
13 the law firm maintained before and after the IXL matter. Such a request requires more specificity.¹

14 Finally, Defendant relies on an inapplicable ERISA case that addressed the issue of
15 document management costs. See *Bd. Of Trs. v. Piedmont Lumber*, 13-cv-03898-HSG, 2016 U.S.
16 Dist. LEXIS 113251, at *8-9 (N.D. Cal. Aug. 24, 2016). This case is inapplicable because it
17 concerns “costs and expenses” pursuant to 29 U.S.C. § 1451. *Id.* (citing *Trs. of the Constr. Indus. &*
18 *Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257-58 (9th Cir. 2006)). In
19 *Piedmont Lumber*, the Court found that litigation-related expenses such as electronic document
20 management costs “are recoverable as part of ‘attorney’s fees,’” which are considered costs under 29
21 U.S.C. § 1451. *Id.*², see also *Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v.*
22 *Redland Ins. Co.*, 460 F.3d at 1257-58 (“It is well established that attorney’s fees . . . include
23 reasonable out-of-pocket litigation expenses that would normally be charged to a fee paying client,
24 even if the court cannot tax these expenses as “costs” under 28 U.S.C. §1920.”) (emphasis added)).

25 ¹ Despite raising these same arguments when opposing Defendant’s initial bid for costs, Defendant
26 continues to fail to address the deficiency in their attempt to seek these costs. This suggests that
such detail is unavailable.

27 ² It is also worth noting that the Plaintiff in *Piedmont Lumber* provided explicitly detailed support
28 outlining each cost sought in the motion for costs and expenses. See Plaintiff’s Declaration in
Support of Motion for Reimbursement of Reasonable Attorney’s Fees and Costs, 4:13-cv-03898-
HSG, ECF No. 152 (Nov. 18, 2015).

1 Here, however, attorney's fees are not considered taxable costs under 28 U.S.C. § 1920. Defendant
2 has not pointed to any case holding the maintenance of an electronic document management system
3 as a taxable cost under 28 U.S.C. § 1920. Accordingly, Defendant cannot justify seeking these costs
4 and Plaintiffs support the Clerk's reduction of the full \$4,510.00.

5
6 **B. The Clerk correctly reduced the trial exhibit fees by \$1,696.71**

7 Plaintiffs do not dispute the Clerk's reduction of \$1,696.71 of trial exhibit costs as outside
8 the ambit of Civil Local Rule 54-3. (ECF No. 173) Alternatively, and to preserve their prior
9 objections, Plaintiffs reiterate their objections to \$473.71 of Defendant's specific line items for trial
10 exhibit fees. These entries however are presumably subsumed by the Clerk's greater reduction.
11 (ECF No. 160)

12 Plaintiffs objected to trial exhibit fees in the amount of \$473.71. First, Plaintiffs sought to
13 reduce \$364.34 of costs incurred through United Litigation Discovery (ECF No. 155-3 at p. 37).
14 The parties used the vendor Digital One for all trial exhibits and witness binders, so this expense is
15 unclear and the invoice provides no additional clarity. It is not taxable to the extent it relates to the
16 creation of working copies for Defense counsel's use. Second, Plaintiffs sought to reduce \$30.60 of
17 copying costs of Nemo Curiel's deposition (line item no. 32 with a corresponding invoice at ECF
18 No. 155-3 at p. 42). Plaintiffs should not be held liable for copying transcripts of Nemo Curiel's
19 deposition for use at trial because Defendant did not call him as a witness. Finally, Plaintiffs
20 objected to \$78.77 of unnecessary reproduction of Scott Duane's transcript (line item no. 34 with a
21 corresponding invoice at ECF No. 155-3 at p. 44). The reproduction of two copies of a 204-page
22 deposition at \$0.10/page with the binding and tax is only \$49.69.

23
24 **C. The Clerk correctly reduced witness fees**

25 Defendant originally sought witness fees totaling \$2,151.07 (ECF No. 155), which included
26 \$788 for lodging and meal expenses for Jeremy Murphy. After being pressed for documentation
27 supporting this request (ECF No. 170), Defendant was compelled to provide receipts and reduce its
28 request to the actual amount spent for Murphy: \$498.25. (ECF No. 173)

1 The Clerk's reduction of Mr. Murphy's excessive travel expenses was appropriate.
2 Defendant's claimed costs of Mr. Murphy's travel for trial from Raleigh, North Carolina to San
3 Francisco, California do not meet the requirements of 28 U.S.C. §§ 1821(c)(1) which provides:

4 A witness who travels by common carrier shall be paid for the actual expenses of
5 travel on the basis of the means of transportation reasonably utilized and the distance
6 necessarily traveled to and from such witness's residence by the shortest practical
7 route in going to and returning from the place of attendance. Such a witness shall
utilize a common carrier **at the most economical rate reasonably available**. A
receipt or other evidence of actual cost shall be furnished.

8 (bold added). As Plaintiffs noted in their initial objections to the costs, a search on
9 www.google.com/flights shows that round trip air fare from Raleigh/Durham, NC to San Francisco,
10 CA was approximately \$447.00.³ Thus, Defendant sought \$577.99 more than the round-trip cost for
11 a "common carrier at the most economical rate reasonably available." Defendant also has not shown
12 why Murphy did not return to Raleigh/Durham on October 26, 2018 after he was excused at 10:09
13 a.m. Instead, Murphy stayed overnight before returning to Raleigh/Durham, incurring additional per
14 diem costs. This is further proof that his travel expenses were needlessly inflated. Thus, although
15 Plaintiffs sought a greater reduction of airfare and one-day of per diem costs, Plaintiffs accept the
16 Clerk's reduction to \$428.99.

17 Moreover, Plaintiffs also note that alcohol costs cannot be considered part of Murphy's
18 subsistence allowance. Costs recoverable for a witness must comply with the per diem allowance
19 prescribed by the Administrator of General Services. 28 U.S.C. §1821(d)(2). Federal per diem
20 subsistence allowances are limited to meals and incidentals, not alcohol. *See* 5 U.S.C. §5702.
21 Though it is unclear, Murphy's receipts suggest that Defendant inappropriately included his alcohol
22 expenses of \$29. (*See* ECF No. 172-2 at pp. 2, 3) The United States government should not be
23 required to pay for Murphy's alcohol intake and therefore Plaintiffs seek an additional reduction of
24 \$29 from the allowable witness fees and expenses.

25
26 _____
27 ³See <https://goo.gl/flights/mjGU3>, last accessed Nov. 27, 2018 (using a hypothetical travel date of
28 December 11-14, 2018, *e.g.*, non-holiday as would have been applicable for the October 22-26, 2018
trial in the present situation).

